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No space for storage: Appeal against refusal of proposed self-storage facility is dismissed

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Middle Pond Pty Ltd v Whitsunday Regional Council & Ors* [2024] QPEC 45 heard before Kefford DCJ

February 2025

In brief

The case of *Middle Pond Pty Ltd v Whitsunday Regional Council & Ors* [2024] QPEC 45 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) brought by Middle Pond Pty Ltd (**Applicant**) against the decision of the Whitsunday Regional Council (**Council**) to refuse part of the Applicant's development application for a development permit for a material change of use to facilitate the construction of a self-storage facility (**Proposed Development**) at 82 Shute Harbour Road, Cannonvale (**Subject Land**). The appeal also related to particular development conditions imposed by the Council on that part of the development application which was approved.

The Court had to decide whether the Proposed Development should be approved, approved in part, or refused, and in doing so considered the following key issues (see [10] and [20]):

- Is the Proposed Development consistent with the planning goals sought to be achieved in the Low-medium Density Residential Zone (**LMDR Zone**)?
- Does the Proposed Development comply with the Industry Activities Code (**IA Code**)?
- Are there relevant matters relied on by the parties under section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**)?
- Is there a need for the Proposed Development?
- Should the Court exercise its discretion to approve the Proposed Development?

The Court found that the Applicant had failed to demonstrate that the Proposed Development should be approved. The part of the appeal relating to the Proposed Development was dismissed.

Background

The Applicant applied to the Council for a development permit for reconfiguring a lot (1 lot into 2 lots, and 1 lot into 6 lots) on the Subject Land, as well as for the Proposed Development. The Council granted the development permit for reconfiguring a lot subject to conditions, however, refused the part of the development application relating to the Proposed Development (at [7]).

The Applicant appealed against certain development conditions, as well as against the decision to refuse the Proposed Development. At the time the case was heard, the Applicant only sought determination of the part of the appeal relating to the Proposed Development (at [10]).

The Subject Land is located within the LMDR Zone under version 3.7 of the *Whitsunday Regional Council Planning Scheme 2017* (**Planning Scheme**), being the version in force at the time the Applicant's development application was properly made.

The Proposed Development fell within the use definition of "Warehouse" under the Planning Scheme, forming part of the defined activity group "Industry activities". Such an activity did not fall within the accepted defined activity groups for the LMDR Zone.

Court finds the Proposed Development is not consistent with the planning goals sought to be achieved in the LMDR Zone

The Council argued that the Proposed Development "*… involves material non-compliance with, and gains no relevant support from, assessment benchmarks in the Low-medium density residential zone code*" (**LMDR Zone Code**) (at [69]) and that the built form of the Proposed Development "*… is not 'compatible with the intended scale and character of the streetscape and surrounding area'*" (at [134]).

The Applicant conceded the non-compliances with the relevant assessment benchmarks in the LMDR Zone Code but argued that the Proposed Development was nonetheless consistent with the underlying planning goals and therefore the non-compliances are not significant and should be afforded little weight (at [74]).

The Applicant further argued that the design of the Proposed Development is appropriate, the commercial nature of the Proposed Development is an appropriate type of use for the LMDR Zone, the Proposed Development would function in the manner intended for non-residential uses, and the Proposed Development performed favourably in terms of its location and accessibility (see [76] to [79]).

Whilst the Court was satisfied that the Proposed Development complies with certain height requirements in the LMDR Zone Code, is commercial in nature, and is consistent with some outcomes sought in the LMDR Zone Code, the Court was not persuaded that the Proposed Development is appropriately located (see [192] and [193]).

The Court noted that the LMDR Zone Code contains a number of qualifications in respect of non-residential uses in the LMDR Zone, for example relating to scale, function, form, and accessibility, and that the qualifications differ from zone to zone (see [63] and [65]). The Court found it apparent from these provisions that the protection of residential character and amenity is an important planning policy for land within the LMDR Zone (see [67] and [201]).

The Court ultimately found that:

- the Planning Scheme reflected sound town planning strategy with respect to the LMDR Zone;
- the commercial character and other positive attributes of the Proposed Development did not alleviate the significant conflicts with the LMDR Zone Code in respect of inappropriate scale, visual amenity, and character impacts; and
- the non-compliances with the assessment benchmarks in the LMDR Zone Code provide a "*… compelling reason to refuse the [Proposed Development]*" (at [201]).

Court finds the Proposed Development does not comply with the IA Code

The Proposed Development was also assessed against the IA Code, as it falls within the "Industry activities" defined activity group.

The Council submitted that the Proposed Development did not comply with several assessment benchmarks in the IA Code. The alleged non-compliances related to (at [203]):

- amenity, scale, and intensity being compatible with location and setting;
- buildings and structures for the activity being appropriate and positively contributing to the visual character and streetscape of the area; and
- the Proposed Development generally being designed to avoid or mitigate potential adverse impacts on adjoining or nearby sensitive land uses.

The Applicant's position was that the non-compliances with the assessment benchmarks should be afforded little weight as, in its submission, the underlying planning goals are achieved (at [205]).

The Court accepted evidence from the Council's town planning expert that the scale and intensity of the Proposed Development is "*well beyond*" what would be compatible with its location, the Proposed Development will not contribute positively to the visual quality of the zone and locality, and the Proposed Development represents a significant intrusion into a predominantly residential area (at [206]).

The Court was not persuaded that the Proposed Development complies with the assessment benchmarks in the IA Code. The Court concluded that the non-compliance with the IA Code, in addition to the non-compliances with the LMDR Zone Code, were matters telling against approval of the Proposed Development (at [209]).

Court accepts the Applicant's relevant matters but does not find them persuasive

The Applicant relied on several relevant matters under section 45(5)(b) of the Planning Act.

The Applicant alleged that there is a strong town planning, community, and economic need for the Proposed Development, there is insufficient appropriate land in the Low Impact Industry Zone within the catchment to accommodate the Proposed Development, self-storage is not a typical industrial use but is more akin to a commercial use, the loss of the Subject Land will have no material impact on the Planning Scheme's ability to accommodate residential development, and the design of the Proposed Development is compatible with the character and amenity of the surrounding area (at [210]).

The Council opposed each of these relevant matters (at [211]).

The Court accepted that the matters raised by the Applicant were relevant matters for the purposes of section 45(5)(b) of the Planning Act, however was not persuaded that they represented compelling reasons to approve the Proposed Development (see [212] to [214]).

Court finds there is no need for the Proposed Development

The Applicant noted three recent decisions by the Council approving similar self-storage development proposals within the locality of the Proposed Development (at [217]). The Applicant submitted that, despite these approvals, there is still a need for the Proposed Development (at [218]).

The Council contended that there is no need for the Proposed Development (at [219]).

The Court considered the parties' need experts' assessments of the demand for the Proposed Development and found that there was a latent unsatisfied demand which is "*… more than adequately addressed by the three recent self-storage facility approvals*" (at [231]).

Whilst the Court was satisfied that the well-being of the community would be enhanced by the benefits offered by the Proposed Development, the Court was not persuaded that there is a demand for the Proposed Development which would not be adequately met by the three recent approvals (see [261] to [262]).

Court finds the Proposed Development should not be approved in the exercise of its discretion

The Court acknowledged that the Proposed Development is of a commercial nature, performed well when assessed against the LMDR Zone Code in terms of accessibility, and "*… would offer a superior standard of facility and service to that provided by the existing and approved developments*" (see [265] to [266]).

The Court weighed these benefits against the significant non-compliances with the relevant assessment benchmarks in the Planning Scheme relating to inappropriate scale and impacts on the visual amenity and character of the area (at [269]).

The Court was not persuaded that it should exercise its discretion to approve the Proposed Development, in full or in part, and stated that the non-compliances with the LMDR Zone Code were serious and compelling reasons against approval (at [270]).

Conclusion

The Court found that the Applicant had not discharged the onus of demonstrating that the Council's decision to refuse the Proposed Development should be replaced with an approval (at [271]).

The part of the appeal relating to the Proposed Development was dismissed and the hearing of the balance of the appeal was adjourned.

Key points

The Court's decision in this case highlights the following important considerations for those seeking approval of a development application:

- Compliance with the assessment benchmarks relevant to a particular development is likely to be afforded significant weight by the Court, and the existence of relevant matters in favour of approving development will not always be sufficient to outweigh non-compliance with the relevant assessment benchmarks.
- An assessment of the need for a particular development should have regard to other existing development approvals for the same type of development, even if those development approvals have not been carried out.

Health scare: Appeal concerning the use of land directly opposite Greenslopes Private Hospital is decided

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Ramsay Health Care Australia Pty Limited v Brisbane City Council & Anor* [2024] QPEC 49 heard before McDonnell DCJ

February 2025

In brief

The case of *Ramsay Health Care Australia Pty Limited v Brisbane City Council & Anor* [2024] QPEC 49 concerned a to the Planning and Environment Court of Queensland (**Court**) by Ramsay Health Care Australia Pty Limited (**Submitter**) against the decision of the Brisbane City Council (**Council**) to approve, subject to conditions, a development application (**Proposed Development**) by Ron Build Pty Ltd (**Applicant**) seeking a development permit for a material change of use for centre activities (community care centre and health care service) on neighbourhood centre zoned land situated at 68-72 Hunter Street, Greenslopes (**Land**).

The Proposed Development comprises a contemporary single building with three storeys above ground and three basement levels of car parking, including 114 car parking spaces and six motorcycle parking spaces. The length, width, and height of the building is approximately 40 metres, 33 metres, and 14.75 metres respectively, and 20.6% of the Land will be landscaped (at [40]). The Proposed Development is categorised as impact assessable under the *Brisbane City Plan 2014* (version 26) (**Planning Scheme**) (see [6] and [14]).

The Court considered whether the Proposed Development is an appropriate use of the Land, whether the built form is a form of overdevelopment and therefore unacceptable, and whether there is a need which arises both in the planning context and as a relevant matter that supports approval or refusal (at [47] and [48]).

The Court was persuaded that the appeal should be allowed in part and approved the Proposed Development subject to conditions (at [155]).

The Applicant has since made an application to the Court seeking orders that the Submitter pay its costs of an incidental to the appeal. That application has not yet been decided by the Court.

Background

The Land is within the Coorparoo and Districts Neighbourhood Plan area and comprises three parcels of land with a total area of approximately 1,919m^2 (see [3], [7], and [8]).

The Submitter operates the Greenslopes Private Hospital which is Queensland's largest private hospital, located directly opposite to the Land and within the Greenslopes Private Hospital Precinct of the Coorparoo and Districts Neighbourhood Plan. That land has a development approval for hospital, community care centre, emergency service, health care service, and child care centre uses (see [1], [5], [10], and [96]).

Significantly and importantly, the Planning Scheme expects the existing and future character of the locality, including the Land and the Greenslopes Private Hospital, to continue to develop and intensify (at [26]).

Key issue in the appeal

The key issue in the appeal was whether the requirements of the Coorparoo and Districts Neighbourhood Plan Code (**Neighbourhood Plan Code**) are satisfied by the Proposed Development providing a mix of centre and community activities that are complementary to the Greenslopes Private Hospital (at [2]).

Court finds the Proposed Development is an appropriate use of the Land

The Submitter argued that the Proposed Development is an inappropriate use of the Land having regard to the relevant assessment benchmarks, including the Strategic Framework, Neighbourhood Plan Code, and the Neighbourhood Centre Zone Code (at [49]). More particularly, in respect of the Neighbourhood Plan Code, the Submitter argued that "*… to be 'complementary', development should not compete with, or duplicate medical activities offered at, the Greenslopes Private Hospital*" (at [94]). The Court did not accept this as the Planning Scheme "*… contemplates uses [on the Land] that compete with the Greenslopes Private Hospital…[so long as] they comply with certain requirements*" (at [94]).

The evidence accepted by the Court suggested that the Proposed Development is complementary to the Greenslopes Private Hospital, because "*… the use will serve a local need*", "*… the Greenslopes Private Hospital will continue to function and provide services to the community, including the local community, and possible expansion will not be delayed*", and "*… the Greenslopes Private Hospital will not fail if this Proposed Development proceeds*" (see [69], [93], and [95]).

The Court was therefore satisfied that the Proposed Development is an appropriate use of the Land, which weighs in favour of approval, and that the Proposed Development complies with the relevant assessment benchmarks, particularly the Neighbourhood Plan Code (at [99]).

Court finds the Proposed Development will not result in overdevelopment of the Land

The Submitter argued that the Proposed Development should be refused because it represents an overdevelopment of the Land and has unacceptable built form, having regard to the relevant assessment benchmarks, including the Strategic Framework, Neighbourhood Plan Code, Neighbourhood Centre Zone Code, and Centre or Mixed Use Code (at [100]). The Submitter argued that the Proposed Development is a visually dominant building and therefore the "*… bulk and form of the proposal is inconsistent and incompatible with the existing and intended character of the locality*" and "*… an unacceptable overdevelopment of the Land*" (at [101]).

The Court relied on evidence given by visual amenity experts and town planning experts to address these alleged issues with respect to the built form and overdevelopment (at [102]). The Court found that the Proposed Development does not comply with the assessment benchmarks relating to setback and separation distance (at [121]). However, the Court was convinced that the non-compliance does not weigh in favour of refusal "*… because the height, bulk, scale and character of the building respects and reflects the mixed character and partly commercial, partly residential streetscape of the area and the intended character of the locality*" and "*… the Greenslopes Private Hospital will continue to have a dominant visual influence and remain the most prominent built form [within the visual catchment]*" (see [25] and [121]).

Therefore, the Court found that the built form of the Proposed Development is appropriate and will not result in overdevelopment of the Land (at [133]).

Court finds need for the Proposed Development

The Submitter argued that there is no need for the Proposed Development and the absence of a tenancy schedule creates uncertainty surrounding the scope and nature of the potential new uses (see [134] and [135]). The Court rejected this on the basis that it is not practical to identify and assess all possible tenancies: what is relevant is the uses sought to be approved by the Proposed Development which the Court remarked is "*entirely orthodox*" (see [34] and [38]).

The Court observed as follows in respect of the consideration of need (at [141]):

- The bar should not be set too high if the need to be satisfied involves the essentials of every day life.
- The co-location of health care services within walking distance to a private hospital is a significant benefit for the community.
- There is a deliberate intention within the Planning Scheme to provide for health care service and community care centre uses on the Land.

The evidence established that there are more medical practitioners living in the local catchment surrounding the Greenslopes Private Hospital than anywhere else in Brisbane (at [144]). This is a result of the clustering of health services in the local catchment, which is also apparent around the Princess Alexandra Hospital, Mater Hospital, and Queensland Children's Hospital (at [144]). The number of people within the local catchment is anticipated to significantly increase (at [146]). The Court accepted that "*the presence and proximity of these major health facilities drives the demand for health and medical practitioner and related floor space within areas close to those hospitals*" and that "*[t]he growing population, as well as the ageing of those populations, will add to the demand for a range of Health care services*" (see [144] and [146]).

Therefore, the Court found that there is a community and economic need for the Proposed Development, which will service the needs of the local catchment and further afar in addition to providing more choice and competition (at [151]).

Conclusion

The Court approved the Proposed Development subject to conditions and allowed the appeal in part (at [154]).

Key points

The Court's decision in this case serves as a reminder to litigants and expert witnesses that when considering the need for a particular development, if the need to be satisfied involves the essentials of every day life such as health care services, the bar to be met should not be placed too high.

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Interesting rates and charges: Unpaid amounts and interest to be paid over 10 years later

Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Amos v Brisbane City Council [No 2]* [2024] QCA 116 heard before Boddice JA, Crow, and Crowley JJ

February 2025

In brief

The case of *Amos v Brisbane City Council [No 2]* [2024] QCA 116 concerned an application to the Queensland Court of Appeal (**Court of Appeal**) by a landowner seeking to restrain the Brisbane City Council (**Council**) from recovering unpaid rates and charges the subject of an order made by the Court of Appeal on 20 February 2018 (**Order**) or a permanent stay in respect of that Order. The Council made a cross-application seeking that any amount to be assessed in a costs order favouring the landowner be offset against any judgment sum awarded by the Court of Appeal.

The Order relevantly entered judgment for the Council "*… in accordance with the minutes of judgment produced by the parties to the Registrar*" (at [2]).

The Court of Appeal found that both parties failed to comply with the Order and the obligation under rule 5 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) to proceed in an expeditious way, because neither party produced the minutes of judgment for the judgment sum the subject of the Order to be perfected (at [12]). Accordingly, the Court held that there was no injustice in now perfecting the Order (at [15]).

The Court of Appeal held as follows:

- The landowner's application is refused (at [16]).
- The delay and non-compliance by both parties means that the interests of justice and fairness require the judgment to be entered to be the judgment that would have been entered if the parties had complied with the Order and their obligations under the UCPR within three months of the date of the Order (at [22]).
- The Council is entitled to a payment for rates and charges and interest on the unpaid rates and charges from 31 March 2012 to 20 May 2018 in the total amount of $518,726.58, less $54,322.30 being an offset of costs in favour of the landowner (see [24] to [26]).
- The interests of justice favour an award of interest from 21 May 2018 to 14 June 2024 in the amount of $210,711.14 on the amount of $464,404.28, because the Council has been deprived of that amount despite the landowner being aware of the landowner's obligation to pay the unpaid rates and charges and interest (at [27]).
- There be no order as to costs (at [28]).

Background

The landowner owned seven parcels of land in respect of which the Council levied various rates and charges between 30 April 1999 and 9 January 2012.

The Council commenced proceedings in the Supreme Court of Queensland (**Supreme Court**) in 2009 to recover the unpaid rates and charges. The Supreme Court relevantly held in the case of *Brisbane City Council v Amos* [2016] QSC 131; (2016) 216 LGERA 312 that the Council's claim was not statute barred because the 12-year limitation period in section 26(1) of the *Limitation of Actions Act 1974* (Qld) (**Limitations Act**) applied.

On appeal by the landowner, the primary judgment of the Court of Appeal in the case of *Amos v Brisbane City Council* [2018] QCA 11; (2017) 230 LGERA 51 relevantly overturned the Supreme Court's finding on the basis that the six-year limitation period in section 10(1) of the Limitations Act applied and made the Order (**2018 Judgment**). The Court of Appeal's decision was the subject of our September 2018 article.

The Council appealed the findings in the 2018 Judgment relating to the limitation period to the High Court of Australia (**High Court**). The High Court in the case of *Brisbane City Council v Amos* [2019] HCA 27 granted special leave and upheld the decision in the 2018 Judgment. Significantly and importantly, the High Court held at [35] and at [46] that section 10(1) and section 26(1) of the Limitations Act can apply concurrently and in that situation the defendant can choose to invoke the most advantageous limitation period. The High Court's decision was the subject of our October 2019 article.

Both parties obliged under the UCPR to comply with the Order

The Order was in effect for over five years before the parties sought to agree on the terms of the minutes of the 2018 Judgment.

The Council's reasons for delay were that the parties agreed to wait 21 days after the High Court's judgment to perfect the Order, the Council was dealing with the recovery of rates and charges associated with COVID-19 and flood emergencies from early 2020 until 2022, and the Council's cost assessment process was not finalised until 2023 (see [8] to [10]).

The landowner argued that the Council's delay was unsatisfactory and that the Council had the primary obligation to take steps to comply with the Order (at [11]).

The Court of Appeal held that the obligations under the UCPR fell on both of the parties, the Council's explanation for the delay did not absolve the Council of its obligations under the UCPR, and that the landowner at any time could have taken steps to comply with the Order in the absence of the Council doing so including by bringing the matter back before the Court of Appeal to address the non-compliance (see [12] to [14]).

Landowner to pay unpaid rates and charges and interest

The Court of Appeal held that no injustice would be served in perfecting the Order five years later, and that the judgment to be entered ought to be the judgment that would have been entered if the parties complied with the Order within three months of its date (see [22] and [22]).

The Court of Appeal ordered that the landowner pay the Council unpaid rates and charges, as well as interest, in a total amount of $464,404.28 (at [29]). The total amount included a reduction of $54,322.30 being an offset of costs in favour of the landowner (at [25]).

Conclusion

After a lengthy litigation history, the landowner was liable to pay unpaid rates and charges and interest on those unpaid amounts in a total amount of $464,404.28.

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Time is up: Planning and Environment Court of Queensland finds that a compensation application was made out-of-time

Ashleigh Foster | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Roseingrave & Anor v Brisbane City Council* [2024] QPEC 7 heard before Williamson KC DCJ

February 2025

In brief

The case of *Roseingrave & Anor v Brisbane City Council* [2024] QPEC 7 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse an application for compensation, made under section 31 of the *Planning Act 2016* (Qld) (**Act**), in relation to an alleged "*adverse planning change*" affecting the Appellants' land located in Everton Park (**Decision**).

The Court considered whether:

- the Appellants' compensation application was made out-of-time, having regard to the relevant statutory time limit; and
- the Court could, and should, exercise its discretion under section 37 of the *Planning and Environment Court Act 2016* (Qld) (**Court Act**) to excuse the non-compliance with the statutory time limit for making the compensation application such that the appeal could continue.

The Court found that the compensation application was made out-of-time and that the Court's discretion should not be exercised to excuse this non-compliance because a decision that effectively extended the time limit for making a compensation application would prejudice the Council and there was insufficient evidence before the Court to justify the exercise of discretion.

Background

Section 31 of the Act allows an "*affected owner*" to apply for compensation arising from an "*adverse planning change*" provided that particular requirements are met.

The requirements relevant to this appeal are set out in subsection 31(3) as follows:

> *(3) An affected owner may claim compensation in relation to development that is or becomes assessable development after the adverse planning change has effect, if—*
>
> *(a) the local government refuses a superseded planning scheme request in relation to the development; and*
>
> *(b) a development application has been made for the development; and*
>
> *(c) the development application is—*
>
> *(i) refused; or*
>
> *(ii) approved with development conditions; or*
>
> *(iii) approved in part, with or without development conditions.*

The Council refused a superseded planning scheme request made by the Appellants and a development application was subsequently made to the Council. The Council refused the development application and gave notice of this decision in February 2020.

The Appellants appealed the Council's decision to refuse the development application, however the appeal was dismissed by the Court on 28 October 2022 (**DA Appeal**). The decision to dismiss the DA Appeal is considered in our February 2023 article.

The Appellants made the compensation application on 6 April 2023.

Court finds that the compensation application was made out-of-time

Section 31(6) of the Act requires that a compensation application must be made within six months after the "*affected owner*" is given notice of the decision under section 31(3)(c) of the Act.

The Appellants' submitted that the six month time limit commenced following the conclusion of the DA Appeal on 28 October 2022 and therefore, the compensation application was made within time (at [13]).

The Council submitted that the six month time limit commenced once the Council gave its decision notice refusing the development application to the Appellants in February 2020 and therefore, the compensation application was made out-of-time (at [15]).

The Court accepted the Council's submission and found that the Court's previous Order to dismiss the DA Appeal could not constitute a "*notice of the decision*" for the purpose of section 31(6) for the following reasons:

- An order to dismiss an appeal is not, in and of itself, a refusal as required by section 31(3)(c)(i) of the Act (at [17]).
- There are instances where a decision made by the Court is treated as a decision made by an assessment manager, however a decision to dismiss an appeal is explicitly excluded from this treatment by section 47(3) of the Court Act (see [18] and [34]).
- The Order which confirms the Council's decision (by dismissing the DA Appeal) can be distinguished from an Order which sets aside the Council's decision and replaces it with a new decision (at [26]).

The Court held that the compensation application was made out-of-time because it was not made within six months after the Appellants received notice of the Council's decision to refuse the development application. Consequently, the appeal was not valid as the Council did not have the power to receive and decide the compensation application which was out-of-time.

Court does not exercise its discretion to excuse the non-compliance with the statutory time limit

The Appellants sought an extension to the time limit prescribed by section 31(6) of the Act by relying on the broad discretionary power to excuse non-compliance with a provision of the Court Act, or an enabling Act, conferred to the Court by section 37 of the Court Act.

Whilst the Council accepted that section 37 of the Court Act could be relied upon to extend the time in which the compensation application could be made, it opposed the relief sought by the Appellants.

The Court considered matters which weighed for and against extending the time limit for the compensation application and decided not to exercise its discretion under section 37 of the Court Act for the following key reasons:

- Extending the time for a person to claim compensation from the Council would prejudice the Council and impose a new liability, which is against the public interest in local governments having certainty in relation to their liabilities and spending (see [55] and [61]).
- It would be unfair to make ratepayers liable for compensation by re-instating an expired claim (at [61]).
- It was for the Appellants to convince the Court that the relief they sought should be granted, however no evidence was put before the Court explaining why the Appellants did not make a compensation application within six months of receiving notice of the Council's decision to refuse the development application in circumstances where the Appellants had knowledge of the factual circumstances comprising the basis of the compensation application within the relevant time period (see [64] to [72]).

Conclusion

The Court held that the Appellants did not have a right of appeal and that the appeal should be struck out.

Key points

The Court's decision in this case is a timely reminder of the following:

- An application for an extension of time under section 37 of the Court Act is not granted as of right.
- Applicants need to understand the statutory time limits operating in respect of their applications in order to exercise their statutory rights in time.
- Litigants seeking to extend a statutory time limit need to be prepared to address any prejudice to another party and present evidence, including to explain any delay in commencing proceedings, in favour of the Court exercising its discretion.

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Third time unlucky: Decision that an environmental authority application for mining is not properly made is reaffirmed

Erin Schipp | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Queensland Land Court in the matter of *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science (No 2)* [2024] QLC 16 heard before JR McNamara

February 2025

In brief

The case of *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science (No 2)* [2024] QLC 16 concerned an appeal to the Land Court of Queensland (**Court**) against a review decision of an original decision of the Chief Executive of the Department of Environment, Science and Innovation (**Department**) that an application made by MacMines Austasia Pty Ltd (**Applicant**) for an environmental authority was not properly made.

Whilst the Court set aside aspects of the review decision, the Court confirmed the aspect of the review decision that the environmental authority application was not properly made because it did not comply with section 125(1)(l) and section 126A of the *Environmental Protection Act 1994* (Qld) (**EP Act**)

Background

The Applicant is a mining company which coordinates a project known as the China Stone Coal Project (**Project**) in the Galilee Basin in Queensland (at [1]).

In October 2012, the Project was declared a "coordinated project" for which an environmental impact assessment (**EIS**) was required to progress the Project (at [2]). In 2014, the Applicant lodged with the Department applications for mining leases (**2014 ML Applications**) and a site-specific application for an environmental authority (**2014 EA Application**) (see [4] to [5]).

When the draft EIS for the Project was published in 2015 for public consultation, the then Commonwealth Department of Environment obtained advice on water matters which resulted in further information being requested from the Applicant and an amended EIS being provided (**Applicant's EIS**).

On 22 November 2018, the Coordinator-General (**CG**) publicly notified a report evaluating the Applicant's EIS (**CG Report**) and requesting further information. The CG Report was to lapse after it was publicly notified, being 22 November 2022 (at [11]).

In March 2019 the Applicant abandoned the 2014 ML Applications, thereby invalidating the 2014 EA Application but this did not impact the further information request in the CG Report (at [14]).

On 16 November 2022, the Applicant lodged another application for a mining lease for the Project and two days later, a site-specific application for a new environmental authority (**2022 EA Application**) (see [16] to [18]). The 2022 EA Application did not contain the further information requested in the CG Report, which the Department had also recommended the Applicant include (at [19]).

On 6 December 2022, the Department determined that the 2022 EA Application was not properly made (**Original Decision**) (at [23]). On 16 December 2022 the Applicant lodged an application for internal review, and on 6 February 2023 the Department confirmed the Original Decision (**Review Decision**) (see [25] and [28]). The Applicant then lodged its appeal to the Court against the Review Decision (at [34]).

Issues considered by the Court

The Court considered the following four issues in respect of the 2022 EA Application (at [48]):

- Its compliance with the requirements of section 125(1)(c) of the EP Act.
- Whether any exception in section 125(1)(l) of the EP Act applies.
- Its compliance with section 125(1)(l) of the EP Act.
- Its compliance with the requirements of section 126A(2) of the EP Act.

Court finds the 2022 EA Application complies with section 125(1)(c) of the EP Act

Section 125(1)(c) of the EP Act requires an environmental authority application to "*… describe all environmentally relevant activities for the application*".

In the 2022 EA Application the Applicant described the environmentally relevant activity as "*… incinerating waste vegetation, clean paper or cardboard*" (at [54]). The Department contended that this description was with respect to environmentally relevant activity 61 (**ERA 61**) under the repealed *Environmental Protection Regulation 2008* (Qld) and not the in force *Environmental Protection Regulation 2019* (Qld) (**EP Regulation 2019**) (at [54]).

The Court held that the word "describe" in section 125(1)(c) of the EP Act requires that an application "*identify*" or "*give an account of*" the environmentally relevant activities (at [56]).

The Court found that despite the description in the 2022 EA Application lacking reference to the EP Regulation 2019 and the appliable thresholds, the application did adequately describe ERA 61 and therefore complied with section 125(1)(c) of the EP Act (at [58]).

Court finds that an exception to section 125(1)(l) of the EP Act does not apply

Section 125(1)(l) of the EP Act requires an environmental authority application to include particular information about the likely environmental impacts and risk management strategies, unless an exception in section 125 of the EP Act is satisfied. The relevant exceptions in this case are as follows:

- The CG has evaluated the EIS for each relevant activity and there are CG conditions that relate to each relevant activity, and an assessment of the environmental risks of each relevant activity would be the same (sections 125(3)(a)(ii) and 125(3)(b) of the EP Act).
- The CG has declared the project to be a coordinated project for which an EIS is required (section 125(6)(c) of the EP Act).

The CG Report contains a series of conditions in respect of the Project, however there was a dispute about whether the conditions relate to each relevant activity so as to satisfy the exemption in section 125(3)(a)(ii) of the EP Act (at [65]).

The Court noted that when section 125 of the EP Act is construed as a whole, there is conflict between subsections (3) and (6) and that they cannot both apply (at [93]).

The Court accepted that section 125(6) of the EP Act has a "*broad application*" as it only requires that the application be "*site specific*" and the CG to declare the project as a "*coordinated project*" for which an EIS is required (at [94]).

In contrast, the Court accepted that section 125(3) of the EP Act has a "*narrower application*" which requires the CG to have evaluated the EIS for each environmentally relevant activity and there to be CG conditions for each relevant activity, and that an assessment of environmental risks would be the same as the CG evaluation (at [95]).

The Court accepted that "*… [section 125(6) of the EP Act] was designed to operate prospectively and that upon completion of the EIS process it gives way to specific requirements of [section 125(3) of the EP Act]*" at [101]). As the Applicant's EIS process was not complete, the Court held that the exception in section 125(6) of the EP Act "*has no operation here*" (at [102]).

The Court was also not satisfied that the CG evaluated the EIS for each relevant activity of the 2022 EA Application (at [122]), and thus it did not fall within the exception in section 125(3) of the EP Act.

Court finds the EA Application does not comply with section 125(1)(l) of the EP Act

Section 125(1)(l) of the EP Act requires an assessment of the likely impact of each relevant activity on the environmental values, which must include the matters listed in sections 125(1)(l)(A) to (E) of the EP Act. The Court accepted that the Applicant failed to satisfy section 125(1)(l) of the EP Act because it did not include an assessment of certain impacts identified in the CG Report and CG conditions (at [130]).

Court finds the 2022 EA Application did not "state" matters required by section 126A(2) of the EP Act

The Department submitted that the Applicant did not comply with section 126A(2)(c)(iv) and sections 126A(2)(d) to (f) of the EP Act because it did not sufficiently state, being "*to declare definitely or specifically; to set forth in proper or definite form; to say; or to fix and settle, as by authority*", certain matters relating to the exercise of underground water rights (at [149]).

The Applicant contended that only a basic assessment of whether the matters contained in section 126A(2) of the EP Act are "stated" in the application is required, and that the 2022 EA Application read in conjunction with the Applicant's EIS and CG Report provided information directed to the relevant subsections of section 126A(2) of the EP Act (see [148] and [152]).

The Court held that to "state" under section 126A(2) has a low threshold, but it requires an applicant to do more than re-state information previously determined to be insufficient, incomplete, or inadequate (at [164]). Thus, the Applicant's reliance on the CG Report was insufficient to state the matters relating to underground water rights for the purposes of section 126A (at [165]).

Conclusion

The Court held that the aspects of the Review Decision relating to the lapsing of the CG Report and non-compliance with particular sections of the EP Act be set aside, but otherwise held that the Review Decision is confirmed insofar as it relates to a finding that the 2022 EA Application was not properly made.

Key points

This Court's decision in this case is a reminder to applicants that the requirements for an application for an environmental authority are extensive and that compliance with those requirements is necessary for the application to be properly made.

Not necessary: Source of appeal right not necessary to be included in notice of appeal

Erin Schipp | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Pero-Joda Investments Pty Ltd v Moreton Bay Regional Council & Anor* [2024] QPEC 39 heard before Williamson KC DCJ

March 2025

In brief

The case of *Pero-Joda Investments Pty Ltd v Moreton Bay Regional Council & Anor* [2024] QPEC 39 concerned an application in pending proceeding to the Planning and Environment Court of Queensland (**Court**) seeking leave to amend a notice of appeal (**Notice**) filed by Pero-Joda Investments Pty Ltd (**Applicant**) to include the source of the Applicant's appeal right relating to the substantive appeal against conditions in a negotiated decision notice issued by Moreton Bay Regional Council (**Council**) for a two into 17 lot reconfiguration (**Development**).

The Court held that it was not necessary for the Notice to include the source of the Applicant's right of appeal and thus the application will be dismissed in due course.

Background

In May 2023, the Council approved the Development, subject to conditions. Following the Applicant's written representations about changing a matter in the development approval, in October 2023 the Council issued a negotiated decision notice which also included conditions (at [13]).

The Applicant filed the Notice against particular conditions in the negotiated decision notice imposed by the Council and Chief Executive of the Department of State Development, Infrastructure, Local Government and Planning (**Chief Executive**) under the *Vegetation Management Act 1999* (Qld) (see [1] and [13]). The Applicant's application in pending proceeding related to the amendment of the Notice to identify the appeal right it had exercised (at [2]).

Application of repealed planning legislation

The Applicant filed the original development application in October 2004 when the now repealed *Integrated Planning Act 1997* (Qld) (**IPA**) was in force. The original development application was subject to code assessment under the Integrated Development Assessment System (**IDAS**) (at [3]). The IDAS process was not yet decided when the IPA was replaced by the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) (at [3]).

The Applicant contends, with the Council's agreement, that the appeal right exercised is one with respect to conditions, conferred by the SPA read in conjunction with the *Acts Interpretation Act 1954* (Qld) (**AIA**) (at [2]). The Chief Executive disagrees, contending the Applicant has a right of appeal against a deemed refusal under the IPA, as preserved by section 20 of the AIA (at [2]).

Section 802(1) of the SPA provides that section 802 applies to a development application made under the repealed IPA, but not decided, before the commencement of the SPA, and section 802(2) provides for the continuation of the IDAS process under the IPA.

Section 819 of the SPA relevantly relates to appeals under the IPA. Sections 819(5)(a) and (6) of the SPA in particular include transitional provisions for an appeal about a development application made under the IPA, and decided under section 802 of the SPA. Section 819(6) of the SPA relevantly states as follows:

> *The person may appeal, and the court must hear and decide the appeal under repealed IPA as if [the SPA] had not commenced.*

The Court noted that the repeal of the SPA by the *Planning Act 2016* (Qld) (**PA**) was not relevant as the transitional provisions contained in section 311, section 312, section 345, and section 347 of the PA reference development applications made under the "old Act", which is defined in section 285(1) of the PA to be the SPA, and not the IPA (see [11] to [12]).

Issues

The Chief Executive contended the following (at [17]):

> *(a) the statutory appeal right in respect of a deemed refusal, which accrued under IPA, is a right preserved by [section] 20 of the AIA;*
>
> *(b) there is no provision in SPA, or the PA, which allowed the Council to decide the development application in 2023; and*
>
> *(c) on the material, it is not apparent the [Applicant] had accrued a right to have its application assessed and decided under the IPA after the repeal of the IPA and SPA in any event.*

The Court noted there was no dispute about (a) and considered submissions in respect of (b) and (c) (see [18] and [19]). In doing so, the Court considered the following two issues (at [19]):

- Whether the Applicant had accrued a right to have its development application assessed and decided by the Council despite the repeal of IPA and SPA.
- Whether the Applicant had accrued a right to appeal against a decision made in relation to its development application.

Court determines that the Applicant has a right to have its development application assessed and decided by the Council

The Court determined that the starting point for the resolution of the first issue is section 20A of the AIA, rather than section 20 of the AIA as contended for by the Chief Executive (see [2] and [20]).

Section 20A(2) of the AIA relevantly states as follows:

> *If an Act—*
>
> *(a) declares a thing for a saving or transitional purpose (whether or not the Act is expressed to be made for a purpose of that type); or*
>
> *(b) validates a thing that may otherwise be invalid; or*
>
> *(c) declares a thing for a purpose that is consequential on a declaration mentioned in paragraph (a) or a validation mentioned in paragraph (b) (whether or not the Act is expressed to be made for a purpose of that type); the declaratory or validating effect of the Act does not end merely because of the repeal of the Act ...*

The Court noted that section 802(2) of the SPA "*… declares a thing for a saving or transitional purpose*" (at [21]). The word "declare" is not defined in the AIA, and is therefore given its plain and ordinary meaning, being "*to make known or announce*", but can also mean "*affirm*" (at [22]). The Court noted that common to both meanings is that to "declare" is to "*… express or announce something in formal or explicit terms*" (at [22]).

The Court noted that section 802(2) of the SPA "declares" two things: "*(1) that an existing application as defined is preserved despite the repeal of IPA; and (2) an existing application is to be assessed and decided as if IPA has not been repealed*" (at [24]). The Court noted that item (1) is a declaration for a "saving purpose", and item (2) is a declaration for a "transitional purpose" (at [24]).

The Court determined section 20A(2) of the AIA is therefore engaged and continues the declaratory effect of section 802 of the SPA, which required the Council to assess and decide the Applicant's development application (at [25]).

Court determines that the Applicant accrued a right to appeal against a decision made in relation to its development application

The Court examined the source of the Applicant's appeal right also by reference to section 20A(2) of the AIA and sections 819(5) and (6) of the SPA, which determined that the IDAS process is to continue under the IPA pursuant to section 802(2) of the SPA, noting that "*… appeal rights, which could have accrued under IPA, are saved*" (at [26]).

The Court was satisfied that the appeal was properly instituted as a conditions appeal, which is to proceed to be heard and determined in accordance with sections 802 and 819 of the SPA (at [28]). Therefore, the Court found it unnecessary to determine whether section 20 of the AIA was engaged (at [28]).

The Court noted that a notice of appeal does not need to identify the source of the appeal right, and therefore determined that the amendments to the Notice "*do not appear necessary*" and that, in any event, the source of appeal right is published in the Court's judgment (at [29]).

Conclusion

The Court decided that the application in pending proceeding will be dismissed.

Do not dwell on it: Dispute over appropriate dwell times for an electronic advertising device

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Think Outdoor Pty Ltd v Brisbane City Council* [2024] QPEC 48 heard before Williamson KC DCJ

March 2025

In brief

The case of *Think Outdoor Pty Ltd v Brisbane City Council* [2024] QPEC 48 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Think Outdoor Pty Ltd (**Applicant**) against the decision of the Brisbane City Council (**Council**) to refuse an application to install, erect, and display an electronic advertising device (**Proposed Device**) on land located to the north-west of the intersection of Beaudesert Road, Fox Road, and Paradise Road in Acacia Ridge, Queensland (**Land**).

The Council's position changed during the course of the appeal and ultimately was that the Proposed Device could be approved subject to conditions.

However, the Applicant and Council could not reach agreement on a condition that prescribes minimum dwell times, being the minimum period for each individual image or message to be displayed, which is required to mitigate driver distraction due to involuntary glances towards the Proposed Device when there is a change of image or message.

The Court had to assess any potential risks and determine whether the proposed minimum dwell times ensure that the Proposed Device is controlled to maintain road safety to an acceptable standard under the Council's *Advertising Devices Local Law 2021* (**Local Law**).

The Court was satisfied that the level of road safety could be maintained to an acceptable standard and ordered that the Proposed Device be approved subject to the conditions proposed by the Applicant (at [56]).

Background

The Land is currently improved by an "*… existing and approved double-sided static billboard …*" that is marginally larger than the Proposed Device (at [10]).

The Applicant is seeking to upgrade the existing billboard to the Proposed Device which involves replacing the north and south facing panels with electronic screens (at [19]).

The evidence before the Court established that driver visibility is good at the intersection of Beaudesert Road, Fox Road, and Paradise Road, and that all sightlines are clear (at [16]). Beaudesert Road comprises three lanes in each direction, has a speed limit of 70 kilometres per hour, and carries approximately 16,750 vehicles per day in each direction (at [16]). The limited crash history for the intersection establishes that it has not been adversely affected by the presence of the existing billboard "*… beyond what may be reasonably expected for an intersection of [its] size and carrying the traffic volumes set out above*" (see [17] and [18]).

Court finds that a minimum dwell time of 10 seconds for the north facing panel will appropriately maintain road safety

The Applicant contended that the minimum dwell time for the north facing panel should be maintained at 10 seconds (at [5]). The Council contended that it should be 36 seconds (at [6]).

The Court considered the proposed minimum dwell times and found that the Applicant's proposed minimum dwell time of 10 seconds would maintain road safety to an acceptable standard given the following (see [25] to [34]):

- Under the Local Law, regard is to be given to the technical standards (**Local Law Standards**) applicable to the Proposed Device and "*… Council's own document provides for a minimum dwell time of eight seconds*".
- Beaudesert Road is a State-controlled road managed by the Department of Transport and Main Roads (**DTMR**), and therefore regard is to be given to DTMR's roadside advertising manual (**DTMR Manual**) which identifies a minimum dwell time of 10 seconds.
- The Applicant's and Council's respective traffic engineers reviewed the travel path and surrounding conditions and determined that there is no reason to warrant a minimum dwell time beyond those identified in the Local Law Standards and the DTMR Manual.

- The Council's traffic engineer calculated an appropriate minimum dwell time of 10 seconds using a formula in the Austroads Guide to Traffic Management. The formula aims to limit the number of message changes that drivers are exposed to and provides that ideally the proportion of drivers (**PD**) should be less than one. A minimum dwell time of 10 seconds for the north facing panel yields a PD of 0.77.

Court finds that a minimum dwell time of 25 seconds for the south facing panel will appropriately maintain road safety

The Applicant contended that the minimum dwell time for the south facing panel should be maintained at 25 seconds (at [5]).The Council contended that it should be maintained at 200 seconds between the hours of 7:00 am to 9:00 am and 2:30 pm to 6:30 pm, and 100 seconds at all other times (at [6]).

The Court considered the proposed minimum dwell times and found that the Applicant's proposed dwell time of 25 seconds would maintain road safety to an acceptable standard given the following (see [36] to [55]):

- The Local Law Standards applicable to the Proposed Device provide for a minimum dwell time of 8 seconds.
- The DTMR Manual provides for a minimum dwell time of 10 seconds.
- The proposed minimum dwell time complies with the minimum dwell time for an electronic advertising device visible from a motorway contemplated by the DTMR Manual.
- A minimum dwell time of 25 seconds for the south facing panel yields a PD of 0.68.

Conclusion

The Court was satisfied that the level of road safety could be maintained to an acceptable standard and ordered that the Proposed Device be approved subject to the conditions proposed by the Applicant (at [56]).

Key points

This Court's decision serves as a reminder to local governments that for Local Laws drafted like the Local Law in this case regard should be had to both the technical standards and guidelines, and expert opinion about what is appropriate in the relevant circumstances.

Thou shall not pass: Statutory easement for drainage purposes is set aside

Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *M Salazar Properties Pty Ltd v Jeffs* [2024] QCA 257 heard before Flanagan JA, Boddice JA, and Kelly J

March 2025

In brief

The case of *M Salazar Properties Pty Ltd v Jeffs* [2024] QCA 257 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) in respect of the decision of the Supreme Court of Queensland (**Supreme Court**) in the case of *M Salazar Properties Pty Ltd v Jeffs* [2024] QSC 9 which imposed, under the statutory right of user provisions in section 180 of the *Property Law Act 1974* (Qld) (**PLA**), an easement for the construction and maintenance of drains for stormwater subject to conditions (**Easement**).

The landowner benefitting from the Easement (**Dominant Tenement Holder**) appealed against some of the Easement conditions imposed by the Supreme Court. The landowner whose land is burdened by the Easement (**Servient Tenement Holder**) cross-appealed against the decision of the Supreme Court, alleging that the Supreme Court erred in making the Easement because it lacked sufficient clarity, in deciding that the Servient Tenement Holder's refusal to agree to the Easement was unreasonable, and in deciding the amount of an award of costs in favour of the Servient Tenement Holder (at [2]).

The Court of Appeal held that the Easement lacked sufficient clarity to enliven the Supreme Court's discretion under section 180 of the PLA to grant a statutory right of user. Thus, the Court of Appeal dismissed the appeal and allowed the cross-appeal.

Background

The Servient Tenement land relevantly fronts Rosemary Street and has rear access to Perdita Street. The Dominant Tenement land also fronts Rosemary Street, but does not have rear access to Perdita Street (at [8]).

The Dominant Tenement Holder purchased the Dominant Tenement land with the intention of carrying out a residential subdivision and understood, based on town planning advice, that to facilitate the subdivision, water drainage would be required to collect stormwater runoff from the additional residences and carry it from Rosemary Street through to Perdita Street (at [9]).

Prior to the proceedings in the Supreme Court, the parties had unsuccessful negotiations about the potential sale of part or all of the Servient Tenement land to facilitate the relevant drainage works (see [10] to [13]). The Dominant Tenement Holder also made six offers of compensation, which were stated to be offers under the PLA, and commenced the Supreme Court proceedings after the third offer (see [14] to [16]). The Supreme Court relevantly held that offers one to five were not reasonable, but that the final sixth offer was reasonable because it was to the effect that it would be on the terms and compensation amount determined by the Supreme Court (at [17]).

Supreme Court errs in its description of the Easement and lacks jurisdiction

The terms of the order sought in the Supreme Court were that the dimensions of the Easement area and proposed drainage would be in the terms and dimensions approved by the Ipswich City Council (**Council**) in a development permit for reconfiguring a lot (at [19]). A draft deed of easement presented to the Servient Tenement Holder as part of offers one to five also included a description of the Easement area to this effect, as well as clauses permitting the Council to require a new agreement or a variation to the agreement to ensure the Easement or its area is suitable for the drainage works (see [22] to [26]).

The Supreme Court held that it would not grant an easement on terms to be determined by the Council because it would lack sufficient clarity (see [40] and [82]). The Supreme Court determined, having regard to evidence from a civil and structural engineering expert as to the possible dimensions of the Easement and offers one to five, that the Easement sought was 27m^2 (see [28] to [31]).

The Dominant Tenement Holder appealed the Supreme Court's order that the Easement be 27m^2 and sought an order changing the description of the Easement to be for an area of no more than the area required for the drainage infrastructure required by the Council (see [53] to [61]).

The Court of Appeal held that the Supreme Court erred in giving the Easement an area of 27m^2, because the Dominant Tenement Holder actually sought the Easement in dimensions to be determined by the Council and it was not for the Supreme Court to alter the proposal (see [30] and [83]).

The Court of Appeal also held the safeguards in sections 180(3), (4), and (6) of the PLA must be met before a Court can interfere with a landowner's rights (at [67]). In particular, those safeguards necessitate that a proposal for an easement has sufficient clarity to enable the Court to "*properly assess the merits of the application*" and "*settle on conditions to accompany the grant*" (at [71]).

The Court of Appeal held that the power of the Supreme Court under section 180 of the PLA cannot be vested in another authority such as the Council, because the legislature intended the power be vested in the Court (at [80]). It is not appropriate for an application to the Supreme Court to be variable at the discretion of a third party, and it would be better for an application to the Supreme Court to be made after the grant of the relevant development approval which can be conditional upon the Court making an order of easement (at [81]).

The Court of Appeal held that the Court's jurisdiction under section 180 of the PLA was not engaged because the Dominant Tenement Holder's application did not include a proposal that the safeguards under section 180 of the PLA could be properly assessed against (at [81]).

The Court of Appeal further rejected an argument by the Dominant Tenement Holder that the Supreme Court should have made an order permitting interference with existing infrastructure on the Servient Tenement land, as required by the Council in its discretion, because it would defer the Court's discretion under section 180 of the PLA to the Council (at [87]).

Supreme Court errs in finding that the final offer was reasonable

The Supreme Court held that the Dominant Tenement Holder's final sixth offer was reasonable because it was restricted to an area of 27m^2 and would not "*… cause any significant detriment, loss or harm to the [Servient Tenement Holder]. The infrastructure … to be constructed is mainly underground and not otherwise overly obtrusive. It is not adequately demonstrated that there is a real risk the permanent easement sought would interfere with any future development …*" (at [38]).

The Supreme Court held that in circumstances where the Dominant Tenement Holder was prepared to pay whatever compensation determined by the Supreme Court, the Servient Tenement Holder's refusal was unreasonable in the sense required by section 180(3)(c)(i) of the PLA (at [43]).

The Servient Tenement Holder argued that the Supreme Court erred because it failed to take into account a relevant consideration, being that the terms of the Easement were not sufficiently detailed or were too broad (at [88]). The Court of Appeal agreed that this error was established (at [89]).

The Court of Appeal noted that the Supreme Court's finding that the Easement sought was 27m^2 was an assumption and was not the easement proposed in the offers or by the Dominant Tenement Holder in the proceedings which were based on a future determination by the Council (see [90] to [92]). In those circumstances, the sixth offer was uncertain and it was not unreasonable for it to be refused (at [93]).

Supreme Court errs in determining the amount of costs

The Supreme Court later in the case of *M Salazar Properties Pty Ltd v Jeffs* [2024] QSC 86 made an order that the Dominant Tenement Holder and its director pay the Servient Tenement Holder's costs of the earlier proceedings in the amount of $40,000 (at [49]), which was based upon its findings in the earlier judgment that legal costs properly form part of the compensation payable as a consequence of the imposition of the Easement and a finding that the Dominant Tenement Holder and its director engaged in unreasonably aggressive and bullying conduct associated with the offers and proceedings.

The Dominant Tenement Holder appealed against the award of costs alleging that legal expenses are not costs contemplated by section 180(5)(e) of the PLA (at [97]). The Servient Tenement Holder cross-appealed on the basis that the costs actually incurred by the Servient Tenement Holder was $37,105.38 (at [49]).

The Court of Appeal held that the Servient Tenement Holder's costs were incurred after the commencement of the Supreme Court proceedings and the Court's discretion in respect of costs under section 180(5)(e) of the PLA is wide and unrestricted (see [97] and [98]). The Court of Appeal made an order substituting the Supreme Court's award of $40,000 with $37,105.38 (at [96]).

If the Supreme Court had decided to award costs in favour of the Servient Tenement Holder on an indemnity basis rather than fixing costs, the Court of Appeal noted that it would have considered it appropriate because the Dominant Tenement Holder's proposals were uncertain and thus incapable of succeeding and the conduct of the Dominant Tenement Holder and its director, which the Supreme Court held demonstrated "*… an entitled and bullying attitude … which persisted even at trial*", warranted costs on an indemnity basis (see [99] to [111]).

The Court of Appeal noted that section 180 of the PLA contemplates that there will be some animosity between an applicant and respondent but that does not mean an applicant has "free rein" in relation to an applicant's conduct when seeking an easement (at [111]).

Conclusion

The Court of Appeal, having found that the easement proposed by the Dominant Tenement Holder lacked clarity, made orders dismissing the Dominant Tenement Holder's appeal and allowing the Servient Tenement Holder's cross-appeal thereby setting aside the Easement. The Dominant Tenement Holder was ordered to pay the Servient Tenement Holder's costs of the cross-appeal (at [113]).

The Court of Appeal also made orders in relation to applications to adduce further evidence but these were not substantive in the Court of Appeal's reasons.

Key points

Litigants are reminded of the following important considerations in proceedings under the statutory right of user provisions:

- A proposal for a statutory right of user is to be sufficiently described so as to enable the Court to assess its merits according to the provisions of section 180 of the PLA. A proposal which defers to or is able to be varied by a third party authority is unlikely to be sufficiently described.
- The applicant for a statutory right of user bears the onus of presenting its proposal, and the Court's power under the provisions does not include the power to redescribe the proposal if it lacks clarity.
- That a development approval is yet to be obtained is not a bar to the imposition of a statutory right of user, so long as it is sufficiently described. However, the Court of Appeal's judgment in this case encourages applicants to obtain any relevant approval prior to making an application to the Court under the statutory right of user provisions.
- The Court has a wide and unrestricted power under section 180(5) to make orders as to costs, which includes the costs of the legal proceedings relating to the application for a statutory right of user.
- Applicants who engage in entitled and bullying behaviour when dealing with a potential servient tenement holder may open themselves up to indemnity cost orders.

Colin Biggers & Paisley

On the road again: A condition imposing a levy for maintenance works is unlawful but a maintenance regime is reasonable

Erin Schipp | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors (No. 3)* [2024] QPEC 52 heard before Cash DCJ

March 2025

In brief

The case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors (No. 3)* [2024] QPEC 52 concerned an appeal to the Planning and Environment Court (**Court**) in respect of conditions to be imposed on a development approval to be given by the Sunshine Coast Regional Council (**Council**) relating to the maintenance of a haulage route which will primarily be used by heavy trucks in the transport of rock from a quarry in Yandina Creek, Queensland (**Quarry**) owned by Parklands Blue Metal Pty Ltd (**Applicant**).

The Quarry is accessible by a haulage route just under five kilometres long, largely unsealed, and subject to flooding in various places (**Haulage Route**). The Haulage Route is to be conditioned to undergo construction works by the Applicant, at no cost to the Council, with the sections affected by flooding to be concreted (at [18]). The minimum design life for the Haulage Route after construction works is 50 years for the concrete section and 20 years for the rest of the route (at [18]).

The Council contended that the Applicant, as the Quarry operator, should be responsible for a detailed maintenance regime for the Haulage Route imposed by way of conditions on the development approval (at [2]). The Applicant contended that the development approval should instead include a condition for the Applicant to pay a levy to the Council for the costs of the Council maintaining the Haulage Route (at [3]).

The Court decided that the levy of the type proposed by the Applicant is not lawful and agreed that a maintenance regime should be implemented through the amended conditions package proposed by the Council (see [123] and [124]).

The Court made orders to the effect that the Council is to make a conditions package consistent with the Court's reasons and for the Court to complete the hearing and decide the proceeding (at [132]).

Background

The parties have been involved in legal proceedings in respect of the proposed development since 2011.

In May 2014, the Court in the case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* [2014] QPEC 24; (2014) QPELR 479 allowed an appeal against the Council's refusal of the development application made under the repealed *Integrated Planning Act 1997* (Qld) (**IPA**) for the development approval and adjourned the matter to enable conditions to be formulated in accordance with the Court's reasons. The Queensland Court of Appeal in the case of *Sunshine Coast Regional Council v Parklands Blue Metal Pty Ltd* [2015] QCA 91; (2015) 208 LGERA 199 refused the Council's application for leave to appeal against the Court's decision.

In June 2017, the Court in the case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 35; [2017] QPELR 809 considered conditions that were in dispute between the parties and made orders that conditions be imposed as agreed between the parties during the proceedings.

The parties did not give effect to the conditions and in December 2022 the Court in the case of *Sunshine Coast Regional Council v Parklands Blue Metal & Ors* [2024] QPEC 3 considered an application seeking declarations that the legislative planning regime applicable to the development application, any future infrastructure agreement, the June 2017 appeal, and any development approval was the IPA or the repealed *Sustainable Planning Act 2009* (Qld) and not the *Planning Act 2016* (Qld) (**Planning Act**). The Court dismissed the application because there was no support for finding that a prospective development approval would not be given or made under the Planning Act or that the Planning Act would not apply to any such approval.

The Court's decision in December 2022 was the subject of our May 2024 article.

In September 2024, the Court heard from the parties in respect of a dispute about the conditions relating to the maintenance of the Haulage Route.

Issues

The Court considered the following two questions and three sub-issues in respect of the conditions relating to the maintenance of the Haulage Route (see [5] and [7]):

- Can the levy proposed by the Applicant be lawfully imposed?
- What should be the Applicant's responsibility for the routine maintenance of the Haulage Route?
- Is the Applicant prevented from arguing that a levy is the appropriate mechanism?
- If a levy could be lawfully imposed, should it be?
- Is the Council prevented from arguing that it should not be responsible for the routine maintenance of the Haulage Route?

Court determined that a levy cannot be lawfully imposed

The Court noted that if there was a power to impose a levy as a condition on the development approval, it would be found in the following provisions of the IPA (at [34]):

> ***3.5.30 Conditions must be relevant or reasonable***
>
> *(1) A condition must—*
>
> *(a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or*
>
> *(b) be reasonably required in respect of the development or use of premises as a consequence of the development.*
>
> *...*
>
> ***3.5.32 Conditions that can not be imposed***
>
> *(1) A condition must not—*
>
> *...*
>
> *(b) for infrastructure to which chapter 5, part 1 applies, require (other than under chapter 5, part 1)—*
>
> *(i) a monetary payment for the establishment, operating and maintenance of costs infrastructure; or*
>
> *(ii) works to be carried out for the infrastructure; or*
>
> *...*
>
> ***5.1.2 Conditions local governments may impose for non-trunk infrastructure***
>
> *(1) If a local government imposes a condition about non-trunk infrastructure, the condition may only be for supplying infrastructure for 1 or more of the following—*
>
> *(a) networks internal to the premises;*
>
> *(b) connecting the premises to external infrastructure networks;*
>
> *(c) protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.*
>
> *(2) The condition must state—*
>
> *(a) the infrastructure to be supplied; and*
>
> *(b) when the infrastructure must be supplied.*

When determining whether a levy could be lawful, the Court noted that the context of the above IPA sections should be considered in "*its widest context*" with regard to be had to the "*apparent purpose of the legislation*" (at [34]).

The Court noted that it was common ground that the Haulage Route was not trunk infrastructure and therefore "non-trunk infrastructure" (at [35]).

The Court accepted the Council's submission that section 5.1.2 of the IPA should be given its ordinary meaning, being that it permits a condition in relation to non-trunk infrastructure only where it is for "supplying infrastructure" (see [36] to [37]). The Court noted that section 5.1.2 of the IPA is "*unambiguous*" as it "*… envisaged an arrangement for the provision of the infrastructure itself, rather than a payment to defray the costs of the infrastructure*" (at [38]).

The Court noted that there is a distinct difference between the treatment of trunk infrastructure and non-trunk infrastructure in Chapter 5, Part 1 of the IPA (at [39]). Further, the Court noted that it was "*no accident*" that there was no express power to require a monetary contribution in section 5.1.2 of the IPA (at [40]). As a condition of the type proposed by the Applicant is not contemplated in section 5.1.2 of the IPA, it would be a prohibited condition under the section 3.5.32(1)(b) of the IPA (at 40]).

The Court concluded that the provisions of the IPA set out above "*… cannot be read as providing a power for a local government to impose a monetary contribution for non-trunk infrastructure merely because it would be convenient*" (at [43]).

Court determined that the Applicant is responsible for the maintenance of the Haulage Route

Section 3.5.32 of the IPA does not permit a condition requiring works to be carried out for infrastructure, other than as permitted by Chapter 5, Part 1 of the IPA. Section 5.1.2 of the IPA permits a condition about non-trunk infrastructure for "*… protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component*". As the conditions proposed by the Council were for works for the purpose of maintaining the safety and efficiency of the Haulage Route network, the Court noted that such conditions can be lawfully imposed (see [48] to [49]).

The Court considered the nature and extent of the Applicant's responsibility for maintaining the Haulage Route, noting that section 3.5.30 of the IPA required a condition to be relevant to, and not unreasonable imposition on, the development (at [51]). The Court considered the principles to be "*kept in mind*" when applying section 3.5.30 of the IPA summarised in the case of *Waverley Road Developments Pty Ltd v Gold Coast City Council* [2011] QPEC 59; [2011] QPELR 649 (at [51]).

The Court noted that the power to impose conditions is subject to a "*broad residual discretion*" which must be "*exercised for a proper planning purpose*" (at [52]). The Court determined that the Applicant's responsibility for the maintenance of the Haulage Route is to follow the Council's maintenance regime, which is generally relevant to, and not an unreasonable imposition on, the development (at [126]).

Even if a levy could lawfully be imposed, the Court would not impose the levy proposed

In a joint expert report prepared in 2018 (**2018 JER**), experts for the Council and Applicant agreed that a levy for the Haulage Route could be calculated (at [55]). The Court held concern about the appropriateness of relying on the 2018 JER citing the age of the report, index method, Council's assumptions, and errors in the 2018 JER (at [59]). Whilst it was proposed that the 2018 JER could be updated, the Court had "*… little confidence that a levy could be calculated to properly reflect the actual costs to the Council for maintaining the [H]aulage [R]oute …*" (at [68]).

The Court noted that the Applicant proposed options for a levy, which the Court found to be "*not conducive*" to the goal of litigation which is to finally determine disputes between parties (at [66]). Even if the Court concluded that it was lawful to impose a levy condition, it would not have adopted the Applicant's proposal (at [68]).

Court determined that the Council's proposed maintenance regime should be imposed

The Council proposed a comprehensive suite of conditions for the maintenance regime of the Haulage Route (at [69]). The Court noted that it was "*unsurprising*" that the experts agreed that a bespoke maintenance regime was appropriate, given that the Haulage Route was subject to flooding and used to transport heavy trucks (at [72]). The Court considered that conditions were appropriate and "*… there are good planning reasons for ensuring the road is not rendered inoperable by damage caused by quarry trucks*" (at [73]).

The Council argued that the Applicant would be the "*real and almost sole beneficiary*" of the Haulage Route when the Quarry is operating, estimating that almost all of the traffic on the Haulage Route will be quarry trucks (at [76]).

The Applicant argued that under section 60 of the *Local Government Act 2009* (Qld) (**LGA**), the Council has control of roads in its local government area (at [80]). The Court noted that section 60 of the LGA is "*… arguably facilitative, rather than mandatory*" and does not contradict the Court's conclusion about the power to impose a condition requiring the maintenance of non-trunk infrastructure under the IPA, as "*put plainly*" an ability conferred by one statute, does not imply a condition in another statute invalid (at [80]).

Section 265 of the LGA provides that material from which a road is constructed is the property of a local government, even if the road is constructed by a developer by way of condition. The Court noted that section 265 of the LGA "*… makes it clear that a developer cannot assert property over the construction materials …*" and "*[i]t does not mean that a local government must be solely responsible for the maintenance of the road*" (at [81]).

The Applicant argued that "*complexities and complications*" would arise in the event of a claim in negligence arising from some defect in the pavement of the Haulage Route due to the liability of the Council and Applicant (at [82]). The Court noted that "*[a] claim against two defendants may be more complex …*" but the solution is found in the ordinary application of the law, being that the liability would be determined and apportioned, where appropriate, between defendants and cited that this is not a reasoned basis for concluding that the Council's maintenance regime is an unreasonable imposition (see [83] and [85]).

The Court determined that the Applicant should be responsible for maintaining the Haulage Route for the life of the Quarry (at [87]).

Court determined that the Council is not responsible for "routine maintenance"

The Court considered this issue in the context of the Council's proposed conditions (at [89]).

Proposed conditions 38 and 59 read together require the Applicant to maintain the Haulage Route free of potholes and pavement defects, with routine maintenance every six months and set timeframes to address potholes and drain issues (see [90] and [91]). The Court agreed with the experts that "*timely repair*" is important to maintain the Haulage Route in good condition, finding that the conditions are "reasonable and relevant" as required by section 3.5.30 of the IPA (see [96] to [97]). The Court noted that there was potential difficulty with the proposed conditions if a development permit for operational work was required each time the Applicant were to carry out the routine maintenance works (at [98]).

In February 2025 in the case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors (No. 4)* [2025] QPEC 2, the Court determined that there was a remote possibility that the routine maintenance works could be categorised as "*operational work*" requiring a development approval. The Court concluded that this remote possibility was not an unreasonable burden on the development.

Proposed condition 60 includes a program for the resurfacing, rehabilitation, or reconstruction of the pavement which includes reporting requirements (at [100]). The Applicant contended that this condition was confusing and unnecessary, while the Court noted that it "*… is perhaps not a model of lucid drafting*" the condition is not unnecessary (at [102]). The Court held reservations about the use of the word "*investigate*" in the condition and suggested the word be removed as it is "*superfluous*" in the context of the other conditions (at [104]).

The Court determined condition 60(c) to be unnecessary as it requires the Applicant to install a "weight in motion" monitoring device, which would be in addition to the requirement for a weighbridge imposed by a separate condition (at [105]).

Proposed conditions 60 to 67 are about monitoring, and where necessary, resurfacing, rehabilitating, or reconstructing the pavement with a requirement for advice from a geotechnical engineer to be obtained (at [107]). There was concern that the drafting of these conditions could trigger the requirement for advice from a geotechnical engineer even for routine maintenance, but the Court determined that it is only appropriate where a significant defect has been detected (at [107]). The Court accepted the Applicant's proposal to insert words to the effect that a geotechnical engineer is required if considered necessary by the inspecting engineer or pavement designer (at [108]).

Proposed condition 61, which relates to a proposed timeframe for rectification works, was considered by the Court to be "*too rigid*" and required amending to clarify the Council's position (at [111]).

Proposed condition 65 requires any repair, resurfacing, rehabilitation or replacement, or construction work to be designed, supervised, and certified by a registered engineer (at [113]). The Court determined that given the nature of the Haulage Route, this is not an irrelevant or unreasonable imposition on the development (at [114]).

Proposed condition 51 sets out the requirements to upgrade a section of the Haulage Route (at [115]). Condition 51(b) set out the minimum design life of the Haulage Route, which requires "*consideration of the scope of geotechnical testing …*" (at [115]). The Court noted that this wording "*may be a little imprecise*" but it is still sufficient to convey the effect of the condition and is not an unreasonable imposition on the development (at [119]).

Conclusion

A levy for the maintenance of the Haulage Route as proposed by the Applicant cannot lawfully be imposed. The Court ordered the Council to prepare a conditions package consistent with the reasons provided by the Court.

Key points

In this case a condition under the repealed IPA cannot include a condition requiring the payment of a levy for the maintenance of non-trunk infrastructure.

No error of law, no leave to appeal: Application for leave to appeal against decision to approve multi-storey mixed-use development is refused with costs

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *McEnearney v Council of the City of Gold Coast* [2024] QCA 246 heard before Bond JA, Flanagan JA, and Boddice JA

March 2025

In brief

The case of *McEnearney v Council of the City of Gold Coast* [2024] QCA 246 concerned an application brought by a Submitter seeking leave to appeal to the Queensland Court of Appeal (**Court**) against the decision of the Planning and Environment Court (**P&E Court**) in the case of *McEnearney v Council of the City of Gold Coast & Anor* [2024] QPEC 32, which confirmed the decision of the Council of the City of Gold Coast (**Council**) to approve a change application made by a developer (**Applicant**) for a development permit for a material change of use for a mixed-use development at 3 Rutledge Street, 2-18 Marine Parade, and 119 Musgrave Street in Coolangatta (**Proposed Development**).

The Submitter relied on the following four grounds of appeal (at [10]):

> *(1) The primary judge erred in treating an existing development approval (for building heights not anticipated) by the Planning Scheme to offer a means for further exacerbation of such heights [**Ground 1**].*
>
> *(2) The primary judge erred in [**Ground 2**]:*
>
> *(i) not giving effect to s 3.3.2.1(10) of the Strategic Framework as placing a strict control as to maximum building height;*
>
> *(ii) treating the assessment of the proposed building height as governed by s 3.3.2.1(9) (and without finding each and every outcome of that provision was satisfied).*
>
> *(3) The primary judge erred in permitting the achievement of building heights by incremental approval and change which could not lawfully have been achieved directly [**Ground 3**].*
>
> *(4) The primary judge erred in failing to give effect to community expectations as expressed in objections by reason of the development approval, such approval affording no proper basis in law to render unreasonable the expectations the community has expressed [**Ground 4**].*

The Court found that the Submitter had failed, on all grounds, to establish an arguable error of law. The application for leave to appeal was refused with costs (at [11]).

Background

The Council first gave a development approval for the Proposed Development on 4 April 2014 (**Development Approval**). The Proposed Development comprises a multi-storey mixed use development comprising of apartments, a resort hotel, a tavern, a shopping centre, and service industry uses. The Development Approval authorised the construction of four Buildings in four stages, with the tallest being 16 storeys in height.

On 17 March 2022, the Applicant made an application to the Council for a non-minor change to the Development Approval (**Change Application**). The proposed changes included, among other things, architectural changes to two of the proposed buildings resulting in building height increases of 11.2 metres (from 10 to 14 storeys) and 5.1 metres (from four to seven storeys) to each building respectively (see [3] to [5]).

The Change Application was approved by the Council on 15 June 2023 and the Council's decision was confirmed by the P&E Court on 21 June 2024 (see [7] to [8]).

The Submitter applied to the Court for leave to appeal against the decision of the P&E Court. The Court had to decide, pursuant to section 63 of the *Planning and Environment Court Act 2016* (Qld), whether the Submitter demonstrated that there was an error or mistake in law and whether the error was material in that it could have materially affected the decision of the P&E Court (at [9]).

Court finds that the Submitter fails on Grounds 1, 2, and 3

Grounds 1, 2, and 3, which relate to an alleged failure to construe and apply strict control on the building height of the Proposed Development, were dealt with together by the Court (at [25]).

Sections 3.3.2.1 (8), (9), and (10) of the Strategic Framework in the *Gold Coast Planning Scheme 2003* (**Planning Scheme**) impose restrictions on building heights in accordance with the Building height overlay map (**Building Height Assessment Benchmarks**). The Proposed Development in both its original and changed form does not comply with the 15-metre or three-storey limit required by the Building Height Assessment Benchmarks.

The Submitter argued that the primary judge erred in "*… excusing the exceedance in height by reference to the Development Approval granted under the Gold Coast Planning Scheme 2003 (Qld)*", being the version of the Planning Scheme in force at the time the Development Approval was granted (at [26]). According to the Submitter, allowing the Change Application meant allowing an incremental Development Approval to "*… circumvent strict building height controls*" (at [26]).

Whilst the Applicant accepted that the primary judge had to have regard to the Development Approval, which had already authorised the construction of a 16-storey building and informed the current character of the site (at [18]), the Submitter argued that "*… [the Development Approval] could not in itself '[afford] positive support for approving more height exceedances*'" (at [27]).

The Court found that the Submitter fell short of establishing the alleged errors stipulated in Grounds 1 to 3 for two primary reasons.

Firstly, pursuant to section 82(4)(d) of the *Planning Act 2016* (Qld) (**Planning Act**), the primary judge was entitled to consider a variety of factors in assessing the Change Application, including "*… any development approval for, and any lawful use of, the premises or adjacent premises …*" (at [31]).

Secondly, the Court also found that "*… the Applicant's submission that section 3.3.2.1(10) should be construed as imposing a 'strict building height control' is contrary to authority*" (at [36]). The Court referred to the cases of *Abeleda v Brisbane City Council* [2020] QCA 257; (2020) 6 QR 441 and *Ashvan Investments Units Trust v Brisbane City Council* [2019] QPEC 16; [2019] QPELR 793, which make clear that non-compliance with an assessment benchmark does not automatically warrant refusal (see [36] to [37]).

Whilst the Court noted that the primary judge failed to strictly engage with some aspects of the Building Height Assessment Benchmarks, the Court ultimately found that the discretion afforded by section 60(3) of the Planning Act is broad (see [38] and [39]). The Court held that the primary judge was entitled to "*… determine how, and in what way, non-compliance with [the Building Height Assessment Benchmarks] informed the exercise of the wide discretion*" (at [38]).

Court finds that the Submitter fails on Ground 4

The Submitter's fourth ground of appeal related to an alleged failing to give effect to community expectations as expressed in the 39 properly made submissions objecting to the Proposed Development (at 42]).

The primary judge was conscious of the submissions objecting to the Proposed Development, however found that they "*… do not establish a reasonable expectation about the nature of the built form on the Site against which the Change Application should be considered*" (at [43]).

The Submitter argued that the primary judge elevated the Development Approval to a status which it did not warrant and allowed it to displace community expectations as to height (at [44]).

The Court did not accept the Submitter's position and ultimately found that "*… it has long been recognised … that the reasonable expectations for the community are informed not only by the adopted planning controls, but also by what exists on the ground*" (at [45]). The Court further noted that in this case, what exists on the ground was the already constructed 16-storey building forming part of the Proposed Development.

Conclusion

The Court found that no arguable error of law had been established by the Submitter. The application for leave to appeal was refused with costs.

Costs application

The Applicant later applied to the P&E Court seeking an order that the Submitter pay the Applicant's costs of the P&E Court appeal (**Application for Costs**).

The Application for Costs, which was considered in the case of *McEnearney v Council of the City of Gold Coast & Anor (No. 2)* [2025] QPEC 3, was unsuccessful as the proceedings were not found to be frivolous or vexatious, and thus the application was dismissed.

Key points

The Court's decision in this case highlights the following important considerations for those seeking leave to appeal a decision of the P&E Court:

- The Court's discretion under section 60 of the Planning Act is broad and an error in law may not be established simply because the primary judge may have exercised its discretion by placing less weight on a non-compliance and more weight on other factors relevant to the broader context of the proposed development.
- A jurisdictional error, or an indisputable error or mistake in law which materially affected the decision of the Court, must clearly be established in order for leave to be granted.

Site amalgamations and lot consolidations: Valuation evidence and reasonable offers

Thomas Condon | Mollie Hunt | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Modern Development Pty Ltd v Cumberland Council* [2025] NSWLEC 1070 heard before Porter C

March 2025

In brief

The decision of the Land and Environment Court of New South Wales in *Modern Development Pty Ltd v Cumberland Council* [2025] NSWLEC 1070 delivered on 11 February 2025 provides helpful insight into site amalgamation clauses and in particular, what is necessary to satisfy the Court that a "reasonable offer" has been made to consolidate with surrounding properties.

Modern Development Pty Ltd v Cumberland Council [2025] NSWLEC 1070 was a Class 1 appeal to the Land and Environment Court of New South Wales (**Court**) against the Cumberland Council's refusal of a development application for a child care facility at 12 Florence Street, South Wentworthville.

The Court at [48] held that the site consolidation controls of the *Cumberland Development Control Plan 2021* (**CDCP**) Part F4 – Finlayson Transitway Precinct, were applicable. This included a requirement in the CDCP to amalgamate the site with adjoining properties.

The Court held at [54] and [59] that the applicant's proposed variations to the site consolidation plan in the CDCP were not supported by attempts to "*genuinely engage in the alternate amalgamation process provided by the CDCP*". This was because the Court found that the applicant's offers made to purchase the adjoining properties were inadequate.

Furthermore, the Court was not satisfied that the application would result in the remaining sites being able to achieve the development outcomes sought in the CDCP without the consolidation required by the CDCP.

As a result, the Court refused the development application.

The requirement to make a "reasonable offer"

The development site was identified in Figure 13 of the CDCP as requiring consolidation with other properties for redevelopment.

The CDCP Part F4 at section 4.2 set out the objectives and controls for site consolidation, and also recognised that in some circumstances this cannot be achieved. Control C3 set out what was necessary in those circumstances:

> *C3. In instances where amalgamation cannot be achieved, the following information must be submitted with any development application:*
>
> - *two written valuations indicating the value of the remaining sites that were to be developed in conjunction with the applicants properties. These are to be undertaken by two independent valuers registered with the Australian Valuers Institute, and;*
> - *evidence that a **reasonable offer** has been made to the owner(s) of the affected sites to purchase and valuation reports.* (emphasis added)

In terms of the offer that had been made, the judgment notes the following steps that were taken:

- Prior to 2024, an offer had been made by the applicant, but was not accompanied by a valuation report. The phone number supplied by the applicant in that correspondence was the architect's number. When the owner of 10 Florence Street called the architect, the contact details of the person who made the offer were refused. The Court at [58] noted that this was "unorthodox" and indicative of "*an unwillingness from 12 Florence Street* [the applicant] *to reasonably engage in the process*".
- Undated, unsigned offers were made by the applicant to the relevant surrounding property owners of 8, 10, and 14 Florence Street in approximately mid-February 2024.
- Valuation reports were attached to the offers.
- No response was received by the applicant to the offers made to the owners of 8 and 14 Florence Street. The owner of 10 Florence Street refused the offer on 18 February 2024.

- An amended valuation report with more comparable sales was prepared for 10 Florence Street in June 2024. However, the Court found at [54] that "*on its own, the amended valuation report is of little assistance. The intended recipient (the adjoining landowner) did not receive the amended valuation report with a letter of offer and lacks the benefit of the evidence that the offer made has been based on market value*".

In considering whether the above steps comprised "*evidence that a **reasonable offer** has been made*", the Court held at [53] that as the valuation reports accompanying the offers were flawed, reasonable offers had not been made.

In that regard, the Court noted that the parties' planners had agreed that the valuation reports "*did not consider the properties as development sites*", and the Court found at [53] that "*the sites relied on were not comparable in terms of zoning, permissibility, height and FSR.*"

By failing to make reasonable offers to the adjoining landowners, the Court found that control C3 of section 4.2 of the CDCP was not met.

Impact on the redevelopment potential of remaining sites

Another aspect of the alternate amalgamation process outlined at controls C3-C6 of section 4.2 of the CDCP was that the applicant needed to demonstrate that despite not amalgamating according to the CDCP, that the redevelopment potential of those adjoining sites would not be prejudiced:

> *C4. Alternative consolidation patterns may be considered by Council if it can be demonstrated that development controls can be satisfied on the land and adjoining properties.*
>
> *C5. Where amalgamation (as required) is not achieved, the applicants must show that the remaining sites, which are not included in the consolidation, will still be able to achieve the development outcome prescribed in this DCP, including achieving the required vehicular access, basement parking and built form.*
>
> *C6. Sites must not be left such that they are physically unable to develop in accordance with the prescribed built form outcomes outlined in this DCP.*

The Court at [62]-[63] held that the applicant's concept plans were sufficiently detailed for the purpose of addressing controls C4-C6, but that these plans did not "*demonstrate that the remaining sites can achieve the development outcomes sought in the CDCP.*"

The Court's reasons for this conclusion included the following issues applying to 1 or more of the remaining properties: insufficient minimum frontage, vehicular access, basement parking, and that the built form shown on the concept diagrams was not achievable without varying other key development outcomes sought by the CDCP.

At [69] the Court noted that concept plans for the proposed development appear to be "*alien in their built form*" as opposed to the continuity sought by the CDCP, and further at [70] that the "*likely impacts of the development would unreasonably reduce the redevelopment potential of adjoining sites and result in built forms that are inconsistent with the desired streetscape.*"

Finally, the Court at [73]-[75] found that the variations to the site consolidation plan sought by the applicant were "*not supported by genuine attempts to consolidate*", such that flexibility was not warranted pursuant to controls C4-C6 of section 4.2 of the CDCP, and that the development application should be refused.

Conclusion

This judgment underscores the critical importance of prioritising robust valuation reports to underpin the making of a "reasonable offer", if that is what is required by applicable lot consolidation provisions. Tokenistic offers underpinned by flawed valuations may well lead to the refusal of a development application where these provisions are sought to be invoked.

Mere refusal to sell by the existing landowners will not necessarily lead to a conclusion that amalgamation cannot be achieved if the offers to those landowners were not "reasonable", either in relation to the sum offered, or the supporting methodology underpinning the offer.

Even where a reasonable offer has been made, applicants may also need to ensure that an appropriate level of detail is given explaining how the remaining sites will still be able to achieve the required development outcome set out in the relevant controls.

It is prudent to front-end proper preparation of valuation reports and offers, and then documenting the process of negotiations with the owners of adjoining properties. Well-reasoned explanations as to how the development outcome for those sites can occur, if amalgamation does not occur also needs to be carefully considered. It can be a false economy to avoid investing work on these issues at the early stage.

Where lot consolidation provisions appear in Local Environmental Plans as preconditions to the grant of consent (as opposed to a DCP as was the situation in this case) and no alternate process is provided in the clause where consolidation cannot be achieved, this judgment reinforces the importance for applicants to ensure that the steps taken to attempt consolidation are robust in order to support a clause 4.6 request to vary the development standard (see for example the new Part 8 of the *Hornsby Local Environmental Plan 2013* inserted by the Chapter 5 – Transport Oriented Development of the *State Environmental Planning Policy (Housing) 2021*).

Game-changer: No guarantee later stages will proceed results in a finding that a change is not a minor change

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Ausco Modular Pty Ltd v Western Downs Regional Council* [2025] QPEC 1 heard before Kefford DCJ

April 2025

In brief

The case of *Ausco Modular Pty Ltd v Western Downs Regional Council* [2025] QPEC 1 concerned an application by Ausco Modular Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) to change (**Change Application**) a development permit for a material change of use for an undefined use (non-resident workforce accommodation) (**Development Approval**) to introduce staging. The Development Approval attaches to land at 184 Zeller Street, Chinchilla (**Subject Site**).

The Western Downs Regional Council (**Council**) did not oppose the Change Application (at [2]). However, the Court determined that the introduction of staging to the Development Approval does not constitute a minor change in this case because there was no assurance that the proposed later stages will proceed and if a later stage did not proceed the use of the Subject Site would not operate as intended thereby resulting in substantially different development (see [47] and [48]).

The Court dismissed the Change Application on the basis that the change sought is not a minor change (at [56]).

Background

The Applicant operates Stayover Chinchilla on the Subject Site. The Development Approval authorises development comprising 1,000 rooms, six laundry units, and 11 combined laundry and storeroom units to be delivered in one stage (see [1] and [3]).

The Applicant sought the following changes to the Development Approval:

- The introduction of the following stages (at [4]):
    - *(a) Stage One: 1000 rooms, six laundry units and 11 combined laundry and storeroom units (reflecting what presently exists on the [Subject Site]);*
    - *(b) Stage Two: 856 rooms, three laundry units and 11 combined laundry and storeroom units (which involves the removal of 144 rooms – but not the infrastructure supporting them – on a temporary basis); and*
    - *(c) Stage Three: 1000 rooms, six laundry units and 11 combined laundry and storeroom units (thereby, returning the full complement of 1,000 rooms as approved).*
- The insertion of a condition which makes it clear that the conditions apply to each stage of the development unless otherwise specified.
- The insertion of conditions that apply to Stage 2 and Stage 3 only which require evidence of plumbing and building approvals and inspections associated with the removal and re-introduction of rooms.

In this case, whether the proposed changes to the Development Approval constitute a "minor change" as defined in schedule 2 (Dictionary) of the *Planning Act 2016* (Qld) (**Planning Act**) depends on whether the proposed changes would result in substantially different development (see [9] to [13]). The *Development Assessment Rules* (**DA Rules**) referred to in section 68 of the Planning Act provide guidance in respect of what may result in substantially different development, but the question is one of fact and degree to be considered broadly and fairly in the circumstances of each case (see [14] and [15]). Whilst there is no legislative requirement to consider the DA Rules, the Court taking a purposive approach considered it appropriate to have regard to them (at [15]).

Court finds that the Change Application would result in substantially different development

The Court referred to the case of *Thomco (No. 2087) Pty Ltd v Noosa Shire Council* [2020] QPEC 8; [2020] QPELR 1113 and agreed, in particular, with the following observations of His Honour Judge Rackemann at 116-7 (at [21]):

> *[16] A comparison between pre and post change development scenarios often involves considering the whole of the development authorised by the existing approval and proposed to be authorised by the changed approval. That is because approvals will often be for a particular form of development to occur as a whole at the one time and will not authorise development of parts of a proposal at different times, in a piecemeal way. Where however, approvals permit development to occur in stages, the comparison becomes more complex, because such approvals may generally be acted upon to carry out:*
>
> *(i) the whole of the development at the one time;*
>
> *(ii) different parts of the development in different stages at different times, or*
>
> *(iii) one or some stages of development irrespective of whether the approval is acted upon to develop any subsequent stages.*
>
> *[17] Unsurprisingly, given the third of those possibilities, approvals which permit development to occur in stages often require important components, works or other matters to be incorporated into, or provided prior to, or in conjunction with, the first stage. That ensures that those things are provided if the approval is acted upon ...*

The Court also identified that in the case of *Ausco Modular Pty Ltd v Western Downs Regional Council & Anor* [2017] QPEC 58; [2018] QPELR 80, the need for 1,000 rooms to avoid adverse effects on the community from unanswered demand was an important consideration in favour of approval. Thus, the reinstatement of the rooms to 1,000 as part of proposed Stage 3 is critical to the accommodation operating as intended (at [46]).

The Court held that the evidence relied upon by the Applicant neither addressed the valid concerns in respect of introducing staging to the Development Approval nor considered the operational consequences should Stage 3 not proceed (see [22] and [47]).

The Court therefore found that the Applicant had not demonstrated that the proposed changes do not result in substantially different development (at [53]).

Conclusion

The Court dismissed the Change Application on the basis that the change sought did not constitute a minor change (at [56]).

Key points

The Court's decision highlights that the operational consequences of a change to a development approval are relevant to whether a change is minor or not. Here, the operational consequence was that the final stage may not be delivered meaning that the development may not operate as intended, being as a 1,000 room non-resident workforce accommodation facility.

Overtaken by events: Self-storage facility approved for predominately low residential area

Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *ML Parkway Pty Ltd v Townsville City Council* [2024] QPEC 53 heard before Williamson KC DCJ

April 2025

In brief

The case of *ML Parkway Pty Ltd v Townsville City Council* [2024] QPEC 53 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Townsville City Council (**Council**) to refuse a development application for a development permit for a material change of use to facilitate a modern self-storage facility comprising a site office and 135 self-storage units on land in the low density residential zone.

The Council's reasons for refusal relevantly included that the proposed development is inconsistent with the character and amenity outcomes and land use intentions for the zone and there are relevant matters which support a refusal of the development application (at [48]).

The proposed development is low rise, is consistent with local streetscape character, will not alter the character of the residential neighbourhood, will not result in adverse visual impacts, and is compatible with the local character and amenity (at [69]).

The Court was satisfied that there are sufficient reasons, including relevant matters, in support of approval of the proposed development, despite it being a non-residential use in a residential zone that will serve more than the day-to-day needs of the immediate residential community contrary to the planning strategy for the low density residential zone in the *Townsville City Plan* (version 2022/01) (**Planning Scheme**). The Court considered that the Low Density Residential Zone Code in the Planning Scheme (**Zone Code**) has been overtaken by events because the Council has given development approvals for a number of non-residential uses in the area which have greater character and amenity impacts than the proposed development (at [12]).

The Court approved the development application subject to conditions.

Warehouse use is not an industrial use

A precursor to deciding whether to approve or refuse the development application was the correct characterisation of the proposed warehouse use under the Planning Scheme.

The Court rejected submissions that the proposed self-storage facility, which is included as an example of a warehouse use under the Planning Scheme, is an industrial use or industrial in nature for the following reasons:

- The definition of warehouse use explicitly includes self-storage facilities and excludes industrial uses and the proposed use is not captured by the definitions or thresholds for industrial uses in the Planning Scheme (see [18] and [29]).
- The Planning Scheme encourages storage uses in industrial zones, but that does not mean it is an industrial use. Whether a use is an industrial use is a matter of fact and degree (see [30] and [31]). In this case, the nature, kind, and scale of the proposed development is not industrial (at [31]).
- Whilst warehouses may historically be regarded as industrial uses, self-storage facilities "*… are a modern iteration of warehousing … designed to serve, and be attractive, to a range of customers, including residential users*" (at [32]).

Assessment of the proposed development against the relevant assessment benchmarks

The Court observed that the Planning Scheme requires a balancing exercise between protecting character and amenity in the low density residential zone and ensuring communities in the zone are well-serviced, which includes being serviced by non-residential uses but those non-residential uses are not to predominate the zone (see [43], [45], and [133]).

Proposed development complies with character and amenity assessment benchmarks

The Court held that the character and amenity of the locality includes a mixture of non-residential uses that adversely impact on the residential uses near the subject land (at [57]).

The Court was satisfied that the proposed development complies with the assessment benchmarks in the Zone Code relating to character and amenity in that the proposed development maintains residential amenity and is consistent with the local character and local streetscape character (see [48]), [63], and [73]). The proposed development can be conditioned such that there are no adverse "*hard impacts*", being impacts arising from noise, hours of operation, traffic, and privacy. Any visual impact of the proposed development will be limited given its limited visual catchment, multiple built form components, and landscaping screening (see [53], [55], and [69(d)]).

Furthermore, the assessment benchmarks in the Zone Code relating to character and amenity establish a reasonable expectation that the subject land may be developed for a multiple dwelling, residential care facility, or retirement facility with a greater scale and intensity and greater impacts than the proposed development (see [39], [40], and [63(c)]).

Proposed development cannot be accommodated elsewhere

The Court held that there is no vacant land in the nearby centre to accommodate the proposed development and that the evidence does not establish that vacant land in the industrial zone is a more appropriate location than the subject land (see [82], [90], and [117]).

Proposed development is contrary to planning strategy

Overall outcome 3(h) and performance outcome 18 of the Zone Code state that non-residential uses are to primarily support the "*day-to-day*" needs of the immediate residential community and local community respectively.

The Court held that self-storage is not a "*day-to-day*" need of a residential community and in this limited respect there is non-compliance with these assessment benchmarks and that this attracts significant weight in favour of refusal of the development application (see [81], [87], and [95]).

Relevant matters considered by the Court

The Court held as follows in respect of the relevant matters relating to the proposed development:

- Ordinarily non-compliance with a planning scheme strategy will attract significant decisive weight in favour of refusing a development application, but the character and amenity planned for the low density residential zone has in part been overtaken by the Council granting approvals for non-residential development of a scale and appearance that has greater adverse character and amenity impacts than the proposed development and this is a matter in favour of approving the development application (see [97(a)] and [132]).
- That the impact of the proposed development is "*benign*" and the proposed development does not cause adverse character or amenity impacts are matters in favour of approving the development application (see [97(b)] and [97(c)]).
- That the location of the proposed development accords with sound town planning practice and principles in that it involves the co-location of non-residential uses near a local centre, which has benefits of convenience, muti-purpose trips, and containment of impacts, are matters in favour of approving the development application (at [99]).
- That there is an existing shortfall of self-storage facilities in the identified catchment which the proposed development will conveniently meet will enhance community well-being is a matter in favour of approving the development application (see [102] and [103]). The weight to be afforded to this relevant matter is relatively modest in the circumstances because the proposed development is not for "*necessaries of life*" and only a small proportion of the resident population is expected to use the self-storage facility (at [104]).
- That an approval of the proposed development will not result in adverse town planning consequences is a matter in favour of approving the development application (at [142]).
- That an approval will result in a loss of residential land to meet housing supply is not a matter in favour of refusing the development application (at [100]).

The Court also considered properly made submissions but decided that they attract little weight largely because they are premised on the proposed development being an industrial use with industrial impacts (see [126] to [128]).

Conclusion

The Court approved the development application subject to conditions despite the proposed development introducing a non-residential use in a predominately residential area and it serving more than the day-to-day needs of the local community contrary to the relevant assessment benchmarks.

The reasons for the Court's decision included that the development application significantly complies with the relevant assessment benchmarks in all other respects, the proposed development has limited adverse impacts, development conditions can be imposed to ensure that there are no unacceptable amenity impacts, there is a need for the proposed development and its proposed location is convenient, and the Council has departed from the planning strategy in the Zone Code by permitting non-residential uses of a scale and appearance with greater adverse impacts than the proposed development (at [130]).

Key points

The decision is a reminder that decisions to approve development applications that do not comply with the relevant assessment benchmarks in the applicable planning scheme have the potential to undermine the planning strategies in the planning scheme and may enable the Court to make findings in planning appeals that the planning strategies in the planning scheme have been overtaken by events.

Colin Biggers & Paisley

Unlawful use is still unlawful: Appeal against refusal of a development application seeking to regularise existing unlawful use is dismissed

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Nairn & Anor v Brisbane City Council* [2024] QPEC 46 heard before Kefford DCJ

April 2025

In brief

The case of *Nairn & Anor v Brisbane City Council* [2024] QPEC 46 concerned an appeal by the owners of a building construction business (**Applicants**) against the decision of the Brisbane City Council (**Council**) to refuse the Applicants' development application for a development permit for a material change of use to operate a subcontracting construction company and a building company (**Proposed Development**), to regularise the existing unlawful use of the land at 302 Grassdale Road, Gumdale (**Land**).

The Court considered the following key issues (at [19]):

- Is the Proposed Development an appropriate use of the Land?
- Does the Proposed Development involve unacceptable ecology impacts?
- Are there relevant matters relied on by the Applicants under section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) that lend support to approval?
- Should the Proposed Development be approved in the exercise of the Court's discretion?

The Court found that the Applicants failed to establish that the Proposed Development should be approved and dismissed the appeal.

Background

The Land is well vegetated with a rural character (at [29]). The ecological attributes of the Land are consistent with it being included in the Environmental Management Zone under the *Brisbane City Plan 2014* (version 23) (**City Plan**), as well as it being affected by the High Ecological Significance, High Ecological Significance Strategic, Koala Habitat Area, and Matters of State Environmental Significance sub-categories of the Biodiversity Areas Overlay (at [26]).

The Proposed Development involves the indoor storage of building equipment within an existing approved shed, an ancillary, detached office for accounts and business management activities, as well as the periodic storage of containers and vehicles outdoors on the Land (at [55]).

Parties' positions with respect to the land use

The Council argued that the Proposed Development is an inappropriate use of the Land as it is out of character with the locality, does not support the implementation of the planned Greenspace System, and cuts across the clear land use intent in the Environmental Management Zone Code (**EMZ Code**) for the Land (at [82]). The Council also alleged that for those reasons the Proposed Development does not comply with various applicable assessment benchmarks (at [83]).

The Applicants contended that the Proposed Development constituted a "*Domestic Enterprise*", being a use which is not defined in the City Plan, but which the Applicants defined as "*the use of a premises for business activities [being the storage of equipment used for a business and office activities] where the premises is also used for a dwelling; and the dwelling is occupied by the owner of the business*" (at [56]). The "*business activities*" component of the "*Domestic Enterprise*" was proposed to be confined to an area identified on the development plan (at [59]).

The Applicants further argued that the Proposed Development is not out of character with the locality given the limits on the use of the Land (at [86]).

Court finds that the Proposed Development is out of character with the locality

The Applicants' visual amenity and town planning experts suggested that mitigation measures, such as painting the existing shed a darker colour, further landscaping, and the installation of a new boundary fence would result in the Proposed Development being unobtrusive (see [94] to [95]).

The Court, however, found that these mitigation measures would "*… not disguise the intense nature of the operations proposed to be undertaken*" (at [97]). The Court preferred the evidence of the Council's town planning expert and agreed that the Proposed Development will be different to other development in the locality (at [101]).

The Court found that "*[t]he frequency of vehicle movement, and the types of vehicles entering and exiting the subject land, coupled with the scale of the proposed shed, give the subject land an industrial character …*", which will be out of character with the locality (at [108]).

Court finds that the Proposed Development does not support the implementation of the policy direction for the planned Greenspace System

Brisbane's Greenspace System is a key strategic land use outcome stipulated in the City Plan consisting of a "*… network of greenspaces that is comprised of land with various attributes on the functionality continuum*" (at [111]). The policy direction for the Greenspace System is a key focus in a number of themes contained in the Strategic Framework of the City Plan which seek to accommodate non-urban rural, environmental, or open space type uses and provide protection of environmentally sensitive areas from urban and industrial activities (at [117]). The Court held that when read in a holistic way, the assessment benchmarks in the Strategic Framework and EMZ Code establish a clear planning policy to not only protect the Greenspace System, but also to restore and enhance it (at [126]).

The Court preferred the evidence of the Council's town planning expert that the Proposed Development is "*… fundamentally discordant with the strategic direction of the City Plan*" and held that the proposed use of the Land does not support the implementation of the policy direction in the relevant assessment benchmarks (see [123] and [131]).

Court finds that the Proposed Development cuts across the clear land use intent in the EMZ Code for the Land

The purpose of the EMZ Code is to identify environmentally sensitive areas and provide for the protection of the environmentally sensitive areas from urban and industry activities (at [134]).

The Council argued that the Proposed Development does not comply with the overall outcomes of the EMZ Code and that no relevant support for the Proposed Development can be found elsewhere in the EMZ Code (at [138]). The Applicants did not meaningfully address the Council's arguments (at [139]).

The Court found that the Proposed Development cuts across the land use intent for land in the Environmental Management Zone and therefore the relevant overall outcomes for reasons including that the Proposed Development is not "*natural environment-centred living*" or "*natural environment-centred land use*" as alleged by the Applicants but rather a "*… composite use that has, in part, an industrial character*" (see [151] and [153]).

Court finds that the non-compliances with respect to land use warrant refusal of the Proposed Development

The Applicants argued that little weight should be afforded to the above non-compliances. The Council argued that the non-compliances warrant refusal because they can not be rectified by the imposition of conditions (at [155]).

The Applicants' town planning expert opined that the Proposed Development does not conflict with the strategic intent of the City Plan regarding land use and that it "*… is not an overtly commercial or industrial land use*" (at [164]). However, the Court preferred the evidence of the Council's town planning expert who opined that the Proposed Development "*… is discordant with the strategic direction of City Plan and sound town planning principles to separate high amenity lifestyle areas from industrial type uses*" (at [171]).

The Court found that the Proposed Development is an inappropriate use of the Subject Land based on "*[t]he land use non-compliance and inappropriate character impact [which is] incapable of resolution by conditions*", which alone warrants refusal of the Proposed Development (at [176]).

Parties' positions with respect to ecology impacts

The Council argued that the Proposed Development would result in an inappropriate and unacceptable ecological outcome when assessed against the planning intent for the Subject Land as stipulated in the City Plan (at [177]).

While the Applicants conceded that the Proposed Development does not comply with a number of applicable assessment benchmarks, the Applicants argued, broadly, that appropriate mitigation measures could be achieved via conditions (see [180] and [181]).

Court finds that the ecological impacts of the Proposed Development tell against approval

The Court held as follows with respect to the following questions and consequently found that an assessment of the Proposed Development against the relevant assessment benchmarks tell against approval:

- ***What do the assessment benchmarks require in respect of ecological impacts?*** – The Court found that the Biodiversity Areas Overlay Code "*… sets high standards for development on land affected by the overlay*" which are "*… unlikely to be addressed by adopting a minimalistic approach …*" (at [189]).
- ***What mitigation measures with respect to ecology are proposed?*** – The Court found that the mitigation measures relating to stormwater management, visual amenity, ecology, and bushfire, as well as other things, proposed by the Applicants' ecology expert to deal with the ecological impacts of the Proposed Development fell short of the ecological outcomes sought by the City Plan (see [192] and [195]).
- ***Does the Proposed Development achieve appropriate ecological outcomes?*** – The Court found that the ecological impacts of the Proposed Development are not minor and the proposed mitigation measures are insufficient (at [225]). Thus, the Court found that, when assessed against the applicable assessment benchmarks, the Proposed Development does not achieve an appropriate ecological outcome (at [229]).
- ***Should conditions be imposed in accordance with the advice of the Applicants' ecology expert?*** – Whilst the Court accepted that if the conditions proposed by the Applicants were lawful they could be imposed as relevant conditions, the Court was not persuaded that the Proposed Development should be approved in light of the unacceptable character impacts (see [233], [236], and [245]).

Court finds that the Applicants failed to establish relevant matters in support of approval

The relevant matters relied on by the Applicants were that the Proposed Development could be undertaken without adverse impacts upon surrounding properties and the Proposed Development complies with the relevant assessment benchmarks or otherwise could be conditioned to comply (at [248]).

Whilst the Court accepted that these are relevant matters for the purpose of section 45(5)(b) of the Planning Act, the Court had already dealt with them and remained unpersuaded "*… that the substance of these contentions lends any greater weight to the case for approval …*" (at [250]).

Court finds that the Proposed Development should not be approved in the exercise of its discretion

The Court considered a number of matters raised by the Applicants as lending support to the case for approval and weighed them against the significant non-compliances with the City Plan.

The Court was not persuaded that the matters favouring approval, taken collectively, "*… are sufficient to provide a sound town planning basis to depart from the City Plan*" (at [258]).

Conclusion

The Court refused the development application for a development permit for the Proposed Development and dismissed the appeal.

Key points

The Court's decision in this case highlights the following important considerations for those appealing to the Planning and Environment Court of Queensland in respect of a refusal of a development application:

- Significant non-compliances with the policy direction, land use strategies, and applicable assessment benchmarks in the relevant planning scheme represent strong matters favouring refusal of a proposed development.
- Where there are significant non-compliances with the applicable assessment benchmarks, a sound basis for departure from the relevant planning scheme must be established.

Goldmate decision overturned on appeal: A win for landowners in the Western Sydney Aerotropolis

Bethany Burke | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for New South Wales* [2024] NSWCA 292 heard before Gleeson JA, Adamson JA, and Preston CJ

April 2025

In brief

Further to our release below on 10 December 2024 regarding the Court of Appeal's decision, the High Court yesterday declined TfNSW's application for special leave to appeal. This outcome solidifies the Court of Appeal's decision setting out the steps involved in properly characterising the "public purpose" behind a compulsory acquisition.

Breaking News

The outcome handed down on Thursday the 3rd of April carries significant implications for dispossessed landowners challenging compensation, particularly in the Western Sydney Aerotropolis, but also more broadly. This is reflected in the decision handed down this week in *UPG 72 Pty Ltd v Blacktown City Council* [2025] NSWLEC 29, where the Court rejected the Council's attempt at a "rolled up" public purpose to justify a nil compensation amount. We will now see the broader implications of the decision play out on infrastructure planning and land acquisition strategies for new projects such as the Federal Government's recent $1 billion commitment to secure a rail corridor connecting Sydney's south-west with the Western Sydney Airport.

Summary

The NSW Court of Appeal has overturned the Goldmate decision in a significant course correction for landowners affected by compulsory acquisitions in the Western Sydney Aerotropolis. In a unanimous judgment, the decision found the notion of a "composite" public purpose to be "legally erroneous", thereby undermining such a purpose from forming the basis of the notional disregard required when determining the market value of land. In practical terms, the recent Aerotropolis rezonings have now clearly been held not to form part of the public purpose to be disregarded in the determination of "market value" for the M12 road acquisitions constituted by Justices Gleeson, Adamson, and Preston CJ of the LEC.

The decision will be welcomed by landowners in the Western Sydney Aerotropolis currently engaged in litigation before the Land and Environment Court against acquiring authorities, as well as by those in the region who are in negotiations with acquiring authorities.

The Court of Appeal has ended the basis for the recent Aerotropolis rezonings being notionally disregarded in the determination of "market value" for acquired land, which should lead to fairer outcomes for landowners. The decision confirms that the public purpose of a land acquisition must fall within the purpose for which the particular acquiring authority has power to acquire land. In this case, the acquiring authority was Transport for NSW. The power to acquire land was under the *Roads Act 1993* (NSW), and the relevant purpose under it was "to carry out road work".

There is extensive analysis in the judgment on the key provisions in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), the power to acquire land under the *Roads Act 1993* (NSW), and the key cases to date dealing with the statutory disregard under section 56(1)(a) of the Just Terms Act.

The Court of Appeal has ordered that the determination by Justice Duggan be set aside, and the proceedings be remitted to the Land and Environment Court for determination according to law.

The decision under appeal: *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39

[Disclaimer: Colin Biggers and Paisley acted for the landowner]

In our 2024 review article, we wrote that the Land and Environment Court decision in *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39 (**primary judgment**) had attracted considerable interest given it was the first of many cases involving acquisitions of land in the Western Sydney Aerotropolis, and how the statutory disregard in section 56(1)(a) of the Just Terms Act was to be applied given the planning changes in the Aerotropolis area that occurred in late 2020. In essence, that provision requires the disregard of any increase or decrease caused by the public purpose, or the proposal to carry out the public purpose, as at the acquisition date (**statutory disregard**).

The facts in the Goldmate case were that Transport for NSW (**TfNSW**) acquired 46% of a parcel land under the *Roads Act 1993* (NSW) for the M12 Motorway (which is currently midway through construction) in June 2021. Approximately 8 months before the acquisition, the Aerotropolis SEPP commenced, which rezoned vast swathes of land in the vicinity of the Western Sydney Airport for various uses including agribusiness, enterprise, environment, recreation and mixed use.

Goldmate's land was one of many parcels rezoned from a rural use to an 'Enterprise' use.

The main implication of the primary judgment was that the public purpose of the TfNSW acquisition had been characterised expansively as a "composite purpose" whereby multiple government authorities had acted "in concert" to achieve a public purpose that was not limited to the scope of influence of a particular acquiring authority (who in this case, was Transport for NSW). The public purpose adopted in the primary judgment was as follows:

> [51] *Having regard to the evidence that there was a unified goal that characterised the actions subsequent to the announcement of the construction of the [Western Sydney Airport (WSA)], that goal was to facilitate the operations of the WSA and to facilitate commercial, industrial and employment uses around the WSA to leverage the economic opportunities provided by the WSA. This was the public purpose (**Public Purpose**).*

Partial acquisitions of land often use the "before and after" valuation approach to determine the amount of compensation payable by an acquiring authority. Because of the broad characterisation of the public purpose, the effect of the rezoning under the Aerotropolis SEPP (ie the Enterprise zoning) was disregarded by the primary judge in the "before" valuation of the Goldmate land. Instead, a hypothetical rural zoning was used. The Enterprise zoning was however taken into account in the "after" valuation of the residue land. This meant that the difference between the "before" and "after" valuations was less than what would otherwise have been the case.

The main ground of appeal – identification of the public purpose

Goldmate's main ground of appeal concerned how the primary judge had interpreted the statutory disregard in characterising the public purpose of the TfNSW acquisition. Goldmate argued that:

- the public purpose of the acquisition needed to align with TfNSW's power to acquire land, which only existed under the *Roads Act 1993* (NSW), and
- the public purpose adopted by the primary judge went beyond the purposes of *Roads Act 1993* (NSW), which did not authorise the acquisition of land to facilitate and leverage land uses around the Western Sydney Airport.

In support of the main ground, Goldmate focused on the text, context, and purpose of the Just Terms Act. Further, in oral submissions, Mr Bret Walker SC (senior counsel for Goldmate) advanced the proposition that there would be a hypothetical *ultra vires* if TfNSW had actually sought to acquire the Goldmate land on the same terms as the public purpose that had ultimately been adopted in the primary judgment.

TfNSW defended the appeal and argued that no error of law arose on the main ground, and that the primary judge's finding on the public purpose was a finding of fact that was open to her. Those findings were described by TfNSW's senior counsel in oral submissions as "clear and unsurprising".

The Court of Appeal judgment

The main ground was unanimously upheld. The primary judge's characterisation of the public purpose was held to be "legally erroneous" at [77] (per Adamson JA) and at [94] and [109] (per Preston CJ of LEC).

The lead judgment was written by Adamson JA. Her Honour pellucidly set out the steps required to be undertaken at [71] in the assessment of market value under section 56(1)(a) of the Act, these being:

> *…*
>
> *(1) the identification of the acquiring authority;*

> (2) *the identification, by reference to the empowering legislation, of the public purpose or purposes for which the acquiring authority {identified in (1) above) has the power to acquire land;*
>
> (3) *the identification of the acquiring authority's public purpose in acquiring the land, which must fall within the purpose or range of purposes identified in (2) above; and*
>
> (4) *the determination of the question, which is one of fact, whether there has been any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, identified in (3) above (any such increase or decrease is to be disregarded).*

Steps 2 and 3 were the focus of the appeal, with the Court finding at [73]:

> *As to step (2), the respondents power to acquire the land derives from s 177 of the Roads Act. The only purpose in the Roads Act which was identified as supporting the acquisition was s 71: namely, to carry out road work. There is a distinction between power and purpose; however, the respondents power to acquire land is constrained by the purpose of the acquisition. The respondent could not point to any source of power to acquire land for any broader purpose than that for which the Roads Act provided. Thus, its purpose in acquiring the land, being the sole statutory purpose authorised, was to carry out road work for the M12 (step (3)).*

Preston CJ of LEC added further reasons at [82] - [111] which Gleeson JA agreed with, which provided textual and contextual analysis in support of the narrower public purpose contended by Goldmate. His Honour commented at [84] that:

> *There are numerous textual and contextual indicators supporting this focus on the particular acquisition of the land by the particular acquiring authority exercising the power under the particular law authorising acquisition of land by compulsory process by that authority.*

His Honour emphasised the need for there to be an alignment between the acquiring authority's power to acquire land and the public purpose of the acquisition. At [92], His Honour stated:

> *... **the relevant public purpose** in s 56(1)(a) **is a purpose for which the particular acquiring authority is authorised by law to acquire the land**. Such a purpose not only authorises the acquisition of the land by compulsory process, it also limits the width of the expression in s 56(1)(a) of "the public purpose for which the land was acquired".* (emphasis added)

At [94], Preston CJ of LEC was clear in dismissing any basis for a "composite purpose" being formulated, finding that this is not something that is permitted by the Just Terms Act. His Honour stated:

> [94] *Contrary to the primary judge's finding at [25], **the phrase in s 56(1)(a) does not permit a finding of "composite purpose"**, involving the bundling together of not only the public purpose for which the acquiring authority acquired the land but also other public purposes of other authorities of the State that did not acquire the land or of the NSW Government itself. **The primary judge's findings that bundled together purposes of different authorities of the State and the NSW Government to form a composite purpose of the NSW Government were in error on a question of law**. These findings include those in [41], [42] and [52]. **These findings impermissibly formulate a rolled-up purpose of the NSW Government that extends far beyond the purpose for which the land was stated in the proposed acquisition notice and the notice of acquisition of land to be, and was authorised by the Roads Act to be, acquired by compulsory process by the acquiring authority of TfNSW**, which was for the purposes of the Roads Act.* (emphasis added)

In reaching its decision, the Court of Appeal undertook an extensive review of the relevant case law, focusing in particular on the High Court in *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, which was described as "the leading case".

Analysis followed on the other relevant cases, and each was found to sit harmoniously with the narrower public purpose contended for by Goldmate: *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; *Roads and Traffic Authority v Perry* (2001) 52 NSWLR 222; *Barkat v Roads and Maritime Services* [2019] NSWCA 240; *Sydney Metro v G & J Drivas Pty Ltd* (2024) 113 NSWLR 429; and *Coffs Harbour City Council v Noubia Pty Ltd* (2024) 258 LGERA 351.

Observations

The Court of Appeal's decision might on one view be considered unremarkable in that no previous authorities were directly challenged or overturned. However, the reality is that acquiring authorities in the Aerotropolis area have been applying the Goldmate LEC decision to value land at its pre-rezoning value. ABC News have even reported that some acquisitions had been delayed so as to take advantage of the Goldmate LEC decision.

In the course of preparing for the hearing, Goldmate's legal team undertook an extensive analysis of decisions under the Just Terms Act in order to ascertain whether there was any previous judgment of the Court where the purpose of acquisition had ever been determined as something outside the power of the acquiring authority. No such cases were located, with the Goldmate decision being the first of its kind. This submission was ultimately made in the appeal, and was unchallenged by TfNSW.

The Court of Appeal's decision will have significant implications for landowners within the Western Sydney Aerotropolis, and will no doubt be welcomed by most of those owners - some of whom are currently engaged in litigation against acquiring authorities. Other impacted landowners are currently in pre-acquisition negotiations with acquiring authorities who have sought to apply the Goldmate LEC decision.

We consider the decision to be an important course correction in how the statutory disregard operates when determining the market value of acquired land. Looking beyond the Aerotropolis, the decision will be relevant for future acquisitions that coincide with broader land use changes.

The final compensation determination for Goldmate will be determined upon remitter to the NSW Land and Environment Court.

Rejection is protection: Appeal concerning the use of community facilities zoned land in Brisbane is dismissed

Victoria Knesl | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Roycorp Pty Ltd v Brisbane City Council* [2025] QPEC 4 heard before Everson DCJ

May 2025

In brief

The case of *Roycorp Pty Ltd v Brisbane City Council* [2025] QPEC 4 concerned an appeal by Roycorp Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a multiple dwelling (**Proposed Development**) in respect of vacant land at 141 Fursden Road, Carina (**Subject Site**).

The Proposed Development comprises 85 dwellings in the form of attached townhouses and includes an affordable housing component (see [2] and [3]). Under the relevant planning scheme, being the *Brisbane City Council City Plan 2014* (version 26) (**Planning Scheme**), the Proposed Development is impact assessable (see [2] and [9]).

The Court dismissed the appeal and refused the Proposed Development on the basis that the permanent loss of community facilities zoned land, intended for the benefit of the whole community, could not be justified in the circumstances (see [40] and [41]).

Background

The Subject Site, spanning 1.357 hectares, is located in the community facilities zone within the health care purposes zone precinct and forms part of a larger similarly zoned parcel of land in an otherwise predominantly residential area (at [4]). It adjoins a residential aged care facility and Brisbane State High School's sporting facilities (at [4]). There is also an existing development approval for a retirement facility and health care services over the Subject Site (at [4]). The affordable housing component of the Proposed Development is to comprise nine affordable dwellings out of the 85 total proposed dwellings (at [6]).

The Applicant argued that there is a need for multiple dwellings in the locality and, as a result, the Proposed Development offers community benefits (at [2]). The Council alleged that the Proposed Development is non-compliant with the Planning Scheme on the basis that there is a clear forward planning strategy within it to protect and preserve community facilities uses into the future (at [23]). The Applicant disputed the allegations of non-compliance and argued that the Planning Scheme is much more flexible, in that relevant provisions within it support the Proposed Development (at [23]).

Court finds non-compliance with Planning Scheme

The Court considered the relevant provisions in the Planning Scheme, namely the strategic framework and community facilities zone code, and the expert evidence given by the parties' town planners. The Council's town planner stressed the importance of categorising community facilities zoned land as a finite and valuable resource, and in need of protection for the benefit of the whole community (at [35]). The Applicant's town planner admitted that in the Planning Scheme there are some "*strong statements*" about ensuring community facilities zoned land is used for that zoned purpose (at [36]). The Court determined that "*… each of the land use strategies contemplates the ongoing use of land allocated for community facilities remaining available for use for community facilities*" and that "*… all uses contemplated for the [community] [facilities] [zone] are to be community facilities or ancillary uses*" (at [24] and [32]).

The Court also considered whether the Proposed Development is appropriate for the health care purposes zone precinct and determined that "*[t]he only identified residential uses are for occupation by the elderly, the young or people with disabilities, such as a residential care facility or a retirement facility*" (at [26]).

Therefore, the Court found non-compliance with the abovementioned relevant provisions within the Planning Scheme in respect of the Proposed Development.

Court finds no planning need for Proposed Development

The Court considered the Applicant's argument that the Proposed Development offers community benefits by providing more housing, including affordable housing, and the expert evidence given by the parties economists. The Applicant's economist and the Council's economist both acknowledged the housing supply shortage in Brisbane and "*… community benefit associated with the [P]roposed [D]evelopment delivering additional housing*" but "*… agreed that this demand is capable of being met by the [P]lanning [S]cheme in its present form*" (at [34]).

The Court concluded that "*… [nine] affordable dwellings in the context of 85 dwellings on the land, does not outweigh the permanent alienation of the land for the provision of community facilities in the future*" and consequently "*… there is … no warrant for justifying the [P]roposed [D]evelopment on the basis of planning need where it is in significant conflict with the provisions of the planning scheme identified above*" (see [37] and [38]).

Conclusion

The Court dismissed the appeal and refused the Proposed Development on the basis that the permanent loss of community facilities zoned land intended for the benefit of the whole community could not be justified in the circumstances (see [40] and [41]).

Key points

The Court's decision highlights that whilst the housing supply shortage is significant, it does not trump all other planning strategies. In this case, the benefit to the whole community as a result of protecting community facilities zoned land could not be trumped by the delivery of nine affordable dwellings.

No new heights: Appeal against decision to dismiss application for declaration that a change application did not require impact assessment for introducing new building height has been dismissed

Marnie Robbins | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Leeward Management Pty Ltd v Sunshine Coast Regional Council* [2025] QCA 11 heard before Bond JA, Boddice JA, and Wilson J

May 2025

In brief

The case of *Leeward Management Pty Ltd v Sunshine Coast Regional Council* [2025] QCA 11 concerned an application to the Queensland Court of Appeal (**Court**), by the applicant development company (**Applicant**), for leave to appeal against the decision of the Planning and Environment Court of Queensland (**P&E Court**) in the case of *Leeward Management Pty Ltd v Sunshine Coast Regional Council* [2024] QPEC 31 (**Primary Decision**) in which the P&E Court dismissed the Applicant's application for a declaration that a change application it sought did not require impact assessment.

The Applicant relied on the following four grounds of appeal in respect of the Primary Decision (at [5]):

- The primary judge erred in finding that the Applicant's change application made to the Sunshine Coast Regional Council (**Council**) under the *Planning Act 2016* (Qld) (**Planning Act**) to change a development permit, which introduced building work and added new structures above the approved second storey (**Change Application**), required impact assessment under the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**) and the Planning Act.
- The primary judge erred in finding that section 8(5) of the Planning Act does not preclude the Planning Scheme from categorising the development proposed by the Change Application as impact assessable, rather than code assessable, under the Planning Act.
- The primary judge erred in failing to find that, in respect of a material change of use for a dwelling house, sections 8(5) and 8(6) of the Planning Act and/or section 43(4) of the Planning Act preclude the Planning Scheme from doing any of the matters under section 43(1) because of the building height.
- The primary judge erred in failing to find that provisions of the Planning Act, the *Planning Regulation 2017* (Qld) (**Planning Regulation**), the *Building Act 1975* (Qld) (**Building Act**) and the *Building Regulation 2021* (Qld) (**Building Regulation**), which impose limitations and exclusions in respect of planning scheme provisions, apply to provisions of a planning scheme regulating or limiting building height in respect of a material change of use of premises.

The Applicant also sought leave to appeal against the decision of the P&E Court that the Applicant pay the Council's costs of the proceeding, including of the Change Application, on the standard basis (**Costs Decision**).

The Applicant relied on the following two grounds of appeal in respect of the Costs Decision (at [6]):

- The primary judge mischaracterised the Applicant's case as one alleging that the Change Application sought permission for "building work" under the Planning Act and Planning Scheme for a dwelling house exceeding 8.5 metres in height, as opposed to permission under the Planning Act and Planning Scheme for a material change of use for a dwelling house exceeding 8.5 metres in height.
- The primary judge erred in failing to recognise the Applicant's legal propositions regarding the construction of Queensland planning legislation and the Planning Scheme and their relevance to the Change Application.

Whilst the Court granted the Applicant leave to appeal the Primary Decision, finding there was a question of law warranting a grant of leave to appeal (at [43]), the Court ultimately dismissed the appeal against the Primary Decision and subsequently refused leave to appeal against the Costs Decision.

Background

The Applicant obtained from the Council in early 2023 a development permit for a material change of use to establish a dwelling house, which was to be undertaken in accordance with plans specifying a building height of no more than 8.5 metres (at [7]).

Later in 2023, the Applicant submitted its Change Application which sought permission to change the development permit to include new structures above the second storey which included a rumpus room, resulting in the development now being 10.2 metres in height (at [8]).

The Council determined that the increased height of the development would conflict with the Height of Buildings and Structures Overlay, and that therefore the development required impact assessment. The Applicant then sought a declaration that the Change Application did not require impact assessment (at [10]).

Court finds the Applicant is unsuccessful with respect to Primary Decision and Costs Decision on appeal

The Applicant argued that the Planning Regulation, as opposed to the Planning Scheme, was the correct categorising instrument under which the Change Application was to be assessed and that therefore the development was subject to code assessment (at [25]).

The primary judge found that the Applicant's original development application related only to development permit for a material change of use and that the Applicant's "*… attempt to change the application, to recast the approval as one concerning building work, was disingenuous and ineffective*" (at [27]).

As a result, the primary judge found that the Planning Scheme was the correct categorising instrument under which the Change Application was to be assessed and the Planning Regulation had no relevance to the category of assessment (at [28]). Therefore, in accordance with the Planning Scheme, the Change Application required impact assessment (at [29]).

The Applicant contended that such a characterisation would be "*… inconsistent with the [Planning Regulation], because the [Building Act] 'prescribes the building height is regulated under the building assessment provisions and is therefore defined as building work and categorised as code-assessable development …*'" (at [30]).

The Applicant further submitted that the "*… characterisation of such a material change of use, as impact-assessable development by the planning scheme, on the basis of building work necessarily associated with that change of use, was invalid by reason of ss 8(5) and (6) of the [Planning Act]*" (at [31]).

Accordingly, the Applicant argued that Part 5 of the Planning Scheme is invalid, because it sets assessment benchmarks which breach the prohibition contained in section 8(5) of the Planning Act and operates to require an application for building work to be subject to impact assessment (at [34]).

The Council conceded that its Planning Scheme is a local planning instrument to which section 8 of the Planning Act applies, and that the assessment benchmark dealing with height of buildings and structural overlay is "*a provision about building work*" (at [36]).

The Council submitted, however, that the building work is not "*regulated under the building assessment provisions*" as specified in the section 8 prohibition. The Court agreed with this submission, finding that it was "*… consistent with the proper interpretation of the legislative provisions*" (at [37]).

The definition of "building assessment provisions" in section 30(d) of the Building Act includes "*… any provisions of a regulation made under the [Building Act] relating to building assessment work or accepted building work*". Further, section 6 of the Building Regulation allows for local government planning schemes to provide for all or some of the performance criteria set out in the *Queensland Development Code*, including by providing quantifiable standards for qualitative statements regarding the matters provided for under the performance criteria (at [38]).

While the Planning Scheme provides for a maximum height for the purposes of determining a category of assessment, it does not provide any performance criteria for height or any acceptable solution or quantifiable standards for height (at [39]).

The Court therefore found that the relevant section of the Planning Scheme "*… is not a provision about building work regulated under the building assessment provisions of the [Building Act]*" (at [41]).

Conclusion

The Court found no error in the primary judge's dismissal of the Applicant's application for a declaration (at [42]) and found that no question of law arose from the exercise of discretion to award costs (at [44]).

While leave to appeal the Primary Decision was granted, the appeal with respect to the Primary Decision was dismissed, leave to appeal the Costs Decision was refused, and the Applicant was ordered to pay the Council's costs with respect to the application for leave to appeal.

Last resort: Originating Application in respect of the alleged unlawful use of accommodation units is successful

Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Townsville City Council v Body Corporate for Magnetic International Resort Hotel Community Title Scheme 22894 & Ors* [2025] QPEC 5 heard before Everson DCJ

May 2025

In brief

The case of *Townsville City Council v Body Corporate for Magnetic International Resort Hotel Community Title Scheme 22894 & Ors* [2025] QPEC 5 concerned an originating application made by the Townsville City Council (**Council**), which sought a declaration that the use of lots in the Magnetic International Resort Hotel (**Resort**) for permanent or long-term accommodation is not a lawful use. The Council also sought enforcement orders restraining that use.

The proceeding was against the Community Title Scheme for the Resort and the lot owners of the 96 units (**Accommodation Units**).

The Council and the lot owners had agreed upon the terms of a proposed final order, except for two lot owners: the 78th Respondent, who wanted a modified order, and the 12th Respondent, who opposed the making of any declarations or enforcement orders (at [3]).

The Court considered the relevant development permits and planning schemes and determined that the use of the Accommodation Units for permanent or long-term accommodation is not a lawful use. The Court also considered a number of matters relevant to the exercise of its discretion to make enforcement orders, including the fact that the Council had, in correspondence, given support to the use of the Accommodation Units for permanent or long-term accommodation, and made an order on terms which offered protection to existing tenants and owners who reside in an Accommodation Unit.

Background

The resort comprises the Accommodation Units plus two units which are self-contained and used for permanent manager accommodation. Each of the Accommodation Units has a gross floor area of either 30m^2 or 50m^2 and is modestly equipped with a kitchenette containing a fridge, microwave, toaster, kettle, and sink, as well as a small bathroom and a patio. Relevantly, each Accommodation Unit is not separately metered for water and electricity, has no storage spaces, no cooking facilities such as a cooktop or oven, and no laundry facilities. There are communal facilities within the Resort, comprising laundry facilities, a restaurant and bar, a swimming pool, a tennis court, a gymnasium, and a playground (at [6]).

The Council sought declarations pursuant to section 11(1)(c) of the *Planning and Environment Court Act 2016* (Qld) that the permanent or long-term accommodation use of the Accommodation Units is unlawful, and enforcement orders pursuant to section 180 of the *Planning Act 2016* (Qld) to restrain the alleged unlawful use (at [2]).

Court makes a declaration that the use is not lawful

The Court considered the historical planning approvals and planning schemes as follows (at [5]):

- The Council approved on 13 November 1975 a "Tourist Holiday Resort", being an undefined use.
- The Council approved on 13 November 1985 a manager's residence and 34 additional units. This, and other relevant development permits approving extensions to the Resort, did not clarify the approved use.
- None of the applicable planning schemes which apply to the land on which the Resort is located have from 1975 to the date of the judgment conferred a right to use the Accommodation Units for permanent or long-term accommodation.
- The Council approved on 10 January 1996 a group title subdivision of the Resort but subject to a condition that the premises be used in accordance with the existing planning approvals.

In the absence of a definition of "Tourist Holiday Resort" in the relevant development approvals and planning schemes, the Court had regard to the principles of statutory construction and more particularly the Macquarie Dictionary Online which defines Tourist as "*someone who tours, especially for pleasure*", Holiday as, inter alia, "*a vacation*", and Resort as, inter alia, "*a large hotel with special facilities offered*" (at [7]). The Court looked at the meaning of each word and the facilities offered within each Accommodation Unit and within the broader Resort, and concluded that the use of the Accommodation Units for permanent or long-term accommodation is not a lawful use (at [8]).

Court makes an order which protects the interests of some tenants and owners

The Court went on to consider the discretionary nature of the relief sought. In particular, the Court had regard to the Council's submission that the size and characteristics of each Accommodation Unit made them unsuitable for permanent or long-term accommodation (at [12]). The Court also had regard to communications from officers of the Council since 2003 which provided support for the Accommodation Units being used on a permanent basis, as well as the fact that the Council has collected rates on the basis that the Accommodation Units are used on a long-term or permanent basis (at [10]).

The Court noted that the exercise of the Court's discretion is broad, and that as set out in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341 "*… it concerns the enforcement of a public duty in circumstances where there is a legislative purpose in upholding*", "*the integrated and co-ordinated nature of planning law*", and "*a court may be less likely to deny equitable relief than it would in litigation between private citizens*" (at [11]).

The Court made an order on terms including variations sought by the 78th Respondent, which prohibit the use of the Accommodation Units for permanent or long-term accommodation except those Accommodation Units subject to a lease for up to 12 months and Accommodation Units owned by respondents who live in them for as long as they live in them (at [13]).

Conclusion

The Court thus declared the use of the Accommodation Units for permanent or long-term accommodation is not a lawful use (at [8]), and made orders on the terms of a draft prepared by the Council (at [15]).

Key points

The Court's decision highlights that as a general rule representations made by Council officers cannot make right that which is wrong at law. In this case, the fact that the Council officers had made representations in support of the permanent or long-term accommodation use did not overcome the fact that such use was not supported by the development approvals.

Development control orders: Tips on checking whether they are valid

Mollie Hunt | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Kingfisher Properties Pty Limited v Northern Beaches Council* [2025] NSWLEC 39 heard before Preston CJ

May 2025

In brief

The case of *Kingfisher Properties Pty Limited v Northern Beaches Council* [2025] NSWLEC 39 involved an appeal to the NSW Land and Environment Court against a $100,000 fine imposed by the Local Court for failing to comply with a development control order (**DCO**), pursuant to section 9.37(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Notably, the Court made significant observations regarding the history of the DCO's lawfulness, which, in this matter, contributed to a substantial reduction in the penalty.

The DCO related to a carport that had been constructed without development consent. Kingfisher was initially issued with a penalty infringement notice for failing to comply with the DCO and elected to have the matter determined by the Local Court.

The NSW Land and Environment Court significantly reduced the fine to $9,000, finding that "*the offence committed by Kingfisher is at the very low end of the range of objective seriousness*" (at [50]). One of the factors contributing to this conclusion (amongst other factors) was that some of the terms of the order that had not been complied with "*ought not to have been issued*" (at [37]) because they "*went beyond what a Demolish Works Order can require*" (at [18]).

The significance of a guilty plea in criminal proceedings

Extraordinarily, Chief Justice Preston of the NSW Land and Environment Court found that the circumstances did not exist for the DCO to have been issued (at [11]), and that the terms of the DCO were also outside power (at [12]).

However, despite those deficiencies with the DCO, this was an appeal against sentence only – not a challenge to the conviction, as the appellant had pleaded guilty to the offence in the Local Court.

Chief Justice Preston at [31]-[32] explained that, in sentencing, the Court cannot go behind a guilty plea:

> *On 11 September 2024, Kingfisher appealed to this Court against the severity of the sentence. It did not appeal against its conviction for the offence as it had pleaded guilty to the offence in the Local Court.* ***This Court must deal with the appeal against sentence on the basis that Kingfisher has committed the offence*** *of failing to comply with the identified terms of the Demolish Works Order, notwithstanding that that order is in large parts outside power.*
>
> *…*
>
> *Because of Kingfisher's guilty plea, however, this Court must sentence Kingfisher for having committed an offence by failing to comply with these requirements of the Demolish Works Order. Nevertheless, the fact that these requirements were outside power is relevant to this Court's assessment of the objective seriousness of the offence. It is* ***less objectively serious to fail to comply with requirements of a development control order that are outside power*** *than it is to fail to comply with requirements of a development control order that are within power.* (emphasis added)

Issues with DCOs – how to avoid these, and how to check for these

DCOs are issued under section 9.34(1) of the EP&A Act, and the specific types of orders that may be given are itemised in the table at Schedule 5 to the EP&A Act.

This judgment serves as a useful reminder of the need to carefully check the table in Schedule 5 when issuing or receiving a DCO.

If a DCO is issued without properly complying with the parameters set by Schedule 5, it may be susceptible to invalidation. However, in these circumstances Kingfisher did not challenge the validity of the order.

For each type of order, the table specifies:

- The type of order, ie an order "To do what?".
- The circumstances that must exist before the order can be issued: "When?".
- Who the order can be given to: "To whom?"

Order "To do what?"

When a DCO is issued, it will specify what type of order it is, which must correspond to one of the categories listed in the table at Schedule 5. The item of the table specifies what the order can require someone to do. A DCO cannot require something outside the scope of what is described in the "To do what" column.

In this case, originally the DCO issued was under item 11 (a compliance order). Kingfisher appealed against the issue of the DCO, and at a conciliation conference the parties agreed that it be substituted for a demolish works order under item 3 of the table at Schedule 5: see [14] of the judgment.

However, the demolish works order required works which were beyond the scope of a demolish works order, which can only be an order "*To demolish or remove a building*". In addition to requiring the removal of the carport roof, the terms of the demolish works order also purported to require:

- the construction of a replacement roof with guttering;
- the submission of a works as executed survey plan for the building work required to be constructed; and
- the certification of any stormwater drainage works required to be constructed.

Chief Justice Preston also noted at [31] that in relation to requiring a security bond:

> *There might be power for a Demolish Works Order to require a security bond, but* ***only for the demolition*** *of the unlawfully erected carport and not for the construction of new building work …*" (emphasis added)

Do the circumstances exist for an order to be issued?

Column 2 of the table at Schedule 5 then lists the circumstances that need to exist for that type of order to be issued.

In this case, Chief Justice Preston noted in relation to the demolish works order, that none of the circumstances existed for that DCO to have been issued, being:

- "*A planning approval has not been complied with.*" – as no planning approval existed.
- "*Building has been unlawfully erected and does not comply with relevant development standards.*" – because the relevant development standards for a carport were complied with, noting that those standards are not the standards from the Codes SEPP: see [9] of this judgment.
- "*Authorised subdivision works, or works agreed to by the applicant, have not been carried out.*" – subdivision was not relevant to the carport in this case.

Has the order been given to the right person?

The third column ("To whom?") was not in issue in this case.

It is always necessary to check that an order is being issued to the correct person.

Some orders contain multiple subtypes in column 1 (eg item 11 – compliance order – where there are three different types of orders "To do what"). It is necessary to consider the correct row within the item to determine the correct person to whom an order can be given.

Conclusion

This judgment highlights the importance for local councils of selecting the appropriate orders to remedy unauthorised works using DCOs, particularly where those works already comply with relevant development standards. For owners or occupiers it is essential to consider the enlivening powers for the issue of the order, and to assess what is being required against the purported exercise of the relevant order. It is clear from the terms of Schedule 5 and from this judgment that a demolish works order cannot be used as a means of requiring works to be carried out.

However, because the works in this case already complied with the relevant development standards (see [9]), an order "*To do whatever is necessary so that any building or part of a building that has been unlawfully erected complies with relevant development standards*" was not appropriate.

That aside, the key point from this judgment is the importance of thoroughly reviewing all columns of the table at Schedule 5 to the EP&A Act when issuing or receiving a DCO, to ensure it has been properly issued.

DCOs can be appealed, and their validity can also be challenged in the NSW Land and Environment Court. Where an order is flawed, and that flaw leads to a penalty for non-compliance, this case demonstrates that the penalty may be significantly reduced if the issues with the order are established at a later stage.

Money, money, money: Land Court of Queensland determines a preliminary question about compensation

Victoria Knesl | Nadia Czachor

This article discusses the decision of the Queensland Land Court in the matter of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council (No 2)* [2024] QLC 24 heard before JR McNamara

June 2025

In brief

The case of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council (No 2)* [2024] QLC 24 concerned an application to the Land Court of Queensland (**Court**) by Genamson Holdings Pty Ltd (**Applicant**) for the determination of a preliminary question regarding the proper construction of section 16(1A) of the *Acquisition of Land Act 1967* (Qld) (**ALA**).

The Applicant had previously applied to the Court in *Genamson Holdings Pty Ltd v Moreton Bay Regional Council* [2024] QLC 8 for the separate and preliminary determination of two questions regarding the proper construction of section 16(1A) of the ALA, which was summarised in our September 2024 article. In short, the Court held that only one of the questions was "ripe" for separate and preliminary determination. That question is as follows (at [5]):

> 1. *On the proper construction of section 16(1A) of the Acquisition of Land Act 1967 (Qld) (ALA), is a claim for compensation pursuant to that provision limited to:*
>
> *(a) out-of-pocket costs and expenses in the nature of legal, valuation and other professional fees:*
>
> *(i) reasonably incurred;*
>
> *(ii) themselves reasonable; and which are incurred in connection with the consideration of and/or the preparation of a claim for compensation following the resumption of land foreshadowed by the notice of intention to resume; and*
>
> *(b) any actual damage done to the land by the constructing authority.*

The Court considered the proper construction of section 16(1A) of the ALA and held that the answer to the preliminary question is "yes" (at [85]).

Background

The key issue in this case related to the wording in paragraph 1(a) of the question (see [9] and [11]).

The Applicant claimed that the out-of-pocket costs referred to in paragraph 1(a) of the question are not limited to legal and professional costs but also include other types of costs, such as financial costs and loss of profit (at [15]).

The Council disputed the Applicant's claim and argued that compensation under section 16(1A) of the ALA is limited to costs and expenses, as opposed to loss or damage, or potential loss or damage (at [18]).

Court finds no compensation for loss or damage under section 16(1A) of the ALA

The Applicant submitted that there are practical consequences for a landowner after receiving a notice of intention to resume, such as business losses or a failure to realise profits in anticipation of the resumption, and therefore a broader construction of section 16(1A) of the ALA is necessary to allow for compensation for loss or damage (see [71] and [80]).

The Council contended that the primary purpose of section 16(1A) of the ALA is to deny a claim for loss or damage in accordance with the express language of the section, and therefore is directly at odds with the Applicant's submission. Section 16(1A) of the ALA is as follows [our underlining]:

> *16 Discontinuance of resumption before publication of gazette resumption notice*
>
> *(1A) Service of the further notice shall discontinue the resumption concerned, and no person shall have any claim for compensation or other right or remedy whatsoever against the constructing authority for any loss or damage alleged to have been occasioned (directly or indirectly) by the service of the notice of intention to resume or the discontinuance of the resumption, except a claim for compensation for costs and expenses incurred by the person who was served with the notice and any actual damage done to the land concerned by the constructing authority.*

The Court did not accept the Applicant's submission on the basis that it was "*… contrary to the wording of section 16(1A), which denies compensation for 'loss or damage*'" and "*… limits any claim to costs and expenses*" (see [80] and [82]).

Conclusion

The Court held that the answer to the preliminary question is "yes" (at [85]).

Governance risks in school infrastructure spending

Thomas Condon | Todd Neal

This article discusses the ICAC's inquiry into School Infrastructure NSW and highlights the significant probity and governance risks associated with the billions being invested in school infrastructure. The findings are a timely reminder for government and independent schools to strengthen governance practices to safeguard against reputational harm and regulatory scrutiny

June 2025

In brief

The billions of dollars being raised and spent on school infrastructure come with a legion of probity and governance risks as the current Independent Commission Against Corruption (**ICAC**) inquiry (**Operation Landan**) into the conduct of the former Chief Executive of School Infrastructure NSW (**SINSW**) highlights.

The inquiry serves as an important reminder of the importance of good governance for independent schools and government schools alike given the increasingly sophisticated nature of these projects and the money at stake.

ICAC's inquiry

In this context, it is worth pausing to consider the scale of expenditure occurring. In New South Wales alone, Counsel Assisting's Opening Statement for the inquiry reports that the four-year budget allocation for school infrastructure surged from approximately $2.6 billion in 2016–17 to $6.7 billion by 2019–20. Independent Schools Australia reports that in 2022, capital expenditure in independent schools was $2.97 billion.

Obvious probity and governance risks arise where infrastructure projects involving several millions are being proposed.

It is in this context that ICAC's inquiry is examining allegations that the former Chief Executive of SINSW and others:

> *(a) intentionally subverting appropriate recruitment practices to benefit friends and business associates;*
>
> *(b) improperly awarding contracts to friends and business associates; and*
>
> *(c) misallocating funds from school projects to favour particular businesses and to fund consultancy positions for friends and business associates.*

The allegations detail large multimillion dollar payments to entities with key personnel close to the former Chief Executive.

Following a review of the allegations detailed in Counsel Assisting's Opening Statement, many of the issues under examination in the inquiry could be avoided by adhering to the following good governance and probity principles:

- **Value for money:** Contracts and hiring decisions should be based on merit and cost-effectiveness, not familiarity or convenience.
- **Clear lines of authority:** Ensure there are appropriate delegations and proper oversight mechanisms in place to avoid one person or group of people taking control of the procurement decisions.
- **Transparent procurement:** Competitive tenders should be used for significant contracts rather than direct negotiations.
- **Conflict of interest management:** Decision-makers should disclose any relationships that could influence procurement or hiring decisions, manage any conflict of interest properly, and recuse themselves from the decision making where necessary.
- **Respect for professional independence:** Consultants should not be pressured to tailor advice to suit organisational preferences, nor should future work be tied to favourable reporting.
- **Fair employment practices:** Redundancies and terminations should be free from any perception of reprisal or bias.

This is not to suggest that schools should avoid working with trusted contractors or consultants. Long-term relationships can offer valuable continuity and insight. But these relationships ought to be underpinned by a governance framework that ensures decisions are accountable, fair, transparent, and in the best interests of the school.

Conclusion

Although independent schools are not subject to the same public sector procurement principles or reporting to ICAC, improper governance or probity in the management of school infrastructure projects will nevertheless raise significant reputational issues for the school, as well as potential legal implications under contract and regulatory scrutiny by the bodies governing accreditation. Whilst trite to mention, a lack of probity will erode the trust of donors jeopardising future funding. The lessons emerging from Operation Landan should serve as a reminder for all education providers to review and strengthen their governance practices.

The (rezoning) plot thickens: SRLA announces dates for standing advisory committee

Adam Celik | David Passarella

This article discusses the Victorian Government's advancement of the Suburban Rail Loop (SRL) East Project through draft structure plans, amendments, and an uplift framework

June 2025

In brief

In April last year, we explored several key aspects of this landmark infrastructure initiative in our article, "*Victorian Government announces plan to build 70,000 additional homes: Suburban Rail Loop East precincts to support growing population.*"

For those unfamiliar, SRL East is the first stage of the broader Suburban Rail Loop, currently being delivered between Cheltenham and Box Hill. It includes 26 kilometres of twin tunnels and six new underground stations. Comprehensive planning for the surrounding neighbourhoods aims to facilitate the development of approximately 70,000 new homes by the 2050s, positioned within easy reach of world-class public transport, essential services and employment hubs.

The 'structure plan areas' involved in the SRL East Project are Cheltenham, Clayton, Monash, Glen Waverley, Burwood and Box Hill, encompassing various municipalities within each area. Since the publication of our previous article, the project has seen significant progress. In particular, the precinct visions have been finalised following public consultation, the draft structure plans and draft amendments have now been released, and the authority has confirmed that public hearings will commence from 27 August 2025.

The SRL East Project is a major undertaking by the Victorian Government, and it is not possible to cover all elements within a single article. As such, while this article touches on the draft amendments, draft structure plans and the upcoming hearings, it focuses in particular on the mandatory maximum floor area ratio (**FAR**) proposed by the draft amendments, as well as the Suburban Rail Loop East Voluntary Public Benefit Uplift Framework (**Uplift Framework**).

Draft amendments and draft structure plans

To summarise, the draft structure plans set out the objectives and strategies for each structure plan area. The draft structure plans are underpinned by five themes:

- Enriching Community.
- Boosting the Economy.
- Enhancing Place.
- Better Connections.
- Empowering Sustainability.

Whilst the draft structure plans outline the ambitious goals of the SRL East Project, the draft amendments provide the actual mechanism to introduce planning policies and controls which will guide the development of land within each of the structure plan areas. These amendments give effect to section 4(1) of the *Planning and Environment Act 1987* (Vic) .

Relevantly, the draft amendments propose to apply the precinct zone to the 'majority' of the structure plans areas. Notably, the precinct zone proposes to apply a mandatory maximum FAR.

What is a FAR?

A FAR is the ratio between the amount of above ground 'gross floor area' that can be developed on a particular site, relative to the area of that site. The FAR is defined in the proposed schedules to the precinct zone, as follows:

> *For the purposes of this schedule, the floor area ratio is the gross floor area above ground of all buildings on a site, including all enclosed areas, services, lifts, car stackers and covered balconies, divided by the area of the site. Void associated with lifts, car stackers and similar services elements should be considered as multiple floors of the same height as adjacent floors or 3.0 metres if there is no adjacent floor.*

For developers seeking to exceed the mandatory maximum FAR (where it applies to the land), they must satisfy the responsible authority that a public benefit can be established as provided for and calculated in accordance with the Uplift Framework.

The Uplift Framework supports the implementation of the draft structure plans and identifies the following public benefits:

- affordable housing;
- public realm improvements;
- open space; and
- strategic land uses.

FARs and uplift schemes have previously been implemented in other parts of Victoria, most notably in the Melbourne CBD and Fisherman's Bend.

On one view, a FAR and uplift scheme can be seen as a blunt tool; operating as a 'one size fits all' approach. A FAR and uplift scheme can, in some cases, hinder optimal development opportunities and the realisation of the site's potential. This is particularly apposite with respect to sites that have unique characteristics such as land area, heritage buildings, environs and other geographical factors.

On the other hand, for specific sites and areas, a FAR can enable positive outcomes, provided that the site can be developed feasibly and economically in accordance with that FAR. FARs also offer the additional benefit of enabling certainty of outcome for developers and community stakeholders.

To summarise, we suggest that in order for a FAR to be effective, several factors must be realised, namely that:

- the base case FAR is appropriate and the development of the site can feasibly occur;
- the proposed FAR provides an appropriate urban design and planning outcome, in particular in terms of scale and form;
- the FAR achieves the expected housing demands for the area; and
- if the uplift framework is to be applied, the government, community and developer all benefit from the application of the uplift framework.

Fundamentally, we think that a considered approach should be taken when applying FARs over precincts or parts of a precinct, to ensure that the FAR responds appropriately to the characteristics of that precinct. In our view, it is important that FARs are not intended as a 'blanket approach' as this risks producing suboptimal planning outcomes.

What happens next?

Panel hearing

The authority has announced that a directions hearing will be held on 22 July 2025 and that from 27 August 2025 onwards, public hearings will be held by the independent advisory committee. These hearings will give developers, council's and other affected persons the opportunity to provide submissions and evidence regarding the draft amendments and draft structure plans.

How can Colin Biggers & Paisley help?

If you are a land owner within one of the structure plan areas and would like to understand how the SRL East Project may affect your property or development opportunities, we encourage you to reach out to our Planning, Government, Infrastructure & Environment team for further advice and support.

The new developer bond regime in Victoria: What you need to know before 1 July 2026

Kerry Ioulianou | Michael Lanyon | Rhett Oliver | David Passarella

This article discusses the Victorian Government's introduction of the *Building Legislation Amendment (Buyer Protections) Bill 2025*, which establishes a statutory developer bond scheme requiring developers of residential buildings over three storeys to lodge a financial bond prior to seeking an occupancy permit from 1 July 2026

June 2025

In brief

The *Building Legislation Amendment (Buyer Protections) Bill 2025* (Vic) (**Bill**) signals a decisive shift in how residential development risk will be managed in Victoria. Among a broad range of consumer-focused reforms, the centrepiece for developers is the introduction of a statutory developer bond scheme.

Subject to earlier proclamation, the scheme is due to commence on **1 July 2026**. It will apply to residential apartment buildings of more than three storeys, and developers will be required to lodge a financial bond before applying for an occupancy permit.

The consequences of non-compliance are far-reaching, including regulatory penalties, delayed settlements, contract rescissions by off-the-plan purchasers, and the possibility of public enforcement action. In short: the new regime raises the bar on post-completion accountability and will reshape project planning, finance structuring, and compliance risk management in the development lifecycle.

This article explores the key features of the proposed scheme, outlines the practical and legal implications for developers, and identifies the steps that sophisticated market participants should be taking now to prepare.

A new compliance threshold for occupancy permits

The Bill inserts into the *Building Act 1993* (Vic) (**Building Act**) a new statutory objective focused on consumer protection, based on a developer bond scheme. It imposes a precondition to the issuance of occupancy permits for residential apartment buildings over three storeys namely that the developer must first execute and lodge a developer bond with the Victorian Building Authority (**VBA**).

Failure to do so is not a mere procedural defect. The scheme expressly prohibits developers from applying for occupancy permits unless they have complied with the bond requirement. Non-compliance will attract significant penalties – up to 500 penalty units for individuals and 2,500 penalty units for corporations, equating to fines in excess of $500,000 under the current penalty unit rate.

These provisions fundamentally alter the compliance landscape for developers. Obtaining an occupancy permit will no longer be purely dependent on the building surveyor's certification. It will now be tied to a financial compliance event, enforced at the regulator level and monitored throughout the handover process.

What is the developer bond and how much will it cost?

The bond must be executed in favour of the VBA and must represent 2% of the "total build cost" of the apartment building.

Importantly, "total build cost" is defined as the estimated total cost of the building work carried out for or in connection with the construction of the residential apartment building. This is not limited to structural work or base building costs. It captures the complete cost of construction – including finishes, services, and external works.

Acceptable forms of security include bank guarantees, surety bonds, or other prescribed instruments. The bond must be secured and lodged prior to submission of the occupancy permit application, meaning it must be factored into both development finance and the project program well in advance of completion.

The legislation is silent on whether staged occupancy permits will require staged bonds, though this may be clarified by regulation. Developers pursuing staged towers or podium-tower configurations should consider whether each component will attract a separate bond obligation.

Off-the-plan sales and the risk of contract rescission

Perhaps the most commercially sensitive change for developers lies in the Bill's amendment to the *Sale of Land Act 1962* (Vic). These provisions provide that vendors under off-the-plan contracts must not require or permit purchasers to take possession of a lot until an occupancy permit has been obtained.

More critically, if an occupancy permit is issued but the developer has not lodged the bond, purchasers are granted a statutory right to rescind their contracts.

This right is not limited to minor purchasers or first home buyers. It applies to all off-the-plan sales, and where exercised, it entitles the purchaser to a full refund of all monies paid, including the deposit, together with penalty interest as determined under the *Penalty Interest Rates Act 1983* (Vic).

In effect, this creates a high-stakes compliance trigger. If the bond is not in place at the time of occupancy permit issuance, developers may face mass contract rescissions, refund obligations, and corresponding enforcement action. The implications for finance settlements, cash flow, investor relations, and project viability are potentially severe.

Purpose and access to the bond

The bond is designed to function as a safety net for defective building work identified post-completion. It is not an insurance scheme but a targeted compliance mechanism that enables third parties to apply to the VBA for access to funds.

Those eligible to make a bond claim include the owners corporation, the appointed building assessor, or any person performing a statutory function under Part 6 of the Building Act. The VBA will determine claims, and where there is disagreement between the developer and owners corporation, it has the power to appoint an independent expert to assist. Unless otherwise prescribed, the cost of this report is to be shared equally between the parties.

Once a claim is approved, the owners corporation must use the bond for the specific purpose approved by the VBA. However, with the developer's consent, the funds may be applied for other uses. Any unused portion of the bond must be returned to the developer following the bond period and clearance of liability.

This feature reinforces the temporary nature of the obligation – it is not an open-ended contribution, but it does require careful planning to ensure proper release.

Building assessors: timing, roles and risk

The developer bond regime is underpinned by a new independent role: the building assessor. This person must be appointed by the developer to inspect building works post-completion and produce two key reports: a preliminary report and a final report.

The preliminary inspection must be conducted no later than 18 months after the occupancy date (or any later date authorised by the VBA). Its purpose is to identify defective building work and determine the cause. A final inspection must then be carried out by the same assessor to confirm whether the identified defects have been rectified.

If a developer fails to engage the assessor to conduct the final inspection, the VBA has the power to appoint one itself. This mechanism ensures that the bond cannot be indefinitely withheld or left unresolved by developer inaction.

Developers must therefore ensure that assessor engagement is formally contracted, costed, and programmed into their delivery timelines. Delays in assessor engagement or reporting may delay bond release or trigger claims from owners corporations.

Strategic implications for developers

This legislative reform reshapes how completion risk is allocated in Victorian apartment projects. Rather than resolving disputes post-handover through private enforcement or insurance claims, the State has now created a front-end compliance mechanism that compels developers to carry secured exposure beyond practical completion.

Key commercial implications include:

- **Settlement timing risk:** Projects cannot settle unless bonds are executed, and occupancy permits are available. One missing step may derail a coordinated handover.
- **Capital structuring impact:** 2% of the total build cost will need to be secured for a period of at least two years, with little commercial leverage to reduce that exposure.
- **Dispute exposure:** The VBA will become the de facto arbiter of post-completion disputes, potentially overriding negotiated outcomes between developers, builders, and OCs.
- **Contractual flow-down:** Developers will need to revisit builder contracts, consultant engagements, and D&C risk allocation to ensure downstream parties are properly aligned to this new regime.

Next steps: what you should be doing now

Top-tier developers should begin preparing well before mid-2026. Projects already in procurement or design should be assessed now to identify:

- Whether the development will fall within the bond scheme.
- What impact a 2% bond will have on project finance, or liquidity.
- How to structure builder and consultant obligations to account for the post-completion inspection process.
- Whether the project settlement strategy is sufficiently flexible to accommodate the new preconditions.

This is also the time to engage with government and regulators to understand implementation guidance and, where appropriate, to make submissions on draft regulations that will support the scheme.

How Colin Biggers & Paisley can assist

Our team is already advising leading developers on the implications of the developer bond regime and related consumer protection reforms. We can assist with:

- Structuring and drafting delivery contracts that address the bond regime.
- Settlement strategy reviews and contract compliance audits.
- Advising on building assessor engagement frameworks and reporting obligations.
- Managing bond disputes and navigating VBA processes.
- Developing standard form clauses and compliance procedures to ensure future-proofed development models.

Colin Biggers & Paisley

Small but mighty: Planning and Environment Court of Queensland finds that proposed small lot subdivision will have unacceptable environmental impacts

Ashleigh Foster | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Landarch Properties Pty Ltd v Logan City Council & Anor* [2024] QPEC 47 heard before Everson DCJ

July 2025

In brief

The case of *Landarch Properties Pty Ltd v Logan City Council & Anor* [2024] QPEC 47 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Logan City Council (**Council**) to refuse its development application for a small lot subdivision in Waterford, Queensland (**Primary Site**).

Following two minor changes made to the development application after the commencement of the appeal, the development application sought a development permit for reconfiguring a lot, to create 55 small residential lots across three stages together with a balance lot and a preliminary approval for operational work (**Proposed Development**). The Proposed Development included a second site located several kilometres away in Chambers Flat for the purpose of providing compensatory flood storage and an environmental offset (**Offset Site**).

The Court dismissed the appeal and refused the Proposed Development on the basis that it would unacceptably impact protected native vegetation, fauna and a mapped biodiversity corridor and that these impacts could not be overcome by the proposed environmental offset or by conditions of approval.

Background

The Primary Site is included in the small lot precinct of the low-density residential zone pursuant to version 8.1 of the *Logan Planning Scheme 2015* (**Planning Scheme**), however it also contains areas of koala habitat and is subject to various overlay maps, relevantly including (at [8]):

- 91.6% of the Primary Site is identified as primary vegetation management area;
- 97.7% of the Primary Site is identified as a biodiversity corridor;
- 81.9% of the Primary Site is identified as locally significant remnant vegetation; and
- 87% of the Primary Site is identified as matters of both State and local environmental significance.

With respect to koala habitat, the development application was referred to the Chief Executive administering the *Planning Act 2016* (Qld), which issued a referral agency request imposing conditions including a requirement to provide an environmental offset at the Offset Site to compensate for the loss of non-juvenile koala habitat trees from the Primary Site (at [2]).

The Appellant emphasised the need to consider the zoning of the Primary Site and argued that the Proposed Development achieved an appropriate balance between the land use outcome sought for the Low-Density Residential Zone Code and the ecological outcomes sought by the Biodiversity Areas Overlay Code. However, the Proposed Development was subject to code assessment and the Low-Density Residential Zone Code was not called up as an assessment benchmark by the Planning Scheme (at [43]).

Court finds that the Proposed Development would result in an unacceptable loss of native and remnant vegetation

The Appellant argued that the remnant vegetation at the Primary Site was not locally significant as it was comprised of two regional ecosystems which are not locally endangered, relying on evidence of its ecology expert and a property map of assessable vegetation which had been obtained pursuant to the *Vegetation Management Act 1999* (Qld) prior to the hearing of the appeal, also with the assistance of the Appellant's ecology expert (at [34]).

The Court did not accept the evidence of the Appellant's ecology expert and preferred the evidence of the Council's ecology expert, who is an expert in mapping regional ecosystems and was critical of the methodology adopted by the Appellant's ecology expert in proposing the alternate regional ecosystems. The Council's ecology expert considered that the Primary Site was correctly classified as containing regional ecosystem 12.11.18, which the Court accepted is locally significant because there is less than 10% of its pre-clearing extent left within the Council's local government area (at [35]).

The Court therefore found that the Proposed Development did not comply with provisions of the Biodiversity Areas Overlay Code concerning the protection of native and remnant vegetation (see [49] and [51]).

Court finds that the Proposed Development would unacceptably impact on fauna habitat and movement opportunities and compromise the functionality of the mapped biodiversity corridor

The Court also preferred the evidence given by the Council's experts in respect of the importance of the Primary Site's functionality as a biodiversity corridor and provision of habitat and movement opportunities for various fauna, including the koala.

In particular, the Court accepted that:

- there are hollow-bearing trees at the Primary Site, as conceded by the Appellant's ecology expert, in circumstances where it takes about 100 years for hollow-bearing trees to emerge (at [38]);
- the Proposed Development would result in the removal of 49% of the fauna habitat on the Primary Site (at [38]);
- the reduction in the effective corridor width would create a 'pinch point' at a strategically important section of the biodiversity corridor (at [38]); and
- the Proposed Development fails to meet key benchmarks for koalas (at [41]).

The Court therefore found that the Proposed Development did not comply with provisions of the Biodiversity Areas Overlay Code concerning the protection of mapped biodiversity corridors and fauna habitat values (at [48]).

Court finds that proposed environmental offset does not excuse non-compliance with the Biodiversity Areas Overlay Code

The Appellant argued that compliance with the Biodiversity Areas Overlay Code was achieved by the provision of an environmental offset, comprising a combination of revegetation and managing the balance lot at the Primary Site and revegetating and managing areas of the Offset Site (at [44]).

However, the Court did not accept this argument and found that, in circumstances where the Court had found that the Biodiversity Areas Overlay mapping of the Primary Site is sound from an ecological perspective, "[i]*t is not appropriate for the appellant to simply disregard the overlays, including the biodiversity areas overlay, and seek to establish compensatory habitat in another location of its choosing*" (at [45]).

The Court also emphasised that the proposed environmental offset did not comply with the relevant requirements provided in the Council's *Planning Scheme Policy 3 - Environment* (at [46]).

Key points

The Court's decision highlights the importance of a Local Government's mapping of protected vegetation and applicants should be wary of reliance on the provision of an environmental offset elsewhere to satisfy the outcomes sought for protected vegetation by the Local Government's planning scheme.

Conclusion

The Court dismissed the appeal and refused the Proposed Development.

Colin Biggers & Paisley

A walk in the park: Planning and Environment Court of Queensland upholds independent valuation of land required for future trunk infrastructure parks in support of an amended infrastructure charges notice

Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Rochedale Development Partners v Brisbane City Council* [2025] QPEC 16 heard before McDonnell DCJ

July 2025

In brief

The case of *Rochedale Development Partners v Brisbane City Council* [2025] QPEC 16 concerned an appeal to the Planning and Environment Court of Queensland against an amended infrastructure charges notice given by the Council on 26 November 2024 (**Amended ICN**) in relation to land at 32 Farley Road, Rochedale (**Land**).

The Amended ICN included a refund amount in relation to land required for future trunk infrastructure in the Local Government Infrastructure Plan (**LGIP**), being for a district recreation park and a district sports park (**Required Land**). The Appellant argued that the Council's decision to give the Amended ICN failed to comply with the Council's charges resolution because the independent valuation adopted by the Council (**Independent Valuation**) in support of the Amended ICN erroneously failed to value the Required Land as if it had never been identified as being required for future trunk infrastructure in the LGIP (at [21]).

The Court was satisfied that the Independent Valuation and the delegate's decision-making accorded with the Council's charges resolution, and dismissed the appeal (at [42] and [44]).

Appellant made a successful recalculation application in respect of the negotiated infrastructure charges notice

The Appellant made a development application for a preliminary approval for a material change of use, including a variation request, for Caretakers Accommodation, Multiple Dwelling, Residential Care Facility, Retirement Facility and Utility Installation, and a development permit for reconfiguring a lot (1 into 2 lots, and a new road) on the Land (**Development Application**) (at [10]).

The Development Application was approved (**Development Approval**), and included a condition requiring the dedication of 1.6 hectares of the Land for a district recreation park and a district sports park, such parks having been identified in the LGIP as future trunk infrastructure. At the same time as issuing the Development Approval, the Council issued a negotiated infrastructure charges notice which provided for a total refund of $1,522,717.93, including $188,650 for the land for the district sports park and $935,438.40 for the land for the district recreation park (at [11]).

The Appellant requested a recalculation (**Recalculation Application**) pursuant to section 137 of the *Planning Act 2016* (Qld) and in accordance with the process under the Council's charges resolution. The request was accompanied by a town planner's report regarding the highest and best use of the Required Land and a valuation report which assessed the market value of the Required Land to be $6,000,000 (excluding GST) (**Appellant's Valuation Report**) (at [12]).

The Land had been purchased by the Appellant approximately seven months earlier pursuant to a put and call option agreement dated 27 September 2021 under which the sale price was agreed in or about May 2021 (at [9]). The Appellant's Valuation Report did not rely upon that sale as a comparable sale because the valuer considered it to have limited relevance given that the price was agreed approximately 12 months earlier than the relevant valuation date and there had been subsequent strong market changes (at [14]).

The Council's internal valuer considered the Recalculation Application and amended the valuation to $3,600,000. The Appellant rejected the outcome of the Recalculation Application and requested that it be referred to an independent valuer (at [15]). The outcome of the referral was the Independent Valuation, in accordance with which the Independent Valuer valued the Required Land at $4,015,000 (at [17]).

The Council's delegate determined that the Independent Valuer had followed the correct methodology under the Council's charges resolution, adopted the Independent Valuation, and gave to the Appellant the Amended ICN which provides for a total refund of $4,865,437.19, including $795,650.11 for the land for the district sports park and $3,671,157.55 for the land for the district recreation park (at [18]).

Court finds that the Independent Valuation did not involve an error

The Appellant argued that the Independent Valuation did not comply with section 25(2)(a) of the Council's charges resolution because the Independent Valuer did not, in determining the original land value for the Required Land, disregard "*… any change in the value (e.g. through development opportunities caused, or contributed to, by the identification of the required land in the local government infrastructure plan …*" as is required by the third dot point in the Note to section 25(2)(a) of the Council's charges resolution (at [22]).

The Independent Valuer's evidence was that they prepared the Independent Valuation using the before and after methodology in the Council's charges resolution. They relied upon six comparable sales, including the adjoining land at 323 Rochedale Road in respect of which the Independent Valuer made an adjustment to the sale price because of an infrastructure agreement under which a trunk park is required to be provided and there is a correlated capped offset of $4,100,000. The Independent Valuer also included the Land as one of the six comparable sales. In respect of that sale, the Court held that the Independent Valuer's decision not to make an adjustment similar to that made in respect of the 323 Rochedale Road sale was appropriate given that at the time of the sale there was no approval and no infrastructure agreement. The Court found that "*This is an appropriate judgement for a valuer to make and means that the valuation by [the Independent Valuer] was undertaken consistently with the requirements of s 25(2)(a), and in particular the third dot point*" (see [32] to [37]).

Court finds that the Council's delegate did not err in their decision-making

The Appellant also challenged the Council's delegate's decision-making for the reason that they did not specifically deal with the third dot point in the Note to section 25(2)(a) of the Council's charges resolution. The Court dismissed the challenge, finding that the Council's delegate was not required to give reasons for their determination and that they, as they were entitled to and without error, relied upon the Independent Valuation (at [41]).

Conclusion

The Court dismissed the appeal.

Colin Biggers & Paisley

NSW Land and Environment Court considers the issues of variations to Environment Protection Licences at waste facilities

Audrey Wu | Bethany Burke | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Scott Greenwood v Environment Protection Authority* [2025] NSWLEC 1051 heard before Young AC

July 2025

In brief

The case of Scott Greenwood v Environment Protection Authority [2025] NSWLEC 1051 concerned Class 1 Appeal proceedings challenging the NSW Environment Protection Authority's (**EPA**) decision to vary the Environment Protection Licence (**EPL**) for "Greenwood Landfill". This case serves as an important reminder on the interplay between development consents on one hand and EPLs on the other as they apply to waste facilities. What is permitted by a development consent may influence what constraints the Court will accept in any appeal challenging the EPA's attempt to vary an EPL. As a result, this case witnessed the EPA construing the development consent narrowly, whilst the owner and the Court gave breadth to the development consent.

Under section 58 of the *Protection of the Environment Operations Act 1979* (NSW) (**POEO Act**), the EPA sought to:

- delete 'building and demolition waste' and 'asphalt waste' as acceptable waste types and instead insert 'concrete' and 'bricks';
- remove landfilling as a permissible activity; and
- impose a waste storage limit.

Mr Greenwood (**the Applicant**), appealed the EPL variation.

The Court considered whether it should vary the EPL so as to:

- Change the waste types able to be received at the premises.
- Remove 'waste disposal (application to land)' from the list of permitted scheduled activities.
- Impose a waste storage limit of 26,000 tonnes at any one time.

Ultimately, the appeal was partially upheld with 'building and demolition waste' allowed to remain on the EPL as an acceptable waste type.

What waste types could be lawfully received?

In determining what waste types could lawfully be received, the Court said that the parties took fundamentally different interpretations to what was permitted by the development consent (at [50]).

The EPA took the view that only 'sandstone, soil, masonry, and vegetation' (or their equivalent) could be received. The Applicant argued that the materials that could be received were not so restricted and rather, a broader range of materials could be imported and screened on the premises for the recycling of 'sandstone, soil, masonry, and vegetation' (or their equivalent) (at [51]).

The Court found that the development consent did not clearly articulate what waste types could be received for 'stockpiling, recycling and resale', but rather focused on what materials can be imported for the purposes of screening and recycling at the premises (at [55]).

The Court had regard to the fact that the EPL was in practice, the primary regulatory mechanism determining the types of waste that could be received and recovered for the last 20 years as the development consent was granted in 1987 with only limited modifications since that time with respect to what waste could be received (at [56]). The EPL had permitted 'building and demolition waste', 'VENM', 'garden waste', 'asphalt', 'office and packaging waste' and 'waste tyres' to be received since at least 2010 (at [57]). In reliance on those facts, the Court found that there was nothing in the development consent that prevented the receipt of those waste types that had been permitted by the EPL for the previous 15 years (at [58]).

The Court gave further consideration to whether 'building and demolition waste' should continue to be received at the premises and found:

- from a practical and historical perspective, it is not reasonable to expect that the waste received has been 'pre-screened' and 'segregated' into the various permitted waste types prior to arrival at the premises (such as 'concrete' and 'bricks') (at [60]);
- 'building and demolition waste' inherently contains other materials that require screening at the premises prior to further processing (at [60]); and
- to replace 'building and demolition waste' with 'concrete' and 'bricks' will result in a financial loss for the current operations as customers are likely to take their waste to an alternative site where pre-screening of applicable waste types is not required (at [62]).

Should the EPL continue to allow landfilling?

The Court found that it was appropriate to remove the scheduled activity of 'waste disposal (application to land)' from the EPL because:

- landfilling could not be carried out unless and until the construction of the landfill cell had been completed (which it had not been) (at [80]);
- it would be premature to allow receipt of waste for the purpose of landfilling as the EPA would have no way of determining whether the landfill cell under construction is appropriate to receive waste and what type of waste should be permitted to be disposed of within the cell (at [81]);
- there is no facility for landfilling (at [83]); and
- while not binding, the EPL summary in the variation said that the EPA would re-instate these conditions onto the licence once the landfill cell has been completed and the EPA has provided written approval to the licensee that landfill in the new cell can occur (see paragraph [84–85] of judgment).

As a result of this finding, the Court found that given the EPL said that 'office and packaging waste' and 'waste tyres' could only be received for the purpose of landfilling, it was appropriate for those waste types to be removed from the EPL (at [76]).

Further, the Applicant agreed to 'asphalt' being removed from the EPL as a waste type that could be received (at [74]).

Should there be storage limits on the EPL?

The Court determined the particulars of a condition that would impose a limit on the amount of waste that could be stored on the premises at any one time.

Given there were already stockpiles that exceeded the proposed 26,000 tonne amount, the Court imposed a condition that staggered the storage limit so that it was gradually reduced over time rather than a condition having immediate effect, which would have put the Applicant in breach of the condition (see [89–96]).

What weight should be given to a Licence Variation Summary?

There was a contest in the proceedings because the Licence Variation Summary was inconsistent with the 2024 Licence.

The Court accepted the EPA's arguments that the Licence Variation Summary did not form part of the Notice given to the Applicant pursuant to section 58(5) of the POEO Act. As such, the Licence Variation Summary is an aid to the understanding the Variation Notice and not the Licence itself (at [99]). Further, the issue of the Licence Variation Summary is not an exercise by the EPA of its licencing functions and is therefore not amenable to appeal under section 287 of the POEO Act (at [100]).

Take away messages

- A Licence Variation Summary does not form part of the EPL itself but can assist in understanding an EPL variation notice.
- While the EPA has the power to prohibit something that would otherwise be permitted by a Development Consent, a development consent is still relevant to the question of what should and should not be permitted to be received.
- Construing a development consent is important for determining what activities and waste types should be included in an EPL. Some older consents are more relaxed than newer consents meaning that some operators have more flexibility under development consents than those that have been subject to the present, more rigorous planning approval regime.
- If scheduled activities cannot be carried out, the EPA may seek to remove them from EPLs.

Colin Biggers & Paisley

Small but significant: Planning and Environment Court confirms height increase not a minor change

Ben Caldwell

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Beckdev Coolangatta Pty Ltd v Council of the City of Gold Coast* [2025] QPEC 15 heard before Williamson KC DCJ

October 2025

In brief

In the case of *Beckdev Coolangatta Pty Ltd v Gold Coast City Council* [2025] QPEC 15, the Planning and Environment Court of Queensland (**Court**) dismissed an appeal by Beckdev Coolangatta Pty Ltd (**Beckdev**) against the decision of the Gold Coast City Council (**Council**) to refuse a change application to increase the height of an approved mixed-use development in Coolangatta from 18 to 21 storeys. The Court held that the proposed change was not a minor change under the *Planning Act 2016* because it would result in substantially different development.

Background

Beckdev obtained a development approval in October 2023 for an 18-storey mixed-use tower on McLean Street, Coolangatta.

The approved height exceeded the 39 metre limit in the Gold Coast City Plan's Building height overlay map but was supported under the uplift provisions of the Strategic Framework.

The development application required public notification and attracted 458 properly made submissions, which raised concerns about height, bulk and amenity, amongst other matters.

After receiving advice from Council that the proposed building height was not supported, the height of the proposed development was reduced from 23 storeys to 18 storeys, which was then approved.

Following the conclusion of the submitter appeal period, Beckdev lodged a change application which sought to increase the height of the proposed development from 18 to 21 storeys. The proposed change, which would also add 24 units to a total of 156 and increase the GFA from 14,923m² to 17,792m², was refused by the Council.

The issues

The Court identified three issues:

- Issue 1 – Whether the proposed change was a "minor change" under Schedule 2 of the *Planning Act 2016*.
- Issue 2 – If so, whether the change application should be approved or refused.
- Issue 3 – Whether the change application should be approved in the exercise of the Court's discretion.

The Court only determined Issue 1, finding it fatal to the change application.

The Court's decision

The Court held that the change would result in substantially different development and therefore was not a minor change. Key reasons included:

- **Visual impact**: The additional three storeys and nine metres were visually appreciable from multiple viewing points and created a legibly greater building height.
- **Planning context**: Building height and bulk at the upper part of the building was a sensitive parameter given the significant exceedance of the level stated on the Building height overlay map and the strategic importance of height controls.
- **New impacts**: The change would introduce or exacerbate overshadowing impacts on an approved but unbuilt adjoining tower at 39 McLean Street, affecting upper-level apartments and communal areas.

Having regard to existing circumstances, the Court was satisfied that the proposed change did not result in a substantially different development. However, when looking forward and considering the impact the proposed change would have on the approved but unbuilt adjoining tower, the Court formed the view the proposed change would result in a substantially different development and was therefore not a minor change.

Conclusion

The Court dismissed the appeal on the limited basis that the change application did not seek a minor change to the development approval.

Key points

- **Height sensitivity**: Where a development already exceeds height controls, further increases will be closely scrutinised.
- **Minor change test**: Even seemingly modest changes (three storeys) can fail the test if they alter building relationships or introduce new impacts.
- **Process matters**: A change that is not "minor" must proceed as an "other change" under section 82 of the *Planning Act 2016*, requiring public notification and appeal rights.
- **Strategic framework relevance**: The uplift provisions do not guarantee approval for additional height; they require a holistic assessment of design, amenity and character outcomes.

Colin Biggers & Paisley

Raising the roof: Decision to approve an other change application increasing the building height by two storeys has been upheld

Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of S*ullivan & Ors v Council of the City of Gold Coast & Anor* [2025] QPEC 20 heard before Everson DCJ

October 2025

In brief

The case of *Sullivan & Ors v Council of the City of Gold Coast & Anor* [2025] QPEC 20 concerned a submitter appeal against a decision of the Council of the City of Gold Coast (**Council**) to approve a change application for an other change to a development approval, being for a material change of use to establish a multiple dwelling on land at 133 Golden Four Drive, Bilinga (**Land**).

The development approval is for a seven-storey residential apartment building with 11 dwelling units, and is 23 metres high with a basement carpark. The change application for an other change sought to increase the number of storeys from seven to nine, increase the number of units from 11 to 13, and increase the height from 23 metres to 32.85 metres (**Proposed Development**).

The Court found that the provisions of the *Gold Coast City Plan 2016* (**Planning Scheme**) in dispute had been satisfied or, if the Court was wrong in that assessment, that there were relevant matters which supported the approval of the Proposed Development. The Court therefore allowed the appeal to the limited extent of allowing the conditions to be amended to enable the provision of enhanced setbacks and opaqued glass.

Background

The Land is 759m² and has a frontage of 15 metres. To the north is a building called Nusa, being a four-storey multiple dwelling in which all of the appellants live. To the south is a building called Lanai, which is an older three-storey multiple dwelling. To the east is a building called San Chelsea, which is a four-storey multiple dwelling.

In addition to the changes described above, the Proposed Development involved the following (at [2]):

- The removal of the basement carpark, to be replaced with ground level car parking.
- An increase in the communal open space from 114.75m² to 124.6m². The communal open space is to be moved from the ground level at the rear of the building to a terrace on level one overlooking Golden Four Drive.
- Reduced setbacks.
- Changes to the architectural treatment of the building to incorporate landscaping elements.
- Design changes, creating a greater degree of openness.
- Three, instead of two, darker top storeys.

Under the Planning Scheme the Land is (at [3]):

- Within the Urban Area on Strategic Framework Map 1.
- In the Consolidation Area on Strategic Framework Map 9.
- In the Medium Density Residential Zone.

Under the Building Height Overlay Map, it is in an area subject to a building height of 23 metres; however, Specific Outcome 3.3.2.1 of the Strategic Framework permits an increase in building height of up to 50% where particular outcomes are satisfied (at [11]).

Assessment and decision making framework under the Planning Act

The Court cited the decision in *McEnearney v Council of the City of Gold Coast* (2024) 261 LEGERA 396, in which the Court of Appeal cited with approval the observations of the Planning and Environment Court in *Catterall v Moreton Bay Regional Council* [2020] QPEC 52, being that the assessment and decision making process for a

change application for an other change is to occur "…*in the context that the application is one to change an existing development approval, as distinct from a fresh development application*" (at [8]).

The Court also recognised that it has a wide discretion under section 60 of the *Planning Act 2016* to approve all or part of the application, impose development conditions, or refuse the application, and that "…*the ultimate decision of the Court is a broad evaluative judgment*", citing *Brisbane City Council v YQ Property Pty Ltd* [2021] QPELR 987 at 1001 (at [9]).

Issues in dispute

The issues in dispute were whether there is compliance with all of the outcomes in Specific Outcome 3.3.2.1 of the Strategic Framework, in particular the following (at [13]):

- "*Does the proposed development achieve a well-managed interface with, and relationship to, nearby development and ensure that the impact on nearby development and its residents is reasonable*."
- "*Does the proposed development reinforce the local identity and sense of place*."
- "*Does the proposed development achieve an excellent standard of appearance of the built form*."

Court finds that the Proposed Development achieves a well-managed interface with and relationship to nearby development

The Appellants argued non-compliance with subparagraph (c) of Specific Outcome 3.3.2.1(9) of the Strategic Framework, which requires a well-managed interface with, and relationship to, nearby development and that the impact on nearby development and its residents is reasonable. In support of this argument, the Appellants argued that regard ought to be had to the following (also at [13]):

- The reasonable expectations in the Medium Density Residential Zone Code (**MDRZ Code**) in respect of setbacks, and that the ground level, level 1, and levels 4 to 9 will intrude into those setbacks.
- The Proposed Development will be physically overbearing to the surrounding development, being Nusa, San Chelsea and Lanai because of its height, setbacks and architectural treatments.
- The Proposed Development involves inadequate landscaping.

The Court agreed that the initially proposed setbacks of 0.75 metres to the eastern boundary are inadequate, but endorsed proposed setbacks of 1.5 metres with deep planting, which the Co-Respondent stated it would agree to as a condition (at [18]). The Court also accepted the concession from the Appellants' visual amenity expert that when the landscaping, proposed opaque glass (which the Co-Respondent also stated it would agree to as a condition), and outdoor entertainment area are taken into account, the Proposed Development does not result in unreasonable impacts along the other boundaries at ground level or level one (at [20]). In respect of the higher levels, the Court was satisfied that the Planning Scheme in the purpose, overall outcomes and PO1 of the MDRZ Code states a number of different pathways to achieve a compliant setback and, importantly, such pathways do not prescribe a particular dimension but rather are qualitative in nature (at [22]). The Court found that the Proposed Development in this respect was compliant with the Planning Scheme, having regard to the progressive setbacks and substantial planting, and the design approach which is not physically overbearing to the neighbouring buildings (also at [22]).

Court finds that the Proposed Development reinforces the local identity and sense of place

In respect of subparagraph (b) of Specific Outcome 3.3.2.1(9) of the Strategic Framework, the Court found that the Proposed Development is a "…*good example of a beachside high-rise multiple dwelling in an area where this development is contemplated by the planning scheme*" and thus it reinforces the local identity and sense of place (at [23]).

Court finds that the Proposed Development has an excellent standard of appearance of built form

In respect of subparagraph (e) of Specific Outcome 3.3.2.1(9) of the Strategic Framework, the Court found that the Proposed Development is "…*of superior merit*" and that it is an improvement on the original development approval (at [24]).

Conclusion

The Court found that the contentious provisions of the Planning Scheme had been satisfied, and thus the increase in the building height was justified under Specific Outcome 3.3.2.1 of the Strategic Framework (at [25]).

The Court went on to find that if its assessment in respect of the Planning Scheme provisions is incorrect, there are relevant matters to support approval, namely that the Proposed Development is a significant improvement on the originally approved architectural design and landscaping, and that the design changes attributable to the Proposed Development when compared to the originally approved development have no meaningful consequence on the Appellants (at [27]).

The Court allowed the appeal to the limited extent of the conditions being amended to enable the provision of the enhanced setbacks and opaqued glass.

Key points

- **Strategic framework relevance**: The uplift provisions do not guarantee approval for additional height; they require a holistic assessment of design, amenity and character outcomes.

Central Coast Strategic Conservation Plan: A preview of regional coordinated biodiversity assessment

Mollie Hunt | Todd Neal

This article discusses how the draft Central Coast Strategic Conservation Plan (CCSCP) foreshadows the anticipated direction of upcoming reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

October 2025

In brief

The draft CCSCP has emerged as a potential preview of what may lie ahead as the Australian Government implements its "nature positive" environmental reforms.

The latest update on the EPBC Act reforms is that legislation will be introduced to Parliament before the end of 2025.

In the meantime, according to the Federal Department of Climate Change, Energy, the Environment and Water's (**Federal DCCEEW**) website, part of the EPBC Act reforms will involve regional planning, to "*support better and faster decision-making under the Act, and will help restore, protect, and manage the environment*."

The Federal Minister for the Environment has been reported to have stated that the "regional plans" would create "no-go" zones where development will be restricted and mapped areas where individual site assessments will not be required.

On its webpage last updated on 3 October 2025, the Federal DCCEEW has confirmed it is developing a pilot regional plan in NSW, which "*will help manage the tensions between the environment and urban development in the Central Coast and Lake Macquarie*".

Agreement between the Commonwealth and NSW Governments

The draft CCSCP has been prepared pursuant to an agreement made on 11 November 2024 (under the existing EPBC Act), to undertake a strategic assessment of the Central Coast. The agreement is between the Minister for the Environment and Water and the NSW Minister for Planning and Public Spaces.

Draft CCSCP

The draft CCSCP has now been prepared and public exhibition has recently commenced. Submissions can be made until **11 November 2025**. Further details are available on the Planning NSW website.

There are five documents currently on exhibition in relation to the CCSCP by the NSW Government:

- Draft plan
- Explanation of Intended Effect
- Draft Commitments and actions
- Draft Strategic Assessment Report
- Strategic Biodiversity Component factsheet
- Technical factsheet - Mitigation measures

The NSW Government's Explanation of Intended Effect states that:

> *Once approved by the State and Federal Ministers for Environment, the CCSCP will provide investment certainty and streamline the delivery of new housing, infrastructure and jobs by removing the need for landholders on certified urban capable land to seek their own statutory biodiversity approvals on a site-by-site basis.*

This is reminiscent of the practical benefits that some landowners and developers experienced in relation to the biodiversity certification of the *Growth Centres State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, which has recently (on 6 June 2025) been extended for one year to 30 June 2026.

Returning to the proposed CCSCP, the draft identifies "certified land", where development can proceed without further biodiversity approvals, and "non-certified land", where clearing is restricted and rezoning is limited to conservation or public recreation zones. The two categories of land are described on the NSW Planning website as:

> *Certified urban capable land – will have upfront state and federal biodiversity approvals, through the plan. Landholders will not be required to seek their own biodiversity approvals if they want to develop their land. A landholder is still required to seek other relevant planning approvals before development, which will include mitigation measures to reduce the impacts on biodiversity.*
>
> *Non-certified land – is not suitable for more intensive development. Current land uses can continue, however native vegetation clearing will be restricted*.

It appears from the NSW Government's website that the distinction between the two has been based on extensive surveys conducted by independent ecologists.

NSW planning controls will restrict development on the "non-certified land" including:

- development consent being required to clear native vegetation (and restrictions on when consent can be granted);
- asset protection zones being wholly "certified land", not adjoining "non-certified land";
- non-certified land will not be able to be rezoned for more intensive land uses, and the preferred zoning will be C2 (Environmental Conservation) or RE1 (Public Recreation); and
- limits on circumstances in which development applications for essential infrastructure will be approved on "non-certified land".

Legislative status and outlook

With EPBC Act reform legislation expected to be introduced before the end of the year, we expect that this will occur in the next few weeks, given that the last sitting week for Parliament is in November 2025.

In the meantime, the CCSCP offers a preview of how plans which aim for streamlined, strategic biodiversity assessment could soon become standard practice across Australia. It involves new forms of coordination between State and Federal environmental legislation to balance conservation with certainty for landowners and developers.

Victoria’s planning overhaul: New framework for restrictive covenants under the 'Better Decisions Made Faster' Bill

Henry Hughes | David Passarella

This article discusses the Victorian Government's "Better Decisions Made Faster" Bill 2025 which introduces sweeping reforms to planning laws, including major changes to how restrictive covenants are handled

November 2025

In brief

The Victorian State Government tabled its *Planning Amendment (Better Decisions Made Faster) Bill 2025* (**Bill**) in the Legislative Assembly on 28 October 2025. The Government has labelled it as the "biggest overhaul of Victoria’s planning laws in decades" and claims it will be "bringing Victoria’s old-fashioned "NIMBY" planning laws into the modern era".

The Bill proposes vast changes to the *Planning and Environment Act 1987* (**Act**) which are too extensive to consider in one article. Accordingly, this article will only focus on the key changes relating to restrictive covenants.

The power to issue permits that can breach restrictive covenants

Under the current Act, when deciding on an application, if the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit (unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant) (section 61(4)).

The Act also currently provides that if the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, it must include a condition that the permit is not to come into effect until the restrictive covenant is removed or varied (section 62(1)(aa)).

The Bill proposes to repeal section 62(1)(aa) and substitute section 61(4) with a new section that provides:

> *Without limiting subsection (1), the responsible authority may grant a permit that would authorise anything which would result in a breach of a registered restrictive covenant.*

In addition, it proposes the inclusion of a new section providing that if a responsible authority grants a permit that would result in a breach of a registered restrictive covenant, it is not liable for any loss suffered by any person as a result of the breach (new section 61(5)).

Revised matters a responsible authority must consider for applications to remove or vary a restrictive covenant

Currently under the Act, a responsible authority must not grant a permit which allows the removal or variation of a restrictive covenant unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer (section 60(2)):

- financial loss; or
- loss of amenity; or
- loss arising from change to the character of the neighbourhood; or
- any other material detriment

as a consequence of the removal or variation of the restriction.

This decision making process, however, does not apply to a restriction that was registered under the *Subdivision Act 1988*, lodged for registration or recording under the *Transfer of Land Act 1958*, or created, before 25 June 1991 (section 60(4)).

For restrictions registered, lodged or created before 25 June 1991, the responsible authority must not grant a permit which allows the removal or variation of a restriction unless it is satisfied that (section 60(5)):

- the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and
- if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

The Bill proposes to repeal section 60(4) to (7) of the Act. This will end the historical distinction of restrictive covenants created before and after 25 June 1991 and eliminate the statutory privilege afforded to grandfathered restrictive covenants, which rely on the often criticised low threshold of perceived detriment.

The Bill accordingly proposes to create a standardised decision making process, applicable to all restrictive covenants regardless of age. The current decision making parameters are however proposed to be amended. The scope of what a responsible authority can consider before deciding on an application which would allow the removal or variation of a restriction will be altered by:

- expressly removing consideration of financial loss (new section 60(2)(a)(iii));
- requiring consideration of:
    - the impact of the restriction on the ability to deliver (new section 60(2)(b));
        - the objectives of planning in Victoria;
        - any applicable State planning strategy, regional planning strategy or planning strategy for the area covered by the planning scheme; and
        - the objectives or purposes of the planning scheme.
    - whether a matter that is the subject of the restriction to be removed or varied is also regulated by the planning scheme (new section 60(2)(c)); and
    - if the removal or variation of the restriction is proposed in conjunction with an application for a permit for a use or development that would breach the restriction, for the purpose of considering a matter under paragraph (a), (b) or (c), whether that use or development is acceptable having regard to the matters set out in subsections (1), (1AA), (1A) and (1B) (if relevant) (new section 60(2)(d)).

Looking ahead

The proposed reforms in the Bill represent a major shift in how restrictive covenants are treated through the planning permit process.

By allowing the grant of a permit in breach of a restrictive covenant, removing the grandfather provisions and updating the decision making framework for permits to remove or vary a restrictive covenant, the Bill appears aimed at streamlining processes and reducing barriers to development. For landowners, developers and responsible authorities, these changes will require careful navigation of both new opportunities and obligations.

Offset insufficient: Provision of an environmental offset 60km away is not enough to overcome loss of environmental values

Ben Caldwell

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Brades Property Agnes Water Pty Ltd v Gladstone Regional Council* [2025] QPEC 24 heard before Everson DCJ

November 2025

In brief

In the case of *Brades Property Agnes Water Pty Ltd v Gladstone Regional Council* [2025] QPEC 24, the Planning and Environment Court of Queensland (**Court**) dismissed an appeal by Brades Property Agnes Water Pty Ltd (**Brades**) against the decision of the Gladstone Regional Council (**Council**) to refuse a development application for a preliminary approval (including a variation request) for a material change of use to establish a new low-density residential precinct and reconfiguring a lot for 158 residential lots.

The Court found that the proposed development failed to demonstrate overwhelming community and economic need, did not adequately address significant ecological impacts, and that the existence of an earlier development approval for a 360 dwelling manufactured housing estate did not justify the approval of the proposed development.

Background

The site the subject of the appeal was included in the Emerging community zone and subject to overlays for bushfire hazard, steep land, and biodiversity. It was also identified within the Our Environment and Heritage Strategic Framework map as an area of high ecological significance and within a strategic environmental corridor.

In 2019, Brades had obtained an approval for a Retirement Facility (Manufactured Housing Estate) which if developed would comprise of 360 manufactured dwellings. The existing approval allowed for extensive earthworks and all of the vegetation on the site to be removed.

The proposed development was for a 158 residential subdivision which would also require all of the vegetation on the site to be removed and significant earthworks.

The Court dismissed the appeal, having found the proposed development does not comply with the relevant assessment benchmarks relating in particular to need and ecological impacts, and that the existing development approval is not to be awarded determinative weight in favour of approving the proposed development.

Issues

The Court identified four key issues:

- **Issue 1** - Whether there was an overwhelming (or overriding) community and economic need for the proposed development.
- **Issue 2** - Whether the proposed development would give rise to unacceptable ecological impacts.
- **Issue 3** - The relevance and weight to be given to the existing development approval for a manufactured housing estate.
- **Issue 4** - Whether there were other considerations justifying approval despite non-compliance with planning scheme benchmarks.

Issue 1 - Community and economic need

The expert evidence found there was only a modest level of need for additional dwellings in the area, especially when the existing approval for 360 manufactured dwellings was factored in. The Court found that Brades had failed to demonstrate the requisite level of need, noting that the proposed development would result in fewer dwellings overall, but of a different type, and that the need for different dwelling types was not meaningfully analysed.

Issue 2 - Ecological impacts

The site contains significant biodiversity values, including remnant vegetation and habitat for threatened species. The ecology experts agreed the site was correctly mapped as of high ecological significance. The Court found that the proposed development made no attempt to avoid or minimse impacts to the biodiversity values of the site. The proposed environmental offset to be provided at Benaraby, which was 60 kilometres away, was found to be of negligible value, conditional, and not compliant with the relevant assessment benchmarks. The Court therefore found that the proposed offset did not mitigate the destruction contemplated by the proposed development.

Issue 3 - Weight to be given to the existing development approval

Brades argued that the existing development approval should be given determinative weight. However, the Court noted the existing approval will lapse in April 2026, and significant operational work and compliance hurdles remained, making it unlikely the approval could be implemented in time. The existing approval was also granted without a proper ecological assessment, and subsequent development on adjoining land had compromised aspects of the approved plan. In the circumstances, the Court concluded the existing approval should not be determinative.

Issue 4 - Other relevant matters

The Court found no relevant matters or discretionary considerations that justified approving the proposed development in light of its serious conflicts with the planning scheme.

Conclusion

The appeal was dismissed and the proposed development refused as:

- it was in serious conflict with multiple provisions of the planning scheme, particularly in respect of need and ecological protection;
- Brades had failed to demonstrate overwhelming community and economic need;
- the proposal did not address or mitigate its significant biodiversity impacts;
- the existing approval did not justify approval of the proposed development, given it was unlikely it could be implemented prior to the time it would lapse and the approval had lacked a proper ecological assessment.

Key points

The Court's decision underscores the following:

- a proposed development should seek to comply with assessment benchmarks in respect of the ecological values of a site;
- significant impacts to the biodiversity values of a site cannot always be compensated by the provision of an environmental offset, particularly if the offset is remote from the site of the proposed development;
- having an existing development approval does not guarantee future development rights, particularly where new evidence or changed circumstances reveals significant impacts or a lack of need.

Primary production wins: Planning and Environment Court of Queensland finds that the fragmentation of rural land is an unacceptable outcome

George Gardener | Krystal Cunningham-Foran | Nadia Czachor

This article discusses the decision of the Planning and Environment Court of Queensland in the matter of *Hunt v Douglas Shire Council* [2025] QPEC 19 heard before Morzone KC DCJ

November 2025

In brief

The case of *Hunt v Douglas Shire Council* [2025] QPEC 19 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of Douglas Shire Council (**Council**) to refuse a development application for a small scale subdivision in Mowbray, Queensland (**Site**).

The development application was for reconfiguring a lot (one into four lots) of Agricultural Class A Land within the Rural Zone. The Council defended its decision to refuse the development application arguing that the proposed development would impermissibly fragment good quality agricultural land, would fail to conserve areas for primary production, and is inconsistent with the planning strategy. The Applicant contended that the primary Site is already naturally fragmented and the proposal would not have adverse impacts to the productive capacity of the land.

The Court ultimately dismissed the appeal and refused the development application on the basis that it does not comply with the relevant assessment benchmarks and can not occur without unacceptable adverse impacts.

Background

The Site forms an irregular shaped parcel with an area of 53.53 hectares and is located in the Rural Zone under the *Douglas Shire Planning Scheme 2018* (**Planning Scheme**). Relevant overlays include the Natural Areas Overlay, in accordance with which part of the Site is mapped Matters of State Environmental Significance - Regulated Vegetation, and the Flood and Storm Tide Hazard Overlay in accordance with which part of the Site is mapped Storm Tide - Medium Hazard and part of the Site is mapped Storm Tide - High Hazard.

The proposed development comprises four allotments, with lots two, three, and four ranging in size from 1.7 hectares to 2.6 hectares. The balance area forms proposed lot one with an area of 47.53 hectares and includes existing cane land, grazing land, a house, and an equestrian facility. The proposed lots are situated along the southern boundary, adjacent to existing rural residential lots to the east and west.

Key questions

The Court identified three critical questions for determination in the appeal as follows:

- Does the proposed development comply with the assessment benchmarks in the planning scheme?
- Can compliance with the assessment benchmarks be achieved by imposing lawful development conditions?
- Should the development application be approved in the exercise of the discretion under section 60(2)(b) of the *Planning Act 2016* (Qld)?

Upon review, the Court answered each question in the negative due to the following considerations.

Compliance with assessment benchmarks

The Applicant argued that the proposed development complies with the relevant assessment benchmarks as there is no prescribed minimum lot size and also argued that there would be no fragmentation or adverse impact to the productive capacity of the Site.

The Court considered the proposed development against the Rural Zone Code and Reconfiguring a Lot Code under the Planning Scheme. The purpose of the Rural Zone Code in section 6.2.10.2(1)(a) and (c) seeks to support primary production activities whilst protecting and managing natural resources to maintain this capacity.

The Court held that the proposed development does not comply with the purpose as well as the overall outcomes of the Rural Zone Code, by further fragmenting good quality agricultural land and failing to conserve areas to be utilised for primary production. The Court went further, finding that the proposed development does not comply with the purpose of the Reconfiguring a Lot Code because it lacks sufficient areas, dimensions, and shapes suitable for a rural use (at [89]).

Ultimately, the Court preferred the evidence given by the Council's expert in respect of the Site being suitable for large-scale primary production and held that the limitations, and proposed use of the lots, were so inadequate that there was no acceptable outcome to achieving compliance with either Code (see [86] and [98]).

Court finds that non-compliance with the assessment benchmarks cannot be addressed through development conditions

The Applicant argued that any issues in relation to the continuation of rural uses and reverse amenity impacts can be resolved through approval conditions such as building envelopes and boundary buffers for the proposed lots (at [88]).

The Court rejected this argument, and given its determination with respect to fragmentation, concluded that these conditions would further erode the amount of good quality agricultural land. Whilst acknowledging that the reverse amenity impacts are partially mitigated, the broader planning harm remains by permanently severing areas of primary production.

The Court stated that the size and availability of quality agricultural land is critical for the intended use of the Rural Zone Code (at [89]). Therefore, the extent of non-compliance and fragmentation caused by the creation of smaller lots was not considered resolvable through development conditions.

Court did not exercise its discretion to approve the proposal

The Applicant urged the Court to exercise its discretion under section 60(2)(b) of the *Planning Act 2016* (Qld) to approve the development application.

The Court held that the matters, singularly or collectively, do not favour the exercise of discretion for approval (at [91]).

The Court found that the proposal was non-compliant with the Planning Scheme, was not consistent with the surrounding pattern of development, did not respond to the areas rural character, and would cause fragmentation contributing to cumulative regional harms (at [106]).

The Court held that the proposal development was "…*opportunistic, rather than sympathetic, to the land's features and topography, and surrounding development and land uses*" (at [101]).

Conclusion

The Court had regard to the significant non-compliance with the assessment benchmarks and did not accept that the proposal could occur without unacceptable adverse impacts or town planning consequences. Therefore, the Court upheld the Council's decision to refuse the development application and dismissed the appeal (see [111] to [112]).

The year in review: Court and regulatory decisions relating to the New South Wales waste and resources industry in 2025

Bethany Burke | Katherine PIckerd | Todd Neal

This article discusses some of the key cases from New South Wales' courts related to criminal proceedings brought against waste and resource industry operators by the New South Wales Environment Protection Authority

December 2025

In brief

In this article, we have briefly outlined some of the cases from the NSW Local Court and NSW Land and Environment Court (**LEC**) related to criminal proceedings brought against operators for:

- Failing to comply with a request for information and records issued by the EPA.
- Failing to comply with clean-up notice directions and a prohibition notice.
- Failing to carry out activities in a competent manner.
- Causing emissions of air impurities above standard concentrations.

We have also highlighted some of the enforceable undertakings that have been offered by industry operators and accepted by the EPA, one of which was worth $18 million.

Finally, PFAS continues to be a headline issue with both the NSW and Federal Government handing down reports this year. We highlight how industry operators can expect increased PFAS regulation, some of which have already been published in draft for comment by the EPA and implemented into conditions of environment protection licenses.

Large fine issued for failing to comply with a request for information and records issued by the EPA

The EPA successfully prosecuted a construction company, He Co Pty Ltd, and its director in the Parramatta Local Court for providing false information during an EPA investigation into the illegal dumping of asbestos. The case warrants mention because the company and its director were each fined $100,000 which was reported to be one of the largest fines secured for providing false or misleading information to the EPA. Given the significant penalties associated with non-compliance, any person issued with statutory notices, such as requests to provide information or records, should take care to ensure their response is accurate, complete and appropriate, including that all relevant documentation is properly collated and provided. Where there is any doubt, legal advice should be sought.

Failure to comply with clean-up notice and prohibition notice

The decision of *Environment Protection Authority v Pullinger (No 3)* [2025] NSWLEC 59 has served as a reminder to directors that their ability to pay a fine is "relevant, but not a decisive matter" when determining what penalty should be imposed. The LEC imposed a significant penalty of $200,000 to Mr Robert Lenard Pullinger, the director of a deregistered waste oil processing facility, for not complying with directions of a clean-up notice and not complying with a prohibition notice. That penalty was imposed despite evidence before the Court that, at the time of the penalty hearing, showed Mr Pullinger was 75 years of age, bankrupt and reliant solely on a pension as his only source of income and that he had little, if any, capacity to work again.

Failure to maintain equipment in a proper and efficient condition

Industry operators, including councils, are often faced with making difficult and time sensitive decisions about whether and when to spend money on maintenance and improvement projects. Holders of environment protection licences would be familiar with a condition that requires:

> *All plant and equipment installed at the premises or used in connection with the licensed activity:*
>
> *a) must be maintained in a proper and efficient condition; and*
>
> *b) must be operated in a proper and efficient manner*.

Failure to comply with conditions of an environment protection licence can attract a significant fine.

A further example of this occurred earlier this year when the EPA investigated WCX M5 PT Pty Limited for polluting waters and ultimately found that it was a result of failing to maintain equipment. Two penalty notices totalling $60,000 were issued by the EPA.

In a similar vein, holders of environment protection licences can also be bound by a condition requiring that:

> *Licensed activities must be carried out in a competent manner*.

In *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 4)* [2025] NSWLEC 92, Maules Creek Coal Pty Ltd was fined $200,000 after the LEC found it guilty of four charges, three of which related to whether it carried out activities in a competent manner.

To avoid enforcement action, industry operators should regularly consider whether plant and equipment is maintained in a proper and efficient condition and whether there is appropriate training in place so that plant and equipment is operated in a "proper and efficient" manner and activities are "carried out in a competent manner".

Penalty for air impurities

The EPA successfully prosecuted *Cadia Holdings Pty Ltd in Environment Protection Authority v Cadia Holdings Pty Limited* [2025] NSWLEC 27. A large gold mine operator for three separate offences relating to the operation of plant in a manner that caused the emission of solid particles in excess of the standard concentration of 100 milligrams per cubic metre. Following guilty pleas, the LEC imposed a fine of $350,000.

Enforceable undertaking

A number of companies have made use of the enforceable undertaking provisions this year. We have seen first hand how useful these can be in averting costly and damaging of reputation criminal prosecutions or enforcement action. Whilst at the same time providing a tangible contribution to the environment through the undertaking made. Significant offers have been made and accepted by the NSW Environment Protection Authority including the following.

- A $18 million undertaking given by Port Kembla Copper Pty Ltd and PKC Properties Pty Ltd for the investigation and remediation of properties potentially impacted from its historic activities. This is the largest amount agreed to in an enforceable undertaking by the EPA to date.
- Following a serious phosphoric acid spill, Australian Pet Brands offered to enter into an enforceable undertaking worth $1,375,000 directed to safety and equipment upgrades. The EPA also agreed for $75,000 to be paid to a local community environmental education centre.
- An enforceable undertaking worth more than $740,000 was entered into between the EPA and BOC Limited following a spill of 2,000 litres of turbine oil. The amount was to be spent on a council project directed to improving water quality, improving the site's infrastructure and the costs of the clean-up.
- $120,000 was given to a local environmental rehabilitation project by Warkworth Mining Ltd following a number of instances where the EPA observed, including by drone surveillance, dust emissions from haul trucks on haul roads and unloading and loading of trucks.

PFAS update

While not a Court or regulatory decision, the Select Committee on PFAS Contamination in Waterways and Drinking Water Supplies throughout New South Wales handed down its report on 'PFAS contamination in waterways and drinking water supplies throughout New South Wales' in September 2025. Recommendation 10 was that the "NSW Government include load limits within environmental protection licences issued under the *Protection of the Environment Operations Act 1997* as to the amount of PFAS chemicals industry and treatment plants can discharge into waterways in New South Wales, with the aim of meeting ecological guidelines". The EPA has also released Draft Environmental Guidelines for Solid Waste Landfills, which references PFAS monitoring and a proposed PFAS Monitoring Chemical Control Order for feedback.

In the coming years, industry operators, in particular landfill and sewage treatment plant operators can expect further PFAS regulation from government as it tries to reign in future contamination.

The year in review: New South Wales planning and environment law in 2025

Rebecca Pellizzon | Bethany Burke | Mollie Hunt | Anthony Landro | Katherine PIckerd | Todd Neal

This article discusses some key judgments of the New South Wales Land and Environment Court and the New South Wales Court of Appeal in 2025 in relation to planning and environment law

December 2025

In brief

In this article, we consider some key judgments of the NSW Land and Environment Court and the NSW Court of Appeal in relation to planning and environment law in 2025. Whilst there have been no groundbreaking doctrinal shifts in the case law, the year has nevertheless involved the assent of the *Planning System Reforms Bill 2025*, the most significant set of reforms to the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in decades.

As a result, 2026 is poised to be a significant year as the reforms will introduce the following:

- Different objects to the EP&A Act highlighting the important nexus between planning law and land economics. In this regard, the objects will include housing delivery, but also climate resilience and proportionality for the first time.
- The Development Coordination Authority, a single agency for most concurrences on major projects.
- The Housing Delivery Authority will be enshrined in legislation, whose lesser-known functions include reporting to the Minister on housing supply and availability.
- Expanding Complying Development pathways and the introduction of a Targeted Assessment Development approval pathway in a new Division 4.3A.
- Introducing a state-wide Community Participation Plan and the prospect of more standardised conditions of development consents and involvement of applicants in the settling of those conditions.

As was predicted in our 2024 article, these reforms have arisen in an attempt to improve supply by removing delay, inefficiency, uncertainty and costs associated with getting new developments approved and built. Whether these reforms will deliver on these aims will be the subject of much scrutiny and debate in 2026. Having reviewed the Bill, we can see new lines of legal controversy arising.

NSW Court of Appeal and Supreme Court

Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd [2025] NSWCA 163 (Note that MACH Energy Australia Pty Ltd has been granted special leave to the High Court, see [2025] HCADisp 297)

In this case, the NSW Court of Appeal declared a development consent invalid for the failure to consider a mandatory consideration under section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW).

Specifically, the question was whether the Independent Planning Commission failed to consider imposing conditions to minimise Scope 3 greenhouse gas emissions arising from the development and the likely impact of those emissions **on the locality**.

In relation to ground 1(a), the Court of Appeal held that the IPC did consider whether to impose conditions on Scope 3 emissions.

However, in relation to ground 1(b), the Court of Appeal held that the IPC was required to take into account the "*likely impacts of the project, including environmental impacts on both the natural and built environments and social and economic impacts in the locality*". The IPC's reasons did not indicate that it had considered the impacts **on the locality** and the Court of Appeal found that the IPC had not done so. It was not enough for the IPC to have made general comments on the effects of global warming globally.

This judgment is a reminder of the need to carefully ensure all mandatory considerations are addressed and that a failure to do so will risk the validity of the development consent.

Although in many ways the judgment is unremarkable, as it is trite to say that environmental assessment must consider impact on locality (which most applications do and which most consent authorities focus on), what will be interesting is how the reforms impact this obligation. One of the amendments to section 4.15(1) of the EP&A Act will mean that, in future, only **significant** local impacts need to be considered. For some projects, it may be open to argue that their local impacts are insignificant.

Manboom Pty Ltd atf the Outdoor Signage Unit Trust v Jemena Gas Networks (NSW) Ltd (No 2) [2025] NSWSC 1330

In this judgment, the NSW Supreme Court was determining four separate questions, in relation to a claim in trespass brought by Manboom against Jemena.

AGL had installed gas main assets underground in rail corridor land which later became private property. Those gas main assets were now the property of Jemena.

Manboom brought proceedings contending that it was a trespass for the gas main assets to be in that land.

The Supreme Court answered "Yes" to all four of the separate questions, meaning that each of the following 4 factors provided Jemena with a complete defence against the trespass claims:

- the installation of the gas main assets at the land occurred under the *Australian Gas Light Company Act 1837* (NSW) and the *Australian Gas Light Company Act 1858* (NSW);
- the continued presence, maintenance and use of the gas main assets occurred under that legislation as well as other more recent legislation;
- the plaintiffs' ownership and possession of the land is subject to and qualified by Jemena's ownership and possession of the gas main assets and Jemena's statutory powers to maintain and use those assets; and
- the *Gas Supply Act 1996* (NSW) excluded the plaintiffs' trespass claims.

This is important for private property owners to bear in mind when dealing with pipelines which may exist on what is now private land and impact redevelopment of such land, even though the pipelines may not be the subject of instruments registered on title due to broader statutory rights that utilities owners have.

Land and Environment Court highlights

Modification applications

Ross v Randwick City Council [2025] NSWLEC 89

In *Ross v Randwick City Council* [2025] NSWLEC 89, the applicant, Ross, commenced judicial review proceedings challenging the Council's decision to approve a modification application that reduced the first-floor rear setback and provided deep-soil permeable surfaces over only 32.38% of the site. The proposed modification did not comply with the rear setbacks or deep soil requirements of the Randwick Development Control Plan (**DCP**).

The Court upheld the appeal and declared the modification application invalid on the basis that a Council DCP is a fundamental element of the decision-making process. In this case, there was no evidence that the Council had engaged with the section 2.5 (deep soil) or 3.3.3 (rear setbacks) of the Randwick DCP 2023 at all. The Council had also incorrectly referred to the repealed Randwick DCP in their assessment.

The Court found that the Council had failed to take into consideration all relevant matters under section 4.15(3) of the *Environmental Planning & Assessment Act 1979* and declared the modification consent invalid.

This judgment serves as an important reminder to ensure that DCPs are not overlooked during the development assessment process.

Alvares v The Hills Shire Council [2025] NSWLEC 1726

This case caught our attention because, while it involved a relatively mundane modification application to replace two boundary fences, it unexpectedly raised complex biodiversity issues of jurisdictional character. In the original application, the Biodiversity Development Assessment Report (**BDAR**) found that there were unacceptable impacts on the two communities of native vegetation within the site. This led to the clearing of 0.17 hectares of the endangered ecological community, a loss that could not be reversed.

Under the *Biodiversity Conservation Act 2016*, applicants seeking to modify a development consent may rely on an exception that removes the need for a further BDAR, provided that the consent authority is satisfied that the modification will not increase the impact on biodiversity values. The applicant in this case intended to rely on this exception. It is relevant to note that biodiversity issues are generally "jurisdictional matters" in NSW planning law, meaning that if a particular requirement, such as a BDAR is not provided, it may be a reason to deny an application, even if the application itself has merit.

The Court in this case found the modification would not satisfy the above requirements, meaning it would not increase the impact on biodiversity values. It was observed that the proposed modification's engineering design did not alleviate or mitigate the biodiversity impacts. This decision underscores that jurisdictional requirements such as BDARs remain critical even for modification applications. Applicants should be mindful of jurisdictional requirements and need to consider preparing a BDAR if the issue is contestable. This is particularly important for any matter that proceeds to Court given the Court's careful focus on ensuring any decision it makes is within power, which has led to the need over the last 5 years for fairly detailed "jurisdictional statements" where the parties have reached agreement in the proceedings and seek to resolve the matter through an agreement under section 34 of the *Land and Environment Court Act 1979*.

Joinder applications

Optus Mobile Pty Ltd v Central Coast Council **[2025] NSWLEC 74**

In this case, Optus Mobile proposed the construction of a telecommunications facility and had appealed the refusal of the development application. The owner of land surrounding the site was successfully joined to the proceedings.

In considering the joinder application, Beasley J neatly summarised the joinder test:

> *The Court must form the opinion that the joinder applicant is able to raise an issue that should be considered on the appeal but would not likely be sufficiently addressed if the joinder applicant was not joined as a party. Joinder therefore can be granted not just in circumstances where the joinder applicant wishes to raise a relevant issue not currently raised on the appeal, but where they raise an issue that is already the subject of the appeal, but is one that would "not be likely to be sufficiently addressed" were they not joined. Alternatively, under s 8.15(2)(b), the Court can grant joinder if it forms the opinion that it is either in the interests of justice or in the public interest that the joinder applicant be joined as a party to the appeal.*

Crucial to these proceedings and without finding the Council would act improperly or without integrity, was the fact that the Council and Optus had entered into a commercial lease agreement, leading the Court to conclude at [46]:

> *It is this combination of factors – the existence of the lease agreement between the Council and Optus over the Site; and the complex and numerous issues said to warrant refusal of consent – that have caused me to form the opinion that it is in the interests of justice to grant leave to the Joinder Applicant (who is likely to be the most affected person by a grant of consent) to be joined to the Appeal proceedings*.

This case was unique, given there was a commercial lease agreement in place between Council and Optus, but also because an earlier development application lodged by Optus was held to be invalid by Pain J: see *Denny v Optus Mobile Pty Ltd* [2023] NSWLEC 27.

The Court made clear that the combination of the issues raised by the applicant and commercial agreement contributed to the Court finding that in the interests of justice and the public interest for the applicant ought to be joined.

Although we don't review the decision in detail here, Preston CJ's decision in *The Owners Corporation – Strata Plan 105507 v Newcastle City Council* [2025] NSWLEC 111 also demonstrates that the prospects for joinder will be assisted if the joinder applicant can raise an issue that is unique and which will not be sufficiently addressed in the appeal.

Unauthorised works cases

Cases involving unauthorised works continue to arise due to the various difficulties people face when unauthorised works have occurred. The system is built on the principle of prospectivity, which can make regularisation difficult and where breaches have occurred, authorities have a range of enforcement options available. One case in the past year warrants comment in this context. Although the orders were flawed, the Court was nonetheless bound to sentence the defendant because they had already entered a plea of guilty in earlier Local Court proceedings.

Kingfisher Properties Pty Limited v Northern Beaches Council **[2025] NSWLEC 39**

The Chief Judge of the Land and Environment Court set aside a $100,000 fine imposed by the Local Court for the failure to comply with a development control order regarding a carport and replaced it with a much smaller fine of $9,000, due to it being at the "very low end of the range of objective seriousness for the offence".

What is most important about the case, however, is that it provides a number of useful reminders to both those issuing orders and those receiving orders, based on the long history of the matter in and out of Court stemming back to August 2020.

His Honour made a number of remarks about the validity of earlier orders and an earlier Court decision made under section 34 of the *Land and Environment Court Act 1979*.

We make three observations from this history:

- For recipients of orders, it is important to make sure development control orders are lawfully imposed before concessions or pleas of guilty (as occurred in this case) are made in litigation. For example, as the name suggests, a demolish works order cannot require the carrying out of building work. Further, there must be a planning approval in place before a compliance order requiring compliance with a planning approval can be issued. Those issuing and receiving orders should therefore go back to first principles and check that what is being ordered falls within what the authority is empowered to command through the issue of an order.
- A careful decision needs to be made as to whether to challenge the merits of a development control order in class 1 or the validity of a development control order in class 4 of the Land and Environment Court, especially as non-compliance with an order can result in a criminal offence.
- For appeals against sentence arising from the Local Court, the Land and Environment Court must still impose a sentence even if the Court identifies the original offence (to which a plea of guilty was made) is flawed. In this case, the order was considered in large parts outside of power.

Concept applications

Concept development applications under section 4.22 of the EP&A Act continue to be a minefield as consent authorities demand more details for the purpose of regulation, while applicants seek flexibility by seeking consent to a proposal at a conceptual level.

In *Rise South West Rocks Pty Ltd v Kempsey Shire Council* [2025] NSWLEC 1663, like many concept applications, the Applicant sought consent for a two-stage development that would incorporate residential, commercial and retain units between three to five storeys with associated landscaping and infrastructure.

The concept DA before the Court had a series of issues including the proximity to coastal wetlands, which remained one of the Council's primary contentions. The coastal wetlands issue creates a jurisdictional threshold by virtue of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* and the potential impacts the development could have.

The Council submitted that the Court could not be satisfied that the proposal would not have a significant impact on the coastal wetland, or the groundwater that flows to the coastal wetlands, with Council's experts remaining unconvinced that engineering design for the stormwater and groundwater infrastructure was technically feasible.

Various concerns were raised as to the extent of the impact and mitigation measures about conditions that could be drafted were discussed amongst the experts. However, neither the Council’s experts nor the Court were satisfied as to the technical feasibility of the proposed conceptual stormwater system based on the Council’s modelling. Notably, the Applicant did not provide any evidence demonstrating that the adverse impacts could be avoided, minimised or managed.

Due to the site’s proximity to coastal wetlands, the concept proposal was ultimately refused because it failed to satisfy the jurisdictional threshold imposed by the biodiversity requirements.

This case serves as a reminder that, while section 4.22 of the EP&A Act permits conceptual development applications, these applications are still subject to strict regulatory obligations. Such requirements can significantly reduce the flexibility that concept proposals are intended to offer.

170 Willmington Road Pty Ltd v Liverpool City Council [2025] NSWLEC 1600

Whilst the Government led construction of the Western Sydney Airport and the M12 Motorway presses on for its targeted 2026 completion date, private sector development of the surrounding Aerotropolis has had one early roadblock. In *170 Willmington Road Pty Ltd v Liverpool City Council* [2025] NSWLEC 1600, the Land and Environment Court refused a concept DA for a logistics hub on greenfield land within the 'Agribusiness' precinct of the Aerotropolis on Aboriginal cultural heritage grounds.

The concept DA proposed the development of the 12.36-hectare site in four stages. Stage 1 (being demolition, tree removal, subdivision, bulk earthworks and internal roads) was proposed concurrently with the concept DA.

The concept DA was refused for five key reasons – see [72]. Notably, the Commissioner reached the determination that there was insufficient information available to determine the impacts of the development on the Aboriginal cultural heritage of the site. The Commissioner also found that the concept DA had not been formulated in accordance with the Recognise Country Guidelines, which were a mandatory consideration under the *State Environmental Planning Policy (Precincts—Western Parkland City) 2021*.

The case again highlights some of the difficulties with concept DAs in NSW. The reasoning for the refusal creates an interesting tension between private and public developments in the precinct, given the intensity of the nearby Western Sydney Airport and the M12 Motorway under construction by Transport for NSW, which involved significant earthmoving and cuts through the rolling terrain of Luddenham and Badgerys Creek.

Turner Contracting Pty Ltd v Tweed Shire Council [2025] NSWLEC 1403

Further to our article last year, provisions requiring a state of satisfaction to be reached before development consent can be granted remain a perennial issue.

In this case, Commissioner Dickson was not satisfied that there were adequate arrangements in place to make sewer and water services essential for the development and as a result clause 7.10 of the *Tweed Local Environmental Plan 2014* was not satisfied.

The Commissioner stated at [163]:

> *Further, in applying the reasoning in Eskander I note that it is not within the Applicant's capacity to ensure any augmentation of the HPWWTP to achieve its design capacity, or any further upgrades. This adds weight to the finding that adequate arrangements have not been made to make services for the disposal and management of sewage available to the development when required*.

The case is instructive, as where these clauses exist in local environmental plans, applicants need to ensure that there are adequate arrangements in place to accommodate a development at the date of the decision. The applicant in this case attempted to argue at [155] that a condition could be imposed to address any further sewerage storage issues. The Court found in this case that it had no power to grant the development consent where no adequate arrangements had been made for the disposal and management of sewage arising from the proposed development.

Kenmore Property Development Pty Ltd v Secretary, Department of Climate Change, Energy, the Environment and Water [2025] NSWLEC 131

This Class 1 appeal concerned whether an applicant for a modification application had a right of appeal under section 70 of the *Heritage Act 1977* (NSW) following a letter from the Heritage Council which stated it would not provide general terms of approval. The Chief Judge of the Land and Environment Court held that the Court had no jurisdiction to hear and determine the appeal brought under this section. However, the applicant could have appealed the Council's refusal of the modification, which would have enabled the Court to determine the matter even if any resulting development consent were inconsistent with the Heritage Council's general terms of approval.

This case serves as a reminder to:

- carefully consider the power relied on to appeal;
- remain vigilant about when appeal rights lapse; and
- properly and promptly address events that create appeal rights.

Where to from here

As stated at the start of this article, 2026 will be marked by the challenge of implementing the amended Act. The amendments will likely have staggered commencements as parts of the reforms are "proclaimed". Additionally, a number of the reforms rely on new environmental planning instruments being introduced. Although we do not expect the changes to dramatically simplify the planning system's maze-like qualities (as depicted in the Department's diagram of the planning system published in the Daily Telegraph's earlier this year, which apparently provided some of the impetus for the reforms), we do anticipate the reforms will streamline some assessment requirements and introduce greater agility into the approval pathways within the Act.

However, given the inherent complexity created through both the mix and proliferation of "hard" and "soft law" in the NSW planning system as well as the contestable or "evaluative" elements enabled within the administrative decision making under the EP&A Act, we see these as risks to the aim of efficiency, which the reforms ultimately strive to achieve.

Colin Biggers & Paisley

New South Wales compulsory land acquisition cases: 2025 overview and implications for 2026

Anthony Landro | Todd Neal

This article discusses some judgments of the New South Wales Land and Environment Court and the New South Wales Court of Appeal in 2025 in relation to compulsory land acquisition cases

December 2025

In brief

This article considers select cases from the NSW Land and Environment Court and the NSW Court of Appeal in 2025 and the outlook for 2026.

Characterising the "Public purpose" - Goldmate Property Luddenham No.1 v Transport for NSW

[Disclaimer: Colin Biggers and Paisley acted for the landowner]

"Public purpose" cases in 2024

A number of important decisions were handed down in the last year which considered how the public purpose of an acquisition is to be determined and how the statutory disregard in section 56(1)(a) applies when determining compensation for "market value".

Goldmate in the Court of Appeal

Less than a week after publishing our 2024 review article, the Court of Appeal handed down its decision in *Goldmate Property Luddenham No 1 Pty Ltd v Transport for New South Wales* (2024) 116 NSWLR 233; [2024] NSWCA 292, which has developed the law on this issue further.

As we discussed in our article reporting on the Court of Appeal's decision (available here), the judgment was significant for two key reasons:

- Firstly, the Court of Appeal found the "composite" public purpose found by the primary judge was legally erroneous. The Court of Appeal emphasised the need for there to be an alignment between the acquiring authority's power to acquire land and the public purpose of the acquisition.
- Secondly, the Court of Appeal outlined a clear four-step process to determine market value compensation under section 56(1)(a) of the Act and the proper application of the statutory disregard.

Goldmate High Court appeal and remitter

Further developments in the long running Goldmate case took place this year.

Special leave to appeal the Court of Appeal's decision was refused by the High Court in April 2025: [2025] HCADisp 68. This confirmed the correctness of the Court of Appeal's decision.

Judgment in the remitter of the Goldmate decision is currently reserved, after a hearing in November 2025. The remitter has attracted a high degree of interest given the outcome will affect other cases in the Court system, particularly for major infrastructure acquisitions in the Aerotropolis.

Post-Goldmate public purpose decisions

UPG 72 Pty Ltd v Blacktown City Council [2025] NSWLEC 29

The decision in UPG was the first case to apply the Court of Appeal's decision in Goldmate and the four steps outlined by Adamson JA. Pepper J's judgment in UPG was delayed whilst the parties awaited the decision in Goldmate.

The UPG case involved the compulsory acquisition by Blacktown Council of a 2.025-hectare parcel zoned SP2 (drainage). The Valuer-General initially awarded approximately $2.5 million, but the Council argued for zero compensation during litigation. The landowner claimed about $7 million. Ultimately, $1.2 million was awarded.

The Court accepted UPG's argument on the scope of the public purpose of the acquisition, finding that the public purpose was to construct a drainage channel and create habitat for the Green and Golden Bell Frog. In doing so, the Court rejected the public purpose contended for by the Council which bore a striking similarity to the style of TfNSW's argument in the Goldmate litigation. In this regard, the Council argued the public purpose was "that of the NSW Government" which includes the release of precincts identified in the Growth Centres SEPP for urban purposes "as part of a coordinated State Government response to the announcement of urban release in Western Sydney" (see [137]). However, that type of rolled up or composite public purpose was rejected by the Court of Appeal in Goldmate.

The Court then considered what the zoning of the acquired land would have been when the public purpose (construction of a drainage channel and creation of habitat for the Green and Golden Bell Frog) were disregarded.

UPG submitted it would have been zoned R2, because the release of the Riverstone Precinct cannot be assumed not to have occurred (see [162]). The Council submitted the acquired land would have been zoned rural, or Environmental E2 (see [161]).

Pepper J ultimately decided the acquired land would have been zoned primarily Environmental E2 because of the Green and Golden Bell Frog habitat it provided, with a small 500 sqm portion zoned R2 Residential land, sufficient enough to enable a single dwelling entitlement (see [174]). The parties' valuers had jointly agreed that if this scenario applied, then the market value compensation would be $1.2 million (see [219]). Compensation was determined accordingly.

***Telado v Sydney Metro; CFT No. 8 Pty Ltd v Sydney Metro* [2025] NSWLEC 42**

The case of Telado concerned the acquisition of 28 O'Connell Street and 48 Hunter Street for the Metro West project in September 2022. The acquired land comprised two commercial buildings.

Telado argued that the statutory disregard needed to encompass the acquisition of the adjoining land at 33 Bligh Street, which had been acquired for Metro West and Metro City South West (each a separate project). This approach was necessary in order to support Telado's claim that the highest and best use of the acquired land was for development with the adjoining 33 Bligh Street as a single development site. Telado submitted that the public purpose of the acquisition was the single public purpose of the provision of the metro network, comprising both Metro West and Metro City Couth West. See [48] - [52].

Sydney Metro argued the public purpose was limited to the Metro West project only, being the project the subject land was acquired for. Based on this characterisation, 33 Bligh Street would not be available for a hypothetical redevelopment of the subject land, because 33 Bligh Street had been acquired for Metro City South West. See [53] - [56].

The Court decided the issue in favour of Sydney Metro, finding that there were two distinct purposes for the acquisition of the adjoining 33 Bligh Street (Metro West and Metro City South West). The consequence of this was to only disregard Metro West for the subject acquisition. This triggered a determination of what the circumstances would have been absent the Metro West - the result being that 33 Bligh Street would be unavailable for the combined redevelopment. This meant the highest and best use of the subject land was its current use, without a capacity for development in conjunction with 33 Bligh St. See in particular [57] - [70].

The Court also applied the decision of *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 and found that the decisions made by the landowners to not pursue a planning proposal, or an unsolicited proposal with the NSW Government, were not caused by the public purpose and were therefore not to be disregarded. See in particular [172] and [153] - [191].

$200m combined claim determined at 28 O'Connell Street and 48 Hunter Street - Telado v Sydney Metro

Putting to one side the complexity of the issues in Telado, the case is also noteworthy for the quantum involved.

$200 million for market value compensation was ultimately awarded by the Land and Environment Court and apportioned to the two claimants on a pro rata land size basis (based on the combined 1,022 sqm).

As the below figures demonstrate, the outcome for each claimant was considerably higher than what the Valuer-General had determined:

Claimant	Valuer-General determination	Claim in the Court	Amount awarded by the Court	Increase
CFT No 8 Pty Ltd (28 O'Connell Street)	$128,082,003	$302,235,616	$146,815,085.65	$18,733,082.65
Telado Pty Ltd (48 Hunter Street)	$49,582,993	$110,964,384	$54,315,085.65	$4,732,092.65

Although the contested legal issues were ultimately resolved in Sydney Metro's favour, the Applicants nevertheless achieved through the Court process a significant increase in compensation compared to the Valuer-General's determination.

Court protects dispossessed landowner's entitlement to litigation costs

This year saw two key decisions on the costs of litigating compulsory acquisition cases. These are important given our anecdotal experience where acquiring authorities look for opportunities to pursue costs in these types of cases.

Both decisions provide comfort to dispossessed landowners in resumption and uphold the conventional proposition that the acquiring authority is required to pay the costs of the dispossessed landowner, provided the dispossessed landowner conducts the litigation reasonably.

UPG 72 Pty Ltd v Blacktown City Council (No 2) [2025] NSWLEC 77

UPG No 2 was a costs decision following the substantive judgment (discussed above). The costs decision arose because Pepper J made an order that the Council was to pay UPG's costs of the proceedings unless an alternative costs order was applied for within 14 days. The Council then filed a notice of motion seeking a split costs order, being that:

- the Council only pays the Applicant's costs until the first day of the hearing; and
- each party to pay its own costs from that point onwards.

In summary, the Council's argument for doing so was because UPG's claim substantially failed and the amount awarded by the Court was less than 50% of the Valuer-General's determination. The Council contended that it was not reasonable for UPG to continue the proceedings after the joint expert reports were finalised.

The Court declined to make the alternative costs order and the Council's motion was dismissed with costs. Pepper J did not consider that the findings of the joint expert reports rendered the litigation pointless. Her Honour observed that the issues raised were arguable, the evidence contestable and the proceedings conducted efficiently. Her Honour further noted that UPG secured more than the zero-compensation sought by the Council and therefore achieved some success in the litigation (see [38]–[46]).

Telado Pty Ltd; CFT No 8 Pty Ltd v Sydney Metro (No 2) [2025] NSWLEC 124

Similarly, Telado No 2 was a costs decision, which followed the substantive judgment (discussed further above).

Duggan J declined to grant the costs order sought by Sydney Metro, which was that Telado should pay its own costs for the part of the case where it was unsuccessful, which was a departure from the ordinary course for litigation of this kind. Sydney Metro submitted that the dispossessed owner had failed on all major points and significant costs had been incurred by the parties in dealing with those points at the hearing, which was unreasonable.

Her Honour found at [39] that the lack of success in discharging the evidentiary onus was not a proxy for unreasonableness. In her judgment, Duggan J confirmed long standing principles that appeals against the determination of compensation for a compulsory acquisition are not "ordinary litigation" and a dispossessed owner is entitled to access the Court to present an arguable and organised case (see [44]).

The decision should therefore give comfort to dispossessed owners in complex acquisitions where there are intensive costs involved in discharging the evidentiary bonus to substantiate their claims.

As a final aside on the issue of costs, we also foreshadow that the remitter judgment in Goldmate will also need to deal with a costs claim by TfNSW for an interlocutory dispute before the final remitter hearing. TfNSW claimed costs for an aborted motion where Goldmate sought to reopen evidence regarding the collocation of the Outer Sydney Orbital with the M12 (for which the land was acquired), due to evidence given following the initial hearing by TfNSW's Chief Transport Planner at a Parliamentary Inquiry.

Special Value claims refused - *The Eddie Arnott Corporation Pty Ltd v Sydney Metro (No 4)* [2025] NSWLEC 103

In *The Eddie Arnott Corporation Pty Ltd v Sydney Metro* (No 4) [2025] NSWLEC 103 (**The Eddie Arnott Corporation Pty Ltd**), a dispossessed owner (who was self-represented) saw two claims for special value refused.

The case concerned the acquisition of a ground floor shop used as a dental practice in the former Hunter Connection. Eddie Arnott Corporation (a corporate trustee) was the owner of the strata lot and held a freehold claim. Dr Arnaout operated a business from the land and held a leasehold claim.

Notably, each claimant made an unsuccessful claim for special value:

- The company's special value claim of $3.5 million was based on the premise that the company could not find replacement CBD premises for the same purchase price as the market value of the acquired interest. The Court found that the replacement value of a freehold interest held for investment purposes did not constitute special value within the meaning of the Just Terms Act. See [185] - [193].
- Dr Arnaout's special value claim for $436,000 was based on his use of the premises as a dental business. The Court dismissed the claim for three reasons. Firstly, because the identified financial advantage appeared to be the historical use of the premises. Secondly, because the loss of the future use of the leasehold would be captured in the market value of that interest. Thirdly, because the financial advantage claimed was not based on any expert evidence. See [254] - [259].

Unfortunately for Dr Arnaout, the Court found him to be an unreliable witness. The Court also decided not to admit the applicant's expert town planning and valuation evidence, as the expert witnesses were not made available for cross-examination. These matters became detrimental to the case. It is therefore difficult to fully evaluate the implications of the Court's findings on special value given the fundamental issues with the case that was before the Court.

The Court ultimately held the Dr Arnaout's unregistered lease did not amount to a compensable interest in the land. In summary, this was because the lease itself was not enforceable. His special value claim was nevertheless considered in case the Court was wrong about the threshold question of whether there was a compensable interest in the land.

The company was ultimately awarded $1,070,000 for market value, plus $32,000 for legal and valuation costs.

The company is now pursuing an appeal to the Court of Appeal.

The year ahead

Moving into 2026, we conclude with some observations.

Firstly, we are seeing continued momentum for infrastructure projects in the renewable energy space and we expect to see more rural acquisitions move through the acquisition process and into the Courts.

Secondly, with the initial buzz of the Land Acquisition Review fizzling out, we are not expecting any major changes to the legislation to arise. Final recommendations are expected to be considered by Government in 2026, but no precise timeframe has been committed to.

Thirdly, we observe that the case law interpreting this 34 year old piece of legislation continues to develop. Given our expectation that only modest changes to the legislation might occur, case law will be important in the years ahead in terms of both the application of the legislation to novel property interests but also in terms of increasing property values where minor percentage differences in valuations can involve large quantitative differences to the tune of millions of dollars.

Finally, as many practitioners have observed, the Court of Appeal decisions over the last 6-7 years have significantly narrowed the scope of what dispossessed owners can claim where that scope exceeds the market value of their interest land. Cases like *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 and *Sydney Metro v C & P Automotive Engineers Pty Ltd* [2024] NSWCA 186 have limited the disturbance head of compensation and cases like *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 will place a stop on claims for loss of value associated with applicant's ceasing development work on land marked for acquisition.

If there is to be any change to the trajectory set by the above cases that have favoured acquiring authorities, we see that occurring in the area of special value, even though the decision in *The Eddie Arnott Corporation* at face value suggests otherwise. In particular, there will come a time where a dispossessed owner with significant interests at stake will explore whether the special value head of compensation might be utilised in a manner similar to that eluded to by Basten JA in *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 at [102] and in *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7 at [36] and following these decisions narrowing the scope of disturbance claims.

Colin Biggers & Paisley

It's a long road: Queensland Court of Appeal considers the imposition of maintenance conditions to be unreasonable

George Gardener | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council* [2025] QCA 207 heard before Bond J, Doyle JA, and Crowley J

December 2025

In brief

The case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council* [2025] QCA 207 concerned an appeal to the Queensland Court of Appeal (**Court**) overturning a previous decision of the Planning and Environment Court of Queensland (**P&E Court**).

The parties agreed that Parklands Blue Metal Pty Ltd (**Parklands**) should make some form of contribution towards the maintenance of a haulage road. However, the means by which and extent to which Parklands should be responsible for the maintenance was the subject of the dispute. Parklands contended that it should pay a 'levy' towards the maintenance of the road, calculated as a figure per tonne of material extracted (**Levy Condition**). The Sunshine Coast Regional Council (**Council**) contended for conditions which require Parklands to maintain the haulage road over the life of the development (**Maintenance Conditions**). The P&E Court found that a levy as proposed by Parklands is unlawful, and held that a maintenance regime should be implemented through an amended conditions package. The regime was to be the quarry operator's responsibility.

Parklands applied for leave to appeal to the Court, contending that the P&E Court fell into various errors which it characterised as errors of law. The Court granted leave to appeal, and held that the P&E Court erred in finding that the Maintenance Conditions were not an "unreasonable imposition" and were "reasonably required". The Court ordered that the Maintenance Conditions be set aside and remitted the matter back to the P&E Court to determine if any further conditions ought to be imposed.

Background

In 2009, Parklands submitted a development application for a hard rock quarry in Yandina. The Council refused the development application in October 2011. The refusal was successfully appealed to the P&E Court.

In June 2017, the P&E Court in the case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 35; [2017] QPELR 809 considered conditions that were in dispute between the parties and made orders that conditions be imposed as agreed between the parties during the proceedings. In September 2024, the P&E Court heard from the parties in respect of a dispute about the Maintenance Conditions. The P&E Court's decision in the case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* (No. 3) [2024] QPEC 52 in December 2024 determined the dispute in favour of the Council, which was the subject of our March 2025 article.

Grounds of appeal

Parklands argued the following four grounds of appeal (at [11]):

- That the development conditions requiring Parklands to be responsible for the maintenance of the haulage route for the life of the quarry unlawfully shifted the Council's statutory maintenance obligations onto Parklands.
- That there is no power to impose the Levy Condition as part of the conditions because there was a failure to conclude that section 5.1.2 of the relevant planning legislation, being the now repealed *Integrated Planning Act 1997* (Qld) (**IPA**), conferred such power.
- That there was a failure to determine whether future routine maintenance work may constitute operational works.
- That the Levy Condition, if within power, should nevertheless not be imposed.

Key issues in the appeal

In considering each of the grounds of appeal, the Court considered each of the following issues (at [12]):

- Firstly, whether there was any statutory power to impose the Maintenance Conditions or the Levy Condition.
- Secondly, whether it was unreasonable to impose the Maintenance Conditions.
- Finally, whether the P&E Court made an error of law by determining not to impose the Levy Condition.

Power to impose the Maintenance Conditions or the Levy Condition

Overview of the statutory scheme

The dispute required a consideration of sections 3.5.30 and 3.5.32 of the IPA and what conditions must be and must not do.

Section 3.5.30(1) of the IPA states as follows:

> "*(1) A condition must—*
>
> *(a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or*
>
> *(b) be reasonably required in respect of the development or use of premises as a consequence of the development.*"

The parties agreed that the imposition of the Levy Condition or the Maintenance Conditions was "relevant to" the development. The dispute was whether such imposition was an "*unreasonable imposition*" or is "*reasonably required*" (see [15] to [16]).

Section 3.5.32 of the IPA outlines what a condition must not do and states as follows:

> "*(1) A condition must not—*
>
> *…*
>
> *(b) for infrastructure to which chapter 5, part 1 applies, require (other than under chapter 5, part 1)—*
>
> *(i) a monetary payment for the establishment, operating and maintenance costs of the infrastructure; or*
>
> *(ii) works to be carried out for the infrastructure; or*
>
> *(c) state that works required to be carried out for a development must be undertaken by an entity other than the applicant;*
>
> *…*"

The focus of the appeal was on section 3.5.32(1)(b) of the IPA which requires consideration of section 5.1.2 of the IPA, which is in chapter 5, part 1, and states as follows:

> "*(1) If a local government imposes a condition about non-trunk infrastructure, the condition may only be for supplying infrastructure for 1 or more of the following—*
>
> *(a) networks internal to the premises;*
>
> *(b) connecting the premises to external infrastructure networks;*
>
> *(c) protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.*
>
> *(2) The condition must state—*
>
> *(a) the infrastructure to be supplied; and*
>
> *(b) when the infrastructure must be supplied.*"

Maintenance Conditions

The Court held that it was within the power of section 5.1.2 of the IPA to impose the Maintenance Conditions as they are "about" non-trunk infrastructure and "*for*" supplying infrastructure; in other words, the Maintenance Conditions are for maintaining the efficiency of the infrastructure network of which the haulage road forms part. However, the imposition of these conditions was primarily challenged on the basis that they are not reasonable in the context of section 3.5.30 of the IPA (at [62]).

Levy Condition

The Court considered whether there is a statutory power to impose the Levy Condition. Relevantly, it found that section 5.1.2(1) of the IPA "*…permits a condition **about** non-trunk infrastructure only **for** supplying infrastructure and that the supplying is for a specified purposes*" (at [72]).

The Court determined that the language of section 5.1.2(2) of the IPA provides an indication that a condition requiring the payment of money is not one contemplated by section 5.1.2(1) of the IPA. Further it found that even if a condition could fall into the broad language of section 5.1.2(1) of the IPA, the obligation for a developer to make such a payment is not itself the supply of infrastructure (at [92]).

The Court held that the P&E Court correctly determined that section 5.1.2 of the IPA does not permit the imposition of a condition requiring a financial contribution for the cost of road maintenance, like the Levy Condition (at [96]).

Reasonableness of the Maintenance Conditions

Parklands argued that the Maintenance Conditions do not meet the requirements in section 3.5.30(1) of the IPA for a number of reasons, the pertinent ones being as follows:

- The proposal for a new road is likely to save the Council costs as they would otherwise have to maintain the current unsealed road. The Court considered this to be a significant omission of a highly relevant matter (see [107] to [110]).
- Over the approximate 40 year life of the development, it is possible for the benefits to be enjoyed by others, without any mechanism to reduce Parklands' obligations to continue road maintenance (at [106]).
- Exposure to third party claims who suffer loss or damage as a result of alleged defects for the maintenance of the road, complicated by the fact that the Council retains control of the road. This was not considered a material consideration in relation to the reasonableness of the condition (at [113]).
- The obligation to maintain the road may require further operational works approvals. The Court considered that there was a possibility, albeit remote, that the requirement to obtain operational works approvals will make the performance of the condition more difficult (at [121]).
- The planning scheme policies do not expressly require a proponent to be responsible for providing long term road maintenance. The Court considered that the Council did not view this circumstance as being engaged frequently enough to make provision for it in the planning scheme policies (at [123]).
- There was a reliable and well-established means of obtaining a contribution by Parklands, even if not in the form of a levy as proposed. The Court held that other possibilities can arise (at [125]).

The P&E Court concluded that "*It is hard to see how it would be unreasonable to require the operator of the quarry to maintain the haulage route which is for the benefit of the quarry, necessary to its operation and which will be the main cause of the need for maintenance*" (at [126]). The Court departed from this finding, noting that the P&E Court did not take into account the saved current maintenance costs as a benefit of the upgraded road, and going further to say the conditions imposed are "*…ones which no assessment manager could reasonably come to*" (at [127]).

Reasonableness of the Levy Condition

Despite determining that there was no power to impose the Levy Condition, the Court went on to consider whether, if there was a power, it ought to be imposed.

The Court noted that the P&E Court was discouraged from adopting the Levy Condition because of some minor errors and the lack of precision in the costing data. The Court concluded that this reflected the P&E Court's pessimism about being able to assess a levy in order to reflect the actual costs to the Council (at [137]).

The Court determined that an inability to calculate the costs with precision is not necessarily a bar to the inclusion of a condition requiring a financial contribution as being reasonable (at [137]).

Conclusion

The Court held that the P&E Court made an error of law in relation to the imposition of the Maintenance Conditions and the decision of the P&E Court was set aside. The matter was remitted back to the P&E Court for further consideration as to whether any further conditions are to be imposed.

No error, no leave: application for leave to appeal against dismissal of submitter appeal relating to Greenslopes Private Hospital dismissed

Innes McDiarmid | Nadia Czachor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Ramsay Health Care Australia Pty Limited v Brisbane City Council* [2025] QCA 221 heard before Bowskill CJ, Brown J, and Bradley J

December 2025

In brief

The case of *Ramsay Health Care Australia Pty Limited v Brisbane City Council & Anor* [2025] QCA 221 concerned the refusal of an application for leave to appeal a decision of the Planning and Environment Court of Queensland (**P&E Court**) to the Queensland Court of Appeal (**Court**), being the dismissal of a submitter appeal in the case of *Ramsay Health Care Australia Pty Limited v Brisbane City Council & Anor* [2024] QPEC 49 which upheld the approval of a mixed use community health and medical centre.

Ramsay Health Care (**Appellant**) operates Greenslopes Private Hospital and appealed the approval granted to Ron Build Pty Ltd for a community care and health care facility on Newdegate and Hunter Streets adjacent to the Greenslopes Private Hospital grounds.

The P&E Court dismissed the Appellant's submitter appeal in the case of *Ramsay Health Care Australia Pty Limited v Brisbane City Council & Anor* [2024] QPEC 49. The Appellant then sought leave to appeal to the Court under section 63 of the *Planning and Environment Court Act 2016* (Qld). The Court refused leave, finding no error of law in the P&E Court's decision.

The matters considered by the Court included:

- application specificity;
- interpretation of the terms "complementary" and "local need";
- treatment of need evidence;
- admissibility of expert evidence; and
- legal reasonableness.

Leave was refused with costs.

No error in application specificity

The Court affirmed that a development application for a material change of use need only identify the defined uses being applied for, and not the tenants or specific services. The Court described that approach as "entirely orthodox" (at [17(c)]). Requiring detailed tenant information would be impractical and contrary to the relevant planning scheme, *Development Assessment Rules*, and *Planning Act 2016* (Qld).

Ordinary meaning of "complementary"

The P&E Court adopted the dictionary definition of "complementary", being "*that which completes or makes perfect*", and the Court observed that the proposed uses meet that criterion which it described as a high bar (see [26] and [35]). It declined to authoritatively determine the meaning of "complementary" in this context but accepted that the hospital and development could operate adjacent without interfering with one another.

"Local need" is not "only local need"

The Court agreed that the relevant planning scheme provisions requiring services to "*serve or support local needs*" do not confine uses to local patrons only (at [36]). The Court found that had the Council intended such restriction, it would have used the word "only" in the relevant planning scheme provisions.

Need and reasons adequately addressed

The Court found that the P&E Court considered all of the need evidence, including existing supply and expert disagreements over job setting assumptions (see [42] to [48]). Reasons were adequate and no error of law was identified.

Admissibility and legal reasonableness

The Appellant argued that evidence given by the selling and leasing agent for the proposed development was either hearsay or inadmissible opinion evidence. The Court held that the evidence was rightly admitted and the Court found no factual basis for the Appellant's argument. Furthermore, the Court found that if it had have found an error it would have been immaterial as this was a particularly small aspect of the evidence relied on by the P&E Court with respect to the question of need (see [49] to [52]). The "unreasonableness" ground failed because no underlying error was made and it was found unnecessary to address this ground (see [53] to [54]).

Conclusion

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

Key points

In the circumstances of the case, "local need" does not equate to "only local need", allowing for flexibility where both local and broader needs are met.

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