

## Legal Fundamentals – Planning and Development Law

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### THE EVOLUTION OF REGULATION

#### Evolution of Planning Law

##### ***Snapshot – the last thirty years***

Planning law consists of statute and case law. Over the last thirty years the body of statute law has expanded significantly and planning law in general has become more sophisticated and complex.

In the beginning matters like subdivisions and rezonings were dealt with in a couple of sections in the *Local Government Act 1936*. These sections were amended many times over the years.

Planning appeals were initially to the District Court then the Local Government Court.

In 1990 the Queensland Government enacted the *Local Government (Planning and Environment) Act*. This was the first statute dealing specifically with planning and development matters. It also contained provisions dealing with appeals and set up the Planning and Environment Court.

In 1997 there was a further evolutionary stage when the *Integrated Planning Act* (“IPA”) was introduced. The IDAS concept (“Integrated Development Assessment System”) was introduced by this Act. The various stages of IDAS as detailed in IPA<sup>i</sup> were: -

- A. application stage;
- B. information and referral stage;
- C. notification stage; and
- D. decision stage.

The final stage in the evolution of the regulatory system (to date) was the introduction of the *Sustainable Planning Act 2009* (“SPA”) which commenced on 18 December 2009. It retains many of the same features as IPA and adds another stage to the IDAS process being the compliance stage.<sup>ii</sup>

##### ***A Classic Case – King Ranch***

The King Ranch Case<sup>iii</sup> is a classic case in the planning and development industry. It set the stage for the future approach of the legislation concerning the imposition of conditions on development.

The case involved a subdivision in which Cardwell Shire Council sought to impose some conditions including what might be described as “external conditions”. For example, one of the conditions required an amount of \$25,000.00 to be contributed towards future costs involved in a bridge replacement and external roadworks.

The relevant legislation was section 34(10) of the *Local Government Act 1936*. Under that provision the Council had power to impose conditions only if they were “reasonably required by the subdivision of the land”.

The Council had lost in both the Local Government Court and the full court of the Supreme Court of Queensland (the forerunner of the Court of Appeal) and the appeal came before the High Court of Australia. Chief Justice Gibbs provided the lead judgment and the four other judges of the High Court agreed. The following excerpts encapsulate the judgment: -

*10. In the present case, the learned District Court Judge found, amongst other things, that traffic on the road and wear and tear on the bridge would be increased by the subdivision of the land. It is difficult to reconcile with that finding the statement that there is no requisite nexus, identification or relationship between the development and the purpose to which the contribution is to be put or the moneys expended on sealing Davidson Road. There seems to be an obvious connexion between the effect of a subdivision which causes an increased use of roads and bridges and a condition that the subdivider should, by making a reasonable contribution, assist in defraying the costs incurred in meeting the consequences of the extra wear and tear that is expected. Notwithstanding his Honour's earlier reference to the principles laid down in the authorities, and his later citation of cases, his remarks support the view that when he said that the conditions were not within power, he meant exactly what he said. It does appear that he considered that the conditions could be imposed only if they were necessary to provide access or drainage to the land or if they provided a benefit to the land which would be enjoyed exclusively by persons connected with the land. This is a test more stringent than the law allows and in applying it his Honour erred in law.*

*11. For those reasons I consider that the appeal should be allowed and that the matter should be referred back to the Local Government Court to decide, in the light of this judgment, whether those or any other conditions are reasonably required by the subdivision.*

👉 view case at: <http://www.austlii.edu.au/au/cases/cth/HCA/1984/39.html>

## THE ROLE OF THE COURTS

### Appeals to the Planning and Environment Court

Aggrieved applicants can appeal against council decisions by lodging an appeal in the Planning and Environment Court.<sup>iv</sup> The Court also has power to make certain declarations and orders.<sup>v</sup>

It is important to note the following: -

- A. Costs – in most cases each party must bear their own costs in the Planning and Environment Court (there are some exceptions to this);<sup>vi</sup>
- B. In an appeal by an applicant it is for that party (the applicant) to establish that the appeal should be upheld;<sup>vii</sup>
- C. The appeal is by way of “hearing anew”.<sup>viii</sup> One consequence of this is that the parties are not limited to the material upon which the application was considered.

In relation to what the Planning and Environment Court can decide on an appeal section 496 of SPA is in the following terms: -

#### **496 Appeal decision**

- (1) *In deciding an appeal the court may make the orders and directions it considers appropriate.*
- (2) *Without limiting subsection (1), the court may—*
  - (a) *confirm the decision appealed against; or*
  - (b) *change the decision appealed against; or*
  - (c) *set aside the decision appealed against and make a decision replacing the decision set aside.*
- (3) *If the court acts under subsection (2)(b) or (c), the court's decision is taken, for this Act, other than this division, to be the decision of the entity making the appealed decision.*
- (4) *If the appeal is an appeal against the decision of a building and development committee, the court may return the matter to the committee with a direction that the committee make its decision according to law.*

### Appeals from the Planning and Environment Court

The following sections are self-explanatory: -

#### **498 Who may appeal to Court of Appeal**

- (1) *A party to a proceeding may, under the rules of court, appeal a decision of the court on the ground—*
  - (a) *of error or mistake in law on the part of the court; or*
  - (b) *that the court had no jurisdiction to make the decision; or*
  - (c) *that the court exceeded its jurisdiction in making the decision.*

(2) However, the party may appeal only with the leave of the Court of Appeal or a judge of appeal.

#### **500 Power of Court of Appeal**

The Court of Appeal may do 1 or more of the following--

- (a) return the matter to the court or judge for decision in accordance with the Court of Appeal's decision;
- (b) affirm, amend, or revoke and substitute another order or decision for, the court's or judge's order or decision;
- (c) make an order the Court of Appeal considers appropriate.

A 2009 case involving Mackay City Council was *Ajana Park Pty Ltd v Mackay City Council & Anor.*<sup>ix</sup>

This concerned an application to the Court of Appeal for leave to appeal against a decision made in the Planning and Environment Court.

Initially, the developer had appealed to the Planning and Environment Court in respect of two conditions imposed by the Department of Main Roads. Those conditions were: -

#### **Condition 3.**

*At the Maraju-Yakapari Road / Glenella Road intersection, the [developer] shall be responsible for the provision of an additional circulating lane and approaches. In lieu of the physical works, the [developer] may contribute the costs of the works to Main Roads. The cost shall be determined by the department.*

#### **Condition 4.**

*The [developer] shall provide at no cost to the department, sealed shoulders and pavement widening to a 9.0m formation width on Maraju-Yakapari Road between Glenella Road Roundabout and the existing Queensland Rail Crossing. Submit detailed design plans and specifications to the department for approval and provide the works prior to construction of the new access to Sugarshed Road.*

The Planning and Environment Court allowed the appeal in part, slightly modifying the Department's conditions of the development approval.

In this case the appellant was unsuccessful in obtaining leave. Some of the excerpts from the case are instructive: -

*[5] The developer stated in its application for leave to appeal that the reasons justifying the granting of leave are that "the primary judge erred in law for the reasons set out in the draft Notice of Appeal". In its draft notice of appeal, it set out what it claimed were the errors of law:*

*[11] Chapter 3 of IPA deals with the integrated development assessment system (IDAS), under which the developer brought the development application seminal to this case. Part 5, ch 3 of IPA deals with the decision stage of an application, div 6 of which relates to conditions imposed on development approvals. Section 3.5.30 is in these terms:*

#### **"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.*

*(2) Subsection (1) applies despite the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency."*

☞ view case at: <http://www.austlii.edu.au/au/cases/qld/QCA/2009/404.html>

## **The High Court**

The highest court of record in Australia is the High Court. In most planning cases special leave to appeal is required in order to proceed with an appeal to this court. A prospective appellant can seek leave to appeal from a decision of the Queensland Court of Appeal, including a decision not to give leave to appeal.

Some High Court planning cases from Queensland are: -

*H A Bachrach Pty Ltd v Queensland* (1998)<sup>x</sup>

☞ view case at: <http://www.austlii.edu.au/au/cases/cth/HCA/1998/54.html>

*Kettering Pty Ltd v Noosa Shire Council* (2004)<sup>xi</sup>

☞ view case at: <http://www.austlii.edu.au/au/cases/cth/HCA/2004/33.html>

## Other Issues

### ***Extension of Currency Period***

This is a topical issue given that many approvals are now either coming to the end of their life or are at a stage where they may need to be reviewed having regard to the market, construction timeframes and financing issues.

A party can apply for an extension of the currency period.<sup>xii</sup> Section 388 of SPA sets out the considerations for an assessment manager in dealing with such a request:-

#### **388 Deciding request**

- (1) *In deciding a request under section 383, the assessment manager must only have regard to—*
  - (a) *the consistency of the approval, including its conditions, with the current laws and policies applying to the development, including, for example, the amount and type of infrastructure contributions, or infrastructure charges payable under an infrastructure charges schedule; and*
  - (b) *the community's current awareness of the development approval; and*
  - (c) *whether, if the request were refused--*
    - (i) *further rights to make a submission may be available for a further development application; and*
    - (ii) *the likely extent to which those rights may be exercised; and*
  - (d) *the views of any concurrence agency for the approval given under section 385.*
- (2) *If the assessment manager does not receive a notice under section 385 from a concurrence agency within 20 business days after the day the request was received by the assessment manager, the assessment manager must decide the request as if the concurrence agency had no objection to the request.*
- (3) *Despite subsection (2), if the development approval is subject to a concurrence agency condition about the period mentioned in section 341, the assessment manager must not approve the request unless the concurrence agency advises it has no objection to the extension being approved.*
- (4) *If the assessment manager receives a notice under section 385 from a concurrence agency within 20 business days after the day the request was received by the assessment manager, the assessment manager must have regard to the notice when deciding the request.*

It is important in all cases to have regard to the fingerprint of the approval itself and also to examine the legislation in each case. There can sometimes be opportunities to negotiate a satisfactory outcome with the local authority. There may also be opportunities to obtain, or apply for, a "related approval" which can extend the life of a development approval.<sup>xiii</sup>

In *Fima & Associates as Agents for TMK Pty Ltd v Toowoomba City Council*<sup>xiv</sup> the appellant applied to the Planning and Environment Court to overturn the decision of the Council not to grant an extension of a currency period. The original approval was given on 23 February 1999. On 12 March 2002 this was extended to 12 May 2004. The appellant then sought to extend the currency period to 14 September 2005. The Council refused to grant the extension and gave the following reasons for doing so:

1. *The proposal is Stage 1 of a stage development approval;*
2. *A previous extension has already been granted for Stage 1 until 12 March 2004;*
3. *Council reasonably expects the development to be undertaken within five years of its original approval;*
4. *Council's new planning scheme took effect in March 2003 and has implications for the nature of development considered acceptable for the subject land.*

At the appeal hearing the appellant made it clear that if it was successful on obtaining the extension sought it would commence construction by no later than 31 December 2004.

The Court allowed the appeal and granted the extension:

*[30] I am satisfied on the evidence given in this case that an extension of the currency period sought is not only reasonable but would not prejudice the implementation of the planning scheme in any important way. I am prepared to allow the appeal and grant the extension sought subject to the condition which the appellant is content to accept.*



view case at: <http://www.austlii.edu.au/au/cases/qld/QPEC/2003/69.html>

Another case on this topic is *Wallace & Anor v Logan City Council*.<sup>xv</sup>

This case also concerned an extension of a currency period. The Court referred to section 440(3) of SPA. It is worthwhile to set out the whole of section 440: -

#### **440 How court may deal with matters involving noncompliance**

- (1) Subsection (2) applies if the court finds a provision of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with.
- (2) The court may deal with the matter in the way the court considers appropriate.
- (3) To remove any doubt, it is declared that this section applies in relation to a development application that has lapsed or is not a properly made application.

The Court indicated that section 440(3) might be available to revive collapsed approvals:

*Oddly, in the expanded equivalent of the old s 4.1.5A, in s 440, one finds provision in subsection (3) to make it clear that development applications which may have lapsed by statute are capable of revival. It says nothing about development approvals which have lapsed. In my opinion that subsection which is there "to remove any doubt" does not have the effect that a lapsed approval may not be directly or indirectly revived by an appropriate Court order.*

 view case at: <http://www.austlii.edu.au/au/cases/qld/QPEC/2010/66.html>

#### **Powers of the Court regarding Compliance**

The above discussion leads into this topic.

We have already looked at section 440 and one possible application of that section. For IPA applications where no decision has been made on the application the repealed IPA continues to apply as if SPA had not commenced.<sup>xvi</sup> However, the Court has power in certain cases (such as in certain declaratory proceedings or appeals)<sup>xvii</sup> to make orders like those contemplated by section 440 where provisions of IPA or "another Act in its application to repealed IPA, has not been complied with or has not been fully complied with."<sup>xviii</sup>

In *Vidler v Fraser Coast Regional Council & Anor*<sup>xix</sup> the relevant council argued that an application was not a properly made application because section 3.2.1(5) of IPA had not been complied with by the appellant. This section is in the following terms: -

##### **3.2.1 Applying for development approval**

- (5) *To the extent the development involves taking, or interfering with, a State resource prescribed under a regulation, the regulation may require the application to be supported by 1 or more of the following prescribed under the regulation for the development –*
  - (a) *evidence of an allocation of, or an entitlement to, the resource;*
  - (b) *evidence the chief executive of the department administering the resource is satisfied the development is consistent with an allocation of, or an entitlement to, the resource;*
  - (c) *evidence the chief executive of the department administering the resource is satisfied the development application may proceed in the absence of an allocation of, or an entitlement to, the resource.*

The Court considered both section 4.1.5A of IPA (the previous version of section 440 of SPA) and section 820 of SPA. Essentially, it held that the IPA provision contained a more limited power than section 820 but that even applying section 820, the Court did not believe it was appropriate to exercise its discretion in favour of the appellant. The appellant therefore failed.

 view case at: <http://www.austlii.edu.au/au/cases/qld/QPEC/2011/18.html>

Some other cases, specifically to do with public signage requirements are: -

*Beeston & Ors v. Raymond & Anor* [2003]<sup>xx</sup>

 view case at: <http://www.austlii.edu.au/au/cases/qld/QPEC/2003/12.html>

The signage requirements under the *Integrated Planning Regulation 1998*<sup>xxi</sup> were not complied with. The person responsible for the signage said:

*"Having regard to the nature of the trees and vegetation existing in the Gibson Street road reserve and the dimensions thereof where it adjoins the subject land, I did not believe that the erection of a sign at this location... would be effective in achieving its purpose."*

The Court exercised the power under section s4.1.5A of IPA and found that, whilst there had been non-compliance, this non-compliance had not substantially restricted the opportunity for a person to exercise the rights conferred on that person by IPA.

*Friends of Springbrook Alliance Incorporated & Ors v Council of the City of Gold Coast & Anor* [2003]<sup>xxii</sup>



view case at: <http://www.austlii.edu.au/au/cases/qld/QPEC/2003/14.html>

The following case excerpts summarised the facts and findings:

*[4] In this case the road reserve of Lyrebird Ridge Road is quite wide with the result that a substantial extent of vegetation separates the boundary of the subject land and the sealed portion of the carriageway. It appears to be accepted as fact that if the notice had been placed on or within 1.5m of the boundary it would have been invisible from the carriageway. What did occur is that a position for the sign was chosen in an area beside the carriageway that had been cleared of dense vegetation. Material before the court indicated that it was a little over 9m outside the property boundary and about 9m from the carriageway.*

*[5] Photographs taken of the sign in place show that it was clearly visible from the carriageway although, if one took up different positions on the road some interruption of views of the sign by vegetation would occur.*

*[6] Commonsense suggests that in some circumstances (this being one of them), it will be impossible to comply with both sub-paras (a) and (c) of s 11(2) of the Regulations. It is also clear that if one has to favour one of these requirements at the expense of the other, that calling for visibility of the sign from the road is clearly the more compelling.*

## CONCLUSION

This paper has been prepared to highlight some of the issues relevant to the planning and development industry. It is not exhaustive and it is not intended as legal advice.

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## REFERENCES

<sup>i</sup> Currently section 3.1.9

<sup>ii</sup> SPA s257

<sup>iii</sup> *Cardwell Shire Council v King Ranch Australia Pty Ltd* [1984] HCA 39

<sup>iv</sup> SPA s461

<sup>v</sup> SPA s456

<sup>vi</sup> SPA s457

<sup>vii</sup> SPA s493

<sup>viii</sup> SPA s495

<sup>ix</sup> *Ajana Park Pty Ltd v Mackay City Council & Anor* [2009] QCA 404

<sup>x</sup> 195 CLR 547

<sup>xi</sup> 207 ALR 1

<sup>xii</sup> SPA s383

<sup>xiii</sup> SPA s341-343

<sup>xiv</sup> *Fima & Associates as Agents for TMK Pty Ltd v Toowoomba City Council* [2003] QPEC 69

<sup>xv</sup> *Wallace & Anor v Logan City Council* [2010] QPEC 66

<sup>xvi</sup> SPA s802(1), (2)

<sup>xvii</sup> SPA s820(1)

<sup>xviii</sup> SPA s820(1)

<sup>xix</sup> *Vidler v Fraser Coast Regional Council & Anor* [2011] QPEC 18

<sup>xx</sup> QPEC 12 (17 April 2003)

<sup>xxi</sup> s11

<sup>xxii</sup> QPEC 14 (17 April 2003)