SUPREME COURT OF QUEENSLAND

CITATION:	*Hope Island Resort Holdings P/L v Bridge Investment Holdings P/L & Ors* [2004] QCA 235
PARTIES:	**HOPE ISLAND RESORT HOLDINGS PTY LTD** ACN 091 967 921 (appellant/first respondent) **v** **BRIDGE INVESTMENT HOLDINGS PTY LTD** ACN 104 007 169 (first respondent/applicant) **HOPE ISLAND RESORT PRIMARY THOROUGHFARE BODY CORPORATE** (second respondent/second respondent) **HOPE ISLAND RESORT PRINCIPAL BODY CORPORATE** (third respondent/third respondent)
FILE NO/S:	Appeal No 2436 of 2004 P&E No 4533 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave Integrated Planning Act
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	16 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2004
JUDGES:	de Jersey CJ, McPherson JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs to be assessed**
CATCHWORDS:	ENVIRONMENT AND PLANNING – PLANNING SCHEMES AND INSTRUMENTS – CONSISTENCY OF PLANNING SCHEMES WITH OTHER LEGISLATION – where the Planning and Environment Court made a declaration that the development of certain land at the Gold Coast for the purpose of "residential accommodation" would be unlawful under the relevant Scheme of Development and the *Integrated Resort Development Act* 1987 – where the applicant seeks leave to appeal against that declaration – whether the learned primary Judge committed a sufficiently arguable error of law

Integrated Resort Development Act 1987 (Qld)

Project Blue Sky Inc and Ors v Australian Broadcasting Authority (1998) 194 CLR 355, considered
MEPC Australia Ltd v Westfield Ltd; Robina Town Centre Pty Ltdv Westfield Ltd (1998) 100 LGERA 204, distinguished
Z W Pty Ltd v Peter R Hughes & Partners Pty Ltd [1992] 1 Qd R 352, distinguished
Zieta No 59 Pty Ltd v Gold Coast City Council [1987] 2 Qd R 116, cited

COUNSEL: P A Keane QC, with R S Litster, for the applicant
G J Gibson QC for the first respondent
A M Daubney SC for the second respondent
C L Hughes SC for the third respondent

SOLICITORS: Corrs Chambers Westgarth for the applicant
Deacons for the first respondent
McCullough Robertson for the second and third respondents

[1] **de JERSEY CJ:** The learned primary Judge, sitting as the Planning and Environment Court, made a declaration that the development of certain land at the Gold Coast for the purpose of "residential accommodation" would be unlawful under the relevant Scheme of Development and the *Integrated Resort Development Act* 1987. The applicant, the unsuccessful party below, seeks leave to appeal against that declaration.

[2] The applicant must first secure a grant of leave to appeal, which would in this case be warranted had the Judge committed a sufficiently arguable error of law. All parties joined in asking the court to determine the application for leave by considering the merits of the substantive appeal.

[3] The case is distinctive in that the issue has not, by contrast with most town planning cases which come before the Court of Appeal, already been considered at two levels: a local government planning committee and the Planning and Environment Court. It is in this instance both convenient, and supportive of the reasonable review of a decision with important public and private ramifications, that the court consider the merits of the substantive appeal in the course of determining the leave application.

[4] Having gone through that process, I consider that the conclusion of the learned primary Judge was so plainly correct that leave to appeal should be refused. I would accordingly order that the application be dismissed, with costs to be assessed. I will now express my reasons for that view.

[5] The subject land, owned by the applicant, comprises approximately four hectares at Hope Island. A four storey apartment building stands on part of that land. The applicant wishes to construct another six four storey apartment buildings, some detached houses, and a swimming pool. The result would be 231 residential accommodation units. The learned Judge characterized this as "medium density residential development", which he said would allow "little room for any further buildings or other land use". This is at once significant because the land comprises

a precinct – within a larger development – substantially dedicated to sporting and cultural pursuits.

[6] His Honour considered the proposal would amount to unlawful development because of conflict with a scheme of integrated resort development approved under the *Integrated Resort Development Act* 1987 ("the Act"). Schemes approved under that Act are statutory instruments (s 7 *Statutory Instruments Act* 1992), they are noted on zoning maps etc (s 8 *Integrated Resort Development Act*), and they may be amended only by the Governor-in-Council (s 12). To attract approval, a scheme must provide (s 3(1)(c)) "at the least" for "the division of the site into precincts specifying the names of the precincts, the intended development generally of each precinct and the permitted uses of the land within each precinct".

[7] This scheme was approved by the Governor-in-Council (s 7(1)(a)) on 13 February 1992. The subject land was designated precinct seven, a "sports and cultural precinct". As already mentioned, s 3 of the Act required the scheme to specify "the intended development generally" of the precinct, and "the permitted uses of the land" within it. Accordingly, in respect of this precinct, the scheme provided:

> "**3.07 Precinct 7 – Sports and Cultural Precinct**
>
> The principal development intended for the sports component of this Precinct is a range of indoor and outdoor recreation facilities including: facilities for sports coaching; treatment of sporting injuries; fitness assessments; food and beverage outlets and pro-shops. The facility may consist of a club, membership of which would be generally available.
>
> The principal development intended for the cultural component of this Precinct is a range of facilities to provide opportunities for the promotion of drama, art, dance, music, crafts and other cultural pursuits.
>
> Facilities will include: cultural workshops, retail outlets, licensed food and beverage outlets and performance areas.
>
> Some residential accommodation is also intended for this Precinct including a retirement community and associated facilities provided incompatible land uses are separated or are appropriately designed to ensure residential amenity is maintained.
>
> Uses permitted in this Precinct are as listed in Section 4.00."

[8] The learned Judge took the view that the scheme therefore contemplated, within this precinct, substantial sporting and cultural development of the character specified, complemented by "some residential accommodation" of "minor proportion or scale", "a minor adjunct to the cultural pursuits". This proposed development, being overwhelmingly residential, would conflict with the intention of the scheme and hence be unlawful. (The Judge proceeded then to exercise his discretion to grant the declaration, and that stage of his process is not challenged.)

[9] The principal submission for the applicant is that the Judge misconstrued s 15(7) of the Act. Section 15 is in these terms:

"**15. Approved scheme regulates development etc. of site**

(1) The approved scheme regulates the development and use of land within the site.

(2) The approved scheme modifies any planning scheme in force in relation to the site to the extent the planning scheme is inconsistent with the approved scheme.

(3) However, the approved scheme cannot increase the uses permitted by the planning scheme.

(4) The provisions of the *Integrated Planning Act 1997* about reconfiguring a lot do not apply to the site.

(There is no s 15(5).)

(6) Local laws made by a local government under any Act do not apply to the site so far as they are inconsistent with this Act or the approved scheme.

(7) Any land, building or structure may be used within a precinct without the consent of the local government for any of the purposes set out in the approved scheme as a permitted use in relation to the precinct.

(8) A person must not use land, or a building or other structure, within a precinct for a use that is not a use specified in the approved scheme as a permitted use in relation to the precinct.

Maximum penalty for subsection (8) – 200 penalty units."

The Judge took the view that s 15(7) was intended to exclude any suggestion that notwithstanding the scheme permitted a use, local government consent may still be necessary if that use were, say, but "permissible" under an otherwise applicable town planning scheme.

[10] The applicant submitted the provision means the subject land may be used, even exclusively used, for any one or more of the purposes specified as permitted uses. The land could be used exclusively as a car park, for example, or as a shopping centre, or as a coal powered electricity generating station, notwithstanding its falling within this "sports and cultural precinct" – and without the need to obtain any further local government consent. The applicant's position is, effectively, that the ultimate outcome is not constrained by the scheme (save insofar as it permits only specified uses) but by the market.

[11] The learned Judge's view emerged from his consideration of the scheme as a whole, in the context of the Act. He noted the appropriate approach to the task of statutory construction: *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355, para [69] and para [70]. It has been said broadly comparable schemes should be construed broadly and beneficially, rather than pedantically or narrowly (cf. *Z W Pty Ltd v Peter R Hughes & Partners Pty Ltd* [1992] 1 Qd R 352, 360). This case provides a good illustration of the importance of reading particular provisions in context.

[12] His Honour was pressed with the submission that the permissive terms of s 2.00 and s 4.00 of the scheme should be read literally, as sanctioning this development. The terms of those slightly differing provisions follow.

[13] Section 4.00 provides:

> "The scheme of development provides for nine Precincts within which certain uses are permitted. The permitted uses in each precinct are set out in the following Precinct Uses Table and are denoted by an "x" immediately opposite the uses and below the relevant precinct.
>
> Any land, building or other structure may be used for any or all of the uses permitted within a Precinct as provided for in this scheme of development. A use which is not permitted within a Precinct is prohibited in that Precinct."

[14] The similar s 2.00 provides:

> "The scheme of development provides for six Precincts within which certain uses are permitted.
>
> Any land, building or other structure may be used for any one or more of the uses permitted within a Precinct as provided for in this scheme of development. A use which is not permitted within a Precinct is prohibited in that Precinct."

[15] I discuss below the words "as provided for in the scheme of development".

[16] The essence of His Honour's approach may be gathered from these paragraphs in his reasons for judgment:

> "[27] Mr Lyons' main submission was based on a particular interpretation of s.15(7) of IRDA aided by a consistent interpretation of s.4.00 of the Scheme. His submission was that s.15(7) of IRDA and ss.2.00 and 4.00 of the Scheme permit expressly the use of "any land" within a precinct for any of the purposes set out in the Scheme as an approved use. Section 4.00 permits various residential uses so any land can be used for that purpose and, as a matter or [sic] logic, if any land can be thus used, so can all the land in the precinct. The dictionaries agree that such a meaning of "any" is part of English usage.
>
> [28] In my opinion the key to the interpretation of s.15(7) of IRDA is to look at it in the context of the section as a whole. Thus:
>
> > Subsection (1) applies the scheme to the development and use of the site. That application is stated emphatically, without qualification;
> > Subsection (2) explains the application of the scheme a little by emphasising its effect on local government planning schemes which would otherwise have applied to the land in question;
> > Subsection (3) provides a restraint on the scheme;
> > Subsection (4) removes any doubt about the application of the Integrated Planning Act 1997 with respect to lot reconfiguration;

> Subsection (6) explains the application of local laws to a scheme;
> Subsection (7) states that if a use which is permitted under clause 4.00 should happen to be one which could only, for land not in a scheme, be carried on with the consent of the local government, then for land in a scheme such consent is not required. In other words it emphasises that consent applications are not required for scheme land development;
> Subsection (8) prohibits (with criminal sanctions) uses in scheme land which are not permitted under clause 4.00.
>
> [29] Thus I do not read s.15(7) as a warrant to read down the primacy of the "principal development" references in s.3.07. Having concluded that, it is difficult to see that ss.200 and 4.00 could achieve that result. In my opinion they cannot, as that would contradict the overall intent of IRDA and the Scheme."

[17] The applicant submitted the learned Judge misapprehended the purpose of s 15(7). As has just been seen, His Honour considered that purpose was to confirm that uses permitted (or "as of right" uses) under schemes were not to be regarded as subject to any additional or supervening local government town planning scheme consents. The applicant submitted that approach ignored the effect of s 15(3), which provides that a scheme "cannot increase the uses permitted" by a town planning scheme otherwise applicable. That presumably means a scheme cannot permit uses not permitted under the town planning scheme, although the scope here of the term "increase" is not entirely clear. It is nevertheless difficult to conceive of a situation where further consent would be required for a use permitted under a scheme. I have reached the view s 15(7) refers to local government consent out of an abundance of caution (lest, for example, there be any uncertainty arising from s 15(3)), as part of a comprehensive statement designed to guarantee the predominance of a scheme over an otherwise applicable town planning scheme.

[18] The applicant's central submission was that s 15(7) should be read as a blanket sanction for the carrying out of any of the uses specified in the scheme. But that is not the focus of the provision. The inclusion of the reference to "consent of the local government" provides the key to its interpretation. Its primary focus rests not on particular permitted uses, but on the exclusion of any suggestion of a need for further local government consent. Otherwise the provision could simply have read: "Any land, building or structure may be used within a precinct for any of the purposes set out in the approved scheme."

[19] Consistently with its approach to s 15(7) of the Act, the applicant submitted that the second paragraphs of s 2.00 and s 4.00 of the scheme confirm a right to use any land in the precinct for any of the permitted purposes, a right which may not then be diminished by s 3.07, through its description of the "sports and cultural precinct". The applicant submitted that s 3.07 should not be read as "regulating" s 2.00 and s 4.00; other matters apart, the language of s 3.07 was not, it was submitted, apt for that purpose.

[20] As to the language of s 3.07, it is ordinary language readily understood. The provision contemplates development principally directed towards sporting and cultural activities as specified, and also including "some residential accommodation", which, as put by the Judge, an "interested" reader would regard as a minor adjunct to the rest.

[21] Mr Keane QC, who appeared for the applicant, fastened on what he submitted was the non-prescriptive character of the language. But it is more than aspirational. It says what is 'intended', not merely hoped for. It says what 'is' to be included, save where some licence is permitted, where it says what 'may' be done. It does not apportion the uses in any precise way, it is true, but that does not render its sensible implementation impossible or impracticable. A court could, in a case of dispute, adjudicate upon such an issue, and do so notwithstanding the absence of what Mr Keane termed "specified standards". The scheme, in short, is not merely "a statement of intention providing useful guidelines" (cf. *MEPC Australia Ltd v Westfield Ltd; Robina Town Centre Pty Ltd v Westfield Ltd* (1998) 100 LGERA 204, 211). On the applicant's argument, provisions like s 3.07 of this scheme would not "regulate" (s 15(1)) the development and use of the land: they would constitute no more than messages of encouragement in the hope certain development or usage might occur. That would seem an unlikely position.

[22] As to the suggestion s 2.00 and s 4.00 should in effect predominate, the scheme must be read as a whole, and s 15(1) of the Act is important in providing that "the approved scheme regulates the development and use of land within the site". The word "regulates" is used there in the sense of governs, controls, directs. In its original form, prior to amendment in 1993, the provision said: "The development and use of land within the site must comply with the provisions of the approved scheme". That language is arguably more prescriptive than the present. But interestingly, the heading of the earlier section, which formed part of it (s 35C *Acts Interpretation Act* 1954), was: "Approved scheme regulates development etc of site". That remains the heading of the section in its present form.

[23] The current direction that the scheme "regulate" the development implies an obligation upon a developer to comply with that scheme. Section 2.00 and s 4.00 of the scheme must be read, in the context of s 3(1)(c) of the Act, as simply confirming the range of uses to which the land may be put, but subject to the constraint that that be done consistently with the objective for the precinct specified in s 3.07 of the scheme.

[24] Although this is not entirely clear, the words "as provided for in this scheme of development" in s 2.00 and s 4.00 probably modify "used" not "uses", which would sit comfortably with what I have said above in relation to the operation of s 15(1). Some support for that construction, albeit not substantial, may be gained from the use of the words "provided for in this scheme of development", rather than "provided for in the precinct uses table" (a table so-named being included in the scheme).

[25] Emphasizing the "right" of usage accorded, as it was submitted, by s 2.00 and s 4.00 of the scheme and s 15(7) of the Act, the applicant submitted that right is not modified by the operation of other parts of the scheme, even allowing for s 15(1) of the Act. The applicant pointed to the prohibition in s 15(8) of the Act (and see s

31(2)), said to be unnecessary if s 15(1) means that certain uses, otherwise permitted by s 2.00 and s 4.00 of the scheme and s 15(7) of the Act, are to be prohibited by the operation of s 3.07 of the scheme. That would involve a disjointed, piecemeal reading of the relevant instruments.

[26] The difficulty ultimately facing the applicant is that because of s 15(1) of the Act, the scheme is effectively the determinative document, and read as a whole, the scheme contemplates particular development and use of this precinct which would be starkly inconsistent with the proposed, overwhelmingly residential development.

[27] It is s 15(1) which ensures these schemes have a significance not accorded some planning instruments in other contexts, such as strategic plans (as to which see *Zieta No 59 Pty Ltd v Gold Coast City Council* [1987] 2 Qd R 116, 123). These schemes are quite different from strategic plans and town planning schemes. Strategic plans are forward looking documents produced by local government to deal in anticipation with a wide range of possible developments over substantial areas. A scheme of this character will usually be put forward by a developer contemplating particular development of a much more limited area of land. It is unsurprising that with the approval of the scheme, and the by-passing of other town planning controls, the legislature should have seen fit to tie the developer to the scheme; and that because the scheme is specific to particular, limited development, it be given a prescriptive construction sometimes inappropriate in the case of planning documents of more general application.

[28] One does no violence by reading s 2.00 and s 4.00 of the scheme as confirming the range of possible uses, while recognizing always that the lawfulness of the implementation of any of them will be subject to consistency with the purpose of the precinct as specified in s 3.07 of the scheme. It cannot be the case, as appeared to be submitted, that post-approval, the scheme could impose, as a matter of law, no enduring constraint on development and use: that would be contradictory of s 15(1) of the Act.

[29] In my view the learned Judge was plainly correct to determine the issue as he did, with the consequence that leave to appeal should be refused.

[30] **McPHERSON JA:** I agree with the reasons of de Jersey CJ, which I have had the advantage of reading. I would add, largely by way of emphasis, reference to only two points, which are already comprehended in what is said by the Chief Justice.

[31] One is that, according to the appellant's submission, the only function of dividing the site into different precincts, each with a description of its own "primary purpose", is to provide a means of guiding the discretion of the Governor in Council in deciding whether or not to approve the scheme of "integrated resort development", or to do so with variations. Once that stage is complete and the scheme is approved, the function of dividing the site into precincts is, so it is said, exhausted and has no further purpose to serve in regulating the scheme.

[32] It seems most unlikely that this was the legislative intention. It is inconsistent with the express provision in s 15(1) of the Act that the approved scheme regulates the development and use of the land within the site. What is now s 15(1) corresponds to

the second paragraph of s 19(1) of the Act in the form in which it was originally enacted. It then said:

> "The development and use of land within the site *must comply with* the provisions of the approved scheme." (my italics).

[33] A requirement to comply with the provisions of the approved scheme was possibly more specific as to the obligation imposed on those bound to obey it than one saying simply that it regulates it; but it hardly differs in effect from the current provision in s 15(1) under which the approved scheme "regulates" development and use of land within the site. The alteration in language occurred in 1993 not with any evident intention of changing the meaning of the provision but simply in the course of amending the Act to substitute references to later versions of Acts mentioned in other subsections of what is now s 15. As the Chief Justice points out, the heading to both the current s 15 and the original s 19 has remained the same throughout; namely: **Approved scheme regulates development etc. of site**. Its retention suggests that the scheme is not to be viewed as having exhausted its function at the moment of its approval by the Governor in Council. And, if that is so, it must be credited with having some continuing prescriptive and proscriptive effect or operation in relation to development and use of land within the site as a whole and the individual precincts that go to make up the integrated resort development.

[34] I agree with the order proposed.

[35] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of the Chief Justice and the additional reasons of McPherson JA. I respectfully agree for the reasons stated therein that leave to appeal should be refused and that the learned primary judge was clearly correct in declaring unlawful the proposed development of the land in question, which comprised one of the precincts of a scheme approved under the *Integrated Resort Development Act* 1987.

[36] The purpose, *inter alia*, of the approved scheme is to regulate not only the use, but also the development of the land (see s 15(2) of the Act). Section 15(7) of the Act and sections 2.00 and 4.00 of the scheme on which great emphasis was placed by the appellant cannot be read in isolation. Bearing in mind s 15(2) of the Act and section 3.07 of the scheme, it is apparent that the word "any" in s 15(7) of the Act and sections 2.00 and 4.00 of the scheme cannot be construed as meaning "any or all". Such a construction would render nugatory the scheme's role in regulating the development, as opposed to the use, of any particular precinct. Given the express words of s 15(2) of the Act, such an interpretation cannot be accepted. Furthermore, the interpretation urged by the appellant would render the intentions specified in section 3.07 meaningless and the conditions imposed by the scheme easily liable to circumvention.