SUPREME COURT OF QUEENSLAND

CITATION:	*Lewani Springs Resort P/L v Gold Coast CC & Anor* [2010] QCA 145
PARTIES:	**LEWANI SPRINGS RESORT PTY LTD** ACN 068 977 104 (appellant/applicant) **v** **GOLD COAST CITY COUNCIL** (respondent/first respondent) **ALDI STORES (A LIMITED PARTNERSHIP)** (co-respondent/second respondent)
FILE NO/S:	Appeal No 14095 of 2009 P & E Appeal No 2143 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	11 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2010
JUDGES:	Chesterman JA and Atkinson and Ann Lyons JJ Joint reasons for judgment of Chesterman JA and Ann Lyons J, Atkinson J dissenting
ORDERS:	**1. Application for leave to appeal refused.** **2. Parties to make submissions on the appropriate orders for costs within 14 days.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – SUPREME COURT – ERROR OF LAW – where second respondent lodged a development application – where 30 business days of public notification were required because of the presence of wetlands near the proposed development – where only 15 days' notice were given – where primary judge excused the deficiency under s 4.1.5A of the *Integrated Planning Act* 1997 (Qld) – whether the primary judge's decision to excuse the non-compliance was an error of fact or law *Integrated Planning Act* 1997 (Qld), s 4.1.5A(1), s 4.1.5A(2), s 4.1.56 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33, cited

Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16, cited
NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation (1956) 94 CLR 509; [1956] HCA 80, cited
Regional Land Development Corporation No 1 P/L v Banana SC [2009] QCA 140, followed
Ridgewood Development Pty Ltd v Brisbane City Council [1985] 2 Qd R 48, followed
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306; [1996] QCA 226, cited

COUNSEL: R S Litster SC, with M Williamson, for the applicant
C L Hughes SC, with B Le Plastrier, for the first respondent
D R Gore, with B D Job, for the second respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicant
McDonald Bacanda & Associates for the first respondent
DLA Phillips Fox for the second respondent

[1] **CHESTERMAN JA and ANN LYONS J**: The facts relevant to the application are fully and comprehensively set out in the reasons for judgment of Atkinson J, as are all relevant statutory provisions. We gratefully adopt her Honour's rehearsal of the evidence and exposition of the statutes which enables us to go at once to the point in issue.

[2] The failure by the second respondent ("Aldi") to erect a notice on the Dayflower Street frontage can be ignored as irrelevant. For the reasons given by the primary judge, and by Atkinson J, that failure was of no consequence. It is highly improbable that anyone would have observed a sign at that location. Anyone who did would certainly have also observed one or both of the signs erected on Old Coach Road and Days Road. The applicant did not contend otherwise.

[3] The issue for the primary judge was whether the continuance of the notices for 15 business days rather than 30, and the intimation in newspaper advertisements and notices to adjoining owners giving a wrong, early, date for the receipt of submissions, should have been excused pursuant to s 4.1.5A of the *Integrated Planning Act* 1997 (Qld) ("IP Act"). The only issue for this Court is whether the decision to excuse the non-compliance was an error of law. It is only such mistakes which, by s 4.1.56 of the *IP Act*, may be made the subject of an appeal, and then only with the leave of the Court of Appeal.

[4] Section 4.1.5A provides that:

> "(1) Subsection (2) applies if in a proceeding before the court, the court –
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> (a) finds a requirement of this Act … has not been complied with, or has not been fully complied with; but
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> (b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this … Act.

> (2) The court may deal with the matter in the way the court considers appropriate."

[5] The section operates where there has been some failure to comply, wholly or in part, with a requirement of (in this case) the *IP Act*. Where such non-compliance is established and the court is satisfied that the failure has not substantially restricted the opportunity to exercise rights conferred by the *IP Act* the court is given a discretion to deal with the non-compliance as it thinks appropriate which, no doubt, means just in the circumstances.

[6] The precondition to the exercise of the discretion is that the failure to comply fully with the Act's requirement "has not substantially restricted the opportunity … to exercise … rights conferred … by (the *IP Act*)".

[7] An appeal against the exercise of the Planning and Environment Court's discretion conferred by s 4.1.5A(2) will be governed by the well understood principles found in *House v The King* (1936) 55 CLR 499.

[8] The immediate question is whether the primary judge's finding that the shortness of notice did not substantially restrict the opportunity for a member of the public to exercise the rights of submission in opposition to Aldi's application is a question of fact or one of law. It is only if it is a mistake of law that the Court may give leave to appeal. Whether or not it does so is a matter for this Court's discretion.

[9] The primary judge dealt with the matter in this way. His Honour said:

> "[14] Here, for what it is worth, both the Council and the Department of Environment and Resource Management (formerly the EPA) support the granting of s 4.1.5A relief. That cannot determine the matter. As s 4.1.5A stands, the court should not act to assist the co-respondent unless it is satisfied that the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred by the IPA or some other Act. In this regard, the co-respondent bears the onus: s 4.1.50(2). The parties' rights have not been restricted. Have those of members of the public, those to whom the IPA seeks to provide opportunities for involvement in decision making (s 1.2.3(1)(f)) had their opportunities "substantially restricted"?
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> [15] Mr Litster has made a number of good points: … .
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> [16] While advancing the IPA's purpose includes providing opportunities for community involvement in decision-making, it includes other desiderata such as:
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> '(a) ensuring decision-making processes –
>
> (i) are accountable, coordinated and efficient; and
>
> …'
>
> That would tend to be promoted by allowing this appeal to proceed to determination on the merits, it being left to the

existing parties to ventilate all arguable issues. There were no adverse submissions other than the appellant's. While it was observed in *Ramsgrove* [2005] QPEC 101 at [19] that the absence of submissions is consistent with the public having no awareness of the development application, that observation was made in the context of the single sign placed on the site being effectively invisible, which cannot be said of the Days Road and Old Coach Road signs here; I think that the absence of additional adverse submissions here bespeaks equanimity at the prospect of an Aldi supermarket in the location. The prospect of commercial development on a larger scale on the site appears to have been a matter of some notoriety, another proposal for the site having been resolved unfavourably by the court in *Family Assets Pty Ltd v Gold Coast City Council* [2008] QPELR 448. References in the reasons to *Lewani Springs* confirm what the court was told as to its being a party in that appeal.

[17] The court has to proceed in the absence of identification by the appellant of any particular person who would have made a submission or considered making one had the public notification deficiencies not occurred and in the absence of evidence that all or any of those who might have seen a sign in Dayflower Street became aware of one or both of the two signs that were placed (which the co-respondent might have adduced). While entertaining misgivings at the extent of truncation of public notification here, I am in the end persuaded that the opportunities for public involvement have not been substantially restricted. Accordingly, the court has a discretion to consider granting s 4.1.5A relief. That gives rise to a balancing exercise which I consider ought to be resolved in favour of the co-respondent. I take into account not only the deficiency in notification period, but also omission of the Dayflower Street sign and the "de minimis" deficiency, if there was one in delayed postal delivery in respect of neighbouring owners not domiciled locally.

[18] I have been acutely conscious in this matter of the desirability of avoiding an outcome inconsistent with other decisions in the court (including my own), although in these matters there is little room for a doctrine of precedent. I note that in *Burnett v Isaac Regional Council* [2008] QPEC 71 relief was granted in respect of a combination of a deficiency in the public notification period (15 business days being required) and a sign not being placed on the site's sole street frontage until some days into the notification period. There were also multiple deficiencies in *Emerdev Pty Ltd v Central Highlands Regional Council*, 2317 of 2009, 19 November 2009.

[19] The preliminary point does not stand in the way of this appeal proceeding to a hearing on the merits."

[10] The critical question, whether the shortness of notice had substantially restricted the opportunity for objection to Aldi's proposal, obviously involved an examination of the relevant evidence and a conclusion from that examination. Whether the lost opportunity was properly described as a substantial restriction of opportunity to object was an evaluation, involving an assessment of degree.

[11] So understood the exercise undertaken by the primary judge was one of fact. That point was made in *Ridgewood Development Pty Ltd v Brisbane City Council* [1985] 2 Qd R 48 where the court was concerned with s 22D(2) of the *City of Brisbane Town Planning Act* 1964. It provided that where a provision of s 22 had not been complied with the court might direct "that it be taken that (the section) has been complied with", if it considered that there had been substantial compliance, and that no person had been adversely affected by the non-compliance. Carter J (with whom Kelly and Kneipp JJ agreed) said (at 52):

> "Section 22D leaves for the consideration of the Local Government Court the questions whether there has been substantial compliance with the statutory provision in question and whether any person has been adversely affected by the non-compliance. Considerable argument was directed to the question whether there had been 'substantial compliance' with the Act … .
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> Dealing with the question whether there had been 'substantial commencement' of a building so that a building approval had not become void, the High Court in *Day v Pinglen Pty Ltd* (1981) 148 CLR 289 at 299 said:
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> > "We come then to this question of substantial commencement. As has been said, it is a question of degree. The facts must be such as to lead naturally to the conclusion that the commencement is not merely evident, but is substantial, that is, of considerable amount. The statutory purpose must be borne in mind."
>
> In my view the question whether there has been substantial compliance with the requirements of s 22 … is likewise a question of degree, and that being so it is a question of fact. Section 22D requires the Local Government Court … to consider the facts of each case where there is suggested non-compliance … and to determine firstly whether such compliance as there has been is substantial or not. The result in each case will depend upon its own facts and the relevant circumstances bearing in mind 'the statutory purpose' or the particular provision. It will always be a question of the degree of compliance and the result will differ from case to case. … It is for the Local Government Court to say whether in the particular case the degree of compliance is substantial or otherwise. That in my view is a question of fact. Similarly the question of any potential adverse affect upon others on account of the failure to strictly comply is for the Local Government Court to determine. That question also, is a question of fact."

[12] To the same effect is the judgment of Keane JA (with whom Holmes and Fraser JJA agreed) in *Regional Land Development Corporation No 1 Pty Ltd v Banana Shire Council* [2009] QCA 140. His Honour said:

> "[23] Questions as to whether evidence satisfies an indeterminate test such as 'significance' or 'substantiality' are generally questions of fact."

[13] His Honour quoted with approval the judgment of Bleby J in *Harrow Trust v Adelaide Hebrew Congregation Inc & City of Burnside* [2002] SASC 308:

> "It may be doubted that the provisions of the Development Plan are to be interpreted as if they were a statute. … However, for present purposes I am content to assume that they should be so treated. The words used in the extracts I have quoted are ordinary English words with no particular legal or technical meaning. Whether a given set of facts comes within the terms of those words will be a question of fact."

[14] The question of whether there is *any evidence* of a particular fact is a question of law. So is the question whether facts found or agreed can give rise to a particular inference. See e.g. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355. In *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 the court was concerned with whether what the appellant did fulfilled the description of carrying on "mining operations upon a mining property". Kitto J said (at 512):

> "The common understanding of the words has therefore to be determined, and that is a question of fact … . The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the appellant's operations fall within the ordinary meaning of the words as so determined; and that is a question of law … . If differing conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact … ."

[15] In *Hope v Bathurst City Council* (1980) 144 CLR 1 Mason J said (at 7):

> "… special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts as found fall within these words. *Brutus v Cozens* ([1973] AC 854) was just such a case. The only question raised was whether the appellant's behaviour was 'insulting'. As it was not unreasonable to hold that his behaviour was insulting, the question was one of fact."

[16] In *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 Fitzgerald P noted (at 335):

> "Importantly, the proposition for which *Brutus* is cited in *Hope* only applies if the conclusion that the 'facts fall within [the] words' is available on the evidence; it is a question of law 'whether the material before the court reasonably admits of different conclusions' with respect to whether or not the statutory provision … is met: … . A conclusion that such a provision is met without evidence which 'reasonably admits of' that conclusion is consequently a mistake or error in law … ."

[17] These authorities demonstrate that the primary judge's conclusion that there had not been a substantial restriction on the opportunity to exercise rights given by the *IP*

Act would be, if wrong, a mistake of fact and not of law, if there was evidence which was capable of supporting the finding, or which reasonably admitted of the finding. It is only if there was no such evidence that the primary judge's conclusion would be an error of law.

[18] The question for the application is thus whether there was evidence which allowed the primary judge to find that there was no substantial restriction on the right to object.

[19] There was such evidence.

[20] Notices advising the public of Aldi's proposed development were displayed as prominently as the *IP Act* required on two busy streets bordering the development site. The notices were in place for the 15 business days which the *IP Act* regards as the appropriate length of notice for most development applications. In this case a longer period of 30 business days was required because of the presence of wetlands. Leaving that point aside for the present, the public was given notice of the application. The notices were placed on two busy roads which Aldi's counsel described as the site of "substantial activity where people who live in this … locality can be expected to travel on a regular basis … and … have been given … the normal opportunity to object … ."

[21] Secondly, the site had been the subject of a previous development application for a shopping centre. That application was unsuccessful and the development did not proceed, but it demonstrated that the site was of interest to developers. The site is in an area which has considerable ongoing commercial development. There are shopping centres, commercial premises and schools in the near vicinity. Residents would suspect that the Aldi site would again be the subject of a development application. Those who were minded to object to it could not have been under any misapprehension that the site would remain undisturbed and undeveloped. The adequacy of notice must be assessed against that background.

[22] The third point is that the reason for the need to advertise for 30 rather than 15 business days, the existence of wetlands, was, on the facts of this case, of limited relevance. It is true that, in general, wetlands are environmentally important and should be protected so that those who object to development which will diminish or destroy wetlands should be given the opportunity afforded by the *IP Act* to make submissions. The facts here, however, show that the wetlands had already been degraded and preventing the development would do little to preserve them. That part of the wetlands which does remain intact will not be disturbed by Aldi's development. It will be, as the primary judge said, remote from it and separated by a proposed road.

[23] The evidence revealed:

> "The wetlands in the vicinity of the site have subsequently been removed by approved residential development to the west of the site, by development across Old Coach Road to the east and by the widening of Old Coach Road by Gold Coast City Council … .
>
> … the latter works and other downstream development have resulted in a hydraulic need to increase the flow capacity in the site's remnant waterway to avoid downstream flooding.
>
> The following Operational Works applications have been recently approved … and the implementation of these have had the effect of

> almost completely removing the mapped referrable wetlands on the site:
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> > … approval … for the purpose of earthworks to provide a waterway channel …
> >
> > clearing of trees and other vegetation necessary to effect the earthworks in the above approval …
> >
> > landscaping and rehabilitation planting to the areas affected by earthworks and clearing … ."

[24] That being the state of the wetlands it is open to infer that there would have been little interest in objecting to the development because of its impact on the wetlands. Anyone inclined to object on that ground had 15 business days' notice of the application.

[25] Next there is the point emphasised by the primary judge that there was no evidence that any member of the public was in fact prevented or inhibited from making a submission in opposition to the development by reason of the short notice. The primary judge emphasised this point and was, we think, right to do so. Counsel for the applicant complained that in so doing his Honour reversed the onus of proof but that is not, in our opinion, a fair criticism. The primary judge had earlier in his reasons correctly pointed out that Aldi bore the onus of establishing that the discretion in s 4.1.5A(2) should be exercised in its favour, and that it had to establish antecedently that there had been no substantial restriction of the opportunity to oppose the development. It is not to be supposed that his Honour had overlooked such a basic point.

[26] It is obvious that evidence that a would-be objector had been confused by the shortness of notice and thereby lost the opportunity to object would have been cogent evidence that the opportunity to make a submission had been substantially restricted. The absence of any such evidence is capable of giving rise to an inference that there had been no such restriction. It was in the interests of the applicant, the appellant before the Planning and Environment Court, to adduce such evidence if it could be found. It is not to be assumed that the applicant lacked energy or resources. The fact that the applicant did not adduce such evidence is capable of suggesting that no such evidence could be found. That in itself would be a relevant fact. The primary judge's reference to "the absence of identification by the appellant of any particular person who would have made a submission … had the public notification deficiencies not occurred" is no more than a recognition of these basic forensic facts. We would reject the applicant's misdescription of it.

[27] As well there was the circumstance that the only submissions lodged with respect to Aldi's application were from commercial competitors, and they had sufficient time in the 15 business days to state their case. The absence of any submission expressing concern for the wetlands is relevant as it was that factor which required the additional notice.

[28] Although it does not matter we would also reject the criticism that the primary judge erred in fact in saying that the only submission against Aldi's development came from the applicant. His Honour is said to have overlooked the fact that Westfield Management Limited ("WML") had also made a submission. However WML did not persist in its opposition and consented to the dismissal of its appeal against the

Council's decision. The primary judge was informed of that fact. We are not sure it is valid to criticise the primary judge for disregarding a submission which was abandoned.

[29] Lastly there is the point that the government department charged with the responsibility of environmental protection did not oppose the application. Of course that did not determine the question but the fact that the responsible expert department did not consider that the protection of the wetlands required 30 business days' notice was a relevant fact.

[30] The applicant's submission took issue with several aspects of the primary judge's treatment of the facts. It is not necessary to deal with the criticisms because they would be relevant, if at all, to an appeal by way of rehearing. They are not relevant to the only right of appeal given by s 4.1.56 of the *IP Act* which is limited to questions of law.

[31] One point made by the applicant should, however, be dealt with. The applicant stressed the length of the deficiency of notice by reference to the number of days on which the notice would have been displayed had Aldi complied with the *IP Act*. That led to the submission that the "period within which the opportunity to exercise the right conferred by IPA to make a submissions … is truncated by some 60%." The result is achieved by including both business days and the non-business days which the *IP Act* says are to be ignored in the computation of the 30 business days. The calculation for which the applicant contends compares the 23 days during which the signs were on display with the 60 odd days on which they would have been displayed had the *IP Act* been complied with. This comparison involves counting days which are specifically excluded in the computation of the notification period.

[32] We would accept Aldi's submissions that the legislation excludes non-business days on the express supposition that it is only on business days that potential submitters might attend to the business of preparing and lodging their submissions. Accordingly the deficiency of notice here was 15 business days, no more no less.

[33] We would also deprecate the applicant's arithmetical approach to determining if there had been a substantial restriction in the opportunity to make submissions. The answer to the inquiry will depend upon an examination of the nature and extent of the non-compliance and what effect it had on the public's opportunities to exercise the rights given to them by the *IP Act*. The determination required by s 4.1.5A(1)(b) is not to be assessed by any mechanical or arithmetical formulation. The length of the deficiency in notice, if that be the relevant non-compliance, is but one factor to be considered.

[34] Our analysis of the material shows that there was evidence from which the primary judge could conclude that the precondition found in s 4.1.5A(1)(b) had been satisfied. That being so the primary judge was called upon to determine, as a question of fact, not law, whether he should be so satisfied.

[35] We do not consider that his Honour has been shown to have erred in any event. The question was, as he recognised, a difficult one. There were considerations pointing in support of, and against, the ultimate conclusion. Mr Litster, senior counsel for the applicant, "made a number of good points" as the primary judge recognised. In the end, in the evaluative process of determining questions of degree his Honour

found that the statutory precondition to the exercise of the discretion conferred by s 4.1.5A(2) had been satisfied. We are not satisfied that an appeal against that finding could have succeeded. As it is a finding of fact, the point does not arise.

[36] We do not understand the applicant to have submitted that the exercise of discretion pursuant to s 4.1.5A(2) miscarried, save in the respect that the precondition for its exercise had not been satisfied. We have rejected that contention which leaves intact the exercise of discretion by the primary judge. In any case the satisfaction of the precondition would in most cases lead to an exercise of discretion in favour of an applicant. It will normally be appropriate to excuse the consequences of non-compliance where it is seen not to have deprived the public substantially of its rights to oppose a development. Given the finding of fact in this case there is nothing unreasonable in the manner in which the primary judge exercised the discretion. It was obviously relevant, as his Honour said, that the reason for the non-compliance was inadvertence in overlooking an obscure provision.

[37] Also relevant is that the primary judge was considering, as a preliminary point, whether the applicant's challenge to the development approval should proceed in the Planning and Environment Court. The judgment on the preliminary issue will lead to an extensive hearing on the merits of the development and whether it is a desirable outcome for the site. In that hearing the applicant can advance all such evidence as may be available to oppose the development in the interest of protecting the wetlands.

[38] The application for leave to appeal should be refused. The parties are to make submissions on the appropriate orders for costs within 14 days.

[39] **ATKINSON J**: The applicant seeks leave to appeal against a decision made by the Planning and Environment Court of Queensland on 20 November 2009 in relation to a preliminary issue. A party to a decision of that court must apply to this court for leave to appeal and may only appeal a decision on the grounds set out in s 4.1.56(1) of the *Integrated Planning Act* 1997 (IPA):

> "(a) … error or mistake in law on the part of the court; or
> (b) that the court had no jurisdiction to make the decision; or
> (c) that the court exceeded its jurisdiction in making the decision."

[40] Notwithstanding the introduction of the *Sustainable Planning Act* 2009 on 18 December 2009, by virtue of s 822 of that Act, if a person has appealed to this court under the repealed IPA before its commencement, and the appeal has not been decided before the commencement, the Court of Appeal may hear and decide the appeal under the repealed IPA as if the new legislation has not commenced.

[41] The preliminary hearing concerned whether the appeal could proceed to determination on its merits or had to be allowed given the admitted deficiencies in public notification of the development application by the co-respondent, Aldi Stores (A Limited Partnership) ("Aldi"). The learned primary judge held that the applicant's appeal should proceed notwithstanding deficiencies in the public notification given by Aldi.

Background to preliminary hearing

[42] The preliminary matter came to be determined before the primary judge in the following circumstances. In August 2008, Aldi applied to the Gold Coast City

Council ("the Council") for a development permit for a material change of use to establish a shopping centre development with a total GFA of 2,020 square metres and to clear vegetation under the *Vegetation Management Act* 1999 ("development application"). The development application concerned land on the corner of Days Road and Old Coach Road, Upper Coomera being property described as L999 SP 212744 which is more than 20 hectares in size (the "site"). The development application proposed to develop the site with a shopping centre comprising an Aldi supermarket and speciality shops with 147 car parking spaces, loading bays and a refuse area. Access to the site would be via traffic signals at the intersection of Old Coach Road and a new site access road with landscaping and a bio retention basin adjacent to the new alignment of Old Coach Road.

[43] On 10 September 2008 the Council acknowledged receipt of the development application. The acknowledgement notice said that the development would not require code assessment but it would require impact assessment. It advised Aldi that there were two referral agencies for the development application: the Department of Natural Resources, as the material change of use involved a lot containing remnant vegetation for which the existing use was rural and the size of the land was greater than two hectares; and the Environmental Protection Agency (EPA), because it was an application for material change of use on land within 100 metres of a wetland.

[44] The EPA's response to the development application was sent to the Council and Aldi on 28 October 2008. It showed that the site had the following environmental values:

- referrable wetlands;
- remnant vegetation occupying greater than 50% of the site representing the regional ecosystem communities including open forest, not of concern, and open forest that was of concern;
- remnant vegetation considered to be of regional significance under the SEQ Biodiversity Planning Assessment including potential habitat for a number of species which were considered vulnerable such as koala, wallum froglet, wallum rocket frog and glossy black cockatoos; endangered, such as Floyd's walnut; and priority species such as the greater glider;
- the regional ecosystem was poorly conserved; and
- vegetation on site was mapped as part of a bioregional corridor which extended from Tamborine National Park through to the coast line at the southern extent of Moreton Bay.

[45] With regard to the wetlands, the EPA recommended:

> "The existing state of the watercourse and the potential for future rehabilitation opportunities along the watercourse must be considered against future land use intent. If the area is to be maintained as a riparian waterway for conservation purposes, further development and modification to the wetland area should only occur if it can be shown that significant net benefit will result from the development proposal and that riparian values will be enhanced. The

> preferred outcome (i.e. not clearing of the wetland) would be the retainment and enhancement of the wetland area through a more sensitive environmental approach …."

[46] The EPA did not support Aldi's development proposal given the sensitive environmental value of the site.

[47] In the Council's acknowledgement of 10 September 2008, Aldi was advised that public notification would be required in accordance with Chapter 3 Part 4 Division 2 of the IPA.

[48] Section 3.4.9 of the IPA provides that during the notification period, a person may make a submission about the application to the assessment manager who must accept it if it is a properly made submission. Apart from the EPA submissions, two submissions were received in response to the public notification for the application for a development permit for the site: one was from Westfield Development and Asset Management ("Westfield") dated 12 December 2008 and the other from the appellant, Lewani Springs Resort Pty Ltd trading as Coomera City Centre (Lewani Springs) on 18 December 2008. Both are commercial competitors of Aldi. Lewani Springs had built a shopping centre known as Coomera City Centre on the eastern side of Old Coach Road.

[49] On 22 December 2008, Aldi gave a notice of compliance to the Council pursuant to s 3.4.7 of the IPA setting out what it said was its compliance with the public notification requirements. Because of the effect of s 3.4.10, the notice of compliance brought the notification period to an end. The Council failed to consider whether or not to exercise its power to waive Aldi's non-compliance with the notification requirements pursuant to s 3.4.8 of the IPA which provides:

> "**3.4.8 Circumstances when applications may be assessed and decided without certain requirements**
>
> Despite section 3.4.7, the assessment manager may assess and decide an application even if some of the requirements of this division have not been complied with, if the assessment manager is satisfied that any noncompliance has not –
>
> (a) adversely affected the awareness of the public of the existence and nature of the application; or
>
> (b) restricted the opportunity of the public to make properly made submissions."

[50] The exercise of the power conferred by s 3.4.8 would have authorised the assessment manager to proceed to make a valid decision on the development application notwithstanding the failure to comply with notification requirements: see *Ramsgrove Pty Ltd v Beaudesert Shire Council.*[1] However, that power was not exercised by the Council.

[51] Notwithstanding the deficiencies in the public notification requirements which had not been waived by the Council, on 8 July 2009, a negotiated decision notice was issued by the Council in favour of Aldi's application subject to certain conditions. The applicant, Lewani Springs, filed a notice of appeal against the grant of the

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1 [2005] QCA 434 at [44]-[45]; 143 LGERA 43 at 53.

development application on 3 August 2009. The parties then sought determination of the preliminary question of whether the appeal could proceed to determination given the admitted deficiencies in public notification of Aldi's development application.

Public notification requirements

[52] It was undisputed before the primary judge that the public notice requirements of the IPA were not complied with in two main respects. The first involved the omission of a sign on one of the site's three road frontages and the second was the giving of public notification for 15 business days (referred to in s 3.4.5 of the IPA) rather than 30 business days (referred to in s 6.7.1A of the IPA, made applicable by s 7 and Schedule 8 of the *Integrated Planning Regulations* 1998 (IPR)). Aldi's failure to comply with these requirements was found by the primary judge to be inadvertent and the application for leave to appeal does not seek to overturn that finding.

[53] The way in which public notice of applications was to be given under the IPA is set out in s 3.4.4. Relevantly for this application s 3.4.4(1)(b) of the IPA provides that the applicant (or with the applicant's written agreement, the assessment manager) must place a notice on the land in the way prescribed by regulation. Section 18 of the IPR is the prescribed regulation:

> "**18. Requirements for placing public notices on land – Act, s 3.4.4**
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> (1) This section prescribes, for section 3.4.4.(1)(b) of the Act, requirements for the placing of a notice on land.
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> (2) The notice must be –
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> (a) placed on, or within 1.5m of, the road frontage for the land; and
>
> (b) mounted at least 300mm above ground level; and
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> (c) positioned so that it is visible from the road; and
>
> (d) made of weatherproof material; and
>
> (e) not less than 1200mm x 900mm.
>
> (3) The lettering on the notice must be –
>
> (a) for lettering in the heading, as indicated on the approved form of the notice – at least 50mm in height and in a bold style; or
>
> (b) for lettering in the subheadings, as indicated on the approved form of the notice – at least 25mm in height and in a bold style; or
>
> (c) for lettering not mentioned in paragraphs (a) and (b) – at least 25mm in height, of regular weight and in sentence case.
>
> (4) Each sentence in the notice must start on a new line.
>
> (5) If the land has more than 1 road frontage, a notice must be placed on each road frontage for the land.
>
> (6) The applicant must maintain the notice from the day it is placed on the land until the end of the notification period.
>
> (7) In this section –
>
> ***road frontage***, for land, means –
>
> (a) the boundary between the land and any road adjoining the land; or

(b) if the only access to the land is across other land – the boundary between the other land and any road adjoining the other land at the point of access."

[54] Sections 3.4.5 and 3.4.6 of the IPA set out the period of time for which such notices must be displayed in accordance with the requirement in s 18(6) of the IPR:

"**3.4.5 Notification period for applications**

The ***notification period*** for the application –

(a) must be not less than 15 business days starting on the day after the last action under section 3.4.4(1) is carried out; and

(b) must not include any business day from 20 December in a particular year to 5 January in the following year, both days inclusive.

3.4.6 Requirements for certain notices

(1) The notice placed on the land must remain on the land for all of the notification period.

(2) Each notice given to the owner of adjoining land must be given at about the same time as the notice is published in the newspaper and placed on the land.

(3) All actions mentioned in subsection (2) must be completed within 5 business days after the first of the actions is carried out.

(4) A regulation may prescribe different notification requirements for an application for development on land located –

(a) outside any local government area; or

(b) within a local government area but in a location where compliance with section 3.4.4(1) would be unduly onerous or would not give effective public notice."

[55] However, after the commencement of the *Integrated Planning and Other Legislation Amendment Act* 2006 ("the 2006 Amendment Act") on 30 March 2006, the notification period was also affected by s 6.7.1A of the IPA which provided:

"**6.7.1A Notification period for particular applications**

(1) This section applies to a development application if –

(a) it requires public notification under chapter 3, part 4; and

(b) it is made after the commencement of the *Integrated Planning and Other Legislation Amendment Act 2006*, section 26; and

(c) any of the following apply for the application –

(i) there are 3 or more concurrence agencies;

(ii) all or part of the development –

(A) is assessable under a planning scheme; and

(B) is prescribed under a regulation;

(iii) all or part of the development is the subject of an application for a preliminary approval mentioned in section 3.1.6.

(2) Despite section 3.4.5(a), the notification period, under that section, for the application is 30 business days starting on the day after the last action under section 3.4.4(1) is carried out."

[56] Section 7 of the IPR provides that for the purposes of s 6.7.1A(1)(c)(ii) of the IPA, Schedules 7 and 8 of the IPR set out the circumstances where all or part of the development is prescribed by the IPR. In the circumstances set out in Schedules 7 and 8, a notification period of 30 business days applies.

[57] Those Schedules are as follows:

"**Schedule 7 Development for which a notification period of 30 business days applies – purposes**

A material change of use, assessable against a planning scheme, for any of the following –

(a) an aerodrome that is, or is proposed to be, used by commercial operators not normally living at the premises;

(b) a large outdoor sport and recreation facility including, for example, a golf course, a major sporting venue and a racing circuit, but not including a golf course of 30ha or less or a golf driving range;

(c) a tourist resort –

(i) with accommodation for more than 1000 people, including staff; or

(ii) on an offshore island;

(d) a body of water (including an artificial lake but excluding an effluent pond or the like), that has, or would have after the change of use, a total surface area of more than 5000m².

Schedule 8 Development for which a notification period of 30 business days applies – areas

A material change of use (other than for a dwelling house, outbuilding or farm building) assessable against a planning scheme, or reconfiguring a lot, if the premises –

(a) are wholly or partly below a floodline adopted by the local government and the development involves filling an area greater than 5000m² below the floodline; or

(b) share a common boundary with a protected area or registered place under the *Queensland Heritage Act 1992*; or

(c) contains or shares a common boundary with or is within 100m of the boundary of –

(i) an area that is a critical habitat, a protected area, subject to a conservation agreement or an area of major interest under the *Nature Conservation Act 1992*; or

(ii) the wet tropics area under the *Wet Tropics World Heritage Protection and Management Act 1993*; or

(iii) a fish habitat under the *Fisheries Act 1994*, if the proposed development –

(A) has impact on riparian vegetation; or

(B) results in alteration of natural flow patterns; or

(C) requires the construction of a levee; or

(D) does not contain stormwater management; or

(E) allows contaminated runoff; or

(F) disturbs instream habitat; or

(G) requires drainage of fish habitat; or

(iv) a wetland."

[58] Paragraph (c)(iv) of Schedule 8 is relevant to the development approved by the Council in this case because the site contains a wetland. Accordingly, the notification period was 30 business days. It is difficult to describe these provisions as obscure. They had been in place from 30 March 2006 and ought to have been well known to those involved in planning and development. The presence of the wetland was obvious and well documented.

[59] A wetland is defined in Schedule 14 of the IPR as "an area shown as wetland on 'Map of referrable wetlands', a document approved by the chief executive (environment)." The map of referrable areas was in evidence before the primary judge and shows wetlands along the length of the eastern boundary of the site adjacent to Old Coach Road. Those wetlands continued around the site where Old Coach Road meets Days Road and continued along the site for some distance along its frontage to Days Road. The map also shows wetlands across the southern portion of the site. The portion of the site which it was proposed to develop covers wetlands identified in the map of referrable wetlands.

Excusal

[60] The matter came on before the learned primary judge for a determination of whether the deficiencies in notification could be retrospectively excused under s 4.1.5A of the IPA. Section 4.1.5A provides:

"**4.1.5A How court may deal with matters involving substantial compliance**

(1) Subsection (2) applies if in a proceeding before the court, the court –

(a) finds a requirement of this Act, or another Act in its application to this

> Act, has not been complied with, or has not been fully complied with; but
>
> (b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this or the other Act.
>
> (2) The court may deal with the matter in the way the court considers appropriate."

[61] The jurisdiction of the court under s 4.1.5A of the IPA arises only in the following circumstances:

(1) where a statutory requirement in, or with relevant application to, the IPA has not been complied with, whether in whole or in part; and

(2) the court is satisfied that that non-compliance or partial compliance has not "substantially restricted" the opportunity for a person to exercise rights conferred on the person by a statute.

If those two circumstances arise, then the court may make any order to deal with the matter in the way in which the court considers appropriate.

The decision at first instance

[62] The problems in this case were twofold. One concerned the placing of notices on each road frontage as required by s 18(5) of the IPR and the second concerned the placing of the notices until the end of the notification period as required by s 18(6) of the IPR.

[63] As mentioned earlier, the proposed development is on land with frontages to two major roads: Old Coach Road on the eastern boundary of the site and Days Road on the southern boundary of the site. Aldi placed a notice on each of Old Coach Road and Days Road. The portions of the site adjourning the northern and western boundaries were heavily treed and the proposed development did not interfere with that vegetation. The northern boundary was adjacent on the eastern side to a school and on the western side to some housing which shared a common boundary with the land. Five of those houses faced Chinaberry Crescent and four faced Kudzu Street. At about the middle point of that housing, Dayflower Street (which runs south to north) ended in a cul de sac which abutted the site. The applicant did not place a notice on that road frontage, i.e. the portion of the land which adjoined the end of Dayflower Street.

[64] The learned primary judge first considered the admitted failure to place a notice at the end of Dayflower Street. In findings of fact which are not the subject of dispute, the primary judge held that it was unsurprising that Aldi overlooked the need to place a notice there. As the judge found:

> "The frontages to a stub where Dayflower Street intersects with Chinaberry Crescent and its continuation, Kudzu Street, in a residential subdivision abutting the western part of the northern boundary of the site remote from its other frontages and from the proposed supermarket location. The stub road goes nowhere; noone

> would use it for access; it may well have been indistinguishable on the ground from the 4 Chinaberry Crescent lots and the 4 Kudzu Street lots whose rear boundaries adjoin the site (although a large aerial photograph tendered suggested the stub is sealed)."[2]

[65] His Honour found that:

> "although it is possible to get to the Dayflower Street stub without passing either the Days Road sign or the Old Coach Road sign, both of those major roads are well trafficked; signs placed there would attract the attention of large numbers of passers-by, very likely to include the denizens of Dayflower Street and environs."[3]

[66] The learned primary judge compared the facts of this case with similar cases where relief under s 4.1.5A of the IPA was granted (*Grummitt Planning Pty Ltd v Gold Coast City Council* [2009] QPEC 47 and *DTS Group Queensland v Brisbane City Council* [2005] QPEC 085); and where relief was not granted (*Ramsgrove Pty Ltd v Beaudesert Shire Council* [2006] QPELR 330, affirming [2006] QPELR 254) and concluded that there would be a clear case for relief if the failure to place a notice at the end of Dayflower Street were the only deficiency. That conclusion was not disputed on appeal.

[67] The learned primary judge then considered the insufficient notice period. Again the judge said that the person who supervised the relevant steps for the giving of notice could "perhaps be forgiven" for overlooking s 6.7.1A of the IPA found in the 2006 Amendment Act under transitional provisions, s 7 and Schedule 8(c)(iv) of the IPR which, when read together, provide for a 30 day notification period. His Honour found that the 30 day notice period applied because the site does, in fact, contain a wetland. He observed:

> "Whatever might be said about its quality or the complete appropriateness of relevant mapping, the site does contain a wetland remote from the location of the actual development proposed – indeed, separated from it by a road."[4]

[68] His Honour was presumably referring to photographs and a map in evidence before him that showed that much of the referrable wetlands had been removed by operational works approved by the Council subsequent to the EPA submission on 28 October 2008. The first approval for those operational works was given on 14 January 2009, after the time given by the co-respondent as the notification period but before the notification period should have ended if the statutory period had been followed. The remaining wetlands are now in the north-east quadrant of the site. Although the development site is not in fact presently separated by a road from the remaining wetlands, such a road is apparently planned. The Council approval did not allow any further clearing of the wetland in the north-west area of the site.

[69] All of the notices specified that the date by which submissions about the development should be made to the Council was 19 December 2008, a date which reflected the 15 business days specified under s 3.4.5(a) found in Chapter 3 Part 4 Div 2 of the IPA rather than the required period of 30 business days.

[70] As well as the notices placed on Days Road and Old Coach Road, notices were published in a newspaper (as required by s 3.4.4(1)(a)) and notices were given to the

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2 *Lewani Springs Resort Pty Ltd v Gold Coast City Council* [2009] QPEC at [4].

3 *Lewani Springs Resort Pty Ltd v Gold Coast City Council* at [5].

4 *Lewani Springs Pty Ltd v Gold Coast City Council* at [9].

owners of all land adjoining the land (as required by s 3.4.4(1)(c)). The notices were given within the time limitations set out in s 3.4.6(3) and were in the approved form as required by s 3.4.4(2) and s 18 of the IPR. However, each of those notices wrongly specified that the date by which submissions could be made to the Council was 19 December 2008.

[71] The learned primary judge found that, if the 30 business days notification period had been specified on the notices rather than 15 business days, the notification period would not have expired until 23 January 2009 (or perhaps 27 January 2009 depending on when the notification period began)[5] rather than 19 December 2008 (a deficiency of more than a calendar month). The disparity in actual time was increased by the requirement found in s 3.4.5(b) of the IPA that the notification period must not include any business day from 20 December in a particular year to 5 January in the following year, both days inclusive. His Honour found that this was a "considerable deficiency". No party sought to impugn that finding.

[72] His Honour then referred to other cases in which the overlooking of a longer notification period had been excused under s 4.1.5A of the IPA (*Lagoon Gardens Pty Ltd v Whitsunday Shire Council* [2006] QPEC 14, *Kunapipi Springs Pty Ltd v Whitsunday Shire Council* [2006] QPEC 34, *Consolidated Properties Group Pty Ltd v Brisbane City Council* [2008] QPEC 87) and those in which overlooking a longer notification period had not been excused (S*tockland Developments Pty Ltd v Thuringowa City Council* [2007] QPELR 430 at 441-442, *Jahnke v Cassowary Coast Regional Council* [2009] QPEC 36 at [30]; [2009] QPEC 39).

[73] His Honour noted that in this case both the Council and the Department of Environment and Resource Management (formerly the EPA) supported the granting of relief under s 4.1.5A. The EPA had, after all, already made its submission to the Council recommending a more sensitive environmental approach than that proposed in the development application. In fact the Council did not support the granting of relief under s 4.1.5A but rather adopted a neutral stance. However his Honour also noted that the lack of opposition from those entities to the grant of relief under s 4.1.5A was not determinative; rather the test is that which is set out in the statute.

[74] The jurisdiction to grant relief under s 4.1.5A in a case such as this where statutory requirements in the IPA have not been complied with, arises only if where the court is satisfied that non-compliance has not substantially restricted the opportunity for a person to exercise rights conferred on the person by statute. The primary judge found that the onus lay on the applicant for approval, Aldi, the co-respondent to the appeal pursuant to s 4.1.50(2) of the IPA, to show that that test had been satisfied.

[75] In answering the question of whether he was satisfied that the non-compliance had not substantially restricted the opportunity for a person to exercise rights conferred on the person by statute, the primary judge listed what were described as "a number of good points" made by Mr Litster SC on behalf of the appellant, Lewani Springs. He then referred to the IPA's purposes which included providing opportunities for community involvement in decision-making (s 1.2.3(1)(f)) and ensuring that decision-making processes are accountable, co-ordinated and efficient (s 1.2.3(1)(a)(i)). His Honour held that the latter aim would tend to be promoted by allowing this appeal to proceed to determination on the merits, it being left to the existing parties to ventilate all arguable issues.

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5 His Honour did not find it necessary to resolve this issue.

[76] His Honour referred to the fact that there were no adverse submissions other than that of Lewani Springs. That finding was not accurate. It was accepted by all parties to the appeal that Westfield also objected, although Lewani Springs was the only party which sought to appeal to the Planning and Environment Court.

[77] His Honour also observed that he thought that the absence of additional adverse submissions bespoke "equanimity at the prospect of an Aldi supermarket in the location." He said that the prospect of such a development on the site appeared to be a matter of some notoriety, as another application for a supermarket and similarly sized shopping centre had been rejected by the Planning and Environment Court in *Family Assets Pty Ltd v Gold Coast City Council* [2008] QPELR 448. With respect, the logic of that observation is difficult to follow. The refusal of the Planning and Environment Court to approve a supermarket and shopping centre development on the site in 2008 hardly bespeaks equanimity by members of the public at the prospect of an Aldi supermarket on the site; it rather suggests that members of the public would form the view that any such application would not be consistent with desired outcomes for the site. However both of those observations are findings of fact not susceptible of founding a right to appeal even where they are clearly wrong.

[78] The primary judge's conclusions are set out in [17] of the reasons for judgment:

> "The court has to proceed in the absence of identification by the appellant of any particular person who would have made a submission or considered making one had the public notification deficiencies not occurred and in the absence of evidence that all or any of those who might have seen a sign in Dayflower Street became aware of one or both of the two signs that were placed (which the co-respondent might have adduced). While entertaining misgivings at the extent of truncation of public notification here, I am in the end persuaded that the opportunities for public involvement have not been substantially restricted. Accordingly, the court has a discretion to consider granting s 4.1.5A relief. That gives rise to a balancing exercise which I consider ought to be resolved in favour of the co-respondent. I take into account not only the deficiency in notification period, but also omission of the Dayflower Street sign and the 'de minimis' deficiency, if there was one in delayed postal delivery in respect of neighbouring owners not domiciled locally."

The applicant's submissions

[79] The applicant for leave to appeal, Lewani Springs, identified what it submitted were three errors of law which it identified in its draft grounds of appeal:

(a) the evidence before the Planning and Environment Court was not sufficient to justify the finding that "the opportunities for public involvement have not been substantially restricted";

(b) the Planning and Environment Court was wrongly influenced by "the absence of identification by the appellant, Lewani Springs, of any particular person who would have made a submission or considered making one had the public notification deficiencies not occurred"; and

(c) the exercise of the discretion conferred by section 4.1.5A of the IPA was unreasonable and unjust having regard to the matters in (a) and

> (b) above, in circumstances where the period required by the IPA within which the public was afforded an opportunity to make a submission was truncated by at least 35 calendar days.

[80] The co-respondent, Aldi, argued that Lewani's application for leave to appeal should be refused because the draft notice of appeal did not, it submitted, raise an arguable error of law and no warrant for interfering with the order made by the primary judge was suggested let alone made out. The co-respondent did not cavil with the primary judge's findings of non-compliance with the public notification requirements of the IPA. It argued, however, that ground (a) did not raise an error of law as there is no error of law in making a wrong finding of fact and a finding of fact cannot be challenged on the ground that the evidence was not sufficient to justify the finding. It submitted that the Full Court of the Supreme Court had held in *Ridgewood Development Pty Ltd v Brisbane City Council* [1985] 2 Qd R 48 that questions raised under the predecessor to s 4.1.5A were questions of fact and that decision was relevantly indistinguishable. It further argued that as the statutory test was conditioned on the satisfaction of the Planning and Environment Court, the merits of the matter were immune from review. With regard to ground (b), it submitted that the statement made by the primary judge was correct as a matter of fact and did not involve any question of law. It submitted that ground (c) did not articulate any error of law but rather used the language of a merits complaint and expressly depended upon success on grounds (a) and (b).

[81] The respondent Council supported the decision of the primary judge on appeal. It submitted that the court below had the power under s 4.1.5A because of non-compliance with two of the requirements of the IPA. That court made a finding which the Council submitted was a finding of fact that no person's rights were substantially restricted and, therefore, quite properly proceeded to exercise the discretion open to the court to excuse the relevant non-compliance. The Council therefore submitted that Lewani Springs could not establish any error of law sufficient to warrant a grant of leave to appeal, let alone a likelihood of success in any such appeal.

[82] The applicant's counsel summarised his submissions by arguing that the determination in para [17] of the reasons for judgment of the primary judge that the opportunities for public involvement had not been substantially restricted was made without evidence that reasonably admitted of that conclusion. He submitted that the unchallenged finding in the reasons for judgment that there was a considerable deficiency in the notification period provided, including the extent of that deficiency, was evidence which, even when considered with all of the other evidence, did not reasonably admit of the conclusion that the opportunities for public involvement were not substantially restricted. There is a nice distinction in cases such as the present between an error of fact, which is not reviewable, and an error of law, which is the proper subject of appeal.

[83] In *Ridgewood Development v Brisbane City Council*,[6] the Full Court of the Supreme Court of Queensland considered a statutory predecessor to s 4.1.5A of the IPA, s 22D of *City of Brisbane Town Planning Act* 1964. Section 22D provided:

> "Where in respect of an application to which section 22 applies a provision of that section has not been complied with but the Court considers –

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6 [1985] 2 Qd R 48.

> i) that there has been substantial compliance with the provision;
> ii) that no person has been adversely affected by such non-compliance,
>
> the Court may direct that it be taken that such provision has been complied with and thereupon it shall be taken accordingly."

[84] The provisions of s 22 of the *City of Brisbane Town Planning Act* had not been strictly complied with. Some of the wording on notices required by that section had been omitted; and the notice which was required to be placed on the site at all times during a period of 30 days, had been placed on the site during only part of rather than the whole of the first day although it had otherwise remained there for 30 days. These failures were relatively inconsequential and the judge of the then Local Government Court was satisfied, that there had been substantial compliance with s 22 and that no person had been adversely affected by the non-compliance. He therefore directed that the section was taken to have been complied with. The Full Court held that both the question of substantial compliance and adverse effect were questions of fact. The court held[7] that there was ample material for the judge to conclude that there was substantial compliance and that no person had been adversely affected by the non-compliance and "that being so, it has not been shown that His Honour erred or was mistaken in law in concluding as he did."

[85] In *Regional Land Development Corp No. 1 Pty Ltd v Banana Shire Council*[8] this court considered the ground of appeal that there was an error of law exemplified by what the court referred to as "desultory and unfocussed assertions." The case concerned whether or not the judge erred in law, having found that there was conflict between a proposal and the planning scheme, in not finding that the conflict was significant. The court held, at [23], that questions as to whether evidence satisfies an indeterminate test such as "significance" or "substantiality" are generally questions of fact.

[86] The distinction between questions of fact, which are not reviewable, and questions of law regarding findings of fact which are reviewable, was conveniently set out by Mason CJ in *Australian Broadcasting Tribunal v Bond*:[9]

> "The question whether there is **any evidence of a particular fact is a question of law**: *McPhee v. S Bennett Ltd*[10]; *Australian Gas Light Co. v. Valuer-General*[11]. Likewise, the question **whether a particular inference can be drawn from facts found or agreed is a question of law**: *Australian Gas Light*[12]; *Hope v. Bathurst City Council*[13]. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v. Broken Hill South Ltd*[14]. So, in the context of judicial review, it has been accepted that **the making of findings and the drawing of**

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7 At 53.
8 [2009] QCA 140.
9 (1990) 170 CLR 321 at 355-356; [1990] HCA 33.
10 (1934) 52 WN (NSW) 8 at 9.
11 (1940) 40 SR (NSW) 126 at 137-138.
12 (1940) 40 SR (NSW) 126 at 137-138.
13 (1980) 144 CLR 1 at 8-9; 29 ALR 577.
14 (1941) 65 CLR 150 at 155, 157, 160.

> **inferences in the absence of evidence is an error of law**: *Sinclair v. Maryborough Mining Warden*[15]. (notes in original) (emphasis added)."

[87] In *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 335-336 Fitzgerald P held that if the facts found could not support the conclusion reached as to a statutory test being satisfied then that amounted to an error of law:

> "A conclusion that such a provision is met without evidence which 'reasonably admits of' that conclusion is consequently a mistake or error in law."

Purpose of notification requirements

[88] The question of whether a judge, having found that a failure to comply with notification requirements constitutes a "considerable deficiency", may nevertheless be satisfied that the non-compliance has not substantially restricted the opportunity for a person to exercise the persons' statutory rights, first requires consideration as to what those statutory rights are. As Keane JA, with whom McMurdo P and Williams JA agreed, observed in *Ramsgrove Pty Ltd v Beaudesert Shire Council*:[16]

> "The purpose of the notification requirements in s 3.4.4(1)(b) of the IPA is discernible from s 3.4.1 of the IPA which provides that notification of an application serves the purpose of giving members of the community 'the opportunity to make submissions, including objections, that must be taken into account before an application is decided'."

[89] Section 3.4.1(b) also identifies another statutory right given by the notification stage. It gives a person "the opportunity to secure the right to appeal to the court about the assessment manager's decision."

[90] Section 3.4.9(1) of the IPA provides that during the notification period, any person, other than a concurrence agency, may make a submission to the assessment manager about the application. If the notification period is repeated for any reason such a submission will, subject to the qualifications set out in s 3.4.9A(1)(a), be taken to be a submission for the later notification period. Once the development application is approved or refused, the assessment manager must inform each submitter under s 3.5.15. The decision must inform any submitter of the rights of appeal (s 3.5.15(2)(m)). Submitters must also be informed if the assessment manager agrees with any representations made by the applicant (s 3.5.17(2)(b)). Whether or not submissions are made during the notification period affects when the approval takes effect (s 3.5.19)) and therefore when development may start or when the development application may be called in (s 3.6.5(b)). A submitter for a development application may appeal to the Planning and Environment Court against the grant of a development approval or a condition of, or lack of condition for the grant (s 4.1.28).

[91] These are the rights conferred on a person by the IPA which the court must be satisfied that non-compliance with a requirement of the IPA has not substantially restricted the opportunity for a person to exercise. The significance attached by the legislature to the notification period is amply demonstrated by the fact that it is only by making a submission during the notification period that the rights referred to above arise.

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15 (1975) 132 CLR 473 at 481, 483; 5 ALR 513.

16 [2005] QCA 434 at [28]; LGERA 43 at 50.

[92] The importance of the right of members of the public to be adequately notified of applications, approvals and their conditions and therefore to have the opportunity to exercise their statutory rights in this area of the law which so significantly affects the social and physical environment in which people live has been recognised in many cases. In *Stockland Developments Pty Ltd v Thuringowa City Council,*[17] for example, the Court of Appeal held that compliance with s 3.1.6, an application for a preliminary approval which would vary the effect of any local planning instrument for the land, was not only an essential pre-requisite to the assessment process but:

> "also necessary to ensure that Council and **potential submitters** are given a clear understanding of the effect approval of the application will have upon the existing planning scheme.[18] The need to ensure that **potential objectors** to variations in existing planning arrangements **should be given a meaningful opportunity to address proposals** for such variations **has long been recognised as a consideration of the first importance in planning law**. It is unlikely that the legislature intended that those who might wish to oppose the application should be left to draw their own conclusions as to the effect of the application if granted (note in original, emphasis added)".

[93] *Stockland* was referred to by Robin DCJ in *Consolidated Properties Group Pty Ltd v Brisbane City Council*[19] when his Honour made an order under s 4.1.5A of the IPA where such an order was not opposed by the appellant and where there were potential adverse impacts on the educational opportunities the co-respondent school would be able to offer its students if there was delay which would be the only effect of the court not exercising its power under s 4.1.5A.

[94] In *Consolidated Properties*, his Honour also referred to his own earlier decision at first instance in *Stockland Developments Pty Ltd v Thuringowa City Council*[20] where he held at [36]:

> "it should not be thought that the court will readily overlook or excuse an unjustified curtailment of the period of public notification, which bodes to deprive citizens of the opportunity to learn of and make submissions about a development application."

[95] In *Stockland Developments Pty Ltd v Thuringowa City Council*, as in this case, the co-respondent had wrongly advertised for 15 business days rather than 30 business days as the relevant notification period; the effect of the shorter notification period was that it ended before the Christmas/New Year period which had a dramatic effect on the actual time which should have been made available for submissions to be made; the inadvertent error was made by the co-respondent; and the only objectors were commercial rivals. In that case, his Honour said "what is known of other potential submitters suggests they would have favoured the proposal." Nevertheless his Honour refused to exercise the excusal power under s 4.1.5A.

[96] His Honour there referred to the fact that if a power or function is conferred by the IPA on an entity (which would include the assessment manager and the court), the entity must perform the function or exercise the power in a way that advances the

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17 [2007] QCA 384 at [44].

18 cf *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 257-258.

19 [2008] QPEC 87.

20 [2007] QPELR 430.

IPA's purpose. Section 1.2.3 set out an inclusive list of how the IPA's purposes are advanced. They include (s 1.2.3(1)(f)) "providing opportunities for community involvement in decision making."

[97] A power must be exercised consistently if it is not to appear that its exercise is arbitrary or capricious. Nor should it be exercised to frustrate the legislative intent: see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 quoted with approval by Jerrard JA in *Metrostar Pty Ltd v Gold Coast City Council.*[21] There appears to be no principled distinction between *Stockland Developments Pty Ltd v Thuringowa City Council* and the present case. The different outcomes therefore suggest inconsistency and consequently arbitrariness in decision making.

[98] In the present case the learned primary judge referred to s 1.2.3(1)(f) and also to the factor found in s 1.2.3(1)(a)(i) of "ensuring decision-making processes are accountable, coordinated and efficient." Lest any of the factors be neglected, it is perhaps desirable to set out s 1.2.3(1) of the IPA in full. It provides:

> "(1) Advancing this Act's purpose includes –
>
> (a) ensuring decision-making processes –
>
> (i) are accountable, coordinated and efficient; and
>
> (ii) take account of short and long-term environmental effects of development at local, regional, State and wider levels; and
>
> (iii) apply the precautionary principle; and
>
> (iv) seek to provide for equity between present and future generations; and
>
> (b) ensuring the sustainable use of renewable natural resources and the prudent use of non-renewable natural resources; and
>
> (c) avoiding, if practicable, or otherwise lessening, adverse environmental effects of development; and
>
> (d) supplying infrastructure in a coordinated, efficient and orderly way, including encouraging urban development in areas where adequate infrastructure exists or can be provided efficiently; and
>
> (e) applying standards of amenity, conservation, energy, health and safety in the built environment that are cost effective and for the public benefit; and
>
> (f) providing opportunities for community involvement in decision making."

[99] The need for accountability in decision-making processes, the need to avoid or lessen adverse environmental effects of development and the need to provide opportunities for community involvement in decision making no doubt all contributed to the decision of the legislature to allow 30 business days (excluding the Christmas/New Year period) for public notification of a development application over land that was within 100 metres of a wetland. In this case, the site itself included wetlands. The wetland was not, contrary to the finding made by the learned primary judge, presently separated from the site by a roadway. A wetland is a significant environmental resource. As Wilson DCJ observed in *Titanium Enterprises Pty Ltd v Caloundra City Council*:

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21 [2006] QCA 410 at [23].

> "It was not in dispute that wetlands are important. They are productive, manifest high levels of biological diversity, and support a large range and number of plants, birds, mammals, reptiles, amphibians, fish and invertebrates." [22]

Members of the community, either as individuals or as groups, are likely to need the extra time to martial the material and resources to object to a development on environmental grounds. It is hardly to be expected that those grounds will be earnestly argued by those who are merely commercial rivals, who have business rather than environmental reasons to oppose the development.

[100] The learned primary judge's decision to excuse compliance was based in this case on the absence of identification by the appellant of any particular person who would have made a submission or considered making one had the public notification deficiencies not occurred. The onus rested, however, as his Honour correctly observed, not on the appellant, Lewani Springs, but on the co-respondent, Aldi. Lewani Springs would be unlikely to be able to identify persons who would have made or considered making a submission despite the considerable deficiency in the notification period without engaging in a public advertising process of similar duration and intensity to the public notification required of the co-respondent under the IPA so that such persons or groups could be identified. In spite of his earlier observation, the learned primary judge, when applying the test of whether the non-compliance, or partial compliance, *had not substantially restricted* the opportunity for a person to exercise the rights conferred on the person by the IPA or any other Act, inadvertently placed the onus on the *appellant* to show that non-compliance *had substantially restricted* the opportunity for identified persons to exercise rights under the IPA, not on the co-respondent, where the onus should lie.

[101] The question the primary judge must address under s 4.1.5A, is whether the court is satisfied that the non-compliance (in this case, a "considerable deficiency" in the notification period) *has not substantially restricted* the opportunity for a person to exercise the rights conferred on the person by the IPA; not whether the non-compliance has substantially restricted that opportunity. The distinction is subtle but significant particularly as the asking of the wrong question has the effect of reversing the onus of proof.

[102] A reversal of the onus of proof as occurred here is an error of law. That error of law wrongly influenced the decision reached and indeed features in the very paragraph in which his Honour reached his conclusion. It could not be said that the co-respondent had discharged the onus of proof cast upon it for excusal. As the decision was infected by error of law it should be set aside. The applicant therefore is entitled to succeed on ground (b) of the proposed notice of appeal.

[103] The application for leave to appeal should be granted. Because of the way the application for leave was argued it is also convenient to determine the appeal. The appeal should be allowed. The matter should be remitted to the Planning and Environment Court to allow the applicant's appeal to that court given the admitted deficiencies in public notification of the development application which have not been excused.

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22 [2006] QPEC 106 at [39].