DISTRICT COURT OF QUEENSLAND

CITATION:	*Tseng v Brisbane City Council* [2020] QDC 48
PARTIES:	**EN-TZU TSENG** (Appellant) **v** **BRISBANE CITY COUNCIL** (Respondent)
FILE NO/S:	2831/19
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	3 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2020
JUDGE:	Barlow QC DCJ
ORDER:	**1. Paragraph 1 of the enforcement order made on 16 July 2019 be set aside.** **2. The date shown on the enforcement order be varied to 16 July 2019.** **3. Otherwise the enforcement order be confirmed.** **4. The appeal otherwise be dismissed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING AND DEVELOPMENT PROSECUTIONS – GENERALLY – pursuant to s 163(1) of the *Planning Act* 2016, the respondent charged the appellant with carrying out assessable development without a permit, by way of depositing fill onto property without a development permit – whether the appellant was responsible for the placement of the fill – whether expert evidence on the depth of the fill proved the charge beyond reasonable doubt ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING AND DEVELOPMENT PROSECUTIONS – GENERALLY – pursuant to s 440ZG of the *Environmental Protection Act* 1994, the respondent charged the appellant with depositing a contaminant expected to move into waters – whether there was a reasonable expectation that the soil would move into waters ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING AND DEVELOPMENT

PROSECUTIONS – GENERALLY – pursuant to s 363E of the *Environmental Protection Act* 1994, the respondent issued a direction notice in relation to depositing a contaminant expected to move into waters – whether requirements of direction notice were satisfied

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING AND DEVELOPMENT PROSECUTIONS – SENTENCING – the learned magistrate imposed a fine of $40,000 for all three offences – whether the penalty was manifestly excessive

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING AND DEVELOPMENT PROSECUTIONS – OTHER MATTERS – the appellant was ordered to pay $8,000 for professional costs, $103 for filing and serving of the complaint and summons, $1,125 for witness costs and $45,000 for investigation costs – whether the costs were reasonable

Environmental Protection Act 1994 (Qld) ss 363E, 440ZE, 440ZG

Planning Act 2016 (Qld) s 163(1)

SOLICITORS: Self-represented appellant

City Legal for the respondent

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Introduction

[1] The appellant, Ms Tseng, owns two adjacent parcels of land, which she bought in April 2016. The land is within a rural zone under the *Brisbane City Plan* 2014. The rear (northern) section of the land (slightly less than half of its total area) is within a waterway corridor associated with the local creek that runs to the north of the land.

[2] In 2017 and 2018, large amounts of fill were placed and spread on the land. The respondent Council contended that Ms Tseng caused the fill to be placed on the land without first obtaining a necessary development approval under s 163(1) of the *Planning Act* 2016. The Council also contended that the fill was a contaminant that was reasonably likely to enter a waterway, contrary to s 440ZG of the *Environmental Protection Act* 1994 (EPA). In August 2018, the Council gave Ms Tseng a direction notice, pursuant to s 363E of the EPA, requiring her to remove the fill or to apply for development approval. Ms Tseng did not take either step.

[3] The Council prosecuted Ms Tseng on three charges. She was convicted by a magistrate of all three offences, namely:

(a) carrying out assessable development without an effective permit, the maximum penalty for which was $567,675;[1]

(b) unlawfully depositing a prescribed water contaminant in a way so it could reasonably be expected to wash or otherwise move into waters, the maximum penalty for which was $75,690;[2] and

(c) failing to comply with a direction notice without reasonable excuse, the maximum penalty for which was $75,690.[3]

[4] She was fined $40,000 for all three offences and was ordered to pay $8,000 for professional costs, $103 for filing and serving of the complaint and summons, $1,125 for witness costs and $45,000 for investigation costs. The total, $94,228, was referred to the State Penalties Enforcement Registry for collection. The magistrate also made an enforcement order, pursuant to s 176 of the *Planning Act*, requiring the appellant to obtain approval for the fill or to remove it. No convictions were recorded.

[5] Ms Tseng now appeals from her convictions, the penalty, the costs and the enforcement order.

Grounds of appeal

[6] Ms Tseng's notice of appeal contained nine grounds of appeal. Unfortunately, it is long and in many respects unclear. It contains a lot of argument, which was mostly repeated in written submissions filed in the appeal by Ms Tseng. I have done my best to understand the grounds of appeal and the bases for each ground.

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1 *Planning Act* 2016 (Qld) s 163(1); *Penalties and Sentences Act* 2012 (Qld) ss 5(e)(i), 5A(1); *Penalties and Sentences Regulation* 2015 (Qld) s 3.

2 EPA, s 440ZG; *Penalties and Sentences Act* 2012 (Qld) ss 5(e)(i), 5A(1); *Penalties and Sentences Regulation* 2015 (Qld) s 3.

3 EPA, s 363E; *Penalties and Sentences Act* 2012 (Qld) ss 5(e)(i), 5A(1); *Penalties and Sentences Regulation* 2015 (Qld) s 3.

[7] Broadly speaking, the grounds of appeal appear to fall into six categories of appeal against conviction and one category of appeal against each of the penalty, the costs and the enforcement order. Those categories may be summarised in the following way:

(a) the evidence did not identify Ms Tseng as the person who committed the offences (or at least the first and second of the offences);[4]

(b) the expert evidence led by the Council was not admissible or reliable;[5]

(c) the evidence did not prove that the alleged contaminant was on her land;[6]

(d) the evidence did not demonstrate any grounds for a reasonable expectation that soil could move into waters;[7]

(e) the Council did not prove she had breached the direction notice by depositing fill and performing earthworks between the dates specified in the complaint;[8]

(f) the direction notice did not contain necessary and sufficient detail to be valid;[9]

(g) the penalty was manifestly excessive and based on errors;[10]

(h) the costs ordered were excessive;[11] and

(i) the enforcement order went beyond the bounds of the charges and was made in circumstances of procedural unfairness.[12]

Mode of appeal

[8] The appeal is made under s 222 of the *Justices Act* 1886. It is therefore an appeal by way of rehearing, based on the evidence that was before the magistrate and any other evidence introduced with my leave.[13] I am required to conduct a "real review" of the evidence and to determine whether the magistrate erred in fact or law.[14] I must make my own determination of the facts in issue from the evidence, but giving due deference and attaching a good deal of weight to the magistrate's view. However, "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error."[15] In order to succeed, therefore, the appellant must establish some legal, factual or discretionary error.[16]

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4 Grounds A, B and E in the notice of appeal. I shall refer to this basis of the appeal as ground 1. This ground relates principally to charges 1 and 2, but it is also partly relevant to charge 3.
5 Ground C (ground 2), principally concerning charge 1.
6 Ground D (ground 3), concerning charge 2.
7 Ground D (ground 4), also concerning charge 2.
8 Ground A (ground 5), concerning charge 3.
9 Ground D (ground 6), also concerning charge 3.
10 Ground H (ground 7).
11 Ground I (ground 8).
12 Grounds F and G (ground 9).
13 Neither party sought leave to tender additional evidence.
14 *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679, 686-687.
15 *Allesch v Maunz* (2000) 203 CLR 172, [23]; *Teelow v Commissioner of Police* [2009] QCA 84, [4].
16 *McDonald v Queensland Police Service* [2018] 2 Qd R 612, [47].

[9] In determining the appeal, I have therefore had particular regard to those aspects of the evidence relevant to each ground of appeal. I have taken into account the magistrate's findings of fact, although of course I have reviewed the relevant evidence concerning contested findings and I have made my own decisions on those facts. I do not, of course, have the benefit (as the magistrate did) of seeing the witnesses give their evidence and therefore, where issues of credit are relevant to the grounds of appeal, I give due deference to the magistrate's findings about the facts to which those issues relate.

The relevant law

Charge 1

[10] The following provisions are directly relevant to charge one.

[11] Subsection 163(1) of the *Planning Act* provides that a person must not carry out assessable development unless all necessary development permits are in effect for the development.

[12] In the dictionary to the *Planning Act* (schedule 2):

(a) "development" is relevantly defined as meaning carrying out operational work; and

(b) "operational work" is relevantly defined as meaning work on or over premises that materially affects premises or the use of premises; and

(c) "premises" relevantly means land, whether or not a building or other structure is on the land.

[13] Assessable development is development for which a development permit is required: s 44(3). A development permit is the part of a decision notice for a development application that authorises the carrying out of the assessable development to the extent stated in the decision notice: s 49(3).

[14] Under s 43(1), a "categorising instrument" is a regulation or local government categorising instrument that, among other things, categorises development as prohibited, assessable or accepted development and specifies the categories of assessment required for different types of assessable development. Subsection 43(3) provides that a "local categorising instrument" includes a planning scheme.

[15] The *City Plan* is a planning scheme and therefore a categorising instrument. The *City Plan*, in table 5.8.81, relevantly provides that filling is assessable development where it results in an increase in depth or height of the ground level or finished design level by one vertical metre or more. Where filling occurs within a waterway corridor on premises, that filling is assessable development where it is 100 vertical millimetres or more in depth.[17]

[16] Therefore, filling in excess of one metre in depth on premises, or in excess of 100 vertical millimetres within a waterway corridor on premises, is assessable development requiring a development permit before development can occur.

[17] Insofar as the complaint alleged that Ms Tseng had carried out assessable development without a permit, the particulars of that charge referred only to the

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17 *City Plan* table 5.10.25, "operational work".

depth of the fill having exceeded one metre above the natural ground level. It did not specify that any fill exceeded 100 millimetres in depth within the waterway corridor. Therefore, the latter definition of assessable development and evidence that was led to the effect that some of the fill deposited in the waterway corridor was in excess of 100 millimetres in depth are irrelevant.[18] Therefore, I shall not consider the evidence and submissions to that effect.

Charge 2

[18] The following provisions of the EPA are directly relevant to charge two.

[19] Section 440ZG(a)(iii) relevantly provides that a person must not unlawfully deposit a prescribed water contaminant at a place and in a way so that the contaminant could reasonably be expected to wash, blow, fall or otherwise move into waters, a roadside gutter or storm water drainage.

[20] Section 440ZD relevantly defines "prescribed water contaminant" as meaning earth and "earth" as meaning sand, soil, silt or mud.

[21] Section 440ZE is particularly relevant to a number of Ms Tseng's contentions. I shall therefore set out the relevant paragraphs in full.

> (1) A person ***deposits*** a contaminant in waters or at another place if the person –
> (a) … places … the contaminant … onto the place ….
>
> (2) A person ***deposits*** a contaminant at a place if –
> (a) the person is an occupier of the place or the contaminant is under the person's control; and
> (b) someone deposits the contaminant at the place in a way mentioned in subsection (1); and
> (c) the person does not remove the contaminant from the place within a reasonable time after becoming aware that the contaminant has been deposited at the place.
>
> (3) A person ***deposits*** earth at a place if the person carries on earthworks or another activity that exposes the earth at the place.
>
> (4) A person ***deposits*** earth at a place if –
> (a) the person is an occupier of the place; and
> (b) someone deposits the earth at the place in a way mentioned in subsection (3); and
> (c) the person does not stop the earth being exposed at the place within a reasonable time after becoming aware that the earth has been exposed at the place.

[22] The Council relies on each of these subsections. To my mind, however, subsections (3) and (4) are irrelevant. They do not concern the deposit of earth **on** a place, which is the subject of subsections (1) and (2) and of the second charge. Rather, they concern earthworks involving exposure of the earth **at** a place. I do not understand the charge to concern exposure of earth at the land, but only the deposit of fill (including earth) on the land.

[23] The dictionary (schedule 4) contains the following relevant definitions:

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[18] After closing its case, the Council sought leave to amend its complaint to include the latter allegation, but the magistrate refused that leave.

(a) ***occupier***, of a place, includes the person apparently in charge of the place;
(b) the ***owner*** of land is –
  (a) for freehold land—the person recorded in the freehold land register as the person entitled to the fee simple interest in the land;
(c) ***waters*** means Queensland waters.

[24] Paragraph 493A relevantly provides that a deposit of a contaminant mentioned in s 440ZG is unlawful unless it is authorised to be done under a development condition of a development approval.

Charge 3

[25] Finally, part 5A of the EPA is relevant to the third charge. It provides for a direction notice to be issued for a contravention of, among other things, s 440ZG.

[26] Section 363B provides relevantly that, if an authorised person is satisfied on reasonable grounds that a person is contravening a prescribed provision (which includes s 440ZG) or has contravened a prescribed provision in circumstances that make it likely the contravention will continue or be repeated; and a matter relating to the contravention can be remedied; and it is appropriate to give the person an opportunity to remedy the matter, the authorised person may issue a direction notice to the person requiring the person to remedy the contravention.

[27] Section 363E provides that a person who is issued with a direction notice must comply with it unless the person has reasonable excuse. That section provides a penalty for failing to comply with such a notice.

[28] Section 363D sets out a list of requirements for direction notices.

Charge 1 – carrying out assessable development without a permit

[29] It is not in dispute that Ms Tseng is the person registered in the freehold land register as the person entitled to the fee simple interest in the land. Nor is it in dispute that she calls herself, and is known as, Phoebe Tseng. Finally, it is not in dispute that Ms Tseng did not seek or obtain a development permit for any works done (including for the deposit of fill) on the land.

[30] The nub of the Council's case in respect of charge one is that, between 6 July 2017 and 11 January 2018, a large amount of filling material (mostly soil) was placed on Ms Tseng's land. In many places the fill exceeded one metre in depth over the natural ground level.

[31] The Council called evidence from a number of witnesses who said that they were asked by someone to place fill on the land, or they saw fill being placed on the land and then being spread more or less evenly over the land. Ms Tseng's challenge to those people's evidence was essentially that it was insufficient to prove, beyond reasonable doubt, that the fill was placed on the land at her request or that she controlled its placement. Therefore, she contends, the Council has not proved that she "carried out" assessable development on the land.

Evidence about the deposit of fill on the land (ground 1)

[32] A substantial amount of evidence was called by the Council in its attempt to demonstrate that considerable quantities of fill had been deposited on the land in

2017 and early 2018 and that Ms Tseng was responsible for it being placed there. The Council contends that, as the person who directed the fill to be placed there, Ms Tseng did "carry out" assessable development on the land.

[33] The Council called a number of witnesses to identify Ms Tseng as the person responsible for the deposit of the fill. The first was a near neighbour, Frances Karup, who said she saw many trucks arrive and deposit fill on the land between September 2017 and January 2018, on many occasions they were directed by an "Asian lady" who would clean the road with a broom at the end of the day. She saw the same lady arguing with a number of Council and police officers on 10 January 2018.

[34] Another witness was Katherine Isaac. She said she saw trucks going past with land fill and putting the fill on the land and she saw an "Asian lady" who would sit in her car waiting for trucks to arrive, drop a chain to let the trucks in and sweep the dirt off the road after the trucks had left.

[35] Ms Tseng cross-examined both these witnesses, asking for specific dates on which trucks arrived, any identifying marks on the trucks, and whether they could identify the "Asian lady". They were unable to assist in answering those questions. Surprisingly, they were not asked in evidence in chief or in reply if they could see the lady in court that day.

[36] Salvatore Scarcella gave evidence that he owned a tip truck business and also ran a website called "landfillregister.com.au", by which he sought to match suppliers and acquirers of land fill. He said that, in August 2017, he was sent a text message by a person who identified herself as Phoebe, asking about getting 1000 cubic metres of land fill. He rang her and asked her where it was needed and for what purpose. She told him it was needed to grow mango trees in Compton Road, Kuraby. He placed a listing on his website and then, when he had access to fill in about December 2017, he arranged to meet Phoebe on site. He went there and met a woman "of Chinese denomination" calling herself Phoebe and a man she said was her father. She told him that she owned the land. Mr Scarcella saw then that there was already a large amount of fill on the site and he asked if she had an earthworks permit in place. She said she did not, so he decided not to proceed further. Then, in January 2018, he received a text message from Phoebe asking him to remove the listing from his website, which he did.

[37] Ms Tseng asked him to produce the initial text message and the advertisement on his website. He was unable to do so. He was also unable specifically to identify the woman he had met.

[38] Andrew Welbourne gave evidence that he was a real estate agent who, in 2017, drove past the land six days a week. He saw that trees on the land had been removed and one day, in the second half of 2017, he saw three people on the land: an older man, a younger man and a woman who said her name was Phoebe. He approached them hoping to interest them in selling the land for development, but the woman told him that they intended to grow mangoes on it and they were going to build up the land for that purpose. He could not identify the woman at the time he gave evidence, nor was he able to provide any specific date when that conversation occurred.

[39] Michael Hansen works for an earth moving and civil construction company as a procurement officer. He was responsible for trying to find places to take land fill taken from the company's sites. He found a phone number on a land fill register, rang it and spoke to a lady who said her name was Phoebe. He arranged to meet her on site at the land in October 2017, where she told him where to put the fill. She unlocked a chain to let the trucks onto the land. In his evidence he identified Ms Tseng as the person he met. (She objected that "that identification is inadmissible", to which the magistrate said, "All right," but in my view there was nothing inadmissible about it.) He said he had two truck loads of fill delivered and, while he was there, two trucks from another company arrived and deposited fill in places on the land as directed by Phoebe.

[40] Jason Keogh was the general manager of the same company. He gave evidence that Mr Hansen told him about the land as a possible site on which to place fill. He inspected the site in late 2017 and then, in mid-January 2018, he exchanged text messages with "Phoebe", who appeared to be the owner. Phoebe asked him to have fill delivered and gave him instructions about where it was to be placed and related matters.

[41] Kelly Chong-Nee works for the same company as a bobcat operator. He was directed by Mr Keogh to attend the land on 16 January 2018 to smooth out fill that had been delivered to the site. He arrived and some time later an "Asian woman" arrived and told him where to spread the fill. He did that while she remained on site. While he did not directly say that Ms Tseng was that woman, when she put to him that she had never seen him before the day of the trial and that she did not send anyone to do any job on her property on 16 January 2018, he said that was not true. One might infer from that response that he indirectly identified Ms Tseng as the lady concerned.

[42] Most of Ms Tseng's challenges to all these witnesses' evidence appeared to be that their oral evidence was not supported by documentary evidence, such as proof that messages or phone calls came from her phone, or copies of the relevant landfill register entries. She asserted that each witness made up his or her evidence and was lying. None of those grounds of challenge to the evidence had any basis and they were quite properly dismissed by the magistrate.

[43] Sean Dench was a local law officer with Logan City Council. He went to Millers Road, next to the land, on 21 and 22 December 2017. While there on 21 December, he took some photographs of soil and piles of fill on Millers Road and a photograph and a video of two people who approached him from a car parked on the land. One was a woman who introduced herself as Phoebe and one was a man. While he was there, he saw and video recorded a truck arriving with a load of fill. It went to a location on the land where it was directed by the man who had accompanied Phoebe and emptied its load at that location. I have watched this video.[19] The woman is clearly Ms Tseng[20] and, although she denied to Mr Dench that she had any knowledge of the truck full of fill,[21] neither she nor the man protested against the truck entering her land or dumping the fill. Having regard to her protests before the magistrate, in cross-examining witnesses, that fill had been dumped on her land without her consent or knowledge, one might have expected her to have at least

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19 Exhibit 16.

20 When pressed by the magistrate, she finally admitted from the bar table that it was her: T3-67:12.

21 "I don't know what's that about."

protested against, or prevented, this truck entering her land and depositing fill on it at her companion's instructions if she had really had nothing to do with it and did not want the fill on her land. Instead, she and her companion acted as though they expected the truck to come and the fill to be deposited on the land.

[44] Mr Dench returned on 22 December 2017, when he saw (and took photographs and a video showing) that the piles of fill that had been on the land and on Millers Road the day before had been moved, spread and smoothed out.

[45] Mark Govender was a senior investigator with the Council. He obtained a warrant entitling Council officers to enter on the land and he attended with a number of officers on 10 January 2018. In order to gain access to the land, they had to cut a chain that was across Millers Road and part of the land. Mr Govender gave evidence that Ms Tseng arrived later, with an older man and a younger man, and was abusive to the Council officers. A video was taken of his conversation with her and associated events and was shown in evidence.[22]

[46] Ms Tseng also challenged the witnesses' identification of her as the lady they dealt with on the basis that she had not been identified in a line-up or photo board of a number of people. However, the evidence was sufficient to identify her as the person concerned. Not only did some of the witnesses identify her from the witness box, but Ms Karup confirmed that the lady whom she had seen directing trucks and sweeping the road was the same lady whom she saw arguing with Council officers one day. Mr Govender and the video played during his evidence identified clearly that that lady was Ms Tseng,[23] as did the video taken by Mr Dench on 21 December 2017.

[47] The combination of all the witnesses' evidence demonstrated without any doubt that Ms Tseng was the person who organised and supervised the deposit and spread of fill on the land between July 2017 and January 2018.

[48] Ogbuja Ikoro is an erosion and sediment control officer with the Council. He first went to see the land on 7 July 2017, when he saw a large amount of fill on the land, including in the waterway corridor. There were no sediment or erosion control measures present on that occasion. He explained that that was of concern to him because the fill was a contaminant that could move into the waterway, particularly as the land slopes toward the rear, where the waterway corridor is situated.[24] He took photographs on that occasion, which were tendered in evidence[25] and show both flattened fill and piles of fill in various places on the land.

[49] Mr Ikoro returned to the land on 14 August 2017, when he took more photographs.[26] They show that there was a considerable amount of fill over a large part of the land, apparently piled right up to an area of swamp land, with no erosion or sediment controls in place.

[50] At some time between 14 August and 21 September 2017, Ms Tseng arranged for some form of sediment control (an erosion control fence involving stakes to which

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22 Exhibit 13.

23 Indeed, in exhibit 13 she complained about the Council officers coming "onto my property" and "entering my property".

24 T3-74:9-19.

25 Exhibit 17.

26 Exhibit 19.

was attached a form of material) to be installed on the land. It is not clear exactly where, on the land, the fence was constructed, though it was near the northern edge of the fill, which was well within the waterway corridor on the land.[27] Mr Ikoro inspected the land again after it was installed. He considered the fence to have been incorrectly and inadequately installed and he also saw piles of fill against the fence in places, some of which appear from photographs to have caused the fence to collapse partly. He described the inadequacies in an email dated 29 September 2017 to Ms Tseng.

[51] Mr Ikoro visited the land (on all occasions standing outside the land only) again in November and December 2017 and then, with other Council officers, on 10 January 2018. On each occasion he took photographs of the land and the area of Millers Road abutting the land, all of which were tendered. Some of them appear clearly to show fill from the land falling into the swampy area to the rear (that is, within the waterway corridor on the land).

[52] The Council tendered a number of emails exchanged between Mr Ikoro and Ms Tseng,[28] the first of which was sent by Mr Ikoro on 14 July 2017. Ms Tseng did not deny that the emails said to be from Phoebe Tseng were from her: indeed, she cross-examined Mr Ikoro on the basis that they were from her and did not suggest otherwise. In her emails, she made a number of statements that constitute admissions that she was responsible for at least some of the fill on the land. In an email dated 1 August 2017, Mr Ikoro told her that inspection had revealed the dumping of soils in the waterway corridor. In her response, she said, "As far as I know, truck drivers put the dirts in front of the property. I didn't have time to check their work. I told them to leave the dirt close to the road, not waterway. The dirts were spread immediately which won't cause any environmental issue. I raise up the surface for farming purpose, not building anything." She made similar assertions in an appeal to the Planning and Environment Court of Queensland against the giving of another enforcement notice that was not the subject of this prosecution and appeal.[29]

[53] Mr Ikoro's evidence about the reasonable possibility of a contaminant entering the waterway was supported by photographs that he took on the occasions that he went there. His evidence was also graphically supported by the video taken on 10 January 2018 (exhibit 13). It showed built up fill toward the rear of the land that had, in places, no sediment or erosion control and in other places merely a strip of anti-erosion material that was clearly not effective. The fill could clearly be eroded and flow into the swamp area to the rear of and behind the land in the event of heavy rain. Indeed, parts of it were deposited so that it appeared to have slid into the swampy area to the rear.

[54] In her cross-examination of Mr Ikoro, Ms Tseng referred to some of the fill having been deposited by the land owner and some by a trespasser. However, neither she nor anyone else gave evidence that any of the fill had been deposited by a trespasser. In any event, for reasons that I discuss later,[30] who deposited the fill is irrelevant, at least to the second charge.

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27 This is clear from survey maps in exhibits 9(1) and 9(2).

28 Exhibit 18.

29 Exhibit 2, attachment 2. That appeal was dismissed: exhibit 2, attachment 3.

30 Paragraphs [85] to [88][87].

[55] The evidence overwhelmingly proves that fill was deposited on the land in 2017. It also overwhelmingly proves that Ms Tseng was responsible for its deposit on the land: in that sense, she "carried out" the actions that constituted assessable development if the depth of fill on the land equalled or exceeded one metre. There was no evidence that anybody else had any involvement in ordering the deposit and spread of the fill on the land. Ms Tseng's questions to witnesses and her submissions to the effect that fill was deposited without her permission and that the Council had not proved that she was responsible for it were disingenuous and dissembling.

[56] I am therefore satisfied that Ms Tseng was responsible for all the fill that was placed on the land in 2017. Her ground one of her appeal fails.

Evidence about the depth of fill on the land (ground 2)

[57] As to the depth of the fill, the Council relied in particular on evidence from a geotechnical engineer, Mr Collins, and a surveyor, Mr Gilby. Ms Tseng challenged Mr Collins' expertise in determining the constituent elements of fill, including which parts of fill were old and which fill had been recently placed on the land. She also challenged the relevance of his evidence on the ground that he undertook his investigations outside the period of the charge.

[58] Mr Collins gave evidence that he had a bachelor's degree in civil engineering, he is a registered professional engineer in Queensland, a chartered professional engineer on the National Engineering Register and a member of the Institution of Engineers Australia. He also has over 34 years' experience in geotechnical engineering, which includes assessing the characteristics of materials making up the ground. Mr Collins said that assessing fill was a critical part of geotechnical engineering.

[59] Mr Collins' evidence was that, on 10 January 2018, he attended the premises and measured the depth of the fill at various locations on the premises, by directing the digging of test pits of various depths and assessing the soil within and surrounding those pits. He determined the locations of the test pits in order to obtain "as good a coverage across the site as possible." He identified whether there was recent fill or old fill, or both, in those pits and measured the depth above the natural ground of each of those categories of fill. He dug a total of 30 pits and analysed the soil which he saw in each of them. In his report he identified where, on the premises, each of the pits was and the depth of the recent fill, old fill and total fill at each of those pits. The results of his work were relevantly that:

(a) six pits showed an excess of one metre of recent fill; and

(b) 19 pits revealed an excess of one metre of total fill (both old and recent fill), including two pits in which the total depth of fill (both old and recent) was three or more metres.

[60] Mr Collins produced a report,[31] the purpose of which he said was "to determine thickness and composition of fill material across the site." He reported that "subsurface conditions across the site typically comprise layers of fill material that are variable in thickness and composition overlying old topsoil horizons and/or alluvial soils." He described the fill materials and added that the fill "was further described in terms of 'Recent' or 'Old' fill based on engineering judgement (including visual assessment of oxidation of metals and decomposition of organic

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31 Exhibit 10.

materials) and with consideration given to surrounding ground profiles." He attached a table summarising the depth of recent and old fill at the site of each test pit. He also attached engineering logs of the test pits. They showed that each pit was dug down to below the natural ground level, the material above that level was described and identified as old topsoil, recent fill, old fill and, in one case, possible old fill. The depth of each of those categories of material was identified in the logs.

[61] As I understood his evidence, Mr Collins said that he could tell the difference between old and new fill from a number of factors, including differences in colour, materials, smell, decomposition and oxidation of metals. However, he conceded in cross-examination that he could not tell the age of the respective layers of fill. He did not analyse the fill with any scientific instruments but exercised his judgment based on his experience and knowledge.

[62] Ms Tseng challenged Mr Collins' evidence on a number of bases. She contends that Mr Collins did not conduct a geotechnical field investigation or dig test pits across the entire two hectares of the premises before the last date at which the Council alleges the fill was placed on the premises. In other words, his investigation was conducted outside that period. Therefore, she says, it is irrelevant because it does not prove that, during the period charged, any fill on the site exceeded the relevant depths. Secondly, she contends that Mr Collins did not explain his reasoning in determining what was recent fill or old fill (or, indeed, the natural ground). She contends that he did not explain how he distinguished the differences between recent and old fill when the test pit did not contain either metals or organic materials, to which he referred as relevant factors in determining the age of fill. She also challenges his expertise because, she says, he did not explain how his expertise and experience enabled him to make a visual assessment of what was old or recent fill, without using any scientific methods to identify and determine the quality and constituents of soil taken from the test pits.[32]

[63] In his evidence, Mr Collins explained that geotechnical engineering, in which he had substantial experience, included the investigation of embankments, excavations and cuts to determine the characteristics of ground in order to assess or design foundations or other things that go into the ground. Assessing the nature and age of fill is a critical part of his duties and he has substantial experience in doing so. His experience and qualifications, he said, enable him to identify or visually log or describe material in and constituting the ground. He described the process of how that occurs and the factors that form the basis of his findings.

[64] To some extent, Mr Collins' evidence was factual: namely, his evidence about what he did and his observations of the soil. To a large extent, however, his evidence comprised opinions as to the nature of the fill that he had found in the test pits and, in particular, whether it was recent fill or old fill, as well as what was the natural ground.

[65] I have no reason to doubt Mr Collins' expertise in the areas about which he gave evidence. Ms Tseng did her best to challenge the manner in which he reached his conclusions and the basis for those conclusions but, in my view, he clearly has considerable expertise in the area and I consider his evidence to be reliable, as did

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32 Notice of appeal paras 14 to 17 are particularly relevant.

the magistrate. Of course, the magistrate also had the advantage of seeing and hearing Mr Collins give his evidence.

[66] I consider that Mr Collins' evidence was reliable and that it was sufficient to prove, beyond reasonable doubt, that there was fill that had been recently placed on the land in the locations where he dug his tests pits and that the fill, in some locations, exceeded the relevant depth of one metre above the natural ground level. He was also able to identify where there was old fill below the recently placed fill. His evidence about the make-up and depth of both old and recent fill was compelling and, in the absence of evidence to the contrary from a similarly qualified (or indeed, any) expert, there was no reason for the magistrate, or me, not to accept it. His Honour's reasons for accepting that evidence do not reveal any error.

[67] Mr Gilby is a licensed surveyor with over 30 years' experience. He described how he surveyed the land to measure the fill, in association with Mr Collins. He noted the natural ground level at each of the test pits and assumed that the natural ground level was the same, or increased or decreased at a consistent rate, between one pit and the next.

[68] Mr Gilby had previously made an affidavit for the purposes of a proceeding in the Planning and Environment Court, to which was exhibited a report that he had done.[33] In that report, he described its purpose as being "to ascertain the extent and volume of fill placed on the subject properties." That affidavit and the report were put to Mr Gilby in cross-examination by the defendant. The report attached survey plans very similar to those produced by him to the Magistrates Court, but the test pit depths were different. Mr Gilby explained that the differences reflected different pit depths supplied to him by Mr Collins after he had produced the earlier plans (those attached to his report). The pit depths in the later plans were less than those in the earlier version and thus favoured Ms Tseng.

[69] Both in his oral evidence and in his report, Mr Gilby explained his methodology and the sources of his information and attached three documents: a survey map of the land and the area around it; the same survey map with an aerial photography overlay; and another copy of the aerial photography overlay showing, by colour coding, the depth of fill on the land. The survey maps showed the location of each of the test pits that had been dug by Mr Collins and the area on the land comprising the waterway corridor. After receiving the amended test pit depths from Mr Collins, Mr Gilby calculated that the total volume of fill on the land was 9,619 cubic metres.[34]

[70] Notably – and of particular relevance to the enforcement notice – Mr Gilby's maps demonstrate that some of the fill was not on Ms Tseng's land, but extended off that land over an adjoining strip of land at the south-east corner of Ms Tseng's land. I understood Mr Gilby's evidence as to the volume of fill on the land to include that area of fill.[35]

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33 Exhibit 9(2). Exhibit 9(1) comprised later versions of the first two survey maps from his report. The copies exhibited to his report had highlighting that had been placed on them by Ms Tseng: T1-78.

34 Having regard to Mr Collins' evidence that the depths shown on Mr Gilby's March survey map were of new fill only, that is clearly the volume of new fill. Mr Gilby had previously calculated that the volume of total fill was 23,588m^3, as shown in his report at exhibit 9(2).

35 The adjoining strip is referred to in the survey maps as "Millers Road". It is an unformed future road rather than an actual road.

[71] I did not understand Ms Tseng to challenge Mr Gilby's expertise as a surveyor. Rather, she contended that his evidence:

(a) was unreliable; or

(b) in any event, did not prove the natural ground level of the premises because it was undertaken after the fill was on the land; and

(c) in some places at least, demonstrated that there was less than one metre of fill over the natural ground level that had been identified on a contour survey map produced in 2009, that was made available by the Council to the public and a copy of which Ms Tseng had obtained.[36]

[72] Ms Tseng contended that Mr Gilby's evidence was inconsistent with that of Mr Collins, because Mr Gilby conceded that there was, at least in some places, less than one metre difference in the ground level shown in his Survey Plan and (natural) ground level shown in the survey map produced by Ms Tseng from the Council's records. (Therefore, Ms Tseng contends, Mr Collins' measurements of the depth of fill and the level of the natural ground were unreliable and inconsistent with Mr Gilby's evidence that there was less than a metre difference between the top of the fill and the ground level shown in the survey map produced by Ms Tseng from the Council's records.) However, he said that he was estimating and trying his best in expressing that view. Ms Tseng contends that there was no proof of the natural ground levels both before and after the fill had allegedly been placed on the land and therefore the survey evidence could not demonstrate sufficiently that the fill or any part of the fill exceeded a depth of one metre.

[73] Mr Gilby said that he identified the natural ground level at the bottom of the fill in each test pit that had been dug by Mr Collins. To that extent, he relied on Mr Collins' identification of the depth of fill after Mr Collins had dug each test pit through all the fill and therefore down to the natural ground level, and from there he calculated the natural ground level. On that basis he produced a survey map on 31 January 2018[37] showing his calculation of the topography of the natural ground and also showing the locations and depths of the test pits. On 23 March 2018 he produced another survey map showing the same topography, but the depths of the test pits were different to those on the original survey map. Mr Gilby explained the differences in the test pit depths as being new depths that Mr Collins had given him. Mr Collins later explained that the depths shown on the January survey map were the depths of all the fill in the test pits.[38] Mr Collins explained the reason for the different test pit depths shown on the March map: the March map shows the depths of new fill only, while the January map shows the depth of all fill.[39] This explanation is confirmed when one compares those depths with the depths of fill shown in his test logs (exhibit 10).

[74] Mr Gilby explained that the survey map on which Ms Tseng relied was not an accurate map, having been drawn from aerial photographs rather than from a survey conducted on the ground. He considered that his survey, having been conducted on the ground, was accurate as to the surface level (i.e., at the top of the fill) on the date he conducted the survey and was a reasonable representation of the natural ground level, as it was revealed in each test pit.

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36 The latter contour map was exhibit 9(3).

37 An attachment to exhibit 9(2).

38 The bottom of those test pits comprised the natural ground level, according to Mr Collins' evidence. Transcript day 2, pp6, 8.

39 Transcript day 2, p9:38-41

[75] Ms Tseng also contends that, even if the court accepts the evidence about the extent and depth of old and recent fill in the test pits, it was insufficient to prove, beyond reasonable doubt, that fill to the relevant depths was placed on the entire area of the premises. As I understand her contention, it is that, unless the entire area were tested, there was insufficient evidence to prove the charge.

[76] It was not necessary for the Council to prove that the fill exceeded the relevant depths at all places on the premises and it did not try to do so.[40] Whether it exceeded those depths over all the premises or only part or parts of the premises is irrelevant to determining whether fill has been placed on the premises in sufficient quantities and depths in one or more places to comprise, at law, assessable development. Mr Collins' and Mr Gilby's evidence demonstrates that, in at least a number of locations reflected by the test pits, there was fill that equalled or exceeded the relevant depths at those places. At a minimum, therefore, the placement of fill, or leaving it there once it had been placed there, constituted assessable development. It is also reasonable to infer, from that evidence, that fill of the relevant depths was placed on most of the land. This part of Ms Tseng's challenge must fail.

[77] Additionally, Ms Tseng contends that, as Mr Collins and Mr Gilby at most demonstrated the state of affairs that existed on the day they attended at the land, it is irrelevant or, in any event, does not prove that the fill was deposited on the land during the period the subject of charge 1.[41]

[78] I do not accept the submission that this evidence was irrelevant. The evidence to which I have referred in paragraphs [33] to [55] above demonstrates that fill was deposited on the land during the period the subject of the charge. Mr Collins' and Mr Gilby's evidence demonstrates the result of that deposit, namely that fill exceeding the relevant depths was on the land in at least the places where some of the test pits were dug on the date they attended (10 January 2018): that is, one day before the end of the charged period.

[79] Therefore ground 2 of the appeal is not made out.

Conclusions on charge 1

[80] I have concluded above that Ms Tseng organised and was responsible for (that is, carried out) the deposit of fill on the land and that the fill[42] exceeded a depth of one metre above natural ground level in several identified places. Neither party made a submission about the meaning of "ground level" – in particular, whether it meant the natural ground level or the level of the ground immediately before the deposit of fill onto it. However, "ground level" is relevantly defined in the *City Plan* as meaning:

(a) the level of the natural ground; or
(b) if the level of the natural ground has changed, the level lawfully changed.

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40 Indeed, the solicitor appearing for the Council said exactly that in a submission during the trial: transcript day 2, p20:1-6, 34-42.

41 She put such a question to Mr Collins, who agreed that he could not determine when the new fill was deposited: transcript day 2, p23:5-10. Charge 1 alleged that the fill was deposited on the land between 6 July 2017 and 11 January 2018.

42 Both the fill deposited at Ms Cheng's direction, in some places, and a combination of that fill and old fill in other places.

There was no evidence that the level of the natural ground had been lawfully changed (however that might occur). Mr Collins identified the natural ground level in his evidence and the fill in places on the land exceeded one metre in depth above that level.

[81] The fill deposited on Ms Tseng's instructions itself was one vertical metre or more in depth above the pre-existing surface level in several identified places on the land. In other places, a combination of pre-existing fill and the fill deposited in 2017 and 2018 resulted in a depth of fill of one metre or more above the natural ground level. The deposit of fill on the land at Ms Tseng's behest was therefore assessable development under the *City Plan* and the *Planning Act*. Ms Tseng did not have a development permit for that assessable development.

[82] Therefore, I am satisfied that charge one has been proved beyond reasonable doubt.

Charge 2 – depositing a contaminant expected to move into waters (grounds 3 and 4)

[83] The Council alleged that some of the fill deposited on the land was placed in such a manner, and without suitable protective measures, that there was a reasonable possibility that some of the soil would enter and thus pollute the waterway.

[84] Ms Tseng contends that, for a number of reasons, the Council did not prove that she had deposited any soil (that is, a contaminant) in such a way that it could reasonably be expected to move into waters.

[85] I have addressed the evidence about Ms Tseng's responsibility for depositing the fill on the land in dealing with charge 1. I am satisfied that she was fully aware that the fill was on the land and where it was. Even if she were not aware that the fill was being deposited on the occasions when that occurred, by the operation of subsection 440ZE(2) of the EPA, if she was the "occupier" of the land who has not removed the contaminant from it within a reasonable time of becoming aware that it had been deposited, then she has deposited the contaminant on the land.

[86] Ms Tseng contended that she was not the occupier of the land because she did not live, or otherwise stay, there. "Occupier" is defined in the dictionary to the EPA as including "the person apparently in charge of the place." Notably, that is an inclusive definition: it leaves open the possibility that persons other than those apparently in charge of a place may be an occupier of the place. "Occupy" is defined in common dictionaries as, among other things, to take possession of a place[43] and "occupier" as a person having possession of property, especially a dwelling or land.[44]

[87] Ms Tseng was the registered owner of the land. She did not occupy it in the sense of living or conducting business on the land. However, she clearly had control of it and used it. She was the person who regularly turned up to direct trucks where to deposit soil. She was the person who dealt with Council officers about the land, both by email and in person on or adjacent to the land. She was the person who sought to prevent Council officers doing works on the land, or even photographing it. She was the person who told others that she intended to grow mango trees on the

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43 Macquarie Dictionary Online.

44 The New Shorter Oxford English Dictionary (1993).

land or to use it for farming purposes. There is no doubt that she was the occupier of the land. Therefore subsection 440ZE(2) applies to her.

[88] At the latest by 14 July 2017, when she received Mr Ikoro's first email to her, Ms Tseng was aware that soil had been deposited on the land. She was therefore a person who deposited the fill on the land. The fill was partly in the waterway corridor on the land and Mr Ikoro was concerned that it may go into the area of waters to the north of the land. Mr Ikoro informed Ms Tseng of that concern when he first contacted her by email on 14 July 2017.[45] She did nothing to remove the soil although, as I have said, she did eventually install some inadequate soil and erosion protection fencing.

[89] I have previously referred to Mr Ikoro's evidence that he was concerned that the fill might move into waters. In several emails to Ms Tseng, he expressed the view that the fill had been deposited in such a way that it could wash or otherwise move into waters.[46] Ms Tseng did not specifically challenge that evidence or opinion in her cross-examination of him.

[90] Ms Tseng contends that Mr Ikoro did not identify whether any "particular, suspicious" water contaminant was inside or outside the boundaries of the land. I understand her to contend that this was principally because those boundaries were not physically marked out by, for example, survey pegs and a fence.

[91] This contention must fail. The photographs and video evidence, taken by both Mr Ikoro and other Council officers, clearly show some of the fill was placed in the waterway corridor on the land and that, in some places, it had spilled into the swampy area in that corridor. The land also sloped toward the north: that is, toward the creek outside the land boundaries. All this is also confirmed by Mr Gilby's and Mr Collins' evidence.

[92] The second ground of appeal about charge two is that there was no basis shown for a reasonable expectation that soil could move into waters. Ms Tseng contends that Mr Ikoro had no expertise concerning water flow and, without evidence from a person with such expertise, the evidence is inadequate to prove the charge.

[93] The requirement that it could reasonably be expected that a contaminant would move into waters does not necessarily require expert evidence. The expectation is simply required to be "reasonable". In my view, the opinion may be formed by a reasonable bystander or by people with differing levels of expertise. Whether such an expectation might arise depends on the facts of each case.

[94] Having regard to Mr Ikoro's evidence, as well as that of Mr Collins and Mr Gilby, the photographs and videos that I have seen and the fact that the land sloped toward the waterway to the north, it is clear that the soil was deposited on the land in such a way and in such places that it could reasonably be expected to wash, blow or otherwise move into waters. It was already pushing beyond the erosion protection fencing and there was a slope in the ground toward the waterway to the north of the land. At the least, heavy rain would be likely, in my view, to cause some of the soil to run into the waterway. Therefore, the test in s 440ZG was satisfied.

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45 Exhibit 18(1).

46 Exhibits 18(1), 18(2).

[95] Ms Tseng deposited the soil there, within the meaning of that term in s 440ZE.

[96] I am therefore satisfied that charge two has been proved beyond reasonable doubt.

Charge 3 – failure to comply with a direction notice (grounds 5 and 6)

[97] The charge is that, between 18 September and 22 December 2017, Ms Tseng failed to comply with a direction notice dated 2 August 2017.

[98] On 2 August 2017, Mr Ikoro sent to Ms Tseng a direction notice under s 363B of the EPA.[47] Mr Ikoro sent a copy of that notice to Ms Tseng by email. She responded by saying that it had been sent to her old address and giving the new address. Mr Ikoro then, on 3 August 2017, sent a new direction notice to Ms Tseng, addressed to the correct address.[48] The only other changes were to refer to the first direction notice and the change of address and each notice had a different reference number.

[99] The complaint refers to the 2 August 2017 notice. No issue was taken by Ms Tseng about the date of the notice the subject of the charge.

[100] Ms Tseng sought internal review of the decisions to issue the direction notices.[49] The decision maker in the reviews confirmed the notices, but extended the date for compliance with the requirement to install erosion control.[50] Although both decisions referred to the first notice, no point was made of that and it is clear that each decision was intended to concern a different notice from the other.

[101] In the end, by the notices, as varied by the review decisions, the Council required that Ms Tseng:

(a) immediately cease all earth disturbing work on the land, except for those actions necessary to achieve compliance with the general environmental duty and that notice; and

(b) by 19 September 2017, implement erosion and sediment control measures on the land that prevent movement of prescribed contaminants into waters, complying with best practice standards for those measures.

[102] For the purpose of my decision, I shall deal with the notices as if the charge were in respect of the second notice, notwithstanding the date of the notice referred to in the complaint. That is in Ms Tseng's favour, as the second review decision extended the date for compliance to a later date than the first. There was no other relevant difference between the notices.

[103] The notice identified that the earth disturbing activities had exposed about 50% of the land to soil erosion and potential sediment runoff into the adjacent waterways; stockpiles of soil and other materials had been placed close to the waterway corridor, with no erosion and sediment control measures installed to prevent soil moving into the waterway; and the property entry and exit point lacked adequate control measures to prevent mud and dirt being tracked onto the road by exiting vehicles.

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47 Exhibit 3, attachment 1.
48 Exhibit 3, attachment 2.
49 Exhibit 3, attachment 3.
50 Exhibit 3, attachments 4 and 5.

[104] The notice also stated that Mr Ikoro had formed a reasonable belief that an offence had been committed, comprising the placement of loose, unprotected topsoil and other materials close to the waterway that could reasonably be expected to wash, blow, fall or otherwise move into waters, as could areas of disturbed soil and exposed ground close to the waterway.

[105] I am satisfied, having regard to Mr Ikoro's evidence and the photographs and videos in the evidence as a whole, that Mr Ikoro had reasonable grounds to believe that Ms Tseng had committed an offence (namely, that ultimately the subject of charge 2). There were therefore proper grounds for him to give the direction notice.

[106] Ms Tseng's first defence to the charge was that there was no evidence that showed that fill had been deposited on the land and fill on the land was spread over it between 18 September and 22 December 2017 and therefore that she had breached the first part of the direction notice. The evidence to which I have referred in dealing with ground 1 clearly demonstrated that the deposit of fill continued throughout that period. That is particularly demonstrated by the evidence of Frances Karup, Salvatore Scarcella, Michael Hansen, Sean Dench and Ogbuja Ikoro about their observations and their visits to the land and by the photographs and videos taken by the various witnesses on a number of dates during the relevant period. Therefore this ground of appeal fails.

[107] Ms Tseng's next ground of appeal concerning charge three is that the direction notice was not valid because it did not contain sufficient details. In particular, she notes that it did not attach photographs of the soil that was said to be on the land, particularly the soil said to be a contaminant that could reasonably be expected to move into water. She complains in the notice of appeal that the direction notice did not "disclose which particular water contaminant, nor … which location of the premises required erosion and sediment control measures, nor … what type of erosion and sediment control measures he required [Ms Tseng] to install."

[108] There is no requirement in the legislation to be as specific in a direction notice as Ms Tseng contends. Paragraph 363D(1)(c) relevantly provides that a direction notice must state "briefly, how it is believed the prescribed provision is being, or has been, contravened." The direction notice certainly did this. Again, her defence and this ground of appeal are disingenuous. She knew exactly what soil was on the land. The earthworks and stockpiles of soil were clearly described in the notice. The erosion control measures required were clearly stated by reference to a specified standard. This ground of appeal therefore fails.

[109] I am therefore satisfied that charge three is proved.

Ground 7 – penalty manifestly excessive and based on errors

[110] My approach to the appeal against the penalty is different to that concerning the defendant's conviction, because the imposition of a penalty involves the exercise by the magistrate of a discretion. Having formed my own view that Ms Tseng was guilty of the offences charged, I should only vary the penalty imposed by the magistrate if I consider that it was clearly wrong. In determining the answer to that question, I must consider whether the magistrate has made some error in the exercise of his sentencing discretion.[51] It does not matter if I consider that I would

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[51] *House v The King* (1936) 55 CLR 499, 504-505; *R v Lawley* [2007] QCA 243, [18].

have imposed a different penalty, had I been the trial magistrate, provided that the penalty imposed was not so excessive as to indicate a misapplication of principle by the magistrate.

[111] Ms Tseng asserts, first, that the magistrate erred by not taking into account that there was insufficient evidence to prove that she was responsible for the fill on the land or the depth of fill, nor of the specific dates on which fill was deposited there, and that the evidence was that the land was unfenced and unoccupied, so the fill could have been placed there by trespassers.

[112] None of those matters was relevant to the sentence, given the findings by the magistrate (which I have confirmed) as to Ms Tseng's knowledge of and responsibility for the fill and for failing to comply with the direction notice.

[113] Ms Tseng also contends that the penalty was excessive because the magistrate did not take into account that Ms Tseng is unemployed, relies on Centrelink financial support (having a pensioner healthcare card) and suffers from chronic mental illness.

[114] Contrary to those submissions, the magistrate expressly took into account that, even though she is the owner of a valuable property, she said that her purchase of it had been financed by private loans from relatives, she had had no job for more than three years and, according to medical certificates tendered by her, she suffered from depression. She also tendered a copy of a Commonwealth Health Care Card that expired in October 2019.

[115] In fact, the medical certificates were not strictly sufficient to prove that Ms Tseng suffered from depression, as they were from general practitioners, not persons qualified to diagnose such a disease, such as psychiatrists. However, the magistrate assumed their correctness, in favour of Ms Tseng.

[116] I am satisfied, therefore, that the magistrate took into account those factors in determining the appropriate penalty.

[117] Apart from the matters discussed above, Ms Tseng's contention that the sentence imposed was manifestly excessive will only be established if she can demonstrate that the sentence was so markedly different from sentences imposed in comparable authorities that there must have been a misapplication of principle, or that a conclusion can be reached that the sentence is unreasonable and plainly unjust.[52]

[118] At the hearing into the appropriate orders consequent on the defendant's conviction, Mr Cartledge, who appeared for the Council, contended that an appropriate penalty for all three convictions together would be in a range of $40,000 to $50,000, based on comparable decisions. He also submitted that it would be appropriate to impose a penalty at the top of that range because Ms Tseng had proceeded to a full trial, had shown no insight into her offences and required personal deterrence, as well as general deterrence.

[119] The maximum penalties for the offences were, respectively, $567,675, $75,690 and $75,690. The Council submits that the penalty imposed was 6% of the total of those figures and therefore not, on the face of it, excessively high in comparison to the

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52 *R v Tout* [2012] QCA 296 at [8].

maximum possible exposure. I do not accept that that is an appropriate basis for measuring the severity of the penalty. The sentencing court must take into account the particular circumstances of the offences and the personal circumstances of the defendant. The circumstances of the offences will include whether they were blatant and wilful, whether the defendant committed any of the offences after having been put on notice that they were (or were likely to be) offences, the period of time over which they were committed and the extent of the offences (in the sense of whether they were minor or involved extensive development and risk of contamination).

[120] Before the magistrate, the Council referred to two case summaries, prepared by its officers, of cases that had been dealt with in the Magistrates Court. In the first, *Famhall Pty Ltd*,[53] the defendant company had deposited substantial quantities of fill on its land, including in a waterway corridor and resulting in a reasonable expectation that it could move into waters. After receiving an enforcement notice (which I understand to be the equivalent, under the relevant legislation at the time, to a direction notice under the EPA) requiring it to cease operational works and to install erosion and sediment protection, it continued, over a period of some months, to add fill to the site and it installed grossly inadequate protection. In those respects, it was factually very similar to this case. The company's sole director and shareholder gave evidence that the land was worth considerably less than the debt secured by a mortgage over it and he and the company had no ability to pay a fine. However, the Council demonstrated that the director personally owned several other valuable properties. The magistrate considered that the aggravating features were that the actual waterway was filled and work was done in defiance of the enforcement notice (again, similar to the facts of this case). Her Honour highlighted the importance of both personal and general deterrence that should be reflected in the penalty. The company was fined $40,000 and ordered to pay costs of $12,000, the magistrate having reduced the amount of costs having regard to the large fine.

[121] The second case relied on by the Council before the magistrate was that of *Qureshi*.[54] The defendant in that case had imported fill onto a waterway corridor on land bounded by two creeks and, despite having been told that fill could not exceed 100 millimetre above ground level without a development permit, he proceeded to import and spread fill and gravel to depths of 0.5 metres to 1.9 metres. The defendant had also committed other offences on other properties, for which he was also convicted and fined at the same time. He pleaded guilty to all the charges. He was fined a total of $72,000 for all the offences, of which $38,000 was for the filling offences.

[122] In *Dixonbuild Pty Ltd v Ipswich City Council* [2011] QDC 185, the defendant was convicted after trial of an offence against s 440ZG of the EPA for unlawfully depositing sand where is could reasonably be expected to enter a roadside gutter. It was fined $20,000. Although the conviction was overturned on the appeal to the District Court, the judge did not consider the penalty to be an improper exercise of the magistrate's discretion. His Honour also noted that the offending was not done blatantly or wilfully, for which a higher penalty might be imposed.

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53 Magistrate Payne, Brisbane, 26 May 2014.

54 Magistrate Cornack, Holland Park, 19 November 2018.

[123] Finally, the Council relied on the decision of Robertson DCJ in *McSweeny v Spiller* [2002] QDC 295 for his Honour's summary of factors likely to aggravate the conduct the subject of a charge under the *Integrated Planning Act* 1997. Although concerning a different statute, Council submitted that the same factors may also be relevant aggravating factors in a case such as this. Those factors are:

(a) the period of time over which the offence was committed (in this case, about six months);
(b) whether the offender had had prior notice from the local authority of the unlawfulness of the actions (here, the Council informed Ms Tseng in July 2017, yet she continued to deposit and spread fill, including without adequate erosion and silt protection, over the following 5 or 6 months);
(c) the scale and commerciality of the unlawful activity (here, she deposited a total of about 9,600 cubic metres for the apparent purpose of commencing a mango farm);
(d) any other conduct suggesting a wilful disregard of the relevant laws (in this case, I consider that Ms Tseng's disingenuous and aggressive behaviour toward the Council and its officers throughout the relevant period displayed such a wilful disregard for the laws);
(e) previous convictions for like offences (there were none here[55]); and
(f) the potential for environmental harm (here, there was clear potential).

[124] Evidence tendered at the sentencing hearing included a report[56] prepared by an hydraulic engineering company, which included aerial photographs of the land in 2005, 2016 and a number of dates from February to December 2017. The photos showed that the land was treed until at least September 2016, the trees had been cleared by February 2017 and fill was introduced onto the land and then spread across it (and onto the adjoining future road) over the course of 2017. Those photographs reinforced the evidence at the hearing as to the extent and timing of the earthworks. They demonstrated that substantial quantities of fill had been placed on the land, including within the waterway corridor.

[125] The report considered the effects of the fill on the environment. It concluded that large quantities of sediment were likely to discharge from the fill areas during rainfall events. It also reported that the fill had resulted in a loss of flood storage on the site which had the potential to increase flood flows downstream. Those impacts are not allowable under the *City Plan*. It concluded that the filling and activities on the site were in significant breach of the Flood Overlay Code, the Stormwater Code, the Filling and Excavation Code and the Waterway Corridors Overlay Code.

[126] While the opinions expressed as to breaches of the various Codes were merely those of an environmental expert and are not binding on the magistrate or this court, the factual matters described in the report demonstrated that Ms Tseng's breaches of the law, for which she had been convicted, have caused and, while they are unrectified, continue to have the potential to cause serious environmental damage. They are serious breaches for which she continues to deny responsibility, contrary to all the evidence and the magistrate's findings. Ms Tseng has demonstrated no insight into

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55 Although Ms Tseng had been convicted of public nuisance, obstructing a police officer and assaulting a police officer, charges that arose from the confrontation with Council officers on 10 January 2018, the magistrate was not informed of those convictions, which are irrelevant to these charges. An appeal from those convictions was dismissed: *Tseng v Queensland Police Service* [2019] QDC 245.

56 Exhibit 1 at the sentencing hearing.

her offending and it was therefore appropriate for the magistrate to impose a penalty that might be a significant deterrent to Ms Tseng personally as well as to others who may be tempted to commit similar offences.

[127] Notwithstanding my views expressed in the preceding paragraph, the Council expressly did not rely on that report as going to penalty, but rather as demonstrating the appropriateness of the magistrate issuing an enforcement notice in the terms sought by the Council. Nevertheless, in my view the report is graphically demonstrative of the actual and potential environmental harm caused by Ms Tseng's illegal activities and could be considered relevant to penalty.

[128] Taking into account all these factors and the comparative cases, including taking account of Ms Tseng's blatant and ongoing disregard for the law, her lack of remorse for and insight into her offences and the potentially serious damage to the environment, although the penalty of $40,000 was substantial, I do not consider that it was beyond the bounds of an appropriate exercise of the magistrate's discretion. Therefore, the appeal against that penalty fails.

Ground 8 – costs

[129] An affidavit of Mr Cartledge was read at the sentencing hearing. Mr Cartledge deposed to the costs that had been incurred by the Council in investigating and prosecuting Ms Tseng for the offences. Those costs included $15,078 for in-house legal fees, $13,112 for Mr Gilby's survey and report, $9,619 for Mr Collins' investigation and report and $34,980 for the hydraulic engineer's report. The magistrate noted that scale legal costs would be $4,125, but the case involved some complexity, so he allowed $8,000 for legal costs. He also fixed the costs of Mr Gilby's and Mr Collins' reports combined at $20,000 and he allowed $25,000 for the hydraulic engineer's report.

[130] The award of costs is another exercise of the magistrate's discretion,[57] although that discretion is regulated by the *Justices Act*. In particular, s 158B relevantly provides that, in deciding the costs that are just and reasonable, the court may award costs only for an item allowed under a scale of costs and up to the amount allowed for the scale, but the court may allow a higher amount if it is satisfied that the higher amount is just and reasonable having regard to the special difficulty, complexity or importance of the case.

[131] Ms Tseng contends that there was no special difficulty or complexity in the preparation or the hearing and therefore the magistrate should not have increased the legal costs above scale. She also contended that Mr Gilby's and Mr Collins' evidence was unnecessary because the survey plan that she had relied on (exhibit 9(3)) was sufficient (and, she contends, would have shown that no part of the fill exceeded one metre in depth above the ground level shown in that plan). She also contended that Mr Collins' and Mr Gilby's costs were excessive.

[132] I disagree with each of those contentions. The evidence of Mr Collins and Mr Gilby was essential for the Council to prove its case. Mr Gilby's survey was more accurate and more recent than exhibit 9(3) and was necessary to identify the locations of the test pits dug by Mr Collins. Mr Collins' evidence was necessary to

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57 *Justices Act* 1886, s157: the court may, in its discretion, order that the defendant pay to the complainant "such costs as to [the court] seem just and reasonable."

demonstrate the fill that was placed on the land, both by Ms Tseng and previously. Both those witnesses' evidence involved some complexity and the production of a detailed report. Ms Tseng cross-examined both witnesses at some length. In addition, it was necessary for the Council to marshal and to call a total of 14 other witnesses over three days of evidence, mostly to demonstrate that it was Ms Tseng who controlled the deposit of fill on the land, in the face of her disingenuous denials of that fact.

[133] If Ms Tseng had merely cooperated with the Council, installed proper erosion and sediment control and applied for a development permit for properly placed fill, then few of these costs would have been incurred. If she had simply admitted that she was responsible for the deposit of the fill, many of the witnesses' evidence would have been unnecessary. The complexity was caused and the costs were incurred as a result of her intransigence and in order for the Council to prove its case. Subject to one matter that I will consider separately, they were not apparently excessive, but were necessary, and the magistrate reduced them all in coming to his final order. In my view, subject to the following paragraph, the magistrate did not commit any error of principle in determining the order for costs and it was an appropriate order.

[134] The matter requiring separate consideration is the cost of the hydraulic engineer's report. That report was not used for the purpose of proving the Council's case. It was not tendered until the sentencing hearing. It was used for a limited purpose at that hearing, which was said by Mr Cartledge to demonstrate the need for and appropriateness of the orders under s 176 of the *Planning Act* (that is, an enforcement order). The magistrate relied on it for that purpose. The cost of that report was by far the highest of all the experts' reports and his Honour reduced the award of costs for that report by $10,000 to reflect the fact that it was not used at the trial itself.

[135] While I may have allowed somewhat less for the cost of this report, as it seems to have addressed more matters than may have been strictly necessary, I do not consider that it was beyond the reasonable exercise of the magistrate's discretion to allow the sum he did.

[136] Therefore Ms Tseng's appeal against the costs order fails.

Ground 9 – the enforcement order

[137] The final grounds of appeal are against the enforcement order. Ms Tseng contends that it was wrongly made for three principal reasons. First, that it requires her to remove fill from areas outside the land, whereas the charges concerned only fill on the land. Secondly, that the magistrate did not take into account Ms Tseng's financial and medical circumstances in making the order. Thirdly, that the prosecution allegedly provided a draft order to the magistrate, to which he agreed, on the day before she was convicted and sentenced, which was an abuse of process and a failure to accord her natural justice.

[138] The first ground concerns paragraph 1 of the enforcement order. It required Ms Tseng to remove all fill introduced on the properties adjacent to the land, as identified in areas marked on an attached survey plan. Those areas were, broadly, that part of Millers Road on which fill had been placed and a smaller area on the property to the west of the land.

[139] Ms Tseng objects that those areas, outside the boundaries of the land, were not the subject of the charges against her. That is correct. Each of the charges specifically stated that the alleged offences had occurred "at premises situated at" the land, which was specifically described by its street address and its lot numbers. In fact, on 16 July 2019, when final addresses were made and Ms Tseng was convicted and sentenced, the Council opened by seeking leave to amend the complaint, relevantly, to add into charge 1 the allegation that the assessable development occurred "at and near" the land, in order to encompass the fill on the adjacent properties. That leave was refused.

[140] Subsection 176(1) of the *Planning Act* provides that, after hearing offence proceedings, a Magistrates Court may make an order (an ***enforcement order***) for the defendant to take stated action within a stated period.

[141] That subsection does not specifically provide that the stated action may only relate to the property where the offence was committed. However, the notes to that subsection gives examples of action that an order may require. All the examples concern the development of the premises the subject of the offence proceedings and subsection (2) provides that the enforcement order may be in terms the court considers appropriate to secure compliance with the Act. Subsection (6) provides that, unless a court orders otherwise, an enforcement order other than an order to apply for a development permit attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises.

[142] It is clear to me that an enforcement order may only concern the development and the land that is the subject of the charge that has been dealt with in the relevant proceeding. As the complaint in this case was limited to development on Ms Tseng's land, it was wrong to make an enforcement order that extended to properties other than that land.

[143] Therefore, paragraph 1 of the enforcement order was beyond the power of the magistrate and must be set aside.

[144] Ms Tseng's second ground of challenge to the enforcement order is factually wrong. Ms Tseng specifically made submissions to the effect that she could not afford to apply for a development permit or to remove the fill, relying on assertions that she had not had any employment for three years, she had bought the land with loans from family members, she was ill and her only income comprised social security benefits. The magistrate did consider those matters in his reasons for convicting her and the consequential orders he made. In any event, Ms Tseng presumably paid for the fill to be deposited on the land and it was appropriate to order that she either regularise it by applying for and complying with any development permit, or by removing the fill to the extent that it exceeded one metre in depth. She brought on herself her liability to such an order by her own conduct.

[145] Finally, Ms Tseng submits to the effect that the order was agreed to by the magistrate in an arrangement with the Council before the final date of the hearing and without giving her an opportunity to be heard about it. She also complains that, after the order was made, she wrote to the magistrate three times to ask him to withdraw the order and he did not take any steps consequent on those letters. Therefore, she submits, the magistrate did not give her natural justice before making the order.

[146] Ms Tseng's submissions in these respects are misconceived, possibly resulting at least in part from her failure to understand court processes and partly because the order itself was incorrectly dated 15 July 2019, when it was made on 16 July 2019.

[147] The processes leading to the order were that, on 16 July 2019, the hearing was resumed to enable Ms Tseng to make a submission that she had no case to answer. She made that submission, which the magistrate rejected. The magistrate then convicted her and proceeded to hear submissions on sentence.[58] At the commencement of the Council's submissions, Mr Cartledge handed to the magistrate and Ms Tseng the comparable decisions to which I have referred in considering the appeal against sentence and a draft enforcement order.[59] He then made submissions as to sentence and about the proposed enforcement order. The magistrate then suggested a possible adjournment (which had also been discussed earlier), it appears to enable Ms Tseng to consider her position and perhaps to seek to cross-examine the author of the hydraulic engineer's report. Ms Tseng, however, said she would prefer to get it over with that day.[60]

[148] The magistrate then gave his decision, including to make the enforcement order in the terms of the draft that had been provided to him by Mr Cartledge.

[149] Ms Tseng is wrong in believing that the magistrate had decided to make that order on 15 July 2019. It is clear that he did not see the draft order until it was handed to him at the hearing, as is the usual practice. Ms Tseng was offered the opportunity of an adjournment to consider what to do about addressing sentence and orders, but chose not to take it up.

[150] As Ms Tseng was self-represented and clearly did not understand the law or procedures, it would have been preferable for the Council to have provided to her copies of the cases on which it relied for sentencing and a copy of the enforcement order that it was seeking, well before the hearing on 16 July 2019. She did not have much opportunity to consider them before making submissions about them. However, there clearly were very good grounds to make the order (apart from paragraph 1). Ms Tseng is incorrect in suggesting that the magistrate decided to make the order before the hearing date. The date of 15 July 2019 on the order was clearly just a typographical error made in the Council's office when drawing the draft and the error was not picked up by the magistrate when he signed it on 16 July after hearing from the parties.

[151] As for Ms Tseng's complaint that the magistrate did not respond to, or take account of, her subsequent correspondence, it is also based on misconceptions by her. Having made his decisions, the magistrate had no power to withdraw the order and no further role or authority in the matter. The proceeding was over. It was inappropriate for Ms Tseng to write to him.

[152] Therefore, Ms Tseng was afforded natural justice. Her appeal against the enforcement notice fails, apart from paragraph 1.

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58 Transcript, 16 July 2019, p88ff.

59 T1-88 line 31.

60 T1-107:22-24; T1-118:23 to T1-119:10. The earlier discussion of a possible adjournment was at T1-33:30.

Conclusions

[153] Under section 225 of the *Justices Act*, on an appeal to this court the judge may confirm, set aside or vary the appealed order or make any other order the judge considers just. It is appropriate that paragraph 1 of the enforcement order be set aside. To avoid any further confusion, the date of the order should be varied to 16 July 2019. Otherwise I shall confirm that order. The appeal will otherwise be dismissed.

[154] I will hear from the parties on costs at a mutually convenient date, if either party seeks to be heard.