SUPREME COURT OF QUEENSLAND

CITATION:	*Total Ice P/L v Maroochy Shire Council & Ors; S & L Developments P/L & Ors v Maroochy Shire Council & Ors; Bukmanis & Anor v Maroochy Shire Council* [2008] QCA 295
PARTIES:	**TOTAL ICE PTY LTD** ACN 111 697 815 (applicant/first respondent) **v** **MAROOCHY SHIRE COUNCIL** (respondent/applicant) **VALDIS AND HELEN BUKMANIS** (co-respondents/second respondents) **S & L DEVELOPMENTS PTY LTD** ACN 089 625 347 **LINDSAY AND GLENDA CLARK** (appellants/first respondents) **v** **MAROOCHY SHIRE COUNCIL** (respondent/applicant) **THE CHIEF EXECUTIVE UNDER THE TRANSPORT INFRASTRUCTURE ACT 1994** (first co-respondent/second respondent) **TOTAL ICE PTY LTD** ACN 111 697 815 (second co-respondent/third respondent) **FABCOT PTY LTD** (third co-respondent/fourth respondent) **VALDIS AND HELEN BUKMANIS** (appellants/respondents) **v** **MAROOCHY SHIRE COUNCIL** (respondent/applicant)
FILE NO/S:	Appeal No 742 of 2008 Appeal No 743 of 2008 Appeal No 744 of 2008 P & E Appeal No 1596 of 2006 P & E Appeal No 1495 of 2006 P & E Appeal No 199 of 2006
DIVISION:	Court of Appeal
PROCEEDINGS:	Applications for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	26 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	23 May 2008

JUDGES: McMurdo P, Fraser JA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Each of the applications for leave to appeal is refused, with costs**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – FORM AND CONTENTS OF APPLICATION – VALIDITY OF APPLICATION – GENERALLY – where a development application that was lodged with the local council invoked a superseded planning scheme – where such an application was required to be made within two years after the day the planning scheme or planning scheme policy creating the superseded planning scheme took effect or the amendment creating the superseded planning scheme took effect – where the application was lodged within two years after the commencement of the amendments but made more than two years after the amendments were adopted by the local council – whether a development application which is not in truth a development application because it was lodged outside the specified period may nevertheless be treated as an ordinary development application

Integrated Planning Act 1997 (Qld), s 1.2.1, s 1.2.3, s 3.2.1, s 3.2.3, s 3.2.5, s 4.1.5A, s 5.4.2

Adams v Lambert (2006) 228 CLR 409; [2006] HCA 10, cited
Botany Bay Council v Remath Investments No 6 Pty Ltd (2000) 50 NSWLR 312; [2000] NSWCA 364, cited
Brierley v Reeves (2001) 51 NSWLR 689; [2001] NSWCA 189, cited
Bukmanis & Anor v Maroochy Shire Council; S & L Developments and Ors v Maroochy Shire Council & Ors; Total Ice Pty Ltd v Maroochy Shire Council & Ors [2007] QPEC 113, affirmed
Chang & Anor v Laidley SC (2006) 146 LGERA 283; [2006] QCA 172, discussed
Chang v Laidley Shire Council (2007) 154 LGERA 297; [2007] HCA 37, discussed
Lamb v Brisbane City Council [2007] 2 Qd R 538; [2007] QCA 149, discussed
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Raniere Nominees Pty Ltd trading as Horizon Motor Lodge v Daley and Another (2006) 67 NSWLR 417; [2006] NSWCA 235, cited

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No 743 of 2008
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No appearance for the fourth respondent in Appeal No 743 of 2008

SOLICITORS: Minter Ellison for the first respondent in Appeal No 742 of 2008 and the third respondent in Appeal No 743 of 2008
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No appearance for the fourth respondent in Appeal No 743 of 2008

[1] **McMURDO P:** I agree with Fraser JA's reasons for refusing each of the applications for leave to appeal with costs.

[2] **FRASER JA:** The substantial question in these applications for leave to appeal is whether upon the proper construction of the *Integrated Planning Act* 1997 (Qld) ("IPA") a "development application" in the form of a "development application (superseded planning scheme)" which is not in truth a "development application (superseded planning scheme)" because it was lodged outside the period specified in paragraph (b)(iii) of the definition of that term nevertheless may be treated by a local government as an ordinary "development application".

Background

[3] On 5 May 2004 Mr and Mrs Bukmanis caused to be lodged with the Maroochy Shire Council a development application under IPA seeking a permit for a material change of use of land for a shopping centre and multiple dwelling units.

[4] Their application included a request that "the proposal be assessed against the provisions of a superseded planning scheme", which was described as "May 31, 2000 version of Maroochy Plan 2000 (superseded by round 1 amendments May 07, 2002)". Thus the application on its face purported to be a "development application (superseded planning scheme)" ("DASPS") within the meaning of paragraph (b) of that defined term in IPA:[1]

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

[1] The relevant provisions of IPA in force when the application was lodged on 5 May 2004 are contained in Reprint No 5.

(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."

[5] The "superseded planning scheme" invoked in the application lodged by Mr and Mrs Bukmanis, the *Maroochy Plan 2000*, was relevantly superseded by amendments which were adopted by the local authority on 24 April 2002 but which did not commence until 7 May 2002. The application lodged on 5 May 2004 was made within two years of the commencement of the amendments but it was made more than two years after the amendments were adopted by Council.

[6] Mr and Mrs Bukmanis evidently acted on the view that the date of commencement of the amendments was the relevant date for the purposes of paragraph (b)(iii) of the definition of "development application (superseded planning scheme)". They were mistaken in that view. The two year period expired when the amendments were adopted even though the amendments did not commence until after that time, as was established much later by the decision of this Court in 2007 in *Lamb v Brisbane City Council*.[2] Thus the purported DASPS lodged by Mr and Mrs Bukmanis was lodged out of time.[3]

[7] On 30 July 2004 the Council, apparently adopting the same mistaken view, issued an acknowledgment notice which contemplated that the application would be assessed under the superseded planning scheme. Further, on 27 August 2004 the Council delivered an information request to Mr and Mrs Bukmanis who thereafter caused a response to be delivered at the end of July 2005.

[8] Subsequently Mr and Mrs Bukmanis appealed to the Planning and Environment Court against what they contended was the deemed refusal of their DASPS as a result of the Council having failed to deal with it.

[9] A similar course was followed in relation to an application lodged by Mr and Mrs Clark on 6 May 2004 seeking a permit for a material change of use for shops and offices. The land the subject of that application adjoins the land described in the application lodged by Mr and Mrs Bukmanis. The Clarks' application was in the form of a DASPS and it too was lodged out of time. On 30 July 2004 the Council gave the Clarks an acknowledgement notice treating their application as a DASPS requiring impact assessment under IPA. S & L Developments Pty Ltd (which appears to have become a party to the Clarks' development application) and the Clarks also appealed to the Planning and Environment Court against what they contended to be the Council's deemed refusal of the Clarks' application.

[10] It is convenient to refer to S & L Developments Pty Ltd, Mr and Mrs Clark, and Mr and Mrs Bukmanis collectively as "the developers".

[11] By an originating application in the Planning and Environment Court filed on 31 May 2006 Total Ice Pty Ltd ("Total Ice") sought declarations that the application lodged by Mr and Mrs Bukmanis on 5 May 2004 was not in truth a DASPS or that

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2 *Lamb v Brisbane City Council* [2007] 2 Qd R 538; [2007] QCA 149.

3 The definition was subsequently amended but it was held in *Lamb v Brisbane City Council* [2007] 2 Qd R 538; [2007] QCA 149 at [37] that the amendments were not retrospective. The applicants do not seek to rely upon those amendments.

in the events that had happened it was invalid. Similar preliminary points were identified in the developers' appeals to the Planning and Environment Court.

[12] The developers and the Council, anticipating that Total Ice's claim that the purported DASPSs were not valid DASPSs might succeed, developed an alternative contention: if the DASPSs were out of time and invalid for that reason, the Council nevertheless was entitled to treat the purported DASPSs as development applications that are not DASPSs. (I will call such a development application an "ordinary development application").

[13] The primary judge rejected that contention. It is that contention which the developers and the Council would seek to establish in the appeals proposed by their applications for leave to appeal to this Court.

IPA

[14] The relevant definitions in IPA provided:

> "***development application*** means an application for a development approval.
>
> ***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.
>
> (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.
>
> …
>
> "***development approval*** means a decision notice or a negotiated decision notice that—

(a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and

(b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval."

[15] IPA includes the following provisions:

"**1.2.1 Purpose of Act**

The purpose of this Act is to seek to achieve ecological sustainability by—

(a) coordinating and integrating planning at the local, regional and State levels; and …

…

1.2.3 What advancing this Act's purpose includes

(1) Advancing this Act's purpose includes—

(a) ensuring decision-making processes—

(i) are accountable, coordinated and efficient; and

…

3.2.1 Applying for development approval

(1) Each application must be made to the assessment manager. [A single application may be made for both a preliminary approval and a development permit].

(2) Each application must be made in the approved form.

(3) The approved form—

(a) must contain a mandatory requirements part including a requirement for—

(i) an accurate description of the land, the subject of the application; and

(ii) the written consent of the owner of the land to the making of the application; and

(b) may contain a supporting information part.

(4) Each application must be accompanied by—

(a) if the assessment manager is a local government—the fee set by resolution of the local government; or

(b) if the assessment manager is another public sector entity—the fee prescribed under a regulation under this or another Act.

(5) If an application is a development application (superseded planning scheme), the application must also identify the superseded planning scheme under which assessment is sought or development is proposed.

(5A) If the development involves taking, or interfering with, a resource of the State, another Act may require the application to be supported by—

(a) evidence of an allocation of the resource; or

(b) the written consent of the chief executive, of the department in which the other Act is administered, to the application being made. [For example, see the *Water Act 2000*, chapter 2, part 9 or chapter 8, part 2].

(6) An application complying with subsections (1), (2), (3)(a), (4), (5) and (5A) is a "**properly made application"**.

(7) The assessment manager may refuse to receive an application that is not a properly made application.

(8) 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***).

…

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.

(2) If a notice is given under subsection (1)(a), section 3.2.3(2) does not apply.

(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.

(4) If the applicant is given a notice under subsection (1)(a), the applicant may start the development for which the application was made as if the development were started under the superseded planning scheme.

…

4.1.5A How court may deal with matters involving substantial compliance

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

(a) finds a requirement of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with; but

(b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this or the other Act.

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

…

5.4.2 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."

The primary judge's reasons

[16] *Lamb v Brisbane City Council*[4] concerned a purported development application in the form of a DASPS within paragraph (a) of the definition of "development application (superseded planning scheme)", that is, a purported application for development that would not have required a development permit under the superseded planning scheme but requires a development permit under the planning scheme in force at the time the application is made. It was held in *Lamb* that what purported to be a DASPS was not in truth a DASPS because it was made outside the period specified in sub-paragraph (a)(iii) of the definition.

[17] The primary judge, applying the reasoning in *Lamb* to the developers' purported applications in the form of DASPS within paragraph (b) of the same definition, concluded that the purported DASPSs lodged were not DASPSs. On 13 December 2007 the primary judge made declarations to that effect in the originating proceedings brought by Total Ice and in each of the developer's appeals.[5] No party now seeks to challenge those declarations or his Honour's reasons for making them. The developers and the council also accept the inevitable consequence flowing from *Lamb* that the council's acknowledgment notices, which purported to accept the development applications on the basis that they were DASPS, were themselves void.

[18] The primary judge also rejected the alternative contention made by the developers and by the Council that the Council was entitled to treat the purported DASPSs as ordinary development applications. His Honour said:

"[36] The difficulty the Bukmanises and the Clarks face here commences with the fact that in lodging their applications as DASPSs they were, as is now clear, mistaken. The Council, then, acted *ultra vires* in accepting the applications on that basis. On any view the applications here purported to be DASPSs. Although applications of that kind must first be a DA [*Chang v Laidley Shire Council* (2006) 146 LGERA 283 at p 303], a DASPS requires Council to make an election of the kind provided for in s 3.2.5(3) – an election which has important compensation implications: s 5.4.2. The entire process

4 *Lamb v Brisbane City Council* [2007] 2 Qd R 538; [2007] QCA 149.

5 *Bukmanis & Anor v Maroochy Shire Council; S & L Developments and Ors v Maroochy Shire Council & Ors; Total Ice Pty Ltd v Maroochy Shire Council & Ors* [2007] QPEC 113.

miscarries, however, if an applicant mistakenly asserts, and Council mistakenly accepts, that a proposal is a DASPS. The exercise becomes both arid and essentially meaningless.

[37] A DASPS is a purely statutory creation, which has no existence at common law. With applications of that kind, the first question for determining their validity is to ask whether it was the purpose of the legislation that an act done in breach of the relevant provision should be invalid [*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355, at 390]. That test is sometimes referred to as one which raises the question whether an event is a 'jurisdictional fact' – i.e., whether a particular fact is a condition precedent to the exercise of jurisdiction or, in other words, an essential pre-condition for an application to be made [*Raniere Nominees Pty Ltd v Daley* (2006) 67 NSWLR 417 at p421 per Giles JA, p429-430 per Santow JA; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, at [62], and [63] per Spigelman CJ].

[38] These matters are to be considered within the structure of IPA which gives an applicant a generous, but limited, time after the adoption of an amendment to a planning scheme in which to have the application assessed under the superseded planning scheme.

[39] Importantly, compliance with the time limit in IPA is a condition precedent for an application which is capable of being accepted as DASPS. The legislation otherwise discloses no intention that a DASPS, if invalid, might nevertheless be treated as an ordinary DA; rather, the clear statutory intention is that, if an applicant is out of time to make a DASPS then it may if it wishes to seek a development approval make an ordinary DA.

[40] Relevantly, too, IPA provides no means for an applicant to seek an extension of the time in which to lodge a DASPS, or for Council to grant one. Although the relevant provisions were later amended to provide for a time limit of two years from the date of effect, rather than the date of adoption, the legislature did not, again, provide any means for an applicant to extend the time period if it was already out of time. The amendment points, rather, to the conclusion that Parliament considered that an application made outside the two year period from the date of adoption was, in fact, incapable of being treated as a DASPS – hence, the need for the amendment.

[41] Nor can Council invest the DASPS with legitimacy by its own error. Treating an invalid application as one which is valid cannot invest it with validity. An alternate analysis would lead to a confusing situation in which IPA is interpreted to treat a DASPS as void for that purpose, to treat the Acknowledgment Notice wrongly treating it as valid as invalid, but to yet accept the DASPS as valid and alive in another guise – ie, as a DA *simpliciter*. Whether the

consequence of non-compliance with a statute results in invalidity is to be determined by reference to the purpose of the statute [*Project Blue Sky Inc ,above n14,* at 390]. No rights flowed from the misconceived applications here, which should have been rejected by Council in the first instance. They were, as the decision in *Chang* shows, always something which had no force or effect.

[42] From another light, an act done without power is simply void and, ordinarily, so are the consequential acts that depend upon it [*Hoffman-La Roche AG v Secretary of State for Trade & Industry* [1975] AC 295]. As a matter both of logic and general legal principle, there are no degrees of nullity [*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147]. These purported DASPSs involved attempts by the applicants to enliven defined, but limited rights under a statute. That statute empowered Council to accept an application properly made but, when it wrongly accepted ones which were invalid, its consent was ineffective and incomplete, and void. In *Building Recyclers v Marrickville City Council* (2003) 131 LGERA 413 at 420, Pain J found that the application in that case:

> … (because it was) not supported by an EIS then the Development Application is ineffective and incomplete and not properly made. Further, the Council has no power to deal with the application, see *Remath* at 316, 322; *Helman v Byron Shire Council* (1995) 87 LGERA 349 at 358-369. This court therefore cannot consider the Development Application as it stands in the Council's shoes… because there is no determination by the Council pursuant to which an appeal under s 97 can be lodged in the Court… I do not consider there is a valid decision by the Council to grant the development consent against which the applicant can appeal. Therefore the court does not have jurisdiction to determine this appeal.

[43] It is also legitimate to see the DASPS process as one involving stages. Schedule 10 separately defines DAs, and DASPSs. If a valid DASPS is made (the first stage) then IPA gives the assessment manager the right to make a decision about how to treat it [Sections 3.2.3(1)(b), 3.2.5(3)]. The second stage can only be reached, logically, however if the first is valid. In the absence of a legitimate DASPS there is, in effect, no first stage and the matter cannot proceed to the second.

[44] In summary, it is manifestly important that the DASPS is a separate method of application, involving an obligation to request an assessment in a way referable to the superseded planning scheme. It is separately defined in Schedule 10. It is a separate method of application, carrying with it a statutory obligation for assessment on a special and particular basis. It attracts, on the part of the assessment

manager, a particular discretion – whether or not to assess it as a DASPS. It involves a time limit. And, a DASPS is the only form of development application which opens up the prospect of compensation for an applicant.

[45] This conclusion about the meaning and effect of the legislation accords with the practical aspects of these applications. There are obvious and notable difficulties about, in effect, now winding the clock back as the Bukmanises and Clarks (and Council) urge. Logically if, in truth, a valid DA presently exists in either case and an Acknowledgment Notice might now be given, it could only be delivered in response to the application as submitted. The applications have, however, gone through a multiplicity of changes – an exercise which, in light of their fundamentally erroneous nature, was a frolic. If the changed applications are now to be accepted as DAs which should be the subject of an Acknowledgment Notice, serious difficulties and complexity arise in respect of public notification and adequate comprehension of the nature and effect of the applications by persons interested in them, who might wish to become submitters.

[46] Lastly, it might be said that the course of action urged by the applicants and Council involves, in effect, putting the applicants in a better position than existed when the invalid DASPSs were accepted. To use stratagems of the kind now urged so as to allow Council to treat these applications as valid DASPSs when, in truth, they originally failed to come within the definition at the date of their purported lodgement means they would now be either assessed against the old scheme, or obtain rights to compensation. Council will find itself faced with having to assess the application against the superseded scheme, or accept a compensation liability.

[47] In summary it is inherently illogical and wrong, and cannot have been the intention of the drafters of IPA, that a DASPS which was invalid because brought out of time can, by the devious course suggested by the applicants and Council end up in the same or a better position than one which had been properly brought, within time."

[19] The developers and the Council seek to challenge the primary judge's conclusion. Each of them applies for leave to appeal to this Court against the failure of the primary judge to make declarations to the effect that the Council may now treat the purported DASPSs as ordinary development applications. Total Ice opposes the applications.

Discussion

[20] The problem here arises only because both the developers and the Council apparently acted on the same mistaken view of the relevant time limit. Any adverse consequences sustained by them flow from that mistake. That cannot influence the proper construction of IPA, which turns upon an analysis of the relevant provisions.

[21] Total Ice contended that the contention advanced by the developers and the Council is inconsistent with this Court's decision in *Lamb v Brisbane City Council*.[6] One question in that case was whether or not the discretion conferred on the Planning and Environment Court by s 4.1.5A of IPA could be exercised to cure the "non-compliance" with the time limit in paragraph (a)(iii) of the definition of "development application (superseded planning scheme)". That was considered in the following passage in the judgment:

> "[48] In not making the DASPS within two years, Mrs Lamb did not breach or fail to comply with any 'requirement' of the Act [Cf *Metrostar Pty Ltd v Gold Coast City Council* [2007] 2 Qd R 45 at 51-52 [20] – [21].] Mrs Lamb simply did not make a DASPS at any time.
>
> [49] This is not the occasion to explore the outer limits of s 4.1.5A in its application to the variously worded provisions of IPA. It is sufficient, we think, and consistent with this Court's decisions in *Metrostar* and *Oakden Investments*, to say that where a DASPS is not made within the two years referred to in the definition of that term, the case is not properly described as one of non-compliance with a requirement of the Act.
>
> [50] Rather, the case is one where there has not come into existence a DASPS capable of having any consequences under the provisions of IPA. In such a case, the local authority is not obliged to deal with the application, and a refusal by the local authority to deal with it cannot give rise to an appeal to the P & E Court. The occasion for the exercise of the discretion conferred by s 4.1.5A on the P & E Court will not arise; that provision assumes the existence of a valid application to the local authority which might give rise to an appeal to the P & E Court."

[22] The Council contended that *Lamb* should be distinguished on the basis that Mrs Lamb's purported DASPS concerned what was an exempt development under the superseded planning scheme, so that it did not require development approval: it was an application of the kind described in paragraph (a) of the definition of "development application (superseded planning scheme)" rather than, as is the case in these applications, a development application under paragraph (b).

[23] IPA does provide different consequences for those different forms of development application. In the case of an application under paragraph (a) of the definition of "development application (superseded planning scheme)", the local authority's acknowledgement notice must state either that the application may proceed as proposed as if the development were to be carried out under the superseded planning scheme or state that a development permit is required for the application: s 3.2.5(i). In the case of a DASPS under paragraph (b) of the definition, the choice conferred by s 3.2.5(3) is between assessment under the superseded planning scheme or assessment under the existing scheme. In both cases the second alternative potentially opens up an entitlement to compensation for the applicant. The difference is that paragraph (a) contemplates that there will be no further

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6 *Lamb v Brisbane City Council* [2007] 2 Qd R 538; [2007] QCA 149.

assessment of the application whereas paragraph (b) contemplates that there will be such an assessment.

[24] I accept that the particular point in issue in these applications did not arise in *Lamb* and that the Court's reasons were not directed to it. Even so, it is difficult to reconcile the reasoning in *Lamb* with the result for which the developers and the Council contend.

[25] It is submitted on behalf of the Council and the developers that the primary judge's conclusion was inconsistent both with this Court's decision in *Chang & Anor v Laidley SC* [7] and the High Court's decision in the same case.[8] They contend that the primary judge erred in erecting a "dichotomy" between a development application and a DASPS for a development permit.

[26] In support of that proposition, counsel for the developers and the Council referred to the following passage in this Court's decision, in the judgment of Keane JA:[9]

> "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."

[27] Reference was also made the following passage in the High Court's decision:[10]

> "Two expressions used in s.5.4.2 require explanation. First, a 'change', referred to in s.5.4.2(a), is defined[s 5.4.1] 'for an interest in land, [as] a change to the planning scheme or any planning scheme policy affecting the land'. Secondly, reference is made in s.5.4.2(b) to 'a development application (superseded planning scheme)'. That expression is defined in the dictionary of definitions contained in Sched 10 to the 1997 Act that is applied to the Act by s 1.3.1. The definition reveals that a development application (superseded planning scheme) is a particular species of the genus 'development application'. It is therefore an application which engages provisions of the legislation applying generally to all development applications."

[28] Those passages do make it clear that IPA treats a DASPS as a particular form of development application, but the primary judge appreciated that. So much clearly appears from paragraph [36] of his Honour's reasons. The point which the primary

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7 *Chang & Anor v Laidley SC* (2006) 146 LGERA 283; [2006] QCA 172.

8 *Chang v Laidley Shire Council* (2007) 154 LGERA 297; [2007] HCA 37.

9 *Chang & Anor v Laidley SC* (2006) 146 LGERA 283; [2006] QCA 172 at [36].

10 *Chang v Laidley Shire Council* (2007) 154 LGERA 297; [2007] HCA 37 at [91] per Hayne, Hayden and Crennan JJ.

judge made in that respect was that the provisions of IPA identified by his Honour nevertheless distinguish between a DASPS and an ordinary development application.

[29] The critical question is whether, despite that differential legislative treatment, a document in the form of a DASPS which is not a DASPS because it is not lodged within the specified time may be treated by the Council (acting as the "assessment manager") as an ordinary development application.

[30] It was submitted for the developers that an affirmative answer to that question was required by the fact that the documents they had lodged with the Council satisfied the definition of "development application". Similarly, it was submitted on behalf of the Council that it "has before it the necessary application to commence the IDAS process." ("IDAS" is shorthand for the "integrated development assessment system" created by the provisions in chapter 3 of IPA. It includes what are known as the "application stage", the "information and referral stage", the "notification stage" and the "decision stage".[11] The "application stage", which is the subject of part 2 of chapter 3 of IPA, includes s 3.2.1, s 3.2.3 and s 3.2.5.)

[31] The task for the primary judge was to ascertain whether, taking into account "the language of the relevant provisions and the scope and object of the whole statute", it was part of the legislative purpose that a document in the form of a DASPS which is not a DASPS because it is not lodged in time may nevertheless be treated by the Council, acting as the assessment manager, as a valid development application.[12] The submissions made for the developers and for the Council therefore invite error because they do not take into account those provisions of IPA identified by the primary judge that differentiate between a DASPS and an ordinary development application.

[32] A DASPS that follows the form of paragraph (b) of the definition of "development application (superseded planning scheme)" requests assessment of the application under a superseded planning scheme rather than under the current planning scheme with reference to which an ordinary development application must be assessed. Thus the Council, acting as the assessment manager, must approach the assessment of a DASPS differently from the manner in which it must assess an ordinary development application. That difference is reflected in the longer period of time allowed to the assessment manager for giving the acknowledgement notice for a DASPS: s 3.2.3.

[33] On behalf of the Council it was submitted that this distinction was not important because, at the election of the Council, a DASPS might be assessed under the planning scheme current at the date of lodgement. I reject that submission. The distinction is material because a decision to assess a DASPS under an existing planning scheme also opens up the prospect of compensation for the applicant: s 5.4.2. The overall effect of these provisions is that a person who makes a DASPS under paragraph (b) of the definition applies for approval on one of two bases. The first basis is that of an assessment under the superseded planning scheme. The second basis is that of assessment under the existing planning scheme coupled with the prospect of an entitlement to compensation under s 5.4.2.

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11 IPA, s 3.1.9.

12 Cf: *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [92] – [93], see also at 381 [69]-[71]; [1998] HCA 28.

[34] A DASPS thus differs from an ordinary development application, under which application is made for approval on the basis of an assessment under the existing planning scheme without any potential entitlement to compensation. That difference is material. A development that may be feasible if the necessary application for approval is assessed under a superseded planning scheme, or under a current planning scheme with a concomitant entitlement to compensation, may be uneconomic if the application must be assessed upon the basis of the current planning scheme with no concomitant entitlement to compensation. If the assessment manager accepts what purports to be but is not a DASPS and then treats it as an ordinary development application that would falsify the premise upon which the application was lodged. In a case of that character the applicant might rationally have preferred to have the application, with the fee proffered with it, rejected at the counter.

[35] No doubt there may also be cases, such as those of these developers, in which applicants would prefer the assessment manager to have a discretion to accept and deal with such applications. But IPA contains no criteria by which any such discretion should be exercised. In the context of the elaborate scheme for development applications in IPA it is therefore in the highest degree unlikely that it was intended that the assessment manager have any such discretion. The construction of these provisions propounded by the developers and the Council is at odds with the statutory intention expressed in s 1.2.3(1)(a)(i) that the decision-making processes be "accountable".

[36] For the reasons I have given, the inclusion in each of the developers' purported development applications of the request that "the proposal be assessed against the provisions of a superseded planning scheme" was a substantial departure from the statutory requirements for an ordinary development application. The provisions of IPA to which I have referred imply that the form of a "development application" that is not a "development application (superseded planning scheme)" (what I have called an ordinary development application") must **not** include such a request.

[37] Nor does s 3.2.1(9) of IPA have any potential application. Its terms are not apt to empower an assessment manager unilaterally to omit from a purported DASPS the request, central to that kind of development application, that it be assessed under a superseded planning scheme. It allows for acceptance of an application despite departure from the requirements identified in s 3.2.1(7) but the developers' applications are not deficient merely on account of any such departure. Rather, they are simply not applications of a kind contemplated by the statute itself.[13] In my respectful opinion the primary judge's conclusion that s 3.2.1(9) has no application was correct.[14]

[38] The developers' applications were not made in accordance with the statutory requirements for a DASPS (for the reasons given in *Lamb*) and nor were they made in accordance with the statutory requirements for making a development application which is not a DASPS. That being so neither developer in fact made a

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13 Cf *Adams v Lambert* (2006) 228 CLR 409 at 418 [22]; [2006] HCA 10.

14 *Bukmanis & Anor v Maroochy Shire Council; S & L Developments and Ors v Maroochy Shire Council & Ors; Total Ice Pty Ltd v Maroochy Shire Council & Ors* [2007] QPEC 113 at [24] – [27]

"development application".[15] It follows that the Council had and has no authority to accept or otherwise to deal with the purported applications.[16]

Disposition

[39] The applications for leave to appeal are made pursuant to s 4.1.56 of IPA, which limits the grounds of appeals to error of law and issues of jurisdiction. The applicants contended for an error of law in the construction of IPA. In my opinion no such error has been demonstrated. For that reason I would refuse each of the applications for leave to appeal, with costs.

[40] **WHITE J:** I agree with Fraser JA that these applications should be refused with costs for the reasons which he gives.

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15 Each case turns upon the interpretation of the statute in issue, but I note that similar conclusions have been reached in analogous cases: *Botany Bay Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 312 at 319 – 322; [2000] NSWCA 364; *Brierley v Reeves* (2001) 51 NSWLR 689 at 698 [51]; [2001] NSWCA 189.

16 *Raniere Nominees Pty Ltd trading as Horizon Motor Lodge v Daley and Another* (2006) 67 NSWLR 417; [2006] NSWCA 235 at [19] per Giles JA and at [67] per Santow JA, (Spigelman CJ concurring).