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Court allowed a strike out application following prolonged and uncertain proceeding

Ian Wright | Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lambert Property Group Pty Ltd v SJ Daly & Ors* [2015] QPEC 4 heard before Jones DCJ

August 2015

In brief

The case of *Lambert Property Group Pty Ltd v SJ Daly & Ors* [2015] QPEC 4 concerned an application by the Dalys to strike out an originating application made by Lambert Property Group Pty Ltd on the basis that its originating application had not been progressed. Lambert opposed the application on the grounds that it lacked merits or, alternatively should be done formally including a timetable for filing and serving of material by both parties.

The court found that a timetable such as that proposed by Lambert would involve the parties in further delay and expense. Given that Lambert would have been aware of the factual matters and that there was no material surprise or prejudice on Lambert, the court accepted that the Dalys could make this application.

The court concluded that Lambert's originating application should be struck out since it would not be able to sensibly prosecute its application until its Supreme Court action had resolved and it would be unfair to the Dalys by keeping the legal proceeding on foot with such uncertainty particularly where there was no fault of the Dalys.

Lambert considered making changes to its development involving land owned by the Dalys and sought declaratory relief that it did not require owner's consent from the Dalys for its lodgement of a development application or changes to the development

Lambert was carrying out a major multi-unit residential development at Kangaroo Point. The development land owned by Lambert had the benefit of an easement for a right of way over land owned by the Dalys.

The proposed development was the subject of two Planning and Environment Court appeals in which the Dalys were submitters opposing to the proposed development. Both appeals were ultimately resolved through negotiations.

After the resolution of the appeals, Lambert considered making changes to stage 3 of the proposed development by way of a permissible change application. The Dalys made it clear that it would oppose any such application and would not consent to the changes or any new development application involving its land the subject of the benefiting easement.

Lambert by way of an originating application in the Planning and Environment Court sought declaratory relief that owner's consent from the Dalys was not required "for the lodging of a development application nor for the lodging of an "alternative" development application as particularised … or some further iteration of that development".

The Dalys' strike out application was dismissed by the court but the court foreshadowed that it may end the proceedings if the nature of the actual form of the development Lambert intended to rely upon for its application remained uncertain when it next came back before the court

Since Lambert's application was made, it had been adjourned with the Dalys' consent on a number of occasions. In July 2014, Lambert was advised by the Dalys that it would not consent to any further adjournments and would bring a strike out application if the application was not withdrawn.

The Dalys subsequently brought a strike out application which was heard by the court in August 2014. Whilst the strike out application was dismissed, the court foreshadowed that if the nature of the actual form of the development Lambert intended to rely upon for its application remained uncertain when it next came back before the court, the court may end the proceedings and would be minded to do so based on an oral strike out application.

The court accepted the Dalys' renewed application since Lambert would have been aware of the factual matters and that there was no material surprise or prejudice on Lambert

In February 2015, the Dalys made an application to renew the strike out proceeding. The Dalys' application was premised on the allegations that Lambert still had not properly identified a defendable form of the development, there had been little progress made by Lambert on its application and the Dalys suffered prejudice by continuing to incur costs of the proceeding.

It was further alleged by the Dalys that Lambert's application would be further delayed as it seemingly depended upon a proceeding in the Supreme Court for a statutory easement against the Body Corporate for the neighbouring land filed by Lambert in November 2014.

Lambert resisted the application and submitted that it denied Lambert's ability to fairly consider its position and evidence it required to call in response. It was further submitted that the strike out application should be done formally including a timetable for filing and serving of material by both parties.

The court disagreed with Lambert's submissions and considered that the proposed timetable would involve the parties in further delay and expense. Further, the court was of the view that Lambert would have been aware of the factual matters, in particular the Daly's position and that there was no material surprise or prejudice on Lambert.

The court accepted the strike out application be made by way of an oral application.

Lambert's application was struck out as it would be unfair to the Dalys to allow the proceeding to continue with a state of uncertainty where the delay was of no fault of the Dalys

The court proceeded to consider the merits of the strike out application. In doing so, it considered the relevant factors outlined in the Queensland Court of Appeal decision in *Tyler v Custom Credit Corp Ltd & Ors* [2008] QCA 178 that the court took into account when determining whether the interests of justice required a case to be dismissed.

It was observed by the court that Lambert's application would be expected to have been prosecuted and determined. The Dalys had been prejudiced by the continued delay by incurring costs of the proceedings. The court agreed with the Dalys' submissions that "the Dalys are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its potential consequences hanging over their heads … in circumstances where the facts that are intended to be relied on by LPG in support of its application are in apparent continual state of flux".

In the court's view, the continued delay in prosecuting Lambert's application was mainly attributed to its difficulty in identifying a defendable form of the development and was of no fault of the Dalys. Lambert had not provided a satisfactory explanation for the delay and by implication was in breach of its implied undertaking to the court and to the Dalys to proceed with the matter expeditiously.

Based on the material before the court, it was concluded that Lambert's application would not be able to be sensibly prosecuted until the Supreme Court action was resolved, which could take over several months. The outcome of the Supreme Court action would also affect the factual matters which Lambert's application was relied on.

Given that it would be unfair to the Dalys to allow the proceeding to continue with a state of uncertainty, and that the strike out application would not prevent Lambert to commence fresh proceedings in the future, the court dismissed Lambert's application.

Court not exercising its discretion to extend time for the removal of unlawful fill under consent order

Ian Wright | Ronald Yuen | Eva Coggins

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Bowman & Ors and Bowman & Ors v Brisbane City Council* [2015] QPEC 14 heard before Searles DCJ

August 2015

In brief

The case of *Brisbane City Council v Bowman & Ors and Bowman & Ors v Brisbane City Council* [2015] QPEC 14 concerned applications heard by the Queensland Planning and Environment Court relating to the enforcement order made by the court with respect to unlawful fill on Mr John Alexander Bowman's land situated in Bald Hills, Brisbane.

In 2013, Mr Bowman, who had a history of carrying out unlawful filling work, consented to an enforcement order requiring him to remove introduced fill material from his land in accordance with the rehabilitation plan within twelve months of approval by the Brisbane City Council of the plan, or such further time as agreed in writing between the parties with reference to the relevant experts.

Mr Bowman sought orders from the court varying the enforcement order to extend the period for the removal of the fill material or seeking a stay of the enforcement order and alternate orders for the removal of the fill material.

The court found that there was no evidence of an extension of time agreed between Mr Bowman and the council as contemplated in the enforcement order. Mr Bowman had not provided an explanation for his non-compliance with the order or established any good reason for the exercise of the court's discretion to vary or stay the operation of the enforcement order. Accordingly, the court dismissed both applications.

Mr Bowman adopted the options for carrying out the fill removal works proposed by his ecological expert as part of his contention for the variation of the enforcement order

Mr Bowman adduced expert evidence from his ecological and civil and hydraulic engineering experts in contending for the orders being sought. Mr Bowman's ecological expert, in reliance of Mr Bowman's engineering expert's inputs, concluded that the fill removal would take over 36 years if Mr Bowman was to remove the fill using his existing equipment only.

The ecological expert therefore proposed four options for carrying out the fill removal works, which also relied upon Mr Bowman's engineering expert's inputs. One of the options was a partial removal of the fill which included the removal of the gross pollutants relying on Mr Bowman's engineering expert's opinion that the existing fill did not cause unacceptable off site impacts in terms of flooding.

All four options provided a range of different removal timeframes and they all exceeded the twelve month period in the enforcement order consented to by Mr Bowman in 2013.

As part of the orders being sought by Mr Bowman, he adopted a combination of the options proposed by his ecological expert which included the partial removal of the fill.

Court found Mr Bowman's engineering expert's evidence to be unreliable and unhelpful and preferred the council's expert's evidence regarding the timeframe for completing the fill removal work

The court found Mr Bowman's engineering expert's evidence to be unreliable and unhelpful. In particular, the court observed that Mr Bowman's engineering expert did not critically analyse the work on flood impact in the locality undertaken by another hydraulic engineer in another litigation matter, but rather merely relied on it in arriving at his opinion. As a result, little weight was given by the court to Mr Bowman's engineering expert's evidence.

The council adduced evidence from its engineering expert who considered the options and associated timeframes proposed by Mr Bowman's expert. In the council's expert's view, the fill removal could be completed between 8 and 28 weeks if a commercially-efficient moving contractor was engaged, and the timeframes proposed by Mr Bowman's expert were "not cost effective for a normal earth moving contractor".

On balance, the court preferred the evidence of the council's expert and concluded that the council's expert's proposal was sensible, feasible and realistic in all the circumstances.

As there was no explanation for Mr Bowman's non-compliance with the enforcement order or good reason to deprive the council of the benefit of the agreement between Mr Bowman and the council by varying the enforcement order, the court found no sufficient grounds to warrant the exercise of its discretion to vary or stay the operation of the enforcement order

As a starting point, the court had to decide whether Mr Bowman had established good reason for the court to exercise its discretion to vary the enforcement order.

As a general rule, an applicant who was seeking relief from the consequences of non-compliance with a consent order would be required to explain the reasons for the non-compliance. In this instance, Mr Bowman provided no explanation for the non-compliance.

In the context of the enforcement order being made by consent of the parties, the court was satisfied that the consent order was underpinned by a formal and binding agreement between Mr Bowman and the council. In the court's view, it would also be necessary for Mr Bowman to establish good reason to deprive the council of the benefit of the agreement by varying the enforcement order.

The court observed that by Mr Bowman reaching agreement with the council and consenting to the enforcement order, it was reasonable for the council to assume that Mr Bowman had the capacity and willingness to remove introduced fill material from his land in accordance with the enforcement order.

As far as the court was concerned, the terms of the enforcement order were clear. If Mr Bowman required an extension of the removal period, it was incumbent on him to seek agreement from the council with the required expert evidence. However, Mr Bowman chose to ignore the orders and did nothing until it was close to the deadline.

Accordingly, the court found that Mr Bowman had not established any good reason to deprive the council of the benefit of the agreement by varying the enforcement order.

In the circumstances, the court was not persuaded that sufficient grounds were established by Mr Bowman which would warrant the court to exercise its discretion to vary or stay the operation of the enforcement order.

Code assessable restaurant use was available – no compensation under section 705 of the Sustainable Planning Act 2009

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chong & Anor v Logan City Council* [2015] QPEC 12 heard before Andrews SC DCJ

August 2015

In brief

The case of *Chong & Anor v Logan City Council* [2015] QPEC 12 concerned an appeal in the Planning and Environment Court against the decision of Logan City Council to refuse the landowners, Tyam Heong Chong and Chin-Jui Yang's claim for compensation under section 705 of the *Sustainable Planning Act 2009* arising from the change to the council's planning scheme.

The court found that a public purpose was not the only purpose for which the land could be used as a result of the change to the council's planning scheme and as such the landowners were not entitled to a compensation under section 705 of the *Sustainable Planning Act 2009*.

Council carried the onus to establish that the land could be used for a public purpose only after the change to the council's planning scheme, other than the purpose for which it was being used when the change was made

Section 705 of the *Sustainable Planning Act 2009* provides that "an owner of an interest in land is entitled to be paid reasonable compensation by a local government if because of a change the only purpose for which the land could be used, other than the purpose for which it was lawfully being used when the change was made, is for a public purpose".

The council carried the onus to establish that the landowners' appeal should be dismissed. In order for the council to be successful, the council must establish that the land could be used for a public purpose only, after the change to the council's planning scheme, other than the purpose for which it was being used when the change was made.

Based on the parties' submissions, the primary matters that the court had to decide were as follows:

- whether the code assessable use for a "home business", which was available for the land after the change to the council's planning scheme, was a use for the purpose for which the land was being used when the change occurred;
- whether the code assessable use for a "restaurant" or "food outlet" if carried out with but incidental and subordinate to a public recreation or nature based recreation activity, which was available for the land after the change to the council's planning scheme, was a use for a public purpose.

Court found that a home business use involved no change to the purpose for which a dwelling house was used and as such it was a use for the purpose for which the land was being used when the council's planning scheme was changed

The court first considered whether a home business was a use for the purpose for which the land was being used when the change to the council's planning scheme was made.

The land was being used for a residential dwelling at the time of the change. The court accepted the landowners' submission that a home business was a residential use, which must be subordinate to the residential use of the premises by a person who resided in the dwelling unit permanently.

Since a home business was a component or aspect of a residential use, the court was of the view that "starting a home business involves no change to the purpose for which a dwelling house is used". On that basis, the court concluded that a home business was a use of the land for the purpose for which the land was being used at the time of the change to the council's planning scheme.

Court found that a restaurant use in a park could be for a commercial purpose and therefore was satisfied that the land could be used for a purpose other than only a public purpose after the change of the council's planning scheme

The court then considered whether a use for a restaurant or food outlet subject to being "carried out with but incidental and subordinate to a public recreation or nature based recreation activity" was a use for a public purpose.

Whilst the court acknowledged that the word "carried out with but incidental and subordinate to" had the effect of defining and limiting the available use, it was of the view that in the context of a restaurant in a park, the restaurant and the park could be "appropriately described as two complementary uses and two complementary purposes". For a restaurant, the most appropriate description of the purpose would be a commercial purpose. On that basis, the court was satisfied that the land could be used for a purpose other than only a public purpose.

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Court struck out irrelevant paragraphs of the notice of appeal and allowed a partial stay of the environmental protection order

Ian Wright | Ronald Yuen | Eva Coggins

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 36 heard before Searles DCJ

September 2015

In brief

The case of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 36 concerned two applications made by the parties in an appeal in the Planning and Environment Court by Ms Cuthbert, the operator of a boat maintenance and repair facility, against an environmental protection order issued over the facility by the Moreton Bay Regional Council. The council applied to the court to strike out certain paragraphs of the notice of appeal. Ms Cuthbert applied to the court seeking a stay of the environmental protection order pending the final determination of the appeal.

The main issue in dispute regarding the application to strike out paragraphs of the notice of appeal was whether those paragraphs were relevant to the determination of the appeal. The main issues in dispute regarding the application to stay the environmental protection order were, if a stay was not granted, whether Ms Cuthbert would be irreparably prejudiced, and whether it would render ineffective the final decision in the appeal.

The court found that the paragraphs of the notice of appeal which related to the history of the matter were not relevant to the determination of the appeal. The court therefore struck out those paragraphs.

The court found that the relevant requirements of the environmental protection order conceded by the council would have financial implications for Ms Cuthbert and that a stay of those requirements would be necessary to secure the effectiveness of the final decision in the appeal. The court did not find that the other requirements of the environmental protection order would prejudice Ms Cuthbert or render ineffective the final decision in the appeal. The court therefore granted a stay in relation to those requirements of the environmental protection order conceded by the council pending the final determination of the appeal.

Court found that disputed paragraphs of the notice of appeal related to the historical conduct of the facility and matters which had already been dealt with by the court in previous proceedings and therefore ordered that they be struck out on the premise of irrelevance

The council submitted that a number of paragraphs of the notice of appeal were not relevant to the determination of the issues in dispute in the appeal.

There were four issues to be determined in the appeal. The first issue was whether Ms Cuthbert had failed to comply with the general environmental duty under the *Environmental Protection Act 1994* in the conduct of the boat maintenance and repair facility. The second issue was whether Ms Cuthbert had failed to comply with the conditions of the environmental authority for the facility.

The third issue was whether the requirements of the environmental protection order were necessary to secure Ms Cuthbert's compliance with the general environmental duty and the conditions of the environmental authority, and the final issue was whether the proper exercise of the discretion would warrant the issue of the environmental protection order.

The disputed paragraphs of the notice of appeal dealt with the historical use of the land between 1962 and 1996 (paragraphs 3 and 4), the operation of the facility between 2002 and 2007 (paragraph 13), and an appeal of a previous enforcement notice relating to the facility (paragraphs 14 to 26).

The basis of the council's submission for its strike out application was that the relevant environmental protection order was issued as a result of an inspection by its officers in 2014 and therefore, the historical conduct of the facility or the previous enforcement notice set out in the disputed paragraphs had no relevance to the determination of the issues in the appeal.

Despite Ms Cuthbert arguing the contrary, the court agreed with the council's submission that the matters the subject of the disputed paragraphs were not relevant and by allowing them to stand, it would involve unnecessary expenses to be incurred by the parties. Accordingly, the court ordered that paragraphs 3 to 4 and 13 to 26 of the notice of appeal be struck out.

Council accepted that those parts of the environmental protection order requiring physical works and upgrade would involve financial implications for Ms Cuthbert and on that basis, a stay of those parts of the environmental protection order was granted by the court

Ms Cuthbert sought a stay of the environmental protection order pending the final determination of the appeal.

The council accepted that parts of the environmental protection order requiring physical works and upgrades would involve financial implications for Ms Cuthbert. If a stay was not granted and Ms Cuthbert was required to comply with those requirements of the environmental protection order before the appeal was determined, this may render the ultimate decision ineffective. The council therefore did not oppose a stay of those parts of the environmental protection order. For that reason, the court granted a stay of those parts of the environmental protection order conceded by the council pending the final determination of the appeal.

As to the remaining requirements of the environmental protection order, the council submitted that they mainly involved procedural and operational requirements of the facility for its day to day operation and opposed a stay of those requirements.

In support of the stay application, Ms Cuthbert submitted that there was a lack of evidence before the court in relation to the alleged environmental harm arising from the operation of the facility, the alleged non-compliance with the relevant environmental authority and the relevance of the environmental protection order requirements.

In the court's view, the information available to Ms Cuthbert relating to those issues was sufficient to inform Ms Cuthbert of the council's case and in any event, the further and better particulars to be given by the council would expand or clarify those issues.

Court found that the remaining requirements of the environmental protection order would not threaten the integrity of the appeal decision or irreparably prejudice Ms Cuthbert and therefore decided not to grant a stay of those requirements

Ms Cuthbert also relied on the history of previous proceedings involving the council and the fact that she was not given warning by the council or opportunity to discuss the issues with the council before the environmental protection order was issued in order to support the stay application.

However, the court noted that the council had no obligation to give such warning or allow such opportunity, with which Ms Cuthbert agreed.

The court, by reference to the principles outlined in the decision of *Cougar Energy Limited v Debbie Best Chief Executive under the Environmental Protection Act 1994* [2011] QPEC 150, found that compliance with the remaining requirements of the environmental protection order would not threaten the integrity of the appeal decision, and that Ms Cuthbert had not established any threat of irreparable prejudice if a stay of those requirements was not granted. On this basis, the court did not grant a stay of the remaining requirements of the environmental protection order.

Court dismissed Mr Stankovic's application for costs and ordered Mr Stankovic to pay 85% of the council's costs

Ian Wright | Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stankovic v Brisbane City Council (No. 2)* [2015] QPEC 27 heard before Jones DCJ

September 2015

In brief

The case of *Stankovic v Brisbane City Council (No. 2)* [2015] QPEC 27 concerned cost applications made by Mr Stankovic and Brisbane City Council for an earlier appeal to the Planning and Environment Court against conditions imposed by the council for filling carried out by Mr Stankovic.

The court considered relevant matters from the earlier appeal, such as the "systematic and deliberate" conduct of Mr Stankovic and the almost complete success of the council and ordered Mr Stankovic to pay 85% of the council's costs of the earlier appeal and dismissed Mr Stankovic's application for costs.

There should be no presumption that costs should follow the event although the court's discretion to award costs is a broad one

Section 457 of the *Sustainable Planning Act 2009* provides that the "costs of a proceeding, including an application in a proceeding, are in the discretion of the court." Whilst a number of matters are identified in section 457 which the court may have regard to in making a costs order, the court's consideration is not limited to those matters only.

The court in interpreting section 457 had reference to the court's earlier decisions of *Altitude Corporate Pty Ltd v Isaac Regional Council (No. 2)* [2014] QPEC 55, *Cox & Ors v Brisbane City Council & Anor (No. 2)* [2013] QPEC 78 and *YFG Shopping Centres Pty Ltd v Brisbane City Council & Ors (No. 2)* [2014] QPEC 43 and observed that no presumption should be made that costs should follow the event whilst noting that the court had a broad discretion and the success of a party was a relevant consideration.

The court dismissed the costs application as it found the allegations made by Mr Stankovic in support of the application were unsustainable and unmaintainable as well as scandalous and vexatious

In support of the costs application, Mr Stankovic alleged that the earlier appeal was triggered by the issuing of an inappropriate decision notice by the council and that Mr Stankovic was "the innocent victim of unlawful uses on his land that required restoration by carrying out the introduction of fill".

The court considered that Mr Stankovic's allegations lacked any evidential basis and, as such, rejected them. The court also rejected Mr Stankovic's unsubstantiated allegations of the council's unreasonable and inappropriate conduct concerning the earlier appeal.

Not only did the court find that Mr Stankovic's allegations were unsubstantiated, in the court's view, a number of them were "scandalous and vexatious", which were consistent with Mr Stankovic's unsatisfactory conduct in the earlier appeal. The court therefore dismissed Mr Stankovic's costs application.

The deliberate and systematic conduct of Mr Stankovic and the council's success in the earlier appeal resulted in Mr Stankovic being ordered to pay 85% of the council's costs in the appeal

In deciding whether to award costs against Mr Stankovic, the court took into consideration the council's success in the earlier appeal as well as Mr Stankovic's conduct from which the unlawful works arose and its consequences.

The court was of the view that "this was not a case of unintended unlawful works occurring; it was a deliberate and systematic course of conduct which resulted in a nuisance being caused to neighbouring properties. In that context, issues raised in this proceeding went beyond the personal rights and interests of the parties".

The court considered that the council had no other alternative but to proceed in the way that it did and therefore, it was appropriate that Mr Stankovic pay a significant proportion of the council's costs in the appeal.

Since Mr Stankovic achieved some success in the earlier appeal by not having to undertake excavation works in relation to the easement, the court ordered Mr Stankovic to pay 85% of the council's costs in the appeal.

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Understanding the nature of a challenge under section 456 of the Sustainable Planning Act, what does the court consider?

Ian Wright | Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee* [2015] QPEC 22 heard before Morzone QC DCJ

September 2015

In brief

The case of *Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee* [2015] QPEC 22 involved an application in the Planning and Environment Court by Mr Wheldon and Armview Pty Ltd, seeking declarations and consequential relief under section 456 of the *Sustainable Planning Act 2009* in relation to the validity of a negotiated decision notice given by a delegate of the Logan City Council. The negotiated decision notice related to an extension and refurbishment of an existing shopping centre at Park Ridge. The development application was code assessable under the *Logan Planning Scheme 2006*.

The issues the court had to consider included whether condition 1.2 of the negotiated decision notice was beyond power and invalid, whether there had been inconsistent findings of fact, whether there had been a failure to take into account relevant considerations, whether there had been findings about which there was no evidence, whether the decision maker had erred in a number of his findings and whether the decision was unreasonable.

The court considered and dismissed each of those issues and consequently dismissed the application.

A proceeding, under section 456 of the Sustainable Planning Act 2009, was analogous to a judicial review proceeding and was limited to reviewing the legality of the decision of a decision maker and did not involve a merits review of the decision

The court, by reference to a number of High Court and the Planning and Environment Court decisions, noted that proceedings under section 456 of the *Sustainable Planning Act 2009* were not concerned with the merits of the approval but were similar to judicial review proceedings having regard to the material before the decision maker. That means, it would be limited to reviewing the legality of the decision of the decision maker and, where the decision was legally and factually defensible, the decision should stand.

The court, in considering the relevant decisions, noted the following:

- *Jurisdictional error* – This would include a failure to take into account all relevant considerations, taking into account irrelevant considerations and purported exercise of powers. Consideration would need to be given to whether the council, through its delegate, had exceeded its authority or powers in making the decision and how it had affected the decision.
- *Fact finding* – There was no reviewable error simply in making a wrong finding of fact. The question was whether, on the available material, it was reasonably open for council's delegate to come to the view in question.
- *Wednesbury unreasonableness* – The decision made must be accepted unless it was able to be shown to have been one that no reasonable council could have formed or that it was based on irrelevant considerations, or that it was unjustifiable. Where the decision was justifiable, it should stand irrespective of whether or not others agree with it.

The court dismissed the challenge of condition 1.2 and found that the condition was not beyond power or invalid

Mr Wheldon and Armview challenged condition 1.2 which required the relocation or removal of one of the approved uses, namely the mini-major use, within a specified timeframe. They asserted that the condition was beyond power on two grounds, firstly that it approved a temporary retail development which had not been the subject of the development application and secondly that it offended the principle of finality.

The court found that the council's imposition of a time limit on the mini-major use at the given location was a proper exercise of the power under section 346(1)(a) of the *Sustainable Planning Act 2009* which allowed the imposition of a condition which placed a limit on how long a lawful use may continue. The court did not accept that the use could be characterised as a temporary retail development or that the condition lacked finality as the condition did not alter the development in a fundamental way and did not excuse or truncate the need for the developer to comply with approval processes in relation to the relocation or removal of the mini-major use in the future.

The court dismissed the assertion that inconsistent findings of fact had been made and was not satisfied that the council's decision was not unreasonable in the Wednesbury sense

Mr Wheldon and Armview asserted that the council, through its delegate, had made inconsistent findings which were relevant to the exercise of the power to conclude that there was no conflict with the council's planning scheme with respect to integration.

The court considered that the approach taken by Mr Wheldon and Armview was flawed for a number of reasons. Firstly, the findings relied upon were findings in a council officer's precursor report which the court did not accept could be attributed to the council's decision made through its delegate as there was no evidence of the delegate adopting or incorporating the report. This fatal flaw of unsupported attribution was observed by the court in respect of a number other assertions by Mr Wheldon and Armview. Secondly, their assertion relied on findings on the Overall Outcomes when instead it was the consistency of findings on the Specific Outcomes which were relevant to a code assessable development application. Finally, the overall findings were not materially inconsistent when considered in their full context.

The court found that this was a situation where reasonable minds may differ in relation to integration and the court was not satisfied that the council's decision in this respect was unreasonable in the Wednesbury sense.

The court dismissed the assertion that the council had failed to take into account relevant considerations

Mr Wheldon and Armview asserted that the council, through its delegate failed to take into account relevant considerations when determining conflict with the council's planning scheme. The court observed that Mr Wheldon and Armview would only succeed where there had been a failure to take account of a consideration that the decision maker was bound to do so in reaching a decision.

The court was unable to draw any inference, from the council's conduct, that the council had failed to take account of relevant considerations and even if such a failure could have been established, in the circumstances it was considered that it would have had no bearing on the ultimate result.

The court dismissed the assertion that the council's delegate's findings were based on matters about which there were no evidence and dismissed the remaining assertions in respect of a material error or unreasonableness

Mr Wheldon and Armview asserted that the council's delegate made a number of findings about which there was no evidence and had erred in a number of his findings.

The court, by reference to *Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure and Planning* [2014] QSC 36, observed that to establish the no evidence ground there must be absolutely no evidence and the error relating to the lack of evidence must be a jurisdictional error which would be a basis to invalidate an administrative decision. In the court's view, the matters raised by Mr Wheldon and Armview as lacking evidence were obvious and could be gleaned without the need for strict proof of evidence and that the findings were not unreasonable in the Wednesbury sense.

As to the remaining assertions, the court was not satisfied that Mr Wheldon and Armview had discharged the requisite burden of establishing any material error or unreasonableness in the Wednesbury sense in the council's delegate's findings, particularly in relation to the following:

- there was no conflict with a desired environmental outcome under the council's planning scheme;
- the identification of the nature and extent of the conflict with the council's planning scheme; and
- there were sufficient grounds to overcome conflict with the council's planning scheme.

Statutory Guideline 06/09 is helpful but is still a guide

Ian Wright | Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dickson Properties Pty Ltd as Trustee for the Dickson Investment Trust v Brisbane City Council & Ors* [2015] QPEC 18 heard before Jones DCJ

November 2015

In brief

The case of *Dickson Properties Pty Ltd as Trustee for the Dickson Investment Trust v Brisbane City Council & Ors* [2015] QPEC 18 concerned an application made by Dickson Properties Pty Ltd as Trustee to the Planning and Environment Court as part of a substantive appeal against a decision of the Brisbane City Council to refuse a development application involving a reconfiguring of a lot and a preliminary approval for a material change of use to enable the construction of dwelling houses in a rural area. The application sought an order that the proposed changes to the development application were minor changes for the purposes of section 4.1.52(2)(b) of the repealed *Integrated Planning Act 1997* and section 350 of the *Sustainable Planning Act 2009*.

There were a number of changes proposed to the development application. The court was content that all of the proposed changes were considered minor other than the introduction of a flood emergency accommodation and assembly point, which required further consideration by the court.

The council did not oppose the minor change application. However, the application was resisted by a number of submitters who joined the appeal and were primarily concerned with Dickson Properties' proposed methodology of dealing with significant flood events. Those submitters contended that the introduction of a flood emergency accommodation and assembly point would introduce a new use and new impacts and also increase the severity of known impacts.

The court acknowledged that the proposed flood emergency measures would have the potential to create new and not insignificant impacts. However, the fundamental nature and extent of the proposed development remained unchanged and these measures would be characterised as being operational in nature. Accordingly, the court concluded that the proposed changes were minor changes.

Court found that the introduction of the proposed flood emergency accommodation and assembly point would create new use and new impacts but the underlying dominant use remained unchanged

The proposed flood emergency accommodation and assembly point was introduced as a result of the joint expert meeting process. The submitters who resisted the minor change application considered the proposed flood emergency measures to be unsatisfactory and its introduction could not be reasonably described as being minor for several reasons. In particular, the proposed measures would do the following:

- fundamentally alter the nature of the proposed development and introduce a new use;
- involve the construction of a large and bulky building and introduction of a car park, storage sheds and other services;
- introduce new impacts and increase the severity of known impacts;
- encourage residents to believe that they could remain and be safely accommodated in "fail safe" Emergency Flood Accommodation as an alternative to evacuation.

The court had regard to the *Statutory Guideline 06/09: Substantially different development when changing applications and approvals* when determining whether the introduction of the proposed flood emergency accommodation and assembly point would result in a substantially different development.

The court considered the following matters listed in the Statutory Guideline to be relevant, whilst noting that the matters listed in the Guideline were not intended to be exhaustive or definitive:

> *A change may result in a substantially different development if the proposed change:*
>
> • *involves a new use with different or additional impacts*
>
> *…*
>
> • *dramatically changes the built form in terms of scale, bulk and appearance*

…

- *introduces new impacts or increases the severity of known impacts*

…

In relation to the first matter, the court acknowledged that the introduction of the proposed flood emergency accommodation and assembly point might create a "new" use for the proposed development. However, it did not change the dominant use contemplated in the development application, particularly given the infrequent and temporary nature of the "new" use.

As to the second matter, the court found that the proposed flood emergency accommodation "would not in any material way impact on the scale, bulk and appearance" of the built form proposed in the development application.

For the third matter, the court noted that the potential impact contended by the submitters was the introduction of a false sense of security which would prevent the proper response to a flood event, namely early mandatory evacuation. In the context of the proposed development, given that the land was subject to flooding and its associated risk to human life, the court considered the word "impact" in the Guideline was broad enough to encompass such a risk.

On this basis, the court was of the view that the introduction of the proposed flood emergency accommodation and assembly point had the potential to introduce new impacts.

Court found that the proposed changes did not change the fundamental nature and extent of the proposed development and by considering the changes objectively they would not result in a substantially different development

Nonetheless, in considering the introduction of the proposed flood emergency accommodation and assembly point objectively, the court found that the proposed changes to the development application would not result in a substantially different development.

This was particularly so where the overall purpose of the proposed development remained the same, the road layout was materially the same and the frontages to the Brisbane River were to remain undeveloped. Furthermore, no probative evidence was put before the court which supported the seriousness of the impacts contended by the submitters.

The court noted that the minor change application was proposing a solution to a flood-prone development and, by adopting the approach taken by the court in *Parcel One Pty Ltd v Ipswich City Council and Ors* [2007] QPEC 33, the proposed changes did not change the fundamental nature and extent of the proposed development and the proposed works would be characterised as being operational in nature.

It was therefore concluded by the court that the proposed changes were minor changes for the purposes of section 4.1.52(2)(b) of the repealed *Integrated Planning Act 1997* and section 350 of the *Sustainable Planning Act 2009*.

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Court found that the proposed changes to the development approval were permissible changes under section 367(1) of the Sustainable Planning Act 2009

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Solac No. 14 Pty Ltd v Sunshine Coast Regional Council* [2015] QPEC 44 heard before Long SC DCJ

November 2015

In brief

The case of *Solac No. 14 Pty Ltd v Sunshine Coast Regional Council* [2015] QPEC 44 concerned an application to the Planning and Environment Court made by Solac No. 14 Pty Ltd involving a request to make changes to a development approval previously given by the court which related to the proposed construction of self-storage facilities on land situated at Coral Street, Maleny.

The proposed changes to the development approval were to "*(a) allow the height of part of one of the proposed buildings to exceed 8.5m above natural ground level; (b) delay the dedication of land as a reserve for park; and (c) vary the stormwater management methods.*"

The court concluded that the proposed changes were permissible changes within the meaning of section 367(1) of the *Sustainable Planning Act 2009* and as such allowed the changes to the development approval.

Proposed changes to the development approval were considered by the court in the context of whether they were permissible changes under section 367(1) of the Sustainable Planning Act 2009

The first proposed change to the development approval was to add the words "except as shown on the approved plans" to condition 3 so it would read as follows:

> *The maximum height of the development must not exceed 8.5m above natural ground level, except as shown on the approved plans. A verification survey of the building is to be carried out by a licensed Surveyor and a certificate lodged with Council at completion of the building work confirming compliance with the maximum allowable building height.*

This proposed change would enable part of the proposed building to exceed the prescribed height limit of 8.5 metres above natural ground level, due to the sloping nature of the site.

It was submitted that this proposed change involved a matter which was an oversight in the development approval because the prescribed height limit would nonetheless be exceeded if the proposed development was to be carried out in accordance with the approved plans. Accordingly, the proposed change was necessary.

As part of the proposed change, the floor level of the proposed building was to be reduced by 1 metre, which was the lowest permissible flooding level, to achieve compliance with the prescribed height limit as far as practicable.

The second proposed change to the development approval was to amend condition 58 to delay the dedication of a 10 metres waterway corridor buffer as follows:

> *Prior to the commencement of use of Stage 1 of the development; the applicant must transfer and surrender to the Crown as Reserve for Park, the area defined within the 'Approximate Line of Open Space Conservation and Waterways Precinct', which is to be no less than 10 metres wide, as identified on the Proposed Site Plan, Project 06681, Sheet p1.01 Issue G, Dated 11/3/11, prepared by Covey & Associates Pty Ltd (as amended).*

It was submitted that it was not practical to rehabilitate and then dedicate the land before completing the adjacent building works. On this basis, the proposed change was to facilitate the construction of Stage 1 of the proposed development prior to the surrender and transfer of the waterway corridor buffer.

The third proposed change to the development approval was to enable a more contemporary and efficient stormwater management treatment method "*which dispenses with the need for rainwater tanks, bio-retention basins and gross pollutant traps in favour of a swale and 'level spreader' system*" which was approved in an operational works permit given by the Sunshine Coast Regional Council.

Court did not consider there being any change to the substance of the proposed development and therefore found that the proposed changes would not result in a substantially different development

In its consideration of whether the proposed changes to the development approval would result in a substantially different development, the court had regard to the Ministerial guideline No. 06/09 whilst noting that it was not intended to be exhaustive or prescriptive. It was ultimately a determination of facts and degree having regard to the effect of the proposed changes.

In the court's view, the proposed changes involved no change to the substance of the proposed development. The proposed changes were "*in the nature of refinements to the implementation of the development*". As such the court found that the proposed changes would not result in a substantially different development.

Court was satisfied that the proposed change would not be likely to cause a person to make a properly made submission objecting to the proposed changes if the circumstances allowed

In considering the likelihood of the proposed changes causing a properly made submission, the court observed the remarks made by the court in the decision of *Collard v Brisbane City Council* [2010] QPEC 39 that "*if circumstances allowed … the contemplation of the Court must necessarily be with putative submitters who may act reasonably in that regard*".

The court further observed that the term "likely" had been subject to judicial consideration in other decisions of the Planning and Environment Court and varied meanings had been assigned to that term depending on the context. The prevailing view, whilst not settled, was that it meant "*a substantial chance, a real, not remote chance, regardless of whether it is more or less than 50 percent*".

By reference to *Scanlon Group Pty Ltd v SCRC* [2012] QPELR 394 and *Orchard (Oxenford) Developments Pty Ltd (ACN 167 310 509) v Gold Coast City Council* [2015] QPEC 11, and the meaning of "likely", the court noted that it had to be satisfied that none of the proposed changes would, on the balance of probabilities, give rise to "*a real, or not remote, chance or probability, of causing a properly made submission to be made objecting to any change, if the circumstances allowed.*"

There were four submissions made in respect of the original development application. The matters raised in those submissions were relevantly concerned with water quality and visual amenity impacts.

The court considered the proposed changes in the context of those concerns and found that those concerns remained appropriately addressed. Having regard to the nature and extent of the proposed changes, the court concluded that the changes would not give rise to "*any real or substantial chance or possibility of causing any reasonable decision to make a submission objecting to any proposed change, if the circumstances allowed.*"

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Court concluded that inaccuracies in the preliminary approval did not warrant refusal of the application and excused partial non-compliance with public notification requirements

Ian Wright | Ronald Yuen | Eva Coggins

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Nadic Investments Pty Ltd v Townsville City Council and Stockland Developments Pty Ltd* [2015] QPEC 40 heard before Bowskill QC DCJ

November 2015

In brief

The case of *Nadic Investments Pty Ltd v Townsville City Council and Stockland Developments Pty Ltd* [2015] QPEC 40 concerned an application made by the developer, Stockland Developments Pty Ltd in a submitter appeal to the Planning and Environment Court, seeking to have a preliminary issue determined. The preliminary issues related to inaccuracies in the preliminary approval given under section 242 of the *Sustainable Planning Act 2009* and the partial non-compliance with the public notification requirements.

In relation to the issues concerning the preliminary approval, on a proper construction, the court found that the inaccuracies in the preliminary approval did not affect its operation and did not warrant refusal of the development application.

In relation to the issues concerning the public notification, the court excused the non-compliance with the public notification requirements as the public notification undertaken for the development application sufficiently met the purposes of public notification under the *Sustainable Planning Act 2009*.

Court found that on a proper construction, the preliminary approval sought to override the planning scheme and not the existing plan of development and the inaccurate title did not warrant refusal of the development application

The title of the preliminary approval stated that the approval overrode the "North Shore Plan of Development", being an existing plan of development for a previous preliminary approval which applied to the subject land. Under section 242 of the *Sustainable Planning Act 2009*, a preliminary approval may override a planning scheme, but not a plan of development. The question was whether the approval was therefore not a valid preliminary approval under section 242.

The court considered the principles of construing a development approval, being that the approval must be construed according to its actual contents and function rather than the intention of the local government, and should not be construed in an overly technical manner. In applying these principles, the court found that despite the inaccurate references to the existing plan of development in the title of the preliminary approval, its context and operation made it clear that the approval was to override the planning scheme, not the existing plan of development. As such the inaccuracy did not warrant refusal of the development application.

Court found that the Structure Plan might have included land outside the subject land, but on a proper construction, the preliminary approval did not affect land outside the subject land

The Structure Plan map, which formed part of the preliminary approval, appeared to have included land outside the subject land.

However, the court observed that there were express terms in the preliminary approval including the approved plan of development which specified that the preliminary approval and the plan of development applied to the subject land only. Given those express terms, on a proper construction, the court concluded that the preliminary approval did not affect land outside the subject land.

Nevertheless, to avoid confusion, the parties agreed that the Structure Plan should be amended to correct the inaccuracy.

Court found that on a proper construction of the preliminary approval, the operation and effect of the plan of development was sufficiently clear despite its reference being incorrectly included in condition 1(a) of the preliminary approval

Condition 1(a) of the preliminary approval provided that the proposed development "must generally comply" with the drawings listed in the table of drawings, which included the plan of development. However, as the plan of development was not a drawing, it was erroneously included in condition 1(a) of the preliminary approval.

Nadic Investments Pty Ltd contended that the incorrect inclusion of the reference to the plan of development to the table of drawings in condition 1(a) gave rise to a number of issues including uncertainty about the nature and extent of future development under the preliminary approval. Whilst acknowledging that it was an erroneous inclusion of the reference to the plan of development in the table, the court was of the view that the requirement "to generally comply with drawings" was not directed to the plan of development since it was not a drawing. Further, the court noted that condition 2(a) of the preliminary approval expressly provided that "subsequent development over the subject site must be in accordance with the relevant Assessment tables under the *Plan of Development North Shore Mixed Use sub-area*".

Since condition 2(a) was the leading provision, given its express terms, the court was satisfied that the purpose and operation of the plan of development could be appropriately given effect under the preliminary approval.

Nevertheless, the parties agreed that the reference to the plan of development in condition 1(a) should be removed.

Court found that the public notification of the development application sufficiently met the purposes of public notification under the Sustainable Planning Act and excused the non-compliance with the public notification requirements

There were two issues in relation to public notification. The first issue was that a notice was not placed on one of the road frontages to the subject land, and the second issue was that the content of the public notice was not accurate in that it did not describe each proposed use for the proposed development and incorrectly described the proposed development as overriding the existing plan of development rather than the planning scheme.

As to the first issue, the court found that it was impossible to get to the road frontage in question without first passing the other public notice that had been erected. On this basis the court exercised its power to excuse the non-compliance with the public notification requirements in this regard.

As to the second issue, the court found that given the number of proposed uses for the proposed development, it would have been impractical for the public notice to list all of the proposed uses.

Nonetheless, the court noted that it would not be expected that a person would decide whether to make a submission about a development application based on the public notice alone. The court considered that the notice that was displayed contained sufficient information to put an interested person on notice to go and look at the full application.

Further, the court found that the inaccuracies in the public notice would not have substantially restricted a person's right to make a submission.

On this basis, the court also exercised its power to excuse the non-compliance with the public notification requirements in this regard.

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Court found that the condition proposed by the council was beyond what was reasonably required by the proposed development

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Exchequer Property Finance Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 60 heard before Wall QC DCJ

December 2015

In brief

The case of *Exchequer Property Finance Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 60 concerned an appeal in the Planning and Environment Court against the decision of Fraser Coast Regional Council to partly approve a request by Exchequer Property to change conditions 29 and 30 of its development approval for reconfiguring a lot for the Parklands Estate.

Conditions 29 and 30 related to the upgrade of Doolong South Road progressively as each stage of the estate fronting the road was developed. The dispute in question concerned stages 3A and 3B of the estate which had frontage to the north-south section of Doolong South Road.

As condition 30 was resolved, the court only had to determine the dispute in relation to condition 29. After having considered the arguments advanced by Exchequer Property and the council as well as their respective traffic and town planning experts' opinions, the court concluded that the council's proposed condition 29 "*goes beyond what is reasonably required by the subject development*".

The court found that the contribution proposed by Exchequer Property would allow the upgrade of Doolong South Road to a safe and acceptable standard and was a reasonable response to the traffic impact generated by the proposed development. As such, the court allowed the appeal and amended condition 29 on similar terms as proposed by Exchequer Property.

Exchequer Property contended that its contribution to future construction of Doolong South Road should be limited to the traffic impact generated by the proposed development

Exchequer Property made a request to the council to change condition 29 of its development approval for the Parklands Estate to specify that the assessment of the contribution to future construction of Doolong South Road should be based upon traffic generated by the proposed development. This request was prompted as a result of a change of the status of Doolong South Road from Traffic Distributor Road to Major Collector Road (bus route).

It was estimated by Exchequer Property that the proposed development would generate about 12% of the traffic likely to use Doolong South Road. Based on an estimated cost of the road construction of $1,079,701, Exchequer Property submitted that its contribution should amount to $129,564.12.

Exchequer Property therefore proposed that condition 29 be amended on the following terms:

> *29. In lieu of constructing kerb and channel together with all associated road widening and underground drainage for the full length of the existing Doolong South Road frontage to the development, the developer shall make a cash contribution towards the roadworks by Council in the amount of $129,564.12.*

Council contended for a condition requiring that part of Doolong South Road fronting the proposed development to be upgraded to a Major Collector Road standard or alternatively Exchequer Property to pay the council an amount equal to the upgrade cost

The council disagreed with Exchequer Property's proposal and contended for an amended condition 29 such that the relevant part of Doolong South Road fronting the proposed development would be upgraded in accordance with the council's design requirements for a Major Collector Road (bus route) or in the alternative, a payment would be made to the council of an amount equal to the cost of the upgrade.

It was submitted by the council that, in the absence of its proposed condition 29, Doolong South Road might not be upgraded in the future where the other developments in the area such as the Insight Estate and Ring Estate did not proceed and that the interim upgrade solution proposed by Exchequer Property's traffic expert would not provide a safe road or traffic outcome.

Court accepted that the interim road upgrade solution proposed by Exchequer Property would provide a reasonable and acceptable traffic outcome as it was sufficient to bring Doolong South Road to a safe reasonable standard which would accommodate the existing traffic and traffic generated by stages 3A and 3B of the proposed development

Both parties adduced expert evidence from their respective traffic and town planning experts. After having heard the evidence of the parties' experts, the court preferred the evidence of Exchequer Property's traffic and town planning experts.

It was accepted by the court that the interim road upgrade proposed by Exchequer Property's traffic expert would accommodate the existing traffic and traffic generated by stages 3A and 3B of the proposed development and was sufficient to the bring the road to a safe reasonable standard. The court also observed that the interim road upgrade would provide a foundation for upgrading Doolong South Road to a Major Collector Road.

Further, the court accepted that the proposed 12% contribution would allow the council to carry out works which would adequately accommodate traffic demand generated by the proposed development and existing uses, in light of the fact that other developments in the area would be expected to contribute to the road construction or cost in the future.

The court therefore found that "*the appellant's proposal better reflects likely future development in the area and resultant cost sharing for ultimate construction of the road to Major Collector Road (bus route) standard. Only a small part of Parklands Estate will use this section of Doolong South Road whereas most, if not all, of Ring Estate and probably most of Insight Estate (recognising that there will be a road connection between Insight Estate and Parkland Estate) will use the road.*"

Court found that Exchequer Property's proposal was a reasonable response to traffic likely to be generated by the proposed development and was not inconsistent with likely future residential development in the area

The town planning experts agreed that "*the Ring and Insight developments would complete the urbanisation picture intended by the local plan*".

The court accepted Exchequer Property's town planning expert's opinion that the proposed "12% contribution" and the interim upgrade solution was an appropriate and reasonable response to the traffic generated by the proposed development, particularly given that the largest single contributor to urbanisation would be Ring Estate.

It was concluded by the court that "*the contribution suggested by the appellant will allow the upgrading of the road to a safe (interim) standard, would be a reasonable response to traffic likely to be generated by the subject development, would not be inconsistent with likely future residential development in the area or inconsistent with the provisions of the planning schemes … It is of course a matter for the respondent whether it carries out the interim solution but the evidence is to the effect that any work now would not be wasted in future upgrading of the road.*"

COLIN BIGGERS & PAISLEY LAWYERS

The importance of forensic and scientific investigations

Ian Wright | Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Council of the City of Gold Coast v Thi Hoa Dam* [2015] QPEC 51 heard before Morzone QC DCJ

December 2015

In brief

The case of *The Council of the City of Gold Coast v Thi Hoa Dam* [2015] QPEC 51 involved an application in the Planning and Environment Court by the Gold Coast City Council seeking declarations about the lawfulness of development and enforcement orders against Thi Hoa Dam, the owner of land at 183-185 Monaco Street, Broadbeach Waters. These proceedings concerned the lawfulness of certain development that had occurred on the land in respect of a satellite dish, a pool cover and rock armouring works.

The council was successful in establishing that the pool cover was assessable development for which a development permit was required. As to the satellite dish, the court found that it was not assessable development. However the council's case failed in relation to the rock armouring works primarily due to a lack of adequate expert evidence.

The court made a declaration that the pool cover constituted code assessable development for which a development permit was required and made a consequential order requiring the landowner to remove or regularise the unlawful development by obtaining a development permit within set timeframes.

The court was satisfied that, on the balance of probabilities, the landowner or her agents had erected both the satellite dish and the pool cover but was not satisfied that the rock armouring works were carried out by the landowner

On the evidence presented the court was satisfied that the landowner, or her agents, had erected both the satellite dish and the pool cover.

In respect of the construction of the rock armouring the council adduced evidence from its development compliance officer who had observed the rock armouring when inspecting the land and made a desktop comparison of aerial photographs. The court considered the opinion evidence adduced by the council was "*no more than mere conclusions drawn on matters upon which the court is equally qualified to draw an opinion, and it is inadmissible*".

The court was of the view that more forensic and scientific investigations could and should have been undertaken in the circumstances. In this regard, the court by reference to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, noted that expert evidence should provide criteria for testing the accuracy of conclusions reached thereby enabling the court to reach its own independent judgment by applying the relevant criteria. Such evidence should also be intelligible, convincing, tested and supported by materials which would convince the court of its fundamental soundness.

Whilst the court had sought to review the aerial photographs to determine the difference in the rock armoury before and after the landowner purchased and occupied the land, it was not able to identify any increase of the rock armoury. Ultimately the court concluded that there was not sufficient evidence to establish that, on the balance of probabilities, the landowner had carried out, or caused to be carried out, the works.

The court found that the pool cover constituted assessable development for which a development permit was required

The council adduced evidence from its development compliance officer and senior building certifier that the pool cover was a class 10a structure under the *Building Code of Australia*. The court again found this evidence to be deficient on similar grounds to the evidence about the rock armouring. The court emphasised that further investigations could have been undertaken and that the opinion evidence of council officers were mere conclusions drawn on matters that the court was equally qualified to reach an opinion on and were therefore inadmissible.

In its interpretation of the relevant provisions of the *Building Code of Australia*, the court found that the pool cover was a class 10a structure, being a non-habitable shelter or storage structure, irrespective of whether the structure was fixed to the ground or not.

Having made this finding the court then considered whether the pool cover was self-assessable or exempt development under the *Building Act 1975*. Given the dimensions of the pool cover, the court found that it did not fall within the relevant criteria for self-assessable development. The court further noted that the pool cover did not constitute exempt development. Accordingly, the pool cover was assessable development for which a development permit was required.

The court found that the work on the satellite dish including its removal was not assessable development and therefore did not require a development permit

As to the satellite dish the court found that it was a class 10b structure under the *Building Code of Australia*. In reaching this conclusion, the court had to solely rely on the historical photographs of the structure taken at some distance, and from the ground, by council's development compliance officer.

Having reached the conclusion on the classification of the structure, the court found that the building work for the satellite dish was exempt development under the *Building Act 1975* as the satellite dish was no higher than 3m above its natural ground surface. On this basis, the work on the satellite dish including its removal did not require a development permit.

The court made a declaration that the pool cover was code assessable development for which a development permit was required and consequentially ordered the landowner to remove or regularise the unlawful pool cover, but declined to make an enforcement order

The court noted that the power to make the declaration and enforcement order sought by the council was discretionary.

It was observed by the court that the council had established only the pool cover was erected by the landowner and constituted assessable development for which a development permit was required.

The court did not accept the council's submission that the development offence in this case was "flagrant", rather the court held the view that it was borne out of limited comprehension, confusion and uncertainty on the part of the landowner. The court accepted that the landowner intended to remove or regularise the unlawful building work.

In this context the court made a declaration that the pool cover was code assessable development for which a development permit was required and made a consequential order requiring the landowner to remove or regularise the unlawful development by obtaining a development permit within set timeframes. However the court declined to make an enforcement order.

The demolition of a pre-1946 house was approved due to its diminished traditional building character as a consequence of unsympathetic alterations

Ian Wright | Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mariott v Brisbane City Council* [2015] QPEC 45 heard before Bowskill QC DCJ

December 2015

In brief

The case of *Mariott v Brisbane City Council* [2015] QPEC 45 concerned an appeal in the Planning and Environment Court against the Brisbane City Council's decision to refuse Julie Lois Mariott's development application for a preliminary approval to demolish a house on Sydney Street at Kedron.

The council's refusal of Ms Mariott's development application was on the grounds that the proposed demolition did not comply with the Traditional building character (demolition) overlay code.

The relevant codes of the demolition overlay code under consideration by the court were performance outcome PO5(c) and acceptable outcomes AO5(c) and (d). However, the court noted that each of the outcomes were alternatives and if any one of the outcomes were met, then by operation of the *Brisbane City Plan 2014*, the purpose and overall outcomes would be complied with, and, consequently, the demolition overlay code would be complied with.

The court concluded that the demolition of the house would not result in "*significant, concerning or unacceptable loss of traditional building character*" (AO5(c)). In forming this conclusion, the court had regard to the character of Sydney Street as a whole and the representation of traditional building character offered by the house to the street. Accordingly, the appeal was allowed by the court.

The court found that the whole of Sydney Street was the relevant area of assessment for the purpose of assessing whether there was any conflict with PO5(c), AO5(c) and (d) of the demolition overlay code

The court considered the differing positions taken by the heritage architectural experts in their joint report in relation to what the "*area under assessment*" was. Ms Mariott's expert focussed on the whole of the street where the house was located. However, the council's expert focussed on a smaller section of the street more relevantly known as the area comprising the 8 properties (including the house) that were covered by the demolition overlay.

Considered in the context of the *Brisbane City Plan 2014*, the court adopted a flexible, case-by-case approach in its interpretation and application of the relevant outcomes of the demolition overlay code. Whilst acknowledging that it was the area the subject of the overlay which would primarily be protected by the demolition overlay code, the court considered it appropriate, also in some instances, to apply the demolition overlay code over a broader area. In this instance, the court was of the view that the relevant area of assessment was the whole of Sydney Street and not confined to the 8 properties covered by the demolition overlay as submitted by the council's expert.

The court found that the demolition of the house would not result in the loss of traditional building character as prescribed under AO5(c) of the demolition overlay code

The loss of traditional building character contemplated by acceptable outcome AO5(c) was not considered to be absolute. By reference to *Lynch v Brisbane City Council* [2010] QPELR 314, Ms Mariott submitted that the loss required to be "*significant, concerning or unacceptable, rather than to any loss at all*". The council submitted to the contrary but was not successful. In any case, the court accepted Ms Mariott's submission and found no basis to adopt a different interpretation.

Ms Mariott's expert was of the opinion that due to several unsympathetic alterations, the traditional building character of the house had diminished and as such the extent of loss of the character as a result of the demolition was limited. The court found support from the decisions of *Litbit Pty Ltd v Brisbane City Council* [2009] QPELR 197 and *Wallace v Brisbane City Council* [2012] QPELR 689 in taking into account the altered appearance of the house.

The council's expert, on the other hand, contended that the demolition of the house would result in the loss of traditional building character. A number of supporting arguments were submitted by the council's expert. One of the arguments was that in assessing whether the demolition of a pre-1946 house would result in a significant, concerning or unacceptable loss of traditional building character from the relevant street, this loss should be measured against the post-1946 houses which were considered sympathetic to the traditional building character, instead of measuring the loss in terms of the actual traditional building character present in the street.

The court found difficultly in that approach and noted that the traditional building character in Sydney Street was confined to particular houses and that their effect on the character of the street had been diluted by the overwhelming amount of surrounding post-1946 development. Further, the contribution of the house to the traditional building character in Sydney Street had also been diluted due to the unsympathetic alterations made to it.

Accordingly, the court preferred the evidence of Ms Mariott's expert and held that having regard to the character of Sydney Street as a whole and the representation of the traditional building character by the house, its demolition would not result in significant, concerning or unacceptable loss of traditional building character.

Although the court found that the house was in a street that had traditional character as prescribed under AO5(d), the demolition overlay code was complied with given that the demolition of the house would not result in "significant, concerning or unacceptable loss of traditional building character"

The court did in turn deal with acceptable outcome AO5(d) and performance outcome PO5(c). Acceptable outcome AO5(d) dealt with whether the house was in a street that had no traditional character. The court found in favour of the council's expert in that it was difficult to conclude that the street had no traditional character due to the "*not insignificant traditional character*" represented by the pre-1946 houses on the street.

Performance outcome PO5(c) concerned whether the house was a building which did not contribute positively to the visual character of the street. The court observed that for this performance outcome to be met, it had to be shown that the house contributed positively to, or added to, the visual character of Sydney Street. It would not be considered sufficient where the house positively contributed to the visual character of the street because of the traditional building character represented by the house and its location within a group of houses covered by the overlay.

Nonetheless, given that the proposed development complied with acceptable outcome AO5(c), it complied with the purpose and overall outcomes of the demolition overlay code and therefore, complied with the demolition overlay code.

Court found that the wholesale nursery was an existing lawful use and no approval was required

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Allen & Anor v Cairns Regional Council & Anor* [2015] QPEC 28 heard before Andrews SC DCJ

January 2016

In brief

The case of *Allen & Anor v Cairns Regional Council & Anor* [2015] QPEC 28 concerned an application made to the Planning and Environment Court by Mr Barry Allen and Edgewill Pty Ltd for a declaration in respect of the lawfulness of the wholesale nursery on land located at 29-31 Zanzoo Close, Crystal Cascades, Redlynch.

The court found that the wholesale nursery was an existing lawful use under section 681 of the *Sustainable Planning Act 2009* and the development application for the wholesale nursery was not required.

Court was required to satisfy itself that the wholesale nursery fitted within the definition of agriculture under the 1978 town planning scheme and that it commenced before 29 November 1996

Until 29 November 1996, the land was zoned Rural Residential A under the Town Planning Scheme for the Balance of the Shire of Mulgrave gazetted in July 1978 under the *Local Government Act 1936*. Agriculture on the land would have been lawful under the 1978 town planning scheme without the consent of the council.

The various town planning schemes commenced on and from 29 November 1996 would have required a development approval to be obtained to lawfully carry out agriculture on the land. Accordingly, the court had to be satisfied that the wholesale nursery commenced prior to 29 November 1996 and fitted within the definition of agriculture under the 1978 town planning scheme.

Mr Allen demonstrated and satisfied the court that through his continuous activities on the land the wholesale nursery commenced its use on the land before 29 November 1996

The court was satisfied that the wholesale nursery commenced before 29 November 1996 based on the evidence of a series of continuous activities carried out by Mr Allen since the early 1990s up to 29 November 1996, which included the several years of planting stock in the ground, the maintenance of growth plants with irrigation, mulching, fertiliser and weeding, a large portion of the land being used for nursery purposes, increased planting of dracaenas, propagation of dracaenas in pots and sale of pots.

Court was satisfied that the primary use of the land was agriculture and that it was a lawful use in November 1996

The owners of the neighbouring land submitted that the propagation process was the dominant use of the land and the growth of the dracaena stock was an incidental use. It was asserted by the owners that the "cutting of the canes from the mother stock in combination with the propagation phase was 'Rural Industry'" and as such it was not a lawful use.

The court disagreed with the neighbouring landowners' assertions. The court was of the view that the primary use of the land was for growing stock and the propagation phase formed part of the growing phase. The cutting of the canes was incidental to the primary use of the land. Accordingly, it was satisfied that the use of the land was agriculture, which was lawful in November 1996.

Court was not satisfied that there had been material intensification or abandonment of the wholesale nursery use

The neighbouring landowners asserted that there had been material intensification of the use of the land after 30 March 1998 or abandonment of the use in 1993 and 2013.

The court found that there had not been material intensification of the use for the following reasons:

- since 1994, the proportionate use of the land for the purpose of wholesale nursery had remained roughly the same;
- there had not been an increase of the volume of the production of pot plants;
- there had been a consistent number of deliveries of mulch, fertiliser and potting mix;
- the volume of pesticides or herbicides sprayed and vehicles or equipment used on the land had not been increased.

The court also found that the use of wholesale nursery was not abandoned even though when the previous company owned by Mr Allen was liquidated in 1993 so long as the use commenced and before and was continuing after 29 November 1996. The asserted abandonment in 2013 was not consistent with the evidence.

Court found that the past use of a shade house without a building approval would not warrant a refusal of making the declaration sought in this case

The neighbouring landowners sought to submit that the shade house was unlawfully erected on the land. Based on the evidence before the court, it was not satisfied that the shade house was unlawful.

Nonetheless, the court did not consider Edgewill Pty Ltd had wilfully not obtained a building approval and where such approval was required, the council could take remedial actions.

In any event, the court was not persuaded that the previous use of the shade house constructed on the land without a building approval if that was the case would warrant a refusal of making the declaration sought.

COLIN BIGGERS & PAISLEY LAWYERS

Using an existing structure to realise otherwise unrealisable yield

Ian Wright | Ben Caldwell | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Aspinall & Ors v Brisbane City Council* [2015] QPEC 31 heard before Horneman-Wren SC DCJ

January 2016

In brief

The case of *Aspinall & Ors v Brisbane City Council* [2015] QPEC 31 concerned an appeal commenced in the Planning and Environment Court by submitters against a decision made by the Brisbane City Council to approve the development application of Butterfield Projects Pty Ltd for a development permit for 35 units in a disused aged care facility on a site located at 6 Southerden Avenue and 4a Gawler Street, Grange.

The submitters argued that the development application should be refused as it conflicted with the relevant planning instruments, being the *Brisbane City Plan 2000* and the *Brisbane City Plan 2014*, and there was a lack of sufficient grounds to justify the approval of the development application despite the conflicts.

The court found that there were sufficient grounds to justify the approval despite substantial conflict with the gross floor area limits. In particular, the court considered that the conflict was largely a product of the existing built form, and that the proposed development would improve amenity, reuse a structurally sound building for a purpose envisaged in the planning scheme and facilitate the potential for residents to remain in their neighbourhood throughout their lives.

The proposed development conflicted with the planning scheme as it was over twice the density specified in the intent of Low Density Residential Area

The site was an island block with a total area of over 3,600m^2. The existing building on the site was the legacy of an aged care facility which had been in operation on the site for approximately 40 years since the 1970s. The existing building, which had a gross floor area of over 3,300m^2 and was up to four storeys in height, had ceased operating as an aged care facility and fallen into disrepair. However, the structural engineers agreed that the existing building was in good structural condition and remained suitable for the proposed residential use.

The existing building was not consistent with the surrounding area which was predominately comprised of one to two-storey dwelling houses many of which were of pre-1946 "timber and tin" character. The proposed development sought to reuse the existing building to create 35 residential units while reducing its overall gross floor area and enhancing its appearance. Despite the reduction in gross floor area the proposed development would still be 77% of the total site area substantially exceeding the 30% of site area specified as the maximum gross floor area of a multi-unit dwelling for the low density residential area in which the proposed development was sited.

The submitters contended that the existing building on the site was discordant with the predominant character of the area, and that this discordance would be entrenched with the approval of the proposed development.

Court considered the proposed development was consistent with the community's reasonable expectations as to future amenity

The submitters' central argument was that the reasonable expectations of the community, which were based on the planning scheme, were that the existing building would be demolished at the cessation of its use as an aged care facility to return the site to low density residential development. The court found that the reasonable expectations of the community were to be judged in the context of not just the planning scheme but the broader statutory planning controls.

The court emphasised two particular aspects of the broader statutory planning controls. Firstly, that the proposed development could be approved despite the conflict with a relevant planning instrument where there are sufficient grounds to justify an approval despite the conflict. Secondly, that a planning instrument could not require a lawfully constructed building to be altered or removed.

In the context of the broader statutory planning controls, the evidence given by the submitters and the fact that built form had existed on the site for almost 40 years the court found that it was not beyond the reasonable expectations of a person considering the locality that the built form would continue to exist on the site and might be redeveloped so as to be put to a different use.

Court dismissed the remaining arguments raised by the submitters

The submitters also contended that the proposed development was in conflict with the desired environmental outcomes of the planning scheme; discordant with the predominant character of the area; not consistent with the bulk, scale and density limits in the planning scheme; and that there should be demolition of at least part of the built form on the basis of the planning philosophy that existing non-conforming development was phased out.

The court dismissed the submitters arguments for a variety of reasons but largely on the basis that the submitters' contentions focused on the demolition of the existing building which could not be compelled by the planning scheme. The court distinguished a number of cases relied on by the submitters in support of their arguments as the cases considered the establishment or expansion of a built form. The court found that there was a fundamental distinction between a case where there was an existing built form, and the statutory planning controls prevented its demolition, and where a new built form was to be establish or an existing built form was to be expanded.

The court found that there were sufficient grounds to justify approving the proposed development despite the conflict with the planning scheme

The court emphasised that it was not permitted to approach the development application by considering some more preferable development on the site, particularly one that would require demolition of the existing structure. In considering whether there were sufficient grounds the decision maker should not be distracted by hypothesised alternative proposals that would not be in conflict with the planning scheme.

The court found that despite there being substantial conflict with the gross floor area limits in the intent for the Low Density Residential Area in the planning scheme this conflict was a direct product of the existing built form, and the reuse of that form was a sensible, practical and appropriate outcome. Ultimately the court found that there were sufficient grounds to justify the approval of the proposed development despite conflict with the planning scheme.

COLIN BIGGERS & PAISLEY LAWYERS

Court found that the Building and Development Dispute Resolution Committee made an error of law in deciding that a building without fire separation measures was not dangerous

Ian Wright | Ronald Yuen | Eva Coggins

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Erlbaum* [2015] QPEC 46 heard before Rackemann DCJ

January 2016

In brief

The case of *Brisbane City Council v Erlbaum* [2015] QPEC 46 concerned an appeal against the Building and Development Dispute Resolution Committee's decision about the validity of an enforcement notice issued by the Brisbane City Council.

The council issued an enforcement notice for a building that did not have the fire separation measures required for a building of its class. The council did not give a show cause notice before giving the enforcement notice.

Michael and Erez Erlbaum, the owners of the building appealed to the Committee against the council's decision to issue the enforcement notice without first giving a show cause notice, and the Committee set aside the enforcement notice. The council then appealed to the Queensland Planning and Environment Court. The main issue in dispute was whether the Committee had made an error of law in deciding that the lack of fire separation measures was not "dangerous" and therefore did not justify the council's decision to issue the enforcement notice without first giving a show cause notice.

The court found that the Committee had made an error of law by relying on the *Queensland Building Work Enforcement Guidelines 2002* and the presence of smoke alarms in the building to make its decision. The court allowed the appeal and remitted the matter back to the Committee to re-determine the matter according to law.

The Committee found that the building did not comply with the BCA in relation to fire safety for class 2 buildings but nonetheless set aside the enforcement notice as it was not so dangerous which warranted the giving of an enforcement notice without a show cause notice

Mr and Mrs Erlbaum built additions to the building that they owned, which was a dwelling house, resulting in three discrete living areas within the building. There had been longstanding dispute between the council and Mr and Mrs Erlbaum in relation to the building.

In 2013, the council issued an enforcement notice relating to fire safety, including the lack of fire separation between the independent living areas. However, the council did not first give a show cause notice.

Under s 248(4) of the *Building Act 1975*, the council may give an enforcement notice without first giving a show cause notice where the matter that the enforcement notice relates to is of a dangerous or minor nature.

In that instance, the Committee set aside the enforcement notice but required Mr and Mrs Erlbaum to make an application to change the Building Code of Australia classification of the building from class 1a (detached house) to class 2 (2 or more occupancy units each being a separate dwelling). The Committee found that the building did not comply with the Building Code of Australia in respect of fire safety for class 2 buildings. However, it was not "dangerous" for the purpose of justifying the council's decision to give an enforcement notice without first giving a show cause notice.

The Committee did not consider the building to be dangerous given the presence of individual smoke alarms in the building and set aside the further enforcement notice given by the council which was given in the absence of a show cause notice

In 2014, the council issued another enforcement notice relating to fire safety, similar to the one issued in 2013. Again, the council did not give a show cause notice as it held the view that the building was dangerous due to the inadequacy of fire separation measures.

The Committee set aside the enforcement notice, maintaining its earlier view that the building was not dangerous.

In its consideration of whether the building was dangerous as a result of the lack of fire separation measures between the separate dwellings, the Committee observed that the word "dangerous" was not defined for the purposes of section 248 of the *Building Act 1975* and it was to be interpreted according to its ordinary meaning.

Nonetheless, the Committee sought interpretation assistance from the 2002 guidelines, in particular section 4.2.2 which provided that:

> *What constitutes a 'matter of dangerous or minor nature' is not defined, nor has it been tested in court. However it is reasonable to assume dangerous is intended to refer to some circumstance where a building or structure is structurally unsound and could collapse or present another immediate hazard.*
>
> *A building or structure that was lawfully constructed and remains structurally sound or intact cannot be considered dangerous because it does not meet current safety standards.*

The Committee observed that individual smoke alarms which were present in the building were subject to the final determination by the building certifier on the development application for building works. Nonetheless the Committee assumed that they "*would function as required to give an early warning of a fire to the residents and allow them the opportunity to escape the premises*".

It was on this basis and having regard to section 4.2.2 of the 2002 guidelines, the Committee concluded that "*although it may be inferred the building is unsafe due to the absence of any early warning or protection for occupants in the upper level from a fire situation originating in the lower level of the subject building, there are nevertheless individual smoke alarms present in each of the SOU's. The degree of risk does not represent an immediate hazard such as to find a building "dangerous" as that term is commonly understood.*"

The council appealed to the court, asserting that the Committee made an error of law by making its findings on the question of dangerous by reference to the 2002 guidelines.

Court found that the Committee had failed to properly consider whether the smoke alarms would sufficiently fulfil the function of the fire separation measures and these matters should have been expressly considered rather than basing them on assumption

The court had difficulties to see how the 2002 guidelines would assist the Committee with its interpretation of the word "dangerous", particularly given its purpose. In the court's view, the Committee should have applied the plain ordinary meaning of the word rather than adopting the meaning given in the guidelines. Nonetheless, after a closer examination of the Committee's reasoning, the court did not find any specific error of law made by the Committee as a result of its reference to the guidelines.

However, the court relevantly noted that the Committee in making its findings mainly relied on the presence of individual smoke alarms, which in its view would mitigate the fire danger caused by the absence of fire separation between the dwellings. The court observed that the two fire safety measures had different purposes. Smoke alarms served to give warning of a fire, and fire separation measures would slow the spread of fire, giving time and opportunity to escape. As such a building with smoke alarms but without adequate fire separation could still be dangerous.

The court found that the Committee had not properly considered whether the smoke alarms would adequately fulfil the function of the fire separation measures. These matters should not have been the subject of an assumption or presumption and the Committee should have expressly considered them. Accordingly, the court was satisfied that the Committee's fact finding exercise was materially affected by an error of approach which indicated an error of law.

Blasting of boats held to have breached the general environmental duty and an environmental authority

Ian Wright | Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 63 heard before Morzone QC DCJ

February 2016

In brief

The case of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 63 concerned an appeal commenced in the Planning and Environment Court by Mrs Heather Cuthbert against the Moreton Bay Regional Council's internal review that affirmed the issuance of an environmental protection order under the *Environmental Protection Act 1994* in respect of Mrs Cuthbert's boat maintenance and repair facility at 48 Bishop Parade, Toorbul.

The court considered whether the operator of the facility had breached conditions of the relevant environmental authority issued for the facility and the general environmental duty under the *Environmental Protection Act 1994* and whether an environmental protection order was required to secure their future compliance.

The court found that there had been non-compliance with both the general environmental duty and the environmental authority. However the court considered that the environmental protection order that had been issued by the council was unnecessarily restrictive, prescriptive and onerous.

On this basis the court allowed Mrs Cuthbert's appeal in part, setting aside the council's environmental protection order but ordering that a substituted environmental protection order be issued requiring Mrs Cuthbert to prepare and lodge with the council a stormwater management plan and a site based management plan.

The facility was surrounded by a sensitive environment part of the Ramsar Convention Wetland

The boat maintenance and repair facility had been operated by various owners since 1962 which included a boat ramp, slipway and jetty. Following the introduction of the *Environmental Protection Act 1994* the use of the facility was identified as an environmentally relevant activity and subsequently an environmental authority was issued.

It was the use of the slipway to repair, sand, spray, fibre glass, water-blast and anti-foul boats that the court described as being the "*nucleus of disputation with the respondent council amid a chorus of complaints from local residents*". The slipway was adjacent to the Elimbah Creek which is near to the Pumicestone Passage. Being located as such meant that the facility was surrounded by a sensitive environment part of the Ramsar Convention Wetland.

The use of the facility was the subject of two previous appeals involving the environmentally relevant activity; the first against an enforcement notice and the second against a refusal of a development application.

Court accepted the evidence of the expert witnesses and local residents and was satisfied that conditions of the environmental authority relating to air quality, noise, water quality and land contamination had not been complied with

The council asserted that there had been non-compliance with the environmental authority due to a failure to comply with certain conditions. In response Mrs Cuthbert submitted that there was no probative or substantive evidence before the court that would prove the non-compliance on the balance of probabilities.

The court had the benefit of evidence from local residents, a number of experts, Mrs Cuthbert and Mr Cuthbert, who were primarily responsible for the operation of the facility. The court found the evidence of the expert witnesses called by the council and the local residents to be credible. In contrast the evidence given by Mrs Cuthbert and Mr Cuthbert was not viewed favourably by the court.

The court considered a number of conditions of the environmental authority in turn, finding that during the operation of the facility, and in contravention of the environmental authority:

- contaminants were released which caused noxious or offensive odour beyond the boundary of the premises;
- dust/particular matter was released beyond the boundaries of the premises;

- spray painting had been conducted in the absence of an authorised spray booth;
- noise contaminants had been released at levels likely to cause environmental harm and likely to exceed prescribed levels;
- contaminants had been caused or permitted to be released directly or indirectly into Elimbah Creek;
- contaminants had likely been released onto land by irrigation using contaminated water;
- inadequate waste management arrangements had been adopted.

Court found that there had been a breach of the general environmental duty under the Environmental Protection Act 1994 as the activity had caused, or was likely to cause, environmental harm

The *Environmental Protection Act 1994* imposes a general environmental duty requiring a person to not "*carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm.*"

For the same reasons the court found that Mrs Cuthbert had breached the conditions of the environmental authority, the court found that she had breached her general environmental duty on the basis that her activity was carried out in a way that had caused, or was likely to cause, environmental harm.

Court found that the environmental protection order given by the council was not appropriate but decided to exercise its discretion to issue an amended environmental protection order

The court has a discretion as to whether to issue an environmental protection order having regard to the particular circumstances of a given case. The court was not bound by the council's previous decision to issue an environmental protection order and had to undertake its own assessment of the relevant criteria to determine whether to issue such an order in this case.

In considering the nature and the extent of non-compliance with the environmental authority and the general environmental duty the court was satisfied that there was scientific certainty that the operation of the facility had caused serious environmental damage. The court relevantly observed that the damage had been caused by ongoing non-compliance with both the environmental authority and the general environmental duty and that Mrs Cuthbert had had ample opportunity to rectify such non-compliance.

In considering the environmental protection order that had been issued by the council the court was of the view that it was "*unnecessarily restrictive prescriptive and onerous, with the potential to derogate from the original grant of the environmental authority*". The timeframes in the environmental protection order proposed by the council were viewed by the court as unreasonable, impractical and as having the potential to create intolerable immediate material financial implications for Mrs Cuthbert.

However the court did find that an environmental protection order was necessary to secure compliance with the environmental authority and the general environmental duty. The court therefore made an environmental protection order requiring Mrs Cuthbert to prepare and implement an appropriate site based management plan and stormwater management plan. The court imposed a timeframe for compliance of 90 days as opposed to the 7 day timeframes imposed under the council's original environmental protection order.

There was no "overlapping" evidence to justify a single hearing

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council* [2015] QPEC 59 heard before Durward SC DCJ

February 2016

In brief

The case of *The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council* [2015] QPEC 59 concerned a preliminary hearing in an appeal before the Planning and Environment Court to determine whether the following disputed issues should be heard and decided in one hearing or separate hearings:

- whether the St Patrick's Convent which was constructed in 1883 satisfied the cultural heritage criteria identified in section 35(1)(a), (d) or (h) of the *Queensland Heritage Act 1992*;
- whether the Convent should be on the Queensland Heritage Register having regarding to its physical condition and structural integrity.

The court decided that the issue concerning the cultural heritage criteria should first be determined. Depending on the outcome of that hearing, if necessary the court would then determine whether the Convent should be on the Queensland Heritage Register.

Court observed that an order to decide a question separately from another question before the trial of the proceeding under rule 483 of the Uniform Civil Procedure Rules 1999 was not appropriate if the question of fact was in dispute

The court first considered its power to make an order to decide on a question separately from another question before the trial of the proceeding under rule 483 of the *Uniform Civil Procedure Rules 1999*. Rule 483(1) relevantly states that "*The court may make an order for a decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.*"

The court noted that the term 'question' is defined under rule 482 to include "*a question or issue in the proceeding, whether a fact or law or partly of fact and partly of law and whether raised by pleadings, agreement of parties or otherwise*".

The court by reference to *Body Corporate for Sun City Report CTS 24674 v Sunland Constructions Pty Ltd & Ors* [2010] QSC 463 at [19] observed that "*A number of discretionary considerations that apply in making an order for a separate decision appear in the judgement of Branson J and Reading Australia Pty Ltd v Australian Mutual Providence Society, an authority which has been referred to with approval by judges of this Court. The factors identified in Reading and other authorities favour the making of an order under UCPR 483 on the present application. The question has been appropriately formulated. The facts that are relevant to its determination are not in dispute. The question is ripe for determination*".

Court found that a separate hearing was appropriate as there was no "overlapping" evidence and that hearing costs and delay were not properly established to convince the court for a decision to have a single hearing

The Corporation of the Sisters of Mercy of the Diocese of Townsville submitted that the disputed issues should be heard and determined in a single hearing in that:

- there were a number of important facts in dispute between the parties;
- separate hearings were not desirable as the assessment of the physical condition of the Convent was relevant to the determination of both disputed issues;

- separate hearings could result in multiple applications for leave to appeal which would cause further delay and undesirable financial impact on the Sisters of Mercy by having to divert funds away from charitable work in order to maintain the Convent in its current condition.

On the other hand, the Queensland Heritage Council argued that separate hearings would be more desirable in that:

- if it was determined that the Convent did not satisfy the cultural heritage criteria, it would result in a resolution of the matter as the Convent would be removed from the Queensland Heritage Register;
- if the Sisters of Mercy failed to make out at least one of the grounds of appeal in relation to the issues associated with the cultural heritage criteria, it would also result in a resolution of the matter;
- a single hearing was not desirable as expert witnesses would need to make assumptions on the court's views in relation to the cultural heritage significance issue;
- the delay and financial impact contended by the Sisters of Mercy were not warranted as the magnitude of time and cost between a single hearing and two separate hearings were immaterial.

The court did not find that there was an "overlapping" evidence that needed to be considered in a single hearing and that the Sisters of Mercy's arguments in relation to hearing costs and delay were sufficiently made out to justify a single hearing.

The court therefore decided that the first disputed issue in relation to the cultural heritage criteria should be decided first and if necessary, the court would then decide whether the Convent should be on the Queensland Heritage Register.

In dismissing the appeal, the court adopted a holistic assessment of the planning scheme in finding that landslide risk minimisation strategies were not matters of public interest and, therefore, insufficient grounds to justify an approval despite the conflict

Ian Wright | Nadia Czachor | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Duffy v Sunshine Coast Regional Council & Anor* [2015] QPEC 58 heard before Long SC DCJ

February 2016

In brief

The case of *Duffy v Sunshine Coast Regional Council & Anor* [2015] QPEC 58 concerned an appeal in the Planning and Environment Court against the Sunshine Coast Regional Council's decision to refuse an application for a development permit for a reconfiguration of one lot into four lots with an access easement at Buderim.

The council refused the development application on several grounds but prior to the hearing those issues were resolved other than for conflicts with the Strategic Plan, the Code for Development on Steep or Unstable Land and the Code for Configuring Lots of the *Maroochy Plan 2000* relating to the steeply sloping nature of the land. Therefore, the court had to determine "*whether, from a geotechnical perspective, the proposed development, as it involves obviously steep land, can be undertaken so as to be safe to persons and property*".

The court considered the conflicts with the *Sunshine Coast Plan 2014* and concluded that it was clear that there was an explicit and substantial conflict. Under section 326(1)(b) of the *Sustainable Planning Act 2009*, the applicants had to establish that there were sufficient grounds to justify the approval of the application despite the conflict. The applicants submitted that the implementation of risk minimisation strategies on the advice of their town planner and the geotechnical experts would serve to remove any conflict with the *Maroochy Plan 2000*. The court found that the risk minimisation strategies put forward identified rather than removed the conflicts in issue and, as such, there were not sufficient grounds to justify the approval of the application despite the conflict.

The court adopted a broad consideration of the planning scheme and found that the risk minimisation strategies were not sufficient enough to waive the substantial conflict with the planning scheme

The court firstly had to determine whether there was a conflict with the former *Maroochy Plan 2000*, the planning scheme which was in force at the date the development application was lodged. In respect of the geotechnical issues, the joint expert report stated that the implementation of risk minimisation strategies would "*reduce the risk to persons and property from the potentiality of landslides to very low to low*" which, it was further stated, was an acceptable rating to regulators. In addition to this, however, there were town planning issues that related to the "*stability of the site and the potential for landslide hazard.*"

It was submitted by the applicants that in light of the geotechnical evidence, the proposed development complied with the provisions of the *Maroochy Plan 2000* as the risk minimisation strategies, if adopted, would protect people and property from the risk of landslide. However, upon a "*holistic assessment*" of the *Maroochy Plan 2000*, this was considered a substantial conflict. The court adopted the reasoning of the council that a broad consideration of the planning scheme revealed a three limbed planning approach in relation to the development of the subject land. Firstly, the *Maroochy Plan 2000* actively discouraged the creation of new lots in the precinct the subject land was located in. Secondly, it discouraged development on land with a gradient greater than 25% upon which the subject land was located. Thirdly, it discouraged development that increased the risk of harm to people or property.

Whilst the court contended that the geotechnical evidence dealt with the third limb, with reference to the relevant aspects of the Strategic Plan, the Code for Development on Steep or Unstable Land and the Code for Configuring Lots, the applicants failed to address the other two limbs.

The conflicts of the proposed development with the Sunshine Coast Plan 2014 were relevant in respect of establishing whether there were sufficient grounds to justify an approval of the development despite the conflict

The court also found that that the proposed development conflicted with the *Sunshine Coast Plan 2014* which commenced at the date the development application was lodged. Firstly, it conflicted with the Limited development (landscape residential) zone code in that the proposed development did result in the creation of additional lots. Secondly, it conflicted with the Buderim local plan code because the subject land is located outside the immediate urban growth boundary to which urban and rural residential development is limited. Further, the subject land was deliberately excluded from the urban growth area and zoned in a way that restricted the creation of additional lots, therefore, conflicting with the Landslide hazard and steep land overlay code and the reconfiguring a lot code.

The court considered whether any weight could be given to the *Sunshine Coast Plan 2014* in making its decision. The court held that under section 495(2)(a) of the *Sustainable Planning Act 2009*, appropriate weight may be given to the planning scheme. However, after considering the decisions of *Coty (England) v Sydney City Council* (1957) 2 LGRA 117, *Lewiac Pty Ltd v Gold Coast City Council* (1996) 2 Qd R 266 and *Yu Feng Pty Ltd v Maroochy Shire Council* (1996) 92 LGERA 41, the court concluded that it was only appropriate to give weight to the conflict with the *Sunshine Coast Plan 2014* when considering whether there were sufficient grounds to justify an approval of the development, despite the conflict.

The risk minimisation strategies identified rather than removed the conflict as issues were found to be matters of personal circumstance and not matters of public interest and were, therefore, not sufficient grounds to justify the approval despite the conflict

Under section 326(1)(b) of the *Sustainable Planning Act 2009*, the applicants had to establish that there were sufficient grounds to justify the approval of the development application despite the conflict. On that basis, the applicants submitted that the implementation of risk minimisation strategies on the advice of their town planner and the geotechnical experts would serve to remove any conflict with the *Maroochy Plan 2000*.

The court rejected the applicants' submission. Further, the court found that section 495(2) of the *Sustainable Planning Act 2009* expressly allowed the court to consider the conflicts with the *Sunshine Coast Plan 2014* in its decision and concluded that it was clear that there was an explicit and substantial conflict. The risk minimisation strategies put forward by the applicants' experts were found to identify rather than remove the conflicts in issue and, as such, the applicants were unsuccessful in establishing that there were sufficient grounds to justify the approval of the application despite the conflict.

In dismissing the appeal, the court further stated that such grounds must be found to be matters of public interest. Instead, the grounds submitted by the applicants were found to be matters of personal circumstances.

COLIN BIGGERS & PAISLEY LAWYERS

Court found council had failed to properly assess applications but declined to make an order requiring remedial works after balancing discretionary factors

Ian Wright | Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Birkdale Flowers Pty Ltd v Redland City Council & Anor* [2016] QPEC 4 heard before Jones DCJ

March 2016

In brief

The case of *Birkdale Flowers Pty Ltd v Redland City Council & Anor* [2016] QPEC 4 concerned an application commenced in the Planning and Environment Court by Birkdale Flowers Pty Ltd and Tarsem and Harbans Sihotas against Wilson Four Pty Ltd and Redland City Council seeking declarations and orders about reconfiguring a lot and operational work approvals issued by the council in respect of Wilson Four's residential development at Birkdale.

The applicants were primarily concerned with a retaining wall and an acoustic fence at the shared boundary between the land and Wilson Four's land. The applicants sought declarations that the approvals issued by council were invalid for the following reasons:

- the council had failed to assess the applications against the excavation and fill code of the council's planning scheme;
- the council had failed to take into account a relevant consideration being a conflict with the excavation and fill code;
- the approvals were so unreasonable that no reasonable council could have granted them.

The applicants also sought an order that remedial works be undertaken by Wilson Four and that the approvals be amended in response to those works.

The court did not find that the approvals were so unreasonable that no reasonable council could have granted them. However the court did find that the council had failed to assess the proposed works against the excavation and fill code in a meaningful way and that this failure could have resulted in the approvals being set aside. Nonetheless, the court decided not to exercise its discretion to order the remedial works be carried out.

Court found that the retaining wall and acoustic fence conflicted in a material way with council's planning scheme but the negative effect of the conflict was limited to the applicants' land

The approvals issued by the council in respect of Wilson Four's land were for reconfiguring a lot and operational works associated with a residential development of land at Birkdale. The approvals were granted in late 2011 and mid 2012 respectively and were both amended in early January 2014. These approvals had been acted on by Wilson Four.

The applicants were the owners and occupiers of land adjoining Wilson Four's land which was used for an extensive nursery business. During the initial assessment of the approval for reconfiguring a lot some of the applicants made a written submission which raised concerns about reverse amenity impacts. In response to these reverse amenity concerns and other concerns in respect of stormwater drainage the proposal was amended to provide for a more substantial retaining wall and an acoustic fence at the shared boundary between the applicants' and Wilson Four's land.

While the applicants advanced a number of issues in their application the main issue was the negative visual amenity created by the retaining wall and acoustic fence constructed on "one plane" on the shared boundary. The retaining wall ranged in height from less than 0.5 metres to over 2.4 metres, ran the full 250 metre length of the boundary and was topped by a 2 metre high acoustic fence which was intended to reduce reverse amenity impacts associated with the nursery business.

The court found that the existing retaining wall, with or without the associated acoustic fence, conflicted in a material way with the relevant provisions of the council's planning scheme. However it was noted that the negative effects of the conflict were largely constrained to the applicants' land.

Court found that the proposed works were not assessed by the council against the excavation and fill code in a meaningful way

The applicants submitted that there had been no assessment of the reconfiguring a lot application against the excavation and fill code by the council and that this failure was so profound as to warrant both approvals being set aside.

The court considered evidentiary principles stated in *Weal v Bathurst City Council* (2000) 111 LGERA 181 and *Jones v Dunkel* (1959) 101 CLR 298 relating to when a court may draw an inference in the absence of direct evidence. The court was satisfied that in the circumstances of this case it could draw an inference that the council had failed to assess the proposed works against the excavation and fill code in any meaningful way.

The court considered that the "*retaining wall and acoustic fence combination is so starkly in conflict with the EFC [excavation and fill code] that some indication that that issue had actually been given consideration ought to have become apparent during the course of evidence.*" While not a decisive factor, the court also took into account the fact that the council had not adduced any evidence from a council officer that an assessment of the excavation and fill code was carried out.

Court did not accept the applicants' submission that the council's approvals were so unreasonable that no reasonable assessment manager could have reached those decisions

Despite finding that there had been an improper assessment of the application the court was not able to find that this was one of those "rare cases" where it could be said the decision of the council in approving the retaining wall and acoustic fence was so unreasonable that no reasonable local government could have approved it.

In the court's view, the council's decision could not be characterised as irrational or devoid of plausible justification. It was in fact a decision motivated by a desire to reduce reverse amenity issues.

Court declined to exercise its discretion to make an order requiring remedial works after balancing a range of discretionary factors

Despite finding that the approvals had not been validly given the court was not placed in a position where it must make the declarations and order requested by the applicants. By reference to *Bon Accord Pty Ltd v Brisbane City Council & Ors* [2010] QPELR 23 the court highlighted that the discretion in respect of making declarations and orders in such circumstances is wide and unfettered with each case turning on its own facts and circumstances.

The court considered that there were a number of discretionary factors which weighed heavily against making an order requiring remedial works, which included the following:

- that there was an absence of bad faith on the part of the council and Wilson Four;
- that the applicants had delayed in bringing the proceedings and no reason had been provided for such delay;
- that some parts of the Wilson Four land had already been sold to third parties whose interests would potentially be affected by an order requiring remedial work;
- that the court was not satisfied that the remedial works were a proportional response to negative effects of the retaining wall and acoustic fence;
- that the court was not satisfied that the remedial works were likely to result in a materially better outcome for the applicants' land.

Balancing the relevant discretionary factors the court decided not to exercise its discretion to order the remedial works be carried out. Consequentially the application was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

The shed constitutes a material change of use but falls within the defined use of a detached house

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Carrigan v Goondiwindi Regional Council* [2016] QPEC 8 heard before Jones DCJ

March 2016

In brief

The case of *Carrigan v Goondiwindi Regional Council* [2016] QPEC 8 concerned an appeal commenced by Grant Carrigan against the decision of Goondiwindi Regional Council to refuse a development application for building work for a new shed which had already been constructed on Mr Carrigan's land.

The court was requested to determine two preliminary issues, namely whether the use of the new shed constituted a material change of use; and if so, whether the use fell within the definition of a detached house or storage facility under the *Waggamaba Shire Council Planning Scheme 2006*, or alternatively whether it was not a defined use under the planning scheme.

The court found that the use of the new shed constituted a material change of use but fell within the definition of a detached house under the planning scheme.

Council refused a development application for building works which was lodged to regularise the construction of a new shed without the requisite development approval

A shed of 135m^2 with a height of 5m was lawfully constructed on Mr Carrigan's land and used for "home industry (machinery storage)" under an approval given in 2002. In 2012, a development application for a material change of use for an extension of the machinery shed and the construction of a helicopter landing site was lodged with the council. The proposal was to store helicopters in the extended machinery shed.

While the application was being assessed, Mr Carrigan demolished the machinery shed and constructed a new shed without obtaining any approvals for building work or a material change of use. The new shed was 454.8m^2 with a height of 7.6m, which was materially larger than the old machinery shed and the proposed extended machinery shed.

In 2014, Mr Carrigan lodged a development application for building work for the new shed seeking to "regularise his unlawful conduct in constructing the new shed without the necessary development permit", which was subsequently refused by the council.

Court found that the new shed was not a storage facility but rather it was predominately used for personal storage purposes

The court first dealt with the council's contention that the use of the new shed was a storage facility for the purposes of the planning scheme. The council sought to rely on the size of the new shed and a number of circumstantial matters such as the character and previous conduct of Mr Carrigan to support its contention.

Based on the evidence before the court, it was not satisfied that use of the new shed was a storage facility. Rather, in the court's view, the intended use of the new shed was predominately for personal storage purposes which would include "the storage of large 4WD vehicles and other typical plant and equipment associated with large rural residential properties". The council's contention was therefore rejected.

Court found that the additional storage space of the new shed constituted a new use of premises

In considering whether a new use was introduced, the court noted that approximately 135m^2 of the new shed would be used for home industry purposes in accordance with the 2002 approval. As such any new use would relate to the additional storage space of approximately 319m^2.

Whilst the court acknowledged that the additional storage space would be used to store personal plant and equipment, it would constitute a new use of the premises and therefore a material change of use for the purposes of the *Sustainable Planning Act 2009*.

Court was satisfied that the home industry use was abandoned in 2012 and the use of the new shed was a re-establishment of a use that had been abandoned

The court then went on to consider whether the intended use constituted a re-establishment of an abandoned home industry use. By reference to *Leeming v City of Port Adelaide [No. 2]* (1987) 62 LGRA 296, the court observed that one must have regard to what is taking place on the land to determine whether an existing use continues or has been abandoned and the intention and conducts of the owner or occupier of the land were relevant considerations.

Having regard to Mr Carrigan's 2012 development application, the court was of the view that Mr Carrigan had no intention to maintain the home industry use. Further, the court observed that Mr Carrigan had not offered any explanation why the old shed was demolished had it been Mr Carrigan's intention to maintain the home industry use.

In the court's view, the home industry use was abandoned in 2012 and did not accept Mr Carrigan's proposition that the home industry use had continued other than the short period between the demolition of the old shed and the construction of the new shed. On this basis, the use of the new shed constituted a material change of use for the purposes of the *Sustainable Planning Act 2009*.

Court found that the use of the new shed constituted a material increase in the scale, but not the intensity, of the use

In determining whether there was a material increase in the intensity or scale of the use of the premises, the court did not consider that there was a material increase in the intensity of use just because of the size of the new shed and the hardstand area, particularly in the context of a rural residential situation.

However, the court found that there was a material increase in the scale of the use in that the footprint of the new shed was three times bigger and 50% higher than the old shed.

Even though the scale of the new shed was excessive, the court was satisfied that the use of the new shed could be properly characterised as being incidental to and necessarily associated with the use of the land for a detached house

Given that the court found that the use of the new shed amounted to a material change of use, it had to determine whether it fell within the definition of a detached house under the planning scheme.

The court considered the meaning of "use" which was defined under the *Sustainable Planning Act 2009* to include "*any use incidental to and necessarily associated with the use of the premises*".

In the context of a large rural residential lot, the court was of the view that the use of the new shed could be properly characterised as being incidental to and necessarily associated with the use of the land for a detached house whilst noting that the scale of the new shed was excessive and was more than that contemplated under the planning scheme.

The court therefore concluded that the use of the new shed fell within the definition of a detached house for the purposes of the planning scheme.

Council or court - who was the responsible entity which gave the original approval?

Ian Wright | Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Forde v Toowoomba Regional Council* [2016] QPEC 5 heard before Searles DCJ

March 2016

In brief

The case of *Forde v Toowoomba Regional Council* [2016] QPEC 5 concerned a permissible change application made by John Forde in the Planning and Environment Court with respect to the development permit given to him. The court was requested to determine two preliminary matters namely, whether Mr Forde's permissible change application should have been made to the Toowoomba Regional Council rather than the court and whether the development permit had lapsed on the basis that the court's previous order did not effectively extend the relevant period of the development permit.

The court found that the council was the responsible entity to which Mr Forde's application should have been made rather than the court, as the development permit was originally given by the council's predecessor, the Crows Nest Shire Council.

The court also found the court's previous order extending the relevant period of the development permit was valid.

Court found that Mr Forde's permissible change application should have been lodged with the council, not the court, as the original development permit was given by the council

Mr Forde contended that the court was the responsible entity because the court's previous order extending the relevant period of the development permit was the subject of Mr Forde's application, rather than the initial development permit given by the council's predecessor.

In reliance of *Orchard (Oxenford) Developments Pty Ltd (CAN (sic) 167 310 509) v Gold Coast City Council* [2015] QPELR 462, Mr Forde argued that a development approval was the approval as amended from time to time, for the purpose of section 369 (Request to change development approval) of the *Sustainable Planning Act 2009*, not the approval in its original form.

The court was of the view that the Orchard Developments case provided little support to Mr Forde's argument as it was concerned with which version of the development approval should form the basis of comparison with the permissible change application rather than determining the responsible entity to which the application should be made.

The court by reference to *Aqua Blue (Noosa) Pty Ltd v Noosa Shire Council* [2003] QPELR 82, observed that the original development approval would be the relevant approval for the purposes of a permissible change application and that the application must therefore be made to the responsible entity who gave the original approval.

In this instance, as the original development permit was given by the council's predecessor, the court held that Mr Forde's application should have been made to the council, rather than the court. The court therefore dismissed Mr Forde's application.

Court found that the previous court order extending the development permit was valid unless and until it was set aside and that it was too late now for the council to assert that the application made to the court should have been made to the council

The court observed that the council took no objection to the court's previous order extending the relevant period of the development permit when it was made.

The court considered that it was too late for the council to now assert that Mr Forde should have made the application the subject of the previous court order to the council not the court in circumstances where Mr Forde would have been in a position to have the issue determined had it been raised then and, if necessary, seek an order under section 440 (How court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009* to regularise any irregularity.

The court referred to *Attorney-General v Kowalski* [2014] SASC 1, where the court said … "*in more recent times, it has been established that, unless a plain intention to the contrary by the legislation is manifested, a judicial order of an inferior court or tribunal exercising judicial power is valid unless and until set aside even if it is contended that it acted beyond jurisdiction*".

Accordingly, the court considered that the previous court order extending the relevant period of the development permit was valid. The court nonetheless declared that if required, under section 440 (How court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009*, "*any irregularity inherent in the application heard by His Honour Judge Jones be regularised to the intent that DA597 has not yet lapsed and will remain extant until 28 November 2016 unless further changed*".

COLIN BIGGERS & PAISLEY LAWYERS

Two bedroom, or not two bedroom? Court of Appeal overturned the decision of the Planning and Environment Court on the relevance of development application documents in interpreting a development approval

Ian Wright | Ronald Yuen | Luke Grayson

This article discusses the decision of the Queensland Court of Appeal in the matter of *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2016] QCA 19 heard before Margaret McMurdo P, Morrison JA and Atkinson J

March 2016

In brief

The case of *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2016] QCA 19 concerned an appeal to the Queensland Court of Appeal from the decision of the Planning and Environment Court in *Walter Elliott Holdings Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 8 in which the primary judge determined to set aside the infrastructure charges notice issued by the Fraser Coast Regional Council for 3 bedroom relocatable homes on the basis that Walter Elliott's development was only for 2 bedroom relocatable homes.

In allowing the appeal by the council, the majority of the court concluded as follows:

- That the development approval was for "home sites" and not for 2 bedroom dwellings or 3 bedroom dwellings.
- That once the council approved the development application it was required to give an infrastructure charges notice.
- That the only avenue for Walter Elliott to appeal the infrastructure charges notice was by way of an appeal under section 478 of the *Sustainable Planning Act 2009*.
- That the making of an application for declaratory relief under section 456 by Walter Elliott rather than an appeal under section 478, "*appeared to be an inappropriate attempt to circumvent the limited nature of the statutory appeal process*".
- That as the proposed development was for the exclusive use of people who are over 50 years of age, the development may contravene sections 7(f), 76 and 77 of the *Anti-Discrimination Act 1991*.

This judgment, with respect to the majority of the court, raises a number of potential issues, in particular the following:

- That it is now unclear to what extent a development approval is limited by a development application.
- That it is now unclear whether a development approval for aged persons accommodation can be validly given.

The development approval did not expressly or by necessary implication incorporate the example house designs or the planning report which would prescribe the development as being for 2 bedroom or 3 bedroom dwellings

The majority of the court identified the following two legal principles which would limit the development approved by a development approval:

1. A development approval should be construed only by reference to the approval itself together with any documents incorporated, expressly or by necessary implication, into the development approval.
2. A development application marks out the boundaries of the development approval being sought and the scope of a development approval cannot be wider than the application to which it relates.

In interpreting the application of these principles to this case the majority noted that Walter Elliott had identified in its planning report that a maximum of two people were to reside in each dwelling and plans demonstrating example house designs included two bedrooms and a multi-purpose room or a study.

However, the development approval was silent on the number of bedrooms being approved and the example house designs were not approved plans. It appears that the majority may also have been influenced by a request by Walter Elliott that the council not include the example house designs as approved plans.

The majority determined that nothing in the development approval or the conditions of approval, either expressly or by necessary implication, incorporated either the example house designs or the planning report into the development approval and on this basis the approval was for neither 2 bedroom nor 3 bedroom dwellings but for "home sites".

Given that the development approval did not limit the number of bedrooms for land use purposes, in the majority's view, the council was not prohibited from determining that the dwellings had 3 bedrooms for infrastructure charging purposes.

The limited scope of appeals in respect of infrastructure charges notices should not be circumvented by allowing declaratory relief

Walter Elliott commenced declaratory proceedings under section 456 of the *Sustainable Planning Act 2009* to seek declarations that its development application was for 2-bedroom dwellings and that the council had no power to issue an infrastructure charges notice for 3-bedroom dwellings.

Before the initial declaratory proceedings were determined by the Planning and Environment Court, the council approved the development application and issued an infrastructure charges notice for 3-bedroom dwellings. Walter Elliott did not appeal the development approval or the infrastructure charges notice and instead it amended its application for declarations.

The majority determined that once the council approved the development application, it was required to give an infrastructure charges notice for the development approval. If Walter Elliott had an issue with the infrastructure charges notice, a limited right of appeal exists under section 478 of the *Sustainable Planning Act 2009*, which should not be circumvented by declaratory proceedings.

The majority relevantly stated that it "*is clear from the applicable statutory provisions that the legislative intent was to limit any appeals from a local government's determination of an infrastructure charges notice to the grounds specified in s 478(2)*".

In the majority's view in this instance, it was an improper use of the declaratory power and the primary judge had "*impermissibly used the declaratory powers under s 456 to usurp the function of the Council as the planning authority*".

The majority questioned the lawfulness of any development application for aged persons accommodation in Queensland

The majority of the court also queried whether a proposed development for occupation exclusively for those who were over 50 years old was unlawful as contrary to section 7(f) of the *Anti-Discrimination Act 1991*, which prohibits discrimination on the basis of age.

The court considered that whilst the Queensland Civil and Administrative Tribunal has the power to exempt a person from the operation of a specified provision of the *Anti-Discrimination Act 1991*, in considering QCAT decisions regarding applications for such an exemption "*it cannot be assumed that, were the respondent to apply for an exemption under the Anti-Discrimination Act, it would be granted*".

Whilst the majority did not reach a concluded view on whether the implementation of the development approval by Walter Elliott would be unlawful as contrary to the *Anti-Discrimination Act 1991*, this was a factor in its determination to refuse to grant Walter Elliott the declaratory relief sought.

Dissenting judgment concluded that the development application was for 2-bedroom dwellings and that the Anti-Discrimination Act 1991 was not relevant in assessing a development application

In the dissenting judgment, Morrison JA did not agree with the matters concluded by the majority in relation to whether the planning report was 'incorporated' in the development approval and the application of the *Anti-Discrimination Act 1991* to a planning decision and relevantly determined as follows:

- The development approval must be taken to incorporate, by necessary implication, a statement in section 7.2 of the planning report that all future dwellings across the development would consist of 2 bedrooms, in order to resolve an ambiguity in the development approval.
- The development application, properly construed, could not be treated as merely being for "home sites" without reference to the number of bedrooms and was in fact seeking a development approval for 2-bedroom dwellings.
- Declaratory proceedings were not inappropriate to determine whether the council acted beyond power in setting an infrastructure charge based on 3-bedroom dwellings.

- In assessing a development application requiring code assessment an assessment manager must not have regard to anything other than a matter stated in section 313 of the *Sustainable Planning Act 2009*, which would not include a potential subsequent violation of the *Anti-Discrimination Act 1991*.

Refusing to cooperate could lead to an adverse costs order

Ian Wright | Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lyons v Olive & Anor* [2015] QPEC 62 heard before Jones DCJ

March 2016

In brief

The case of *Lyons v Olive & Anor* [2015] QPEC 62 concerned two applications in the Planning and Environment Court for costs arising out of a dispute between Andrew Lyons, Mark and Leanne Olive and Building Certification Consultants Pty Ltd over a development approval given by Building Certification approving building works on Mr and Ms Olive's land.

In the initial proceedings, the court found that the development approval was void from the outset. Mr Lyons and Building Certification subsequently sought costs on an indemnity basis against each other.

The court found that Building Certification's actions had caused unreasonable delay such as to warrant an adverse costs order being made against it. Building Certification was ordered to pay Mr Lyons' costs from 5 March 2015.

Mr Lyons contended for a favourable costs order on the basis that he was an innocent bystander and was successful in the proceedings and that Building Certification's conduct was unreasonable

Mr Lyons relied on the following in contending for a favourable costs order:

- He was an innocent bystander who was forced to bring the proceedings as a consequence of the conduct of Mr and Mrs Olive and Building Certification.
- He had enjoyed a significant degree of success in the proceedings.
- Building Certification had incorrectly continued to maintain its position that it was not a proper party to the proceedings and imprudently rejected offers of compromise, as well as insisting on a deed being entered into which required Mr Lyons not to make any complaint to any relevant statutory authority in the future.

Building Certification contended for a favourable costs order on the basis that it was not a proper party to the proceedings and that Mr Lyons had acted unreasonably by insisting on indemnity costs against it

Building Certification's central argument was that it was not a proper party to the proceedings but nonetheless, it had acted reasonably by seeking to work towards a resolution. The court dismissed this argument on the basis that if Building Certification was not notified of the proceedings, then any relief granted by the court would "*inevitably be set aside by virtue of the fact that the certifier had not been given the opportunity to be heard*".

In contending for a favourable costs order, it was submitted by Building Certification that Mr Lyons had acted unreasonably by insisting on indemnity costs against them on 20 January, being the day after Mr Lyons reached an agreement with Mr and Ms Olive in relation to their further participation in this matter.

Court found that Building Certification's conduct was such as to warrant the making of an adverse costs order but that it did not warrant a costs order on an indemnity basis

The court found that Building Certification's conduct in maintaining its position that it was not a proper party to the proceedings and its persistence with the requirement that a deed be provided in circumstances where that requirement was later abandoned had caused the matter to unreasonably drag on.

The court relevantly noted that there had been significant delay since 5 March 2015 after Mr Lyons, through his solicitors, put a proposition to Building Certification that agreement be reached concerning the substantive relief and that the issue of costs be reserved and dealt with at a later time before the court if agreement was not able to be reached.

The court by reference to *Cox & Ors v Brisbane City Council & Anor (No. 2)* [2013] QPEC 78 and *Paroz v Paroz & Ors (No. 2)* [2010] QSC 157 observed that costs would generally be payable on a standard basis unless there was some special or unusual feature which would warrant departure from the general proposition.

The court found that the actions of Building Certification were such as to warrant the making of an adverse costs order. However having regard to the conduct of Mr Lyons through his solicitors, the court was not satisfied that it warranted a costs order on an indemnity basis to be made against Building Certification.

Court awarded compensation for loss of business profits resulting from roadworks

Ian Wright | Ronald Yuen | Georgina Taylor

This article discusses the decision of the Queensland Land Court in the matter of *Zacsam Pty Ltd v Moreton Bay Regional Council* [2016] QLC 12 heard before WA Isdale

April 2016

In brief

The case of *Zacsam Pty Ltd v Moreton Bay Regional Council* [2016] QLC 12 concerned a claim for compensation made in the Land Court under the *Acquisition of Land Act 1967* for costs attributable to disturbance to a pizza business operated in leased premises in the Castle Hill Shopping Centre in Murrumba Downs, resulting from the resumption of land for roadworks along the frontage of the shopping centre.

The issues in dispute primarily concerned the impact of the roadworks on Zacsam's business, namely the loss of profits, the loss of capital value and rental liability, and the costs associated with the claim for compensation, the interest payable and the costs of the proceeding.

The court assessed the compensation for loss of profits at $137,628.16, but did not find in favour of Zacsam in relation to the aspects of the claim relating to loss of capital value and rental liability.

The court also made orders for interest to be payable to Zacsam from the date its business ceased to operate to the date of payment, and for costs incurred in the making of the claim for compensation.

Court resolved uncertainties relating to loss of profits in favour of Zacsam and ordered that the compensation for loss of profits for Zacsam's business be assessed in the amount of $137,628.16

The land was resumed in November 2008. The associated roadworks began in May 2010 and were finished in July 2011. Zacsam commenced trading for its business in March 2008 and it ceased to operate in January 2012. In February 2012, the landlord took back the leased premises and purchased the business from Zacsam and ran it until the franchise agreement expired in March 2013 and the store closed.

Zacsam claimed $137,628.16 in loss of profits, calculated from the start of the roadworks to the cessation of its business in January 2012. The council accepted that the roadworks would have caused some inconvenience and disruption to the business but contended that the loss of marginal profits was only incurred during the roadworks, calculated at $67,532. The council submitted that there was no reason that the roadworks would cause further decline in business after the roadworks ceased.

In considering the economic evidence, the court found that the financial statements of the business were not reliable after the 2009 financial year. Attention instead was directed to the sales figures during the operation period of the business, and the seasonally adjusted turnover evidence. The sales figures showed an initial spike in transactions after the commencement of the business in 2008, and then showed a decline until an improvement in the 2010 financial year, and then another decline until the end of trading in the 2012 financial year. The court found that the business was doing better before the roadworks than after they were completed.

The court accepted that during the roadworks the lost profits were $67,532, but the court could not accept the council's submission that once the roadworks ceased, the business could no longer suffer from their impact.

Zacsam submitted that the damage was caused by the roadworks interfering with access to the business, and that once people had chosen to go another way, the end of the roadworks would not necessarily result in that potential trade returning. Whilst this was not demonstrated by conclusive evidence, the court, with the support of the council, considered it appropriate to resolve this uncertainty in favour of Zacsam.

The court was satisfied that the roadworks were the cause of the decline in the business from the date the roadworks commenced, up until the cessation of the business. The council assessed losses due to business interruption for this period at $121,998. For the same period, the calculations of Zacsam were $137,628.16. As the figures were close, and it was not possible for the court to conclude from the evidence which figure was correct, the uncertainty was again resolved in the favour of Zacsam.

Court found insufficient evidence to support claim of loss in capital value of business and declined to order compensation for loss in capital value of business

Zacsam claimed $420,000 as the loss in capital value of its business, which was the purchase amount for the business. The council contended that there had been no loss in capital value, due to the business being worthless as it had been run down in value by making losses, resulting in no goodwill value left in the business. The council submitted that the business was too highly geared and insolvent prior to the roadworks.

The valuation of the business supporting Zacsam's claim relied heavily on the business acquisition cost. Zacsam's expert accountant did not produce evidence of comparable sales in order to show comparative value.

Whilst Zacsam's expert accountant acknowledged that the most widely applied methods of valuing a business were the earnings-based and the assets-based approaches, the expert used neither of these methods.

As the court was unable to be satisfied that, at any relevant date, the business had a capital value of $420,000, the valuation of the business relied on by Zacsam was not accepted by the court.

Whilst the court was unable to find in favour of Zacsam for this aspect of the claim, the court emphasised that acceptance of the whole of the business valuation evidence relied on by the council could not be implied.

The court was unable to be satisfied that the approach adopted for determining insolvency was correct, as it was not done in accordance with section 95A of the *Corporations Act 2001*. The court did not consider that the value of the business was necessarily zero at any time. However, the court found that the claim for $420,000 was not supportable on the evidence.

Court could not find causal connection between rental liability and disturbance due to roadworks and declined to order compensation for rental liability

Zacsam claimed $66,547 for rent liability, for rent paid by Zacsam for the period between 17 March 2012 and 16 March 2013 when the landlord owned and ran the business. The council submitted that the amount should instead be nil.

The court was not satisfied that the expense due to the rental liability had a causal connection with the disturbance due to roadworks, as there was no evidence of how the business was conducted when the landlord took over until it closed. The court was therefore not satisfied that any amount was able to be awarded for rental liability.

During the course of the hearing, the parties reached an agreement that the sum of $9,748.20 was the sum for the costs associated with the claim for compensation, which formed part of the court's final orders. The court also ordered interest to be payable on the compensation amount from 22 January 2012 to the date of payment, taking into account an advance payment of compensation made by the council.

Court found that the proposed development was too tall and too big and was in significant conflict with the planning scheme

Ian Wright | Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Norfolk Estates Pty Ltd v Brisbane City Council & Body Corporate for Kirribilli Apartments Community Titles Scheme and Ors* [2016] QPEC 9 heard before Robertson DCJ

April 2016

In brief

The case of *Norfolk Estates Pty Ltd v Brisbane City Council & Body Corporate for Kirribilli Apartments Community Titles Scheme and Ors* [2016] QPEC 9 concerned an appeal in the Planning and Environment Court against the Brisbane City Council's decision to refuse a development application for a material change of use to develop two adjoining lots at New Farm with a 10-storey building, including a rooftop terrace containing 13 dwelling units.

The council refused the development application on the basis that it was in significant conflict with the New Farm and Teneriffe Hill Neighbourhood Plan Code, the Multiple Dwelling Code and the Medium Density Residential Zone Code of the *Brisbane City Plan 2014*, and there were no sufficient grounds to justify an approval despite the conflict.

The court found that the development application was in conflict with the *Brisbane City Plan 2014* at all levels. In the absence of sufficient grounds to justify an approval despite the conflict, the court dismissed the appeal.

Town planning experts accepted that the character of the surrounding locality of the proposed development corresponded with the town planning designation in the Brisbane City Plan 2014 as medium density residential

The court first considered the character of the surrounding locality of the proposed development. The proposed development is located on the southern side of Oxlade Drive.

As agreed by the town planning experts, the character of the southern side of Oxlade Drive and Griffith Street was "*predominantly medium rise, medium density residential area … and contains mostly multiple dwellings although some single dwellings remain.*" As to the character of the northern side of Oxlade Drive and Griffith Street, the town planning experts were of the view that "*opposite the site on the northern side of Oxlande Drive the profile and density is markedly different. It is an area of predominantly low rise medium density residential development containing both detached houses and multiple dwellings as well as … small scale non-residential uses.*"

The existing character of the surrounding locality is comprised of a mixture of high rise buildings, namely Glenfalloch (15 storeys), Platinum (7 storeys) and Kirribilli (11 storeys) and low rise buildings.

On balance, the town planning experts agreed that the character of the surrounding locality corresponded with the town planning designation in the *Brisbane City Plan 2014* as medium density residential (or living).

Court found that the local area would be viewed collectively and it did not have a "higher density, multi-unit feel" and the proposed development would visually bridge the gap between Kirribilli and Edgewater if the top four storeys were removed

Norfolk, through its visual amenity expert, divided the local area into three sub-precincts. The middle sub-precinct where the proposed development was located had "*a higher density, multi-unit feel*", with Kirribilli being a prominent building but making minimal positive contribution to the local character and amenity.

Norfolk's visual amenity expert argued that the proposed development would "*reconcile the 11 storey Kirribilli apartments to the prevailing character*", "*is restorative in its nature bridging between the bulk and scale of the buildings to the east of the site and Kirribilli*" and "*has been carefully framed to visually link with other medium rise development within the area whilst also linking with its taller neighbour*".

The court disagreed with the three sub-precincts division and accepted the council's visual amenity expert's opinion that "*a person passing through the whole of this part of the locality would not assess the character as 3 distinct sub-precincts but rather "collectively as part of a wider visual experience".*"

The court also disagreed that any part of the local area had "*a higher density, multi-unit feel*" when it was viewed collectively. During cross-examination, Norfolk's visual amenity expert's "bridging" and "visual link" arguments were significantly undermined. The court preferred the council's visual amenity expert's proposition that the proposed development would in fact visually bridge the gap between Kirribilli and Edgewater (to the east of the site) and produce "a pleasant graduation" if the top four storeys were removed.

Court observed that reasonable members of the community would expect a development on the subject site of up to 5 storeys or 15 metres in height and found the impact of the proposed development on the views of the Brisbane River of Kirribilli residents to be unacceptable and significant

The court went on and considered the impact the proposed development would have on views of the Brisbane River, in particular those of residents within the eastern unit of Kirribilli.

Both the zone code and the neighbourhood plan relevantly contain provisions relating to protection of view corridors and maintenance of views to and from the river, taking into consideration the height, scale and form of development and community expectations about the number of storeys to be built.

The court observed that a fair and objective reading of the *Brisbane City Plan 2014* would lead Kirribilli residents to an expectation of a development on the subject site of up to five storeys or 15 metres in height. A higher building may be developed in limited circumstances where a community and economic need was demonstrated and it responded to the characteristics of the adjoining building.

Norfolk's visual amenity expert argued that the impact on views of Kirribilli residents from levels seven to 11 was minor, which was again undermined during cross examination.

The court preferred the council's visual amenity expert's evidence and concluded that the impact of the proposed development on the views of the Brisbane River of Kirribilli residents from levels seven to 11 would be "*unacceptable, unwelcome and significant.*"

Due to the inconsistency of the proposed development with the amenity and character of the locality and a failure to demonstrate an economic and community need, the court held that the development application significantly conflicted with the Brisbane City Plan

As to the height, bulk and scale of the proposed development, in the court's view, it would present as a high density high rise building, rather than as medium density, which was not consistent with the amenity and character of the locality or the community expectations.

Further, the proposed development failed to maintain views to and from the Brisbane River to an acceptable level or establish an acceptable relationship to adjoining buildings.

Norfolk sought to demonstrate a community and economic need for the proposed development and rely on the maximisation of infrastructure as a ground to support an approval of the proposed development.

However, the court considered that the extent of conflict of the proposed development with the *Brisbane City Plan 2014*, particularly in relation to height, bulk and scale was so significant that the purported need was not sufficient to justify an approval despite the conflict.

Body corporate's appeal struck out due to lack of a special resolution

Ian Wright | Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Quay Terraces Cts v Brisbane City Council* [2016] QPEC 12 heard before Rackemann DCJ

April 2016

In brief

The case of *Body Corporate for Quay Terraces Cts v Brisbane City Council* [2016] QPEC 12 concerned a strike-out application made by HSW Nominees Pty Ltd in the course of an appeal commenced in the Planning and Environment Court by the Body Corporate for Quay Terraces Cts against the Brisbane City Council in respect of the council's decision to approve HSW's development application.

Under the *Body Corporate and Community Management Act 1997* the body corporate could start a proceeding only if the proceeding was authorised by a special resolution. As no special resolution had been obtained, HSW submitted that the appeal should be struck out as it had been commenced without the necessary authorisation.

The court ordered that the appeal be struck out as there were no pressing reasons in the interests of justice warranting an alternate course of action and the determination of an adjudicator under the *Body Corporate and Community Management Act 1997* which purported to tie the court's hands was found to be beyond jurisdiction and have no weight in the circumstances.

Court considered whether the appeal should be struck out or adjourned to allow the body corporate time to hold an extraordinary general meeting and found no pressing reasons to adjourn the proceeding

A proceeding which was brought without the necessary authorisation would generally be dismissed or struck out except where there were pressing reasons in the interests of justice which would warrant an alternate course of action.

HSW's application was heard by the court on 8 March 2016. Relevantly, an extraordinary general meeting was called by the body corporate, which was due to be held on 16 March 2016, seeking to ratify the commencement of the appeal.

The body corporate contended that the appeal should not be struck out but rather adjourned until after the extraordinary general meeting. In support of this contention, the body corporate sought to rely on a number of discretionary considerations which included the proximity of the extraordinary general meeting, the prospects of a resolution being passed at that meeting ratifying the commencement of the proceeding and a lack of significant prejudice to HSW.

In its consideration of whether there were any pressing reasons which would warrant the appeal not being struck out, the court was cognisant of the fact that, if the appeal was struck out but a favourable resolution was subsequently obtained to authorise the proceeding, the body corporate could make an application to the court seeking an extension of time to file a new notice of appeal under section 497 of the *Sustainable Planning Act 2009*. Accordingly, this was not a situation where, in the court's view, striking out the appeal would "shut off any prospect of the matters of concern ever being ventilated by proceedings in this court".

The court therefore found no pressing reasons in the interests of justice which would warrant the adjournment contended for by the body corporate. Further, in the event that a favourable resolution was obtained, the court saw no injustice in putting the body corporate in a position of having to apply for an extension of time to file a new notice of appeal.

The body corporate submitted that the court was bound by a determination of an adjudicator made under the Body Corporate and Community Management Act 1997 and it should proceed with the appeal as if a special resolution had been obtained

The day prior to HSW's application first coming before the court the body corporate lodged an adjudication form under the *Body Corporate and Community Management Act 1997* which resulted in the following determination being made:

> *I hereby order that subject to the decision of the Body Corporate for Quay Terraces in respect of motions 9 and 10 to be considered at the extraordinary general meeting to be held on 16 March 2016, or any adjournment of that meeting, the Body Corporate for Quay Terraces is authorised to commence and pursue proceedings number 369 of 2016 before the Planning and Environment Court as if a special resolution had already been passed at a general meeting authorising the commencement of those proceedings.*

The body corporate submitted that this determination "ties this court's hand" and the court was "bound by the determination to act on the basis that the body corporate was indeed authorised to commence and pursue the proceedings as if the special resolution had, in fact, been obtained".

Court found that the adjudicator's determination which purported to authorise the commencement of the appeal was beyond jurisdiction and should be given no weight in the circumstances

HSW submitted that the adjudicator's determination was beyond jurisdiction and on this basis should be ignored by the court in considering whether to strike out the appeal.

Despite the exclusivity of dispute resolution processes under the *Body Corporate and Community Management Act 1997* the court considered, as a collateral question in determining HSW's application, whether the dispute in the appeal was a dispute to which the *Body Corporate and Community Management Act 1997* applied.

The body corporate submitted that the adjudicator's determination was for "a declaratory order about the operation of the Act" for the purposes of section 227(2) of the *Body Corporate and Community Management Act 1997*.

The court disagreed with the body corporate's submissions and found that the determination made was not a declaration about the operation of the relevant Act. The determination purported to allow the body corporate to commence and pursue the appeal under the *Sustainable Planning Act 2009* as if a special resolution had already been passed when in fact it had not. This was not, in the court's view, a declaratory order about the operation of the *Body Corporate and Community Management Act 1997*.

The court therefore found that the determination of the adjudicator was beyond jurisdiction and should be given no weight. On this basis, and in the absence of pressing reasons for adjourning the proceeding, the appeal was struck out.

Advice for councillors and officers dealing with planning matters

Ian Wright

This article discusses a framework to help a councillor and officer to ensure compliance with all laws that apply to the exercise of the local government's planning powers

May 2016

Background

Operation of the planning system

The successful operation of the planning system relies on councillors and officers of a local government having mutual trust and understanding of each other's roles and responsibilities in the consideration of planning matters which involve the balancing of private proposals with wider public interests.

Councillor and officer roles and responsibilities

A councillor and officer must amongst other matters, ensure that the local government:[1]

- discharges its responsibilities under the *Local Government Act 2009*;
- complies with all laws that apply to the local government; and
- achieves its corporate and community plans.

Object of advice

This advice provides a framework which will help a councillor and officer to ensure that the local government complies with all laws that apply to the exercise of the local government's planning powers in order to best serve the public interest of the local government area.

Planning powers

Local government planning powers

A local government is required by the *Sustainable Planning Act 2009* to exercise the following relevant planning powers:

- *Strategic planning* – the preparation of a local planning instrument.[2]
- *Development assessment* – the assessment of a development application.[3]
- *Enforcement* – the enforcement of a development offence.[4]

A local government's planning powers involve the exercise of the following:

- *Legislative power* – the making of a law such as a local law under the *Local Government Act 2009* or a local planning instrument under the *Sustainable Planning Act 2009*.
- *Executive or administrative power* – the administration of a law such as the assessment of a permit application under a local law or a development application under a planning instrument.

Judicial powers

A local government has no judicial or quasi-judicial powers; which are reserved to courts and tribunals such as the Planning and Environment Court and Building and Development Tribunal to review by way of an appeal or application a local government decision for a planning matter.

Planning powers must comply with all laws

A local government must exercise its planning powers in compliance with the following laws:

- *Ultra vires* – acting within power.

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1 See section 12(3)(a) of the *Local Government Act 2009* for councillors and section 13(2)(b) of the *Local Government Act 2009* for officers.
2 See chapter 3 of the *Sustainable Planning Act 2009*.
3 See chapter 6 of the *Sustainable Planning Act 2009*.
4 See chapter 7 of the *Sustainable Planning Act 2009*.

- *Good faith* – acting in good faith.
- *Due diligence* – acting with reasonable care.

A local government's exercise of its planning powers which does not comply with these laws is null and void, open to legal challenge and cannot be legally enforced.

The compliance with these laws generally does not arise in an appeal as the Planning and Environment Court or Building and Development Tribunal hearing the appeal is required to consider the planning matter afresh and as such the "merits" of the planning matter as opposed to the "lawfulness" of a local government's decision is more relevant to the determination of an appeal.

However compliance with these laws becomes critical where an appeal to the Planning and Environment Court or Building and Development Tribunal is not available such as in the following circumstances:

- strategic planning decisions for which there is no right of appeal;
- a compliance assessment or code assessment development application where there is no right of submission or approval for a submitter;
- impact assessment development application where a right of submission or an appeal by a submitter has not been exercised;
- a right of appeal for a development approval has expired.

Acting within power

A local government must act within its planning powers and not *ultra vires* (Latin: beyond the power).

A local government can do anything that is specifically authorised by the *Local Government Act 2009*, *Sustainable Planning Act 2009* or other legislation.

A local government cannot do something that is prohibited by the *Local Government Act 2009*, *Sustainable Planning Act 2009* and other legislation. For example a local government cannot:

- make a local law that establishes a process that is similar to or duplicates a process in the *Sustainable Planning Act 2009*;[5] or
- make a planning scheme which prohibits development other than in the limited circumstances provided for in the *Sustainable Planning Act 2009*.[6]

Acting in good faith

A local government must act in good faith and not exercise its planning powers in the following manner:

- *Improper purpose* – exercise its powers for an improper purpose.
- *Bias* – exercise its powers in a manner that is biased or prejudiced against a person or group.
- *Personal interest* – exercise its powers for the benefit of a councillor or officer.
- *Preferential interest* – exercise its powers to give partial or preferential treatment to a person or group.
- *Prejudicial interest* – exercise its powers prejudicially in relation to a planning matter without giving it proper consideration.
- *Prejudgement* – exercise its power in accordance with a predetermined view of a matter without giving it adequate consideration.
- *Irrelevant consideration* – exercise its powers based on a matter which is irrelevant or extraneous to the planning matter.
- *Relevant consideration* – exercise its powers without considering all matters relevant to the planning matter.
- *Procedural fairness* – exercise its powers without according a right to be heard to a person.
- *Reasonableness* – exercise its powers in a manner that is so unreasonable that no reasonable local government could have exercised the power in that manner.
- *Merits consideration* – exercise its powers based on the merits of the case and not the automatic application of a policy without consideration of the particular circumstances relevant to the matter.

Acting with due diligence

A local government must act with due diligence and exercise its planning powers with reasonable care consistent with what is expected of a 'reasonable local government' and not an ordinary 'reasonable person'.

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5 See section 37 of the *Local Government Act 2009*.
6 See section 88(2) of the *Sustainable Planning Act 2009*.

The failure of due diligence is highlighted by the example of Wollongong City Council, which was placed into administration following a recommendation by the New South Wales Independent Commission Against Corruption. According to the Commission, a number of councillors (but not all councillors) had failed to pay heed to the following warning made by Justice Owen in the Report of the HIH Royal Commission:

> *I am not so much concerned with the content of a corporate governance model as with the culture of the organisation to which it attaches. For me, the key to good corporate governance lies in substance, not form. It is about the way the directors of a company create and develop a model to fit the circumstances of that company and then test it periodically for its practical effectiveness.*[7]

Roles and responsibilities of an officer

Roles of an officer

An officer must assess a planning matter, provide advice to the local government in respect of their assessment of the planning matter and if exercising delegated authority decide the planning matter, on the basis of their overriding obligation of professional independence which on occasions may be at odds with the views, opinions and decisions of councillors and the local government.

Officer's report

An officer's report assessing a planning matter should have regard to the following:

- The report should be accurate and cover amongst other things the substance of any submission or the views of those consulted.
- The report should include relevant information including a clear exposition of the relevant planning instruments, the site or related history and any other material consideration.
- The report should have a written recommendation of action. Oral reporting should be avoided and minuted when it does occur.
- The report should contain a technical assessment in accordance with the *Sustainable Planning Act 2009* and other relevant legislation which clearly justifies the recommendation.
- The report should, if its recommendation is contrary to the provisions of the planning scheme, clearly state the sufficient grounds which justify the departure.
- The report should, if an officer with delegated authority has been requested to refer a planning matter to the councillors for determination, record the reasons for the referral.

Roles and responsibilities of a councillor

Roles of a councillor

A councillor can be involved at various stages of a planning matter and can play different roles at different times.

A councillor may perform the following roles:

- *Decision maker* – a councillor sitting as a local government or exercising delegated authority from the local government may be charged with making a decision in respect of a planning matter.
- *Community representative* – a councillor as an elected representative may be charged with ensuring that a decision maker is aware of their constituent views.
- *Mediator* – a councillor may play a mediating role looking for common ground between different interests in a planning matter.

Responsibilities of a councillor – acting in the public interest

A councillor must act in the overall public interest of the whole local government area.[8] This is a councillor's *corporate responsibility*.

A councillor must ensure that their corporate responsibility is not overridden by the following:

- A councillor's responsibility as an elected community representative who represents the current and future interests of the residents of the local government area.[9] This is a councillor's *representative responsibility*.
- A councillor's personal interests.

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7 See Independent Commission Against Corruption (2008), Report On Investigation Into Corruption Allegations Affecting Wollongong City Council, Part 1, 4th March.
8 See section 12(3)(a) and (6) of the *Local Government Act 2009*.
9 See sections 4 and 12(1) of the *Local Government Act 2009*.

Identifying the public interest

A councillor when determining whether an action is in the overall public interest of the whole local government area should consider the following legal principles:

- The *public interest* is not the same as an *interest of the public* – it may be different.
- The public interest test will not be satisfied if the action is inconsistent with the following local government principles or provides results which are inconsistent with these local government principles:[10]
  - Transparent and effective processes and decision making in the public interest.
  - Sustainable development and management of assets and infrastructure, and delivery of effective services.
  - Democratic representation, social inclusion and meaningful community engagement.
  - Good governance of, and by, the local government.
  - Ethical and legal behaviour of councillors and local government employees.
- The public interest test is an objective test – what would a reasonable elected councillor who is not influenced by personal considerations decide?

Lobbying of a councillor

A councillor consistent with their representative responsibility, may be lobbied by a person or group which may be affected by a planning matter; but they should respond in a manner that is consistent with their corporate responsibility and otherwise complies with the law.

Planning lobbyists

A councillor who is lobbied in respect of a planning matter should take the following action:

- The councillor should keep a record of an approach including a telephone call which is not of a routine constituency nature, invite the person to write to the local government setting out their view, inform a relevant officer nominated by the local government about the approach and seek advice from the relevant officer.
- The councillor should understand what role (ie decision maker, community representative, mediator) they are playing when participating in different stages of a planning matter and communicate the role they are performing and requirements of the respective role to the person.
- The councillor should provide procedural advice to a member of the public who does not have a professional representative or indicate where such advice is available within the local government.

Avoiding bias and predetermination

- The councillor who is a decision maker should, to avoid disqualification from taking part in the decision on the basis of a perceived bias or predetermination:
  - simply listen to a point of view and not indicate or imply their own view in relation to the planning matter or otherwise declare their voting intention; and
  - if they wish to express an opinion it should be made clear that they only have a predisposition to a certain position at this time but that they will only be in a position to make a final decision after having heard all the relevant evidence and arguments and that they otherwise retain an "open mind" about the planning matter.
- The councillor who is a decision maker should advise the person that the local government will not decide on the merits of the planning matter until all information is available and has been duly considered by the local government.
- The councillor who is a decision maker should advise the person that any verbal or written material provided to the councillor in relation to the planning matter will not be treated in confidence as this will prejudice any open discussion, leaving officers with little or no time to provide proper advice to the councillors.
- The councillor who is a decision maker should ensure that a political or other group meeting is not used to determine how a councillor is to decide the planning matter.
- The councillor who is a decision maker should not communicate with a person during a local government meeting other than through the local government's meeting procedures as this may give the appearance of bias.
- The councillor who is a decision maker should not engage in the negotiation or mediation of a planning matter unless delegated authority to do so by the local government and should only do so in the presence of an officer.

[10] See section 4 of the *Local Government Act 2009*.

- The councillor should report to the relevant officer an offer or receipt of a gift, hospitality or favour either personal or to the local government or community and declare the existence of the offer or receipt if the councillor takes part in a decision making process.
- The councillor should ensure that an applicant and submitter are treated alike in terms of a request to address the councillors.
- The councillor should ensure that a presentation is on the local government premises, open to all councillors and for the purpose of presenting factual information only and not for the discussion of the merits of the planning matter.
- The councillor should ensure that the local government has clear procedures for handling correspondence received after the agenda for a planning matter has been issued and that these are communicated to applicants and submitters.

Lobbying by a councillor

A councillor may wish to express a predetermined position in respect of a planning matter, such as where the councillor acts:

- on behalf of existing or future residents of the local government area consistent with the councillor's representative responsibility;
- as a portfolio councillor responsible for a particular area of the local government's responsibilities such as economic development, social development or environmental matters, consistent with the councillor's corporate responsibility; or
- in a personal capacity as a proponent, applicant or submitter or in support of a friend, relative or other person who is a proponent, applicant or submitter.

A councillor who wishes to express a predetermined position on a planning matter should strongly take the following action:

- The councillor should not organise support or opposition, lobby other councillors or act as an advocate to promote a particular outcome.
- The councillor should not act on behalf of a proponent or applicant pursuing the planning matter with the local government.
- The councillor should not apply pressure to an officer to make a particular recommendation or decision.
- The councillor may seek to make representations to the local government in the same manner that is afforded to a member of the public to make representations to the local government.
- The councillor should not be involved in a decision making process for the planning matter by:
  - not taking part in the planning process;
  - not voting in relation to the planning matter; and
  - withdrawing once any public speaking opportunities have been completed to ensure that councillors or officers are not influenced by their continuing presence.

Decision against an officer's recommendation

A councillor may make a decision against an officer's recommendation where the planning issues are finely balanced and the councillor's planning reasons are clear and convincing.

A councillor who is considering making a decision contrary to an officer's recommendation should take the following action:

- The councillor should encourage the formation of tentative reasons by discussing with a relevant officer beforehand a predisposition (and not a predetermination) to consider making a decision contrary to an officer's recommendation.
- The councillor should ensure that the planning reasons are written down as part of a motion to ensure that a detailed minute of the reasons can be made if the motion is agreed.
- The councillor should seek an adjournment for a period to enable the planning reasons to be discussed by the councillors including affording a relevant officer the opportunity to provide advice in respect of the implications of a contrary decision.
- The councillor should consider deferring the planning matter to another meeting to have the putative reasons tested and discussed, if a relevant officer provides very strong objection to the validity of the planning reasons.

A councillor who makes a decision against the officer's recommendation should be aware that:

- an officer may be unable to defend that decision at an appeal;

- a councillor may have to justify the resulting decision by giving evidence in the event of any legal challenge; and
- the decision may be overturned on appeal with costs awarded against the local government if no good reasons for the decision have been given.[11]

Post-decision representations

A local government decision may be the subject of post-decision representations through the following:

- A request for a negotiated decision notice to the local government.[12]
- An appeal or application for review to the Planning and Environment Court or Building and Development Tribunal.[13]
- A request to the Minister for a call in.[14]
- A complaint to the Ombudsman.[15]

A councillor may comment on a local government decision where consistent with the councillor's representative responsibility and their corporate responsibility to serve the overall public interest of the whole local government area.

A councillor who comments on a local government decision should take the following action:

- The councillor should accept the decision of the majority gracefully even if reluctantly and give effect to it or take action in accordance with the law in an appropriate and acceptable manner to change the decision.
- The councillor should take no action to prejudice the local government's position in relation to any post-decision representation.
- The councillor should not denigrate the decision of the majority in public or malign the position of other councillors or officers.

A councillor who comments on a local government decision should be aware that they may have to give evidence in relation to their comments in the event of any challenge to the local government's decision.

Conclusions

Given the significance of well informed and appropriate judgments by councillors and officers, a local government should consider taking the following action:

- A local government should hold regular seminars on planning matters, the roles and responsibilities of councillors and officers in planning matters and the exercise of a local government's planning powers.
- A local government should focus on embedding in the strategic planning of its local planning instruments its goals and policies for the development of the whole local government area, to avoid any issue of predetermination by a councillor and officer in the subsequent assessment of a development application for a proposed development.
- A local government should give consideration for major planning matters to be subject to higher level engagement such as:
  - a development forum which is arranged for and paid for by a proponent or applicant but convened in accordance with a local government protocol to ensure community engagement rather than merely project promotion; and
  - a planning forum convened by the local government.
- A local government should periodically review a selection of their decisions once a development has been completed in order to assess the quality of its local planning instruments and planning decisions and to improve the quality and consistency of its local planning instruments and planning decisions.
- A local government experiencing high rates of sustained legal appeals or reviews should examine the possible reasons for this, including the continuing relevance of the local planning instruments on which the planning decisions have been based, the quality of the planning assessment and the quality of the decision making.

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11 See section 457 of the *Sustainable Planning Act 2009*.
12 See section 361 of the *Sustainable Planning Act 2009*.
13 See chapter 7 of the *Sustainable Planning Act 2009*.
14 See section 424 of the *Sustainable Planning Act 2009*.
15 See section 20 of the *Ombudsman Act 2001*.

Too big and too tall development conflicts with planning schemes

Ian Wright | Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *VG Projects Pty Ltd v Brisbane City Council* [2016] QPEC 15 heard before Rackemann DCJ

May 2016

In brief

The case of *VG Projects Pty Ltd v Brisbane City Council* [2016] QPEC 15 concerned an appeal commenced by VG Projects Pty Ltd against the Brisbane City Council's deemed refusal of a development application for a material change of use for the proposed multiple dwellings at Oxlade Drive, New Farm.

Through mediation, traffic, noise and wind impact issues were agreed by the parties as not warranting a refusal of the development application. The remaining issues which the court had to determine related to the height, bulk and scale of the proposed development, its consequential impact on the character and amenity of the locality and whether there were sufficient grounds to justify an approval in the event of conflict.

The court found that the proposed development was in conflict with both the *Brisbane City Plan 2000* and *Brisbane City Plan 2014* and the grounds contended by VG Projects were not sufficient to justify an approval. The appeal was therefore dismissed.

9 storey multiple dwellings development was proposed in locality which contained predominantly low to medium rise residential development but some high rise development

The proposed unit development comprised 9 storeys and a roof deck with a gross floor area of 8905m^2 and a plot ratio of approximately 3.75 times the site area. It comprised of 65 dwelling units with a mix of 2, 3 and 4 bedrooms.

The land the subject of the proposed development was included in the Medium Density Residential Area and the New Farm and Teneriffe Hill Local Plan under the *Brisbane City Plan 2000*. Under the *Brisbane City Plan 2014*, the land was included in the Medium Density Residential Zone and the New Farm Neighbourhood Plan under the *Brisbane City Plan 2014*.

Development within the locality was predominantly low to medium rise residential development but it also had some high rise development.

Just because a proposal of a greater height and gross floor area could still meet performance criteria it does not mean it provides for a transition of the locality to a high rise built environment

In assessing the height, bulk and scale of the proposed development, the court focussed on performance criteria P1 and P2 of the New Farm and Teneriffe Hill Local Plan Code as follows:

- "*P1 New buildings must maintain views to and from the River and other landmarks identified on Map A – New Farm and Teneriffe Hill, while maintaining a visual relationship with other buildings in the vicinity*"
- "*P2 Building size and bulk must be consistent with the medium density nature of the locality and retain an appropriate residential scale and relationship with other precincts in the plan area*".

The proposed development did not meet the acceptable solutions A1.1 and A2.1 to performance criteria P1 and P2. In fact, it was nearly twice the height prescribed in A1.1 and had more than 3 times the plot ratio prescribed in A2.1.

Whilst acknowledging that a proposal of a greater height and gross floor area than that prescribed in the acceptable solutions could still meet P1 and P2, the court did not consider those performance criteria provided for a transition of the locality to a high rise/high density built environment.

Court found the proposed development was in conflict with Brisbane City Plan 2000 in that it was not sympathetic to the existing low rise buildings and was not consistent with the medium density nature of the locality

It was not seriously contended by the council and the submitters that the proposed development was in conflict with the first limb of P1. As to the second limb of P1, the court adopted the approach established in *Calvisi & Ors v Brisbane City Council & Ors* [2009] QPELR 35 that "*visual relationship in P1 should be construed to mean a relationship which is pleasing, sympathetic, supportive, harmonious or complementary*". As to P2, the court noted that "*the "relationship" required in P2 is an appropriate relationship*." Consistent with the approach adopted in *Calvisi* and *BTS Properties (Qld) Pty Ltd v Brisbane City Council & Ors* [2015] QPEC 47, the court further noted that building height would be a relevant factor in considering building size and bulk.

In order to determine whether the proposed development complied with P1 and P2, the court had to assess the other buildings in the area, the medium density nature of the locality and other precincts in the area.

In the court's view, the predominant built form in the area was between 2 to 6 storeys. Even though there were a few taller buildings dispersed in the area, it did not detract from the medium density character of the area. Further, unlike the proposed development, the existing high rise buildings were generally sympathetic to existing low rise buildings by having significant setbacks or a design which achieved a transition in height.

Whilst the proposed development sought to incorporate design features to reduce or mitigate the impression of its size and bulk, the court was not satisfied that they were adequate to render its size and bulk as being acceptable.

The court found that the proposed development was not consistent with the medium density nature of the locality and "*would not maintain a visual relationship that is pleasing, sympathetic, supportive, harmonious or complementary*", particularly given its significant height.

Court found the proposed development was in conflict with Brisbane City Plan 2014 and its greater height and scale was not justified by community and economic need

The court gave weight to the *Brisbane City Plan 2014* in its assessment of the proposed development. However, the court was of the view that the proposed development was not consistent with the height, bulk and scale expectations in the locality contemplated under the relevant provisions of the *Brisbane City Plan 2014*.

Further, it had not been established that the greater height and scale of the proposed development was warranted by reason of community and economic need.

Court found the proposed development would cause undue adverse impact on the amenity and character of the area and there were not sufficient grounds to overcome its conflicts with the planning schemes and consequential impacts

The court also had the benefit of lay witness statements in relation to their concerns on the impact of the proposed development on visual amenity and perception of character of the area which the court considered to be genuine. The court found that the proposed development would have an undue adverse impact particularly given its height and bulk.

A number of grounds were asserted by VG Projects seeking to justify the approval of the proposed development in the event that the court found it to be in conflict with the council's planning schemes. The court considered the asserted grounds were relatively weak and were not sufficient to warrant an approval of the proposed development.

Pre-1911 houses were not reasonably capable of being made structurally sound

Ian Wright | Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Farrah v Brisbane City Council* [2016] QPEC 19 heard before Jones DCJ

May 2016

In brief

The case of *Farrah v Brisbane City Council* [2016] QPEC 19 concerned an appeal in the Planning and Environment Court commenced by Mr Jeffrey Farrah against the Brisbane City Council's refusal to grant a preliminary approval to carry out building works, particularly its refusal to allow the demolition of two pre-1911 houses.

The council's grounds for refusal included asserted conflicts with a number of desired environmental outcomes and performance criteria and acceptable solutions under the Demolition Code of the *Brisbane City Plan 2000*. It was accepted by both parties that the fundamental issue for determination by the court was "*whether or not the two houses were reasonably capable of being made structurally sound*".

The court accepted that the cost to bring each house to a structurally sound state would be in the order of $96,000 and $136,000 respectively and found that neither house was reasonably capable of being made structurally sound. The appeal was therefore allowed.

Court found that structurally sound would include making the structure waterproof and safe but not necessarily fit for permanent habitation

The court considered the principles in *Gould v Brisbane City Council* [2001] QPELR 77, *Craig Securities (No. 2) Pty Ltd v Brisbane City Council* [2006] QPELR 601 and *Ken Ryan & Associates Pty Ltd v Brisbane City Council & Ors* [2008] QPELR 147 in determining whether the two pre-1911 houses were "*structurally unsound and not capable of being made structurally sound*".

Whilst all three decisions confirmed the test was an objective one, the court noted a difference between the reasoning of Griffin SC DCJ in *Craig Securities* and that of Wilson SC DCJ in *Ken Ryan* on whether a building was required to be restored to a level suitable for safe occupation in order to be structurally sound.

In *Craig Securities*, Griffin SC DCJ considered "*that the relevant tests did not require that the standard of structural soundness meet present day building codes and/or standards*". On the other hand, the court observed that Wilson SC DCJ in *Ken Ryan* appeared to suggest that "*the test required the structure be made habitable*".

Nonetheless, the court accepted the test articulated by Griffin SC DCJ in *Craig Securities* and found that structurally sound would include making the structure waterproof and safe but it would not be necessary for the structure to be fit for permanent habitation.

Court accepted additional works identified by Mr Farrah's engineer were necessary to make both houses structurally sound

The court then went on to consider the expert evidence relied on by both parties.

The parties' engineers agreed on most of the items needed to be repaired for both houses. However the engineer for Mr Farrah identified several additional works in respect of both houses.

As to the additional works for the house at 8 Amersham Street, the court found that the rectification to the rear door was necessary but that the works identified in respect of the window frames on the northern external wall of the house were not necessary to make the house structurally sound and waterproof.

As to the additional works for the house at 10 Amersham Street, the court accepted that the chamfer boards on the northern external wall were required to be replaced, otherwise it would result in an "*unacceptable risk of water damage to the timber framing behind those walls*". However, the court was not satisfied that all the timber sills would need to be replaced to make the house structurally sound.

Court preferred the evidence of the council's expert in determining the cost of making the houses structurally sound but considered there to be a risk of variations to the cost occurring

In determining the costs of making the houses structurally sound, the court considered the evidence of experts for both parties who submitted a cost estimate for making each house structurally sound.

The court found the evidence of the expert for Mr Farrah confusing and also found irregularities in the expert's costings. The court generally preferred the evidence of the council's expert but accepted that there were inherent uncertainties in the process of making the houses structurally sound which could lead to variations to the costings and as such it was appropriate to factor that risk into the evidence.

On that basis, the court found that in order to make the houses structurally sound, a prudent owner would budget for in the range of $86,000 to $96,000 for the house at 8 Amersham Street and $126,000 to $140,000 for the house at 10 Amersham Street.

Court found the valuation evidence offered limited assistance in determining whether the houses were reasonably capable of being made structurally sound but led to the conclusion that a significant amount of money would be required to be spent

The court also considered the evidence of the valuers for both parties who submitted an "as is" valuation of each of the lots and houses in their current state. However, both experts had different starting points and took different approaches in their assessment.

The valuer for Mr Farrah submitted that the making of both houses structurally sound and habitable would result in an added value of $180,000 to the "as is" valuation of both houses. The valuer for the council on the other hand, considered that the making of both houses structurally sound and habitable would result in the net worth of each property being indicative of market value and that the risk of over capitalisation was low.

The court examined the sale price of several other properties in the area and considered that Mr Farrah's valuer had materially underestimated the "as is" value of both houses and therefore gave no weight to his assessment of the "as is" values. In regard to the evidence of the council's valuer, the court found that whilst the valuer's "as is" valuations might be correct based on the three assumptions the valuer proceeded on, those assumptions were not warranted.

The court ultimately concluded that the valuation evidence offered limited assistance in determining whether the houses were reasonably capable of being made structurally sound. However, the evidence did lead to the conclusion that Mr Farrah would be required to spend a significant amount of money.

Court found that neither house was reasonably capable of being made structurally sound given the significant costs involved

In light of the expert evidence, the court concluded that the cost of making the houses structurally sound would involve a significant expenditure and that there was a risk that the expenditure would not be recovered if each of the houses was sold in the open market.

The court also concluded that the houses were far from habitable and that a considerable amount of further expenditure would be required to bring them to a habitable state.

The court found that it would be unreasonable to require a significant expenditure to be incurred in circumstances where there would be two uninhabitable houses which might be left to deteriorate again unless a further significant amount of money was spent to make them habitable.

On this basis, the court found that neither house was reasonably capable of being made structurally sound.

Court found that the requested change to construct an acoustic wall near the boundary of the property constituted a permissible change

Ian Wright | Ronald Yuen | Nina Crew

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10 heard before Bowskill QC DCJ

May 2016

In brief

The case of *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10 concerned an application in the Planning and Environment Court by Mr Arturo Frerreya, Ms Stella Ferreyra, Mr Ben Anderson, Mr Glenn Sim, Ms Samantha Jensen, Ms Bridget Barker, Mr Marco Faraone, Mr Jonathan Cook and Ms Christine Jensen, the owners of the units adjacent to the subject land, for declaratory relief in relation to the Brisbane City Council's decision to approve Brian E Fitzgibbons Family Trust's request to change an existing approval.

The unit owners' primary concern related to the acoustic wall which resulted in a loss of natural light, ventilation and visual amenity to their units. The unit owners argued that the council's decision was invalid on the basis that the council failed to take into account relevant considerations and it was unreasonable.

The court found that the council's decision was valid and dismissed the application.

Council approved the permissible change request to construct an acoustic wall

In April 2011 the council had issued the original development approval for alterations and extensions, including the introduction of a new outdoor bar area, to a hotel in Fortitude Valley known as the 'Fringe Bar'.

In March 2014, the hotel owner made a request to the council for a change to the original development approval under section 369 of the *Sustainable Planning Act 2009*. The change included construction of an acoustic wall near the boundary shared by the units.

The council's delegate was satisfied that the change sought by the hotel owner was a permissible change and approved the permissible change request in July 2014. The acoustic wall was subsequently constructed.

Unit owners argued that the council's decision was invalid in that it failed to take into account relevant considerations and was unreasonable

The unit owners argued that in approving the permissible change request:

- the council's delegate failed to take into account relevant considerations, in particular, the potential amenity impacts associated with the loss of natural light and visual amenity;
- the decision of the council's delegate was unreasonable in that it was not formed reasonably on the material before the council and it was so unreasonable that no reasonable local government could have arrived at it.

Court found that the council did not fail to take into account relevant considerations in approving the permissible change request

As to the first argument, the court considered the ministerial guideline used to determine whether a change to a development approval would result in a 'substantially different development'. The court found that the guideline should not be considered to be binding on the council in mandating the matters to be taken into account. Furthermore, it was observed by the court that:

> *the discretion so conferred on a responsible entity is a broad one and, even in a case where the introduction of new impacts is considered, by the decision-maker, to be relevant, the comparative importance of, or weight to be accorded to, any particular impact, is plainly one for the decision-*

> *maker; not amenable to review by the court, in an application such as this (as compared with an appeal on the merits)*.

In any case, the court found that the material before it was able to demonstrate that the potential impact of the acoustic wall on the general visual amenity was considered by the council's delegate and observed that the "*ameliorating effect of the wall on other impacts (including noise, light, privacy and security) was regarded as outweighing any such impacts*" on the units. In the circumstances, the court did not accept the first argument.

Court found the council's opinion that the change would not be likely to cause a person to make a properly made submission was legally reasonable

As to the second argument, by reference to *Minister for Immigration and Border Protection v Stretton* [2016] FCACF 11, the court noted that 'legal reasonableness' would fall within an area of decisional freedom on the council and that the "*width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness*".

The court went on to note that:

> *In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification… if the decision is within the "area of decisional freedom" of the decision-maker… it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.*

In the context of whether the proposed change would cause a person to make a properly made submission objecting to the proposed development, the court found that the approval of the permissible change request fit within the scope of the decisional freedom of the council having regard to the following matters:

- the original approval for alterations and extension to the Fringe Bar would have had significant acoustic impacts on the unit owners;
- the construction of the proposed acoustic wall would improve the noise, security, lighting and privacy issues which were raised by the one submission objecting to the original approval;
- there was a reasonable development expectation for the Fringe Bar to be built to the boundary of the land;
- the unit building itself had been built to the boundary which posed issues about the access to light and air from the adjoining land;
- the proposed acoustic wall was set back 1.2 metres from the boundary;
- "*reasonable minds might differ*" on whether the proposed change would give a rise to a submission as evidenced by the town planning expert's evidence.

The court was therefore not satisfied "*that no reasonable decision-maker could have reached the conclusion that the change would not be likely to cause an (objective and rational person) to make a (reasonable) properly made submission, objecting to the proposed change*".

Does a street have traditional character, it's more than just a numbers game

Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Guiney v Brisbane City Council* [2016] QPEC 26 heard before Rackemann DCJ

June 2016

In brief

The case of *Guiney v Brisbane City Council* [2016] QPEC 26 concerned an appeal by Margaret Guiney commenced in the Planning and Environment Court against the decision of the Brisbane City Council to refuse a development application for a preliminary approval to carry out building work being work for the demolition of a pre-1947 dwelling located within the Traditional Building Character Overlay of the *Brisbane City Plan 2014*.

The determinative issue for the appeal was whether the proposed demolition conflicted with the Traditional Building Character (demolition) Overlay code. The court found that the proposed demolition conflicted with the code as the house the subject of the proposed demolition was located in a street with traditional character and the house contributed positively to that character.

The court considered whether the proposed demolition conflicted with certain outcomes of the Traditional Building Character (demolition) Overlay code

In considering whether the proposed demolition conflicted with the *Brisbane City Plan 2014* the court focused on the following outcomes of the Traditional Building Character (demolition) Overlay code:

- PO5(c) which provides "*Development involves a building which… does not contribute positively to the visual character of the street*";
- AO5(d) which provides "*Development involves a building which … is in a street that has no traditional character*".

The appeal appeared to proceed on the basis that if either of these outcomes could be satisfied the proposed demolition would not be in conflict with the *Brisbane City Plan 2014*.

Ms Guiney contended that the house did not contribute positively to the visual character of Williams Avenue or that the street had no traditional character

The house the subject of the proposed demolition was located in Williams Avenue, Hendra and was a tin and timber house which the court observed was "*… a fine example of traditional building character*" (at [8]).

Williams Avenue was primarily comprised of dwellings with a mix of pre-1947 and post-1946 buildings. The street contained more post-1946 than pre-1947 buildings and this formed the basis for Ms Guiney's contention that the street was one with a modern character and therefore, despite the traditional character of the house, it did not contribute positively to the visual character of Williams Avenue.

To support this contention it was argued by Ms Guiney that a street could have only one character, the character of a street would be determined by reference to what predominated in the street and, because of the predominance of post-1946 houses, Williams Avenue was a street of modern character only.

The court considered how the character of Williams Avenue was to be determined

In asserting that a street may have only one character Ms Guiney sought to rely on *Leach and Ors v Brisbane City Council* [2011] QPELR 609.

However the court was not persuaded that this decision was an authority for the proposition that a street may only have one character. Instead the court preferred the reasoning in *Lucas v Brisbane City Council* [2015] QPELR 671 where the court in that instance relevantly stated:

> *It is only if one can characterise the visual character has a significantly predominant one and, thereby, exclude the fact that there is any realistic co-existing character at all which has any significance to do with a pre-1946 character that one could conclude that it (the house) did not contribute positively to that.*

The court also relevantly observed as follows in respect of applying AO5(d) and PO5(c) in the context of the proposed demolition:

- The fact that the subject house formed part of a group of traditional character houses did not necessarily dictate that demolition must be assessed to be in conflict with the assessment criteria rather the demolition of the house must be considered in the context of the relevant street (at [29]).
- A numerical predominance of post-1946 buildings, while being a relevant factor, would not inevitably justify a finding that a street had no traditional character or that a building of traditional character did not contribute positively to the visual character of the street (at [32]-[33]).
- Another factor, other than numerical predominance, which may be relevant to the assessment of the character of the street was the visual prominence of the pre-1947 buildings (at [32]).
- No weight was to be given to the fact that some of the other pre-1947 buildings in the street were "*not in good conditions and their 'potential longevity' is questionable*" as there was not sufficient evidence to establish whether these buildings were susceptible to demolition (at [36]).
- What would be required was an assessment of the present visual character of the street and not the street's potential character in the future (at [38]).

The court found that Williams Avenue had retained a traditional character and that the house contributed positively to the visual character of the street

Having considered the evidence of the expert witnesses the court relevantly found as follows:

> *The numerical predominance of post-1946 buildings in the street is relevant, gives the street an element of non-traditional character and provides an arguable case to permit demolition. On balance however, on the evidence, I am satisfied that this is not a case of a street properly characterised as simply being of a modern character with a few remnant pre-1947 character buildings which have no meaningful influence on the character of the street as a whole. Rather, it is a case of a relatively short street of mixed character in which notwithstanding the numerical predominance of more modern buildings (of different styles),the street, assessed as a whole, nevertheless retains (and retains as a distinguishing feature) traditional character to a significant degree by reason, in particular, of the influence of the traditional character buildings within it, including by reference to their attributes, location, consistency of character, relationship with each other and visual exposure to the street. In that context, not only is traditional character of significance in the street but the subject dwelling, being a fine and readily visible example of traditional building character, contributes positively to the visual character of the street* (at [43]).

On this basis the court found that the proposed demolition did not meet AO5(d) and PO5(c) and therefore the proposed demolition conflicted with the *Brisbane City Plan 2014*.

As Ms Guiney had not advanced grounds to justify the approval of the proposed demolition despite the conflict, the court dismissed the appeal.

No presumption that costs should follow the event

Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Farrah v Brisbane City Council (No. 2)* [2016] QPEC 23 heard before Jones DCJ

June 2016

In brief

The case of *Farrah v Brisbane City Council (No. 2)* [2016] QPEC 23 concerned an application made by Jeffrey Farrah in the Planning and Environment Court for costs arising out of an appeal by Mr Farrah against the Brisbane City Council's refusal of an application to demolish two pre-1911 houses.

In the substantive appeal, the court found that due to the likely cost involved in bringing the houses to a structurally sound condition, neither house was reasonably capable of being made structurally sound and allowed the appeal. Mr Farrah subsequently made an application for costs against the council.

The court considered the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The court found that while these aspects were finely balanced, the public interest aspect of the case warranted the making of no orders as to costs.

Mr Farrah made an application for costs on the basis of his success and interest in the appeal and his reasonable conduct in prosecuting the appeal

Mr Farrah contended for a costs order on the following basis:

- He was successful in the substantive appeal. In particular, he was successful on the only substantive issue in the appeal and that no other substantive reasons existed justifying the decision not to award costs.
- He was not pursuing a commercial interest and the appeal was brought to avoid having to waste money fixing up the houses or having to sell the properties for less than their true value.
- His conduct in the prosecution of the appeal was reasonable and the litigation had been conducted in an efficient and cost effective way. In fact, the council had acted unreasonably by resisting his request for a mediation in circumstances where there would be a "*reasonable expectation of some utility*".
- He had incurred costs in prosecuting the appeal.

The council argued to the contrary that the application for costs be dismissed

The council submitted that the application be dismissed for the following reasons:

- Most of the council's expert evidence was preferred to that of Mr Farrah.
- The issue of the costs involved in bringing the houses to a habitable state was introduced by Mr Farrah, despite it being clear that the real issue was the cost of making the houses structurally sound.
- It was in the public interest to resist the appeal as the "habitable point" had a potential to impact on the future operation of council's planning instruments relating to protection of traditional building character.
- Mr Farrah's case in the substantive appeal was different from his pleaded case.
- The council had not acted unreasonably in the conduct of the appeal.

Court found the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal and found that the public interest aspect of the case warranted no orders as to costs

In considering whether to award costs under section 457 (Costs) of the *Sustainable Planning Act 2009*, the court observed the following:

> *It is now well settled that the discretion provided for pursuant to s 457 is a broad one to be exercised judicially but without any presumption that costs ought follow the event or otherwise on the basis that there is some qualified protection against an adverse costs order. In exercising its jurisdiction under s 457 of the SPA the Court has to do so in a way that ensures, as far as can be, that while costs orders are made in appropriate cases it does not create a perceived established attitude as to costs that might act as a disincentive to citizens (individual and corporate) and relevant statutory authorities who either have meritorious cases to litigate or reasonable administrative decisions to defend.*

In relation to the council's refusal to participate in a mediation, the court found that it was not unreasonable since there was little prospect of reaching any compromise and it was unlikely that the mediation would result in any material narrowing of the issues.

The court considered the council's involvement in the appeal which arose out of its concern to preserve residential buildings constructed prior to 1911 involved a matter of genuine public interest. The council was therefore not concerned with achieving or maintaining any commercial advantage over Mr Farrah.

The court accepted that achieving or preserving the public interest might result in "*significant limitations on the ability of a property owner to achieve his highest and best use*" and that the costs of litigation would not be insignificant. However, in the court's opinion, Mr Farrah had secured a commercial advantage from the appeal even if that was not the intended purpose.

It was observed by the court that both parties conducted their respective cases in an efficient and cost-effective manner and it would be wrong to criticise the council for introducing valuation evidence in circumstances where the evidence was brief and provided some assistance in determining the final outcome.

As to the submission that Mr Farrah departed from the "pleaded" case by introducing the "habitable point", the court did not believe it materially affected the conduct of the proceeding and found it to be not an irrelevant consideration.

The court ultimately found the issue on whether to awards costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The court found that while these aspects were finely balanced, the public interest aspect of the case was a particularly significant consideration which warranted the making of no orders as to costs.

Court found overwhelming need for a service station and caretaker's residence in Jimboomba

Ben Caldwell | Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Peet Flagstone City Pty Ltd v Logan City Council and Anor* [2016] QPEC 24 heard before Rackemann DCJ

June 2016

In brief

The case of *Peet Flagstone City Pty Ltd v Logan City Council and Anor* [2016] QPEC 24 concerned an appeal in the Planning and Environment Court commenced by Peet Flagstone City Pty Ltd against the decision of the Logan City Council to approve a development application made by Bluestone Matthews Pty Ltd for a 24 hour service station and caretaker's residence on land located at the corner of a busy intersection of Teviot Road and Cusack Lane, Jimboomba, and which is in close proximity to the Flagstone Priority Development Area.

The court was required to consider the nature and extent of conflict between the proposed development and the *South East Queensland Regional Plan 2009-2031*, the *Beaudesert Shire Planning Scheme 2007* and the *Logan Planning Scheme 2015*, and determine whether there were sufficient grounds to warrant approval of the proposed development despite the conflict.

The court found that the proposed development was in significant conflict with the council's planning schemes. However, there was overwhelming economic, public and community need which warranted an approval of the proposed development.

The court found that the proposed development was not in conflict with the SEQ Regional Plan even though it was an urban activity outside the urban footprint

The land is contained in the Rural Landscape and Regional Production Area, but outside the urban footprint under the SEQ Regional Plan.

The intent of the Rural Landscape and Regional Production Area was to protect land from inappropriate development, particularly urban or rural residential development. Peet contended that the proposed development was in conflict with the Rural Landscape and Regional Production Area, as the proposed development constituted urban development and would impact on the nearby activity centres.

The court first found that the SEQ Regional Plan did envisage service stations being located outside the urban footprint and within areas such as the Rural Landscape and Regional Production Area. This was supported by the fact that service stations of a particular size did not require referral agency assessment in the Rural Landscape and Regional Production Area under the regulatory provisions and there were no identifiable conflicts with the provisions in the SEQ Regional Plan. The court also found that the proposed development did not have an adverse effect on any centre or the character of the Rural Landscape and Regional Production Area.

The court found that the service station component of the proposed development was inconsistent development under the council's planning schemes

The land is contained in the Rural Residential Precinct of the Mount Lindesay Corridor Zone under the Beaudesert Shire Planning Scheme. Under this scheme, the service station component of the proposed development was not identified as consistent development within the Mount Lindesay Corridor Zone and as such it was inconsistent development.

Similarly, the land is contained in the Park Living Precinct of the Rural Residential Zone of the Logan Planning Scheme. The concept of "inconsistent development" was not used under that scheme and instead it identified preferred land uses in the overall outcomes of each precinct of a zone which were required to be met in order to meet the purpose of the zone. The service station component of the proposed development was not a use identified in the overall outcomes of the Park Living Precinct and therefore the purpose of the Rural Residential Zone was not met. As such the proposed development was in conflict with the Logan Planning Scheme.

The town planning expert witnesses called by the council and Bluestone contended that the level of conflict was substantive rather than merely technical. Whereas, the town planning expert witness called by Peet contended that that the level of conflict was significant.

The court however, found that under both of the council's planning schemes the 'inconsistent use' point was relevant and the level of conflict was significant.

The court found that there would be no impact on the structure or network of planned centres despite finding that the proposed development was 'out of centre' development under the council's planning schemes

Peet contended that the proposed development would impact on the planned structure of urban centres and compromise the network of planned centres, particularly in the Flagstone Priority Development Area.

The town planning expert witnesses called by the council and Bluestone contended that service stations were location-flexible land use types and accordingly, there should be flexibility in the sitting of service stations.

Whilst the court found that the proposed development was out of centre development, there would be no impact on the structure or network of planned centres. This finding was supported by the fact that the proposed development was of an appropriate scale for its purpose, the proposed development was a use of a kind which did not have a specific locational need, there was both economic and community need for the proposed development and the existing opportunities within the Flagstone Priority Development Area were not likely to proceed in the short term.

The court found that the proposed development would not impact on the character of the locality

Peet contended that the proposed development was in conflict with the provisions of the council's planning schemes in relation to character and identity.

The court however resolved this issue expeditiously as Peet's town planning expert witness in a joint report stated that the building design and layout of the facility on the land was not a matter which would determine whether the proposed development would be ultimately approved or refused.

The court found that proposed development would not significantly impact on the character of the locality as the proposed development was located on the corner of a busy intersection of 2 significant traffic routes and the building design and layout gave ample separation from adjacent rural residential development.

The court found that there were sufficient grounds to overcome the conflict

Peet contended that there was no need for the proposed development as there was an approval for a service station at the nearby Flagstone Village and service stations had been earmarked to be accommodated in the Flagstone Priority Development Area specifically a Coles express.

Having regard to the evidence of the parties' need experts and a representative of Peet, the court had little confidence that the service station at Flagstone Village would proceed within the life of the approval. In the court's view, there was no prospect of a Coles Express service station operating at any time prior to 2018 in the Flagstone Priority Development Area.

The court found that the proposed development was suitably located and of an appropriate size to cater for the need and there was an overwhelming economic, public and community need for a service station in the locality.

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