IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

B33
No. B5 of 2017

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

JOSHUA JAMES PIKE &
NATALIE PATRICIA PIKE
Appellants

and

KYM LOUISE TIGHE &
MICHAEL JAMES TIGHE
First Respondents

and

TOWNSVILLE CITY COUNCIL
Second Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issues that arise relate to the scope of provision in the *Sustainable Planning Act 2009* ("*SPA*") that a development approval attaches to land and binds successors in title (s.245), and the scope of enforcement provisions in *SPA* (chiefly ss.580, 601, 604, 605), in circumstances where a condition of a development approval by way of reconfiguration of a lot was not satisfied prior to the sale of the newly created lots to the parties now in dispute (the Appellants and the First Respondents).

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3. The issues are:

- First, did the power of the Planning and Environment Court to make an enforcement order under s.604 of *SPA* only arise upon that Court being satisfied that the First Respondents had committed the development offence of contravening a condition of a development approval (as held by the Court of Appeal)?

- Secondly, was s.245 of *SPA* inapplicable to the First Respondents for either or both of the following reasons (as held by the Court of Appeal):

  (a) because the First Respondents were not parties to the reconfiguration of the original lot approved by the development approval;

  (b) because the obligation in the relevant condition only had to be complied with at the time of registration of the survey plan, prior to the First Respondents' purchase of their lot?

Part III: Notice under section 78B of the *Judiciary Act 1903*

4. The Appellants certify that consideration has been given to the question whether notice pursuant to s.78B of the *Judiciary Act 1903* (Cth) should be given, with the conclusion that that is not necessary.

Part IV: Citations for decisions below

5. The citation for the decision of the Planning and Environment Court is *Pike v Tighe 2016 QPEC 30.*

6. The citation for the decision of the Court of Appeal is *Tighe v Pike 2016 QCA 353.*

Part V: Facts

7. The Appellants are the owners of a landlocked residential lot (lot 2), which adjoins land owned by the First Respondents (lot 1) with a frontage to a public road (Nora Road). The Appellants have the benefit of an easement over the First Respondents' land for access (Easement A), but, as a consequence of the position adopted by the First Respondents, the Appellants are unable to construct and provide utility services to a dwelling house on their land. Both lots 1 and 2 were created by a

development approval for a reconfiguration of the parent parcel on 29 May 2009, and that development approval was subject to a condition (condition 2) that contemplated that the easement benefiting lot 2 would provide not only for access but also for *"on-site* manoeuvering *and connection of services and utilities"*. Condition 2 provided:

> *"Access and Utilities Easement*
> *As easement(s) to allow pedestrian and vehicle access, on-site manoeuvering and connection of services and utilities for benefited lot(2) over burdened lot(1) must be provided. The easement(s) must be registered in accordance with the Land Title Act 1994, in conjunction with the Survey Plan."*

8. A copy of the survey plan is reproduced on page 4 of the Reasons for Judgment of the Planning and Environment Court.

9. The Appellants sought relief in the Planning and Environment Court to compel the First Respondents to comply with condition 2. The proceedings were based upon the combination of sections 245, 580, 601, 604 and 605 of *SPA* (set out below). The Planning and Environment Court found in favour of the Appellants.

10. The First Respondents applied to the Court of Appeal for leave to appeal on 3 grounds. Two of the grounds (grounds 1 and 3) raised questions relating to indefeasibility of title, but the Court of Appeal concluded that no question of indefeasibility arose in the case (at [13]). That left ground 2, which read:

> *"The primary judge erred in finding that the Court had jurisdiction to make the Order made by reason of the commission of an 'offense' (sic) when there was not (sic) such an offence and no proper basis to find as a fact that there was."*

11. The development offence relied upon by the Appellants was the failure to grant and register an easement which included provision for on-site manoeuvering and connection of services and utilities and which burdened lot 1 and benefited lot 2. The Court of Appeal accepted that the easement provided was contrary to condition 2 (at [3]).

12. While the development approval was granted under the *Integrated Planning Act 1997* ("*IPA*"), pursuant to s.801 of *SPA*, it was taken to be a development approval under *SPA*.

13. Section 245 of *SPA* provided:

> *"245 Development approval attaches to land*
> *(1) A development approval –*
> *(a) attaches to the land the subject of the application to which the approval relates; and*
> *(b) binds the owner, the owner's successors in title and any occupier of the land.*
> *(2) The remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."*

14. Section 244 of *SPA* provided that a development approval included any conditions imposed by the assessment manager.

15. Section 580(1) of *SPA* provided:

> *"580 Compliance with development approval*
> *A person must not contravene a development approval, including any condition in the approval."*

16. In schedule 3 of *SPA*, the expression *"development offence"* was defined as including an offence against s.580.

17. Sections 601, 604 and 605 of *SPA* then provided (amongst other things):

> *"601 Proceeding for orders*
> *(1) A person may bring a proceeding in the court -*
> *(a) for an order to remedy or restrain the commission of a development offence (an enforcement order);*
> ....
> *604 Making enforcement order*
> *(1) The court may make an enforcement order if the court is satisfied the offence -*
> *(a) has been committed;*
> ...
> *605 Effect of orders*
> *(1) An enforcement order .... may direct the respondent –*
> ....
> *(e) to do anything about a development or use to comply with this Act.*
> ...."

18. In *SPA*, the word "*development*" included "*reconfiguring a lot*" (*SPA* s.7(d)).

19. The Court of Appeal held that the power of the Planning and Environment Court to make an enforcement order under s.604(1) of *SPA* arose only upon that Court being satisfied that the First Respondents had committed the alleged development offence (at [22]), and that since the First Respondents were not parties to the reconfiguration of the original lot approved by the development approval, condition 2 did not impose any obligation upon them (at [37]). The Court of Appeal took the view that condition 2 imposed an obligation only as a condition of completing a reconfiguration which was to be complied with only simultaneously with that event (at [24][36]), and that, once the survey plan was registered under the *Land Title Act 1994* (Qld), and lots 1 and 2 created, the development approval was spent (at [23]-[29]; see also per Philippides JA at [46]). The separately expressed conclusion of Philippides JA that the expression *"the land"* in s.245(1) of SPA is to be construed as a reference to the original lot (at [45]) is consistent with the reasons of Fraser JA (see eg at [27]).

Part VI: Appellants' argument

Some historical considerations

20. The early town planning statutes in Queensland (*Local Government Act 1936* – which applied to all local government areas other than the City of Brisbane – and *City of Brisbane Town Planning Act 1964*) did not contain any provision like s.245 of *SPA*. Although the common law principle is that a development consent runs with the land (*Miller-Mead v Minister for Housing & Local Government 1963 2 QB 196, 215; Eaton & Sons Pty Ltd v Warringah SC 1972 129 CLR 270, 293; Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd 2006 229 CLR 577, 598[67], 606[96]*), no similar principle was established in Queensland for a rezoning approval under the early statutes (*Gold Coast Commerce Club Inc v Body Corporate for Surfers Plaza Resort 2008 QSC 323 at [131]*), and the Planning and Environment Court had recognised that there were difficulties associated with the enforcement of conditions of a rezoning approval (*Re Giant Supermarket Properties Ltd 1993 QPLR 229; Turner v Noosa SC 1995 QPLR 158, 159*). When

the Local Government (Planning & Environment) Act 1990 ("*P&E Act*") replaced the early statutes, it introduced provisions which were precursors to s.245 of *SPA*.

21. The *P&E Act* was in turn replaced in 1998 by the *Integrated Planning Act 1997* ("*IPA*"). Section 3.5.28 was a direct precursor to s.245 of *SPA*. With respect to this provision, the Explanatory Notes stated that the approach contained in the provision *"makes it clear that changes of ownership do not affect the validity of a development approval"* (*Queensland Acts Explanatory Notes 1997* vol 2 p.1972). When *SPA* replaced *IPA* in 2009, the Explanatory Notes for s.245 contained the same statement (*Queensland Acts Explanatory Notes 2009* vol 3 p.1882).

10 22. The *P&E Act* did not include any comprehensive provisions dealing with development offences and enforcement notices. These were first introduced by *IPA* (Chapter 4 Part 3) in terms substantially the same as that which later appeared in *SPA*. The Explanatory Notes described the division dealing with enforcement orders as allowing for *"specific injunctive type orders from the Planning and Environment Court"* (*Queensland Acts Explanatory Notes 1997* vol 2 p.2016).

Some introductory submissions

23. The Appellants submit that, partly in view of the history, the intention of s.245 of *SPA* was to statutorily embody the common law principle that a development approval runs with the land, and to ensure that terms of the approval (including
20 conditions) could be enforced against subsequent owners. The Appellants' contentions about the scope and application of s.245 were supported by:

(a) the decision of the Supreme Court (Peter Lyons J) in *Wirkus v Wilson Lawyers 2012 QSC 150*;

(b) the decision of the Court of Appeal in *Peet Flagstone Pty Ltd v Logan City Council 2014 QCA 210*.

24. The Appellants also submit that the enforcement provisions of *SPA* were intended to confer wide powers on the Planning and Environment Court (cf *F Hannan Pty Ltd v Electricity Commission (NSW) No 3 1985 66 LGRA 306, 310-313; Warringah Shire Council v Sedevcic 1987 10 NSWLR 335, 338-339, 342*).

The errors below

25. The Court of Appeal made 2 basic errors in its decision. The first was its conclusion that the power of the Planning and Environment Court to make an enforcement order under s.604(1) only arose upon that Court being satisfied that the First Respondents had committed the alleged development offence (at [22]). The second was its conclusion that s.245 of *SPA* did not apply in the present case, first, because the First Respondents were not parties to the reconfiguration of the original lot approved by the development approval (at [37]) and, secondly, because the obligation in condition 2 only had to be complied with at the time of registration of the survey plan (at [24][26][36]).

26. The 2 errors are interrelated, but the second error may be viewed as the more critical of the two. These errors are addressed below.

27. First, the Planning and Environment Court's power under s.604(1)(a) is engaged if the Court is satisfied *"the offence has been committed"*. There is no express requirement that the offence be committed by the particular respondent to an application for an enforcement order and no basis for an implication to that effect. It is a sufficient safeguard for any concern about the width of the power that the Court retains a discretion whether or not to exercise the power (cf *Hillpalm Pty Ltd v Heaven's Door Pty Ltd 2002 55 NSWLR 446, 450[22]; Hillpalm Pty Ltd v Heaven's Door Pty Ltd 2004 220 CLR 472, 506[103],* per Kirby J, *515[128],* per Callinan J).

28. Secondly, the reliance by the Court of Appeal (at [21]) upon this Court's decision in *Hillpalm*, and its dismissal of the Appellants' reliance upon the decision of the NSW Court of Appeal in *Hillpalm* (at [30][31]), were wrong:

    (a) in *Hillpalm*, the respondent relied upon a breach of 76A(1) of the *Environmental Planning & Assessment Act 1979* (NSW) (*"EPAA"*) to support the making of an order under s.123 of the *EPAA*; s.76A(1) made provision for carrying out development without development consent, and the plurality concluded that where subdivision of land was the relevant development, the subsequent purchaser does not carry out that development

by occupying and using one of the lots in the subdivision (*220 CLR at 486-488[37]-[43]*); different considerations apply to a provision like s.580(1) of *SPA*;

(b) the conclusion that there was no breach of 76 of the *EPAA*, or of any other provision, then influenced the conclusion of the plurality that s.123 was not directed to a person who is not actually in breach of the Act, and not threatening to act in breach (*220 CLR at 488-489[45]-[49]*); the NSW statutory regime did not include any counterpart to s.245 of *SPA* (and note the reference by the plurality at 491[55] to the absence of any provision of the *EPAA* which would found the right asserted by the respondent);

(c) in view of the different provisions of *SPA*, assistance is given by views expressed by other judges in *Hillpalm*:

(i) at the level of the Court of Appeal, Hodgson JA said:

> *"If the development in question is a subdivision, than a later owner of the subdivided land or of a subdivided part of it may not be guilty of any breach of the Act, but nevertheless, so long as the land remains subdivided in accordance with the development consent without a condition of that consent being fulfilled, there is objectively speaking a continuing contravention of the condition..."*
> (*2002 NSWLR 446, 449[19]*)

(ii) at the level of this Court, consistently with the opinion of the plurality that s.123 should be read giving the words full amplitude (*220 CLR at 488-489[47]; 500[86]* fn.70), Kirby J considered that a breach of the *EPAA* extended to a failure to comply with the condition requiring the right of way (*220 CLR at 500[86]*) and that:

> *"The condition never having been rescinded (and on the contrary maintained and carried into force under the EPAA by the transitional legislation and regulation) it remains applicable to the land in the resulting subdivision. It has not been complied with either by (the original owner) or the (subsequent purchaser) as the owner and occupier of the land. The 'condition subject to which a consent is granted' remains unfulfilled. The 'failure to comply with' it therefore*

enlivens the jurisdiction and powers of the Land and Environment Court under the EPAA."
(220 CLR at 500-501[87])

(iii) the other dissentient, Callinan J, thought that it was at least arguable that (applying a principle laid down in *Coke on Littleton*) a subsequent purchaser of a subdivided lot which was created without satisfaction of a condition requiring an easement burdening the lot, having taken the benefit of the land in its subdivided state, is placed under an obligation to grant the easement, even though the purchaser was not responsible for the condition, but concluded that, in any event, given that a breach of the *EPAA* included a failure to comply with a condition, s.123 of the *EPAA* was not confined to a remedy against the person originally responsible for the breach (*220 CLR at 514-515[126]-[128]*).

29. Thirdly, as mentioned above, the Appellants' argument is supported by the decision of the Supreme Court in *Wirkus v Wilson Lawyers 2012 QSC 150*, and the Court of Appeal's dismissal of the Appellants' reliance upon *Wirkus* (at [33]-[36]) was wrong:

(a) in a paragraph that the Court of Appeal did not refer to, Peter Lyons J expressed the following relevant conclusion in *Wirkus* (footnotes omitted, and underlining added):

"[54] The defendants submitted that no obligation fell on the lot owners (or the body corporate) because they 'did not engage in any conduct' which could be said to have contravened the 1987 approval. It will be apparent from these reasons that a person may contravene a condition of a development approval, notwithstanding that that person played no role in carrying out the development; and that such a contravention may provide a basis for an application under s 4.3.22 of the IP Act. The statutory provisions under present consideration are significantly different from those dealt with in Hillpalm, by reason of the fact that they impose on successors in title an obligation to comply with conditions of a development approval. As was there observed:

'It is the applicable statutory provisions, and those alone, which must be examined in order to determine the rights of the parties.'"

(b) the reasons given by the Court of Appeal for not applying *Wirkus* were wrong or unconvincing:

(i) Peter Lyons J did not suggest that s.6.1.23(2) of *IPA* had any effect of the kind discussed by the Court of Appeal at [34]; rather, His Honour viewed s.6.1.24 as the provision relevant to the binding nature of conditions under the repealed *P&E Act*, despite the repeal;

(ii) the observation by the Court of Appeal at [34] about s.6.1.24(2) overlooks that specific provision to that effect was required, because, while under the *P&E Act*, conditions attached to planning scheme amendments (ie rezoning approvals) and were binding on successors in title (s.4.5(12), rezoning approvals were not in the range of *"continuing approvals"* identified in s.6.1.23 of *IPA* (ie that were not *"transitioned"* as a type of development approval: see *Integrated Planning Bill 1997 Queensland Acts Explanatory Notes 1997 volume 2 pp.2070-2071*);

(iii) at [35], the Court of Appeal observed that "if the legislative purpose was to make what was held in Wirkus to be a change in the law about the effect of conditions of development approval, one would not expect that legislative purpose to be found only in contestable implications from transitional provisions"; however, that overlooks that s.6.1.24 was an orthodox transitional provision, because, under the P&E Act, conditions of a rezoning approval (P&E Act s.4.5(12)), a staged rezoning approval (s.4.8(13)), a subsequent staged rezoning approval (s.4.10(12)), a town planning consent approval (s.4.13(16) and a subdivision approval (s.5.1(8)) attached to the land and were binding on successors in title, and the two subsections of 6.1.24 were designed to cover this field (cf Wirkus at [26], per Peter Lyons J);

(iv) particularly as the relevant conditions in *Wirkus* expressly imposed an obligation on *"the subdivider"*, they are not distinguishable from condition 2 on the basis postulated by the Court of Appeal at [36];

(v) the Court of Appeal accepted that s.245 and s.580(1) of *SPA* are substantially the same as s.3.5.28 and s.4.3.3 of *IPA* (at [18][20][35]), and it would be unreasonable not to assume that Peter Lyons J was aware of the connection between s.3.5.28 and s.6.1.24(1);

(c) set out below is a table comparing provisions referred to by Peter Lyons J, and the counterpart provisions in SPA:

IPA	SPA
s. 6.1.24(1) (see also s. 3.5.28)	s. 245
s. 4.3.22(1)(a)	s. 601(1)(a)
s. 4.3.25(1)(a)	s. 604(1)(a)
s. 4.3.26	s. 605

30. Fourthly, as also mentioned above, the Appellants' argument is supported by the decision of the Court of Appeal in *Peet Flagstone* (which concerned s.3.5.28 of *IPA*, which is the same as s.245 of *SPA*), and the Court of Appeal's dismissal of the Appellants' reliance upon *Peet Flagstone* (at [32]) was wrong:

(a) one of the issues in *Peet Flagstone* was whether persons clearing vegetation on the land in 2012 were not required to comply with an operational works approval which was granted in 2008 prior to the acquisition of the land in 2011 by Peet Flagstone (see at [2][3][4][9][10]), on the ground that the conditions of the 2008 development approval terminated once vegetation clearing permitted by it had been carried out well before 2012 (at [26]); in deciding this issue adversely to Peet Flagstone, Gotterson JA (with whom the others agreed) said (footnote omitted):

> "*[27] The Peet interests did not identify any statutory provision in support of an argument that the conditions of a development approval terminate once development authorised by it has been carried out. The Court was not taken to any provision which expressly so provides. At another level, the circumstance that under a legislative planning scheme, an application for further development might be made in respect of the same land once previously authorised development had been carried out on it, plainly does not give rise to an*

implication that the legislature intended that, as a general legislative principle, the conditions of all development approvals are to terminate in the manner which this theme proposes.

[28] Besides, in terms of logic the result which this theme urges is counterintuitive. It is also contradictory of the character of a condition of a development approval as a "community price" a developer must pay for a development approval and a "vehicle for minimising adverse effects" of permitted development. As well it implies, without any justification, a temporal correlation between the benefit of a development approval and the burden of its attendant conditions."

(b) His Honour went on to conclude that the arguments underpinning the contention found no support in the authorities, and referred to the observations of Keane JA (as he then was) in *Genamson Holdings Pty Ltd v Caboolture Shire Council 2008 163 LGERA 386, 393[22], 395[26],* noting that it was implicit in what Keane JA had said that conditions did not terminate once the particular development in question had been undertaken, and that observations made by His Honour were relevant to *"the enduring nature of...conditions"* (at [29][30]);

(c) the reasons given by the Court of Appeal for not applying *Peet Flagstone* were wrong or unconvincing:

(i) the Court of Appeal said that *"the development approval in that case was required by that appellant to make lawful its clearing of the land"*, but that is not correct, because the appellant in *Peet Flagstone* accepted that the disputed clearing was not permitted by the terms of the 2008 development approval (*2014 QCA 210 at [18]*), but contended that the development approval did not apply to it (*2014 QCA 210 at [26]*);

(ii) the Court of Appeal went on to contrast the First Respondents here, on the basis that they *"required no town planning authority to make their ownership and occupation of lot 1 lawful"*, but that is not correct, because lot 1 would not exist without the 2009 development approval granted by the Second Respondent;

(iii) the Court of Appeal attributed the last observation by Gotterson JA in *2014 QCA 210 at [28]* (set out above) as *"referrable to the approval of a use of land which was in issue in that appeal"*, but that is not correct, because, first, the observation by Gotterson JA was of a general nature and, secondly, the approval in *Peet Flagstone* was for operational works, not for a use of land;

(iv) the Court of Appeal largely confined itself to observations by Gotterson JA in [31] of *2014 QCA 210*, whereas those observations were not central to His Honour's reasoning.

31. Fifthly, the Court of Appeal downplayed the importance of s.245(2) of *SPA* (see [25] fn.9), even though it contemplates that s.245(1) has a continuing operation despite even a later reconfiguration. In that regard, the Court of Appeal took too restrictive a view of what reconfiguration approvals involve. Here, the approval of the reconfiguration of the original lot required that there was an ability to connect services to lot 2. It also contemplated that lot 1 would be the burdened lot, and that the owner of lot 1 would be the person able to provide the easement. The registration of the survey plan, without fulfilment of a condition integral to the proper title of the lots, and to the proper use of lot 2, should not be construed as having completed the development, or as having spent (or exhausted) the obligation imposed by condition 2. The rights and interests to be granted by Easement A may be viewed as akin to the use of both lots 1 and 2, and so as involving a continuing and freestanding obligation, for so long as condition 2 was not fulfilled. The Court of Appeal's approach is not consistent with the objects of *SPA* (see *SPA* s.3(a)(b), s.4(1)(a), s.5(1)(a)(i)).

32. Sixthly, the Court of Appeal accepted that s.245 would apply, including to a successor in title, if no easement was registered in conjunction with registration of the survey plan as required by condition 2 (at [25]), but that is not easy to reconcile with its conclusion that condition 2 was spent by the completion of the reconfiguration of the original lot (at [26]). This highlights that the Court of Appeal failed to recognise that condition 2 created 2 separate obligations – the first was to provide the easement, and the second was to register the easement in conjunction with the survey plan.

33. Finally, the Court of Appeal suggested that *"some very odd results"* would follow from the Appellants' construction (at [29]); this too was erroneous:

(a) the concern expressed by the Court of Appeal that the owner of lot 2 would also be bound by condition 2, and so would commit a development offence (at [29]), ignores that the grantor of the easement could only ever be the owner of lot 1. Similarly, the Court of Appeal's other concern about registered proprietors of the created lots being in a different position to the registered proprietor of the original lot (at [29]) ignores the consideration that the objective of condition 2 is to provide for a post-approval state of affairs, involving the intended obligations of the lot 1 owner and the intended rights of the lot 2 owner;

(b) very odd results follow from the Court of Appeal's construction:

(i) under s.90 of the *Land Title Act 1994*, a registered easement may be surrendered by registering an instrument of surrender, and there is no requirement for any involvement of a local government; accordingly, in the present case, it would have been open for the proprietor of the original lot to comply fully with condition 2 at the time of the registration of a survey plan, but to surrender the easement after lots 1 and 2 were created; on the Court of Appeal's approach, s.245 would not apply, because condition 2 was spent (indeed, fully complied with) at the time of registration of the survey plan;

(ii) consider a case where a 50 lot residential development is created by a series of approvals (material change of use, reconfiguration of lot, operational works) which include a condition requiring the internal roads within the subdivision to be constructed to a particular pavement strength prior to registration of the survey plan of the new lots; in such a case, if it is only discovered after registration of the survey plan and the sale of the 50 lots that the pavement strength required by the condition had not been complied with, on the Court of Appeal's construction, there would be no scope for seeking an

enforcement order either against the original developer, or any successor in title to the original developer (such as a substitute development company that steps in prior to the sale of the lots); on the Appellants' construction, this is the type of mischief that both s.245 and the range of enforcement provisions were intended to cover; consistently with the reasoning of Kirby J in *Hillpalm*, the task of the Planning and Environment Court in such a case is to administer social justice in the enforcement of the legislative scheme of the statute, it being a task that travels far beyond administering justice inter partes (*220 CLR at 496-497*).

Part VII: Applicable statutory provisions

34. The following provisions are applicable to the appeal, and are attached as an annexure:

- *Sustainable Planning Act 2009* ss.3, 4, 5, 7, 244, 245, 580, 601, 604, 605, 801

35. For the convenience of the Court, in view of the submissions made above, the following provisions of earlier legislation are also contained in the annexure:

(a) *Integrated Planning Act 1997* ss.3.5.28, 4.3.3, 4.3.22, 4.3.25, 4.3.26, 6.1.23, 6.1.24;

(b) *Local Government (Planning & Environment) Act 1990* ss.4.5(12), 4.8(13), 4.10(12), 4.13(16), 5.18(8).

36. The *Sustainable Planning Act* was repealed by s.321 of the *Planning Act 2016*, which commenced on 3 July 2017. The annexure includes the successor to s.245 of *SPA* (namely, s73), and relevant parts of the successor to ss.601, 604, 605 (s.180).

Part VIII: Orders sought

37. The appeal be allowed.

38. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 23 December 2016, except insofar as it ordered in paragraph 1 that leave to appeal be granted, and in its place order that:

    (a) the appeal be dismissed;

    (b) the First Respondents the Appellants' costs in this Court, the Court of Appeal and in the Planning and Environment Court.

Part IX: Estimate of time for oral argument

39. The Appellants estimate that 2hrs will be required for the presentation of their oral argument.

Dated: 21 July 2017

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Annexure

Part VII: Applicable statutory provisions

Sustainable Planning Act 2009

3 Purpose of Act

The purpose of this Act is to seek to achieve ecological sustainability by—

(a) managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes; and

(b) managing the effects of development on the environment, including managing the use of premises; and

(c) continuing the coordination and integration of planning at the local, regional and State levels.

4 Advancing Act's purpose

(1) If, under this Act, a function or power is conferred on an entity, the entity must—

(a) unless paragraph (b) or (c) applies—perform the function or exercise the power in a way that advances this Act's purpose; or

(b) if the entity is an assessment manager other than a local government—in assessing and deciding a matter under this Act, have regard to this Act's purpose; or (c) if the entity is a referral agency other than a local government (unless the local government is acting as a referral agency under devolved or delegated powers)—in assessing and deciding a matter under this Act, have regard to this Act's purpose.

(2) Subsection (1) does not apply to code assessment or compliance assessment under this Act.

5 What advancing Act's purpose includes

(1) Advancing this Act's purpose includes—

(a) ensuring decision-making processes—

(i) are accountable, coordinated, effective and efficient; and

(ii) take account of short and long-term environmental effects of development at local, regional, State and wider levels, including, for example, the effects of development on climate change; and

(iii) apply the precautionary principle; and

(iv) seek to provide for equity between present and future generations; and

.....

7 Meaning of *development*

Development is any of the following—

(a) carrying out building work;

(b) carrying out plumbing or drainage work;

(c) carrying out operational work;

(d) reconfiguring a lot;
(e) making a material change of use of premises.

244 Development approval includes conditions

A development approval includes any conditions—
(a) imposed by the assessment manager; and
(b) that a concurrence agency has given in a response under section 285 or 290, or an amended response under section 290; and
(c) that the Minister has directed the assessment manager to attach to the approval under section 419; and
(d) that under another Act must be imposed on, or that apply to, the development approval.
Example for paragraph (d)—
The conditions taken to be imposed under the Building Act, chapter 4, part 5, division 1.

245 Development approval attaches to land

(1) A development approval—
(a) attaches to the land the subject of the application to which the approval relates; and
(b) binds the owner, the owner's successors in title and any occupier of the land.
(2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured.

580 Compliance with development approval

(1) A person must not contravene a development approval, including any condition in the approval.
Maximum penalty—1665 penalty units.
(2) Subsection (1) applies subject to subdivision 2.
(3) In subsection (1)—
development approval includes an approval under the repealed LGP&E Act, section 4.4(5) or 4.7(5).

601 Proceeding for orders

(1) A person may bring a proceeding in the court—
(a) for an order to remedy or restrain the commission of a development offence (an ***enforcement order***); or
(b) if the person has brought a proceeding under paragraph (a) and the court has not decided the proceeding—for an order under section 603 (an ***interim enforcement order***); or
(c) to cancel or change an enforcement order or interim enforcement order.
(2) However, if the offence under subsection (1)(a) is an offence under section 574, 578 or 580 about the building assessment provisions, the proceeding may be brought only by the assessing authority.
(3) The person may bring a proceeding under subsection (1)(a) whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

604 Making enforcement order

(1) The court may make an enforcement order if the court is satisfied the offence—

(a) has been committed; or

(b) will be committed unless restrained.

(2) If the court is satisfied the offence has been committed, the court may make an enforcement order whether or not there has been a prosecution for the offence under division 4.

605 Effect of orders

(1) An enforcement order or an interim enforcement order may direct the respondent—

(a) to stop an activity that constitutes, or will constitute, a development offence; or

(b) not to start an activity that will constitute a development offence; or

(c) to do anything required to stop committing a development offence; or

(d) to return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or

(e) to do anything about a development or use to comply with this Act.

(2) Without limiting the court's powers, the court may make an order requiring—

(a) the repair, demolition or removal of a building; or

(b) for a development offence relating to the clearing of vegetation on freehold land—

(i) rehabilitation or restoration of the area cleared; or

(ii) if the area cleared is not capable of being rehabilitated or restored—the planting and nurturing of stated vegetation on a stated area of equivalent size.

(3) An enforcement order or an interim enforcement order—

(a) may be in terms the court considers appropriate to secure compliance with this Act; and

(b) must state the time by which the order is to be complied with.

801 Continuing effect of development approvals

(1) A development approval under repealed IPA that is in force immediately before the commencement continues as a development approval under this Act.

(2) For this Act, a development approval continued in force under subsection (1) is taken to have had effect on the day it had effect under repealed IPA.

Schedule 3

development offence means an offence against section 574, 575, 576, 577, 578, 579, 580, 581 or 582.

3.5.28 Approval attaches to land

(1) The development approval attaches to the land, the subject of the application, and binds the owner, the owner's successors in title and any occupier of the land.

(2) To remove any doubt, it is declared that subsection (1) applies even if later development (including reconfiguring a lot) is approved for the land (or the land as reconfigured).

4.3.3 Compliance with development approval

(1) A person must not contravene a development approval, including any condition in the approval.
Maximum penalty—1665 penalty units.

(2) Subsection (1) applies subject to sections 4.3.6 and 4.3.6A.

(3) Also, subsection (1) does not apply to a contravention of a condition of a development approval imposed, or required to be imposed, by the administering authority under the *Environmental Protection Act 1994* as the assessment manager or a concurrence agency for the application for the approval.

(4) In subsection (1)—
development approval includes an approval under section 4.4(5) or 4.7(5) of the repealed Act.

4.3.22 Proceeding for orders

(1) A person may bring a proceeding in the court—
(a) for an order to remedy or restrain the commission of a development offence (an ***enforcement order***); or
(b) if the person has brought a proceeding under paragraph (a) and the court has not decided the proceeding—for an order under section 4.3.24 (an ***interim enforcement order***); or
(c) to cancel or change an enforcement order or interim enforcement order.

(2) However, if the offence under subsection (1)(a) is an offence under section 4.3.1, 4.3.2 or 4.3.3 about the building assessment provisions, the proceeding may be brought only by the assessing authority.

(3) The person may bring a proceeding under subsection (1)(a) whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

4.3.25 Making enforcement order

(1) The court may make an enforcement order if the court is satisfied the offence—
(a) has been committed; or
(b) will be committed unless restrained.

(2) If the court is satisfied the offence has been committed, the court may make an enforcement order whether or not there has been a prosecution for the offence under division 4.

4.3.26 Effect of orders

(1) An enforcement order or an interim enforcement order may direct the respondent—

(a) to stop an activity that constitutes, or will constitute, a development offence; or

(b) not to start an activity that will constitute a development offence; or

(c) to do anything required to stop committing a development offence; or

(d) to return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or

(e) to do anything about a development or use to comply with this Act.

(2) Without limiting the court's powers, the court may make an order requiring—

(a) the repairing, demolition or removal of a building; or

(b) for a development offence relating to the clearing of vegetation on freehold land—

(i) rehabilitation or restoration of the area cleared; or

(ii) if the area cleared is not capable of being rehabilitated or restored—the planting and nurturing of stated vegetation on a stated area of equivalent size.

(3) An enforcement order or an interim enforcement order—

(a) may be in terms the court considers appropriate to secure compliance with this Act; and

(b) must state the time by which the order is to be complied with.

6.1.23 Continuing effect of approvals issued before commencement

(1) This section applies to—

(a) conditions set by, and certificates of compliance or similarly endorsed certificates (***continuing approvals***) issued by, a local government in relation to an application mentioned in section 4.1(5) of the repealed Act and in force immediately before the commencement of this section; and

(b) permits (also ***continuing approvals***) issued under section 4.13(12) of the repealed Act, including modifications of the permits under section 4.15 of the repealed Act, in force immediately before the commencement of this section; and

(c) approvals (also ***continuing approvals***), including modifications of the approvals under section 4.15 of the repealed Act, in force immediately before the commencement of this section and made in relation to applications made under the following sections of the repealed Act—

- section 5.1(1)
- section 5.2(1)
- section 5.9(1)
- section 5.11(1)
- section 5.12(1); and

(d) approvals (also ***continuing approvals***), by whatever name called, given under a former planning scheme but not included in

paragraphs (a) to (c) in force immediately before the commencement of this section; and

(e) approvals (also ***continuing approvals***) issued under the *Building Act 1975*, in force immediately before the commencement of this section.

(1A) However, a requirement in a local planning instrument for an action to be carried out to the satisfaction of a nominated person is not a continuing approval.

(2) Despite the repeal of the repealed Act, each continuing approval and any conditions attached to a continuing approval have effect as if the approval and the conditions were a development approval in the form of a preliminary approval or development permit, as the case may be.

Example for subsection (2)—

An application for a staged subdivision approval under section 5.9(1) of the repealed Act and a concurrent application under section 5.1(1) of the repealed Act for approval of the first stage of the staged subdivision would result in—

(a) for the section 5.9(1) application—a preliminary approval for reconfiguration of the whole of the land; and

(b) for the section 5.1(1) application—a development permit for reconfiguration of the land in stage 1.

(3) Subsection (2) has effect only for the period the continuing approval would have had effect if the repealed Act had not been repealed.

(4) If a continuing approval implies that a person has the right to use premises, the subject of the continuing approval, for a particular purpose (because the intended use of the premises did not also require a continuing approval) and the implied right existed, but the intended use had not started, immediately before the commencement of this section, the intended use is to be taken to be a use in existence immediately before the commencement if—

(a) the rights (other than the implied right) under the continuing approval are exercised within the time allowed for the rights to be exercised under the repealed Act; and

(b) the intended use is started within 5 years after the rights mentioned in paragraph (a) are exercised.

6.1.24 Certain conditions attach to land

(1) If a local government has set conditions in relation to a continuing approval, the conditions attach to the land on and from the commencement of this section and are binding on successors in title.

(2) Also, if an application to amend a former planning scheme was, or the conditions attached to an amendment were, approved under the repealed Act or under section 6.1.26 and conditions in relation to either amendment were attached to the land under the repealed Act or section 6.1.26—

(a) if the approval was given before the commencement of this section—the conditions remain attached to the land on and from the commencement of this section and are binding on successors in title; and

(b) if the approval was given under section 6.1.26—the conditions remain attached to the land on and from the day the approval was given and are binding on successors in title.

(3) Subsections (1) and (2) apply, despite—

(a) a later amendment of the transitional planning scheme; and

(b) the later introduction or amendment of an IPA planning scheme.

(4) In this section—

former planning scheme includes any planning scheme made under the repealed Act or an Act repealed by the repealed Act.

Local Government (Planning and Environment) Act 1990 (reprint no. 2)

Approval of planning scheme amendment by Governor in Council

4.5 .....

(12) Any conditions imposed under section 4.4(5) (as subsequently amended under this Act) attach to the land and are binding on successors in title.

Approval of rezoning of land in stages by Governor in Council

4.8 .....

(13) Any conditions imposed under section 4.7(5) (as subsequently amended under this Act) attach to the land and are binding on successors in title.

Approval of subsequent staged rezonings by Governor in Council

4.10 .....

(12) Any conditions imposed under section 4.9(4) (as subsequently amended under this Act) attach to the land and are binding on successors in title.

Assessment of town planning consent application

4.13 .....

(16) Where a permit is issued pursuant to subsection (12), the right to use premises and to erect, re-erect, or modify any buildings or other structures for the purposes specified in the permit is, subject to the conditions contained in the permit or any modifications made thereto pursuant to section 4.15, to attach to the land and be binding on successors in title and continues in force until—

(a) it is revoked pursuant to section 4.14; or

(b) it lapses in accordance with subsection (18); or

(c) the use ceases to be a lawful use pursuant to section 3.1; or

(d) it is superseded by the commencement of another use.

Application for subdivision etc.

5.1 .....

(8) The conditions imposed by a local government on its approval under subsection (6) (as subsequently amended under this Act) attach to the land and are binding on successors in title.

Planning Act 2016

73 Attachment to the premises

While a development approval is in effect, the approval—

(a) attaches to the premises, even if—

(i) a later development (including reconfiguring a lot) is approved for the premises; or

(ii) the premises are reconfigured; and

(b) binds the owner, the owner's successors in title, and any occupier of the premises.

180 Enforcement orders

(1) Any person may start proceedings in the P&E Court for an enforcement order.

(2) An ***enforcement order*** is an order that requires a person to do either or both of the following—

(a) refrain from committing a development offence;

(b) remedy the effect of a development offence in a stated way.

.....

(3) The P&E Court may make an enforcement order if the court considers the development offence—

(a) has been committed; or

(b) will be committed unless the order is made.

.....

(5) An enforcement order or interim enforcement order may direct the respondent—

(a) to stop an activity that constitutes a development offence; or

(b) not to start an activity that constitutes a development offence; or

(c) to do anything required to stop committing a development offence; or

(d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or

(e) to do anything to comply with this Act.

Examples of what the respondent may be directed to do—

- to repair, demolish or remove a building
- to rehabilitate or restore vegetation cleared from land

(6) An enforcement order or interim enforcement order may be in terms the P&E Court considers appropriate to secure compliance with this Act.

Example—

An enforcement order may require the respondent to provide security for the reasonable cost of taking the stated action.

.....

(9) Unless the P&E Court orders otherwise, an enforcement order, or interim enforcement order, other than an order to apply for a development permit—

(a) attaches to the premises; and

(b) binds the owner, the owner's successors in title and any occupier of the premises.