SUPREME COURT OF QUEENSLAND

CITATION:	*Genamson Holdings P/L v Caboolture SC* [2008] QCA 374
PARTIES:	**GENAMSON HOLDINGS PTY LTD** ACN 053 174 271 (applicant) **v** **CABOOLTURE SHIRE COUNCIL** (respondent)
FILE NO/S:	Appeal No 8009 of 2008 P & E Court No 3424 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2008
JUDGES:	Keane and Fraser JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal refused** **2. Applicant to pay the respondent's costs to be assessed on the standard basis**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – REZONING APPLICATIONS – CONDITIONS – where the applicant lodged a development application under a superseded planning scheme – where the land in question fell within a rezoning approved by the respondent in 1993 subject to certain conditions that were agreed to by the applicant's predecessor in title – where the applicant did not upon its acquisition of the land become formally bound by the conditions attached to the rezoning – where the development now proposed by the applicant is not in compliance with the conditions attached to the rezoning – whether the learned trial judge erred in holding the applicant to be obliged to comply with the conditions attached to the 1993 rezoning ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – DEVELOPMENT CONTROL PLANS –

where the applicant lodged a development application under a superseded planning scheme – where the relevant superseded planning scheme incorporated a Town Planning By-Law enacted in conjunction with the scheme – where the development now proposed by the applicant is contrary to the Town Planning By-Law – whether the learned trial judge erred in holding the applicant to be obliged to comply with the Town Planning By-Law

Integrated Planning Act 1997 (Qld), s 3.1.4(2), s 3.2.1(7)(c), s 3.2.1(8), s 3.2.5, s 6.1.1, s 6.1.24, s 6.1.35A
Local Government (Planning and Environment) Act 1990 (Qld), s 4.3, s 4.4(13), s 4.5(11), s 4.5(12)

Comiskey v Pine Rivers Shire Council [1996] QPELR 158, considered
Genamson Holdings Pty Ltd v Caboolture Shire Council [2008] QPEC 42, affirmed
Makucha v Albert Shire Council [1996] 1 Qd R 53; [1994] QCA 550, distinguished
Mimehaven Pty Ltd v Cairns City Council (2002) 121 LGERA 216; [2002] QCA 276, considered
Ponton v Brisbane City Council (1970) 25 LGRA 73, cited
Transcontinental Development Pty Ltd v Pine Rivers Shire Council (1969) 25 LGRA 7, considered

COUNSEL: D R Gore QC, with M A Williamson, for the applicant
M D Hinson SC for the respondent

SOLICITORS: Connor O'Meara for the applicant
King & Company for the respondent

[1] **KEANE JA:** The applicant owns land at Morayfield; the respondent is the local government authority in the area.

[2] On 8 June 2007 the applicant lodged with the respondent a Development Application (Superseded Planning Scheme) ("DA(SPS)") in relation to the development of its land by the building of a new supermarket, specialty shops and car parking in association with some existing retail shopping space. The DA(SPS) notified the respondent of the applicant's intention to carry out "development which would have been self-assessable … under a superseded planning scheme".

[3] Under the respondent's current planning scheme, a development permit is required for the development intended by the applicant. Under the previous planning scheme which commenced in 1988, the land in question was zoned Special Rural, under which development for "shops" was a prohibited use. By a rezoning approved by the respondent in November 1991 and gazetted in 1993 (to which I will refer as "the 1993 rezoning"), the land was included in the Central Commercial Zone. In that zone, "shops" was one of the uses for which "buildings or other structures may be erected or used or for which land may be used without the consent of the Council".

[4] The respondent's approval of the 1993 rezoning was subject to conditions: condition 2(1) required the land to be developed generally in accordance with "the layout plan submitted by (the then developer) under covering letter dated October 10, 1991." It is common ground that the development proposed by the applicant is materially different from that depicted in this layout plan referred to in condition 2(1).

[5] The 1993 rezoning was preceded by the execution of a deed executed by the then developer of the land. Under that deed, the then developer obliged itself to comply with the conditions attaching to the respondent's approval of the rezoning and to obtain a similar covenant from its assigns. It may also be noted here that both the conditions of the 1993 rezoning and the deed obliged the then developer to make certain contributions to the respondent in respect of the head works associated with the proposed development.

[6] It appears that, through no fault of the applicant, the applicant did not bind itself to comply with the conditions relating to the 1993 rezoning when it acquired the land.[1] Accordingly, as is common ground, the applicant is not bound by the deed. The issues which have arisen between the parties relate to whether the applicant is entitled to claim the benefit of the 1993 rezoning free of the conditions to which I have referred.

The issues between the parties

[7] The applicant contends that the development which it now proposes was permitted development under the 1988 planning scheme as a result of the 1993 rezoning. On that basis, the applicant's position is that the proposed development is self-assessable development which, by virtue of s 3.1.4(2) of the *Integrated Planning Act* 1997 (Qld) ("the IPA"), does not require a development permit from the respondent. The applicant contends that the development which it proposes would have been self-assessable development within the meaning of s 6.1.1 of the IPA because it is:

> "development, not inconsistent with schedule 8 or schedule 9, that … under the [*Local Government (Planning and Environment) Act* 1990 (Qld) ("the P & E Act")], would not have required a continuing approval but would have been required to comply with standards".[2]

[8] The applicant claims that the respondent was obliged under s 3.2.5 of the IPA to issue an acknowledgment notice to the applicant in respect of its 8 June 2007 application indicating whether the respondent elected to allow the applicant to proceed as if the development were to be carried out under the 1988 planning scheme or to require the applicant to obtain a development permit.[3]

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1 *Genamson Holdings Pty Ltd v Caboolture Shire Council* [2008] QPEC 42 at [4] – [5].

2 See also paragraph (a) of the definition of development application (superseded planning scheme) in Sch 10 of the *Integrated Planning Act* 1997.

3 Section 3.2.5 of the IPA provides relevantly:

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.

…

[9] The issues between the parties were brought to a head when the applicant applied to the Planning and Environment Court ("the P & E Court") for a declaration to that effect.

[10] The respondent resisted the application for a declaration, principally on the basis that the development proposed by the applicant was not self-assessable development but impact-assessable development which required a development permit from the respondent. Two particular grounds were advanced to support that position. First, it was said that, by virtue of s 4.4(13) and s 4.5(12) of the P & E Act and s 6.1.24 of the IPA, condition 2(1) attached to the land and bound successors in title including the applicant even though the applicant did not become a party to the rezoning deed. Because the development proposed by the applicant is materially different from that described in condition 2(1), the proposed development is not permitted development under the superseded planning scheme. Secondly, it was said that, under By-Law 1(a) in Ch 40 of the superseded planning scheme, the applicant was obliged to obtain the respondent's approval of conditions relating to the proposed development even if that development were properly characterised as permitted development under that planning scheme. By-Law 1 in Ch 40 of the superseded planning scheme is in the following terms:

> "1. A person shall not–
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> (a) use land or erect or use a building or other structure, change any existing lawful use of any land, building or other structure, for any purpose permitted in a zone without the consent of the Council, without first obtaining the approval of Council for such new use or development or such changed use and then complying with the conditions and requirements notified to the applicant with the approval. Such application may be made conjointly with an application for building approval under the *Building Act 1975-1984* and shall be in such form required by the Shire Clerk and be accompanied by an application fee in accordance with a scale of fees determined by the Council from time to time;
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> (b) use land or erect or use a building or other structure for any purpose in a zone in which the consent of the Council to the use or erection in question is required, unless such consent has first been obtained in accordance with the provisions of this part; or
>
> (c) use land or erect or use a building or other structure for any purposes in a zone in which the use is prohibited."

[11] The respondent's position was that it was not obliged to issue an acknowledgment notice under s 3.2.5 of the IPA, first because the applicant erroneously asserted in

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(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.

…

its application of 8 June 2007 that the proposed development would have been self-assessable under the 1988 planning scheme, and secondly because the applicant had not first obtained approval of conditions relevant to the proposed development. As a result, the respondent contended the DA(SPS) made by the applicant on 8 June 2007 was not a "properly made" application within the meaning of s 3.2.1(7)(c) of the IPA,[4] and by virtue of s 3.2.1(8) of the IPA, the respondent was entitled to refuse the application on the ground that it was not properly made.

[12] The applicant sought to counter the respondent's reliance upon condition 2(1) with two arguments: first, that condition 2(1) was irrelevant to the development proposed by the applicant; and, secondly, that condition 2(1) could not validly constrain the uses permitted as a result of the 1993 rezoning. The applicant sought to counter the respondent's reliance upon cl 1(a) of Ch 40 of the 1988 By-Law with the contention that cl 1(a) was invalid so that no "continuing approval" by the respondent of conditions was required by s 6.1.23(1)(a) of the IPA.

[13] In the P & E Court, the learned primary judge rejected the applicant's contentions. His Honour held that condition 2(1) was a valid constraint upon the development of the land and that cl 1(a) of Ch 40 of the By-Laws of the superseded planning scheme was valid. As a result, the application of 8 June 2007 erroneously asserted that the proposed development was self-assessable. Accordingly, the application was not a properly made application, and the respondent was entitled to refuse to accept it. His Honour refused to make the declaration sought by the applicant.[5]

The application for leave to appeal

[14] The applicant now seeks leave to appeal to this Court pursuant to s 4.1.56 of the IPA. The Court's decision on the grant of leave was reserved to a consideration of the merits of the contentions advanced by the parties. In my respectful opinion, the decision of the learned primary judge is not attended with sufficient doubt to warrant the grant of leave to appeal.

The rezoning condition issue

[15] In this Court the applicant's principal argument in support of the contention that the learned primary judge erred in holding that the applicant was obliged to comply with condition 2(1) of the 1993 rezoning approval is that the conditions of the 1993 rezoning are irrelevant to the present application because the applicant is seeking to exercise the "basic rights" conferred by the 1988 planning scheme upon land in the Central Commercial Zone rather than the "conditional rights" conferred by the 1993 rezoning approval.

[16] The applicant's argument seeks to take the benefit of the 1993 rezoning without the burden of the conditions to which that rezoning approval was subject. The applicant would have it that, by some legal miracle, it now enjoys more extensive

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[4] 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 (5); and
- (f) the development would not be contrary to the regulatory provisions or the draft regulatory provisions.

[5] [2008] QPEC 42.

development rights in respect of the land than were at any stage attached to the land under the superseded planning scheme. In this respect at least, the age of miracles has passed. Condition 2(1), which confined the entitlement created by the rezoning to develop the land for "shops" to the plan referred to therein, was attached to the land by virtue of s 4.4(13) and s 4.5(12) of the P & E Act, and s 6.1.24 of the IPA. To argue otherwise is to seek to deny the plain effect of these legislative provisions.

[17] These statutory provisions are in the following terms:

The P & E Act

"**4.4 Assessment of proposed planning scheme amendment**

…

(13) The conditions imposed by the local government on its approval under subsection (5) (as subsequently amended under this Act) attach to the land and are binding on successors in title.

4.5 Approval of planning scheme amendment by Governor in Council

…

(12) Any conditions imposed under section 4.4(5) (as subsequently amended under this Act) attach to the land and are binding on successors in title."

The IPA

"**6.1.24 Certain conditions attach to land**

(1) If a local government has set conditions in relation to a continuing approval, the conditions attach to the land on and from the commencement of this section and are binding on successors in title.

(2) Also, if an application to amend a former planning scheme was, or the conditions attached to an amendment were, approved under the repealed Act or under section 6.1.26 and conditions in relation to either amendment were attached to the land under the repealed Act or section 6.1.26–

(a) if the approval was given before the commencement of this section–the conditions remain attached to the land on and from the commencement of this section and are binding on successors in title; and

(b) if the approval was given under section 6.1.26–the conditions remain attached to the land on and from the day the approval was given and are binding on successors in title.

(3) Subsections (1) and (2) apply, despite–

(a) a later amendment of the transitional planning scheme; and

(b) the later introduction or amendment of an IPA planning scheme.

(4) In this section–

former planning scheme includes any planning scheme made under the repealed Act or an Act repealed by the repealed Act."

[18] Because of condition 2(1) to the 1993 rezoning approval, the "basic right" which the applicant seeks to assert simply did not exist in the untrammelled terms asserted by the applicant.

[19] The applicant seeks to invoke the authority of this Court's decision in *Mimehaven Pty Ltd v Cairns City Council*[6] in support of its argument. But that decision offers no support for denying the clear effect of the legislative provisions which attach conditions of rezoning approval to land which has been rezoned.

[20] In *Mimehaven v Cairns City Council*, a developer sought declarations that it was not bound by the conditions of a 1994 rezoning approval. The local authority asserted that the developer remained bound by the conditions of the 1994 rezoning which related to a materially different development. The developer was held to be entitled to proceed with its proposed development by virtue of the terms of the 1996 planning scheme which attached no conditions to the development in question. The development was a "permitted development", lawfully undertaken pursuant to rights conferred by the 1996 planning scheme. In relation to the proposed development, the conditions of the earlier rezoning were irrelevant.[7]

[21] On the applicant's behalf, it was argued that the true ratio of the decision in *Mimehaven v Cairns City Council* was that the conditions of the 1994 rezoning did not apply to the proposed development in question in that case because it was materially different from that permitted under the conditions of the 1994 rezoning. The applicant's submission was in effect that it was essentially because the proposed development was different from that constrained by the conditions of the 1994 rezoning that the restrictive effect of those conditions did not apply. But that argument fails to recognise that each member of the Court in *Mimehaven v Cairns City Council* accepted that the primary judge in that case was correct in taking the view that, if the development in question was authorised only by the 1994 rezoning approval (pursuant to s 3.4(3) of the P & E Act), then the conditions of that approval would have applied to restrict the proposed development.[8] This Court's decision in *Mimehaven v Cairns City Council* should not be understood as supporting the proposition that the operation of s 4.4(13) and s 4.1(12) of the P & E Act and s 6.1.24 of the IPA can be defeated by pursuing a development which is contrary to the conditions attaching to the land. The point of the decision in *Mimehaven v Cairns City Council* is that the entitlement to pursue the proposed development was established by a charter of rights which was in no way confined by an earlier superseded charter of rights and obligations relating to a different development.

[22] In this case the applicant is not seeking to exercise development rights under the 1988 planning scheme as it was originally promulgated. The rights which the applicant seeks to exercise were conferred only by the 1993 rezoning approval, and those rights as conferred in respect of "shops" were always subject to conditions relating to the rights and obligations bearing upon the use of the land as "shops". These conditions ran with the land by force of s 4.4(13) and s 4.1(12) of the P & E Act, and s 6.1.24 of the IPA. A failure to comply with these conditions would have

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6 (2002) 121 LGERA 216.

7 (2002) 121 LGERA 216 at 217 [3] and [5], 219 [13] and 221 [21] – [23].

8 (2002) 121 LGERA 216 at 217 [3] and [5], 219 [13] and 221 [24].

been an offence under s 2.23(1) of the P & E Act,[9] and would be an offence under s 4.3.3 of the IPA.[10]

[23] The applicant's argument has proceeded thus far on the assumption that condition 2(1) was valid albeit irrelevant. The applicant also argues, in the alternative, that condition 2(1) is invalid. In this regard, the applicant seeks to rely upon a line of authority in the P & E Court and its predecessor, the Local Government Court, for the proposition that a condition of a rezoning approval may not lawfully restrict the right to use land for any of the purposes permitted in that zone under the planning scheme.[11]

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[9] **2.23 Offences and orders (Magistrates Court)**

(1) A person who—
- (a) contravenes or fails to comply with a provision of a planning scheme; or
- (b) commences a permitted or permissible use prior to the completion of works required by a planning scheme;

commits an offence against this Act.
Maximum penalty—33 penalty units.

(1A) For the purposes of this section, a planning scheme includes—
- (a) those interim development control provisions approved under section 2.22; and
- (b) the conditions attached to approvals, decisions and consents given in respect of a planning scheme, an amendment thereof (including rezoning in stages) or those, as the case may be;

and currently in force.

[10] **4.3.3 Compliance with development approval**

(1) A person must not contravene a development approval, including any condition in the approval.
Maximum penalty–1665 penalty units.

(2) Subsection (1) applies subject to sections 4.3.6 and 4.3.6A.

(3) Also, subsection (1) does not apply to a contravention of a condition of a development approval imposed, or required to be imposed, by the administering authority under the *Environmental Protection Act 1994* as the assessment manager or a concurrence agency for the application for the approval.

(4) In subsection (1)–
development approval includes an approval under section 4.4(5) or 4.7(5) of the repealed Act.

…

4.3.26 Effect of orders

(1) An enforcement order or an interim enforcement order may direct the respondent–
- (a) to stop an activity that constitutes, or will constitute, a development offence; or
- (b) not to start an activity that will constitute a development offence; or
- (c) to do anything required to stop committing a development offence; or
- (d) to return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or
- (e) to do anything about a development or use to comply with this Act.

(2) Without limiting the court's powers, the court may make an order requiring–
- (a) the repairing, demolition or removal of a building; or
- (b) for a development offence relating to the clearing of vegetation on freehold land–
  - (i) rehabilitation or restoration of the area cleared; or
  - (ii) if the area cleared is not capable of being rehabilitated or restored–the planting and nurturing of stated vegetation on a stated area of equivalent size.

(3) An enforcement order or an interim enforcement order–
- (a) may be in terms the court considers appropriate to secure compliance with this Act; and
- (b) must state the time by which the order is to be complied with.

[11] *Transcontinental Development Pty Ltd v Pine Rivers Shire Council* (1969) 25 LGRA 7 at 12; *Ponton v Brisbane City Council* (1970) 25 LGRA 73 at 77; *Comiskey v Pine Rivers Shire Council* [1996] QPELR 158 at 160. See also Fogg, *Land Development Law in Queensland* (1987) at 647.

[24] In *Transcontinental Development Pty Ltd v Pine Rivers Shire Council*, Mylne DCJ said:

> "To impose a condition restricting in the proposed zone a use of land that may be conducted without the consent of the council in that zone would be contrary to the town planning scheme and therefore unlawful. On the other hand it would no doubt be competent for a local authority to impose a condition on approval of an application to rezone, that a use, prohibited in the zone, in which application is made to include the land, be discontinued or eliminated."[12]

[25] The learned primary judge held that condition 2(1) does "not limit the range of uses which the table of zones authorises. There is nothing in the [P & E Act] to suggest that such condition would be unlawful."[13]

[26] It may be noted that the respondent's decision in November 1991 to approve the rezoning subject to the conditions which included condition 2(1) purported both to entitle and oblige the then developer to develop the land in accordance with the layout plan to which reference was made. The conditions did not purport to prohibit any other form of development permitted in the Central Commercial Zone. To the extent that an owner of the land might be disposed not to use the land as "shops", the land might lawfully be used for other permitted forms of development. To the extent that an owner might be disposed to seek to develop the land for "shops" in accordance with a plan different from the layout approved by the respondent, that would not mean that the use was not permitted under the conditions attached to the land: it would simply mean that steps would need to be taken to free the land of the condition as might be done under s 6.1.35A of the IPA and s 4.3 of the P & E Act. Absent a successful application to free the land of condition 2(1), however, it would not be correct to say that condition 2(1) prevented the land from being used for "shops" or any of the other permitted uses: it would simply be the case that the land might lawfully be developed for any of the permitted uses, but to the extent that it was to be developed for use as "shops", the entitlement to so develop it was subject to an obligation to develop it in accordance with the layout plan referred to in condition 2(1).

[27] On behalf of the applicant, it was said that the ability of the owner of the land to use the land for purposes other than "shops" in accordance with condition 2(1) might be adversely affected in practical terms by compliance with the condition. But one is here concerned with inconsistency in terms of rights and duties: the circumstance that there might be practical difficulties associated with a change of use can have no bearing on the validity of condition 2(1).

[28] It must also be said that the applicant's argument in this respect proves too much. If condition 2(1) were invalid, it would not follow that the rezoning would remain effective shorn of the conditions upon which it was made; rather, the rezoning would fall with the conditions on which it was dependent. As the learned primary judge said: "The whole basis of the rezoning was the development in condition 2(1) …"

[29] While it is true that the rezoning was given the force of law by notification in the gazette of the order in council approving the amendment of the planning scheme by

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12 (1969) 25 LGRA 7 at 12.

13 [2008] QPEC 42 at [12].

s 4.5(11) of the P & E Act, the making of the order in council is the culmination of a process which required by s 4.5(3)(b) "a statement of the grounds on which the application is made [by the local government] and of the facts and circumstances relied on by the local government in support of those grounds". In this case, if the respondent provided the terms of its November 1991 approval to the Governor in Council in conformity with s 4.5(3)(b), it would be unarguable that if condition 2(1) were invalid the basis for the order in council would fail. If the terms of the November 1991 approval were not provided to the Governor in Council, there would be much to be said for the view that the order in council approving the rezoning was invalid because of non-compliance with s 4.5(3)(b) of the P & E Act.

Clause 1(a) of Ch 40 of the By-Law

[30] The applicant next argues that his Honour erred in proceeding on the basis that the applicant was obliged to comply with cl 1(a) of Ch 40 of the Town Planning By-Law which came into effect with the superseded planning scheme. The applicant's argument in this regard is that cl 1(a) of Ch 40 is invalid because it is repugnant with the "untrammelled" use rights conferred by the 1988 planning scheme in respect of land in the Central Commercial Zone.

[31] The applicant contends that cl 1(a) of Ch 40 of the 1988 Town Planning By-Law is invalid because it prohibited development permitted by the planning scheme unless the respondent's approval is first obtained. The applicant contends that cl 1(a) cannot be read down so as to remove the repugnancy between cl 1(a) and the 1988 planning scheme.

[32] The applicant's contention focuses on the prohibition of the use of land or the erection of a building:

> "for any purpose permitted in a zone without the consent of the Council, without first obtaining the approval of Council for such new use or development or such changed use and then complying with the conditions and requirements notified to the applicant with the approval."

[33] The applicant seeks to rely upon the decision of this Court in *Makucha v Albert Shire Council*.[14] In that case, an Order in Council purporting to amend a planning scheme so as to permit the erection of particular structures (chiefly advertising billboards) only if the local authority had approved the erection under some other law administered by the local authority was held to be inconsistent with the provisions of the P & E Act which made exhaustive and seemingly exclusive provision for the circumstances in which the approval of the local authority might be required and obtained. The present case does not give rise to the same problem. In this case no question arises as to a conflict between By-Law 1(a) in Ch 40 and the legislation under which the planning scheme was promulgated. The question is really whether By-Law 1(a) is invalid because it is repugnant to some other "dominant" provision of the superseded planning scheme.

[34] As the learned primary judge noted, By-Law 1(a) in Ch 40 was itself an integral part of the superseded planning scheme. His Honour said:

> "While there may be different regimes applying to their adoption or amendment, there is some artificiality about separating out what is

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14 [1996] 1 Qd R 53 esp at 61 – 62, 63 – 64.

> called the planning scheme from the associated by-laws, which are referred to in the scheme, as has been seen. By a single process culminating in the Order in Council of 10 March 1988, the Governor in Council notified approval 'in part' of the Town Planning Scheme consisting of:
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> '(i) the provisions contained in the Schedule hereto;
>
> (ii) the scheme maps referred to in the Schedule hereto, being scheme maps signed for identification by the Clerk of the Executive Council;
>
> (iii) the Strategic Plan consisting of–
>
> (A) Part A contained in Appendix A hereto;
>
> (B) Part B contained in the document marked 'Caboolture Shire Council Strategic Plan Part B-Supporting Information'; and
>
> (iv) the by-laws made by the Local Authority to the scheme and to provide for, regulate and control the administration and execution of the scheme.'
>
> The Schedule contains the planning scheme proper, extending in the Gazette to page 1398. Chapter 40 follows, from page 1403, where one finds a particular note of the Governor in Council's approval on 10 March 1988 …"[15]

[35] The 1988 planning scheme identified the nature and extent of permitted development. But it was common ground that under the 1988 planning scheme itself, permitted development was not left otherwise wholly unregulated; rather, it was expressly subject to other provisions which were themselves part of the planning scheme and pursuant to which conditions upon permitted development might lawfully be imposed. Clause 1(a) of Ch 40 cannot be regarded as inconsistent with the planning scheme insofar as it requires a developer to comply with all the provisions of the planning scheme including the other provisions which prescribe conditions applicable to permitted development.

[36] On the basis that cl 1(a) of Ch 40 is part of, and has to be read in harmony with the other provisions of the superseded planning scheme, the learned primary judge was right to accept the respondent's contention that cl 1(a) of Ch 40 purports to operate only where other provisions of the scheme require that conditions be observed in respect of permitted development. In my respectful opinion, his Honour's conclusion on this point was correct.

[37] Clause 1(a) expressly proceeds on the basis that the planning scheme of which it is an integral part, has elsewhere provided that a particular form of development is permitted development in its particular zone. Where the planning scheme itself permits the particular development, cl 1(a) of the by-laws can sensibly be understood as conferring power on the Council only to impose conditions on

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15 [2008] QPEC 42 at [21].

permitted development in accordance with such other provisions of the planning scheme as may be applicable. Clause 1(a) is not concerned to require an applicant to obtain permission for a particular use: rather, it is concerned to require "approval" for a use which is permitted. The matters to be approved cannot include the uses already permitted: they can only be understood as being the conditions required of development otherwise permitted by the provisions of the planning scheme. It should be read in this way in order to give effect to the planning scheme as a coherent whole. In this way, one also avoids the conundrum involved in attempting to decide which of supposedly conflicting provisions is the "dominant" provision to which the other must yield.

[38] On behalf of the applicant, it was argued that this construction of cl 1(a) was gainsaid by the circumstance that cl 1(b) and (c) made specific provision for cases where the use was a consent use or was a prohibited use respectively. This was said to indicate that cl 1(a) could not be understood to be concerned only with obtaining approval of the conditions applicable to permitted development. In my respectful opinion, however, this circumstance tends, if anything, to confirm that cl 1(a) is indeed concerned only with the obtaining of approval of conditions applicable to permitted development.

[39] Under cl 2 of Pt V of the 1988 planning scheme, the development now proposed by the applicant would be required to comply with conditions as to contributions to roadworks to the extent required by the respondent. By cl 3 of Pt V, the development would be required to comply with requirements as to car parking subject to the respondent's discretion to vary those requirements. These provisions are conditions – as opposed to standards – which require "continuing approval" within the meaning of the definition of "self-assessable development" in s 6.1.1 of the IPA.

Conclusion and orders

[40] For these reasons, I have concluded that the applicant's contentions are without sufficient substance to warrant the grant of leave to appeal.

[41] The application for leave to appeal should be refused.

[42] The applicant should be ordered to pay the respondent's costs to be assessed on the standard basis.

[43] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by his Honour, and with his reasons for those orders.

[44] **CHESTERMAN J:** I agree with the orders proposed by Justice Keane for the reasons expressed by his Honour.