In considering the effect of the proposed development upon the health and wellbeing of local residents (a major emphasis of respondents' objections), the Tribunal concluded that the evidence presented by the parties was insufficient to determine the point.

The Tribunal elected to defer its decision until publication of a new report on wind farm noise by the South Australia's Environment Protection Authority which, it is anticipated, will address the fundamental question of whether a causal link exists between sound pressure emissions from wind turbines, and adverse health effects on local residents. It is noteworthy that the Tribunal remained cognisant of the fact that even if a causative link is proven, the weight which the Tribunal accords the issue, in balancing factors to achieve an *acceptable outcome* will depend upon the percentage of the population who actually suffer such causative effects. The application was adjourned until a date not later than 4 October 2013.

'*Existing dwellings*' determination date

Clause 52.32-2 of the Planning Scheme states that no turbine may be constructed within two kilometres of an existing dwelling, without written consent of the owner of any such dwelling.

The key question for the Tribunal to determine was whether an application to amend the existing permit application was made:

- on 14 November 2012, at a directions hearing, when the amendment was contemplated
- on 30 November 2012, when the application to amend the permit application was lodged with the Tribunal, in the form required by Practice Note PNPE9, or
- on 29 January 2013, on the first day of the hearing, when the applicant sought leave from the Tribunal to amend the permit application.

The Tribunal was inclined to the view that the correct date to assess when the 'request to amend the permit application' was made, i.e. 30 November 2012. The basis for this conclusion was that form PNPE9 refers to an amendment application having already been made, in which case, at the point that this formality is satisfied, and the form is lodged with the Tribunal and circulated to the parties, the form suggests that the application is treated as having already been made.

Notwithstanding this conclusion, the Tribunal proceeded on the basis of a conservative approach. It considered whether, at 29 January 2013, any land within 2km of a proposed turbine was used for an 'existing dwelling'. Having considered evidence on the stage of development of two properties within 2km of a proposed turbine, and the level of proposed occupation, the Tribunal found that no dwelling existed on 29 January 2013 and therefore, could not have existed on 30 November 2012.

This decision therefore suggests that where an application to amend a permit application had been made, the date to assess whether existing dwellings are within 2km of a proposed turbine is the date that the applicant seeks the leave of the Tribunal to amend the application.

This is significant for developers seeking to amend a permit application in circumstances where future dwellings are under construction in the vicinity of proposed wind turbines.

The Tribunal dispensed with arguments from respondents that clause 52.32-2 operated prospectively to prohibit the operation of an existing wing energy facility when a later dwelling was constructed within 2km; noting that

> *the purpose of the legislation…is 'to facilitate the establishment and expansion of wind energy facilities' (clause 52.32). The interpretation contended for would serve the antithesis of this purpose.*[3]

Queensland Planning and Environment Court

Rainbow Shores P/L v Gympie Regional Council & Ors [2013] QPEC 26

by Mark Baker-Jones*

Sea level rise impact on coastal development must now be taken into account

After 35 days of hearing, the Queensland Planning and Environment Court has delivered its most significant climate change adaptation decision yet. *Rainbow Shores P/L v Gympie Regional Council & Ors*4 sets a new precedent for decision makers considering development in the Queensland coastal zone.

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Cherry Tree Wind Far Pty Ltd v Mitchell Shire Council, VCAT Reference No P2910/2012, para 38.

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[2013] QPEC 26

To date, climate change adaptation has surfaced as an issue in only a handful of Queensland planning court cases. A summary of these key cases follows:

Beginnings

The first case, although more a precursor to than an actual climate change case, identified an important principle. It found that the court was not a planning authority and therefore it was not the court's responsibility to set design standards for development susceptible to the impacts of extreme weather events. In its 2003 decision of *Daikyo (North Qld) Pty Ltd v Cairns City Council & Ors*[5] the Planning and Environment Court considered the appropriateness of a condition imposed on a proposed 60ha residential and tourist accommodation development, a development similar in nature to that of *Rainbow Shores*. The planning authority, the Cairns City Council, in an attempt to avoid the development being exposed to marine inundation during cyclones, sought to impose a condition requiring the development to meet certain design standards. The standards, in light of recent, although anecdotal, evidence about wave run-up penetration, required higher floor levels than those required for earlier, neighbouring development. The court noted that if the higher standards were accepted, it would be impractical to allow infill or redevelopment works in much of Cairns, including the CBD and airport as well as in Townsville and Mackay (large areas of which are now mapped as coastal hazard areas — see below). Not prepared to assume the role of arbiter of the appropriate standard, the court decided the condition was unreasonable and should not have been imposed. Although the court considered prophetically that while research would one day change the way we look at the effect of cyclones, it concluded that it was not the court's function to pre-empt proper consideration by the council and other relevant bodies of that research.

A year later in 2004, another application for an integrated residential and tourism development (68ha) was before the Planning and Environment Court. In *Mackay Conservation Group Inc v Mackay City Council6* the court was asked to consider cyclonic risk in an appeal by the conservation group against a decision by the Mackay City Council to approve the development. Although not the fundamental objection to the development, one issue in the appeal was a concern about public safety and risk from storm surge. The court refused the appeal, and in doing so, allowed the development to proceed. While accepting that the current standards safeguarding against inundation would prove inadequate, the court, following *Daikyo*, was satisfied that it was not its responsibility to set the standards. It was human nature, the court said, to live or holiday in areas under threat from disaster of one kind or another 'if the benefits by way of a pleasant environment, economic activity, adherence to some tradition or other, et cetera, are judged to make the risk worth taking'; and while there was a lack of clear policy to take the necessary steps to protect human life from the most severe events, 'the Court's approach ought not be dictated by the anticipated folly or stubbornness of the recalcitrants who refuse to follow direction issued to keep them safe'. Again, the court acknowledged the changes that further research might effect, recommending that 'the door should be kept open to admit [those] further changes if new technical advice … dictates them'.

Initial considerations

Two years later, in 2006, the first real climate change adaptation case appeared.

In the matter of *Charles & Howard Pty Ltd v Redland Shire Council*[7] the Planning and Environment Court dismissed an appeal by a developer who was seeking to change a condition of an approval that confined the location of a house he intended to build. The decision was appealed to the Court of Appeal.

The main issue was whether the council could impose a condition requiring the proposed house to be located on the western part of the land. The council wanted the house to be located there because it was above the one in a hundred year flood level. For convenience of access to the site, the appellant wanted the house located on the eastern part, which was below the one in a hundred year flood level, and they intended to place fill there to raise the ground level. The primary judge's decision to dismiss the appeal was supported by evidence before the court that the appellant's proposed building site may be vulnerable to rising sea levels because of climate change. The decision was upheld by the Court of Appeal[8] which found that the primary judge was entitled to take into account the impact of climate change on sea levels.

Despite this rather pioneering decision, the next case in Queensland did not appear for another six years. In the

5 [2003] QPELR 606
6 [2006] QPELR 209

7 [2006] QPEC 095
8 *Charles & Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349

matter of *Copley v Logan City Council & Anor*[9] an appeal was filed against a decision by what is now the Logan City Council to approve a development application for a small 25 lot rural residential development. Local resident, Mr Copely, raised a number of grounds as to why the application should be refused but was unsuccessful on all but one.

Mr Copely submitted that upon consideration of the impact of flooding on the site in 1947, 1974 and 1976; the more severe impacts from the floods before and including 1887 and 1893; anticipated new flood levels based on climate change sea level rise predictions; and that prospective buyers of land at the site would be unforgiving if they were to find out that their inundated homes were built with a full knowledge that flooding was inevitable, the development would be unacceptable. The applicant sought to strike out Mr Copely's appeal but the court found that whereas the development complied with the planning scheme standards relevant to flooding, it was not prepared to determine that a reasonable cause of action had not been raised or that Mr Copely had no prospect of succeeding in the appeal.

Accounting for change

We now arrive at *Rainbow Shores*, where, by its decision delivered on 13 June 2013 the court has dismissed an appeal by the developer of a large integrated resort and residential community at Rainbow Beach on the basis of its potential exposure to erosion, storm surge and climate change related sea level rise.

The subject land was overlaid by coastal hazard mapping. The court noted that mapping of coastal hazards has been carried through from State Planning Policy 3/11: Coastal Protection — which took effect in 3 February 2012 and was subsequently suspended in October that year – to its replacement by what is currently draft coastal protection state planning regulatory provisions, this being the type of policy found wanting in *Mackay Conservation Group*.

Having considered evidence as to the extent to which the proposed development would potentially be subject to storm surge, including having regard to potential sea level rise consequent upon climate change, the court has found that a greater part of the site (approximately 17ha) would be potentially susceptible to storm surge inundation unless protected by measures such as dune enhancement, boundary level enhancement or rock walls. In dismissing the appeal and thereby disallowing the development to proceed, the judge stated, at para [360]:

> *It would, in my view, be unwise to grant a preliminary approval, which is to set the framework for substantial development over a long period of time in this locality, without ensuring that the future development is protected from potential inundation. The appellant impliedly accepts that general proposition, since it accepts that its proposal should make allowance for the 100 year ocean surge level. Once that is accepted, it is difficult to justify ignoring the current predictions of sea level rise which affect the identification of that proportion of the site which is potentially susceptible. The [Plan of Development] is inadequate in its current form.*

At the same time as recognising that the concept of climate change adaptation is not new in Queensland coastal policy and therefore a matter that the courts must have regard for, the decision recognises that predicted long term climate change impacts, at least in respect of sea level rise, must be considered when deciding development applications for development proposed in the coastal zone.

Conventionalisation

The decision in *Rainbow Shores* marks a critical point in planning law and sends an important message to coastal planning decision makers about the increasing relevance to coastal development of sea level rise and climate change related coastal inundation. It brings together the body of case law in Queensland that allows planning decision makers to consider whether development will be affected by the climate change impact on sea level rise and the requirement to assess development against state planning policy that identifies coastal hazards. Consequently, where development is proposed in a coastal hazard area and is potentially susceptible to storm surge inundation, unless otherwise protected, it is unlikely to be approved. This will have significant implications for coastal development throughout Queensland, as the court in *Daikyo* predicted.

9 [2012] QPEC 39