PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Krajniw v Brisbane City Council & Ors* [2008] QPEC 80
PARTIES:	**TONY KRAJNIW** (Applicant) v **BRISBANE CITY COUNCIL** (First Respondent) and **ENVIRONMENTAL PROTECTION AUTHORITY** (Second Respondent) and **DEPARTMENT OF NATURAL RESOURCES** **(**Third Respondent) and **DEPARTMENT OF INFRASTRUCTURE AND PLANNING** (Fourth Respondent)
FILE NO/S:	1190 of 2008 and 1191 of 2008
DIVISION:	
PROCEEDING:	Originating application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	31 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2008
JUDGE:	Rackemann DCJ
ORDER:	**The applications are dismissed.**
CATCHWORDS:	Bikeway constructed by the council in a park – whether assessable development – whether material change of use for road – whether any material change of use was exempt development – whether development involved assessable vegetation clearing or other assessable operational works – discretion to withhold relief
COUNSEL:	Applicant appeared in person Mr Job of Counsel appeared for the respondent, Brisbane City Council Mr Pepper, a solicitor, appeared for the first co-respondent No appearance for the second or third co-respondents
SOLICITORS:	Brisbane City Legal Practice for the respondent Environmental Protection Agency for the co-respondent

Introduction

[1] These proceedings concern the development of a bikeway through the Minnippi Parklands at Tingalpa. The bikeway, which is to be constructed in stages, is proposed to be ultimately connect the Murarrie Recreation Reserve north of Wynnum Road to the existing bike track and Minnippi Parklands to the south. The Council, through Brisbane City Works, has carried out construction work with respect to one stage (referred to as stage 1A). That stage is contained within lot 50 on RP160209 (lot 50) and starts at Wynnum Road to the north and connects to a narrow strip of dedicated road connecting lot 50 to Proprietary Street, approximately south of Container Street. Construction of that stage commenced on 28 March 2008. As at the hearing of the application construction had been completed, save for some very minor ancillary works, which were expected to be completed on the day of the hearing.

[2] The applicant is a resident of Cannon Hill who has a strong interest in wildlife in general and the local squirrel glider population in particular. He is concerned about the impact of the bikeway. He commenced these proceedings in May 2008, when stage 1A was incomplete. He sought a declaration that the development required a development approval. He also sought orders to stop further development and to require the Council to carry out restoration works. On 28 May 2008 the Council undertook not to carry out any further clearing of Minnippi Parklands in association with the provision of bikeways until the determination of this application or earlier order. The affidavit of Ms Johnson sworn that day established that the clearing for stage 1A had already been completed.

[3] The EPA does not contend that the bikeway construction has involved any assessable development for which it is a referral agency, but it will otherwise abide

by the order of the court. The third respondent did not file an entry of appearance. The fourth respondent entered an appearance, but did not play an active role in the proceedings.

[4] It is common ground that no development permit was issued for stage 1A. The Council contends that the development was not assessable development. A development permit is only required for assessable development. No development permit is required for self assessable development or exempt development[1].

[5] The focus of these proceedings is that stage of the bikeway which has been constructed. The originating applications attacked the legality of "the current development work". By his further and better particulars dated 10 July 2008 and 28 July 2008, the applicant identified those works as the construction of stage 1. The plan attached to those particulars show what has been referred to as stage 1A, being the section which starts at Wynnum Road to the north and connects to the narrow strip of dedicated road which connects lot 50 to Proprietary Street. On the hearing of the application the applicant confirmed that he was content for the court to concentrate on that stage.

Material change of use

[6] The applicant contends that the bikeway constitutes the commencement of a new use, being a road. The respondent accepts that the bikeway is a road, but says that it does not constitute a material change of use: rather, it is part of the use of lot 50 for a park. It was also submitted that a road is not assessable development in any event.

[7] Assessable development is defined in schedule 10. It includes development stated in Schedule 8, Part 1 of the IPA. The applicant did not rely upon any item in that

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1 See section 3.1.4.

schedule as making any material change of use assessable. Assessable development is defined to include other development, not stated in Schedule 8, Part 1, which is declared to be assessable development under, amongst other things, the planning scheme for the area.

[8] The applicant rightly contends that the bikeway constitutes a "road" for the purposes of City Plan. City Plan incorporates the definition of road from the IPA which, in turn, adopts the definition from the *Transport Infrastructure Act* (the TIA). Relevantly, Schedule 6 of the TIA defines a road as including "a pedestrian or bicycle path".

[9] City Plan identifies assessable development by the level of assessment tables for each particular area. The site of the bikeway is included within the parkland area. The level of assessment table for that area does not expressly mention a road. Development which is "any other material change of use" is listed in the table as impact assessable – generally inappropriate development.

[10] Assessable development does not however, include exempt development. City Plan identifies exempt development in s 2.3 of chapter 3. It provides that "despite anything to the contrary in the plan, the following is exempt development". The list of exempt development includes the following:

> "any development involving the construction, maintenance or operation of roads … and things associated with roads … by or on behalf of or under contract with the Brisbane City Council …"

[11] His attention having been drawn to that provision, the applicant rightly acknowledged that the bikeway falls within the description of exempt development.

That obviates the need to determine whether it was, in any event, a material change of use. Even if it was, it constituted exempt development.

Operational works

[12] The applicant's next contention was that the development included operational works, which were assessable because they occurred in a coastal management district. Table 4 of Pt 1 of Schedule 8 of the IPA describes development, by way of operational works, which are assessable. Item 5 of that table deals with tidal work or work within a coastal management district. It makes certain operational work, other than excluded work, assessable. It was common ground that the development is not "excluded work" for the purposes of that item in the table. The development is also not tidal work. The parts of the provision relevant to the applicant's argument are as follows:

> "Operational work … that is
>
> …
>
> (b) Any of the following carried out completely or partly within a coastal management district –
>
> (i) Interfering with quarry material on State coastal land above high water mark
>
> …
>
> (iv) Constructing or installing works in a watercourse and not assessable under item 3 or 4.
>
> (c) Carried out in an Urban Development Area.

[13] The work was not carried out in an Urban Development Area. The applicant only raised that part of the provision because he did not know what an Urban

Development Area is. The expression is defined, in the IPA, to mean an Urban Development Area under the *Urban Land Development Authority Act* 2007 (ULDAA). It is defined in the ULDAA to mean an area declared under s 7 of that Act. Section 7, in turn, provides that a regulation may declare a part of the State to be an Urban Development Area. The Urban Land Development Authority Regulation 2008 declares certain Urban Development Areas, none of which include the subject site.

[14] Item (b)(iv) relates to works in a watercourse that is within a coastal management district. It is common ground that the relevant area is within a coastal management district. Schedule 10 of the IPA defines a "watercourse", for the purposes of item (b)(iv) to mean:

> "… A river, creek or stream in which water flows permanently or intermittently –
>
> (a) In a natural channel, whether artificially improved or not; or
>
> (b) in an artificial channel that has changed the course of the watercourse."

[15] In this case, the applicant asserts that works occurred within the watercourse constituted by Bulimba Creek. The Council contends that the works are beside, but not within, that watercourse.

[16] In his further and better particulars of 28 July 2008, the applicant contended that works were carried out "below the highest astronomical tide, and in floodable areas". The affidavit of Ms Fraser, a senior environmental scientist within the Council, establishes that the entirety of the bikeway is located above the mapped highest astronomical tide. The applicant pointed out that the flood regulation line,

as mapped by the Council, is somewhat higher than that.[2] Such lines however, are used by Council, not to define a watercourse but "to indicate floodplain areas reserved for flood water storage and flow, where development may be restricted."[3]

[17] Even if it were accepted that works were constructed or installed within an area which may be the subject of flood water, that would not engage (b)(iv). The focus of that provision is on a watercourse being, in this case, the creek in which water flows in the natural channel. It is not concerned with works in areas which might be impacted by water which has flooded out beyond the watercourse.[4]

[18] There was a relative dearth of evidence which would permit a precise identification of the extent of the watercourse, although the documents before the court tend to suggest that the bikeway, which has been constructed adjacent to the rear of the adjoining industrial allotments, is separated from the creek. The applicant, who bears the onus in these proceedings, failed to establish that works were constructed or installed in the watercourse.

[19] Item (b)(i) relates to interfering with "quarry material" on State coastal land above the high water mark. The IPA adopts a definition of "quarry material" from the *Coastal Protection and Management Act* 1995 (CPMA).[5] That Act defines "quarry material" as follows:

> "1. Quarry material means material on State coastal land, other than a mineral within the meaning of any act relating to mining.

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2 See exhibit 7.
3 Chapter 3 p 69 of Cityplan.
4 Compare *Cornerstone Properties Ltd v Caloundra City Council* [2005] QPELR 96 which concerned definitions under the *Water Act*.
5 See Schedule 10.

> 2. For item 1, material includes, for example, stone, gravel, sand, rock, clay, mud, silt and soil, unless it is removed from a culvert, storm water drain or other drains infrastructure as waste material."

[20] The IPA also adopts the CPMA definition of State coastal land. Section 17 of the CPMA defines State coastal land as follows:

> "(1) State coastal land means land in a coastal management district other than land that is –
>
> (a) freehold land, or land contracted to be granted in fee simple by the State; or
>
> …"

[21] It is common ground that the land is within a coastal management district. Lot 50, upon which stage 1A of the bikeway has been constructed, is however, freehold land.[6] Accordingly, item 5(b)(i) of table 4 of Pt 1 of schedule 8 of the IPA is not engaged.

Vegetation clearing

[22] The applicant also contends that the development was assessable by reason of the vegetation clearing which was undertaken. It is common ground that the construction of the bikeway involved the clearing of some vegetation. Clearing vegetation, including vegetation to which the *Vegetation Management Act* applies,

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6 See affidavit of Johnson JH and Ston para 5(a).

is "operational work" for the purposes of the IPA.[7] City Plan does not make that operational work assessable. In any event, development involving the construction of roads and things associated with roads by or on behalf of the Brisbane City Council is exempt development under City Plan. The question is whether it was assessable by reason of Pt 1 of schedule 8 of the IPA.

[23] Item 1A of table 4 of Pt 1 of schedule 8 provides that operational work that is clearing native vegetation on freehold land is assessable unless one of the exceptions is engaged. The expression "native vegetation" is defined in schedule 10 of the IPA as a "native tree or plant other than … grass or non-woody herbage". One of the exceptions is where clearing is "for urban purposes in an urban area" and where the clearing is of a remnant of concern regional ecosystem.

[24] The expression "remnant of concern regional ecosystem" is defined, in Schedule 10 of the IPA, to mean a remnant of concern regional ecosystem as defined under the *Vegetation Management Act* 1999 (VMA). The VMA defines the expression by reference to what is shown on a regional ecosystem map (where there is one for the relevant area). A regional ecosystem map is, in turn, defined as follows:

> 1 A regional ecosystem map means a map—
>
> (a) certified by the chief executive as the regional ecosystem map for a particular area; and
>
> (b) maintained by the department for the purpose of showing, for the area—
>
> (i) remnant endangered regional ecosystems; and

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7 See s 1.3.5.

(ii) remnant of concern regional ecosystems; and

(iii) remnant not of concern regional ecosystems; and

(iv) numbers that reference regional ecosystems.

2 A regional ecosystem map includes any amendment to the map included in a schedule to the map and certified by the chief executive as an amendment to the map at the day the amendment is certified.

[25] A copy of the certified regional ecosystem map was exhibited to Ms Fraser's affidavit. It shows that the relevant vegetation was within a remnant of concern regional ecosystem. It matters not, for these purposes, that the area may be described as being within a different ecosystem on different mapping undertaken by the council.

[26] The IPA defines an "urban area" as, relevantly:

> "An area identified on a map in a planning scheme as an area for urban purposes, including future urban purposes, but not rural residential or future rural residential purposes".

[27] The expression "urban purposes" is, in turn, defined as follows:

> "Urban purposes means purposes for which land is used in cities or towns, including residential, industrial, sporting, recreation and commercial purposes, but not including environmental, conservation, rural, natural or wilderness area purposes."

[28] The Council contends that the subject area is identified on maps in the planning scheme as an area for urban purposes rather than environmental, conservation, rural, natural or wilderness area purposes.

[29] The land is identified on the planning scheme maps as within the Parkland Area. That is one of the "green space areas" within the City Plan, but that is not determinative of the question whether it is an area for urban purposes. The Sport and Recreation Area is also one of the green space areas although it is clearly an area for urban purposes, as defined. Other green space areas, such as the Conservation Area, the Environmental Protection Area and the Rural Area appear to fall outside the meaning of an area for urban purposes.

[30] The statement of intent for the Parkland Area states that it is for "informal open-air recreation and outdoor cultural and educational activities, and may provide opportunities for informal sports or other events on a casual basis".

[31] The Desired Environmental Outcomes for such areas include:

> "2. Parkland areas serve the recreational needs of the city's residents, workers and visitors on local, district and city wide scales.
>
> 3. Parkland areas provide a wide range of informal and limited formal recreational, cultural and educational activities. …"

[32] The level of assessment table unsurprisingly contemplates development within those areas for "park" purposes. The expression "park" is defined as:

> "A use of premises by the public for free recreation and enjoyment, e.g. playing field, play ground or ornamental garden areas, which are used infrequently for events. Facilities for park users may include kiosks, shelters, play equipment, car parking areas or public conveniences."

[33] The Desired Environmental Outcomes for the parkland area also refer to such areas providing "visual relief from the built environment and a retreat from developed areas" and also to the minimisation of adverse impacts on biodiversity. When one has regard to the provisions read as a whole however, it is evident that parkland areas are an integral part of the urban fabric, to serve the need for informal open air recreation, cultural and education activities for the city's residents, workers and visitors. These are purposes for which land is used in cities. They contrast with the intent for areas such as the Conservation Area and the Environmental Protection Area, which are focussed more strongly on environmental purposes.

[34] The subject land is also identified on map A in the Cannon Hill District Local Plan. That map identifies the Minnippi Parklands as part of the "open space" areas and bears the number "3.10". That is reference to para 3.10 of the Precinct Intents for the local plan, which states as follows:

> "Minnippi Parklands should continue to function as a regional park with a passive recreation focus. A network of shared bikeways should improve circulation and link to external features and communities, including Meadowlands Picnic Grounds, Murarrie Recreation Reserve, Cannon Hill District Shopping Centre and surrounding residential areas."

[35] The intent for the Minnippi Parklands to function as a regional park with a passive recreation focus, with a network of shared bikeways linking to external features and communities, serves to reinforce the conclusion that it is an urban area identified, on the planning scheme maps, as an area for urban purposes, including recreation purposes, being purposes for which land is used in cities.

[36] That is sufficient to dispose of this issue, since I am satisfied that any clearing of native vegetation which occurred in the context of the construction of the bikeway was clearing which fell within item 1A(g) of table 4 of Pt 1 of schedule 8 of the IPA.

[37] Had the clearing not been for urban purposes in an urban area then the Council concedes that it would have involved some assessable development, since there was some clearing of native vegetation. The extent of that clearing was however, quite limited.

[38] During the design phase for the bikeway, Ms Fraser identified that one exotic tree, a Chinese Elm, would need to be removed as part of the bikeway construction. In addition, a 5 m security buffer zone to Bulimba Creek was required, involving the removal of under storey shrubby vegetation, consisting mainly of Lantana and other weeds, although it was not possible to be certain that some native woody herbage would not also be removed during clearing. No mangroves or marine plants were required to be removed.

[39] Given that some clearing would be involved, Ms Fraser consulted the Department of Natural Resources and Water. Subsequently, Council received a letter from the Department, dated 23 October 2007, which stated that the bikeway project did not require a permit. As a result of her inspections during construction, however, Ms

Fraser formed the view that two native trees, of less than 10 cm diameter at breast height had been removed.

[40] The relief which the applicant requests is discretionary in nature.[8] Had I found that the construction of the bikeway involved assessable development by reason of the clearing of native vegetation, then it would have been necessary to determine whether relief ought to be refused on discretionary grounds. The court is, of course, always mindful of the importance of upholding the integrity of planning laws and will not lightly ignore a breach of them, but the extent of clearing of native vegetation was small and the council did not knowingly and deliberately set out to ignore a requirement for an approval. Indeed it raised the matter with the department and appears to have acted in good faith. The clearing and bikeway construction are now complete. Council for the respondent sought the opportunity to adduce further evidence, including as to the cost and inconvenience of any remedial orders, in the event that the court was otherwise minded to grant relief. My conclusion otherwise however, makes it unnecessary to consider that further.

[41] It is an unfortunate consequence of the complexity of the planning legislation and planning schemes, that even the question of whether an approval is required for development, is not always an easy or straightforward one to answer. I can appreciate the difficulty which the appellant has encountered in navigating the statutory maze and do not doubt the sincerity of his concern for the wildlife in general or the squirrel gliders in particular. I have however, concluded that he has failed to establish that the bikeway construction which has occurred to date involved any assessable development.

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8 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335; *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67.

[42] The applications are dismissed.