Planning for Commercial Outcomes
Town planning issues for commercial property lawyers

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Commercial property transactions can be complex and town planning issues often arise. This presentation touches on a number of matters which may be of interest to commercial property lawyers.

This paper considers:

1. The commencement of the *Planning Act 2016* and changes to Queensland's development assessment system.

2. The High Court's decision in *Pike v Tighe* [2018] HCA 9 and its implications.

3. The Court of Appeal's decision in *Trevorrow v Gold Coast City Council* [2018] QCA 19 and landowner's liability for unpaid infrastructure charges.

4. Development constraints on properties adjoining a heritage place.

Planning Act 2016

On 3 July 2017, Queensland's new planning legislation – the *Planning Act 2016* - replaced the now repealed *Sustainable Planning Act 2009* ("SPA"). For those of you familiar with SPA, you will be comforted to know that the new *Planning Act* is an evolution of Queensland's development assessment system rather than a complete revolution. However, there are a number of important changes you should be aware of.

Relevant legislation and instruments

For the most part, SPA was a self-contained piece of legislation. You could go to that Act and get most of what you needed to know about the planning and development system in Queensland. While you might have needed to refer to the *Sustainable Planning Regulation* or the *Planning and Environment Court Rules* those were subordinate legislation to SPA and, and as such, were readily identifiable as being relevant.

In what was, in my view, a misguided attempt to shorten the length of the primary Act, and therefore give the appearance of a simpler system, the government has excised a lot of what was in SPA and has moved those provisions into other legislation or statutory instruments. To comprehend the development assessment system, you must now go to:

a. the *Planning Act* – which sets out the parts of the development assessment system;

b. the *Planning Regulation 2017* – which fleshes out some of the parts established in the Act, including referral agency triggers and categorisation of certain development as assessable or otherwise; and

c. the *Planning and Environment Court Act 2016* – which establishes the court, its jurisdiction, and sets out some procedural matters including alternative dispute resolution.

Further, unlike under SPA, the assessment rules - which councils and other assessment managers must apply in deciding development applications - no longer appear in the legislation and instead appear in a statutory instrument titled the *Development Assessment Rules*.[1] This attempt at simplification has in fact led to complication in that all users must now traverse more pieces of legislation, as well as the statutory instrument, to find the same information which was once largely contained in SPA.

Despite the creation of new legislation, the actual development assessment system has changed little under the *Planning Act*. Other than changes in terminology and slight changes to timeframes and other procedural matters, the system you once knew under SPA largely remains.

Changes to development categories

Arguably, the most significant change in the day-to-day use of the system is the change to categories of assessment. Under SPA there were five categories of assessment: prohibited, exempt, self-assessable, code-assessable, and impact-assessable development.

If development was exempt, or self-assessable, then no development approval was required. This was sometimes loosely referred to as "as of right" development. Whereas code or impact-assessable development required a development approval.

Under the *Planning Act*, those concepts largely remain but have been consolidated from five categories down to three:

a. *Prohibited* - is development for which a development application may not be made - this is the same as under SPA.

b. *Assessable* - is development for which an application is required and a development approval granted before development can commence. This new category contains two parts being code and impact. In that sense, little has changed from SPA. However, where under SPA code assessable development, and more generally impact assessable development, was assessed against applicable codes, under the new Act development must now be assessed against what are called "assessment benchmarks".

c. *Accepted* - is development for which a development approval is not required provided that "certain requirements" are met. For example, if development complies with assessment benchmarks prescribed by a planning scheme, then no approval is needed. This is very similar to the self-assessable category under SPA.

Stop the clock

Another important change is around the applicant's ability to pause timeframes during the assessment process. You may have heard this referred to as "stopping the clock".

While under SPA an applicant did have some limited ability to pause time, under the *Planning Act* an applicant can now stop the clock in almost all stages of assessment to do things such as supply additional information or address matters raised following public notification. This can be done on multiple occasions up to a cumulative period of 130 business days.

In practice, the clock is most frequently stopped during the applicant's appeal period; that is, after the decision to approve or refuse has been made, but before expiry of the time in which the applicant may appeal the decision to the court. That is usually done so that an applicant can make representations to the council, most commonly about amendment to conditions of approval.

[1] Development Assessment Rules may be accessed here: https://planning.dsdmip.qld.gov.au/planning/better-development/da-rules

Importantly, under the *Planning Act* there is now a time limit on how long the appeal period can be stopped. Unlike under SPA, which allowed the time to be stopped indefinitely pending council's response to the representations, the council now has only 20 business days to respond. If no response is received, then the balance of the appeal period automatically restarts at the end of that 20 business day period.

This is a subtle change but can led to a situation where applicants, who wait longer than 20 business days for council's response (as they may have done under SPA), unknowingly allow their appeal period to restart and then expire. If that happens, the applicant would need the leave of the court to re-enliven their appeal rights.

Change to approvals

Under SPA you could make only "permissible changes" to a development approval. If it was not permissible, then in order to undertake a changed form of development, the applicant would need to make a fresh development application and go through the entire assessment process again.

The *Planning Act* modifies this, and the term is now "minor changes". Minor changes can be approved in the same way that permissible changes were --- that is, the "substantially different development" test remains. However, for anything other than a minor change - referred to as "other changes" - the application to change is dealt with much the same way as a fresh development application but is assessed only in respect of the aspects that are being changed, and must be viewed in the context of the development approval.

An example for this given in the explanatory note: *If there is a development approval for a 10 storey building, and an applicant seeks to change the approval to add a further 2 storeys, the additional 2 storeys is intended to be assessed in the context of a 10 storey building, against the assessment benchmarks relevant to a 12 storey building in that locality.*

Finally, under SPA there was a requirement that if the development approval was issued by the Planning and Environment Court (following an appeal for example) then any application to change that approval must be made to the court and not the assessment manager (usually the council). The *Planning Act* only requires the change to go back through the court if there were submissions made during public notification in respect of the original development application. In my view, that is a sensible move and avoids the need for expensive originating applications to the court for what might be a very minor change to an approval, which are usually made following negotiation and with the consent of the council.

Currency periods

One planning issue you may encounter more than others is the "currency period" or "relevant period" of an approval. Under SPA, applicants had certain periods within which to start uses or finish approved development and, if they didn't do so within that period , the approval would lapse. Those periods could, in practice, be extended if a "related approval" was obtained.

For example, if an applicant had an approval for material change of use for a multiple unit dwelling, that applicant generally had four years in which to start the use. But, if within the first two years the applicant got a building works approval to build the units, they could roll forward that four year period to start again on the day they obtained that building approval.

That roll forward calculation could be a nightmare, particularly if there were multiple related approvals, and led to many instances where the developer, or sometimes the council, got the calculation wrong and their approvals lapsed as a result.

The new Act simplifies things and gets rid of the roll forward provision and gives a blanket currency period of six years for material change of use (MCU), four years for reconfiguration of land, and two years for every other type of development.

Conclusion

Those are but a few of the key changes in the planning law which you might come across from time to time in dealings with your commercial property clients. The take-away is that although the system hasn't been fundamentally changed, there are some subtle differences which mean that it is no longer business as usual (as it was under SPA) and you will need to go to the new *Planning Act* to familiarise yourself with the changes before advising your clients.

HCA decision - *Pike v Tighe*

The High Court's decision in *Pike v Tighe* should be of interest to all who practise in property and conveyancing matters as it deals with how far enforcement powers for development offences can reach past the developer, and on to third party purchasers of developed land.

The proceedings concerned a development approval for the reconfiguration of land, which relevantly contained this condition (my emphasis):

> ***Access and Utilities Easement***
> *An easement(s) to allow pedestrian and* ***vehicle access, on site manoeuvring 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****.*

The development approval allowed the reconfiguration of a larger parcel of land into two lots. Lot 2 was to the rear of Lot 1 and access was gained over an easement registered over Lot 1. Inconsistent with the terms of the above development condition, the easement registered with the survey plan described its purpose as for "access" only. No mention was made to on site manoeuvring or connection of services and utilities.

This fact only came to the attention of the Pikes after they had purchased Lot 2. That timing was particularly unfortunate as the original owners who had undertaken the reconfiguration of the land had also disposed of Lot 1, which was sold to the Tighes. Despite attempts to negotiate for a further easement, or amendment of the registered easement, the parties were unable to agree on terms.

The Pikes therefore pursued an originating application in the Planning and Environment Court seeking enforcement orders under SPA intended to compel the Tighes to grant a further easement. The Pikes argued that the obligations of the development approval, including the requirement to register an easement for services, attached to the land and bound the Tighes as the successors in title pursuant to s 245 of SPA.[2] By not complying with that condition, it was argued that the Tighes were committing a development offence and that the court should therefore enforce compliance by them.

That application was granted by his Honour Durward DCJ on 20 November 2015 (*Pike & Anor v Tighe & Ors* [2016] QPEC 030) and the following order, inter alia, was made:

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[2] *Sustainable Planning Act 2009*, s 245 was in the following terms:
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.

> *The first respondents* [Tighes] *have committed a development offence by not complying with the condition of the development approval with respect to the easement…*

That order was based on his Honour's finding (at [111]) that:

> *…the condition in the development approval runs with the land, it subsists and has not been compiled with and accordingly the first respondents have committed a development offence.*

The effect of that would have been that the court could make further orders compelling the Tighes to supply a further easement. However, before that could be ordered, the decision was appealed by the Tighes on grounds which included an argument that the Planning and Environment Court did not have jurisdiction to make enforcement orders against the Tighes, given that they were not the development proponent who carried out the reconfiguration, and that s 245 did not operate to extend the obligations of the development condition to them.

In allowing the appeal and setting aside the decision of the Planning & Environment Court, the Court of Appeal (Fraser, Morrison and Phillippides JJA; *Tighe & Anor v Pike & Ors* [2016] QCA 353) found that (at [37]):

> *Since the* [Tighes] *were not parties to the reconfiguration of the original lot approved by the development approval, condition 2* [the easement condition] *did not impose any obligation upon the* [Tighes]. *It follows that they could not have committed an offence against s 580 of the Sustainable Planning Act by not providing the registered easement described in condition 2.*

In coming to that conclusion, the Court of Appeal made clear its view that once a survey plan was registered, and the lots created, the development approval was "spent" and the obligations under the approval, in effect, merged meaning any non-compliance cannot be enforced.

The Pikes appealed that decision and, in a 5-nil decision, the High Court allowed the appeal. In finding that s 245 did bind the Tighes to the obligations created by the development approval, the their Honours Kiefel CJ, Bell, Keane, Gordon and Edelman JJ held (at [35]):

> *Section 245(1) is not expressed to operate in relation to the carrying out of an approved development; it expressly gives the conditions of a development approval the character of* ***personal obligations*** *capable of enduring in their effect beyond the completion of the development which the development approval authorised. These* ***obligations expressly attach to "the land the subject of the application to which the approval relates".*** *The natural and ordinary meaning of this language is that it attaches to all the land the subject of the application for development approval. The owners of the land in lots 1 and 2 are the successors in title to the owners of the land in the original lot.*

Considerations arising

Given s 73 of the *Planning Act* is in similar terms to s 245 of SPA, the decision has obvious implications for purchasers of reconfigured land. Those purchasers, who take land subject only to the encumbrances registered on title, have no guarantee that further claims for enforcement action would not be brought against them - which could potentially go to the heart of their title and proprietary interests - or expose them to significant costs for remedial development works or fines for development offences.

Change to REIQ contact

Such is the impact of the High Court's decision that the REIQ amended its standard residential contract to include a new clause 7.7(e). That clause allows a buyer to terminate the contract if

compliance with an outstanding planning condition will result in an interest in land being created. The right to terminate arises if the interest in land is material according to the test in clause 7.5.

What then is the role of the solicitor acting in a conveyance? In advising the prospective buyer does the solicitor need to go back to the development approval to ensure full compliance by the seller, or even the seller's predecessors in title? What is reasonable in terms of the searches and advice solicitors are required to give?

QCA decision – *Trevorrow v CCGC*

In a similar vein to *Pike v Tighe*, the Court of Appeal's decision in *Treverrow v Council of the City of the Gold Coast* [2018] QCA 19 deals with a landowner's obligation to pay outstanding infrastructure charges in respect of a development approval obtained by a third party with the landowner's consent.

In that case, a tenant had obtained a development approval for the material change of use of particular land owned by another. The tenant had obtained the owner's consent to the making of the relevant development application. As part of the approval, the council had issued an infrastructure charges notice in the amount of $356,718.84, which was due and payable "prior to use commencing". Complicating the matter was the fact that the use had already started prior to the development approval being issued (the approval in effect regularised the otherwise unlawful use of the land). The tenant did not pay the infrastructure charges and the council subsequently sought to recover the infrastructure charges from to the owner as a rate on the property.[3]

In confirming the owner is liable for payment of the infrastructure charges, her Honour Philippides JA (with whom Sofronoff P and Douglas J agreed) held (at [38]):

> *As the primary judge stated, unless bargained away, an owner controlled the use of the land and an infrastructure charge for a material change of use was not payable until the change of use began. Given the aspect of control exercisable by the owner, the owner was also placed in a position to protect its interests by appropriate avenues of recourse to the applicant for unpaid infrastructure charges.*

While the circumstances facing the court (that the use had started before approval) is somewhat unusual, those landowners who are asked to provide consent to a development application to be made by a third party should be properly informed about their potential liability for, what can be, significant infrastructure charges over their land in respect of any approval gained by that third party.

Development adjoining Heritage Places

As you would likely be aware, there are restrictions on what can be done to buildings and places that are the subject of a heritage listing. However, you may not be aware that restrictions can also extend to properties which merely adjoin a property which has heritage protections.

Amendments originally made to SPA in December 2016, and which were carried through to the *Planning Act* and the *Planning Regulation 2017*, may now require assessment and approval of development on land which adjoins a State heritage place.[4]

Under the *Planning Act*, the material change of use of premises is assessable development if the material change of use is carried out on a lot that shares a common boundary with another lot that is or contains a State heritage place; or, the material change of use is carried out on a lot that contains a State heritage place but is not carried out on that place.

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[3] *Sustainable Planning Act 2009*, s 639 provided that an infrastructure notice levied by a local government is, for the purposes of recovery, taken to be rates.
[4] *Planning Regulation 2017*, Schedule 10, s 15.

So, while a local planning scheme may make a particular use "accepted" development, this trigger may mean approval is needed.[5]

Again, this raises interesting questions as to the role of solicitors in advising prospective purchasers as a search on title won't reveal that the land next-door is a State heritage place. How far do you need to go during due diligence? Should you be searching the adjoining properties too to ensure they aren't heritage properties? If your client is purchasing property with the intent of developing it, then such searches may be prudent.

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[5] *Planning Regulation 2017*, Schedule 10, s 15(3) provides some exceptions.