



## LOCAL GOVERNMENT

### Planning and Environment Update Jan/Feb 2005

#### EACH PARTY BEARS OWN COSTS IN P & E COURT: WALL QC SUGGESTS A CHANGE

*Reelaw v Queensland Heritage Council (No. 2)*

On 10 December 2004, Wall QC delivered his decision in the matter of *Reelaw v Queensland Heritage Council (No. 2)*. This case:

- (a) followed from a successful appeal by Reelaw of the Queensland Heritage Council decision to enter a commercial building (owned by Reelaw) in the Heritage Register (a primary concern being the cost of conserving the building); and
- (b) was an application to the Planning and Environment Court by Reelaw for an order that the Queensland Heritage Council pay Reelaw's costs of the initial appeal.

In the Planning and Environment Court, section 4.1.23(1) of the *Integrated Planning Act 1997* provide that the normal rule is for each party to a proceeding to bear their own legal fees and outlays, regardless of which party commenced the proceedings and which party succeeded.

Section 4.1.23(2) however does provide a list of exceptions, for instance that the Planning and Environment Court may award costs against a party where that party's participation in the proceedings has been frivolous or vexatious, or that a party's conduct has merely been to delay and obstruct the resolution of a dispute.

#### Wall QC's decision

Reelaw claimed the basis for their application for costs to be that the Queensland Heritage Council resisted the appeal to delay or obstruct Reelaw. Wall QC concluded that the Queensland Heritage Council's "resistance to the appeal could not be said to have been groundless, superficial or devoid of merit.....something much more than a lack of success needs to be shown". In this regard he

notes that there was not an "absence of real merit to the Queensland Heritage Council case" and it is not as if they "put no meaningful evidence before the Court". Therefore, it remained that each party was liable for their own costs of the initial appeal.

Wall QC then stated at the end of his decision, that:

- (a) had it not been for section 4.1.23 of the *Integrated Planning Act 1997*, this is a case where he would have granted Reelaw's application for costs; and
- (b) "the legislature should give consideration to amending the Queensland Heritage Act to include a power to award costs in appeals... ..separate from section 4.1.23... [which] ...is really more designed for matters arising under the *Integrated Planning Act 1997*."

#### Proposal to establish the Queensland Land and Environment Court

With the proposal to combine the Planning and Environment Court, Land Court, and Land and Resources Tribunal, to form the Queensland Land and Environment Court, procedural issues such as the general application of s4.1.23(1) may receive more attention in the near future. The notion that parties bear their own costs is derived from the tribunal, rather than Court, system model.

It is likely that for planning appeals at least, that the parties will continue to bear their own costs for the following reasons:

- (a) it could be argued that the risk of bearing both/all parties costs could deter genuine submitters who do not necessarily have a significant commercial interest at stake as a result of a development proposal;
- (b) by having each of the parties bear their own costs, legal fees and outlays involved in resolving planning issues are distributed between local governments, the State Government and individuals/private entities whether developers or submitters. In a sense, this assists in achieving the ecologically sustainable development objective of the planning legislation, as it

ensures that social, cultural, economic, technological and ecological interests are represented and contribute to planning outcomes and the integrated development approval system.

### **Implications for local governments**

The implications of this for local governments may be that they will be required to continue to expend funds on planning appeals, despite proving their decisions. The Court has in recent times however, sounded a stern warning to submitters who proceed with vexatious claims or abuse the judicial process (refer to our review of *Cooloola Ratepayers and Residents Association Incorporated v Cooloola Shire Council and Davies* decision in our July 2004 Local Government flyer).

Furthermore, there are circumstances where local governments are able to recover their costs pursuant to the section 4.1.23(2) exceptions; for instance if the proceeding is an appeal against a decision on a development application and the applicant did not, in responding to an information request, give all the information reasonably requested before the decision was made.

## **OTHER RECENT PLANNING & ENVIRONMENT COURT DECISIONS**

**Walsgott v Maroochy Shire Council & Anor** [2005] QPEC 5 decided on 2 February 2005: The Court addressed the construction of planning schemes and specifically “whether terms of Maroochy Planning Scheme necessitated impact rather than code assessment of the second respondent’s application for a material change of use”. The decision also clarified the meaning of “environmental values”. Walsgott’s application was dismissed.

**Zarb v Brisbane City Council** [2005] QPEC 4 decided on 28 January 2005: In this case, Newton DCJ considered the interpretation of “minor change” and the effect of section 4.1.52 of the *Integrated Planning Act 1997*. The issue before the Court was to decide whether proposed amendments to a development application constituted a minor change to the original development application. Newton DCJ concluded that the new plans constitute more than a minor change to the application.

**Family Assets Pty Ltd v Gold Coast City Council & Ors** [2005] QPEC 6 decided on 4 February 2005

**Woolworths Limited v Maryborough City Council & Anor** [2004] QPEC 86 decided on 17 December 2004

**Telstra Corporation Ltd v Caloundra City Council & Anor** [2004] QPEC 85 decided on 10 December 2004

### **Acting in two capacities: commercial entity and local government**

*Australia Estates Pty Ltd v Cairns City Council* [2004] QSC 378, recently heard and decided by the Supreme Court of Queensland, involved a contract for the sale of land by Cairns City Council to Australia Estates. Contention arose between the parties as to the completion date of the contract and the contract subsequently fell through.

A special condition of the contract was that the contract was subject to an application for development of the land being obtained from Cairns City Council in its capacity as local government and assessment manager. The completion date for the contract was specified by reference to the date of the development approval.

The complication arose because on 26 July 2004, a Decision Notice was issued in relation to the development application. However, on 31 August 2004, Cairns City Council issued a Negotiated Decision Notice in relation to the same development application. The Supreme Court was required to determine the appropriate date for completion (and there were additional circumstances which further varied that date), but in the process the Court was required to consider whether the development was taken to be approved by the initial Decision Notice or the Negotiated Decision Notice for the purposes of the special condition.

Douglas J’s decision notes that Australia Estates legal representative’s submissions “focused on the effect of section 3.5.17 and 3.5.19 in replacing the original decision notice with the negotiated decision notice and in providing that the negotiated decision notice was taken to be the development approval.”

Douglas J went further, “It is important to note, however, that in these circumstances, it is taken to be the approval *from* the time the negotiated decision notice is given; see s. 3.5.19(a). That seems to me to illustrate that the original decision notice is effective until it is replaced, unlike the notice in *Hayes v Walker* [2004] QCA 288 which was the subject of an unresolved appeal and, accordingly, not a development approval but at

the highest an approval subject to a condition precedent”.

Douglas J concluded that “The original decision notice was effective for the purposes of the contract while it subsisted. The negotiated decision notice did not invalidate the steps taken under the contract in reliance on the original notice.”

Another point highlighted by this case is that local governments may (and often are) placed in a unique situation in commercial transactions where they act as a contracting party, but separately in another capacity which impacts on the commercial transaction. It is important in such cases that the local government’s actions in their authoritative capacity are transparent and compliant (especially in terms of statutory requirements and timeframes). Otherwise, a mere oversight or administrative inefficiency may be construed as a conflict.

### **Councillors Codes of Conduct**

The Department of Local Government, Planning, Sport and Recreation has released “draft legislative proposals that provide a regulatory framework for codes of conduct for Councillors.”

The Department is accepting submissions on the draft proposals until 4 March 2005.

We will review the legal effect of the codes of conduct in a later edition of the Swanwick Murray Roche, Local Government flyer.

### **CONTACT US**

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