SUPREME COURT OF QUEENSLAND

CITATION:	*Spring Lake Holdings Pty Ltd v Ipswich City Council & Anor* [2023] QCA 233
PARTIES:	**SPRING LAKE HOLDINGS PTY LTD (ACN 156 492 885) AS TRUSTEE FOR THE SPRING LAKE TRUST** (applicant) **v** **IPSWICH CITY COUNCIL** (first respondent) **CHIEF EXECUTIVE, DEPARTMENT OF STATE DEVELOPMENT, MANUFACTURING, INFRASTRUCTURE AND PLANNING** (second respondent)
FILE NO/S:	Appeal No 2994 of 2023 P & E Appeal No 1428 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning & Environment Court at Brisbane – [2023] QPEC 1 (McDonnell DCJ)
DELIVERED ON:	24 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2023
JUDGES:	Morrison and Dalton and Boddice JJA
ORDER:	**Application dismissed with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicant owns land situated within the area subject to the Springfield Structure Plan (SSP) – where under the SSP the land is developed in line with an Area Development Plan (ADP) – where the applicant sought to expand the built environment on the land – where the applicant lodged a development application with the Ipswich City Council – where the Ipswich City Council refused the application because the application forms did not identify the application as an ADP application – where the applicant submitted a separate appropriate form in relation to the ADP – where there was an alleged deemed refusal of the development application and the ADP application – whether the primary judge erred in law in finding that the Planning and Environment Court did not have jurisdiction to hear and determine the appeal by the applicant ENVIRONMENT AND PLANNING – PLANNING

SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – whether the primary judge erred in law in concluding that an application to change an ADP was a development application

ENVIRONMENT AND PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – whether the Planning and Environment Court had inherent or accrued jurisdiction to hear an application to amend an ADP

Acts Interpretation Act 1954 (Qld), s 7(1)
Planning Act 2006 (Qld), s 18, s 20, s 49(1)(a), s 49(2), s 50, s 229(1), s 316, sch 1, sch 2
Planning and Environment Court Act 2016 (Qld), s 63
Sustainable Planning Act 2009 (Qld), s 857

Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220; [1935] HCA 45, cited
Mirvac Queensland Pty Ltd v Ipswich City Council [2020] QPELR 786; [2019] QPEC 62, cited
Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd [2019] 3 Qd R 40; [2018] QCA 266, cited

COUNSEL: D R Gore KC, with J D Houston, for the applicant
D P O'Brien KC, with J S Brien, for the first respondent

SOLICITORS: Birch & Co Solicitors Pty Ltd Law for the applicant
Clayton Utz for the first respondent

[1] **MORRISON JA:** I agree with Dalton JA.

[2] **DALTON JA:** This is an application for leave to appeal pursuant to s 63 of the *Planning and Environment Court Act 2016* (Qld). For the reasons below, my view is that the application should be dismissed with costs because the proposed appeal lacks merit.

Application to the Ipswich City Council

[3] The applicant owns land approximately 4 hectares in size which is situated within the area subject to the Springfield Structure Plan (SSP). Under the SSP it is developed in line with an Area Development Plan (ADP) for a Special Development Area comprising a shop, place of assembly, restaurant, service industry, medical centre, childcare centre, professional office, commercial premises, fast food premises, gym, veterinary clinic, reception and function rooms, hotel, and motel.

[4] The applicant wished to expand the built environment on this land to accommodate an additional childcare centre, an extension of the motel and some additional tenancies of the same type as those already approved under the existing ADP. It was not contentious that to do so the applicant needed development approval under the *Planning Act 2016* (Qld), because the proposed development fell within the definition of "material change of use".

[5] The applicant lodged a development application under the *Planning Act* with the Ipswich City Council. The covering letter was dated 6 December 2017. The application form contained boxes to be ticked to show the application type. The applicant ticked boxes appropriate to material change of use and operational works, but in the section headed "Springfield only", did not tick the box marked Area Development Plan. At the foot of the form, in a space for "related approvals", the applicant referenced the applicable ADP. Furthermore, throughout the application itself there were many references to the ADP. There was included quite a detailed section tracing the history from the first ADP approved in 2010 through to the then current ADP of 2015. There was also an analysis of the "considerations … relevant to the assessment of this development application, as prescribed under ADP 5825/2015 …" – p 22. At p 35 the application said, "Pursuant to Section 2.4.1 of the Springfield Structure Plan, the application must be assessed against the provisions of the Ipswich Planning Scheme, including the Springfield Structure Plan, Section 5 North Precinct Plan, and the extent to which the application is consistent with any approved Area Development Plan". A more detailed analysis of the parts of ADP 5925/2015 which bore on the current proposal was at p 45, and a conclusion to that analysis (that the proposed development was "entirely consistent with the existing Masterplan/ADP") was developed at p 48. Thus, it could hardly be said that the application ignored the ADP, or for that matter the SSP.

[6] The Council refused to accept the application. By letter dated 14 December 2017 it advised the applicant that its application had not been properly made because "The application forms lodged with Council do not identify the application as an Area Development Plan application (noting Section 2.3.2 of the Springfield Structure Plan)". The Council relied on s 2.2.4.4 of the SSP to form this view.

[7] Senior counsel for the applicant argued, seemingly for the first time, on the application to this Court that there was no need for an ADP application.[1] It was too late for such an assertion to be made having regard to the fact that the appeal to the Planning and Environment Court below was on the basis that an ADP application had been made; should have been granted by the Ipswich City Council, and should be granted by the court below. As well, the matter was not raised below, and the matter was not raised on the application to this Court. In any event, the argument is wrong, see [8]-[14] below.

[8] I think the Council was right in the view it expressed in its letter of 14 December 2017. Part 14 of the Ipswich Planning Scheme is entitled The Springfield Structure Plan.[2] At s 2.4.1 that provides:

> "**2.4.1 Application for Approval for Assessable Development Subject to the Code Assessment Process**
>
> A person may make application for the approval of assessable development subject to the code assessment process in the manner specified in the IPA [*Integrated Planning Act*].
>
> In addition to the matters which Council would otherwise assess under its Planning Scheme (including this Structure Plan), the

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1 T 1-12 of the hearing before this Court.

2 The SSP has a considerable legislative history, but now forms Part 14 of the Ipswich Planning Scheme 2006. See *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd* [2019] 3 Qd R 40 for the history of the SSP.

> Council must also assess the extent to which the application is consistent with any approved Area Development Plan which includes the subject land.
>
> Council shall notify the applicant of its decision on such application within the time and in the manner prescribed by the IPA.
>
> An application for such approval can be made concurrently with any application in respect of an Area Development Plan." (my underlining).

[9] While the first passages which I have underlined in the above provision might allow for one application which addressed both the Code and consistency with the approved ADP, I think it is reasonably clear from the last sentence underlined in the above provision that two applications are contemplated.

[10] This becomes clearer when the very detailed nature of an ADP is considered. Section 2.2.4.1 of the SSP provides that:

> "… Specifically, development of any land included within the Structure Plan area cannot take place within any of the five Structure Plan designations unless—
>
> (i) there is an Area Development Plan over the land to be developed which has been approved by Council; and
>
> (ii) the development is shown on or consistent with the approved Area Development Plan."

[11] Section 2.2.4.2 provides:

> "Upon its approval, an Area Development Plan—
>
> authorises the reconfiguration of the land covered by the Plan in the manner indicated in the Plan;
>
> or
>
> authorises the use of the land (or particular reconfigured parcels of the land) covered by the Plan for the purpose or purposes shown or nominated thereon, and if applicable at the location(s) or on the site or sites shown or nominated on the Area Development Plan, …" (my underlining).

[12] If these provisions seem to descend into minutiae, they are intended to do so. Part of s 2.2.4.1 reads:

> "The process of Area Development Plans ensures that planning within the Structure Plan area will be carried out on a broad and integrated basis consistent with the intent of this Structure Plan which would not be possible if development were determined solely by applying conventional use rights to each site on an *ad hoc* basis."

[13] In this case, although the development application was not for any type of use which was not already occurring on the subject land, the sites shown on the ADP

were different from the expanded sites the applicant wished to use, and it was necessary for a new ADP to be approved.

[14] Section 2.2.4.4 (referred to by the Council in its 14 December 2017 letter) provided for a separate application form to make an application for approval of an ADP. That form is separate from the form for a development application for assessment under the Code.

[15] Having received the Council's letter of 14 December 2017, the applicant submitted the separate, and appropriate, form in relation to the ADP, and made minor amendments to the document it had submitted as a development application to explicitly state that amendment to ADP 5825/2015 was sought. This new documentation was lodged with the Council on 14 December 2017. Correspondence ensued, but it seems from the factual recitals in the appeal to the Planning and Environment Court to have ended in March 2021.

[16] The applicant appealed to the Planning and Environment Court claiming that the delay in approval amounted to:

- a deemed refusal of the application to amend the ADP by reason of s 2.2.4.10 of the SSP, and
- a deemed refusal of the development application and the operational works permit under provisions of the *Planning Act.*

The appeal to the Planning and Environment Court asserted that "no lawful grounds exist for refusing" either application to Council, and asked that the court allow the applications subject to any lawful conditions.

The Decision Below

[17] In the Planning and Environment Court an order was made facilitating the determination of a preliminary issue, namely whether the Planning and Environment Court had jurisdiction to hear and determine an appeal from an application for a new ADP.

The Proceeding Below

[18] The judge below records that the parties agreed questions for determination. Unfortunately the way these are set out in the judgment is not clear. Secondly, the judge did not determine those questions in the conventional way, ie., by answering each of them yes, no, or unnecessary to answer. While the judge certainly discussed the questions and issues relevant to them, she simply concluded at [68] below, "The Planning and Environment Court does not have jurisdiction to hear and determine the appeal from an application to amend the area development plan approved under the Springfield Structure Plan." The judgment itself, and the formal order of the Court, refer to this as an "order". It is not an order, it is a declaration, and it ought to have specified the appeal and the ADP to which it referred.

[19] In an appropriate case preliminary questions can be a very efficient method of dealing with litigation. If the process is used, thought needs to be given to the form of questions asked of the Court, and they should be answered in their terms.

[20] In the event, the order sought by the applicant from this Court, should leave to appeal be granted, was "Declare that the Planning and Environment Court does have jurisdiction to hear and determine the appeal by the Applicant from a deemed refusal of an application to amend the Area Development Plan approved under the Springfield Structure Plan for the land the subject of the proceeding".

[21] The primary judge correctly proceeded on the basis that an appeal right derives only from statute, rather than common law, and that "the scope and effect of an appeal must in the end be governed by the terms of the enactment creating it."[3] She correctly understood that the Planning and Environment Court is a court of statutory jurisdiction. The primary judge rejected the applicant's submission that, as the appeal related to the deemed refusal of the application to amend the ADP, but also related to the deemed refusal of the development application and operational works application, the Planning and Environment Court had either inherent or accrued jurisdiction to deal with the refusal of the ADP application as part of its dealing with the rest of the appeal. She determined that the Planning and Environment Court had inherent jurisdiction to control its own processes, but no other inherent jurisdiction. Further, she rejected any notion of an accrued jurisdiction to hear the appeal against rejection of the ADP application. In my view, those were correct decisions and no appeal is sought to be made from them.

[22] Her Honour then examined Chapter 6 Part 1 of the *Planning Act 2016* (Qld). Section 229(1) of that Act provides that Schedule 1 to the Act states the matters that may be appealed to the Planning and Environment Court. Her Honour concluded:

> "[32] Thus, Schedule 1 of the *Planning Act*:
>
> (a) Does not identify an application to amend an ADP pursuant to the SSP as a matter that may be appealed to the Planning and Environment Court; and
>
> (b) States that a development application is a matter that may be appealed.
>
> [33] There are no other relevant provisions of the *Planning Act* or the [*Planning and Environment Court Act*] that provide for appeals to the Planning and Environment Court in relation to the amendment of an ADP under the SSP. The parties did not suggest that there is any other legislation that conferred jurisdiction."

[23] There was no challenge to this conclusion on this application. Instead, the applicant alleged two errors of law on the part of the primary judge, both said to be found in that part of the decision headed, "Is that part of the Appellant's application which sought approval to amend the existing approved ADP a 'development application' for the purposes of the *Planning Act*?".

[24] As to this question, the primary judge concluded:

> "I do not accept that the application to amend the ADP is a development application for either a development permit or a preliminary approval under the *Planning Act* for the following reasons." – [42].

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3 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220, 225.

[25] On this application no contention was made that an application to amend an ADP was a development application because it was an application for a development permit.[4] Instead, counsel on behalf of the applicant made the following submission: "The challenge is to the conclusion of the primary judge that the application [for amendment of the ADP] should not be characterised as a development application for a preliminary approval."[5]

[26] By s 49(1)(a) of the *Planning Act* a preliminary approval is a development approval. By s 49(2) of that Act:

> "a *preliminary approval* is the part of a decision notice for a development application that –
>
> (a) approves the development to the extent stated in the decision notice; but
>
> (b) does not authorise the carrying out of assessable development."

[27] Section 50 of the *Planning Act* provides:

> "**50 Right to make development applications**
>
> (1) A person may make a development application, including for a preliminary approval.
>
> …
>
> (3) A development application for a preliminary approval may also include a variation request."

[28] The definition Schedule to the *Planning Act* defines "variation request" to mean "part of a development application for a preliminary approval for premises that seeks to vary the effect of any local planning instrument in effect for the premises".

[29] On the back of these provisions counsel for the applicant proceeded to make a series of unsupportable submissions. First, it was said that obtaining an ADP under the SSP authorises the use of the land for the purposes shown on the ADP, but does not allow development for there must still be "an application for the approval of assessable development … subject to the code assessment process".[6] "Equally" it was said, a preliminary approval "approves the development … but does not authorise the carrying out of the assessable development". At a general level of abstraction it might be thought that there are some similarities in effect between the two statutory concepts. That does not mean that an application for an ADP is an application for a preliminary approval. It does not mean that an application for an ADP has the same statutory effect as an application for a preliminary approval. They are, obviously, two different statutory concepts and processes. There is nothing in this argument.

[30] There is less in the second argument advanced by the applicant. There was an argument advanced that the SSP was a local planning instrument and that therefore

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4 Written submissions, paragraph 7.

5 Ibid.

6 Paragraph 17(a), written submissions. No doubt these words were carefully chosen, for a shorter way of expressing the concept would be to call such an application a development application, but the use of those words would emphasise the sophistry inherent in this argument.

an application to change an ADP was an application which sought to vary the effect of a local planning instrument. Therefore, the argument ran, an application to change the ADP was a variation request within the meaning of the *Planning Act*. In the course of discussing this argument the judge below said that, "an approved ADP is not said to form part of the planning scheme and otherwise does not meet the definition of a local planning instrument" – [54] below.

[31] The applicant fastened onto this sentence and contended that it contained a mistake of law. It was submitted that an approved ADP was a local planning instrument as defined. This argument relied upon s 7(1) of the *Acts Interpretation Act 1954* (Qld) which provides that, in an Act, a reference to a law, including another Act, includes a reference to a statutory instrument made or in force under that law. The remainder of the applicant's argument, and the answer to it, is succinctly stated in the first respondent's written outline of submissions.

> "22. The Applicant then contends that, as the *ADP* is made under the [*Integrated Planning Scheme*], it is part of a 'planning scheme' which is recognized under the [*Planning Act*] as a 'local planning instrument'. Accordingly, it could be the subject of a development application for a 'preliminary approval that includes a variation request' as a 'variation request' means 'part of a development application for a preliminary approval for premises that seeks to vary the effect of any local planning instrument in effect for the premises': Sch 2 [*Planning Act*].
>
> 23. The difficulty with the Applicant's contentions is that the application of s 7 of the [*Acts Interpretation Act*] 'may be displaced, wholly or partly, by a contrary intention appearing in any Act': s 4 [*Acts Interpretation Act*]. In the case of the [*Planning Act*] there is such a contrary intention.
>
> 24. Div 2, Part 3, Chapter 2 of the [*Planning Act*] prescribes a detailed regime for the making and amendment of local planning instruments, including planning schemes. Section 18 of the [*Planning Act*] provides:
>
> **18 Making or amending planning schemes**
>
> (1) This section applies if a local government proposes to make or amend a planning scheme.
> (2) The local government must give notice of the proposed planning scheme, or proposed amendment, (the instrument) to the chief executive.
> (3) After consulting with the local government, the chief executive—
> (a) must give a notice about the process for making or amending the planning scheme to the local government; and
> (b) may give an amended notice about the process for making or amending the planning scheme to the local government.

(4) The chief executive must consider the Minister's guidelines when preparing the notice or an amended notice.

(5) The notice, or amended notice, must state at least—

(a) the local government must publish at least 1 public notice about the proposal to make or amend the planning scheme; and

(b) the local government must keep the instrument available for inspection and purchase for a period (the consultation period) stated in the public notice of at least—

(i) for a proposed planning scheme—40 business days after the day the public notice is published in a newspaper circulating in the local government area; or

(ii) for a proposed amendment—20 business days after the day the public notice is published in a newspaper circulating in the local government area; and

(c) the public notice must state that any person may make a submission about the instrument to the local government within the consultation period; and

(d) a communications strategy that the local government must implement about the instrument; and

(e) the local government must consider all properly made submissions about the planning scheme or amendment; and

(f) the local government must notify persons who made properly made submissions about how the local government dealt with the submissions; and

(g) the local government must give the Minister a notice containing a summary of the matters raised in the properly made submissions and stating how the local government dealt with the matters; and

(h) after the planning scheme is made or amended, the local government must publish a public notice about making or amending the planning scheme.

(6) The local government must make or amend the planning scheme by following the process in the notice or amended notice.

(7) If the notice requires the Minister to approve the instrument, the Minister may approve the instrument if the Minister considers the instrument appropriately integrates State, regional and local planning and development assessment policies, including policies under an applicable State planning instrument.

(8) A planning scheme replaces any other planning scheme that the local government administers.

> 25. An amendment to a planning scheme may also be made under s 20 of the [*Planning Act*]. It provides:
>
> **20 Amending planning schemes under Minister's rules**
>
> (1) This section applies to an amendment of a planning scheme that the Minister's rules apply to.
> (2) Instead of complying with section 18, a local government may amend a planning scheme by following the process in the Minister's rules.
> (3) The Minister's rules must provide for the local government to publish a public notice about the planning scheme being amended.
>
> 26. The *Minister's Rules* provide a multi-step process for amending a planning scheme the complexity of which depends on whether it is an administrative amendment, minor amendment or major amendment.
>
> 27. These provisions of the [*Planning Act*] disclose a clear intention by Parliament that the usual position under s 7 of the [*Acts Interpretation Act*] does not apply. For a statutory instrument to be part of a planning scheme it must go through the process for making or amending the planning scheme. It cannot be the case that a provision in an actual planning scheme has to go through the process described by ss 18 and 20 of the [*Planning Act*] but a statutory instrument made under that planning scheme can be treated as part of the planning scheme when that process had not been gone through."[7] (underlining in the original).

[32] Even if the SSP were a local planning instrument, an application to change an ADP is not a variation request within the *Planning Act.* Very clearly, by reason of the provisions of the SSP already discussed, an application to change an ADP must be made separately to a development application and under the statutory provisions of the SSP, not under the *Planning Act.* Furthermore, a variation request is not a development application or an application for preliminary approval; it is something less than each of those things which may be made at the same time as an application for preliminary approval, see [27] and [28] above.

[33] Lastly, counsel for the applicant said that it would be "very odd" if the SSP denied appeal rights to substantial landowners such as his client. It was said that an intention to deny appeal rights would not lightly be inferred by a court.

[34] First, there either are or are not appeal rights as a question of law; it does not matter whether or not the person asking the question is a substantial landowner. Secondly, if there were a provision which was ambiguous as to whether or not appeal rights were created, it might be relevant to consider a beneficial construction. Here there is no statute to beneficially construe. There is simply no provision identified by the applicant capable of creating an appeal right.

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7 Written submissions on this application.

[35] Thirdly, the express provisions of the SSP give every indication that there is to be no appeal to the Planning and Environment Court from a refusal to change an ADP. Section 11 of the SSP, "outlines procedures for the resolution of disputes or differences in relation to Council decisions" – s 1.7 of the SSP. Section 11 commences as follows:

> "11.1 All disputes or differences at any time arising out of any decision or exercise of any discretion by or on behalf of Council or its delegate or officers under or in connection with any provision of this Structure Plan shall be decided as follows –
>
> …"

[36] Section 11.1 then outlines a scheme of alternative dispute resolution which contemplates: first, a conference between the parties at which they use their best endeavours and take all reasonable steps to resolve the dispute by agreement, and then, if the dispute is not resolved, an expert determination process. If after expert determination a party is still dissatisfied, it may commence proceedings in "a Court of competent jurisdiction" – s 11.1.7 of the SSP. There is no legislative indication that the Planning and Environment Court is contemplated by the use of this last expression.

[37] Section 11.9 of the SSP provides:

> "**11.9 Alternative Dispute Resolution Protocol**
>
> The purpose of this protocol is to record how the parties intend the ADR provisions in section 11 of the Structure Plan will operate in practice.
>
> The ADR provisions are intended to operate to bring the parties together to maximise the opportunity for them to resolve differences amicably without recourse to expensive and time consuming litigation. The attitude of the parties' representatives and how they approach ADR is a key element in achieving this goal.
>
> Accordingly it is intended that the parties—
>
> (i) avoid adopting polarizing positions;
>
> (ii) have and demonstrate a genuine preparedness to listen and understand as objectively as possible each other's views;
>
> (iii) be open minded and sympathetic to compromises which address most, if not all of their differences;
>
> (iv) have frequent and open dialogue both within and outside the steps and mechanisms contained in section 11 to maximise the opportunity for achieving resolution."

[38] For completeness, I note that the applicant has made no attempt to comply with the s 11 alternative dispute resolution process and is out of time to do so.

[39] Fourthly, a provision in the *Sustainable Planning Act 2009* (Qld)[8] supports the conclusion that there is no appeal to the Planning and Environment Court from a rejection of an application for an ADP under the SSP. The trial judge noted this as follows:

> "[34] The SSP is a development control plan (DCP) for the purposes of s 857 of [*Sustainable Planning Act*] SPA.
>
> [35] Section 857(5) of SPA (as applied by s 316 of the *Planning Act*), relevantly states:
>
> 'To the extent the development control plan includes a process for making and approving plans, however called, with which development must comply in addition to, or instead of, the planning scheme or provides for appeals against decisions under the plan-
>
> ….
>
> (b) development under the development control plan must comply with the plans in the way stated in the development control plan; and
>
> (c) <u>if the development control plan states</u> that an appeal may be made, and an appeal is made, the appeal is validly made.
>
> [36] It was not disputed that <u>the SSP does not state</u> that an appeal against decisions under the SSP may be made." (my underlining).

[40] Her Honour had earlier noted:

> "[11] The SSP is to take precedence over any inconsistent provision elsewhere in the [Integrated Planning Scheme] IPS 2006[9] and provides a comprehensive suite of planning controls for the area of the SSP subject to it.[10]"

[41] It remains to further note that the planning professionals who lodged the applications of 6 and 14 December 2017 with the Ipswich City Council had the choice offered to them by the relevant forms to make an application for preliminary approval, but they did not. Plainly they applied initially for development approval for a material change of use and operational works, and, by the 14 December 2017 application, added an application to amend ADP 5825/2015.[11]

[42] **BODDICE JA:** I agree with Dalton JA.

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8 The *Sustainable Planning Act* has been repealed (March 2017). However, s 361 of the *Planning Act* continues its operation here as part of transitional provisions.

9 Ex 2, p 27, SSP s 1.6.

10 *Mirvac Queensland Pty Ltd v Ipswich City Council* [2020] QPELR 786 [6].

11 Pp 3 and 11 of the detailed application and the form dated 14 December 2017.