

LOCAL GOVERNMENT

Court's discretion as to weight of current planning scheme where application lodged under a former planning scheme

Justice Brabazon QC recently delivered his decision allowing an appeal in the case of *Herbert and Others v Brisbane City Council and Norris Clarke & O'Brien Pty Ltd*. The development being opposed by four neighbours was for the construction of a three storey residential building containing four attached houses on a site previously constituting the relatively large backyards of two old Queenslanders. The development was to increase the density on five lots from two to six dwellings. Issues were raised in relation to the provision of open space, protection of neighbours' view and the application and enforceability of planning policies.

A complicating factor was that the development application had been lodged just days before the Brisbane City Plan 2000 commenced, repealing the 1987 Brisbane Town Plan. There was a marked difference between the two planning schemes in relation to the provision of sufficient communal and private open space. The new City Plan 2000 significantly reduced the dimensions of open space to be incorporated in the development.

Application of and Weight to be given to a new Planning Scheme

A development application must usually be assessed against the Planning Scheme in force at the date of lodging the application. However section 4.1.52(2)(a) of the *Integrated Planning Act 1997* ('IPA') states that for an Appeal under IPA:

if the appellant is the applicant or a submitter for a development application, the court.....must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate. (emphasis added)

In this case, the Judge concluded that "considerable weight" should be given to the provisions of the more recent planning scheme (City Plan 2000) because:

- the application was lodged only just prior the

- introduction of the City Plan; and
- the application was lodged long after the advertisement of the City Plan; and
- a considerable time had now passed (both since the application was lodged and the new City Plan commenced).

While section 4.1.52(2) of IPA allows the court to give weight to any new laws and policies as it considers appropriate, local governments themselves are not necessarily afforded this option.

Justice Brabazon did however recognise and reiterate in this case that, the role of the Court was to make impartial decisions based on applying the law to the facts, not to act as the town planning authority. Furthermore, he referred to the 2002 decision in *Weightman v Gold Coast City Council* insisting that the Court must maintain the consistent application of a planning scheme, even after it has become a Transitional Planning Scheme pursuant to IPA.

On the issue of Transitional Planning Schemes, the Judge stated that prohibitions under these schemes "lose their emphatic quality, and become only expressions of policy."

Application and Enforceability of Planning Policies

Justice Brabazon traced the shift in the Court's approach to planning policies. Initially, planning policies were considered to be not binding on a local government or a court and "each application was still to be considered on its merits". Then, following the introduction of registers of planning policies and section 1A.4 of the *Local Government (Planning and Environment) Act 1990*, they were given more formal recognition. However, planning policies have never been considered with the status and enforceability of a planning scheme.

He concluded that:

While the policy is a town planning instrument, a more flexible approach may be taken to its application. It is the substance of a policy rather than its form that is important. The planning

objectives upon which the policy is founded must always be recognised and where feasible applied. (emphasis added)

Applicability of Codes under a New Planning Scheme

The applicability of Codes under the City Plan 2000 to this application, lodged prior to the commencement of the City Plan 2000 was briefly addressed. It was concluded that the application must comply with any requirements of IPA, but there was no need to comply with the Codes under the new planning scheme (see s6.1.30(2)). Therefore, in this case the Council was correct in not mentioning any codes in the Acknowledgement Notice.

Protection of a Neighbours' view

There is no general law protection of view. It is necessary to rely on the provisions of the applicable planning scheme, if attempting to show that the view from an existing building should be preserved. In this case, the applicable planning scheme was silent in relation to protecting view and Justice Brabazon concluded as follows:

If the complaints about views were considered in isolation from the development standards, then they would certainly be dismissed. It is quite possible to be sympathetic to the neighbours to the rear who presently enjoy splendid views, and would have them obstructed by this development. However, the degree of obstruction is not such that, standing alone, their complaints could be upheld. Provided that the development in front of them were to follow the development standards, then they could not complain.

It is likely that with the imminent introduction of the new IPA planning schemes currently in the process of being finalised by many local governments, that this case will gain increasing importance as a starting point for planning and environment issues which may arise as a result.

P&EC Decisions: Is a mezzanine floor is counted as a storey

The Court in *Hillbrook Estate Developments Pty Ltd v Maroochy Shire Council* was asked to determine whether a building under construction was six or seven storeys. The roof of the building is sloped upwards from the street side to be higher on the

river side. From the street, the building appears to be six storeys and in fact only has six floors of units. However, the roof peaks at about 5.5 meters from the sixth floor and a mezzanine floor (of about 20% of the level six footprint) has been inserted into this space and is used as bedrooms in the units, accessed by internal unit staircases. From the river side, the building appears to be seven storeys.

The issue of contention is the definition of "storey". The Respondent was relying on the definition in the planning scheme in force at the time that the development application was lodged, while the Appellant was relying on the definition in the Building Code of Australia.

Why the definition in the Building Code of Australia was even considered

The construction of the building constitutes code assessable development pursuant to the applicable planning scheme and IPA, as it is subject to the *Standard Building Regulation 1993* ('SBR') but does not require public notification. The SBR is a code for IDAS purposes and incorporates the Building Code of Australia.

However, section 6.1.29 of IPA, when it commenced in 1997, provided transitional arrangements for dealing with assessing a development application under the repealed *Local Government (Planning and Environment)* Act and expressly set out that under these transitional arrangements that code assessment does not apply to Transitional Planning Schemes. The applicable planning scheme was a Transitional Planning Scheme. Therefore, the application for the construction of the building did not need to be assessed against the SBR and the Building Codes Australia which would otherwise have been applicable. Section 6.1.29 and 6.1.30 of IPA have since been amended to deal with this issue.

Planning Scheme Definition Accepted by Court

In essence the Court had to decide whether a "storey" was to be determined by:

1. the space between floor and ceiling; or
2. the height of the building, calculated by reference to the number of storeys.

The Judge concluded that:

The Court is required to declare the position

adopted in the planning scheme [which in this case was a Transitional Planning Scheme], whatever it is. ... The mezzanine is a floor level, even though it is only over part of level 6... That part of the building is seven storeys in height.

The following aspects of the applicable Maroochy planning scheme (1985) were considered in the Court's reasoning:

- the height of a building is calculated by reference to the number of storeys, however levels completely below ground level escape inclusion;
- the definition for "height of building in meters" envisages buildings having different heights at different places and calculates the height from the natural ground level to the top of the building along a vertical axis at various places;
- no definition of "floor", "floor level" or "mezzanine" are provided; and
- while the planning scheme states that a storey with a height in excess of 5.2 meters is taken to be two storeys in determining height, it is illogical to imply the inverse to define a single "storey" based on internal space.

The Court therefore determined a "storey" to be the space between floor and ceiling and the definition of "mezzanine" provided in the Macquarie dictionary was accepted and applied in this instance.

Submitter Appeal: Vexatious Proceedings and Abuse of Process

The incorporation of appeal rights of submitters in the Integrated Planning Act 1997 has been hailed as an integral element in ensuring transparent decision-making. However, developers and Local Governments have on numerous occasions been subjected to time-consuming and costly litigation in the Planning and Environment Court as a result of unguided or lay submitters misusing or abusing these appeal rights.

Justice Robertson has recently sounded a stern warning to submitters in his decision of *Cooloola Ratepayers and Residents Association Incorporated v Cooloola Shire Council and Davies*, recognising the frustration that such under-resourced submitter appeals cause to not only developers and Local Governments, but also the legal profession and court system. Justice Robertson does not

however, direct sole responsibility for this downfall in the integrated planning system on submitters, suggesting that some preliminary mechanism such as accreditation or filtering of submitter appeals may alleviate the problem.

This case concerned a submitter appeal to a development application for the removal of a character home, the retention of a character butcher shop and the construction of a retail showroom. The application was approved subject to conditions and following the filing of the submitter's Notice of Appeal, further amendments were negotiated by the developer and the Council.

In this case, it was noted that the submitter:

- failed to appreciate the "genuine efforts" of the developer in amending the development application in light of the issues raised by continuing to pursue proceedings;
- requested the cross-examination of expert witnesses engaged by Council and the developer, and then failed to question the witnesses; and
- failed to lead any witnesses in the proceedings.

Justice Robertson concluded that the appeal by the submitter was vexatious and an abuse of process, ordering that:

- the appeal be dismissed;
- the development be approved;
- costs be awarded against the submitter; and
- the evidence tendered by the submitter be referred to the Attorney General to consider prosecution of individuals for perjury.

Pest and Stock Routes: Extension on Management Plans

The *Natural Resources and Other Legislation Amendment Act 2004* assented and commenced on 6 May 2004 has amended sections 25 and 105 of the *Land Protection (Pest and Stock Route Management) Act 2002* granting local governments a one year extension to 1 July 2005, to have:

- a pest management plan for declared pests in its area; and
- a stock route network management plan for managing stock routes in its area.

Pest and Stock Routes: the latest Emergency Pest Notice

On 14 May 2004, an Emergency Pest Notice was published pursuant to the *Land Protection (Pest and Stock Route Management) Act 2002* for the Yellow Crazy Ant (*Anoplolepis gracilipes*).

Proposal to legalise use of household greywater

On 4 June 2004, Premier Peter Beattie and **Desley** Boyle, the Minister for Local Government and Planning, released a ministerial statement of the Government's intention to legalise the use of household greywater for the watering of gardens and lawns.

Under the proposal, the use of greywater by householders would be subject to Council approval and Council could nominate areas where such use would be unsuitable due to the soil conditions. There would also be provision for householders to redirect greywater to the sewer system where necessary to prevent waterlogging. This use of greywater is not expected to be effective before late in 2005.

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