SUPREME COURT OF QUEENSLAND

CITATION:	*Fox v Brisbane City Council & Ors; Fox v Brisbane City Council & Anor; Stop Master Butchers Industrial Estate in Hemmant & Tingalpa Action Group & Ors v Brisbane City Council & Anor* [2002] QCA 487
PARTIES:	**DANIEL PATRICK FOX & DENISE NOELLE FOX** (appellants/applicants) **v** **BRISBANE CITY COUNCIL** (respondent/first respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/second respondent) **STATE OF QUEENSLAND** (co-respondent by election/third respondent) **DANIEL PATRICK FOX & DENISE NOELLE FOX** (applicants/first respondents) **v** **BRISBANE CITY COUNCIL** (respondent/second respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/applicant) **STOP MASTER BUTCHERS INDUSTRIAL ESTATE IN HEMMANT AND TINGALPA ACTION GROUP, MARCUS ULRICH SCHERRER AND JANE PAULA SCHERRER** (applicants/first respondents) **v** **BRISBANE CITY COUNCIL** (respondent/second respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/applicant)
FILE NO/S:	Appeal No 5868 of 2002 Appeal No 8354 of 2002 Appeal No 8355 of 2002 P & E Appeal No 1386 of 2002 P & E Application No 3119 of 2002 P & E Application No 3105 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Applications for Leave *Integrated Planning Act*

ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	15 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2002
JUDGES:	McPherson and Jerrard JJA and Jones J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. In Appeal No 5868 of 2002: Leave to appeal granted. Costs reserved.** **2. In Appeal No 8354 of 2002: Leave to appeal granted. Costs reserved.** **3. In Appeal No 8355 of 2002: Leave to appeal granted. Costs reserved.**
CATCHWORDS:	LOCAL GOVERNMENT – SUBDIVISION OF LAND – where excavation and filling work proposed – whether such work itself constituted both a material change of use and building work LOCAL GOVERNMENT – SUBDIVISION OF LAND – where only preliminary approval for development work sought – whether s 3.2.2 of the *Integrated Planning Act* 1997 applies *Integrated Planning Act* 1997 (Qld), s 1.3.2, s 1.3.5, s 3.2.2, Sch 10 *Development Assessment Commission v Macag Holdings Pty Ltd* [2001] SASC 189; (2001) 80 SASR 104, distinguished
COUNSEL:	G Gibson QC, with R S Litster, for the applicants in Appeal No 5868 of 2002 D J S Jackson QC for the applicant in Appeal No 8354 of 2002 and Appeal No 8355 of 2002 S L Doyle SC, and M E Rackemann, for the first respondent in Appeal No 5868 of 2002, for the second respondent in Appeal No 8354 of 2002 and Appeal No 8355 of 2002 D J S Jackson QC for the second respondent in Appeal No 5868 of 2002 E J Morzone for third respondent in Appeal No 5868 of 2002 S Keliher for the first respondents in Appeal No 8355 of 2002
SOLICITORS:	Fox Lawyers for the applicants in Appeal No 5868 of 2002 Freehills for the applicant in Appeal No 8354 of 2002 and Appeal No 8355 of 2002, and for the second respondent in Appeal No 5868 of 2002 Brisbane City Council Legal Practice for the first respondent

in Appeal No 5868 of 2002, for the second respondent in Appeal No 8354 of 2002 and Appeal No 8355 of 2002
C W Lohe, Crown Solicitor for the third respondent in Appeal No 5868 of 2002

[1] **McPHERSON JA:** I have read the reasons, with which I agree, of Jones J. As those reasons make clear, and as was apparent at the hearing of this application, there is a question of law to be determined in these matters. It is not a trivial or insignificant question; and it is one with respect to which the applicant has some prospect of succeeding.

[2] Leave to appeal should be granted. Ordinarily the costs of an application like this would be made costs in the appeal. But because there are four parties here and three applications, not all of them made by the same party, it is preferable in this instance to reserve the costs to the Court which hears the appeal.

[3] **JERRARD JA:** I have read the draft reasons for judgment herein of Jones J, and respectfully agree with those save for the view expressed by Jones J in paragraph 31. I am not as confident that the circumstances described therein do not establish that the use of one lot of land is "necessarily associated" with the use of the other.

[4] I agree with the orders proposed by .

[5] **JONES J:** Master Butchers Limited ("MBL") makes applications for leave to appeal the decision of the Planning and Environment Court in two planning appeals which were heard together and, in respect of which, the one decision determined both proceedings. Save for the identity of the first respondent in each case, these two applications raise identical issues.

Background facts

[6] On 30 April 2001 MBL made two separate applications to the Brisbane City Council for a development to be carried out on two separate combinations of allotments. The total area of land was 42.6 hectares with five different designations under the City Plan namely Parkland, General Industry, Future Industry, Light Industry and Rural. The Parkland designated area was not affected by either application.

[7] The first application was made in respect of the whole area of land. The application sought the lots already zoned General Industry to be subdivided to create 20 lots with that same designation and the balance area to be designated Rural (Lot 21). The application also sought preliminary approval for the carrying out of operational work namely filling and excavation and building work. All the work was presented as requiring only code assessment.

[8] By its second application MBL sought a development permit for subdivision of Rural land to create further lots, preliminary approval for a material change of use of Rural land to Industrial and preliminary approval for operational works – filling and excavation – over the whole site.

[9] With the applications framed in this way both MBL and the Brisbane City Council ("the Council") determined that the first application was code assessable meaning, under the relevant provisions of the *Integrated Planning Act* 1997 ("IPA"), that the public notification of this proposal did not have to be given nor did members of the public have a right to submit any objection to the proposal. The second application would, because it involved a material change of use, be subject to impact assessment and therefore required public notification.

[10] When lodged the two applications were identified, somewhat inaccurately, as Stage 1 and Stage 2. A staged development was not intended but it was always envisaged that the applications would receive concurrent consideration and, if approved, that the development work would proceed concurrently. The reason for this was that the proposals required significant earthworks to be undertaken to achieve the objectives of the two applications. The scope of these earthworks is best seen in Drawing No. P5007SK2 attached to the Report of Bennett & Francis.[1] In addition the project required remediation of some contaminated land within the area.

[11] Each of the two applications was approved by the Council subject to conditions. In respect of the first application one condition related to earthworks and/or remediation works to be carried out on Lot 21 (the balance lot) "to ensure that the final land form and levels were compatible with the surrounding rural land form" (condition 61). In relation to the second application the condition relating to earthworks (condition 23) required works to be done in accordance with an earthworks plan which took into account the earthworks contemplated in the first application.

[12] The Decision Notices advising of the approvals subject to conditions were issued on 28 February 2002. They referred to the whole of the site the subject of both applications.[2]

[13] After public notice of the second application was advertised a number of persons submitted objections to it. Two groups of submitters appealed to the Planning and Environment Court and they remain parties in the present applications. One group known as the Stop Master Butchers Action Group ("the action group") joined with Mr. & Mrs. Scherrer in one appeal (No. 3105/02) and Mr. & Mrs. Fox instituted the other appeal (No. 3119/02). The interests of each of these groups of submitters and the arguments that they raised, both before the learned hearing Judge and now in these applications, appear to be identical. As a matter of convenience it is possible to refer to them collectively as "**the submitters"** unless there is a specific need for a distinction to be made.

[14] The two appeals to the Planning and Environment Court were heard together and resulted in one set of orders being made in respect of both appeals. The learned primary judge made orders declaring –

> (1) that the filling and excavation proposed by Master Butchers in the Stage 1 application made on 30 April 2001, on the rural land (Lot 4 on RP 118579) is impact assessable development.

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1 Record p 582

2 See record p 252 and p 461 respectively

(2) that the development approval given by the Brisbane City Council in its Decision Notice of 28 February 2002 in relation to the Stage 1 application, is invalid.

Applications to the Court of Appeal

[15] MBL now seeks leave to appeal that decision in each of the two proceedings. The two applications – Appeal No 8354 (Mr. and Mrs. Fox) and Appeal No 8355 (Action group and Mr. and Mrs. Scherrer) – were heard together because the same arguments are material to each application for leave.

[16] In the course of the hearing in the Planning and Environment Court the submitters had argued, by way of a preliminary point, that the development applications were "piecemeal" using that non-technical, yet oft quoted, term taken from the judgment of Stephen J in *Pioneer Concrete (Qld) Pty Ltd. V Brisbane City Council*[3]. The learned primary Judge ruled against the submitters' arguments and Mr. and Mrs. Fox now seek leave to appeal against that preliminary decision (CA No. 5868/02). Mr. and Mrs. Fox as a matter of precaution also seek an extension of time within which to bring the appeal because of uncertainty as to when the record of that preliminary decision became available. No objection is taken by the other parties to such an extension being granted. The subject matter of this application for leave is of limited scope and its outcome will be influenced by the result of the two later applications. The question of leave to appeal in No. 5868/02 was simply reserved without hearing argument pending the outcome of the principal applications.

The decision at first instance

[17] The learned primary judge came to the view that the first application involved either a **material change of use** or was for **building work** and was thus impact assessable. Because it was not so assessed or so notified the approval was invalid. identified three bases for declaring that the development approval was invalid. Briefly stated they were as follows:-

(i) The first application, because of the nature and scale of the works, should have sought approval for a **material change of use**. Reasons [30-49].

(ii) By virtue of s 3.2.2 of the IPA, the first application was deemed to have included an application for a **material change of use**. Reasons [50] – [61].

(iii) The work envisaged by the first application was **building work.** Reasons [64] – [69].

[18] Both MBL and the Council contended that each of those bases was founded upon a misconstruction of the relevant terms of the IPA and thus there was an apparent error of law in the decision. The arguments on behalf of those parties are identical, or at least complementary, and consequently it is not necessary to distinguish on whose behalf the submissions were made.

[19] As to the first of these bases, the learned primary judge said:-

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3 (1979-80) 145 CLR 485 at 500

> "…the operational works on the rural land, even if seen as an incidental part of the Stage 1 application and approval, amount to a material change of use of that land. It has always been asserted by Master Butchers and Council that the Stage 1 application is self-contained, and can stand alone. If so, then the rural land is used for the dominant industrial purpose." (Reasons [49])

[20] The applicant argues that the works envisaged in the application for approval remained **operational work,** as defined, even though the nature and scale of the work did indicate a hoped for change in use.

[21] To comprehend the argument it is necessary to consider the legislative scheme. The relevant statutory provisions deal first with the concept of **"development"** which 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.[4]

"Operational work" is relevantly defined as –

(a) extracting gravel, rock, sand or soil from the place where it occurs naturally; or
(b) ...
(c) excavating or filling that materially affects premises or their use; or
(d) ....
(e) undertaking work (other than destroying or removing vegetation not on freehold land) in, on, over or under premises that materially affects premises or their use; or
(f) clearing vegetation on freehold land;

but does not include building, drainage or plumbing work.[5]

"Material change of use", of premises, means –

(a) the start of a new use of the premises; or
(b) the re-establishment on the premises of a use that has been abandoned; or
(c) a material change in the intensity or scale of the use of the premises.[6]

[22] These three provisions mark a change from earlier legislation where the term "use" embraced activities such as excavation and filling which were preparatory to the actual use. Now, it was submitted, such activities fall within the concept of operational work which, being "development", may ultimately require local authority approval.

[23] The term "use" in the IPA is noted in Schedule 10 as follows:-

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4 Section 1.3.2
5 Section 1.3.5
6 Section 1.3.5

> **"use"**, *in relation to premises, includes any use incidental to and necessarily associated with the use of the premises."*

[24] The scheme of the IPA has the result that any of the five categories of "development" may, depending on the circumstances, have different requirements for assessment and public notification.

[25] The category "operational work" itself includes the notion that excavating and filling may materially affect premises or their use. But does this suggest that the "carrying out of operational work" is, in appropriate circumstances, the same as "making a material change of use of premises"?

[26] It is argued that the learned primary judge took the word "development" to mean the activity rather than a concept and consequently that preparatory work to bring about a change of use of premises was itself a material change of use. As a consequence determined that the excavation and filling was the "start of a new use".

[27] MBL and the Council submit that this approach results from a misconstruction of the legislative scheme. The concept of "material change of use" involves the start of a new use, the revival of a former use or a use changed by intensity or scale. These are quite distinct and do not include preparatory works in the way in which the previous legislation did.

[28] Effectively 's conclusion, that the same excavation and filling activity could fall within both categories of development, resulted in the need for an assessment of the scale of the activity to determine objectively whether it amounted to a material change. Such a construction, it was submitted, could lead to difficulties at the notification and approval stages when determination of questions of fact and degree could lead to arbitrary results.

[29] In deciding that the same excavation and filling activity could be both "operational work" and a "material change of use" within the meaning of "development" the learned primary judge was influenced by decided cases in the United Kingdom and particularly by a South Australian authority *Development Assessment Commission v Macag Holdings Pty Ltd.*[7] It is unnecessary to refer to the specific passages relied upon by . Suffice it to say that, in each instance, the legislative scheme was different and the applicability of the principles to the Queensland scheme was challenged. For example, in the South Australian framework, there was no development category equivalent to "operational work". As a consequence that case could not be determinant of the task of construing the scope of these definitions.

[30] Counsel for the submitters contend that, as each application for approval identified all the land, there was a necessary association between the development proposed in the first application and the change of use the subject of the second application. The excavation and filling which occurred in the latter was a use "necessarily associated" with the use of the area of the first application. Consequently the first

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7 [2001] SASC 189; (2001) 80 SASR 104

application was caught by the change of use consequence of the second application.

[31] In my view the fact, that the whole project as a matter of practicability or commercial gain used the material excavated from one part of the land as fill in another part, does not mean that use of the first land is "necessarily associated" with the use of the other in a town planning sense. Further it could be argued that, as the conditions required the final levels to be compatible with the surrounding rural land form, there was no material change.

[32] Without canvassing each of the very detailed arguments raised by senior counsel appearing for MBL and the Council, sufficient doubt exists about the correctness of the construction of the terms of the IPA, as applied in the proceedings below, to warrant further consideration by this Court.

[33] The second basis for 's declaration of invalidity relied upon the applicability of section 3.2.2 to deem that the first application sought an approval for a material change of use. Whether the section applied depended on the presence of the three preconditions set out in subsection (1) as follows:-

> *"**(1)** This section applies if, at the time an application is made –*
>
> *(a) a structure or works, the subject of an application, may not be used unless a development permit exists for the material change of use of premises for which the structure is, or works are, proposed; and*
>
> *(b) there is no development permit for the change of use; and*
>
> *(c) approval for the material change of use has not been applied for in the application or a separate application.*
>
> ***(2)** The application is taken also to be for the change of use."*

[34] On behalf of the Council it is argued that this section has no application at all and that it applies only when a development permit is sought. The preliminary approval, as sought here, does not authorise the works to occur. In addition it has been urged that, as a material change of use had been sought in respect of the Rural land, paragraph (c) of the subsection had been satisfied. On behalf of the submitters it is argued that the section applies to all applications including the ones seeking only preliminary approval.

[35] The focus of the preconditions in subsection (1) is the existence or otherwise of a development permit for the actual use of a structure or the works. An application for preliminary approval would of itself acknowledge that a permit to actually use the structure or the works does not exist and no application is being made for such a permit. It seems to me that the most practical time, for an application for approval for a material change of use to be made, is upon application for the development permit. If omitted, then, subsection (2) would deem the application for material change of use to have been included and thus trigger the appropriate notification process.

[36] This conflict over the construction of the terms is not sought to be resolved in this application. The construction contended for by MBL and Council has some

practical benefit but importantly it raises sufficient doubt about the correctness of the construction adopted by to require further consideration.

[37] The third of the bases challenged is 's characterisation of the filling and excavation as **"building work"** which is defined as follows:-

> *(a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or*
>
> *(aa) work regulated under the Standard Building Regulation 1993; or*
>
> *(b) excavating or filling –*
>
> *(i) for, or incidental to, the activities mentioned in paragraph (a); or*
>
> *(ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land; or*
>
> *(c) supporting (whether vertically or laterally) land for activities mentioned in paragraph (a).*[8]

The definition of "operational work" referred to in paragraph [21] above results in building work and operational work being mutually exclusive.

[38] The extensive earthworks contemplated by the first application were to facilitate the re-configuration of the lots in the Industrial zone. So much is clear from the detailed expert reports which accompanied the applications. There was no specific evidence as to how the proposed industrial lots would be used and no proposal for the erection of any buildings on the lots. However the earthworks were to provide for relatively level platforms suitable for the erection thereon of buildings. That appears to have been the basis for the learned primary Judge's finding which was influenced by comparison with a number of cases referred to in paragraph [68] of his reasons. Again relied particularly on the decision in *Macag* which, as was observed above, related to a statutory requirement which did not include the development category of "operational work". But if this work is characterised as building work it cannot, by definition, be operational work.

[39] The consequences attendant upon the adoption of the construction preferred by are far reaching. If all bulk earthworks done for the purpose of any development were routinely classified as "building works" they would be assessable against building codes rather than codes relevant to operational work. It seems to me the argument, that the scope of building work as regards excavating or filling should be confined to the activities which are **incidental to** the actual "building, repairing, altering… or demolishing a building or other structure", [9] has more validity and is more in keeping with the scheme which requires operational work and building work to be mutually exclusive. In my view the evidence, that earthworks resulted in a land form which included level areas in each lot, does not suggest any connection with the activities referred to in paragraph (a) of the definition. Whether because of lack of evidence to support the finding of building work or because of a misconstruction

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8 Section 1.3.5

9 See s 1.3.5 "building work" para (a)

of the definition, there is sufficient doubt about the correctness of the learned primary Judge's finding to warrant examination on appeal.

[40] It is clear that the construction of these important statutory provisions is not free of doubt. A determination of the proper construction will have far reaching consequences for local authorities, developers and all those likely to be affected by future developments. The resolution of the issues raised in these applications will affect the manner in which development proposals are dealt with under the IPA. There has been a sufficient demonstration of possible errors of law in 's reasons for leave to appeal to be given.

[41] I would therefore grant leave to appeal in each of the three applications before us and reserve the question of costs.