SUPREME COURT OF QUEENSLAND

CITATION:	*Stockland Property Management P/L v Cairns CC & Ors* [2009] QCA 311
PARTIES:	**STOCKLAND PROPERTY MANAGEMENT PTY LTD** ACN 000 059 398 (appellant/applicant) **v** **CAIRNS CITY COUNCIL** (respondent/first respondent) **MIRVAC FUNDS LIMITED** ACN 002 561 640 (respondent/second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT** (respondent/third respondent) **CHIEF EXECUTIVE, DEPARTMENT OF MAIN ROADS** (respondent/fourth respondent)
FILE NO/S:	Appeal No 1466 of 2009 P & E Appeal No 105 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	16 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2009
JUDGES:	McMurdo P, Keane JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused** **2. Applicant to pay the respondents' costs of the application for leave to appeal to be assessed on the standard basis**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – FORM AND CONTENTS OF APPLICATION – INCLUSION OF IMPACT STATEMENTS – where second respondent developer made application to council for development permit for material change of use – where application a development application (superseded planning scheme) – where council agreed to assess application under superseded planning scheme – where

Department of Main Roads ("DMR") objected to application and required council to refuse application – where DMR indicated it would reconsider its objection if developer provided additional road access to development site – where developer purported to amend its application by including Lot 301 – where Lot 301 was a State resource – where developer did not indicate use of a State resource or evidence that State satisfied pursuant to s 3.2.1(5) of the *Integrated Planning Act* 1997 (Qld) ("IPA") – where s 12(1) of the *Integrated Planning Regulation* 1998 (Qld) ("IPR") requires evidence where application involves "taking or interfering with a [State] resource" – where P & E Court held that application involved interfering with a State resource – where P & E Court held that amended application remained a "properly made application" pursuant to s 3.2.1(7) of IPA despite absence of evidence – where pursuant to s 4.1.5A of IPA the P & E Court excused developer's non-compliance in failing to provide evidence – whether the P & E Court erred in law

Integrated Planning Act 1997 (Qld), s 3.2.1, s 3.2.3, s 3.2.9, s 3.2.15, s 4.1.5A, s 4.1.56
Integrated Planning Regulation 1998 (Qld), s 12, Sch 10

Barro Group Pty Ltd v Redland Shire Council & Others [2009] QPEC 9, cited
Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113; [2003] NSWCA 91, cited
Fawkes Pty Ltd v Gold Coast City Council [2008] 2 Qd R 1; [2007] QCA 444, considered
Lamb v Brisbane City Council [2007] 2 Qd R 538; [2007] QCA 149, cited
Rebenta Pty Ltd v Wise [2009] NSWCA 212, cited
Stockland Property Management v Cairns City Council & Ors [2009] QPEC 1, considered

COUNSEL: L F Kelly SC, with M F Johnston, for the applicant
C L Hughes SC, with M A Williamson, for the first respondent
D R Gore QC, with T N Trotter, for the second respondent
M D Hinson SC, with J S Brien, for the third and fourth respondents

SOLICITORS: Minter Ellison for the applicant
MacDonnells Law for the first respondent
Allens Arthur Robinson for the second respondent
Crown Law for the third and fourth respondents

[1] **McMURDO P:** The application for leave to appeal should be refused with costs. I agree with Keane JA's reasons.

[2] **KEANE JA:** On 30 October 2006, Mirvac, the second respondent to the application for leave to appeal presently before this Court, made an application to

the first respondent ("the Council") for approval for a development permit for a material change of use ("MCU") of land at Mt Sheridan Plaza, Cairns for a major expansion of the shopping centre at that location. Mirvac's application was a development application (superseded planning scheme) ("DA(SPS)"), that is to say, Mirvac sought to have the Council assess its application under the provisions of the town planning scheme which previously applied to the land. The possibility of having the Council determine its application in this way was available only until 1 March 2007, that being the date two years after the planning scheme which created the superseded planning scheme took effect.

[3] The Council issued an acknowledgment notice to Mirvac on 1 December 2006 agreeing to assess the DA(SPS) under the superseded planning scheme.

[4] The fourth respondent, the Department of Main Roads of the Queensland Government ("DMR"), objected to Mirvac's application for the MCU on the basis that the application was inconsistent with the DMR's plans for the Bruce Highway. DMR's letter to the Council of 7 March 2007 required the Council to refuse the DA(SPS). In that letter, DMR did, however, indicate a willingness to reconsider the position if Mirvac were to provide plans and proposals to accommodate DMR's intentions for the reconfiguration of the Bruce Highway which included a "left-in only" access from Foster Road to Mt Sheridan Plaza.

[5] In an endeavour to accommodate the DMR's concerns, Mirvac purported to amend its DA(SPS) by including in the land the subject of the application another parcel of land ("Lot 301").

[6] Lot 301, which is vacant land to the north of Mt Sheridan Plaza, is owned in fee simple by the State of Queensland. On 24 May 2007 Mirvac's agent wrote to the Council enclosing the original DA(SPS) with handwritten changes to include Lot 301. In answer to Question 21 in Form 1 of the DA(SPS), "Does this application involve a State resource prescribed under a regulation?", Mirvac answered: "No." Mirvac did not answer Questions 22 and 23 on Form 1 which sought the evidence required in relation to a State resource by s 3.2.1(5) of the IPA. A "district director" of DMR signed Question 20 of the Form 1 giving the land owner's consent to the DA(SPS). The DA(SPS) thus changed was then notified to the public.

[7] It is common ground between the parties to this proceeding that Lot 301 became a "State resource" within the meaning of Item 10 of Sch 10 of the *Integrated Planning Regulation* 1998 (Qld) ("the IPR") on 31 March 2007. The parties are in dispute, however, as to whether s 3.2.1(5) of the *Integrated Planning Act* 1997 (Qld) ("the IPA") required that Mirvac's application for an MCU be supported by evidence that the Chief Executive of DMR was satisfied that the MCU was consistent with an allocation of, or an entitlement to, Lot 301 as a State resource. That evidence was not provided in Mirvac's original application for the obvious reason that, at that time, Lot 301 was not referred to in Mirvac's application. It was not provided subsequently because the view was taken that the development proposed in Mirvac's amended application did not "involve taking or interfering with" a State resource within the meaning of s 3.2.1(5) of the IPA and s 12(1) of the IPR.

[8] Mirvac's letter of 24 May 2007 to the Council also stated:

> "…
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> We also refer to consultations held with Council, which consultations confirmed that, in accordance with Section 3.2.9(5) of the Act, the

> adverted [sic] changes made to the Application on behalf of the Applicant, are in response to an Information Request, and that therefore the development assessment process may continue without interruption.
>
> …"

[9] By invoking, s 3.2.9(5) of the IPA, Mirvac sought, it seems, to avoid an interruption to the assessment process which would have occurred had Mirvac sought to change the DA(SPS) pursuant to s 3.2.9(1) of the Act.

[10] On 26 November 2007 the Council issued a decision notice purporting to approve the grant of the development permit including Mirvac's inclusion of Lot 301 in its application.

The appeal to the P & E Court

[11] The applicant in this Court, ("Stockland"), a commercial competitor of Mirvac, had opposed Mirvac's DA(SPS). Stockland appealed to the Planning and Environment Court ("the P & E Court") against the Council's decision.

[12] Relevantly for the purposes of the argument in this Court, Stockland contended that the P & E Court was obliged to set aside the Council's decision because of Mirvac's failures, first to include Lot 301 in its original DA(SPS), and secondly, to support its application with the evidence required by s 3.2.1(5) of the IPA and the IPR. Stockland also argued that s 4.1.5A of the IPA was not available to allow the P & E Court to excuse these lacunae on the basis that the DA(SPS) was not a properly made application within the meaning of s 3.2.1(7) of the IPA.

[13] The learned judge of the P & E Court rejected Stockland's arguments and upheld the Council's decision to approve Mirvac's DA(SPS). The learned P & E Court judge held that the change to the application to include Lot 301 did not alter the DA(SPS): Mirvac's DA(SPS) "remained the same application, though with a change".[1] Accordingly, his Honour held that s 4.1.5A was available to cure the absence of the evidence required by s 3.2.1(5) of the IPA because the DA(SPS) was a "properly made application" within the meaning of s 3.2.1(8) of the IPA.

The application to this Court

[14] Stockland now seeks leave to appeal to this Court pursuant to s 4.1.56 of the IPA. The principal contentions which Stockland seeks to agitate on appeal to this Court are:

(a) that because of the absence of the evidence required by s 3.2.1(5) of the IPA, the DA(SPS) was not a "properly made application";

(b) that, in consequence, s 4.1.5A of the IPA was not available to allow the P & E Court to approve the application; and

(c) that a development application may not be amended by adding land to the application under either s 3.2.9(1) or s 3.2.9(5) of the IPA: a new application is necessary.

[15] If Stockland's contentions were to be upheld, Mirvac would no longer be able to pursue a DA(SPS) because it would now be out of time to lodge a fresh DA(SPS).

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[1] *Stockland Property Management v Cairns City Council & Ors* [2009] QPELR 511 at 519 [77].

[16] Mirvac disputes all Stockland's contentions and also submits that the case does not warrant the grant of leave to appeal. DMR submits that s 3.2.1(5) had no relevant operation. The Council contends that there was a properly made application which did not cease to be a properly made application when it was changed to add reference to Lot 301.

[17] The Court reserved its decision on the question of whether leave should be granted until it was able to form a view of the merits of the case.

[18] I will discuss the competing contentions of the parties after first setting out the reasons of the learned primary judge in a greater detail.

The decision of the P & E Court

[19] Section 3.2.1(5) of the IPA provides relevantly:

> "To the extent the development involves a State resource prescribed under a regulation, the regulation may require the application to be supported by 1 or more of the following prescribed under the regulation for the development—
>
> …
>
> (b) evidence the chief executive of the department administering the resource is satisfied the development is consistent with an allocation of, or an entitlement to, the resource;
>
> …"

[20] Section 12 of the IPR relevantly provided:

> "**State resources (schedule 10)**
>
> (1) For section 3.2.1(5) of the Act, schedule 10 prescribes State resources and the evidence required to support an application that involves taking or interfering with a resource."

[21] Schedule 10 of the IPR provided that the "evidence required" is: "Evidence the chief executive of that department is satisfied the development is consistent with an allocation of, or an entitlement to, the resource".

[22] On 31 March 2007 that Sch 10 of the IPR was amended to include land "held in fee simple by the State". It was this amendment which caused Lot 301 to become a "State resource".

[23] The learned judge of the P & E Court held that at 31 March 2007, Lot 301 was a State resource within the meaning of s 3.2.1(5) of the IPA and Sch 10 of the IPR.[2] His Honour held that the development proposed by Mirvac involved Lot 301 as a State resource within the meaning of s 3.2.1(5) of the IPA. In this regard, his Honour said:[3]

> "It was submitted for Mirvac that the proposed use of lot 301 was for the purpose of a public road, and that included access to the shopping centre. Reference was made to the decision in *Gibway Pty Ltd v Caboolture SC* [1987] 2 Qd R 65. There, the land the subject of the shopping centre application adjoined privately owned land which

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2 [2009] QPELR 511 at 520-521 [81] – [92].

3 [2009] QPRLR 511 at 521 [94] - [96].

> was intended to be dedicated as a public road, to give access to the shopping centre. It was pointed out that there was 'a considerable distinction between the private access road to be used by the applicant and its servants for ancillary purposes relating to a consent use and the dedication of a public road which will be used by the public for all lawful purposes for which a public road may be used.' The *Pioneer Concrete* principle was not concerned with the dedication of a public road (at p 67).
>
> Here, the converse is the case. That is, lot 301 is the subject of a development application, because of the amendment to the original application. There was no submission to the effect that including lot 301 in the application was unnecessary and a mistake, and could be disregarded. Once the application was amended, it followed that the development involved lot 301.
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> It will be remembered that lot 301 became a part of the amended application, because Mirvac's development application had no prospect of approval without, giving access from Foster Street to the shopping centre. As Mr Feros put it in the letter of 6 June 2007, 'lot 301 is required to be included in the lands, the subject of the application, pursuant to the direction of the Department.' After that, lot 301 became part of the development application, because of the handwritten amendment on the Form 1 Development Application. It may be safely concluded that the development 'involves' lot 301."

[24] The learned judge of the P & E Court went on to hold that Mirvac's proposal will interfere with Lot 301 as a State resource within the meaning of s 12 of the IPR and that, as a result, s 3.2.1(5)(b) of the IPA applied to Mirvac's DA(SPS) as changed to include Lot 301. His Honour said:[4]

> "Section 3.2.1(5)(b) refers to the Chief Executive being satisfied that the development is consistent with 'an allocation of, or entitlement to, the resource'. Schedule 10 refers to the same words.
>
> The facts show that Mirvac had an 'entitlement' to part of lot 301. It agreed with DMR that it could construct a temporary access road, from Foster Street to the shopping centre. See the approved plan, SKDG27 and the conditions of development being part of Council's approval, AB22. It was the intention of DMR that the access road would become part of a much larger upgrade of Foster Road, and be opened as a public road. See AB273.1, and AB451.5.
>
> The State of Queensland owned lot 301. Mirvac had reached an agreement with DMR about building the access road and using it in the expectation that it would become a public road. At the least, Mirvac had a contract or licence to use part of lot 301 in that way. That arrangement meant that Mirvac had an entitlement to use lot 301.
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> It was submitted for DMR that there was no 'taking or interfering' with a resource because it had been resumed for road purposes, and the access road would be part of that purpose. DMR made it clear, at

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4 [2009] QPELR 511 at 521 - 522 [97] – [101].

> the hearing of these preliminary points, that it was satisfied that this proposed development is consistent with an entitlement to the resource, and that DMR is prepared to allow access over lot 301 so that the access road can be constructed.
>
> **The meaning of the expression, 'taking or interfering with a resource', is not entirely clear. It should be interpreted to cover any activity in connection with the use of the resource. It will apply where the activity is approved, as in this case. The word 'interfering' should be taken to include an activity that has been approved, so long as it is to have an impact on the resource. That is this case. It does not necessarily mean to interfere in some forbidden or destructive way. Mirvac's construction of the access road will be 'interfering' with lot 301.**" (emphasis added)

[25] His Honour went on to find that Mirvac had failed to comply with s 3.2.1(5)(b) of the IPA by not providing evidence that the Chief Executive of DMR was satisfied that the development was consistent with an allocation of, or an entitlement to, Lot 301 as a State resource.[5]

[26] The learned primary judge also held that the addition of Lot 301 to Mirvac's DA(SPS) was a change to the DA(SPS) but that the DA(SPS) remained the same application as had been originally submitted to the Council.[6] In this regard, the learned P & E Court judge said:[7]

> "In this case, the amendment of the application was made at an earlier stage, and was notified to the public.
>
> In *Grasso v Mulgrave Shire Council* [1993] QPELR 86, the amendment sought was not of a 'minor nature' and the public notice to the application was misleading as it did not include some land which was proposed to be used for access to the highway. It was found that omission was significant as it could mislead a potential objector. The application which was proposed to the Court, and the change, made it a markedly different application to that as originally lodged and as advertised. The application was dismissed.
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> It should be found that the considerations which influenced those decisions are not present here. There is no reason why the addition of lot 301, and the access road, should not be regarded simply as a change to the original application. It does not have to be a minor change, which has a particular meaning in other applications of IPA. It is not so different that, overall, there was a new application to be considered by Council.
>
> Three basic principles are important. Material changes of use should be notified to the public, and applications to use land, for one project, should not be made in a piecemeal way, but at the one time – the *Pioneer* principle. These principles have been observed here. These principles were applied, in *Lewis v Mareeba Shire Council* (2000)

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5 [2009] QPELR 511 at [102] – [108],[122] – [123].
6 [2009] QPELR 511 [77].
7 [2009] QPELR 511 [72] – [77].

> QPELR 432, though with a different result as the changes were not advertised, and the application was piecemeal. Also, it is significant that lot 301 is involved, because the ultimate aim is to dedicate the access road as a public road. It is not usually necessary to include such land – *Gibway v Caboolture Shire Council* [1987] 2 Qd R 65.
>
> It was also submitted for Stockland, that the development application could no longer be regarded as one made within two years from the date the current planning scheme took effect. That is, it could not be considered under the superseded planning scheme. That is because, it was submitted, it was a new application, and did not remain a development application (superseded planning scheme), as defined.
>
> For the same reason, that argument is rejected. It remained the same application, though with a change."

[27] The learned primary judge held that the change to the DA(SPS) to include Lot 301 was properly made pursuant to s 3.2.9(1) of the IPA,[8] but that the change was not made in response to an information request within s 3.2.9(5). Rather, it was a change made to appease DMR.[9]

[28] In summary, the learned primary judge concluded that the DA(SPS), as changed to include reference to Lot 301, remained a "properly made application" pursuant to s 3.2.1(7) of the IPA notwithstanding the absence of the evidence required by s 3.2.1(5) of the IPA as a result of the inclusion of Lot 301.[10] Because the application was a properly made application, s 4.1.5A of the IPA was available to excuse Mirvac's non-compliance with s 3.2.1(5) of the IPA. On that footing, the learned primary judge distinguished this case from the decision of this Court in *Fawkes Pty Ltd v Gold Coast City Council*,[11] dismissed Stockland's appeal and declared that the Council's decision to approve Mirvac's application was valid.

The parties' arguments in this Court

[29] In this Court, the arguments of the parties ranged over a number of issues. These were principally:

(a) whether the learned P & E Court judge erred in failing to hold that Stockland's failure to comply with s 3.2.1(5) of the IPA meant that the Council and the P & E Court could not lawfully proceed to decide Mirvac's DA(SPS);

(b) whether s 4.1.5A was available to permit a different outcome;

(c) whether Mirvac was obliged to lodge a fresh development application in respect of the land including Lot 301 because s 3.2.9 does not permit an application to be changed by the addition of a new parcel of land;

(d) whether s 3.2.9(1) rather than s 3.2.9(5) was the only means whereby the DA(SPS) could be changed to add Lot 301 to the application.

Section 3.2.1(5) of the IPA

[30] The principal submission advanced by Mr Hinson SC, who appeared with Mrs Brien of counsel for the DMR, was that the learned primary judge erred in

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8 [2009] QPELR 511 at 519 [67].
9 [2009] QPELR 511 at 518 [60].
10 [2009] QPELR 511 at 522 [111], 524 [124].
11 [2008] 2 Qd R 1.

interpreting the words "taking or interfering with a resource" in s 12(1) of the IPR as covering "any activity in connection with the use of the resource … where the activity is approved …" including "any activity that has been approved, so long as it is to have an impact on the resource".[12] Mr Hinson submits that the words "taking or interfering" indicate the need for some clash with the State's enjoyment of its ownership of the resource if s 3.2.1(5) of the IPA is to be engaged.

[31] On behalf of Stockland, Mr Kelly SC, who appeared with Mr Johnstone of counsel, argues that the learned primary judge's construction of the legislation is correct. Mr Kelly submits that to read the words "taking or interfering with a resource" as engaging the operation of s 3.2.1(5) of the IPA only where the proposed development would clash with the State's enjoyment of its ownership of the resource would be to lower the standard of scrutiny in the public interest assured by s 3.2.1(5) of the IPA. Mr Kelly argues that Lot 301 was resumed by the State for road purposes relating to the upgrade of the Bruce Highway, and that Mirvac is taking or interfering with Lot 301 for a purpose other than that purpose, ie to accommodate an access point to a private development for a shopping centre.

[32] Mr Kelly relies upon the observations of Searles DCJ in *Barro Group Pty Ltd v Redland Shire Council & Others* where his Honour said:[13]

> "To determine whether there is interference will necessarily involve different considerations in each case depending on the wording of the legislation under consideration, the subject matter of the alleged interference and the facts alleged as constituting the interference. Interfering with physical objects such as customs goods, or motor vehicles or other tangible items may be easier to identify than in other cases. Here, we are dealing with a bundle of rights attaching to a Road reserve which rights are available for exploitation by the beneficiary of the reserve to achieve the purpose for which the land was reserved. In its simplest form it would involve an entitlement to develop the reserve as a Road. The full extent of the rights are not in evidence. It seems to me that any activity which would, in any way, limit or encroach upon the right to the full exploitation of the rights of the beneficiary of the Road would constitute an interference. The infringement of the rights attaching to the Road by any interference is not postponed to the point when the rights are sought to be exploited by the construction of a road. They exist from the point of creation of the reserve and could be protected from that point against any transgression in the nature of a trespass."

[33] Mr Hinson points out that the observations of Searles DCJ in *Barro* must be understood as directed to the facts of that case. There the development in question involved the placement on a road of plant and equipment used in a quarrying operation. That use clearly involved the use of the State resource for purposes other than a road in diminution of the State's rights of ownership of the road.

[34] Mr Hinson also points out that, as the learned primary judge found,[14] Lot 301 was acquired by the State in November 2000 "for the purpose of transport, in particular, road purposes", a purpose wider than that stated in a rezoning approval in 1996

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12 [2009] QPELR 511at 522 [101].
13 [2009] QPELR 564 at 568 [17].
14 [2009] QPELR 511at 520 [84].

which was to accommodate "transport infrastructure along the Bruce Highway", and wider than that identified by Stockland, namely the "upgrade" of the Bruce Highway. Mr Hinson argues that Mirvac's intended use of Lot 301 does not clash with or hamper or hinder the State's enjoyment of its ownership of Lot 301 as reflected in the purpose for which it was acquired, in that, as the learned primary judge found,[15] DMR intended that the access road to the shopping centre would become part of a larger upgrade of Foster Road and be opened as a public road, and, as his Honour found,[16] Mirvac had a licence to use part of Lot 301 to build the access road which will be developed for road purposes. In this way, Mr Hinson argues, the State's purposes for Lot 301 are being implemented rather than interfered with.

[35] Mr Hinson's argument is supported by findings of fact made by the learned primary judge. His Honour said:[17]

> "It is necessary to look at how lot 301 became state resource land.
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> The shopping centre land was rezoned in 1996. Conditions of the approval provided for dedication of land for road purposes, and an exclusion area, proposed to be resumed or otherwise acquired by the State of Queensland for the 'purpose of accommodating transport infrastructure along the Bruce Highway.' It is that land, or part of it, that became lot 301 in December 2000, after it was resumed.
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> The land that became lot 301 was acquired according to the *Acquisition of Land Act 1967*, by the State of Queensland in 2000. The first Taking of Land Notice described an area of 8,612 square metres which was 'taken by the Chief Executive, Department of Main Roads, as constructing authority for the State of Queensland for the purpose of transport, in particular, road purposes as from 3 November 2000 vests in the State of Queensland.'
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> An amended notice referred to '…taking of land by the Chief Executive, Department of Main Roads, as constructing authority for the State of Queensland…' (MH4 and MH5 to Mr Hardy's affidavit)"

[36] I am respectfully unable to agree with the approach of the learned primary judge to the construction of the phrase "taking or interfering with a resource". It is only where the "involvement" of the State resource in the development is of a nature which includes "taking or interfering with a resource" that s 12 of the IPR and s 3.2.1(5) of the IPA are engaged. It may be accepted that the "involvement" of the State resource in a proposed development means no more than that there is a connection between the proposed development and the State resource. But the words "taking and interfering with" confine the particular kind of involvement of the State resource in the proposed development which triggers s 3.2.1(5) of the IPA. These words indicate that the nature of the connection is of a particular kind.

[37] One species of the particular kind of involvement is "taking". That is obviously an involvement of a kind which is adverse to the enjoyment by the State of its ownership or stewardship of the State resource. Indeed, it is adverse to the enjoyment of a State resource in a concrete and absolute way.

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15 [2009] QPELR 511 at 521 [98].
16 [2009] QPELR 511 at 521 [99].
17 [2009] QPELR 511 at 520 [82] – [85].

[38] The involvement of the State resource in this case was certainly not in the nature of a "taking". The word "interference" is suggestive of a less absolute kind of adverse involvement than a "taking", but in this context it does, I think, suggest a concrete effect in the nature of a clash with the State's enjoyment of its ownership or stewardship of the State resource. On the findings of fact made by the learned primary judge, Lot 301 will be used for road purposes, not merely as a private driveway to Mirvac's shopping centre. Mirvac's proposed development does not clash with, or hamper or hinder, the State's enjoyment of its ownership of Lot 301.

[39] The Macquarie Dictionary offers as one definition of the word "interfere": "to be in opposition, clash: 'The claims of one nation may interfere with those of another.'" Other meanings are given as: "to come into opposition, as one thing with another", "to interpose or intervene for a particular purpose", "of things to strike against each other, or one against another, so as to hamper or hinder action …". Of course, the dictionary meaning of a word may not be a sure guide to its legal meaning in its statutory context. But with reference to the statutory context in which the phrase "taking or interfering with a State resource" is used, it affords support for the view that "interference" must be understood as involving some clash with, or hampering or hindering of, the State's ownership or stewardship of the resource.

[40] The collocation of "interference" and "taking" may be taken to suggest that the nature of the "involvement" concerned in "interference" is a clash with the State's enjoyment of its ownership or stewardship of the resource. One must take care in applying the *eiusdem generis* rule of statutory interpretation here because of the difficulty of identifying a characteristic shared by "taking" and "interference" which shows that they are members of a relevant genus which might then be used to confine the scope of "interference".[18] But the language of s 3.2.1(5)(b), which speaks of the consistency of the development application "with an allocation of, or an entitlement to, the resource", is a more reliable indication that the legislature's intention is that the occasion for the engagement of the requirements in s 3.2.1(5)(b) is indeed a clash with, or a hampering or hindering of, the State's enjoyment of ownership or stewardship of the State resource which is related to the allocation of, or entitlement to, the enjoyment of those rights in the applicant.

[41] Such a view of the scope of s 3.2.1(5) of the IPA and s 12 of the IPR is consistent with an underlying intention that, where the public interest in the enjoyment of resources held for the community by the State may be adversely affected by a proposed development, the representatives of the State should have the opportunity to veto the development. Where the proposed development is consistent with the implementation of the State's own purposes, the concern which informs the legislation does not arise.

[42] In this case, the State's enjoyment of its ownership of Lot 301 could not be relevantly hampered or hindered by the approval of the application. It is certainly not accurate to describe the proposal as involving the appropriation of Lot 301 to enable Mirvac to create a private driveway. Indeed, the approval of the application would seem to further the implementation of the State's purposes for the use of Lot 301.

[43] If that view be accepted, as I think it should, then it would follow that s 3.2.1(5) was not engaged in this case and the application was a properly made application.

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[18] *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 142 – 144 [125] – [130].

[44] I must note here that it is also argued on Stockland's behalf that it is not open to DMR to challenge the learned primary judge's conclusion that Mirvac's proposed development did involve a "taking or interfering" with Lot 301. It is said that such a challenge should be made by cross-appeal and that because the challenge is concerned with a question of fact, this Court cannot entertain it under s 4.1.56 of the IPA. These points may be disposed of shortly.

[45] DMR does not seek any variation in the orders made by the learned primary judge: rather, DMR seeks to uphold his Honour's decision on other grounds. It is true that DMR has not filed a notice raising these contentions in the event that Stockland were granted leave to appeal. But this Court may grant leave to appeal on conditions which recognise and safeguard the entitlement of a respondent to maintain a judgment which reflects the merits of the case.[19] Alternatively, the conclusion that the decision below is correct, albeit for other reasons, is itself a sufficient reason to refuse leave to appeal.

[46] As to Stockland's attempt to invoke s 4.1.56 of the IPA, it is, I think, apparent from what I have written that I am respectfully of the opinion that the learned primary judge erred in law in his interpretation of the scope of s 3.2.1(5) of the IPA and s 12 of the IPR. The conclusion at which I have arrived on this issue accepts the findings of fact made by his Honour as correct.

A changed application?

[47] It is convenient next to consider whether it was open to Mirvac to amend its application by the addition of Lot 301 pursuant to s 3.2.9 of the IPA.

[48] Mr Kelly argued that an application under the IPA to alter the rights of use attaching to certain land cannot be the same application – albeit "changed" – as an application to alter the rights of use attaching to other land. It is, he argued, fundamental to the process of assessment of applications for development approval established by the IPA, that an application for such approval must specify the particular piece or pieces of land to which it relates. On this argument, the purpose of the assessment process which the IPA establishes is to determine whether the use rights attaching to the land specified in the application are to be altered. Section 3.2.1 of the IPA, which requires that the consent of the owner of the land specified in the application to change use rights be obtained, recognises that the identification of the land in question is fundamental to the process of changing the rights of use attaching to that land. If the changed application is approved, new use rights will be attached to land which, under the original application, would not have been attached to it. So much may be accepted, but s 3.2.9 of the IPA expressly affords an applicant the opportunity to "change the application". It is cast in terms which do not suggest that it does not authorise the addition of further parcels of land.

[49] Section 3.2.9 of the IPA provides:

> "**Changing an application**
>
> (1) Before an application is decided, the applicant may change the application by giving the assessment manager written notice of the change.
>
> (2) When the assessment manager receives notice of the change, the assessment manager must advise any referral agencies

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[19] See *Lamb v Brisbane City Council* [2007] 2 Qd R 538 at 542 [4].

for the original application and the changed application of the receipt of the notice and its effect under subsection (3).

(3) The IDAS process stops on the day the notice of the change is received by the assessment manager and starts again—

(a) from the start of the acknowledgement period, if 1 or more of the following apply—

(i) the application is an application that requires an acknowledgement notice to be given and the acknowledgement notice for the original application has not been given;

(ii) there are referral agencies for the original application, the changed application or both the original application and the changed application;

(iii) the original application involved only code assessment but the changed application involves impact assessment; or

(b) if paragraph (a)(i), (ii) or (iii) does not apply—from the start of the information request period.

(4) However, the IDAS process does not stop if—

(a) the change merely corrects a mistake about—

(i) the name or address of the applicant or owner; or

(ii) the address or other property details of the land to which the application applies; and

(b) the assessment manager is satisfied the change would not adversely affect the ability of a person to assess the changed application.

(5) To remove any doubt, it is declared that this section does not apply if an applicant changes an application in response to an information request."

[50] Mr Kelly argued that the provisions of s 3.2.9(1) do not afford an applicant the opportunity to change an application which is not a properly made application into a properly made application. He submitted that s 3.2.9(1) operated only in respect of "properly made applications". That submission can be dealt with briefly.

[51] Section 3.2.9(1) is located in a group of provisions concerned with the making of an "application" and the requirements for a "properly made application". It is impossible not to recognise that the legislature has used these terms advisedly and not haphazardly or interchangeably. Further, there is nothing in the text of these provisions or their context or legislative history which suggests that the legislature intended to deny the possibility that an applicant might cure defects in its initial application by changing it so as to enable it to proceed beyond the application stage of the IDAS process as a properly made application. On the contrary, one may readily suppose that s 3.2.9(1) was intended to afford an applicant a convenient opportunity to remedy deficiencies in its application so that the application might then progress beyond the application stage, without the inconvenient necessity for the lodgement of an entirely fresh application.

[52] By virtue of s 3.2.3 of the IPA, an application may not lawfully progress beyond the application stage unless and until it is, or is deemed to be (under s 3.2.1(9) of the

IPA), a properly made application. The application stage of a development application of the present land ends under s 3.2.15 "for a properly made application" upon the giving of an acknowledgment notice. No third party can be adversely affected by allowing deficiencies to be corrected before the application progresses further in the IDAS process.

[53] As to Mr Kelly's argument that s 3.2.9(1) may not be invoked to allow an application to be changed by the addition of a further parcel of land to the land affected by the application because the identification of the land affected by an application was essential to the making of an application under the IPA, once again so much may be accepted. But once again there is nothing in s 3.2.9, or in the other provisions of the IPA, which are apt to deny the possibility that the application might be changed by the addition of a further parcel of land prior to the finalisation of the application stage of the IDAS process. Section 3.2.9(1) permits changes to be made to an application. It is expressed in perfectly general and unqualified language. It is not possible to identify any legitimate interest of any other person which would be adversely affected by allowing an application to be changed in this way before the finalisation of the application stage.

[54] These conclusions are sufficient to establish that the decision of the learned primary judge to dismiss Stockland's appeal was correct, albeit for reasons different from those which commended themselves to the learned primary judge. On this basis, the application for leave to appeal should be dismissed.

[55] It is not necessary to address the other issues agitated by the parties: the observations of Basten JA in *Rebenta Pty Ltd v Wise* (with whom Ipp JA and Sackville AJA agreed) are apposite. His Honour said:[20]

> "In these circumstances, it is not necessary or appropriate to address the remaining issues, unless the efficient administration of justice renders that course desirable: see *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [12]. When such a course is appropriate will depend to a significant extent on whether the court is conducting a trial or is an intermediate court of appeal. It is often desirable in the case of a trial judge, who has heard evidence on a matter, to determine factual questions arising from the evidence, even if they are not necessary on conclusions which have been reached on other issues. That is because some account must always be taken of the possibility of a successful appeal, requiring the further evidence to be assessed, or in all likelihood repeated on a rehearing. The costs which are likely to flow to the parties in such an event will rarely be justified by the savings in judicial time. Further, such an event is more likely where there is a full appeal by way of rehearing, than where there is a more limited right of appeal.
>
> With respect to an intermediate court of appeal, there is no further right of appeal, absent a grant of special leave to appeal to the High Court. While it seems undesirable in many cases to assess the likelihood of a grant of special leave and if granted, the likelihood of success on an appeal, in some cases such consideration may be appropriate: cf *Health World Ltd v Shin-Sun Australia Pty Ltd* [2009]

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20 [2009] NSWCA 212 at [9] – [12].

> FCAFC 14; 174 FCR 218 at [47] (Perram J, Emmett and Besanko JJ agreeing). Nevertheless, it will usually be open to the intermediate appellate court to work on the basis that a successful appeal is, in a run-of-the-mill case, a possibility, but not a probability.
>
> There is also a principle of parsimony which applies in terms of the allocation of judicial resources. Parties in civil litigation do not have the right to demand that a court provide resources greater than those necessary to determine the dispute before it. An intermediate court of appeal is entitled to take into account the limits of its resources, its workload and the interests of other litigants: see *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 at [824]–[833] (Ipp JA, Giles JA and Hodgson JA agreeing).
>
> It is also appropriate to take into account the risk that a court will more readily fall into error in dealing with an issue which it knows does not arise in the circumstances of the case: cf *Wade v Burns* [1966] HCA 35; 115 CLR 537. In some cases, such a risk will be warranted; in other cases it will not be in the interests of the best administration of justice: see *Tarabay Pty Ltd v Leite* [2008] NSWCA 259 at [27]–[28]; *Lindholdt v Hyer* [2008] NSWCA 264; 251 ALR 514 at [184]–[185]."

[56] I respectfully agree with what Basten JA has said.

Conclusion and orders

[57] I am of the opinion that the decision of the learned primary judge was correct, even though I have come to that conclusion for reasons which differ materially from those of the learned primary judge. I would refuse the application for leave to appeal.

[58] I would order that the applicant pay the respondents' costs of the application for leave to appeal to be assessed on the standard basis.

[59] **MARGARET WILSON J:** I respectfully agree with the orders proposed by Keane JA, and with his Honour's reasons for judgment.