THE COURT OF APPEAL ENDORSES THE CURRENT APPROACH OF THE PLANNING AND ENVIRONMENT COURT TO HEARING AND DETERMINING MERITS APPEALS

Judge W.G. Everson[1]
Planning and Environment Court of Queensland

[1] On 17 November 2020, the Court of Appeal endorsed the approach which has been taken by the Planning and Environment Court to hearing and determining merits appeals pursuant to the current legislative regime. It resoundingly rejected the pedantic arguments raised by the Brisbane City Council in its application for leave to appeal. In *Brisbane City Council v YQ Property Pty Ltd*,[2] Henry J who wrote the decision of the court with whom Fraser JA and Morrison JA agreed made some telling observations. He began by stating:

> "[4] The application confronts the obstacle that the decision of the primary judge involved a reasoned exercise of discretionary decision-making, applying well settled principles. In its quest to avoid that obstacle, the Council ultimately attempted to deny the existence of any real discretion in respect of two aspects of decision-making below. The argument as to each is untenable. Leave to appeal should not be granted."[3]

[2] In his reasons for judgment, Henry J endorsed the approach which has evolved in the Planning and Environment Court to hearing and determining merits appeals pursuant to the *Planning and Environment Court Act* 2016 ("PECA") and the *Planning Act* 2016 ("PA"). The interrelationship between the current relevant statutory provisions can be summarised as follows. Pursuant to s 43 of the PECA, the appeal is by hearing anew. Thereafter s 46 of the PECA addresses the nature of an appeal and relevantly provides:

> "(2) The Planning Act, section 45 applies for the P&E Court's decision on the appeal as if—
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> (a) the P&E Court were the assessment manager for the development application; and

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1 Paper given to Queensland Environmental Law Association Seminar, 'Learnings from the Bench and Bar', on 23 November 2020.
2 [2020] QCA 253.
3 At para [4].

(b) the reference in subsection (8) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision."

[3] Section 45 of the PA is relevantly in the following terms:

> "(1) There are 2 categories of assessment for assessable development, namely code and impact assessment.
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> (2) A categorising instrument states the category of assessment that must be carried out for the development.[4]
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> (3) A ***code assessment*** is an assessment that must be carried out only—
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> (a) against the assessment benchmarks in a categorising instrument for the development; and
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> (b) having regard to any matters prescribed by regulation for this paragraph.
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> (4) When carrying out code assessment, section 5(1) does not apply to the assessment manager.
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> (5) An ***impact assessment*** is an assessment that—
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> (a) must be carried out—
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> (i) against the assessment benchmarks in a categorising instrument for the development; and
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> (ii) having regard to any matters prescribed by regulation for this subparagraph; and
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> (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.
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> *Examples of another relevant matter—*
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> - a planning need
> - the current relevance of the assessment benchmarks in the light of changed circumstances
> - whether assessment benchmarks or other prescribed matters were based on material errors"

[4] In determining an appeal about a development application a wide discretion is conferred on the Planning and Environment Court pursuant to s 60 of the PA which relevantly states:

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4 A categorising instrument is defined broadly in s 43 of the PA and includes a planning scheme.

"(1) This section applies to a properly made application, other than a part of a development application that is a variation request.

(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—

(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and

(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and

Examples—

1. An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.

2. An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response.

(c) may impose development conditions on an approval; and

(d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.

Example of a development condition—

a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for

(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—

(a) to approve all or part of the application; or

(b) to approve all or part of the application, but impose development conditions on the approval; or

(c) to refuse the application."[5]

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[5] Section 62 requires the assessment manager's decision to comply with all referral agency responses and required conditions.

[5] The extent of the discretion conferred on the Planning and Environment Court in hearing and determining a merits appeal pursuant to the current statutory regime, as opposed to that which preceded it, has been the subject of numerous and consistent decisions of the Planning and Environment Court by different judges of that court. However until the decision of the Court of Appeal in *Brisbane City Council v YQ Property Pty Ltd*, the approach taken by the Planning and Environment Court had not been the subject of any specific endorsement by the Court of Appeal.

[6] The evolution of this consistent approach by various judges of the Planning and Environment Court is exemplified by the following decisions. Firstly, in *Hotel Property Investments Ltd v Council of the City of Gold Coast*[6], I made the following observations:

> "[8] I wish to say something about the scope of what is contemplated by the second permissive basis for assessment of the development application set out in s 45(5)(b) of the PA given its significance in this appeal.
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> [9] In *Wol Projects Pty Ltd v Gold Coast City Council* I made the observation that the assessment undertaken by the court in determining an appeal under the PA is less constrained than it was pursuant to the Sustainable Planning Act 2009 ("SPA"). Pursuant to s 326 of SPA the decision of the assessment manager (the court in an appeal) was required to not conflict with a relevant instrument, which included a planning scheme, unless there were "sufficient grounds to justify the decision despite the conflict". The term "*grounds*" was defined to mean matters of public interest and to expressly exclude the personal circumstances of an applicant, owner or interested party. Unsurprisingly in *Bell v Brisbane City Council & Ors* McMurdo JA observed that:
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> > "…a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land…"
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> …
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> [12] … Under the PA it is not necessary for the assessment manager to have firstly found a conflict with a planning control to then, in a limited way, consider a relevant matter as defined in the PA. As a consequence the assessment undertaken is much more fluid and something which may not be a relevant matter in one sense, as it comes within "a person's personal circumstances, financial or otherwise",

6 [2019] QPELR 554.

> may become one in another sense as it may, for example, involve a question of public interest in terms of its impacts or lack of impacts.
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> [13] Accordingly, pursuant to the regime in the PA there is much more scope for a consideration of the site specific benefits of a proposed development in assessing a development application. This in turn leads to greater scope for the use of expert evidence in the assessment process. It allows for evidence about the benefits of a proposed development as part of the assessment undertaken by the court in the exercise of its discretion in hearing and determining the appeal. While a relevant matter is only capable of being considered in a permissive, not mandatory way, it may be assessed in a way unconstrained by the previous requirement that consideration of such matters not occur until the decision making stage and then only in the context of a conflict with relevant planning controls.[7]

[7] The nature of the jurisdiction conferred upon the Planning and Environment Court by the current statutory regime was most comprehensively examined by Williamson QC DCJ in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*.[8] His Honour made the following seminal observations:

> "[53] An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. The existence of a non-compliance with such a document will be a relevant '*fact and circumstance*' in the exercise of the planning discretion under s.60(3) of PA. Whether that fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question. That question is no longer answered by a provision such as s.326(1)(b) of SPA. It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s.60(3) of the PA. It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established."[9]

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7 At 556-557.
8 [2019] QPELR 793.
9 At 806-807

[8] Having particular regard to the approach to be taken where there is non-compliance with the planning scheme, Kefford DCJ went on to observe in *Murphy v Moreton Bay Regional Council & Anor*:[10]

> "[22] I agree with Judge Williamson QC's observation that a planning decision, and the inherent balancing exercise it entails, is invariably complicated and multifaceted. It must strike the balance between the maintenance of confidence in a planning scheme on the one hand and dynamic land use needs and recognition that town planning is not an exact science on the other. The *Sustainable Planning Act 2009* gave primacy to the planning scheme in the striking of the balance. That is not what s 60 of the *Planning Act 2016* requires. Under the *Planning Act 2016*, the discretion is to be exercised based on the assessment carried out under s 45. Its exercise is not a matter of mere caprice. The decision must withstand scrutiny against the background of the planning scheme and proper planning practice. Not every non-compliance will warrant refusal. It will be necessary to examine the verbiage of the planning scheme to ascertain the planning policy or purpose of relevant provisions and the degree of importance the planning scheme attaches to them. The extent to which a flexible approach will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case."[11]

[9] These observations of judges of the Planning and Environment Court as to the extent of their jurisdiction in hearing and determining merits appeals were entirely consistent with the approach taken by Henry J in *Brisbane City Council v YQ Property Pty Ltd* where he stated:

> "[59] … The ultimate decision called for when making an impact assessment under s 45 and s 60 *Planning Ac* is a broad, evaluative judgment. It will be recalled that while s 45(5)(a) requires the assessment must be carried out against assessment benchmarks, s 45(5)(b) gives the assessment manager broad warrant to have regard to 'any other relevant matter'.
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> [60] The reservation to the decision-maker of that element of discretion in carrying out an impact assessment fits with s 60(3) *Planning Act*…
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> [61] Section 60(3) simply requires the assessment manager, after carrying out the impact assessment, to approve all or part of

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10 [2020] QPELR 328.
11 At 336-337.

> the application or to do so imposing conditions or to refuse the application. It thus stipulates the potential decision outcomes without proscribing which decision should be reached.
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> [62] The Act's approach in respect of code assessments is slightly different in that s 45(3) does not include reference to "any other relevant matter" but s 60(2) expressly confers the assessment manager with the discretion to approve the application "even if the development does not comply with some of the assessment benchmarks". The inter-play of ss 45 and 60 thus gives an assessment manager the discretion to approve an application notwithstanding inconsistency with a planning instrument.
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> [63] None of this is to suggest the nature and extent of an application's inconsistency with a planning instrument might not end up being a determinative consideration against approval in an individual case, depending upon the circumstances of that case. However, a case like the present, in which an inconsistency with the Biodiversity Areas Overlay Code was outweighed by the overall ecological benefits of the development, well illustrates the utility of the discretion which the Planning Act reserves to the assessment manager."[12]

Furthermore, Henry J specifically endorsed the approach of Williamson QC DCJ in *Ashvan*.[13]

[10] The drought of authority from the Court of Appeal referred to in paragraph [5] above was definitely broken where only three days after handing down the decision in *Brisbane City Council v YQ Property Pty Ltd*, and after this paper was first written, the Court of Appeal delivered judgment in *Abeleda & Anor v Brisbane City Council & Anor*.[14]

[11] Mullins JA wrote the decision of the court, with whom Brown and Wilson JJ agreed. Her Honour confirmed the extent of the discretion conferred, observing:

> "[43] In view of the fact that s 60(3) of the Act reflects a deliberate departure on the part of the Legislature from the two part test under s 326(1)(b) of the SPA, it is no longer appropriate to refer in terms of one aspect of the public interest "overriding" another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. The

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12 At paras [59]-[63].
13 At [62], footnote 40.
14 [2020] QCA 257.

> decision-maker may be balancing a number of factors to which consideration is permitted under s 45(5) of the Act in making the decision under s 60(3) of the Act where the factors in favour of approval (or approval subject to development conditions) have to be balanced with the factors in favour of refusal of the application. The weight given to each of the factors is a matter for the decision-maker in the circumstances, particularly having regard to the purpose of the decision in the context of the Act and the obligation imposed on the decision-maker under s 5(1) of the Act to undertake the decision-making in a way that advances the purpose of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.[15]

[12] Thereafter Mullins JA expressly and comprehensively endorsed the analysis of Williamson QC DCJ in *Ashvan*, including quoting para [53] of that decision which I have quoted above.[16] Her Honour noted that the discretion conferred under s 60(3) of the PA "is not fettered other than by reference to the purpose of the Act and the constraints under s 45 imposed on an impact assessment".[17] Furthermore, Mullins JA noted that in an appropriate case the absence of a negative impact or detrimental effect can be taken into account as a relevant matter on an impact assessment,[18] and that an aspect of non-compliance with an assessment benchmark may, in particular circumstances, remain a relevant consideration pursuant to s 45(5)(b) of the PA.[19]

[13] At its essence, the decisions of the Court of Appeal in *Brisbane City Council v YQ Property Pty Ltd* and *Abeleda & Anor v Brisbane City Council & Anor* put to rest any doubt that the discretion conferred upon the Planning and Environment Court under the current legislative regime for hearing and determining merits appeals is broad and, providing it is exercised within the jurisdictional limits conferred by the relevant legislative provisions, it is not readily susceptible to challenge.

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15 [2020] QCA 257 at [43].
16 At [52]-[62].
17 At [56].
18 At [61].
19 At [75], and note the observations in *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5 at [12] quoted above.