SUPREME COURT OF QUEENSLAND

CITATION:	*Stockland Development P/L v Thuringowa City Council & Anor* [2007] QCA 384
PARTIES:	**STOCKLAND DEVELOPMENT PTY LIMITED** ACN 000 064 835 (appellant/applicant) **v** **THURINGOWA CITY COUNCIL** (first co-respondent/first respondent) **ROWLANDS SURVEYS PTY LTD** ACN 010 025 260 (second co-respondent/second respondent)
FILE NO/S:	Appeal No 4135 of 2007 DC No 1231 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	9 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2007
JUDGES:	Keane JA, Jones and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed** **3. Declare that the second respondent's application did not seek to vary the effect of the 2003 Planning Scheme for the land in conformity with s 3.1.6 of the *Integrated Planning Act 1997* (Qld)** **4. Set aside paragraphs 3 to 6 inclusive of the judgment of the Planning and Environment Court** **5. No order as to costs of application for leave to appeal or of appeal**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where second respondent lodged application with first respondent – where application was described as Development Application (Superseded Planning Scheme) – where application sought preliminary approval for a material change of use under s 3.1.6 of the *Integrated Planning Act 1997* (Qld) – where first respondent approved application –

whether a Development Application (Superseded Planning Scheme) may be used to make an application under s 3.1.6 – whether second respondent's application was an application under s 3.1.6 – whether application was accepted as a properly made application

Integrated Planning Act 1997 (Qld), s 3.1.5, s 3.1.6, s 3.2.1, s 3.2.3, s 3.2.5, s 3.5.4, s 3.5.5, s 3.5.5A, s 3.5.6, s 3.5.14, s 3.5.14A, s 3.5.27, s 4.1.52, s 5.4.2, Sch 10

Lagoon Gardens Pty Ltd v Whitsunday Shire Council [2006] QPEC 14; [2006] QPELR 490, distinguished
Liquorland (Australia) Pty Ltd v Gold Coast City Council [2002] QSC 154; [2001] 2 Qd R 476, considered

COUNSEL: P J Lyons QC, with J D Houston, for the appellant
R A Quirk for the first respondent
G J Gibson QC, with R S Litster, for the second respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
MacDonnells Law for the first respondent
Hopgood Ganim Lawyers for the second respondent

[1] **KEANE JA:** On 23 September 2005, the second respondent ("Rowlands") lodged an application with the first respondent ("the Council") with a view to the development of a shopping centre on a parcel of land at Mount Low Parkway, Bushland Beach, North Queensland. The application described itself as a Development Application (Superseded Planning Scheme) ("DA(SPS)"). The application sought preliminary approval for a material change of use of the land for "commercial" or "shopping centre", and asked that the Council assess the application against the provisions of the 1996 Planning Scheme for the City of Thuringowa ("the Old Scheme").

[2] The Old Scheme had been superseded by the 2003 Planning Scheme ("the New Scheme") which came into force on 20 October 2003. Under the Old Scheme, a substantial part of the land in question had been included within the Commercial Zone; the balance of the land had been included within the Residential Zone. Under the New Scheme, the land was partly in the Convenience Sub-Area of the Centres Planning Area, partly in the Traditional Residential Sub-Area, and partly in the Local Open Space and Recreation Sub-Area. The commercial zoning under the Old Scheme permitted a shopping centre development of up to 6,000 square metres of gross lettable area on the land without the need for impact assessment.

[3] The shopping centre development proposed by Rowlands' application was consistent with the former zoning. Under the New Scheme, land in what was formerly the Commercial Zone may be developed by a shopping centre with a maximum of only 1,000 square metres of gross lettable area before the development would be subject to impact assessment.

The Council's decision

[4] On 7 March 2006, the Council resolved to approve Rowlands' application subject to conditions. The Council issued its decision notice giving effect to this resolution on 22 March 2006. The Council's decision notice:

(a) gave a preliminary approval for a shopping centre on the land;

(b) gave rights for development in accordance with the Commercial Zone under the Old Scheme;

(c) provided that:

(i) any future development application for the shopping centre would be code assessable;

(ii) any future development application of the shopping centre would be assessed against the Old Scheme and associated Local Planning Scheme Policies.

The appeal to the P & E Court

[5] The applicant in this Court ("Stockland") appealed to the Planning and Environment Court ("the P & E Court") against the Council's decision to approve Rowlands' application. In that appeal some preliminary points were heard and determined by the P & E Court. Stockland enjoyed a measure of success in that, for reasons which need not be discussed now, the Council's decision of 7 March 2006 and its decision notice of 22 March 2006 were set aside, and the Council was ordered to issue a fresh acknowledgment notice in terms appropriate to a development application under s 3.1.6 of the IPA.

[6] Nevertheless, the P & E Court refused to declare that Rowlands' application was not an application under s 3.1.6 of the IPA, and held, adversely to Stockland, that the *Integrated Planning Act 1997* (Qld) ("the IPA") allowed the making of a DA(SPS) for a preliminary approval under s 3.1.6 of the IPA the effect of which approval was to vary the effect of the New Scheme. The P & E Court rejected Stockland's contention that, in accepting Rowlands' application, the Council had not considered a number of deficiencies in the application, so that Rowlands' application was not a properly made application by virtue of the Council's acceptance of the application pursuant to s 3.2.1(9) of the IPA.

The application to this Court

[7] Stockland now seeks leave to appeal to this Court pursuant to s 4.1.56 of the IPA. Under this provision, the available grounds of appeal are limited to error or mistake in the law, or absence or excess of jurisdiction.

[8] Stockland submits that the P & E Court erred in law in:

(a) holding that an application under s 3.1.6 of the IPA may not be made by a DA(SPS);

(b) holding that Rowlands' application was an application under s 3.1.6 of the IPA;

(c) holding that the application was a properly made application. Stockland argues that the application was accepted by the Council without consideration of the respects in which it did not comply with the requirements of the IPA; and

(d) failing to deal with Stockland's submission that the Council had erred in law in approving the Rowlands' application on the basis that a failure to do so would have exposed the Council to a liability to pay compensation.

[9] It is necessary to summarise the terms of the application and to set out the material provisions of the IPA before turning to a consideration of Stockland's arguments in support of the grant of leave to appeal.

Rowlands' application to the Council

[10] Rowlands' application of 23 September 2005 consisted of the prescribed "Form 1 Development Application – Material Change of Use" and a number of attachments. It was accompanied by a letter in the following terms:

> "**MATERIAL CHANGE OF USE APPLICATION UNDER THE SUPERSEDED PLANNING SCHEME**
> **PROPOSED NEW COMMERCIAL SITE MT LOW PARKWAY BUSHLAND BEACH**
>
> On behalf of our client we make application for a Material Change of Use under the Superseded Planning Scheme.
>
> In making an application under the Superseded Planning Scheme it is submitted that the area adjacent to the existing roundabout has been identified for Commercial Development for many years. The land subject to this application was identified as Commercial as far back as the 1988 Thuringowa Planning Scheme.
>
> This application proposes to amend the boundaries of the Commercial Zoned area as shown on plan 41986/02, the affect [sic] being that the area is rotated 90 degrees so as to provide a greater frontage to Mt Low Parkway, which in turn provides a much greater visibility and accessibility to the Community.
>
> The subject land is identified in Council's IPA Planning Scheme as being within the Convenience Centre sub-area of the Centres Planning Area on an area of 1.453ha, which is the same area shown on the 1988 Planning Scheme and identified as being in the Commercial Zone. The proposal is to utilize the land between the road to the east off the existing roundabout and the existing drainage reserve. The area of this parcel is 1.537ha.
>
> This application seeks a preliminary approval for a Material Change of use for Commercial Use under the Superseded Planning Scheme to allow for the development of a Shopping Centre comprising two (2) individual buildings with a total GLA of 4500sqm and associated car parking (see attached plan 41986/02).
>
> The development includes a Supermarket, approximately 2500 sqm and Specialty shops/offices making a total of 4500sqm. The car parking is to be located centrally with access from the future eastern collector. It is also intended to provide access of [sic] Mt Low Parkway as close as practicable to the northern boundary of the site.
>
> In discussions with Council officers it was advised that should Council approve the application, subsequent applications for Development Approval will be considered as code assessable.
>
> Enclosed please find four copies of proposal plan 41986/02 together with Form 1 – Development Application (Parts A, D & IDAS Referrals Checklist), Attachment 1 – Development Application (Superseded Planning Scheme), a copy of the Certificate of Title and a cheque for $2775.00 to cover Council's application fee."

[11] I note here that it was common ground in this Court that this letter formed part of Rowlands' application.

[12] The application also included as an attachment plan 41986/02 which showed the location of the proposed shopping centre and its relationship to the "Existing Commercial zoning boundary" and the "Proposed New Commercial zoning boundary". These references assumed that the assessment of the application would proceed under the Old Scheme, and the references to existing commercial zoning must be understood in that light.

[13] Rowlands' application to the Council did not include the form Attachment 2 prescribed for an application under s 3.1.6 of the IPA. This attachment contemplates a statement of whether the development resulting from the proposal will be code assessable, self assessable or exempt development, and a list of the codes applicable to the development.

[14] Further, in the IDAS Checklist which was part of Rowlands' application, it was asserted in answer to question 22 that the application did not trigger referral coordination. It was common ground that this assertion was wrong. An application under s 3.1.6 triggers referral coordination.

[15] Rowlands' application was accompanied by the necessary fee for which a receipt was not issued until 27 September 2005. On 3 November 2005, an acknowledgment notice was sent by the Council to Rowlands. This occurred after the preparation of a report dated 25 October 2005 the terms of which show that Council officers had considered the application. The material parts of this report are as follows:

> "**EXECUTIVE SUMMARY**
>
> Council has received a development application for Preliminary Approval of a Material Change of Use to establish a shopping centre on part of a lot described as Lot 19 on SP168587, located on the north-east corner of the intersection of Mount Low Parkway and Lynwood Avenue, Bushland Beach (refer to Locality Map below). The applicant has requested that the proposal be assessed against Council's superseded planning scheme. In accordance with the provisions of the *Integrated Planning Act*, Council must decide whether it proposes to assess the application under the superseded planning scheme or its current IPA Planning Scheme prior to issuing an Acknowledgement Notice.
>
> **PROPOSAL**
>
> The subject lot has a total area of 10.24 hectares. 1.454 hectares of the site adjacent to its southwest corner was designated 'Commercial' under the superseded planning scheme while the balance of the lot was located within the 'Residential 1' planning area (refer to Locality Map). The applicant is seeking Preliminary Approval for a Material Change of Use to develop of [sic] a shopping centre over an area of 1.537 hectares adjacent to the western boundary of the lot. The proposed development will consist of two buildings with a total floor area of approximately 4,500m2 and 138 car parking spaces. The site plan submitted as part of the application shows the main vehicle access and egress point on the proposed eastward extension of Lynwood Avenue with a secondary access from Mount Low

Parkway adjacent to the northern boundary of the development site to provide for heavy vehicle circulation. The site plan also details a boundary realignment and truncation to accommodate a future widening of Mount Low Parkway and extension of Lynwood Avenue.

…

PLANNING SCHEME PROVISIONS

Council's IPA Planning Scheme includes the commercial designated land within Convenience sub-area of the Centres Planning Area.

Development within Convenience sub-area is restricted to 1000m^2 gross lettable area (GLA) for the site. The 'Commercial' zone of the superseded planning scheme permits shopping centre developments to occupy an area of up 2.5 hectares with a maximum gross floor area of 6,000m^2. It is noted that the IPA Planning Scheme refers to gross lettable area which is essentially areas only lettable to tenancies and excludes all public areas. The superseded planning scheme refers to gross floor area which does include some, but not all public areas.

In relation to the comparative levels of assessment, the proposed shopping centre with a gross floor area of 4,500m^2 would require Code Assessment under the provisions of the superseded planning scheme whereas in accordance with the IPA planning scheme it would require Impact Assessment as it exceeds the maximum of 1,000m^2 as permitted within the Convenience Centre sub-area. This policy shift represents a significant 'down-zoning' of the site in terms of comparative land use rights and development potential. Putting aside the comparisons made above, it should be noted that as the applicant is proposing to develop the Shopping Centre over a part of the site that had a 'Residential 1' designation under the superseded planning scheme and consequently the development would trigger an Impact Assessable Material Change of Use application.

…

STATUTORY CONSIDERATIONS

Development applications under a superseded planning scheme are linked to the *Integrated Planning Act's* compensation requirements, and allows a proponent to demonstrate a genuine intent to develop their land within [two] (2) years of a planning scheme being made or amended.

To trigger the compensation requirements of IPA, a proponent must first make an application under the superseded planning scheme. Council may opt to consider a development application as if the scheme had not been changed meaning the owner is 'compensated' by being allowed to exercise development rights now not permitted under the current planning scheme. Alternatively, Council may opt to assess the application under the current planning scheme, in which case the owner would be entitled to claim compensation based on the difference in value of development rights approved under the current scheme and those available under the superseded scheme.

Subsequent to assessment parameters being determined by Council, an Acknowledgement Notice will be sent to the Applicant and the IDAS process will commence.

RECOMMENDATION:
That the development application for a Preliminary Approval for the Material Change of Use of premises for a Shopping Centre on land described as Part of Lot 19 on SP168587, Parish of Bohle and located at Mount Low Parkway, Bushland Beach be assessed under the City of Thuringowa Town Planning Scheme (superseded planning scheme)."

[16] On 3 November 2005, the Council sent the following letter to Rowlands:

"**ACKNOWLEDGEMENT NOTICE**
PURSUANT TO SECTION 3.2.3 OF THE INTEGRATED PLANNING ACT 1997
I refer to the development application received by Council on 23 September 2005. Council's application number is M66/05;2251. In accordance with section 3.2.3 of the *Integrated Planning Act* you are advised of the following:-

Details of Application/Type of Approval

(a) A development application for a development permit under section 3.1.5 of the *Integrated Planning Act*, for a Material Change of Use – Shopping Centre, on land described as Lot 19 SP 168587.

IDAS Referral Agencies

(b) A concurrence agency has not been identified and in accordance with s.3.2.6 of the *Integrated Planning Act*.

Level of Assessment

(c) The application is **Impact Assessable** and will be assessed in accordance with the provisions of Council's Superseded Planning Scheme

Public Notification

(d) The application must be publicly notified under the provisions of section 3.4.4 of IPA with respect to:-
  (i) publishing a notice at least once in a newspaper circulating generally in the locality of the land;
  (ii) placing a notice on the land in the way prescribed under the Integrated Planning Regulation 1998 (IP Reg);
  (iii) giving a notice to the owners of all land adjoining the land;
  (iv) the notice must be in the approved form and maintained on the land for a minimum of 15 business days (not including any business days between 20 December and 5 January in the following year); and
  (v) the public notification can only start in accordance with section 3.4.3 of the Integrated Planning Act.

Information Request Requirements

(e) Council may require additional information to determine your application in accordance with section 3.3.6 of the *Integrated Planning Act*.

Referral Coordination

(f) Referral coordination is not required under section 3.3.5 of the *Integrated Planning Act*."

[17] Stockland draws attention to the circumstance that the terms of this letter do not suggest an appreciation on the part of the Council that it was dealing with an application under s 3.1.6 of the IPA. It was common ground that such an application does, indeed, require referral coordination;[1] and public notification must be for a period of 30 days rather than 15 days. These deficiencies were recognised by the orders made by the P & E Court on Stockland's application; but Stockland's point in referring to these matters in this Court is to support its submission that Rowlands' application was not an application under s 3.1.6 of the IPA and that the P & E Court should have declared that this was the case.

The relevant provisions of the IPA

[18] Chapter 3 of the IPA establishes a system for the assessment and approval of development within local government areas. This system is referred to as IDAS or Integrated development assessment system.[2] In general terms there are four stages in the IDAS process: the application stage, the information and referral stage, the notification stage, and the decision stage.

[19] For the purposes of Ch 3, the term "application" means a "development application".[3] A "development application" is an application for "development approval.[4] A "development approval" may be either a "preliminary approval" or a "development permit".[5]

[20] A preliminary approval approves development, but does not authorise assessable development to occur. A development permit authorises assessable development to occur. Section 3.1.5 of the IPA provides:

"**Approvals under this Act**

(1) A ***preliminary approval*** approves development (but does not authorise assessable development to occur)—
  (a) to the extent stated in the approval; and
  (b) subject to the conditions in the approval.

(2) However, there is no requirement to get a preliminary approval for development.

(3) A ***development permit*** authorises assessable development to occur—
  (a) to the extent stated in the permit; and
  (b) subject to—
    (i) the conditions in the permit; and
    (ii) any preliminary approval relating to the development the permit authorises, including any conditions in the preliminary approval."

[21] Section 3.1.6 of the IPA relevantly provides:

"**Preliminary approval may override a local planning instrument**

(1) This section applies if—

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1 See IPA s 3.3.5(1)(c).
2 IPA, s 3.1.1.
3 IPA - Sch 10 "application".
4 IPA - Sch 10 "development application".
5 IPA – Sch 10 "development approval".

(a) an applicant applies for a preliminary approval; and
(b) part of the application states the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land.

(2) Subsection (3) applies to the extent the application is for—
(a) development that is a material change of use; and
(b) the part mentioned in subsection (1)(b).

(3) If the preliminary approval approves the material change of use, the preliminary approval may, in addition to the things an approval may do under part 5, do either or both of the following for development relating to the material change of use—
(a) state that the development is—
(i) assessable development (requiring code or impact assessment); or
(ii) self-assessable development; or
(iii) exempt development;
(b) identify any codes for the development.

…

(6) To the extent the preliminary approval, by doing either or both of the things mentioned in subsection (3) or (5), is different to the local planning instrument, the approval prevails.

(7) However, subsection (3) or (5) no longer applies to development mentioned in subsection (3)(a) or (5)(a) when the first of the following happens—
(a) the development approved by the preliminary approval and authorised by a later development permit is completed;
(b) any time limit for completing the development ends.

…"

[22] Schedule 10 of the IPA defines a DA(SPS) as:

"***development application (superseded planning scheme)*** means—

(a) for development that would not have required a development permit under a superseded planning scheme but requires a development permit under the planning scheme in force at the time the application is made, a development application—
(i) in which the applicant advises that the applicant proposes to carry out development under the superseded planning scheme; and
(ii) made only to a local government as assessment manager; and
(iii) made within 2 years after the day the planning scheme or planning scheme policy creating the superseded planning scheme was adopted or the amendment creating the superseded planning scheme was adopted; or

(b) for any other development, a development application—

(i) in which the applicant asks the assessment manager to assess the application under a superseded planning scheme; and
(ii) made only to a local government as assessment manager; and
(iii) made within 2 years after the day the planning scheme or planning scheme policy creating the superseded planning scheme was adopted or the amendment creating the superseded planning scheme was adopted."

[23] It may be noted that, as is apparent from the definition of DA(SPS), that a DA(SPS) may be an application for a development permit or an application for "other development". An application for a preliminary approval would fall within the second category.

[24] The IPA contains the following further provisions which relate to the application stage of the IDAS process:

"**3.2.1 Applying for development approval**

(1) Each application must be made to the assessment manager in the approved form.
(2) The approved form—
(a) must contain a mandatory requirements part including a requirement for an accurate description of the land; and
(b) may contain a supporting information part.
…
(7) An application is a ***properly made application*** if—
(a) the application is made to the assessment manager; and
(b) the application is made in the approved form; and
(c) the mandatory requirements part of the approved form is correctly completed; and
(d) the application is accompanied by the fee for administering the application; and
(e) if subsection (6) applies—the application is supported by the evidence required under subsection (5); and
(f) the development would not be contrary to the regulatory provisions or the draft regulatory provisions.
(8) The assessment manager may refuse to receive an application that is not a properly made application.
(9) If the assessment manager receives, and after consideration accepts, an application that is not a properly made application, the application is taken to be a properly made application.

…

3.2.3 Acknowledgment notices generally

(1) The assessment manager for an application must give the applicant a notice (the ***acknowledgment notice***) within—

(a) if the application is other than a development application (superseded planning scheme)—10 business days after receiving the properly made application (the ***acknowledgment period***); or

(b) if the application is a development application (superseded planning scheme)—30 business days after receiving the properly made application (also the ***acknowledgment period***).

(1A) Subsection (1) does not apply if—

…

(c) the application is not a development application (superseded planning scheme).

…

3.2.5 Acknowledgment notices for applications under superseded planning schemes

(1) If an application is a development application (superseded planning scheme) in which the applicant advises that the applicant proposes to carry out development under a superseded planning scheme, the acknowledgment notice must state—

(a) that the applicant may proceed as proposed as if the development were to be carried out under the superseded planning scheme; or

(b) that a development permit is required for the application.

…

(3) If an application is a development application (superseded planning scheme) in which the applicant asks the assessment manager to assess the application under the superseded planning scheme, the acknowledgment notice must state—

(a) that the application will be assessed under the superseded planning scheme; or

(b) that the application will be assessed under the existing planning scheme.

…"

[25] The IPA contains the following provisions which are relevant to the decision stage of the IDAS process:

"**3.5.4 Code assessment**

(1) This section applies to any part of the application requiring code assessment.

(2) The assessment manager must assess the part of the application only against—

(a) applicable codes (other than concurrence agency codes the assessment manager does not apply); and

…

(4) If the application is a development application (superseded planning scheme) and the applicant has been given a notice under section 3.2.5(3)(a), the assessment manager must assess and decide the application as if—

(a) the application were an application to which the superseded planning scheme applied; and

(b) the existing planning scheme was not in force; and

(c) for chapter 5, part 1, the infrastructure provisions of the existing planning scheme applied; and

3.5.5 Impact assessment

(1) This section applies to any part of the application requiring impact assessment.

(2) If the application is for development in a planning scheme area, the assessment manager must carry out the impact assessment having regard to the following—

(a) the common material;

(b) the planning scheme and any other relevant local planning instruments;

(c) if they are not identified in the planning scheme as being appropriately reflected in the planning scheme—

(i) State planning policies, or parts of State planning policies; and

(ii) for the planning scheme of a local government in the SEQ region—the SEQ regional plan;

(d) any development approval for, and any lawful use of, premises the subject of the application or adjacent premises;

(e) if the assessment manager is not a local government—the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the assessment manager and that are relevant to the application;

(f) the matters prescribed under a regulation (to the extent they apply to a particular proposal).

(3) If the application is for development outside a planning scheme area, the assessment manager must carry out the impact assessment having regard to the following—

(a) the common material;

(b) if the development could materially affect planning scheme area—the planning scheme and any other relevant local planning instruments;
(c) any relevant State planning policies;
(d) any development approval for, and any lawful use of, premises the subject of the application or adjacent premises;
(e) if the assessment manager is not a local government—the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the assessment manager and that are relevant to the application;
(f) the matters prescribed under a regulation (to the extent they apply to a particular proposal).

(4) If the application is a development application (superseded planning scheme) and the applicant has been given a notice under section 3.2.5(3)(a), subsection (2)(b) does not apply and the assessment manager must assess and decide the application as if—
(a) the application were an application to which the superseded planning scheme applied; and
(b) the existing planning scheme was not in force; and
(c) for chapter 5, part 1, the infrastructure provisions of the existing planning scheme applied.

3.5.5A Assessment for s 3.1.6 preliminary approvals that override a local planning instrument

(1) Subsection (2) applies to the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land.

(2) The assessment manager must assess the part of the application having regard to each of the following—
(a) the common material;
(b) the result of the assessment manager's assessment of the development under section 3.5.4 or 3.5.5, or both;
(c) the effect the proposed variations would have on any right of a submitter for following applications, with particular regard to the amount and detail of supporting material for the current application available to any submitters;

(d) the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied;

(e) if they are not identified in the planning scheme as being appropriately reflected in the planning scheme—

(i) State planning policies, or parts of State planning policies; and

(ii) for the planning scheme of a local government in the SEQ region—the SEQ regional plan;

(f) the matters prescribed under a regulation (to the extent they apply to a particular proposal).

3.5.6 Assessment manager may give weight to later codes, planning instruments, laws and policies

(1) This section does not apply if the application is a development application (superseded planning scheme).

(2) In assessing the application, the assessment manager may give the weight it is satisfied is appropriate to a code, planning instrument, law or policy that came into effect after the application was made, but—

(a) before the day the decision stage for the application started; or

(b) if the decision stage is stopped—before the day the decision stage is restarted.

…

3.5.14 Decision if application requires impact assessment

(1) This section applies to any part of the application requiring impact assessment.

(2) If the application is for development in a planning scheme area, the assessment manager's decision must not—

(a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or

(b) conflict with the planning scheme, unless there are sufficient planning grounds to justify the decision.

(3) If the application is for development outside a planning scheme area, the assessment manager's decision must not compromise the achievement of the desired environmental outcomes for any planning scheme area that would be materially affected by the development if the development were approved.

(4) Subsections (2)(a) and (3) do not apply if compromising the achievement of the desired environmental outcomes is necessary to further the outcomes of any of the following if they are not

identified in the planning scheme as being appropriately reflected in the planning scheme—

(a) State planning policies, or parts of State planning policies;

(b) for the planning scheme of a local government in the SEQ region—the SEQ regional plan.

3.5.14A Decision if application under s 3.1.6 requires assessment

(1) In deciding the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land, the assessment manager must—

(a) approve all or some of the variations sought; or

(b) subject to section 3.1.6(3) and (5)—approve different variations from those sought; or

(c) refuse the variations sought.

(2) However—

(a) to the extent development applied for under other parts of the application is refused, any variation relating to the development must also be refused; and

(b) the assessment manager's decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area; and

(c) subsection (1)(a) and (b) does not apply if compromising the achievement of the desired environmental outcomes is necessary to further the outcomes of any of the following if they are not identified in the planning scheme as being appropriately reflected in the planning scheme—

(i) State planning policies, or parts of State planning policies;

(ii) for the planning scheme of a local government in the SEQ region—the SEQ regional plan.

…

3.5.27 Certain approvals to be recorded on planning scheme

(1) Subsection (2) applies if a local government—

(a) gives a development approval and is satisfied the approval is inconsistent with the planning scheme; or

(b) gives a development approval mentioned in section 3.1.6; or

(c) decides to apply a superseded planning scheme for a purpose mentioned in section 3.2.5(1)(a) or 3.2.5(3)(a).

(2) The local government must—
(a) note the approval or decision on its planning scheme; and
(b) give the chief executive written notice of the notation and the land to which the note relates.
(3) The note is not an amendment of the planning scheme.
(4) Failure to comply with subsection (2) does not affect the validity of the approval or decision."

[26] A further provision of some present relevance in relation to the decision stage of the IDAS process is s 4.1.52. It is in the following terms:

"**Appeal by way of hearing anew**
…
(3) To remove any doubt, it is declared that if the appellant is the applicant or a submitter for a development application—
(a) the court is not prevented from considering and making a decision about a ground of appeal (based on a concurrence agency's response) merely because this Act required the assessment manager to refuse the application or approve the application subject to conditions; and
(b) in an appeal against a decision about a development application (superseded planning scheme) that was assessed as if it were an application made under a superseded planning scheme, the court also must—
(i) consider the appeal as if the application were made under the superseded planning scheme; and
(ii) disregard the planning scheme applying when the application was made."

[27] The relevant provision of the IPA in relation to compensation is s 5.4.2; which is in the following terms:

"**Compensation for reduced value of interest in land**
An owner of an interest in land is entitled to be paid reasonable compensation by a local government if—
(a) a change reduces the value of the interest; and
(b) a development application (superseded planning scheme) for a development permit relating to the land has been made; and
(c) the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made; and
(d) the assessment manager, or, on appeal, the court—
(i) refuses the application; or
(ii) approves the application in part or subject to conditions or both in part and subject to conditions."

[28] A DA(SPS) is of particular relevance to claims for compensation under the IPA where land owners' development rights are adversely affected by changes in

planning schemes. Under s 5.4.2 of the IPA, one of the conditions of a claim for compensation is the making of a DA(SPS) "for a development permit". Under s 3.2.5(3) of the IPA, the assessment manager may elect to assess a DA(SPS) for a development permit under the planning scheme then current, rather than under the superseded planning scheme, in which event the applicant may have a claim for compensation. It should be noted that, contrary to the view evidently taken by the Council's planning officers in their report of 25 October 2005 and in their later recommendation to the meeting of the Council on 7 March 2006, a decision under s 5.4.2(d) in relation to a DA(SPS) for a development approval, as opposed to a development permit, does not give rise to a right of compensation.

Stockland's challenges to the decision of the P & E Court

May a DA(SPS) be made under s 3.1.6?

[29] On Stockland's behalf, it was argued below and in this Court that, under the IPA, a DA(SPS) may not be used to make an application for preliminary approval under s 3.1.6 to vary the effect of a planning scheme which has effect under the IPA. Stockland focused upon the provisions of s 3.2.5(1) and (3), s 3.5.4(4), s 3.5.5(4), s 3.5.5A, s 3.5.14, s 3.5.14A and s 3.5.27 to argue that these provisions erect a dichotomy between a DA(SPS) and an application for approval for a material change of use under s 3.1.6 of the IPA.

[30] The learned judge of the P & E Court rejected this argument. His Honour preferred the argument advanced by Mr Quirk of counsel on behalf of the Council. His Honour said:

> "… I record the attraction of Mr Quirk's argument for the Council that:
>
> > 'When the IPA, and the provisions within it, are considered as a whole its scheme becomes apparent (See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381). The scheme of the IPA is that it uses specific expressions such as 'properly made application' (Schedule 10 – application, properly made application; s 3.2.1(7)) and 'development application (superseded planning scheme)' (Development application (superseded planning scheme) is only referred to in ss.: 3.2.3(1)(a) and (b), and (1A)(c); 3.2.5(1) and (3); 3.5.4(4); 3.5.5(4); 3.5.6(1); 4.1.30(3); 4.1.53(3)(b); 4.2.11(3); 5.4.2(b); 5.4.9(1)(d) and (e); and Schedule 10) where the legislature intended there to be a divergent treatment of applications falling within those definitions (*Oakden Investments Pty Ltd v Pine River Shire Council* [2003] 2 Qd R 539 at 542-3). Otherwise, the provisions relating to the more general term/expression apply.'
>
> He submitted that the approach to be taken is that:
>
> > 'The expression 'development application (superseded planning scheme)' is used where the legislature intended to use it (Ibid, *Oakden Investments Pty Ltd v Pine River Shire Council* [2003] 2 Qd R 539 at 542-3). The corollary to that proposition is that the legislature otherwise intended to use the term 'development application'.
>
> …

> In my opinion the Court of Appeal's approach, even if thought not directly in point, supports Mr Quirk's argument. Notwithstanding Stockland's argument about the intricacies of the assessment manager's task, a judge of this Court sitting at first instance ought not to depart from that approach. It follows that s 3.1.6 applies to a DA(SPS) as much as it does to any development application."[6]

[31] The contention advanced here on behalf of Stockland is that the IPA provides for the assessment of a DA(SPS) exclusively under the Old Scheme, and that these provisions cannot apply to an application for a preliminary approval under s 3.1.6 which, under s 3.5.5A(2), falls to be assessed with exclusive regard to the consistency of the proposed variations with the current planning scheme.

[32] It should be said immediately that Stockland's argument does not depend on the proposition that a DA(SPS) is not a "development application": Stockland conceded that that proposition cannot be sustained. That concession was rightly made: it is clear that a DA(SPS) is nonetheless a development application because it is a DA(SPS). As was said in this Court in *Chang & Anor v Laidley Shire Council*:

> "The applicants were driven to argue that a DA (SPS) within s 5.4.2 of the IPA is not an 'application' within the meaning of s 3.2.1(7)(f) and its associated provisions. This argument is untenable. There is no dichotomy between a development application and a DA (SPS) for a development permit. The provisions of the IPA treat a DA (SPS) as a particular kind of development application. In this regard, the first element of the definition of the term DA (SPS) is 'a development application'. Similarly, s 3.2.3(1) of the IPA imposes the obligation of giving an acknowledgment notice upon 'the assessment manager for an application', and s 3.2.3(1)(b) expressly refers to a DA (SPS) as a species of application. Moreover, there are no provisions of the IPA, other than the provisions which deal with the making and assessment of development applications generally, which provide for the making and assessment of a DA (SPS) for a development permit."[7]

[33] Stockland's argument is, in substance, that, when the Council accepted Rowlands' request to assess its application under the Old Scheme pursuant to s 3.2.5(3)(a) of the IPA, the application was required to be assessed exclusively under the Old Scheme without any reference at all to the New Scheme.

[34] What is actually provided by s 3.5.5(4) of the IPA is that the Council, as assessment manager, is to assess and decide the application as if it was an application to which the superseded planning scheme applied and the current planning scheme was "not in force". The respondents argue that the assessment and deciding of the application as if the current planning scheme was "not in force" is not necessarily inconsistent with the assessor having some regard to the current planning scheme. They refer to s 3.5.5(4) and to s 3.5.5A(2)(b). Thus, where a development application is made under s 3.1.6, s 3.5.5A(2)(b) suggests that assessment under that section is for the "part" of the application to which s 3.1.6 applies and that the assessment manager

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6 *Stockland Developments Pty Ltd v Thuringowa City Council & Anor*; *Citimark Properties Pty Ltd v Thuringowa City Council & Anor* [2007] QPEC 026 at [17] – [19] (citations footnoted in original).

7 [2006] QCA 172 at [76].

must have regard to the requirements of s 3.5.4 and s 3.5.5 in its assessment of that component. This is said to be an additional requirement applicable to that component of the application: it is not a provision which excludes any other assessment criteria. Section 3.5.4(4) and s 3.5.5(4) both contemplate the assessment of a DA(SPS). The respondents contend that these provisions deny the rigid dichotomy propounded by Stockland's argument.

[35] To the extent that Stockland's argument comes down to the question whether s 3.5.5A(2)(b) should be read as impliedly excluding any recognition of the impact on the current planning scheme of approval of a DA(SPS), Stockland's reading does not sit comfortably with the contrasting language used in s 3.5.4(2) on the one hand, and s 3.5.5(2) and (4) and s 3.5.5A(2) on the other hand. The latter provisions are not expressed in the exclusive way emphasised by the use of the expression "only" in s 3.5.4(2). I consider that the provisions referred to by Stockland simply establish procedures whereby each "part" of an application is assessed. Section 3.5.4(4), s 3.5.5(4) and s 3.5.5A(2)(b) can arguably be seen to provide a mechanism for ensuring that an application having different "parts" produces a coherent planning outcome. On this view, an application may be assessed under the provisions of the Old Scheme while the Council is also permitted to ensure that the terms on which a proposed development may be approved do not subvert the New Scheme in some unacceptable way.

[36] For these reasons, I reject Stockland's first argument.

Was Rowlands' application within s 3.1.6?

[37] The learned judge of the P & E Court did not decline to declare that Rowlands' application was an application of the kind contemplated by s 3.1.6 of the IPA on the basis that this question was immaterial by reason of the Council's acceptance of the application. Indeed, the respondents do not seem to have advanced an argument to that effect in the P & E Court.[8] Rather, his Honour held that the DA(SPS) was an application contemplated by s 3.1.6 of the IPA. In this regard, his Honour summarised Stockland's contention:

> "There was much debate as to whether the development application sought to vary the effect of or to 'override' (to quote the heading of s 3.1.6) any planning scheme, either the 2003 planning scheme, which was current at all times, or the superseded (1996) planning scheme. Only the former is capable of coming within s 3.1.6; not being in force, the latter cannot be 'a local planning instrument'. In terms, the development application does not ask for any overriding or variation of the effect of any planning scheme. It does not include 'Attachment 2', which proclaims itself mandatory in such circumstances. In the accompanying IDAS Assessment Checklist, also proclaiming itself mandatory in respect of section 1 - State Assessment is question 22:
>
> | | |
> |---|---|
> | Referral coordination

An information request requires referral coordination if the application involves - | 22. Does the application trigger referral coordination?
NO
YES, as the application: *(tick the applicable boxes)* |

[8] Nor was such an argument advanced in this Court.

(i) 3 or more concurrence agencies; or	(i) triggers 3 or more concurrence agencies;
(ii) a facility or area assessable under a planning scheme and and prescribed in schedule 7 or 8 of the *IP Regulation*; or	(ii) involves a *material change of use* made assessable under a planning scheme and prescribed in schedule 7 of the IP Regulation;
(iii) development which is subject to an application for preliminary approval mentioned in s 3.1.6 of the *IPA*	(iii) involves a *material change of use* (other than a dwelling house, outbuilding or farm building) made assessable under a planning scheme, or *reconfiguring a lot*, in an area prescribed in schedule 8 of the IP Regulation;
	(iv) is for a preliminary approval mentioned in s 3.1.6 of the IPA

For more information go to *Guide 2* and *Guide 6*.

The applicant ticked the 'no' box. Further, **one does not find in the application anything identifying it as a part which 'states the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land', quoting s 3.1.6(1)(b) again**. The quotation sets out one of the conditions for application of s 3.1.6, the other being that the applicant applies for a preliminary approval. That other requirement is met. To the foregoing considerations the appellants add that the period of public notification requisite for an application under s 3.1.6 was not adopted – something which may be taken to have followed what the court concludes was the erroneous assertion by the co-respondent that referral coordination was not required."[9] (emphasis added)

[38] The learned judge rejected Stockland's contention. His Honour said:

> "I respectfully agree with what was said in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council* [2006] QPELR 490 at [16]:
>
> > 'In my opinion s 3.1.6(1)(b) would apply to any application which seeks a preliminary approval which would, if approved, vary the effect of the local planning instrument, whether or not the intention to do so is expressly stated in the application. It must be an objective reading of the application which determines whether, and if so, 'the way in which the applicant seeks … to vary the effect of any local planning instrument for the land'. That quoted passage must include the way in which the applicant wishes to alter the uses to which the land can be put under the planning scheme (including a 'consent' or a 're-zoning') and that must be a matter of objective fact, not of expressed purpose. And as s 3.1.6(3) makes clear an application also seeks to vary the effect of the planning instrument if a different level of assessment is sought by it.'

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9 [2007] QPEC 026 at [10] – [11].

> I do not think it is a requirement that the application in terms flag some part of itself as the statement contemplated in s 3.1.6(1)(b). The development application, in any event, is not totally devoid of indications that variation or overriding was sought.
>
> Thus Part D of the IDAS Form 1 development application in section 2 describes the way in which 'the subject land is identified in the planning scheme (name the zone, precinct etc)' as 'TRADITIONAL RES & CONVENIENCE CENTRE', closely followed by indications that the material change of use proposed is to a shopping centre incorporating building works of 4,500 m^2, which necessarily involves variation of the planning scheme.
>
> In my opinion, the development application here can and should be recognised as falling within s 3.1.6."[10]

[39] The learned judge went on to say:

> "… it is difficult in the extreme to glean from the documents that any thought was harboured that any planning scheme or the effect of any planning scheme was being sought to be varied."[11]

[40] The last cited observation by his Honour is, in my respectful opinion, an accurate enough description of Rowlands' application; and its significance cannot be denied by emphasising the objective character of the application rather than the subjective intentions of the applicant.

[41] The learned P & E judge seems to have held that Rowlands' application was an application of the character contemplated by s 3.1.6 of the IPA because, if approved, it was apt to alter the rights of development otherwise applicable to the land under the New Scheme. It is no doubt true to say that, generally speaking, the character of an application which is apt to affect the rights of a party is to be determined by "the nature of the rights, duties and privileges which it creates, changes, abolishes or regulates."[12] But this approach does not address the express terms of s 3.1.6(1)(b). This provision required Rowlands to state in its application "the way in which the applicant seeks the approval to vary the effect of" the New Scheme.

[42] The decision in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council* correctly insisted upon an objective reading of the application in order to ascertain "the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land." The problem with Rowlands' application is that it did not **state** the nature and extent of the variation sought. In this regard, Rowlands' application stands in marked contrast with the application considered in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council*.

[43] The question is not whether the requirements of s 3.1.6(1)(b) should be described as mandatory or directory, or whether a failure to comply with those requirements can be said to have rendered the application "void".[13] The question is whether Rowlands' application answered the description in s 3.1.6(1)(b) of the IPA. Plainly,

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10 [2007] QPEC 026 at [12] – [14].

11 [2007] QPEC 026 at [21].

12 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 294. See also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 219 CLR 325 at 346.

13 Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

it did not. To characterise the application by reference to the circumstance that, if approved, it will alter rights relating to the land as contemplated by an application under s 3.1.6 looks at the legal effect of approval of the application rather than addressing the real question which is whether the application itself states those alterations rather than leaving them to be inferred on the assumption that the application is approved. Contrary to the respondents' contentions, the deficiency in the application is not a "storm in a teacup". Section 3.5.5A(1), which provides for the assessment of the application, can operate only upon that "part of an application … mentioned in s 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land". Compliance with s 3.1.6(1)(b) is thus an essential prerequisite to the assessment process contemplated by s 3.5.5A.

[44] Compliance with s 3.1.6(1)(b) is also necessary to ensure that the Council and potential submitters are given a clear understanding of the effect approval of the application will have upon the existing planning scheme.[14] 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.

[45] It was suggested that observations by Jones J in this Court in *Liquorland (Australia) Pty Ltd v Gold Coast City Council*[15] cast doubt on the importance of a clear and explicit statement in an application of "the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land" as a source of information for the public and especially those members of the public who might be disposed to object to the proposal. In this regard, Jones J, with whom McPherson JA and White J agreed, said:

> "It would not be expected that an objector to the proposal would frame a submission based on the information contained in the public advertising, nor indeed in what is set out in the application form. It is the accompanying maps, sketches, site plans and development details which one expects would be relevant to any intending objector."[16]

[46] Two points may be made here. The first is the obvious one that *Liquorland (Australia) Pty Ltd v Gold Coast City Council* was not concerned in any way with the interpretation or operation of s 3.1.6(1)(b) of the IPA. The second point is that compliance with s 3.1.6(1)(b) is concerned to ensure that potential objectors are alerted to the circumstance that an approval will vary the effect of current planning arrangements. That a person so alerted may need to look to other sources of information in order to compile an effective submission in opposition to the proposal does not detract from the importance of ensuring that those who may be adversely affected by approval of the proposal should understand clearly the impact of that approval on existing planning arrangements.

[47] In my respectful opinion, Rowlands' application did not state the respects in which approval would vary the effect of the New Scheme. To say that approval of the

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14 Cf *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 257 – 258.

15 [2001] 2 Qd R 476.

16 [2001] 2 Qd R 476 at 486 [31].

application would have an effect which can be gleaned from a comparison of the proposal with the terms of the New Scheme does not meet the requirements of s 3.1.6(1)(b). For these reasons, I accept Stockland's second submission.

Was Rowlands' application accepted as a properly made application?

[48] Stockland argues that the P & E Court erred in holding that the Council had "accepted" Rowlands' application as a properly made application. In this regard, Stockland points to a deficiency in the application in that it was not complete in respect of every "mandatory requirements part" referred to in s 3.2.1(2) of the IPA. Stockland argues that, because the Council did not advert to this deficiency, the Council could not be said to have accepted the application "after consideration".

[49] The form which was submitted by Rowlands did not indicate that future development proposals would be impact assessable or code assessable. In the letter which accompanied Rowlands' application, it was stated that any future development proposals would be code assessable, but Stockland argues that, if the form was not correctly completed, then it could not be a "properly made application" for the purposes of s 3.2.1(7)(c) of the IPA. More importantly, the form lodged by Stockland did not include the part of the approved form which states the way in which the approval will vary the effect of the New Scheme. Further, Rowlands' application stated that no reference to referral agencies was required: to the extent that the application was made under s 3.1.6 of the IPA, that statement was incorrect. The Council was entitled under s 3.2.1(8) to "refuse to receive it". Under s 3.2.1(9), if, after consideration, the assessment manager accepts the application, it is taken to be a properly made application. Stockland submits, however, that the Council, as assessment manager, did not accept the application.

[50] One may observe that there may be a real question as to whether an application under s 3.1.6 needs to qualify as a "properly made application". The parties did not address this question, and, consequently, it need not detain this Court. To the extent that the parties assumed that it was necessary to consider whether Rowlands' application was a "properly made application", the learned P & E Court judge resolved this issue against Stockland. His Honour said:

> "The advantage to the co-respondent from proceeding by reference to the 1996 scheme and availing itself of the opportunity to do so which expired on 20 October 2005 is obvious, as is the appellants' concern at facing commercial competition which the new planning scheme on its face precluded. Pages 21 and 22 of Exhibit 2 are a detailed list of additional information and details which the Council's Manager, Infrastructure Acquisition indicated should be required of the applicant. The acknowledgment notice of 3 November 2005 actually sent foreshadowed that additional information might be required. No interest has been evinced by the Council in obtaining Attachment 2 or any further information specifically referable to a s 3.1.6 application, although it was appreciated from the outset within the Council that the section was or might be applicable, as quotation of the section heading shows. It was patent that Attachment 2 was not there. Council officers can hardly have overlooked that, and should be taken to have been aware of it. The information Attachment 2 calls for was given. In my opinion, the acknowledgment notice, in circumstances of retention of the application fees ($2,775) bespeaks acceptance of the co-respondent's development application, albeit not

> a 'properly made application', after 'consideration' for purposes of s 3.2.1(9) as an adequate one that should proceed to assessment.
>
> I think that there has been sufficient 'consideration' here, notwithstanding that what is recorded may not satisfy the *Cunningham* test. The consideration was imperfect in that it might have been the 1996 planning scheme seen as over-ridden (whereas, as a matter of interpretation of s 3.1.6(1)(b) by reference to IPA definitions, it was only the new 2003 planning scheme which required or was capable of having its 'effect' varied). The development application was necessarily seeking that and should be treated as doing so. Cf *Lagoon Gardens Pty Ltd v Whitsunday Shire Council* [2006] QPELR 490 at [16]. My view is that the Council did after sufficient consideration 'accept' the application. No basis has been pointed to for the court's reversing that acceptance. This aspect would present a compelling case for applying s 4.1.5A, if necessary, to enable the application to proceed to its next 'stage' within the application stage of an appropriate acknowledgment notice being issued."[17]

[51] Section 3.2.1(9) does not require the Council to advert to each respect in which an application may arguably not be a properly made application. To read the provision that way would be to treat the provision as imposing a new and unnecessary burden on local authorities and on the IDAS process. The provision was clearly intended to afford councils a measure of protection against claims that a flawed application was "a properly made application" merely because a council could be said to have accepted an application before considering whether it was prepared to process the application. That this is so is apparent from the terms of the Explanatory Notes which accompanied the addition of this provision to s 3.2.1. The Explanatory Notes said:

> "The Act currently provides that, if an assessment manager accepts an application that is not properly made, the application is taken to be properly made. There has been concern that this subsection does not distinguish effectively enough between the receipt and the acceptance of an application that is not properly made. In particular, there has been concern that if an assessment manager received in the mail an application that is not properly made, the assessment manager would be obliged to treat it as properly made because it has been 'accepted'.
>
> The proposed amendment clarifies that receipt and acceptance of an application that is not properly made are two distinct actions …"

[52] I reject Stockland's third submission.

The Council erred in law in its decision to assess the application under the Old Scheme

[53] Stockland argues that the learned primary judge erred in law in failing to address and decide Stockland's argument that the Council's decision to assess Rowlands' application under the Old Scheme was itself based, in part at least, on the erroneous consideration that a refusal of Rowlands' application would expose the Council to a claim for compensation under s 5.4.2 of the IPA.

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17 [2007] QPEC 026 at [28] – [29].

[54] As I observed above, a Council cannot be exposed to a claim for compensation by a decision to assess an application under the current scheme unless the application is for a development permit. The contrary view taken by the Council's officers was plainly wrong.

[55] It is certainly arguable that the Council acted upon this erroneous view of the operation of s 5.4.2 of the IPA. It is apparent from the transcript of the argument before his Honour that this issue was agitated on Stockland's behalf in the P & E Court. It is also clear that his Honour did not decide the point.

[56] On behalf of the respondents, however, the point is made that this contention was not raised in Stockland's formal application to the P & E Court. That circumstance may explain the learned judge's failure to deal with this issue. However that may be, the absence of any mention of the point in Stockland's application meant that there was no occasion for the Council to lead evidence on the point so that one cannot be satisfied that a determination of this point in Stockland's favour would not have involved a denial of procedural fairness to the respondents.

[57] Quite apart from considerations of procedural fairness, however, the respondents contend that there would be no utility in granting leave to Stockland to appeal on this point. It is abundantly clear that the Council stands by its decision to assess the application under the Old Scheme notwithstanding the now obvious error as to the operation of s 5.4.2 of the IPA. No good purpose would be served by an order the effect of which would be to require the Council to consider this issue afresh.

[58] Having regard to these considerations of procedural fairness and utility, I would refuse to grant Stockland leave to appeal on this point.

Conclusion and orders

[59] In my respectful opinion, the second argument advanced by Stockland warrants the grant of leave to appeal.

[60] The application for leave to appeal should be granted. The appeal should be allowed. It should be declared that Rowlands' application did not seek to vary the effect of the New Scheme for the land in conformity with s 3.1.6 of the IPA. Paragraphs 3 to 6 inclusive of the judgment of the P & E Court should be set aside.

[61] Having regard to the relative level of success enjoyed by each of the parties, I consider that there should be no order as to the costs of the application for leave to appeal or of the appeal.

[62] **JONES J:** I agree for the reasons expressed by Keane JA that the appeal should be allowed only in respect of Ground 2.2 and that there should be no order for costs. I will add some further comment in relation to that ground.

[63] The learned primary judge, having found (correctly, in my view,) that s 3.1.6 applies to a DA(SPS) as much as it does to any development application, had then to consider whether the application in fact met the statutory requirements. The second respondent’s application made no reference to this section but that is no obstacle provided the requirements are met. The applicant’s challenge relevantly concerns subsection (1) which is in the following terms:-

> “(1) This section applies if –
>
> (a) an applicant applies for a preliminary approval; and

(b) part of the application states the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land."

[64] There is no issue with paragraph (a). As to paragraph (b) regard must be had to the terms of the letter forwarding the formal documents which constituted the application.[18] These were,

1. The proposal plan 41986/02
2. Form 1 : Development application (parts A, D and IDAS referrals check list)
3. Attachment 1: Development application (Superseded Planning Scheme)
4. Certificate of Title
5. Application fee.[19]

[65] The combination of the terms of the letter and the Attachment 1 – DA(SPS) identifies the fact that the approval seeks to vary the effect of the current scheme. But the question is whether the application as constituted "states the way" in which the proposed variations will affect the current scheme. The letter makes reference to the existing scheme[20] but thereafter refers only to the variation to be made within the superseded scheme. The proposal map makes reference only to the superseded scheme zoning. In the letter and in Attachment 1 there is reference to the floor area to be employed of 4,500 square metres. There is a reference also to subsequent applications being "code assessable". Part D of the Development Application refers to the zoning under the current scheme.

[66] The learned primary judge commented that it "is difficult in the extreme to glean from the documents that any thought was harboured, that any planning scheme, or the effect of any planning scheme, was being sought to be varied".[21] He had earlier noted that the application does not "in terms" ask for any overriding or variation of any planning scheme.[22] Nonetheless, he felt able to excuse this on the basis that an objective assessment of the documents "can and should be recognised as falling within s 3.1.6".[23] He did this in reliance on the remarks of Senior Judge Skoien in *Lagoon Gardens Pty Ltd v Whitsunday Shire Council*[24] suggesting that an "objective reading" of the application determines whether it is compliant with the section. The learned primary judge then found –

> "[12] I do not think it is a requirement that the application in terms flags some part of itself as the statement contemplated in s 3.1.6(1)(b). the development application, in any event, is not totally devoid of indications that variation or overriding was sought."[25]

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18 Record A57-58. This letter is part of the "supporting material" as defined in Schedule 10

19 See Appeal Record A61-73

20 Appeal Record p 57 "the subject land is identified in Council's IPA planning scheme as being within the Convenience Centre sub-area of the Centre's planning area. An area of 1.453 ha, which is the same area shown on the 1988 Planning Scheme and identified as being in the Commercial Zone.

21 Reasons para [21] Record p 26

22 Reasons para [10] Record p 21

23 Reasons [13] Record p A22

24 [2006] QPELR 490 at [16]

25 Record p 22

[67] The "indication" to which the learned primary judge then made specific reference was to Part D Form 1 where the current zoning of the subject land was identified and the fact that the floor area of the proposed development was inconsistent with the permissible area allowed in the current scheme.[26] The second respondent contends there were other indications namely –

- The letter identified that "subsequent applicants for Development Approval will be considered as code assessable" indicating a change from the requirement of the current scheme under which such development would be impact assessable. This is directly referable to s 3.1.6(3).
- The combination of references to the proposal map defining "Proposed New Commercial zoning boundary" and to Part D noting the new scheme zoning of "Traditional Residential" and "Convenience Centre".

[68] But there were other indicators working against the recognition that the application was made pursuant to s 3.1.6. Firstly, there was no Form "Attachment 2" to the application as was specifically required in an application of this kind even though the information was found elsewhere and the omission readily excusable.[27] Secondly, there was the assertion in the IDAS check list that there was no referral coordination required when in fact one was required. Finally, the public notification directed by the assessment manager of 15 business days suggested there was no regard to s 3.1.6 which required 30 business days notification.

[69] For the Application's mere mention of floor area, proposed level of assessment and contrasting zoning to be regarded as a statement of the variation would be a result achieved in a most enigmatic way. It would require the reader to know the terms of the current scheme and its description of zones and then to realise that the floor area proposed was not permissible under the scheme or the level of assessment was different to that currently required and infer from this knowledge the way in which the variation would affect the existing scheme.

[70] The purpose of the application is to inform not only the assessment manager but anyone who has an interest in knowing what effect the proposal, if approved, will have on existing rights. That purpose surely requires the effect of the proposed variation to be clear from the statements relied upon using an objective assessment. A statement which would provoke awareness only amongst the planning law cognoscenti would not, to my mind, meet the legislative requirements. The learned primary judge noted the difficulties he had in determining whether the provision of s 3.1.6(1)(b) had been complied with. In my view, they were not. As a consequence the application was void.

[71] I agree with the orders proposed by Keane JA.

[72] **DOUGLAS J:** I agree with the reasons of Keane JA and Jones J and the orders proposed by Keane JA.

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26 Reasons para [13]

27 See s 3.3.5(1)(c); Form of Attachment 2 is at Record p 125