SUPREME COURT OF QUEENSLAND

CITATION:	*SLS Property Group P/L v Townsville CC & Anor; Catchlove & Ors v Townsville CC & Ors* [2009] QCA 380
PARTIES:	**SLS PROPERTY GROUP PTY LTD** ACN 121 514 458 (appellant/applicant) **v** **TOWNSVILLE CITY COUNCIL** (respondent/first respondent) **CONSOLIDATED PROPERTIES GROUP PTY LTD** ACN 010 078 323 (respondent/second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF MAIN ROADS** (respondent/not a party to application) **PETER CATCHLOVE, PLANNING INITIATIVES, and CENTRO PROPERTIES GROUP** (appellants/applicants) **v** **TOWNSVILLE CITY COUNCIL** (respondent/first respondent) **CONSOLIDATED PROPERTIES PTY LIMITED** ACN 128 139 926 (respondent/second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT** (respondent/not a party to application)
FILE NO/S:	Appeal No 5265 of 2009 P & E Appeal No 1877 of 2008 Appeal No 5298 of 2009 P & E Appeal No 2061 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning & Environment Court at Brisbane
DELIVERED ON:	11 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2009
JUDGES:	Keane and Holmes JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Applications for leave to appeal refused**
2. **Applicants to pay the costs of the other parties to the applications to be assessed on the standard basis**

CATCHWORDS: ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – VALIDITY – GENERALLY – where application before first respondent council for material change of use of vacant land – where application included master plan that included two stages – where council approved first stage only – where applicants appealed to Planning and Environment Court for declarations that approval invalid – where invalidity said to arise insofar as council not empowered to approve first stage only – where applicants seek leave to appeal against that decision on error of law – whether leave to appeal should be granted

Integrated Planning Act 1997 (Qld), s 3.5.11, s 3.5.24, s 4.1.52, s 4.1.56

Addicoat v Fox (No 2) [1979] VR 347, cited
Barakat Properties Pty Ltd v Pine Rivers Shire Council & Anor (1994) 85 LGERA 99, cited
Metroplex v Brisbane City Council & Ors [2009] QPEC 110, cited
Mison v Randwick Municipal Council (1991) 23 NSWLR 734, cited
Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council [1996] 1 Qd R 347; [1994] QCA 559, cited
Regional Land Development Corp No 1 P/L v Banana SC & Ors [2009] QCA 140, cited
Ridgewood Development Pty Ltd v Brisbane City Council [1985] 2 Qd R 48, cited
SLS Property Group Pty Ltd v Townsville City Council & Ors; Catchlove & Ors v Townsville City Council & Ors [2009] QPEC 12, affirmed

COUNSEL:

In Matter 5265 of 2009:
C L Hughes SC, with M A Williamson, for the applicant
J J Haydon for the first respondent
D R Gore QC, with B D Job, for the second respondent

In Matter 5298 of 2009:
L F Kelly SC, with J M Horton, for the applicants
J J Haydon for the first respondent
D R Gore QC, with B D Job, for the second respondent

SOLICITORS:

In Matter 5265 of 2009:
Connor O'Meara for the applicant
Townsville City Council for the first respondent
Deacons for the second respondent

In Matter 5298 of 2009:
Minter Ellison for the applicants

Townsville City Council for the first respondent
Deacons for the second respondent

[1] **KEANE JA:** Consolidated Properties Pty Ltd ("Consolidated") applied to the Townsville City Council ("the Council") for a material change of use of vacant land on the Bruce Highway at Deeragun north of Townsville for the purposes of "a district centre (extension) and fast food store". Consolidated's application included a master plan which showed that its proposed change of use was intended to take place in two stages: the first being a supermarket, specialty shops and a community building; and the second a discount department store, specialty shops and kiosks. The Council approved the first stage only of the proposed development.

[2] SLS Property Group Pty Ltd ("SLS") and Centro Properties Group ("Centro"), commercial competitors of Consolidated, appealed to the Planning and Environment Court ("the P & E Court") against the Council's decision. They sought, inter alia, a declaration that the approval was invalid on a number of grounds. The only ground of relevance to the present application is that the Council had no power to approve only the first stage of the application. SLS and Centro argued that the Council exceeded the power conferred on the Council to approve an application "in part" by s 3.5.11(1)(b) of the *Integrated Planning Act* 1997 (Qld) ("the IPA"). The learned judge of the P & E Court rejected that argument and declared that the Council's decision was valid.

[3] SLS and Centro now seek leave to appeal to this Court pursuant to s 4.1.56 of the IPA. Under s 4.1.56 of the IPA an appeal to this Court is available only by leave and relevantly on the ground of "error or mistake in law" on the part of the P & E Court.

[4] I have concluded that SLS and Centro have not demonstrated a sufficiently arguable case of error of law on the part of the P & E Court to warrant the grant of leave to appeal. Having regard to the factual basis on which the P & E Court decided the case, on no arguable view of the correct interpretation of s 3.5.11(1)(b) of the IPA, can the decision below be said to be incorrect.

The decision of the P & E Court

[5] Section 3.5.11 of the IPA is in the following terms:

> "**Decision generally**
>
> (1) In deciding the application, the assessment manager must–
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> (a) approve all **or part** of the application and attach to the approval, in the exact form given by the concurrence agency, any concurrence agency conditions; or
>
> (b) approve all **or part** of the application subject to conditions decided by the assessment manager and attach to the approval, in the exact form given by the concurrence agency, any concurrence agency conditions; or
>
> (c) refuse the application.
>
> …" (emphasis added)

[6] It will be seen immediately that the text of s 3.5.11 expressly contemplates that an assessment manager, such as the Council, may approve "part" of an application.

The power conferred by the provision to approve part of an application is expressly unqualified.

[7] The first proposition which SLS and Centro seek to advance in this Court is that the power conferred by s 3.5.11 of the IPA is constrained, by context or necessary implication, so that it does not extend to authorising developments which are "substantially different from that described in the application … without a further notification …" to the public. The second step in the argument put on behalf of SLS and Centro is that the findings of fact made by the P & E Court were to the effect that the development as approved was "substantially different" from that described in the application. Accordingly, so it is said, the Council's decision was invalid.

[8] It is convenient at this point to refer to the reasons of the learned judge of the P & E Court. His Honour began by noting that the development approved by the Council was different from that for which Consolidated applied. He said:[1]

> "Certainly, a development comprised only of stage 1 is markedly different from one incorporating both stages. The reduction involves some 57% less in gross floor area; it alters the function of the development from one which would now take the form of a neighbourhood centre rather than a district centre, as those terms are used in the planning scheme; and, it removes a discount department store – something which does not otherwise exist in the relevant trade area."

[9] His Honour went on to explain his reasons for concluding that the power conferred by s 3.5.11(1) of the IPA upon an assessment manager was not relevantly qualified or constrained by the statutory context in which s 3.5.11(1) appears. The learned judge said:[2]

> "The power given to the assessment manager under s 3.5.11(1) is to be construed in a way that is consistent with the language and purpose of all of IPA's provisions (*Project Blue Sky Inc v Australian Broadcasting Corporation* [1998] 194 CLR 355 at 381). It will be read in a way which assumes its provisions are '*…intended to give effect to harmonious goals*' (*Ibid).*
>
> The inescapable starting point for construction is that the phrase '*or part*' is not limited, diminished, or circumscribed by anything else in the section itself; and, in its immediate context, has a clear and obvious meaning.
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> Each party also points, however, to other provisions of Chapters 3 and 4 of IPA as the context in which s 3.5.11 is to be construed but, according to their different standpoints, says they have quite opposite effects.
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> Both refer, firstly, to ss 3.2.9 and 3.2.10 which give an applicant for a development permit a right to change an application, in writing, before the assessment manager makes a decision. The assessment manager's power to accept the change without requiring the applicant

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1 *SLS Property Group Pty Ltd v Townsville City Council & Ors; Catchlove & Ors v Townsville City Council & Ors* [2009] QPEC 12 at [34].

2 [2009] QPEC 12 at [35] – [43] (citations footnoted in original).

> to repeat certain steps in the IDAS process is, relevantly, limited to the circumstance in which the manager is satisfied that the change would not be likely to attract a submission objecting to it: s 3.2.10(c).
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> Section 3.5.24 permits 'persons' to seek changes to development approvals but only if they are 'minor changes', a term defined in IPA Schedule 10. Under s 4.1.52(2) this court may also consider changes to a development application in proceedings before it but, again, only if they are minor changes. In context, neither envisages a change being sought or made by the assessment manager.
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> These provisions point, in fact, to a distinction within IPA between what might be called 'applicant initiated changes' on the one hand, and 'assessment manager' or 'public authority' initiated changes on the other. So far as the former is concerned, these provisions suggest, there is a clear and deliberate restraint on the ability of an applicant (or some party other than the assessment manager) to change an application or an approval once the IDAS process has reached a certain point.
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> The one exception in IPA to this proposition is in s 3.2.9(5), which excludes the operation of that section if the change sought by the applicant is one made in response to an information request from the assessment manager; but that rather reinforces the proposition that IPA looks differently at the position, rights and powers of applicants, and local authorities. That is unsurprising when, as has been recognised, IPA acknowledges and cements the powers of the latter to fashion development applications in a way which accords with its planning intentions (See *Heilbronn & Partners v Gold Coast City Council* [2005] QPELR 386 at 392; and, *Bukmanis v Maroochy Shire Council* [2008] QPELR 354 at 363).
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> Support for the proposition can also be found in s 3.3.18 which empowers another form of public body, a concurrence agency, to direct the assessment manager that it may only approve part of a development (and the assessment manager is bound by that direction).
>
> It follows that none of these provisions establish a context limiting Council's power under s 3.5.11(1)." (emphasis in original)

[10] It is convenient to note here that his Honour was clearly correct to recognise that the statutory context in which s 3.5.11(1) is located actually supports rejection, rather than acceptance, of the first step in the argument of SLS and Centro. Section 3.5.24 (which allows the making of a minor change to a development approval) and s 4.1.52(2) (which allows the P & E Court to entertain on appeal applications affected by minor changes) each advert, in terms, to minor changes to applications. It is impossible to suppose that the decision of the legislature to eschew the use of similar language in s 3.5.11(1) to confine the power of an assessment manager to approve part of an application only where that reflects a minor change from the application was not deliberate.

[11] The learned judge then made some observations upon which SLS and Centro seize as indicating acceptance of the first step in their argument:[3]

> "It is true that the power to approve in part cannot extend to approval of something which is materially different from what is sought in the development application (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737; and, *Properties Pty Ltd v Pine Rivers Shire Council* (1994) 85 LGERA 99, at 102), but that is not the case here; what has been approved is part of a whole, and clearly announced in the development application. Some earlier decisions made under the legislation preceding IPA (the *Local Government (Planning and Environment)* Act 1990) are of little assistance because, there, the local authority's decision making power was limited to approval, approval with conditions, or refusal (It was absence of this express power which is behind the decision in *Barakat*)."

[12] In my respectful opinion, there is no difficulty in reconciling the decision of the learned judge of the P & E Court with his Honour's acceptance of the proposition that the power conferred by s 3.5.11(1) of the IPA "cannot extend to approval of something which is materially different from what is sought in the development application" and his Honour's view that "a development comprised only of stage 1 is markedly different from one incorporating both stages".

[13] SLS and Centro confuse the point that a development consisting only of stage 1 is "markedly different" from a development consisting of stage 1 and stage 2 with the different point – clearly appreciated by the learned primary judge – that an approval of one part of a two-part application is not an approval of a different application – at least where it is apparent that the two parts of the application are not mutually dependent. Rather, it is an approval of part of the application. Consolidated's application to the Council sought approval for stage 1 and stage 2, but not on the basis that it was an "all or nothing" application. The Council might approve stage 1 and stage 2, or stage 1 or stage 2: in the latter case it would be approving only part of the application. But that approval would not be of a materially different application because it was always possible that, on that application, only stage 1 would be approved.

[14] The argument that the learned P & E Court judge erred in law in failing to recognise that the effect of his findings of fact was that the development approved by the Council was "substantially different" from that described in Consolidated's application ignores the inescapable fact that Consolidated's application contemplated the possibility that, in conformity with s 3.5.11(1)(b) of the IPA, only the first stage of the proposed development might be approved. When that evident possibility eventuated, what was approved was not a changed application. The development which was approved was one of the very things which Consolidated had applied for.

[15] It may also be noted that the terms of Consolidated's application were such as to inform interested members of the public that its application involved two stages, one or both of which might be approved. SLS and Centro argue that the deletion of the discount department store comprised in stage 2 of the application may have affected members of the public who might have been minded to oppose the

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3 [2009] QPEC 12 at [44] (citation footnoted in original).

application were it not for the prospect of approval of stage 2. This argument assumes that members of the public who were interested in the application would not have appreciated the possibility that stage 1 only would be granted. To make this assumption does little justice to the discernment of members of the public; it is not surprising that his Honour was not disposed to act upon it. No criticism is made of his Honour's failure to make a finding of fact that members of the public could have been led to believe that the application was made on an "all or nothing" basis. Accordingly, this factual foundation for the operation of an arguable constraint upon the operation of s 3.5.11 is not established.

[16] I have already observed that the first step in the argument advanced by SLS and Centro is not supported by the text of s 3.5.11(1)(b) of the IPA; it is also not supported by authority. SLS and Centro rely upon statements from decisions concerned with legislation cast in quite different terms from s 3.5.11.[4] None of these decisions were concerned with legislation which expressly authorise the approval of "all or part of the application".

[17] Decisions such as *Mison v Randwick Municipal Council*[5] on which particular reliance was placed by SLS and Centro, were concerned with the want of finality or certainty in decision-making involved in a partial approval of an application or in some kinds of approval on conditions.[6] Section 3.5.11(1) of the IPA can be seen, in part at least, as a legislative response to the problem identified in such cases in that it makes it clear that a partial approval is not, for that reason alone, challengeable for want of finality or certainty.

[18] Cases such as *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council*[7] and *Barakat Properties Pty Ltd v Pine Rivers Shire Council & Anor*,[8] on which SLS and Centro also relied, were concerned to deny the possibility of the imposition of conditions on approval which would be in conflict with detailed regulatory provisions of the legislation. Such an issue does not arise in this case.

[19] SLS and Centro also sought support for their argument from the decision of Rackemann DCJ in *Metroplex v Brisbane City Council & Ors*.[9] In that case Rackemann DCJ held that s 4.1.52(2)(b) precluded him from entertaining an appeal in which it was sought to delete the component of "an integrated development" that his Honour found "as a matter of fact and degree" to be the "most significant employment generator" of the proposed development. This case affords no support for the argument advanced by SLS and Centro. Indeed, by reason of the terms of Consolidated's application which propounded stage 1 and stage 2 as potentially self-contained developments, this case provides a point of contrast with *Metroplex*: in this case the learned judge of the P & E Court did not make and was not asked to make a finding that stage 1 and stage 2 were integrated elements of the application.

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4 Cf *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737; *Addicoat v Fox (No 2)* [1979] VR 347 at 363; *Barakat Properties Pty Ltd v Pine Rivers Shire Council & Anor* (1994) 85 LGERA 99 at 102; *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347 at 352 – 353, 354 – 355.

5 (1991) 23 NSWLR 734.

6 Cf *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 738 – 739, 740, 741; *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347 at 352 – 353.

7 [1996] 1 Qd R 347 esp at 354 – 355.

8 (1994) 85 LGERA 99 esp at 102.

9 [2009] QPEC 110 at [128] – [145].

[20] It was also argued on behalf of SLS, but not Centro, that s 4.1.52(2)(b) of the IPA was an indication that the power conferred by s 3.5.11(1)(b) to approve in part was limited to cases where that would involve only a minor change in the approval granted from that which was sought in the application. Section 4.1.52(2)(b) provides that, on an appeal to the P & E Court from the decision of an application for development approval "if the appellant is … a submitter for a development application … the court … must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change." In my respectful opinion, s 4.1.52(2)(b) does not afford instruction as to the proper interpretation of s 3.5.11(1)(b). Rather, s 4.1.52(2)(b) is concerned to ensure that the earlier stages of an application are not set at nought by a late change to the application. And in any event in this case there is no basis for a suggestion that the P & E Court is engaged in considering a change to the application.

[21] Where the only material difference between the application and the approval is that the development approved is part of the development for which application was made, the case falls, *prima facie*, within the terms of s 3.5.11(1) of the IPA. For a viable argument to arise that the case is outside s 3.5.11(1), there must be features of the development which is approved which justify characterising that development as something materially different from that which was applied for, other than the mere fact that it is part of what was applied for.

[22] It is perhaps not surprising, given the limits on the scope of an appeal to this Court, that it is not suggested by SLS or Centro that the learned judge of the P & E Court erred in failing to make findings of fact other than those he made in relation to the "significance", in planning terms, of the difference between what was sought and what was approved. Questions of "significance" so far as town planning considerations are concerned are generally questions of fact in respect of which no appeal lies to this Court.[10]

[23] This Court does not encourage attempts to dress up issues of fact or planning expertise as issues of law. In *Regional Land Development Corp No 1 Pty Ltd v Banana SC & Ors*, it was said:[11]

> "… The provisions of s 4.1.56 of the IPA serve a two-fold purpose. First, they manifest an intention on the part of the legislature that this Court should not interfere with the expert resolution of planning issues by the specialist P & E Court save to the extent necessary to ensure that that court acts within its jurisdiction and in conformity with the law. It is the evident intention of the legislature that decisions of the P & E Court as the specialist tribunal for planning matters should not be subject to general review on the merits. In *Sullivan v District Council of Riverton* ((1997) 95 LGERA 150), Duggan J (with whom Doyle CJ and Lander J concurred) emphasised the specialist role of the planning court and its importance in the resolution of conflicts between expert witnesses:
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> > 'The extent, if at all, to which it is appropriate to take account the views of experts in a planning case depends very much on the circumstances of the individual case. …

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10 *Regional Land Development Corp No 1 Pty Ltd v Banana SC & Ors* [2009] QCA 140 at [23]; cf *Ridgewood Development Pty Ltd v Brisbane City Council* [1985] 2 Qd R 48 at 52.

11 [2009] QCA 140 at [12] – [13] (citations footnoted in original).

> However it is important once again not to lose sight of the fact that this is a specialist tribunal. In this respect the comments of Debelle J in *SA Housing Trust v Lee* (1993) 81 LGERA 378 at 385 are appropriate:
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> > 'Frequently the tribunal is required to form a value judgment as to the nature of a proposal, the manner in which it is likely to operate, its likely effect on the relevant neighbourhood or locality and, having determined these and all other relevant factors, determine whether planning consent should issue. These are matters which the tribunal with its specialist expertise is usually in as good a position as the expert to form a judgment. The evidence of planners in this case was not unanimous or uncontradicted. Furthermore, the evidence essentially consisted of opinions going to the nature of the facility and its likely impact on the residential amenity, a matter of planning judgment which a specialist tribunal of this kind is well equipped to determine." ((1997) 95 LGERA 150 at 158)
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> Secondly, s 4.1.56 of the IPA is apt to achieve the wholesome purpose of conserving this Court's resources. It is often convenient for this Court to reserve its decision on the question of leave until after it has heard argument on the merits of the issues sought to be agitated on appeal. Nevertheless, s 4.1.56 of the IPA clearly contemplates that putative errors of law should be presented by an applicant so as to be recognisable as such by this Court without the need for the Court to descend into the evidence to be reviewed on the proposed appeal in order to determine whether leave should be granted."

Conclusion and orders

[24] In my view this case does not afford a useful vehicle to explore the unexpressed limits, if any, on the power conferred by s 3.5.11 of the IPA. If there are limits on that power, then whatever those limits may be, it is not arguable that the P & E Court erred in concluding that they were not transgressed in this case. I am not persuaded that the arguments which SLS and Centro seek to agitate in this Court are apt to establish an error of law on the part of the P & E Court.

[25] I would refuse the applications for leave to appeal.

[26] I would order that SLS and Centro pay the costs of the other parties to the applications to be assessed on the standard basis.

[27] **HOLMES JA:** I agree with Keane JA that the applications for leave to appeal should be refused, with the costs order he proposes. I would simply add that I doubt that concepts of "material" or "substantial" difference have any application where all that is contemplated is the approval in part of the development applied for. Where the imposition of additional conditions is necessitated by that part approval – an example might be where the adoption of a different means of access is required –

such a test may be relevant in considering those conditions; but where the approval granted is simply of part of what was sought, there is no warrant for adding a gloss to the clear statutory authorisation in s 3.5.11.

[28] **DAUBNEY J:** I respectfully concur with Keane JA, and would refuse the applications with costs.