SUPREME COURT OF QUEENSLAND

CITATION:	*Bremer Waters Pty Ltd v Ipswich City Council* [2013] QCA 392
PARTIES:	**BREMER WATERS PTY LTD** (applicant) **v** **IPSWICH CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 6289 of 2013 P & E Appeal No 4793 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2013
JUDGES:	Muir and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal refused.** **2. The applicant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – CONDITIONS – CONDITIONS REQUIRING DEVELOPER CONTRIBUTIONS – GENERALLY – where the respondent Council approved the applicant's development application for a material change of use of land for a retirement community – where the approval was subject to conditions, including condition 24 which required the payment of infrastructure contributions – where, at relevant times, the source of power to impose a condition regarding infrastructure was s 6.1.31 of the *Integrated Planning Act* 1997 (Qld) (the IPA) – where, in response to the applicant's request to change condition 2 of the development approval to acknowledge limited occupancy of the dwelling units, the Council changed conditions 2 and 24 – where the primary judge dismissed the applicant's application for declaratory relief under the *Sustainable Planning Act* 2009 (Qld) (the SPA) to the effect that the conditions were beyond power – where the applicant contends that there was no power to impose condition 24 as

the relevant planning scheme policies (the 1999 policies) were not validly adopted as the Council did not substantially comply with the Sch 3 processes, as required by s 2.1.20 of the IPA – where the applicant contends that s 6.1.31(2)(c) of the IPA maintains the Council's legal position as if the *Local Government (Planning and Environment) Act* 1990 (Qld) (the P&E Act) had not been repealed – where the applicant contends that there is no power under the P&E Act to impose conditions requiring contributions to the cost of infrastructure other than water supply and sewerage infrastructure – where the applicant contends that the 1999 water supply and sewerage policy was invalid as it was not self-contained, as required by s 6.2 of the P&E Act – where the applicant contends that condition 24 could not lawfully require the applicant to pay contributions in accordance with the 2004 policies which were not in force when condition 24 was imposed – where the applicant submits that the Council had no power to unilaterally change condition 24 following the applicant's request to change condition 2 – whether there was an error of law sufficient to warrant the granting of leave to appeal under s 498 of the SPA

Integrated Planning Act 1997 (Qld), Reprint No 4, s 2.1.19, s 2.1.20, s 3.5.32(1)(b), s 3.5.33, s 6.1.1, s 6.1.31, Sch 3, Sch 10
Local Government (Planning and Environment) Act 1990 (Qld), s 6.2
Sustainable Planning Act 2009 (Qld), s 498

Arnold v Hunt (1943) 67 CLR 429; [1943] HCA 23, considered
Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd (2002) 209 CLR 651; [2002] HCA 43, cited
Dorfler v Pine Rivers Shire Council [1994] 1 Qd R 507; [1993] QCA 167, considered
FKP Residential Developments P/L v Maroochy Shire Council & Anor [2010] QPELR 415; [2009] QCA 403, cited
Hervey Bay Developments Pty Ltd v Hervey Bay City Council [1996] 1 Qd R 252; [1994] QCA 216, cited
Ipswich City Council v Bremer Waters Pty Ltd [2013] QPEC 20, related
Manchester Corporation v New Moss Colliery Ltd [1906] 2 Ch 564, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Regional Land Development Corporation No 1 Pty Ltd v Banana Shire Council (2009) 175 LGERA 115; [2009] QCA 140, cited
Ridgewood Development Pty Ltd v Brisbane City Council [1985] 2 Qd R 48, cited
Scurr v Brisbane City Council (1973) 133 CLR 242; [1973] HCA 39, cited

VAW (Kurri Kurri) Pty Ltd v Scientific Committee (established under s 127 of the Threatened Species Act 1995) (2003) 58 NSWLR 631; [2003] NSWCA 297, considered
Wise v Maroochy Shire Council [1999] 2 Qd R 566; [1998] QCA 349, cited

COUNSEL: D R Gore QC, with S Fynes-Clinton, for the applicant
M Hinson QC, with S Ure, for the respondent

SOLICITORS: McCullough Robertson for the applicant
King & Company for the respondent

[1] **MUIR JA**: **Introduction** The applicant, Bremer Waters Pty Ltd, applies for leave to appeal under s 498 of the *Sustainable Planning Act* 2009 (Qld) (the SPA) against that part of the order of a judge of the Planning and Environment Court made on 28 May 2013 dismissing an application by the applicant for declarations which, if made, would have had the effect of determining that certain requirements to make monetary contributions towards the cost of providing infrastructure purportedly imposed on the applicant by the respondent Council, were unlawful.

[2] By a negotiated decision notice dated 13 February 2002, the Council approved a development application made by Bremer in May 2001 for a material change of use of land for a retirement community containing 161 residential units and a manager's residence.

[3] The development approval was subject to conditions, including condition 24 which required the payment of infrastructure contributions. Condition 24 provided:[1]

> "**24. Contributions**
>
> (a) In accordance with the relevant Planning Scheme Policies, the Developer shall pay, prior to the approval of any application for Building Works for Stage 1 of the development, including the Community Building and the Manager's Residence, the following monies to Council:–
>
> (i) Roadworks Contribution = $26 267.00
>
> (ii) Social Infrastructure Contribution = $712.00
>
> (iii) Open Space (Parks) Infrastructure Contribution = $3 559.00
>
> (iv) Water Supply Contributions = $3 766.00
>
> (v) Sewerage Contributions = $4 725.00
>
> (b) In accordance with the relevant Planning Scheme Polices, the Developer shall pay, prior to the approval of any application for Building Works for a dwelling unit in any of the stages of the development, the following monies to Council per unit, dependant on the number of bedrooms of the unit for which approval is being sought:-
>
> (i) One-bedroom Units
> Roadworks Contribution = $769.00
> Social Infrastructure Contribution = $131.00

[1] *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [5].

Open Space (Parks) Infrastructure Contribution = $653.00
Water Supply Contributions = $691.00
Sewerage Contributions = $867.00

(ii) Two-bedroom Units
Roadworks Contribution = $1 153.00
Social Infrastructure Contribution = $196.00
Open Space (Parks) Infrastructure Contribution = $979.00
Water Supply Contributions = $1 037.00
Sewerage Contributions = $1 301.00

(iii) Three-bedroom Units
Roadworks Contribution = $1 537.00
Social Infrastructure Contribution = $229.00
Open Space (Parks) Infrastructure Contribution = $1 143.00
Water Supply Contributions = $1 209.00
Sewerage Contributions = $1 517.00

(c) Calculation of contributions are based on the infrastructure contribution rates applicable at the date a development application was lodged with Council. The contributions above shall be applicable for a period of twelve (12) months from the date of the development approval, and thereafter shall be based on the infrastructure contribution rates applicable at the date when payment is made."

[4] Both the Council and Bremer brought proceedings in the Planning and Environment Court for declaratory relief. Bremer sought declaratory relief under the SPA to the effect that the conditions were beyond power and an order for the refund of monies paid by it in respect of the conditions. An issue in these proceedings was the lawfulness of what were referred to in condition 24 as "the relevant Planning Scheme Policies".

[5] There were four relevant policies (the 1999 policies) in existence in February 2002:

(a) the Roadworks Infrastructure Contributions Policy;

(b) the Social Infrastructure Contributions Policy;

(c) the Open Space (Parks) Infrastructure Contributions Policy; and

(d) the Water Supply and Sewerage Infrastructure Contributions Policy.

[6] In November 2007, Bremer requested the Council to change condition 2 of the development approval to limit occupancy to two persons per dwelling.[2] The letter also sought deletion of the requirement to pay contributions for the Community Building, a matter only addressed in condition 24. In 2008, the Council changed conditions 2 and 24. The changed conditions are quoted in paragraph [9] of the primary judge's reasons.[3] The policies then in existence were what the parties referred to as the 2004 policies.

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2 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [8].
3 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20.

[7] In February 2002, s 6.1.31 of the *Integrated Planning Act* 1997 (Qld) (the IPA) was the source of power to impose a condition on a development approval requiring payment of a contribution towards the cost of supplying infrastructure. It relevantly provided:[4]

> "**6.1.31 Conditions about infrastructure for applications**
>
> (1) Subsection (2) applies if—
>
> (a) a local government is deciding a development application under a transitional planning scheme or an IPA planning scheme; and
>
> (b) the local government has—
>
> (i) a local planning policy about infrastructure or a planning scheme policy about infrastructure; or
>
> (ii) a provision, that was included before the commencement of this section, in its planning scheme about monetary contributions for specified infrastructure.
>
> (2) For deciding the aspect of the application relating to the local planning policy, the planning scheme policy or planning scheme provision—
>
> (a) chapter 5, part 1 does not apply; and
>
> (b) section 3.5.32(1)(b) does not apply; and
>
> (c) the local government may impose a condition on the development approval requiring land, works or a contribution towards the cost of supplying infrastructure (including parks) as if the repealed Act had not been repealed." (footnotes omitted)

[8] Bremer contended in the Planning and Environment Court that:

(a) the 1999 policies were not validly made;

(b) condition 24 was not validly imposed;

(c) if condition 24 was validly imposed, it could only lawfully authorise the imposition of conditions under polices in force when the condition was imposed; and

(d) the Council had no power to change condition 24 in 2008.

[9] The Planning and Environment Court found for the Council in respect of contentions (a), (b) and (d) and, in respect of (c), held that condition 24 could lawfully require contributions to be paid under policies in force at the date of payment.

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4 *Integrated Planning Act* 1997 (Qld), Reprint No 4.

The grounds of appeal

[10] The Council summarised the grounds of appeal as follows:

(a) all of the 1999 policies were invalid with the result that s 6.1.31(2)(c) of the IPA was not engaged and there was no power to impose condition 24 (the s 2.1.20 ground);

(b) in any event there was no power under s 6.1.31 to impose conditions requiring a contribution towards the cost of supplying infrastructure other than water supply and sewerage infrastructure (the s 6.1.31(2)(c) ground);

(c) the 1999 water supply and sewerage policy was invalid because it was not self-contained (the s 6.2 ground);

(d) condition 24 could not lawfully require contributions to be paid in accordance with the 2004 policies which were not in force when condition 24 was imposed (the 2004 policies ground);

(e) the Council had no power to change condition 24 (the s 3.5.33 ground).

The s 2.1.20 ground

[11] The primary judge found, in effect, that the 1999 policies could have been adopted validly only pursuant to s 2.1.19 and s 2.1.20 of the IPA. There was no challenge to the correctness of this finding. Sections 2.1.19 and 2.1.20 relevantly provided:

> "**2.1.19 Process for making or amending planning scheme policies**
>
> The process stated in schedule 3 must be followed for making or amending a planning scheme policy.
>
> **(2)** The process involves 3 stages—
>
> • proposal stage
>
> • consultation stage
>
> • adoption stage.
>
> **2.1.20 Compliance with sch 3**
>
> Despite section 2.1.19, if a planning scheme policy is made or amended in **substantial compliance** with the process stated in schedule 3, the planning scheme policy or amendment is valid so long as any noncompliance has not—
>
> (a) adversely affected the awareness of the public of the existence and nature of the proposed planning scheme policy or amendment; or
>
> (b) restricted the opportunity of the public under schedule 3 to make properly made submissions on the proposed policy or amendment." (emphasis added)

[12] In stating his conclusions in relation to the ground under consideration, the primary judge said:[5]

> "At the end of the day, my view is that the second 'adoption' of the policies as part of the new Planning Scheme was a new action by the Council capable of having useful effect by virtue of s 2.1.20."

[13] His Honour dealt with "substantial compliance" as follows:[6]

> "[56] Substantial compliance being a question of fact to be decided in the particular circumstances of each case, there was 'substantial compliance' here. In my view, the conclusion is the same if the quantitative/qualitative analysis proposed by [counsel for Bremer] is undertaken I think a broad approach should be employed, rather than one focusing on detail. In my opinion it is highly significant that the policies were [put] before the public as an integral part of putting out the proposed new planning scheme.
>
> [57] That is not an end of the matter. Although, 'substantial compliance' may be established, there are further requirements for the saving of a planning scheme policy under s 2.1.20, namely that the non compliance has not –
>
> (a) adversely affected the awareness of the public, of the existence and nature of the proposal; or
>
> (b) restricted the opportunity which schedule 3 requires to make submissions.
>
> The requirements in (a) and (b) are satisfied."

[14] The primary judge thus found substantial compliance with the Sch 3 process and that the requirements of s 2.1.20 as to the absence of adverse effect and the non-restriction of opportunity to make submissions were satisfied.

[15] Bremer challenged these findings on the basis that:

(a) There was no scope for the application of s 2.1.20 if the Council did not even purport to follow the process required by s 2.1.19. It is a condition precedent to the operation of s 2.1.20 that "a planning scheme policy is made … in … compliance with the process stated in schedule 3",[7] albeit that the compliance need only be substantial.

The primary judge concluded, nevertheless, that substantial compliance may occur "by happy accident".[8] That misconstrues s 2.1.20 which applies only in a case where a local government follows the process stated in Sch 3;

(b) In view of the limited extent of imputed compliance and of the finding of the primary judge that the process followed by the Council was "confusing",[9] it was not reasonably open to conclude that s 2.1.20 was engaged (i.e. that the facts fell within s 2.1.20);

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5 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [46].
6 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [56]–[57].
7 *Integrated Planning Act* 1997 (Qld), s 2.1.20.
8 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [51].
9 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [40].

(c) The primary judge relied on the principle that the validity of the exercise of a statutory power is not affected by a mistake as to the source of the power actually engaged. As a matter of construction of the IPA, however, it is apparent that without s 2.1.20, non-compliance with the Sch 3 process referred to in s 2.1.19 would result in invalidity;[10]

(d) For the above reasons the 1999 polices were invalid. Section 6.1.31(2)(c) of the IPA could not be engaged because, for the purposes of s 6.1.31(1)(b), the Council neither had a "local planning policy about infrastructure" (i.e. one made under the *Local Government (Planning and Environment) Act* 1990 (Qld) (the P&E Act) before the IPA commenced,[11] nor a "planning scheme policy about infrastructure" (i.e. one made under the IPA).[12]

Consideration

[16] Whether there was substantial compliance with the process stated in Sch 3 is not dependent on the Council's intention or on whether it purported to act under a particular head of power.

[17] The primary judge relied on the following passage from the reasons of Spigelman CJ in *VAW (Kurri Kurri) Pty Ltd v Scientific Committee (established under s 127 of the Threatened Species Act 1995)*,[13] in which his Honour discussed relevant authorities:

> "22 In *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184, to which Bowen CJ referred without explaining its inapplicability, Fullagar J said: '… It is, I think, a settled principle that an act purporting to be done under one statutory power may be supported under another statutory power …'.
>
> 23 To similar effect is the statement in a five judge joint judgment of the High Court in *Brown v West* (1990) 169 CLR 195 at 203, delivered after *Australian Broadcasting Tribunal v Saatchi & Saatchi*: '… However, the validity of the Tribunal's determinations is unaffected by mistaking the source of the power to make them …'. Their Honours relied as authority for this proposition on *Moore v Attorney-General (Irish Free State)* [1935] AC 484 at 498 and *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487.
>
> 24 Brennan J relied on the same authorities in *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 for the following proposition: '… When a power is exercised, a mistake in the source of the power works no invalidity. Validity depends simply on whether a relevant power existed'. McHugh J came to a similar conclusion (at 469) adapting a proposition from an analogous context: 'The question is not one of intention but of power, from whatever source derived'."

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10 *Scurr v Brisbane City Council* (1973) 133 CLR 242; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

11 *Integrated Planning Act* 1997 (Qld), s 6.1.1.

12 *Integrated Planning Act* 1997 (Qld), s 2.1.16; see also Sch 10.

13 (2003) 58 NSWLR 631 at 637.

[18] By virtue of s 2.1.20, the Council was excused from the requirement under s 2.1.19 of following the process stated in Sch 3 for making or amending a planning scheme policy if the policy was made or amended in substantial compliance with the process stated in Sch 3:[14]

> "… so long as any noncompliance has not–
>
> (a) adversely affected the awareness of the public of the existence and nature of the proposed planning scheme policy or amendment; or
>
> (b) restricted the opportunity of the public under schedule 3 to make properly made submissions on the proposed policy or amendment."

[19] Even if the process followed by the Council was "confusing" it does not follow that the requirements of s 2.1.20 were not satisfied. The primary judge considered the question of substantial compliance at considerable length. In paragraph [50] of his reasons he set out the argument advanced in that respect by Bremer. In stating his views on Bremer's submissions the primary judge observed, "In my opinion, the 'substantial compliance' may occur by happy accident".[15] The primary judge stated:[16]

> "In the process actually followed, one may discern the three stages described in s 2.1.19(2) and separately in the three Parts of Schedule 3 – proposal, consultation and adoption – provided that, as I think is the case in this context, use of the term 'adopt' and variants is equivalent to 'proposed' and variants: It was always expressly stated and intended that a consultation stage would occur as part and parcel of that for the new planning scheme – which is how things happened in the event. While separate advertisement of the policies, naming them, was not undertaken as required by Schedule 3, they were described collectively as 'components' of the scheme in newspaper advertising and highlighted in the 'information' handout as follows:
>
> '**SUPPORTING DOCUMENTS**
>
> A wide range of Planning Scheme Policies and Planning Studies provide further detail in relation to particular planning and design issues relating to development in the City.
>
> There are separate Planning Studies for the Strategic Plan and each of the Structure Plans, plus sixteen (16) Planning Scheme Policies dealing with a diverse range of issues, including development codes and infrastructure charges.' (Page 2)"

[20] The primary judge considered whether the requirements of paragraphs (a) and (b) of s 2.1.20 had been met and concluded that they had. It has not been demonstrated that he was not entitled to reach that conclusion.

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14 *Integrated Planning Act* 1997 (Qld), s 2.1.20.

15 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [51].

16 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [52].

[21] Bremer's contention that, without s 2.1.20, non-compliance with the Sch 3 processes referred to in s 2.1.19 would result in invalidity is, with respect, difficult to follow. Section 2.1.20 exists and s 2.1.19 and s 2.1.20 must be read, construed and applied together.

[22] *Scurr v Brisbane City Council*,[17] on which Bremer relied, was concerned with the sufficiency of a notice required to be published providing particulars of a proposed shopping centre development. Stephen J, with whose reasons the other members of the Court agreed, held, in effect, that the "particulars of the advertisement will either be sufficient to effect the legislative purpose of giving notice to the public of the application or, if not, will not amount even to a substantial compliance with the statute". The case thus concerned a document which either provided the necessary particulars or it did not.

[23] As the Council submitted, the subject provisions are of a different character to those considered in *Scurr*. Section 2.1.20 necessarily contemplates that strict compliance with s 2.1.19 is not required and that what must be the subject of substantial compliance is a process. The primary judge carefully considered the process followed and concluded that there had been substantial compliance.

[24] As the Council submitted, whether or not there has been substantial compliance is a question of fact and degree.[18] It was not suggested that the primary judge, in this regard, misunderstood the concept of "substantial compliance" or otherwise made an error of law. Nothing in the IPA required the Council in making a policy to identify the power it was exercising in so doing. No error of law was established and this ground was not made out.

The s 6.1.31(2)(c) ground

[25] The issue between the parties in this regard was identified by the primary judge as follows:[19]

> "[14] There is no challenge to the contributions sought in respect of water supply or sewerage headworks. The respondent's point is that the Council in imposing a condition like 24 was limited to what the *Local Government (Planning and Environment) Act 1990 ('PEA'*) allowed - which did not go beyond water supply headworks and sewerage headworks contributions: s 6.2. Under sub-section (6)(b) it was a requirement that a local planning policy 'specified a method' for determining amounts. The *PEA* provided for conditions for park contributions, but only where approval of a subdivision was applied for, not the case here.
>
> [15] By the dates of the Council's adoption of the contributions policies relied on in 1999, the *PEA* had been repealed, and replaced by the *IPA*, which was less restrictive. The contest between the parties here comes down to which Act applied. The transitional provision is s 6.1.31 of *IPA*:

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17 (1973) 133 CLR 242 at 256.

18 *Ridgewood Development Pty Ltd v Brisbane City Council* [1985] 2 Qd R 48 at 52; *Regional Land Development Corporation No 1 Pty Ltd v Banana Shire Council* (2009) 175 LGERA 115 at 122 [23].

19 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20.

> **'6.1.31 Conditions about infrastructure for applications**
>
> (1) Subsection (2) applies if—
>
> (a) a local government is deciding a development application under a transitional planning scheme or an IPA planning scheme; and
>
> (b) the local government has—
>
> (i) a local planning policy about infrastructure or a planning scheme policy about infrastructure; or
>
> (ii) a provision, that was included before the commencement of this section, in its planning scheme about monetary contributions for specified infrastructure.
>
> (2) **For deciding the aspect of the application relating to the local policy**, the planning scheme policy or planning scheme provision—
>
> (a) chapter 5, part 1 does not apply; and
>
> (b) section 3.5.32(1)(b) does not apply; and
>
> (c) **the local government may impose a condition on the development approval requiring land, works or a contribution towards the cost of supplying infrastructure (including parks) as if the repealed Act had not been repealed.**'" (emphasis added)

[26] Bremer argued that the meaning of the words "as if the repealed Act had not been repealed" in s 6.1.31(2)(c) is critical. It maintains the legal position that a local government would have been in if the P&E Act had not been repealed and the IPA had not been enacted.[20] The effect of the words is that the Council's power to impose conditions on the development approval was coextensive with its power under the P&E Act to impose conditions requiring a contribution towards the cost of supplying infrastructure. That power did not extend to three of the infrastructure matters.

[27] The primary judge's conclusion that the reference to "infrastructure" in s 6.1.31(2)(c) had the meaning given to it in Sch 10 of the IPA[21] overlooks the mandate that a local government is returned to its pre-IPA position. It also introduces the odd consequence that a local government's power under the transitional provision is seemingly wider than its intended power under ch 5 Pt 1 of the IPA, which contemplates charges for "development infrastructure items", which is a narrower concept than "infrastructure", which is defined in Sch 10 of the IPA.

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[20] Cf *Manchester Corporation v New Moss Colliery Ltd* [1906] 2 Ch 564 at 574, 576-577.

[21] *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [20].

[28] By a 2003 Amendment Act, the central expression in s 6.1.31(2)(c) was replaced with the expression "under a policy or provision mentioned in subsection (1)(b)". The primary judge accepted the Council's argument (which referred to the accompanying explanatory notes) that the purpose of the amendment was not to change anything, but merely to clarify.[22] The difficulties in using such amendments in construing a statutory provision are well known[23] and the difficulties are compounded when reliance is placed upon explanatory material.

[29] On the approach accepted by the primary judge s 6.1.31(2)(c) would have the same meaning even if the critical words under consideration were omitted.

Consideration

[30] The primary judge accepted the Council's argument that if the legislature had intended to limit the conditions power in s 6.1.31 to water supply and sewerage headworks it would have done so expressly. Section 6.1.31(2) is concerned with the method by which contributions may be exacted, not with the subject matter, in the sense of categories of contributions that may be provided for in policies and in turn in development conditions. In the primary judge's view the express exclusion in s 6.1.31(2)(b) of s 3.5.32(1)(b) was a "clear indication that conditions with respect to community infrastructure (widely defined) could be imposed".[24] Section 3.5.32(1)(b) provided at relevant times that:

> "**3.5.32 Conditions that can not be imposed**
>
> (1) A condition must not –
>
> …
>
> (b) require a monetary payment for the capital, operating and maintenance costs of, or works to be carried out for, community infrastructure; or …"

[31] The Council contended, and I accept, that there was in fact power under the P&E Act to impose conditions requiring contributions towards the cost of road works infrastructure, social infrastructure and open space (parks) infrastructure.[25] The Council identified a number of decisions in which the validity of monetary contribution conditions had been the subject of contention and where in some cases they were upheld and in other cases rejected on the basis of lack of merit rather than for infringing any principle against their application.[26]

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22 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [19].

23 *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 669 [52]; *FKP Residential Developments P/L v Maroochy Shire Council & Anor* [2009] QCA 403 at [2] per Fraser JA.

24 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [17].

25 *Wise v Maroochy Shire Council* [1999] 2 Qd R 566; *Hervey Bay Developments Pty Ltd v Hervey Bay City Council* [1996] 1 Qd R 252.

26 *Grant v Pine Rivers Shire Council* [1994] QPELR 99 at 101-102; *Hewbridge Pty Ltd v Mackay City Council* [1999] QPELR 371 at 372, 374 (drainage contributions); *Crengate Pty Ltd v Caloundra Shire Council* [1995] QPLR 247 at 249–250 (park or open space contributions); *Australian International College of Language v Gold Coast City Council* [1994] QPLR 346 at 350 (off street and off site parking contributions); *Coglan v Burnett Shire Council* [1996] QPELR 122 at 125–127 (road works contributions).

[32] The primary judge's reasoning, with respect, is unexceptional and a fundamental underlying premise of Bremer's argument, that there was no power under the P&E Act to impose conditions requiring contributions towards the cost of infrastructure other than water supply and sewerage infrastructure, cannot be accepted.

The s 6.2 ground

[33] This issue concerned the Council's policy in respect of contributions for water supply and sewerage. Bremer argued that, having regard to s 6.1.31(2)(c) of the IPA, a relevant condition could only be imposed as if the P&E Act had not been repealed. Section 6.2 of the P&E Act, dealing with contributions to water supply or sewerage headworks, limited the Council's power to impose a condition to one "determined in accordance with" (s 6.2(2)) or "determined under" (s 6.2(6)) a local planning policy. The applicant's contention was that these provisions required the policy to be self-contained. It asserted that the relevant 1999 policy did not comply with the requirements of s 6.2(2) or s 6.2(6) as it directed the reader to another document, the Local Government's Register of General Charges in order to ascertain the "current infrastructure unit charges" which were included in a formula contained in the policy for the calculation of infrastructure contributions.[27]

[34] The primary judge relevantly held:[28]

> "As to incorporation by reference being admissible (if not specifically forbidden) see *Lamb* [2007] QCA 149 at [15] ff. Here, the condition in the approval of 22 January 2002 was valid, in my view, because the requirement of the policies was sufficiently met. It may be there are times since s 2.1.18 came into effect when there could arguably be a problem flowing from the contributions policy relied on not being self-contained, but involving reliance for one or more elements of the calculation on some other document prepared by the Council. The parties should be afforded an opportunity of making submissions about this; if an issue of practical importance arises. However, it could well be that the position at the time of actual payment governs, that the Council can demand contributions at the dollar rate per unit set out in the policy or – if there is none – can demand the most recent lawful rate that might have been applied. It is unlikely that the solution is that liability to pay contributions under the condition disappears. These are considerations for another day."

[35] It was submitted that the primary judge erred in so concluding as:

(a) when a price is required to be fixed by statute, the price must be fixed in the body of the subordinate legislation itself, and cannot be fixed by some extraneous document;[29] and

(b) the Court of Appeal has preferred the view that subordinate legislation is invalid if it directs the reader to another document to ascertain the law, particularly if the extraneous material contains something essential, rather than subsidiary.[30]

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27 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [26].

28 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [28].

29 *Arnold v Hunt* (1943) 67 CLR 429 at 432 per Rich J; at 433 per McTiernan J.

30 *Dorfler v Pine Rivers Shire Council* [1994] 1 Qd R 507 at 513.

[36] It was asserted that by parity of reasoning, the relevant 1999 policy was invalid.

Consideration

[37] Section 6.2(2) of the P&E Act gave power to impose a condition requiring payment of an amount "determined in a accordance with a local planning policy". Section 6.2(6)(b)(i) provided that the amount of any contribution is "to be determined under a local planning policy which is to specify the method adopted by the local government in determining the amount of any contribution". The Council argued that s 6.2 does not provide that the amount of a contribution must be "fixed by" a policy or that it be "stated in" a policy. The Council's argument should be accepted. A payment may be determined under a policy where that policy specifies the means of calculation of the payment either within the body of the policy or in part by reference to another document.

[38] *Arnold v Hunt*[31] and *Dorfler v Pine Rivers Shire Council*,[32] on which Bremer relied, do not assist Bremer's argument. *Arnold* was concerned with a regulation which empowered the Commonwealth Prices Commissioner by order published in the gazette to fix and declare the maximum price of any declared goods. The Commissioner, by a prices regulation order, fixed and declared the price at which spirituous liquors might be sold "to be those set out in the amended retail price list issued by the Victorian Associated Brewers as operating on and after lst December 1942".[33] Rich J observed:[34]

> "The regulation requires that the price shall be fixed and declared by an order which is published in the *Gazette*. The Order published in the *Gazette* in the present case does not fix or declare any price. The price is fixed and declared by the list issued by the Victorian Associated Brewers. I consider that the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order."

[39] A requirement that a price must be fixed and declared by an order published in a government gazette is a requirement of a very different nature to that under consideration. The latter merely requires a contribution "to be determined under a local planning policy". It is concerned with the means of determination not with the method in which the price must be both determined and formally notified to the public.

[40] In *Dorfler*, it was held that a by-law under the *Local Government Act* 1936 could be properly published in the government gazette although it incorporated other unpublished documents "at least where the identity of the incorporated documents is clear and, perhaps, so long as the incorporated material is subsidiary rather than essential".[35] The by-law under consideration in *Dorfler* incorporated by reference the Council's design manual in respect of road works. The by-law was held to be valid.

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31 (1943) 67 CLR 429.
32 [1994] 1 Qd R 507.
33 *Arnold v Hunt* (1943) 67 CLR 429 at 432.
34 *Arnold v Hunt* (1943) 67 CLR 429 at 432.
35 *Dorfler v Pine Rivers Shire Council* [1994] 1 Qd R 507 at 513.

[41] The contribution amount was determined under a policy and not fixed by the Register of General Charges. The policy incorporated the Register only as a means of identifying a sum for insertion in the formula for calculating infrastructure charges contained in the policy.

[42] This ground was not made out.

The 2004 policies ground

[43] Bremer's argument appeared to be that the Council had no power at the time condition 24(c) was imposed to apply rates for contributions fixed in accordance with relevant planning scheme policies at the time the contributions became payable. In other words, such contributions had to be fixed in accordance with rates prescribed under the planning scheme polices in existence at the time the condition was imposed and not under replacement policies.

[44] The primary judge rejected the applicant's argument and in so doing referred to a number of decisions of the Planning and Environment Court and of this Court which his Honour considered to be inconsistent with Bremer's argument.

[45] On appeal, Bremer sought to distinguish the decisions referred to by the primary judge. Bremer did not refer to any decisions which supported its contention. Nor did it identify any reason in principle why, absent a relevant statutory prohibition in existence at relevant times, a condition could not fix a contribution rate by reference to planning scheme policies in force from time to time. It was not submitted that there was any statutory provision in existence at relevant times which prohibited the approach taken in condition 24(c).

[46] It is convenient to repeat the relevant part of the condition:[36]

> "Calculation of contributions are based on the infrastructure contribution rates applicable at the date a development application was lodged with Council. The contributions above shall be applicable for a period of twelve (12) months from the date of the development approval, and thereafter shall be based on the infrastructure contribution rates applicable at the date when payment is made."

[47] It was not argued that condition 24(c) was uncertain in its application so that it was impossible for contribution rates to be ascertained. The primary judge noted in his reasons that there may be times since the coming into effect of s 2.1.18 of the IPA that "there could arguably be a problem flowing from the contributions policy relied on not being self-contained, but involving reliance for one or more elements of the calculation on some other document prepared by the Council".[37] His Honour said that the parties "should be afforded an opportunity of making submissions about this; if an issue of practical importance arises".[38] Nothing was said about this on the hearing of the appeal.

[48] The Council's contention that there is no reason why a condition cannot be expressed so as to apply a policy in force from time to time rather than a policy in force at the time of imposition of the condition should be accepted.

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36 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [5].

37 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [28].

38 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [28].

[49] This ground of appeal was not made out.

The s 3.5.33 ground

[50] Bremer argued that it was not open to the Council to unilaterally change condition 24 when it changed condition 2 at Bremer's request. The argument was based on the construction of s 3.5.33 of the IPA. Bremer submitted that the express power to impose conditions found elsewhere in the IPA (e.g. s 3.5.11(1)) is a powerful indicator that there was no power to impose conditions on a request under s 3.5.33 (which involves a request to change an existing condition, not the triggering of a fresh exercise of discretion).

Consideration

[51] The applicant's letter of request to the Council of 26 November 2007, as well as requesting a change in condition 2, sought deletion of the requirement to pay contributions for the Community Building, a matter only addressed in condition 24(a).

[52] The primary judge said in this regard:[39]

> "The Council responded to a request to change condition 2 with the clearest possible indication that its preparedness to make the change depended upon condition 24 being changed as well. The letter of 26 November 2007 transmitting the request made it clear that the developer's concern was related to the level of 'head works contributions'. Changing condition 2 above would not necessarily achieve the relief sought on the basis of the modest occupancy expected of 'bedrooms' in the development. Bremer Waters could have appealed if not content with the Council's decision upon its request. It would not be appropriate in my opinion now to sever what the Council has done in respect of condition 24 from what it did otherwise – which Bremer Waters apparently desires to retain."

[53] Had condition 24 not been changed, Bremer would have remained liable to pay contributions for the community building under condition 24(a) and to pay contributions for each three bedroom unit at a different and higher rate than for a two bedroom unit. The request to change condition 2 was on the grounds that the resident of the units were either single or a married couple and that there was thus no justification for charging contributions at a three bedroom rate: two bedrooms at most were being used.

[54] Section 3.5.33(5) of the IPA provides for the entity that decided the condition required to be changed to "decide the request". Section 3.5.33(7)(a) provides that "[t]o the extent relevant" the entity must "assess and decide the request having regard to the matters the entity would have regard to if the request were a development application". Such powers and requirements authorised the change of condition 24 as well as condition 2.

[55] If the request was a development application, the Council would be entitled under s 6.1.31 of the IPA to have regard to infrastructure policy, and whether any and, if

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39 *Ipswich City Council v Bremer Waters Pty Ltd* [2013] QPEC 20 at [12].

so, what conditions should be imposed requiring a contribution towards the cost of supplying infrastructure in assessing and deciding the application. The Council was also entitled to have regard to such matters when assessing a request for a change of conditions. As the primary judge remarked, if Bremer objected to the change to condition 24 it could have appealed against the Council's decision. It could also have withdrawn its application.

[56] Acceptance of Bremer's argument would substantially constrain local authorities in dealing with application for changes in conditions. If the granting of a change in a condition, although reasonable in itself, would produce the result that other conditions would no longer be adequate, appropriate or desirable, the local authority would need to decide between refusing the application and granting it with the resultant creation of an unsatisfactory state of affairs in relation to other conditions. The IPA must surely contemplate that conditions of the nature of those under consideration have a relationship with other conditions and are not devised to operate in isolation.

[57] This ground was not made out.

Conclusion

[58] For the above reasons, I would order that leave to appeal be refused and that the applicant pay the respondent's costs of and incidental to the appeal.

[59] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Muir JA. I agree with those reasons and the orders proposed by his Honour.

[60] **APPLEGARTH J:** I have had the advantage of reading the reasons of Muir JA with which I agree. I also agree with the orders proposed by his Honour.