

HIS HONOUR: The court's had the advantage of a number of days devoted to the hearing of this matter, separated by some weeks. I have clear views as to what ought to be the outcome of the preliminary points that have been argued. I think it's in the parties' interests to have those stated now (supported by brief reasons which I may expand upon in due course) so that they can advance things in relation to the appeal in this court and perhaps by approaching the Court of Appeal first.

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The appellant developer is the latest in a line of developers to face arguments of a broadly similar kind that they've fallen foul of hitherto unsuspected traps in the application process under the Integrated Planning Act 1997 (IPA). The developer began in 2004, applying expressly for a preliminary approval overriding the local planning instrument, which was the 1988 Town Planning Scheme at that stage.

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The application was changed. Indeed, there were two applications which the Council considered together in late 2007. In part, this occurred because of the acquisition of additional land.

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There is a second appeal in the court which is a conditions appeal by the same appellant seeking to have changed conditions which the Council attached to a preliminary approval which was given in respect of an industrial park in the western part of the large site which covers hundreds of

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hectares and has a frontage to the Caboolture River of several kilometres.

This appeal is against the Council's refusal of an application for a preliminary approval overriding the planning scheme in respect of the eastern part of the site where what's proposed is a very large mixed use development, incorporating a good deal of residential land and, significantly, a large marina to be constructed on the site and entered from the Caboolture River.

The two difficulties the appellant faces which the Council, not having alluded to either of them in the course of receiving and acknowledging the application, making information requests and the like: first, the IPA s 3.1.6(b) point, authoritatively established by the Court of Appeal in *Stockland Developments Pty Ltd v Thuringowa City Council* (2007) 157 LGERA 49; [2007] QCA 384, and second, the State resources point which arises under section 3.2.1(5) and was confirmed to be a potential problem for developers, the scope of which had not previously been understood, it seems, in *Barro Group Pty Ltd v Redland Shire Council* [2009] QPELR 564; [2009] QPEC 09 affirmed at (2009), 169 LGERA 326; [2009] QCA 310.

My conclusion, which may be stated at the outset, and possibly permits withdrawal, which I would have no objection to, of some of those at the Bar table, is that the Council succeeds on the State resources point, but not on the s 3.1.6 point. The Council was joined in the State resources point by the

chief executives of the Department of Environment and Resource Management and of the Department of Employment, Economic Development and Innovation, who were given leave to appear and were represented by Mr Morzone of Counsel.

Both Mr Morzone's chief executive clients and the Council, represented by Mr Gallagher QC and Mr Litster SC, accepted that it was open to the court to relieve the appellant from the consequences of its asserted non-compliance under section 820 of the Sustainable Planning Act 2009 (SPA). The court reaches the view that no special order under that section is required for the s 3.1.6 point. One is required for the other point.

It will be essentially to the effect that the appellant may proceed on the basis of providing evidence of allocation of or entitlement to relevant State resources as referred to in s 3.2.1.5(a). Paragraphs (b) and (c) offer alternative means to the appellant which require less than evidence of an actual allocation of or entitlement to a relevant State resource.

The relevant chief executive under s 3.2.1.5(c), for example, may not have to do any more than express satisfaction that the development application may proceed in the absence of an allocation or entitlement.

The material before the court is voluminous. It contains reports from relevant experts engaged by the Council which, as it happens, confirm the large amount of investigatory work that the Council has done in assessing the development

application that has been refused.

It's unnecessary at this stage to go into full detail. The material referred to establishes that the appellant's project, if realised, will involve, State resources. In many cases evidence may be necessary to establish such involvement. Here there is expected to be, among other things, capital dredging of several kilometres of the Caboolture River, involving some 550,000 cubic metres of dredge spoil, maintenance of a dredge pump line along the river and in Farry Road, capital dredging works of extended duration, use of dredge spoil on at least the land the subject of the development application, ongoing maintenance of dredging in the river, construction of fishing platform with canoe landings on the bank of, and extending into, the river; the removal of the bank of the river to construct a lock which will permit access to and from the marina whatever the tide.

The appellant's argument is that the development applied for in the relevant development application does not involve taking or interfering with any State resource, whether quarry material or anything to do with fisheries and fish habitats which are plainly likely to be affected by the proposal which involves the construction and maintenance of a deepened navigation channel for several kilometres along the river to the marina. This is because the preliminary approval applied for doesn't authorise the carrying out of any development on the ground: IPA s 3.1.5(1).

Mr Gore QC who appeared with Mr Fynes-Clinton for the

appellant, relies on the legislative history extending to other Acts and regulations which led to s 3.2.1(5) assuming its current form; he referred to *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 and [13] (and [96] where Hayne J agreed). The latest change was the deletion of "by taking or interfering with" between "involves" and "a State resource". Mr Gore submits that the occasion for insisting on provision of evidence as referred to in subsection (5) as key to a valid development application remains "taking or interference with a resource". That, he says, simply cannot occur where nothing more than a preliminary approval which doesn't authorise the doing of anything physically is applied for.

The explanatory notes for the last legislative change mentioned indicate an understanding that the law wasn't being changed. The key provision, given the reference which the section makes to a regulation, is s 12 of the Integrated Planning Regulation 1998, which it appears has not changed relevantly. It provides that for s 3.2.1(5) of the Act, Schedule 10 prescribes State resources and the evidence required to support an application that involves taking or interfering with each particular category of resource.

The submission was that all that's required to be read in to understand that section is "if approved" before "involves". "Involves" is a word of extraordinarily wide import. Judge Searles acknowledged in *Barro* in [22] at first instance that an application involves interfering with a State resource if

development the subject of it would have that effect, even if there was no physical manifestation, even if any physical manifestation was dependant on further approvals being obtained. The wide purview of "involves" and variants was acknowledged in an expanded way in *Jahnke v Cassowary Coast Regional Council* [2009] QPELR 645; [2009] QPEC 036 at [50] ff.

Mr Gallagher's argument is that although any actual taking or interference with a State resource might be dependent on some future development permit or permits in relevant respects, the IPA does not distinguish between a development application which seeks a permit permitting the actual carrying out of work and a development application which seeks simply a preliminary approval which gives a general authorisation, perhaps on the basis of extensive conditions. He relies on the explanatory notes and, indeed, the terms of the IPA in support of the proposition that a preliminary approval and a development application seeking such an approval cannot be distinguished from a development approval and a development permit which may ensue to permit the actual carrying out of work.

The role of the owner of the land in providing consent to the application applies in exactly the same way in Mr Gallagher's submission, which I consider is correct. That no more than a preliminary approval not authorising the carrying out of development would be no justification for neglecting obtaining the consent of the landowner to the relevant development application being lodged. It is significant, I think, that the two chief executives take this view as well.

There are some practical considerations that might be noticed such as the potential waste of resources, as seems to have happened here to an extent, if the Council as assessment manager is obliged to consider (very likely in considerable detail) whether a preliminary approval ought to be granted in circumstances where it may be that there's no possibility whatever that those who determine whether or not there's an entitlement to use State resources or will be an allocation of them will cooperate with the developer at all.

This is not a context in which the State departments are likely to be excluded. They will have their full opportunity when development permits are applied for to determine what ought to happen in respect of State resources within their purview.

Mr Morzone was able to identify an instance in which there might possibly be an exclusion of a State entity, but that case, while theoretically available, seemed not to be one that was going to be encountered here.

The history of the development application is most unusual. The Coordinator-General became involved under the State Development and Public Works Organisation Act 1971. By s 37, the consequences of that were to replace the information and referral stage and the notification stage which would ordinarily apply under the IPA; subsection (1)(d) says that the Coordinator-General's report is taken to be a concurrence agency's response for an IDAS development application. 21

June 2006 was the date the two development applications were declared a significant project by the Coordinator-General under s 26 of the 1971 Act.

The Coordinator-General, by the end of the year, published terms of reference for an environmental impact statement for the Northeast Business Park project, as the appellant's proposal is known.

In the following year, PMM Brisbane Pty Ltd, on 26 November, sought to change the original application. An environmental impact statement under the 1971 Act for the Northeast Business Park project was publicly notified under s 33 of that Act, from February to April 2008. Numerous submissions were received which were considered by the Coordinator-General and acknowledged in his report dated 31 October 2009 which recommended, subject to conditions, approval of the appellant's changed application.

Those involved in the Coordinator-General's exercise included Mr Morzone's clients. The report in a number of places refers to issues of State resources and in some, at least, expresses confidence that the appellant would obtain allocations it required. One could be forgiven for thinking that the Coordinator-General's report might be seen as committing relevant State entities. However, the legislation does not give the report, or the Coordinator-General's opinions, any such wide-ranging effect. The Council's role as assessment manager is confirmed by s 39 which commences:

- "(1) The Coordinator-General's report may state for the assessment manager 1 or more of the following-- 1
- (a) the conditions that must attach to the development approval;
 - (b) that the development approval must be for part only of the development;
 - (c) that the approval must be a preliminary approval only.
- (2) Alternatively, the report must state for the assessment manager-- 10
- (a) that there are no conditions or requirements for the project; or
 - (b) that the application for the development approval must be refused.
- (3) To remove any doubt, it is declared that subsection (1)(a) does not limit the assessment manager's power under the Sustainable Planning Act to-- 20
- (a) assess the development application; and
 - (b) impose conditions not inconsistent with conditions that must be attached under subsection (1)(a)."

It may well be that a recognition that the Coordinator-General and, likewise, the Council, in allowing to pass without comment the appellant's prescription of its proposed timetable as one according to which State resources issues will be considered later, after preliminary approvals, underlies the "generous" attitude taken to the application of section 820 of the SPA. 30 40

The State resources aspect of the preliminary points for the court's consideration is essentially resolved by an application of Barro. Both it and the other authority relied on by Mr Gore, *Stockland Property Management Pty Ltd v Cairns City Council* (2009) 171 LGERA 1; [2009] QCA 311 concerned development applications, success of which would authorise the carrying out of work. 50

I'm not persuaded that the necessity for further development applications in this context makes any difference. Barrow has been followed recently in *Metricon Innisfail Pty Ltd v Cassowary Coast Regional Council* [2009] QCA 400.

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The s 3.1.6 issue is not so difficult since the Court of Appeal's decision in the *Thuringowa* case. *Moncrieff v Townsville City Council* [2010] QPEC 45 is an instance of in this court accepting as valid an application which came under criticism in much the same way as does the appellant's here. Needless to say, the Council hadn't raised the difficulty in the past.

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I agree with Mr Gore that what the Court of Appeal said in the *Thuringowa* case, in particular what Keane JA held, with whom Jones and Douglas JJ agreed, indicates approval of the decision in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council* [2006] QPELR 490 as well as endorsement of the principle that in determining whether a development application complies with s 3.1.6, an objective interpretation of it is appropriate.

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The specific passage in Keane JA's judgment which Mr Gore relied on is the final sentence of paragraph 42 where it was observed that the application under consideration "stands in marked contrast with the application considered in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council*."

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Reference to the decision in this court at pages 493 and 495

reveals the extent of compliance held to suffice for s 3.1.6 (1)(b), of not one but two applications for preliminary approvals.

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The aspect on which Mr Litster, who carried this part of the argument for the Council, focused on, was the Court of Appeal's statement that it is insufficient compliance with s 3.1.6 if the only indication of the way in which it's sought to change the effect of a planning scheme is by identification of what is approved for a site if the development application succeeds.

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In the Thuringowa case, that is all that one had. Mr Litster submits that it is incumbent on a developer applicant to identify in what ways the planning arrangements in the planning scheme are sought to be varied in their effect by some statement of what the arrangements otherwise applicable might be.

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I suppose this is a philosophical question. The planners engaged by the appellant took the view that it did not matter particularly what the arrangements were that were being varied; what was needed was a clear statement of what the new arrangements would be, not by way of changing the planning scheme, which is not going to happen, but by varying its effect if a particular proposal should be carried out.

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The consultants' lack of interest in identifying what the pre-existing planning arrangements were in respect of the site is exemplified in the confusion that the reports exhibit as to

whether the planning scheme being overridden is the 1988 one, which was expanded by the 1993 strategic plan, or the 2005 one. The right answer would appear to be that it was the former.

The voluminous planning reports supplied in the EIS process supervised by the Coordinator-General focus much more on the variation of arrangements in the 2005 planning scheme. The two year period from its coming into effect within which applications might still be made under the 1988 superseded planning scheme was about to expire at the end of 2007 when the appellant changed its application. The planning reports I mentioned do in the course of some hundreds of pages admittedly acknowledge the making of the original application under the 1988 planning scheme. If one has read so far, it's clear that those 1988 arrangements are being supplanted in a way that a preliminary approval might invite, but there's no descent into the detail of what the planning entitlements associated with the site were under its "rural" designation.

Refinements occurred along the way, including the earmarking of part of the appellant's site for a sewerage treatment plant in the strategic plan, but that notion no longer has any life in it.

In Thuringowa, Jones J made comments relied on by Mr Litster as indicating that reference to s 3.1.6 is irrelevant in the sense that not only that failure to refer to the section by number is not fatal, but that mention of it by number does not

assist an applicant. I'm not satisfied that in that last respect his Honour took the view attributed to him; as to the former, see paragraph [63]. In my opinion it is of assistance to an applicant to refer to the section.

I have compared what the applicant has done here in both its original application in 2004 with what passed muster in Lagoon Gardens, and I'm easily persuaded that the present appellant has done more. Its' 2004 planning report is the most helpful document. It has in section 3.5 on page 25 a page of helpful discussion which, as I read it, is a clear statement even for one not within the planning cognoscenti to the effect that levels of assessment which would ordinarily apply in the rural zone were to be changed for a dozen or so types of "development" or uses relevant to the project. The codes which were identified for purposes of s 3.1.6(3), for example, were identified as those in the "current planning scheme".

The report I have referred to which came under cover of a letter indicating that the application was one for preliminary approval under IPA for "material change of use" was not, it seems, in the EIS documentation.

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However, the IDAS forms which were completed in 2004 were part of the EIS material and those, as clearly as the applications in Lagoon Gardens did, indicated the change from "rural"; the implications of which admittedly were not spelled out, to the new uses identified.

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When the applications changed in 2007, the list of new uses was expanded using 2005 planning scheme definitions, although most of the uses defined included (I don't accept Mr Litster's implied criticism) that that was done in some thoughtless exercise of including everything, regardless of the potential appropriateness for the appellant's large project. I think it's clear that discrimination was exercised.

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New consultants had come in in 2007, and the levels of assessment proposed in the Northeast Business Park plan were more refined than they had been previously, with some development exempt, some self-assessable and some code-assessable.

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Advice of the appellant's material from the point of view of revealing s 3.1.6 issues, and their implications for the assessment and decision under s 3.5.5A and s 3.5.14A is its bulky nature. However, it doesn't seem to me that it's in any

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way misleading or in any way conceals what the applicant developer was about, which was obtaining a preliminary approval to authorise its ambitious mixed use development on a large rural block, the western part of which, by 2005 in any event, was designated industrial which is essentially going to be its use in the project.

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The western part of the site is tied together with the eastern marina/residential part because it's the location of the road providing access to the Bruce Highway.

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As indicated, my view is that, on the Lagoon Gardens approach and the Moncrieff approach, which, I think, are consistent with Thuringowa in the Court of Appeal, reading the 2007 application objectively, it does state the way in which the effect of the planning instruments is sought to be varied for that particular development. In Thuringowa there was no express indication that the effect of the planning scheme was sought to be varied.

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It might be noted that if any more were done by the appellant, it would simply be to provide for the Council, not for the public, who no party suggested might become further involved, some sort of checklist of changes made from the 1988 planning arrangements.

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Mr Litster suggested that the appeal and development application might go forward, subject to a relevant document being produced by the appellant, but I can't see any point

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whatever in that exercise. In the circumstances I cannot identify any advantage the Council or its officers might derive from enumeration provision of a document spelling out how the proposal requires involves change in the effect of the 1988 planning scheme. What that scheme required is essentially irrelevant now, once one appreciates the unsurprising intent of the Rural Zone which is reflected in the 1988 provisions following:

" Division II - Intent of the Zones

1. Rural Zone - The principal purpose of this zone is to cater for general rural activities and will have a secondary benefit of limiting the development of land subject to flooding, maintaining a rural character throughout the Shire by the use of such zones as buffers around the urbanized areas and along the highways, and to maintain land in large holdings for development in accordance with the Strategic Plan at the appropriate time.

Uses in this zone should be generally compatible with primary industry activities."
