PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Boral Resources (Qld) Pty Ltd v Gold Coast City Council & Ors* [2012] QPEC 53
PARTIES:	**BORAL RESOURCES (QLD) PTY LIMITED** **ABN 46 009 671 809** (appellant) v **GOLD COAST CITY COUNCIL** (respondent) and **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS** (co-respondent by election) and **ROBERT BLUCHER** (co-respondent by election) and **ROBYN BLUCHER** (co-respondent by election) and **WILLIAM BLUCHER** (co-respondent by election) and **PETER LEHMANN** (co-respondent by election) and **TIM GREGG** (co-respondent by election)
FILE NO:	4699/11
DIVISION:	
PROCEEDING:	Preliminary Hearing
ORIGINATING COURT:	Brisbane
DELIVERED ON:	21 September 2012

DELIVERED AT:	Brisbane
HEARING DATE:	20-21 August 2012
JUDGE:	Robin QC, DCJ
ORDER:	**Preliminary points determined favourably to the appellant, so that its conditions appeal might proceed to a hearing on the merits**
CATCHWORDS:	*Integrated Planning Act 1997* s3.2.1(5) *Integrated Planning Regulation 1998* Schedule 10 Items 14, 15 *Sustainable Planning Act 2009* s820 *Water Act 2000* definitions of "water" and "watercourse" Conditions appeal by developer quarry operator – co-respondents raise allegations ordered to be determined as preliminary issues as to whether development application "properly made" – Pimpama Creek, a water course, constituted a boundary of the site – course of creek changed (apparently imperceptibly) since boundaries surveyed – "ambulatory boundary" situation that may have existed in early years did not persist – water course diverted by works by appellant (or a predecessor) about 1983 – this controlled the location of the water course as a matter of fact – co-respondents contended proposal involved State resources, by taking water and/or quarry material, either under the proposal or under Council's imposed conditions requiring rehabilitation of Pimpama Creek and surrounds by removal of large quantities of fill – issues whether certain gullies were water courses on the site – "lapsing" issue whether failure to start quarrying on one of two lots pursuant to entitlements dating from 2004 was fatal to the current development application for expansion – issues whether existing licences under the *Water Act* were appropriate and whether this is relevant in any event
COUNSEL:	Mr D. R. Gore QC and Mr J. G. Lyons for the appellant Mr T. Law for the respondent Mr P. Lehmann for the first, second, third and forth co-respondents by election Mr T. Gregg for the fifth co-respondent by election
SOLICITORS:	Ashurst for the appellant King & Company for the respondent Mr Lehmann representing himself and the first, second and third co-respondents by election

Mr Gregg representing himself

[1] The appellant wishes to expand its established quarry at Upper Ormeau Road, Kingsholme. Its development application made in March 2008 resulted in the desired development permit for material change of use for extractive industry and environmentally relevant activities (negotiated decision notice dated 20 October 2011), but the Council imposed conditions which the appeal seeks to have changed. The development application was impact assessable. Adverse submitters included the five co-respondents by election. Mr Gregg has been self represented. Mr Lehmann has represented himself and the others. He raised issues in an affidavit filed on 31 January 2012 which the court decided ought to be determined as preliminary points. Judge Jones' order in that regard, of 12 July 2012 gave appropriate directions, including ones that the co-respondents be given site access. No doubt the basis of the order was appreciation that the issues mentioned bore on whether the development application was (or could be ordered treated) as a properly made one for purposes of assessment by the Council in the first instance and now by the court.

[2] The co-respondents have prepared very comprehensive material and demonstrate a reasonable grasp of potentially relevant considerations. However, things are not presented in the manner that would be expected of a lawyer. Mr Gore QC, appearing for the appellant developer, tendered as Exhibit 2 a long list of objections (with grounds – one or more of irrelevance, argumentative, outside expertise, swearing to the issue, speculating and matter of law) to the three affidavits of Mr Lehmann and one of Mr Gregg. Speaking generally, the objections were well taken, but it has not been necessary to rule on them. The court's determination, namely that what it characterised as preliminary issues must be decided against the co-respondents, would be the same whether the contentious parts of the affidavits were taken into account or not.

The co-respondents' motivation

[3] Although for the moment relying on alleged defects in process to defeat the development application, the co-respondents present genuine concerns. It is enough to note their understandable desire that Pimpama Creek be rehabilitated to follow what would be its natural course, rather than the artificial one dug for it which is said to be prone to "scour, undercutting, erosion" etc and to offer a disappointing environment for bush walkers, ramblers and the like minded to "walk the creek", as they are entitled to do. The reduction in sinuosity of the watercourse, the exposed banks and the like presently lead to further erosion and silting up of water holes important to downstream residents, among them primary producers, as Mr Lehmann describes himself. He explains his motivation in participating in the appeal in terms of increasing frustration at what he calls Boral's failure to live up to expectations generated in the course of community consultation that expansion of the quarry would be accompanied by rehabilitation of Pimpama Creek. His affidavit filed 7 August 2012, after referring to numerous authorities some of which appear to support him, including *Vidler v Fraser Coast Regional Council* [2011] QPEC 18, concludes:

> "On the evidence before the Court I believe the Court can only find the application was not properly made. I would suggest the Appellant needs now to rebuild the trust of the community it has so long taken for granted

> and that the Appellant should do so by firstly by rehabilitating the natural alignment [of] Pimpama River and its flood plains. The Appellant should then work openly and honestly with the community in developing any future development proposals."

[4] Certain development conditions dealing with the rehabilitation (not the subject of appeal) are perhaps seen as inadequate. My understanding is that co-respondent submitters in an appeal such as this are free to contend that even stronger conditions ought to be imposed on a development. The court is told that the present co-respondents do not oppose quarry expansion *per se*, recognising the community interests involved – even though it may be presumed that few in the vicinity of a quarry or haul route would welcome any increase in or extension or intensification of impacts.

The issues identified

[5] Distilling "the issues set out in the Affidavit of Peter Shane Lehmann filed on 31 January 2012 (the Preliminary Points)" the subject of the order of 12 July 2012 has proved not entirely straightforward, but there has been acceptance (in the court's view) of the summary by the appellant's planner, Mr Schneider:

> "[47] The allegations that are made by Mr Lehmann in his Affidavit dated 30 January 2012 broadly relate to six issues and can be summarised as follows:
>
> (1) paragraphs 4 to 20 inclusive, relating to the allegation that the gully in the north-western corner of the site is a Watercourse (as defined by the *Water Act 2000*) (**North-West Gully allegation**);
>
> (2) paragraphs 21 to 41 inclusive, relating to the alignment of Pimpama Creek and the allegation that the development application proposes development within Pimpama Creek (**Pimpama Creek allegations**);
>
> (3) paragraphs 42 to 45 inclusive, relating to the allegation that the development application is deficient because it does not include the requisite resource entitlement (**Resource entitlement allegation**);
>
> (4) paragraphs 46 to 58 inclusive, relating to the allegation that the development application relies on industrial water Licences for the taking and interfering with water in Pimpama Creek (**Water Licence allegation**);
>
> (5) paragraphs 59 to 71 inclusive, relating to the allegation that other gullies on the site are Watercourses (**Other Gullies allegation**); and
>
> (6) paragraphs 72 to 76, relating to the allegation that the application relied on an earlier development approval that has lapsed (**Existing approval allegation**); …"

[6] Item (3) is a key one. It raises the question of whether the development application fails to demonstrate the "evidence" in support required by s 3.2.1(5) of the

Integrated Planning Act 1997 (IPA), that being necessary for a "properly made application" which might proceed to assessment. Practitioners have been surprisingly late to appreciate this potential rock upon which development applications may founder. The applicant in *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206 has become the most celebrated. The present scenario is typical in that the point lurked unsuspected until recently unearthed by Mr Lehmann. The State resources pointed to are water and quarry material, brought within s 3.2.1(5) by items in Schedule 10 of the *Integrated Planning Regulation 1998*:

"State resource	**Department Administering Resource**	**Required evidence**
14 Quarry material taken from a watercourse or lake under the *Water Act 2000*	The department in which that Act is administered	Evidence of an allocation of, or an entitlement to, the resource
15 Water taken or interfered with under the *Water Act 2000*	The department in which that Act is administered	Evidence the chief executive of that department is satisfied – the development is consistent with an allocation of, or an entitlement to, the resource; or the development application may proceed in the absence of an allocation of, or an entitlement to, the resource"

As will be seen, the crucial issue is whether, relevantly, a "watercourse" is involved here.

Although everyone may be taken to know what water is, for present purposes it must be taken to bear the defined meaning at the time the development application was made pursuant to Schedule 4 of the *Water Act 2000*:

> "***water –***
>
> Generally, *water* means all or any of the following -
>
> (a) water in a watercourse, lake or spring;
>
> (b) underground water;
>
> (c) overland flow water;
>
> (d) water that has been collected in a dam."

There had been (presently irrelevant) amendments refining the reference to "lake" and bringing in recycled and desalinated water.

As Mr Gore submits, unless we are concerned with water in a "watercourse" there is nothing in item 15 to trigger a "State resource" point.

[7] "Quarry material" is a State resource dealt with in Schedule 10 items other than 14, notably in item 10 - Quarry material taken under the *Coastal Protection & Management Act 1995* and in item 17 – Quarry material taken under the *Forestry Act 1959*. Those two Acts have their own definitions of "quarry material", an element of the former being that it be "material on State coastal land". There is no definition in the Regulation, but the IPA does have in its Schedule 10 a definition "for Schedule 8, Part 1, Table 4, Item 5" picking up the *Coastal Protection & Management Act* definition. There was at relevant times a definition in the *Water Act*, which, being referred to in Item 14 should be taken to provide the meaning for that item of "quarry material", even though there may be room for an argument that "under the *Water Act*" qualifies only "watercourse". The *Water Act* definitions are:

> "***quarry material –***
>
> 1. *Quarry material* means material, other than a mineral within the meaning of any Act relating to mining, in a watercourse or lake.
>
> 2. *Quarry material* includes stone, gravel, sand, rock, clay, earth and soil unless it is removed from the watercourse or lake as waste material."
>
> "***watercourse –***
>
> 1. *Watercourse* means 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;
>
> but, in any case, only –
>
> (c) unless a regulation under paragraph (d), (e) or (f) declares otherwise – at every place upstream of the point (*point A*) to which the high spring tide ordinarily flows and reflows, whether due to a natural cause or to an artificial barrier; or
>
> (d) if a regulation has declared an upstream limit for the watercourse – the part of the river, creek or stream between the upstream limit and point A; or
>
> (e) if a regulation has declared a downstream limit for the watercourse – the part of the river, creek or stream upstream of the limit; or
>
> (f) if a regulation has declared an upstream and a downstream limit for the watercourse – the part of the river, creek or stream between the upstream and downstream limits.
>
> 2. *Watercourse* includes the bed and banks and any other element of a river, creek or stream confining or containing water."

[8] The site includes lot 43 on W31376 and lot 4 on RP 29989. It is from the former and other land immediately to its south that quarry products will be obtained. Lot 43 and lot 4 are separated by Pimpama Creek (in many places described as Pimpama River), which constitutes the boundary as confirmed by plans on the instruments of title. Section 21(1) of the *Water Act* (relocated to another Act in 2010) provided that the bed and banks of all watercourses and lakes forming all or part of the boundary of land are, and always have been, the property of the State. (Section 19 provides that all rights to the use, flow and control of water in Queensland vest in the State.) It is unnecessary to go into definitions of "bed and banks". The genesis of the issue the appellant now has to face is that Pimpama Creek in this location provides property boundaries that are or have been "ambulatory". See *Beames v Leader* [2000] 1 Qd R 347 at [36] and *Svendsen v State of Queensland* [2002] 1 Qd R 216 at [22] ff. As discussed in MacDonald, McCrimmon, Wallace and Weir, *Real Property Law in Queensland* (3rd) at [4.130], the legal boundary of land "will change if the accretion or the erosion is: (a) slow and gradual; and (b) caused by natural forces."

As the authors say, "if these two conditions are not satisfied then generally the boundary will in law remain where it was before the change in the water course." Surveyors' plans reproduced in title documents show that from the 1870s when lot 43 was surveyed and 1919 when lot 4 was last surveyed - this being the most recent registered survey, the course of Pimpama Creek changed slightly. Aerial photography from time to time suggests that by the early 1980s (by processes of which may or may not have been slow and gradual, "in a practical sense imperceptible", there was a shift or kink towards the west in the area of lot 43 across the boundary where processing occurred, producing what Mr Collins would have called increasing sinuosity. At that time, however, the quarry operator, perhaps to create a larger area for processing and storage of quarried materials and associated movement of vehicles, deposited fill, very likely materials quarried on site, which covered the creek in that location, significantly straightening out the kink at the expense of lot 4. A new channel was dug much further to the east than the surveyed location of the watercourse (Pimpama Creek) in the 1870s. Sometime subsequently, an additional new channel even further to the east which cuts off the "kink" entirely was dug for the purpose of accommodating creek flows in times of high run-off.

[9] In designing its proposal, the appellant has identified what it calls the Disturbance Area, beyond which it proposes no activity. A sensible reason for doing so will be to avoid problems associated with State resources, except for a limited aspect of crossing Pimpama Creek to get product off site to the public road; the expansion will require some improvement and widening (doubling) the existing culvert. The disturbance area keeps to the west of Pimpama Creek as surveyed in 1871 and 1879, indeed further to the west than cadastral boundaries appearing on the Smart Map on which the development application was based. However, the line of the creek as arguably divined from an aerial image from 1978 or thereabouts, on plans prepared by the appellant's surveyor, Mr Dalton lies within the Disturbance Area. On Mr Lehmann's workings by means of overlays (Exhibit 14) there are three stockpiles or the like represented by circles in Exhibit 3 associated with Product Screening Module No. 1. This all falls within the disturbance area. As matters surrounding the hearing developed, Mr Dalton had no opportunity to deal with this contention, or Mr Lehmann's contentions in closing submissions that the Pimpama Creek

watercourse may yet be functioning as an underground flow in something like the pre-1983 location with the consequence that this is still State owned "bed and banks" or equivalent. All manner of interesting questions might arise here, such as whether, for all the appellant's apparent efforts to avoid this, it is proposing development on State land. It is unnecessary to go into these matters, given my view that Mr Gore is correct in his submission that, for present purposes, the watercourse is located where the quarry operator's actions have got it to be. He submits that the co-respondents, whose stance appears to be that Pimpama Creek must be taken to follow its early 1980s course and that the appellant may not rely on the dramatic artificial change thereafter, confuse issues of title with issues of "use". The submission may be more easily appreciated if "use" is read as "function". It must not be lost sight of that for the moment we are concerned with the *Water Act* definition of "watercourse" which relevantly focuses on a creek in which water flows "(b) in an artificial channel that has changed the course of the watercourse." It would be difficult to proceed on any basis other than that water flows (permanently or intermittently) only in the present artificial channel. In the circumstances, it does not matter where the boundary between lots 43 and 4 lies. The appellant owns both lots. The boundary watercourse presently runs where the appellant or its predecessors in about 1983 put it. There may be other legal implications of what has occurred, but these do not concern us presently. If State authorities are concerned about exactly where their "bed and banks" are located, they have not shown it in any way to date.

Work outside the "disturbance area"

[10] A further issues emerge arising from condition 12 of the negotiated decision notice, which provides:

> "12. **Rehabilitation of Buffer to Pimpama River**
>
> a The applicant must undertake the rehabilitation /revegetation in accordance with the approved rehabilitation management plan, as required by the condition titled 'Rehabilitation plan to be submitted for buffer to Pimpama River.'
>
> b The applicant must give security to Council (in the form of cash/cheque/unconditional bank guarantee) in the amount of $400,000 and enter into a bond agreement to secure compliance with the applicant's obligations to rehabilitate a 60 metre buffer to Pimpama River.
>
> c The bond agreement must be entered into and the bond given prior to the earlier of the making of any development application for operational work (inclusive of change to ground level, works for infrastructure, vegetation clearing or landscape work) or prior to the commencement of any works onsite. The bond will be held until Council is satisfied the condition has been complied with.
>
> d All soil, sediment or built form sitting above or in addition to the natural ground level (fill), must be

> removed from the 60 metre buffer to Pimpama River to the satisfaction of the Chief Executive Officer."

The plan referred to is by an earlier condition required to be submitted for "all areas for a distance of 60m to the west of the western top of the high bank of Pimpama River, excluding any area required for access or the location of structures as detailed on [a plan identified] with the minimum buffer width not below 30m." This is seized upon by the co-respondents as establishing (they say) certain important features:

(a) The removal of some metres depth of fill will occur outside the Disturbance Area;
(b) Quarry material (ie the fill to be removed) is involved as a State resource so as to trigger item 14.

[11] As to (b), my opinion is that the reference to watercourse in item 14 has the effect that the quarry material (which the fill may otherwise constitute) must be taken from a location which is a watercourse (as defined) at the time of taking; it is not enough that the location may have been a "watercourse" historically, or that the location may be shown mapped in registered plans as a creek or the like. The hurdle for the co-respondents is the definition of watercourse, which requires permanent or intermittent flow.

[12] By parity of reasoning, the apparent mapping or other recording of particular features, even expressly as "watercourse" does not determine anything. The co-respondents establish such mapping (in relation to the North-west gully in particular) in what Mr Lehmann calls "Official Federal Government Mapping in Natmap Topographic 1:100,000 (Exhibit 4) and 1-250,000 by GeoScience Australia" (Exhibit 5) - which bears an express disclaimer of "accuracy, currency or completeness". There is also what he calls "Official State government mapping such as Regrowth Vegetation Map version 2.1" which he says clearly shows the North-west gully "and labels this watercourse as a first order stream flowing into a second order stream" (Pimpama River) to the North-east of the site. His approach is clear from one of his affidavits:

> "It is clearly a significant natural geographical feature in the landscape. State mapping is done under the Survey Mapping and Infrastructure Act 2003 and other statutes. A watercourse marked on the map is representative of its legal status as a State resource. A copy of this map is Document 7, p 10 of Exhibit PSL 1." (This is in the affidavit filed 31 January 2012).

It is true that the appellation "watercourse" is used in both Federal and State mapping, doubtless for sensible purposes. For present purposes, the Water Act definition governs; it effectively makes issues of the existence, location and dimensions of watercourses ones of fact, rather than of mapping (or of history): cf *Cornerstone Properties Ltd v Caloundra City Council* [2005] QPELR 96 at [55] and [71]-[102]. See also *Karreman Quarries Pty Ltd v Chief Executive under the Water Act* [2008] QPELR 338 at [18].

The Council's Stance

[13] The co-respondents are without support from any quarter for their contentions. Mr Law's written submissions confirm that his client Council has considered those contentions both in the appeal and previously, all along determining that "the development application was a properly made application having regard to matters about resource entitlement" and that no additional referral to the then Department of Natural Resources and Water as a referral agency was triggered. The Council's primary interest in the appeal relates to the disputed conditions, which deal with monitoring of quarry vehicles, hours of operation and noise attenuation.

[14] More significant than the Council's is the stance of the State which owns and administers everything to do with the State resource of water, the purview of the current Department of Natural Resources and Mines which now administers the *Water Act 2000* for the purposes of s 3.2.1(5) of IPA. The Chief Executive chose not to be heard on the preliminary issue, although provided with the relevant material including the notice of appeal and Mr Lehmann's affidavit filed 31 January 2012. The covering letter specifically adverted to "issues relating to the validity of the development application and whether evidence [of] all relevant resource allocations or entitlements was included with the development application." The in-house legal officer (it appears from Exhibit 7) highlighted the issue and sought instructions as to participation at the preliminary hearing. The Principal Natural Resource Officer, Property Services for the South Region responded after further consultation expressing a view that the Boral development application did not involve taking quarry material from a watercourse (Item 14) or taking water or interfering with water (Item 15) under the *Water Act*:

> "Our final position is that the Department considers the application was NOT deficient regarding any necessary State resource evidence prescribed by the repealed Integrated Planning Act 1997 and Integrated Planning Regulation 1998."

(See Exhibit 7.) The foregoing quotes Terry Fox's email of 17 August 2012, which confirms what he wrote in a letter of 4 May 2012 to the appellant's solicitor:

> "I refer to your email correspondence dated 29 March 2012, in which you have requested confirmation on whether a Development Application (DA) for a Material Change of Use can proceed in the absence of an allocation of, or an entitlement to interfere with water, or the allocation of, or entitlement to take quarry material from a watercourse in light of the General Authority & Chief Executive Consent: State's Water Resource (the General Authority).
>
> As I do not have a delegation under the Water Act 2000, I have discussed your request with officers from Water Services who hold the relevant delegations under the Water Act 2000. The General Authority was signed on 19 July 2011 and took effect from that date.
>
> The advice given is that, providing a DA does not conflict with the provisos contained in the General Authority, the General Authority will provide the required evidence to lodge the DA in the absence of an allocation of, or an entitlement to interfere with water, or the allocation of, or entitlement to take quarry material from a watercourse.
>
> I have also reviewed the information provided in my earlier letter to Humphreys Reynolds Perkins, dated 25 January 2008, regarding resource

entitlement for a DA for a material change of use – replacement of a culvert in a non-tidal watercourse separating lot 43 on plan W31376 and lot 1 on RP172507 (refer to Attachment). This letter provided the necessary evidence that the chief executive of the Department administering the state resource was satisfied the DA may proceed in the absence of an allocation of the resource.

I considered that the state resource was described as the bed and banks of the Pimpama River, separating lot 43 on W31376 and lot 1 on RP172507, and described in Item 6 of Schedule 10 of the Integrated Planning Regulation 1998 (IPR) as land that is unallocated State land (USL) under the Land Act 1994, that is not a canal under the Coastal Protection and Management Act 1995, and not subject to Items 11, 12, 13, 14 or 15 of Schedule 10 of IPR.

Prior to granting resource entitlement, I gave consideration to Items 11, 12, 13, 14 and 15 of the IPR. Items 11, 12, 13 related to the Fisheries Act 1994 and were not relevant to the application. The DA made it clear there was no intention to take or interfere with water in that part of the Pimpama River. Therefore, I considered that the proposed culvert extension did not constitute an action where quarry material would be taken from the watercourse and water would not be taken or interfered with under the Water Act 2000. On this basis I considered a Riverine Protection Permit issued under the Water Act 2000 was not required.

The delegation under which I made my decision was the Land Act (Chief Executive) Delegation (No 1) 2008.

At the time I gave resource entitlement in 2008, I considered the bed and banks of a non-tidal watercourse were unallocated State land under the Land Act 1994. However, following the decision handed down in the Barro quarry case in the Planning and Environment Court, departmental officers re-considered previously held views on the tenure and ownership of the bed and banks of non-tidal watercourses forming ambulatory boundaries.

While section 21 of the Water Act 2000 is still mentioned in Item 6(c) of Schedule 14 of the Sustainable Planning Regulation 2009, this section was repealed in May 2010 by the Natural Resources and Other Legislation Amendment Act 2010. The notation referring to section 13A of the Land Act 1994 states: "This section effectively replaces the Water Act 2000, section 21 (beds and banks forming boundaries of land are State property) ... 2010." Section 13A commenced on 7 May 2010.

The bed and banks of a non-tidal watercourse are not described as USL, which can be dealt with under the provisions of the Land Act 1994. Instead, section 13A of the Act states that the bed and banks of a non-tidal boundary watercourse is the property of the State. Item 6 of Schedule 14 of the Sustainable Planning Regulation 2009 only relates to land that is unallocated State land (USL) under the Land Act 1994. Additionally, item 6(c) of Schedule 14 excludes the bed and banks of a watercourse.

It is not appropriate to deal with the bed and banks of a non-tidal boundary watercourse under Item 15 of Schedule 14 as a State resource, as the provisions applicable to dealing with USL in the Land Act do not apply to the bed and banks of non-tidal boundary watercourses. The department

> considers that it is appropriate to deal with the bed and banks of a non-tidal boundary watercourse as the owner of land that is the property of the State and would, where appropriate, give owner's consent to a DA.
>
> Under section 266 of the Water Act 2000, a person may apply to the chief executive for a permit to undertake activities in a watercourse, lake or spring including destruction of native vegetation, excavation of material or placing of fill. Additional information can also be found on the department's website and I refer you particularly to the department's Guideline – Activities in a watercourse, lake or spring carried out by a landowner – WAP/2011/4765.
>
> Any enquiries regarding the Water Act should be directed to the Senior Natural Resource Officer, South on 3896 3212."

[15] Of course, it is a question for the court, and not one for the Department, whether s 3.2.1(5) has been complied with or not. Views of the Department (or equivalent Departments) are accorded great weight when (as might occur here, if the co-respondents are successful on technical points) there is a question whether relief ought to be granted to an applicant pursuant to provisions such as s 820 of the *Sustainable Planning Act 2009* (SPA) to permit a development application which falls foul of the section to proceed to assessment. Even in such a context as the present, the court can be expected to take note of the relevant Department's views, which I find myself in agreement with. The court should not lightly identify difficulties where responsible public authorities say there are none. Sending the appellant back to where it was in 2008 to make its development application all over again (a course noone but the co-respondents would favour, and which is likely to result in a future appeal much like the present one) is an unattractive course, and hardly in the spirit of the philosophy enacted in ss 3, 4, and 5 of SPA (previously ss 1.2.1, 1.2.2 and 1.2.3 of IPA).

The rehabilitation condition

[16] Before dealing in turn with the six issues identified above by Mr Schneider, it is convenient to deal with condition 12 which raises an additional issue that may be variously understood. One analysis may be that it involves "development" on land of an owner whose consent has not been provided. As to the State resource (quarry material) issue, my opinion is that the reference to watercourse in Item 14 has the effect that the quarry material (which the fill may otherwise constitute) must be taken from a location which is a watercourse (as defined) at the time of taking; it is not enough that the location may have been a "watercourse" historically, or that the location may be so mapped in registered plans as a creek or the like. The hurdle is the definition of a watercourse which requires current permanent or intermittent flows.

[17] By parity of reasoning, the apparent mapping or other recording of particular features, even expressly as "watercourse" does not determine anything. The co-respondents establish such mapping, as acknowledged elsewhere, much of it at a scale that is not fine enough to instil much confidence. This consideration is of particular potential relevance to the North-western gully issues. The body of "evidence" that in this matter might be taken as showing a watercourse is aerial photography (Boral says that photographs alone may not be used for such a purpose, citing *Schmidt v Schmidt* [1969] Q113 at 5-6; *Blacktown CC v Hocking* [2008]

NSWCA 144 at [167]-[172] and *Warren v Gittoes* [2009] NSWCA 24 at [2], [55]). The expert surveyor, Mr Dalton gives evidence from the perspective of his expertise, which the court has no reason to reject, that the photographs available here ought not be used by a surveyor attempting to comply with the governing legislation, the *Survey and Mapping Infrastructure Act* 2003 and proper professional practice – in the context of "ambulatory" watercourses constituting a boundary, he offers the particular opinion that the spread of aerial images over the decades is so poor in quality and so scattered chronologically that no conclusions can usefully be drawn.

[18] While Mr Lehmann did not clearly spell out his point about condition 12, it is tolerably clear that he is condemning the development application for its failure to include any description of relevant land and work within the conditions centred on condition 12. I accept Mr Gore's answer to this charge, which is that these are things that his client did not apply for, rather requirements of the Council. There is evidence that Boral might have contemplated imposition of such conditions from an early stage. Its response to an Information Request by the Council contains the following:

> "**Environment and Ecological Assessment**
>
> **6. <u>Waterway Rehabilitation</u>**
>
> Overlay Map 11 (Natural wetlands and waterways) identifies Pimpama Creek traversing the eastern boundary of the site. The applicant was advised at the pre-lodgement meeting to undertake some rehabilitation of this waterway. The applicant has provided details of rehabilitation along the waterway but the development envelope proceeds to the high bank of the western side of Pimpama Creek. PC 5 and PC 8 of the Natural Wetlands and Waterways Code require buffering to waterways onsite. The applicant is requested to connect the rehabilitation zones to the north and south of the development area, and rehabilitate along the entire western bank of the creek.
>
> a) The applicant is requested to provide a plan detailing rehabilitation of the western side of Pimpama creek with the development boundary to be outside this area.
>
> **RESPONSE**
>
> As discussed at the pre-lodgement meeting, the Applicant cannot propose works of this nature within the Pimpama River as the waterway corridor is State-owned land and not part of the subject site. Nevertheless, Council should not overlook the extensive rehabilitation works that are proposed across the subject site as part of the development proposal. In addition to the proposed rehabilitation works, the Applicant continues to be actively involved with the local Landcare community group, including in river bank restoration activities. For these reasons, the proposal does not include any additional rehabilitation works on the State-owned land in the Pimpama River."

[19] It seems to me immaterial whether the conditions were welcome or unwelcome to Boral, expected or not expected. The issue is within the principle expressed by

Gibbs J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485, where conditions imposed by the Local Government Court included:

> "5(b) The land shown marked in green on Annexure "A" to the Conditions shall be retained in its present state in order that it may be a buffer area for the quarry and ancillary operations on the subject land.
>
> (c) Within the land shown in green on Annexure "A" no clearing shall be done but except for the access road referred to in Condition 10(a) ..." (page 491);"

Noting the argument that "the application and the advertisement were defective because they failed to show the buffer area and any road frontage to Mount Crosby Road" (493), he concluded at 494:

> "However, in my opinion there was no reason why either the application or the advertisement should have referred to a buffer area, even though it was situated in Lots 1 and 2. The appellant did not seek consent to provide a buffer area; it was imposed as a condition by the Court."

(Aickin J concurring – see 510). Stephen J (Murphy J agreeing with him) reached a different conclusion in the case overall, famously confirming the celebrated "Pioneer principle", but said at 509:

> "I agree that, for the reasons stated by Gibbs J there was no defect in the application and advertisement resulting from the failure to show the buffer area."

The North-west gully issue

[20] Paragraphs 7 and following of the first Lehmann affidavit raise this issue. Mr Collins is a hydraulic engineer who provided two affidavits in response and gave oral evidence, supplemented by further material submitted to the court electronically giving more information about rainfall recorded at stations near the site at specific dates which might have affected observations at particular times of how much water was about, bearing on "watercourse or no watercourse" issues. His first report, of July 2012 responds to Mr Lehmann's contention in a letter of 21 December 2011 that "a mapped … watercourse in the North east of the site" was not detailed in the "Mandatory Part A of the development application" which referred to Pimpama River as the only watercourse – it appeared the omitted one "will be removed". It is clear that Mr Lehmann's intended reference was to the "North-west gully" which, as he says, is mapped as a watercourse. This gully tracks the western most boundary of the disturbance area (inside it) for some 300 metres then bears North-east to track the North-western boundary of the disturbance area at an increasingly greater remove from it before eventually joining the Pimpama Creek. This was Mr Collins' assessment:

> **"5.1 The Subject Gully**
>
> Figure 1 shows the extent of the north-west gully and my reporting/inspection points. Inspections were carried out at sites A, B & C.

The gully within the site is at its upstream extremity with the top of the catchment within the site on the ridge line at an elevation of RL240M AHD.

The gully is only affected by proposed quarrying activities over a 300 metre length, between 100m and 400m from the top of the catchment on the ridge line.

The catchment area for the gully to its discharge point from the site is approximately 6.1 hectares and to the downstream extent of proposed quarrying activities, less than 5 hectares.

The gully is very steep within the site and is vee shaped within the lower reaches of the proposed quarrying area and is not distinguishable at the upstream extent. The average slope across the site is about 16% or 1 in 6, with the gully falling over 100 metres in height over the 600 metre length from the top of the ridge.

The gully was dry with no flow at the time of our inspection on 11 January 2012 no springs were detected.

The gully is stream order 1 through the site and well downstream.

The Pimpama Creek at its junction with the gully is stream order 4.

Site inspections were carried out at points A, B & C.

Appendix F contains a series of photographs from the inspection as follows:

Photograph No.	Description
1	Site A looking downstream
2	Site B looking upstream
3	Site B looking downstream
4	Site B from just outside the site looking upstream
5	Site B from just outside the site looking downstream
6	Site C looking upstream
7	Site C looking downstream

At Site C, there is no defined bed and no noticeable banks.

At Site B, within the site, the gully is bowl shaped with no defined bed or banks.

At Site A, there is a defined cobble bed and noticeable banks, about 1 to 2 metres in height.

5.2 Assessment against Work Practice and other Recognised Means

My assessment against the Department's Work Practice (included in Appendix E) is as follows:

a. **Defined Bed and Banks**

No defined bed and banks at C & B, defined at A.

b. **Extended periods of flow**

No extended periods of flow at A, B or C

c. **Flow adequacy**

Very little flow at A, B or C being dry over 99% of time based on my hydrologic assessment.

d. **Any springs?**

No springs were observed and appear unlikely within the site extents of the gully being so elevated with hard rock base.

e. **Is there defined high and/or low banks**

- at sites A, B & C – no

5.3 Conclusion

Based on my inspection, analysis and interpretation of the Act, I do not believe that the gully in the north-west section of the site is a Watercourse within the extents of the site under the *Water Act 2000* definition at the date of application."

His site C lies just within the disturbance area and just before the gully turns North-east more or less on the boundary of the disturbance area. Site B is some 150 metres further down the gully and of course well outside the disturbance area, indeed just on the boundary of Boral's landholding there. Site A is a similar (perhaps shorter) distance further down the gully.

[21] Mr Collins sought confirmation of his view from the Department of Environment and Resource Management. Confirmation was forthcoming from Mr Sciacca, Senior Environmental Officer, Environmental Services South. He advised on 20 January 2012 that having:

> "viewed the onsite images, I am very confident that the drainage feature is nothing more than an upland gully.
>
> Effectively this is not a 'defined watercourse' under the *Water Act 2000* (the Act). Therefore there is no requirement and/or jurisdiction under the Act for authorisation for any proposed activities within this gully."

Mr Collins followed a "work practice" produced by the Department or a predecessor for purposes of earlier legislation for the guidance of officers seeking to confirm or exclude punitive "watercourses". I was prepared to acknowledge the usefulness of the work practice in deference to the views of those working in the field in *Vidler* at [12]. Mr Lehmann propounded other tests, including by reliance on provisions inserted in the *Water Act* only very recently and long after Boral's

development application, of which Mr Collins submitted was inappropriate. As to the North-west gully, I am persuaded by Mr Collins' evidence, even without the significant support he garnered from Mr Sciacca.

The other gullies issue

[22] The other gullies issue appears to me to be dealt with by Mr Lehmann in paragraphs 20 and following of his affidavit filed 7 August 2012, contending that gullies within the disturbance area are watercourses. Five other gullies traverse the site, all leading to Pimpama Creek. On his first inspection, and in respect of the northern most, only Mr Collins contemplated a possible watercourse. But, overall, on the basis of his visits to inspect the site and observations he opines that there may be a watercourse well down gully 5 and clear of the disturbance area. Considerable time was spent at the hearing ventilating issues such as whether presence of riparian revegetation indicates a watercourse (Mr Collins saying no) and whether the observations made by Mr Collins as opposed to those made on different occasions on the co-respondents' side might have been unrepresentative in some way because of unusual levels of rain (or lack thereof). Accepting now that Boral has the onus of proof, I find that the evidence of Mr Collins satisfied the responsibility Boral has to establish that the Pimpama Creek is the sole relevant watercourse. For the record, Mr Collins' assessments of the other gullies were as follows:

> "**6 ASSESSMENT OF REMAINING GULLIES**
>
> My assessment of the remaining gullies of the site as shown on Figure 1 are as follows:
>
> **Gully 1**
>
> **Upper inspection point**
>
> - Catchment area is approx. 6 hectares
> - Av stream slope at inspection point is 1 in 4 (steep)
> - Gully is vee shaped with no defined bed and banks.
> - No base flow or riparian vegetation
> - Stream order 1
> - No springs detected
>
> Opinion; not a Watercourse at this location
>
> **Lower inspection point**
>
> - Catchment area approx 11 hectares
> - Av stream slope at inspection point is 1 in 10
> - No discernible bed or banks; wide (20m plus) flat base with sheet flow
> - No base flow or riparian vegetation
> - Stream order 2
> - No springs detected
>
> Opinion; not a Watercourse at this location
>
> **Gully 2**

Upper inspection point

- Catchment area approx. 4.5 hectares
- Upper catchment is bowl shaped and no incised channel or bed and banks
- Av stream slope at inspection point is 1 in 3 (very steep)
- No base flow or riparian vegetation
- Stream order 1
- No springs detected

Opinion; not a Watercourse at this location

Lower inspection point

- Catchment area approx. 6 hectares
- Av stream slope at inspection point is 1 in 13
- No discernible bed or banks; wide (20m plus) flat base with sheet flow
- No base flow or riparian vegetation
- Stream order 2
- No springs detected

Opinion; not a Watercourse at this location

Gully 3

- This currently discharges into the main quarry pit approx. 400 m from the tope of the catchment on the ridge line.
- Catchment area to inspection point at discharge to pit approx. 6 hectares
- Av stream slope at inspection point is 1 on 4 (steep)
- Gully is vee shaped with no defined bed and banks
- No base flow or riparian vegetation
- Stream order 2
- No springs detected

Opinion; not a Watercourse at this location

Gully 4

- This currently discharges into the main quarry pit approx. 400 m from the top of the catchment on the ridge line.
- Catchment area to inspection point at discharge to pit approx. 5.5 hectares
- Av stream slope at inspection point is 1 on 3 (very steep)
- Gully is vee shaped with no defined bed and banks
- No base flow or riparian vegetation
- Stream order 1
- No springs detected

Opinion; not a Watercourse at this location

Gully 5

Upper inspection point

- Catchment area is approx. 4.5 hectares
- Av stream slope at inspection point is 1 in 4 (steep)
- Gully is vee shaped with no defined bed and banks
- No base flow or riparian vegetation
- Stream order 1
- No springs detected

Opinion; not a Watercourse at this location

Mid inspection point (downstream of final proposed quarry pit footprint)

- Catchment area is approx. 12 hectares
- Av stream slope at inspection point is 1 in 10
- Gully is vee shaped with defined low flow channel. Low banks are starting to form.
- Some base flow and riparian vegetation
- Stream order 2 or 3
- No springs detected

Opinion; stream starting to form a low bank but still poorly defined at this location. No quarrying is proposed affecting this mid-section of gully 5 in any case. Further upstream, the gully is vee shaped with no low banks. It is not a Watercourse in this location or upstream of this location.

Lower inspection point

- Catchment area approx 18 hectares
- Av stream slope at inspection point is 1 in 14
- Discernible low flow channel with bed and low banks
- Some base flow and riparian vegetation

Stream in this location has been impacted by existing quarry stockpiles on its southern side and previous quarrying activities.

Stream order 3

Opinion; stream may be a Watercourse at this location; further investigations would be required. No new quarrying is proposed affecting this lower section of gully 5 in any case, and the gully has been affected by previous quarrying activities.

The above opinions are consistent with the DERM Officers opinions on his recent assessment of the gully in the NW corner of the site."

It should be noted that Council mapping of "waterways" which may include some or all of the gullies, does not assist on this issue because more than "watercourses" are included. The Council defines the extent of waterways by its mapping. See section 8 of Mr Collins' report of July 2012.

The Pimpama River issue

[23] One way in which Mr Lehmann covers this issue is as follows:

> "24. As a watercourse, the Pimpama River is allocated land having ambulatory boundaries that allows the banks of the watercourse to adjust as the watercourse moves through natural accretion and erosion. Ambulatory boundary principles are explained in the Cadastral Survey Requirements section 4.2. A copy of this section is Document 17 Page 36 of Exhibit PSL1.
>
> 25. Official State Government 1973 and 1978 aerial photos show the natural alignment of the Pimpama River watercourse. Relevant to this issue is the section of the River marked as A-B. A copy of these photos is Document 18 Pages 37-38 of Exhibit PSL1.
>
> 26. Through natural processes over the years the Pimpama River has moved out is its surveyed boundaries and onto the surrounding lots.
>
> 27. Current State Government Regional Ecosystem mapping indicates the amount of ambulatory movement of the Pimpama River watercourse away from the previously surveyed boundaries. In instances like this, where the river has changed slowly through natural processes, it is normal to resurvey the natural watercourse and adjust the land title to suit. The watercourse is 'at law' where it has naturally shifted to. A copy of this map is Document 19 Page 39-40 Of Exhibit PSL1.
>
> 28. As seen on the 1983 and 1990 aerial photos major earthworks were conducted as part of the quarry operation that filled the natural Pimpama River channel and an artificial waterway was created to the east which discharged the water onto the eastern flood plain as overland flow. The result is that the Pimpama River now flows within Lot 4 RP 29989 approximately 50m east of its ambulatory boundary 'at law'. A copy of these photos is Document 20 Page 41-42 of Exhibit PSL1.
>
> 29. A photo taken from a light plane on 13 January 2010 shows the quarry processing area more clearly. A copy of this photo is Document 21 Page 43 of Exhibit PSL1.
>
> 30. I am awaiting documents through RTI but it appears that the quarry operator, without approvals, filled the Pimpama River to increase the available area for processing and storage of quarry products.
>
> 31. Cadastral Survey Requirements section 4.1.1 explains that the artificial changing of a watercourse is not considered an ambulatory movement and boundaries cannot be shifted in response to such interference. As a result, the boundaries 'at law' stay at the previous natural alignment. A copy of this section is Document 22 Page 44-45 of Exhibit PSL1.
>
> 32. The land is required as watercourse land for the watercourse and natural processes of the Pimpama River to be complete. A general

> principle is that water flowing in a river down from the hills loses energy as it wears the creek bed and hence the further it flows the more energy is lost. The straightening on site of this meander in the watercourse has shortened the River and increased the energy in the River which is reportedly causing problems downstream. The River is currently mobilising sediment as it erodes it's bed and banks onsite in an attempt to re-establish itself. To resolve this issue the River needs to be returned to its natural alignment."[1] (affidavit filed 31.1.12)

The question here is whether the development application proposes work whether or not in part of the "watercourse" comprised by the Pimpama River so as to require a resource entitlement under the Regulation. Surveying is an arcane field in which the court is grateful to have the expert evidence of Mr Dalton. Mr Dalton provides a persuasive case for adopting the 1919 survey which I am grateful to set out extensively:

> "**4. Review of Source Material**
>
> A review of the source material reveals that:
>
> a) From the Deeds of Grants, the feature that defines the portions on either side of the creek are the Left & Right Banks of Pimpama Creek as the case may be.
>
> b) From the survey plans and associated survey records, in the periods from 1871 to 1879 to 1919 there has been some movement in the position of the creek banks and that the surveyors at those times considered the movement to be natural, slow and imperceptible.
>
> c) From the aerial photos we can see that there is some movement from 1944 to 1982 and that in 1983 there is a sudden change in the creek position.
>
> d) There is no source material available for the period from 1919 to 1944.
>
> e) The consequence of this is that in the vicinity of the sudden change, the ambulatory boundary remains in the "location according to the law" it was prior to that change. This is not to be interpreted as the "physical location" immediately prior to the sudden change.
>
> f) It is still necessary to demonstrate that any movement up to the time of the sudden change has been natural, slow and imperceptible.
>
> g) The challenge then becomes determining the "physical position" of the "location at law" from the source material.
>
> **5. Choosing Authoritative Source Material**

---

[1] Paragraph 32 is included as an illustration of the raising of concerns that have no relevance in the present restricted enquiry as to whether there is a properly made development application.

Mr Harden's comments (30/7/2012)[2] referred to in paragraph 19 are quite correct, but are taken out of context. In practice there are severe limitations upon using aerial photos as an authoritative source. By their very nature, photographs cannot be simply scaled from. Scale within a photo changes constantly from the photo centre and is further distorted by changes in the distances various objects are from the camera (in an aerial photo this is the differing height of the terrain). Especially with aerial photos, the photo scale and resolution is usually such that determining the same feature as the previous surveyor is very difficult. Furthermore, photos are merely a snapshot in time. There is no ability to inspect on site and make an informed judgement as to whether any movement has been natural, slow and imperceptible. Although aerial photograph stereo pairs may be used to produce scaled 3D computer models and rectified (properly scaled) images, there is limited ability to correctly orientate these to cadastral survey data, and there is still the questionable determination of whether or not any movement has been natural, slow and imperceptible.

For these reasons the CSR[3] in section 3.27 (Photogrammetric Surveys) & 3.31 (Remote Area Surveys) outline the requirements for the use of aerial photos in cadastral surveys and limit their use. This survey does not meet these requirements and hence in this case the use of aerial photos as an authoritative source for the boundary determination is not permitted. I have discussed this matter further with the Registrar of Titles' Surveying Delegate and was given an unequivocal 'No' to any attempt to utilise the aerial photos in this situation for a boundary definition.

Furthermore, I cannot categorically state that in the period from 1919 through to 1983 prior to the sudden change that any and all movement in this section of the creek was by natural, slow and imperceptible means. I would venture that given the wholesale clearing of the eastern part of Portion 43 evident in the 1944 photos and the continual degradation of the riparian vegetation in the subsequent photos that some movement may be due to human activity.

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2 The reference is to an apparently hypothetical approach set out in the following email:

> "Dear Carol Lehmann,
> Thank you for your phone call regarding questions on how to deal with ambulatory boundaries.
> Your main question was - does aerial photography sourced from the Department of Natural Resources and Mines come under the category of "searchable registered, or otherwise authoritive information" as described in the the Survey and Mapping Infrastructure Act 2003 (SMIA)?
> The answer is yes. I refer you to the Guidance of Writing Survey Reports, page 18, paragraph d), which states "other data or imagery with sufficient metadata so that it can be related to a state dataset."
> http://www.derm.qld.gov.au/property/surveying/pdf/guidance_survey_reports.pdf
> This imagery is used among other things to compile ambulatory boundaries. Hope this has been useful.
> Please contact me if you have any further questions.
> Regards,
> ***Stewart Harden***
> Registered Surveyor (Cadastral)
> Survey Services …
> Department of Natural Resources and Mines"

3 Cadastral Survey Requirements of the Department of Natural Resources and Mines invoked by Mr Lehmann as authoritative in paragraph 18 of his affidavit filed 31 July 2012.

In practice, the use of aerial photography in these situations may be limited to determining:

a) If the watercourse has or has not moved.
b) If there has been movement, whether the movement has been by sudden change.

For this reason I am resorting to RP29989 as the most recent authoritative source for the ambulatory boundary position (as opposed to watercourse position) prior to the sudden change, not from any bias toward the use of survey plans, but because there is no ability to use aerial photos for this purpose in these circumstances.

6. RP29989

It is disappointing that the field notes for RP29989 are unable to be located in the Department's archives. This is not without precedence and the accepted practice in these situations has been to scale from the face of the plan. I would not disparage either the measurements or the penmanship of my predecessors in the profession. As a surveyor I am consistently amazed at the high level of accuracy of both achieved by early surveyors considering the relatively low level of technology and high level of hardship endured by them. In attachment BVD-1 to this report I have used the recorded measurements of the surveyors traverse to control the scale of the drawing. From that it can be seen that there is only a minor error at point 15 equal to about 2 metres and although measurements to both sides of the creek are lacking, one could say with a level of confidence that the LHS bank passes through or nearly through point 14, that the creek is relatively central about points 12, 13, 17, 18, 20 & 21, and the RHS bank passes through or nearly so, points 16 & 19. Given this and the general width shown for the creek of around 5 to 10 metres, I am satisfied that I have represented the ambulatory boundary of RP29989 as near as practicable to the original surveyor's intent.

I trust this in some measure helps all concerned understand my reasoning's behind my choices in this regard, in particular that the physical creek position prior to a sudden change is not necessarily the location at law of the boundary as Mr Lehmann supposes in paragraphs 17, 24, 25 & 27 nor is the use of aerial photographs to define the location at law permitted as supposed in paragraphs 17, 18, 19, 24 & 27.

7. Interpretation of Aerial Photographs

The above discussion on the interpretation of aerial photographs has relevance in regard to Mr Lehmann's comment in paragraph 13. Interpretation of a single aerial photograph, without on-site inspection is questionable. As a professional surveyor, dealing with aerial images on a consistent basis, I would hesitate to allege that the photograph is proof of levee failure, and that the levee failure is ongoing to this day. I originally surveyed the levee in 2007 and I suspect that the nominated location is the site of a rock scour protection and detention basin forming part of the water quality management system. In this case an oblique photograph, rather than a direct overhead shot would be more conclusive one way or another."

Mr Dalton proposes to resolve the matters and get the boundary situation in order by a new survey which would of course require cooperation and consent of the Department of Natural Resources and Mines. He predicted some years ago that that would be a protracted exercise, and so it has proved. In the circumstances, taking the approach indicated throughout the reasons, I take the view that this issue creates no problem under section 3.2.1(5) for the appellant.

[24] Speaking generally, Mr Lehmann's evidence and submissions are replete with material that is irrelevant in the present limited enquiry which comes down to whether some technical or legal defect made the development application fatally flawed. The judge hearing the substantive appeal may take a similar view of that material. I am referring in particular to assertions that Boral should act "openly and honestly" (the implication being that it has not done so in the past), that Boral has acted illegally in respect of Pimpama Creek in various ways, including "illegally filling" (for example in Mr Lehmann's affidavit filed 31 July 2012 paragraph 10). The assertions are said to be supported by letter of the Queensland Water Resources Commission of 7 October 1986 describing installation of a submersible pump in an excavation in the creek bed to provide a sump to draw water from as works that "are unlicensed and therefore illegal" and a later letter (11 December 1987) referring to the licences duly obtained and a need for a levee bank that had been constructed adjacent to the left bank of Pimpama Creek to be licensed. Mr Lehmann requests that the court "not reward the appellant for illegal activities resulting in the destruction of a natural system" (paragraph 28). This approach misconceives the role of the court in an appeal like the present. So much is well understood from situations where a use applied for is already occurring unlawfully. See the discussion and authorities in *Serbian Orthodox Church School v Brisbane City Council* [2012] QPEC 22 at [5]. As it was said *Sci-Fleet Motors Pty Ltd v Brisbane City Council* [1982] QPELR 231, there are remedies available, some in other places, to deal with unlawful use of land and development and environment offences generally. This appeal should not be used to punish or reward bad or good behaviour. Assuming (without considering whether) Boral has done the wrong thing, that would be irrelevant for present purposes. What matters in the appeal will be the merits and impacts of the current proposal. For our present purposes, even those do not matter.

[25] Mr Lehmann's last word on this issue appears from his affidavit filed 7 August 2012 and is typical of his thorough and "hard-hitting" approach:

> "3. THE PIMPAMA RIVER, as shown on 1983 aerial photo, was filled to increase the area available to the quarry for processing quarry materials. The Appellant's consultant, Mr Schneider, on page 12 of his report makes the statement that this was done with approval under the *Water Act 1926*. The Appellant was required by Court order 12/7/2012 to provide any evidence they wished to rely on for the determination of the preliminary issues but supplied no evidence to substantiate Mr Schneider's statement. A copy of page 12 of Mr Schneider's report is Document 2 page 3 of Exhibit PSL3.
>
> 4. A right to information (RTI) request for documents from 1975 to 2012 with the Department of Environment and Resource Management did not find any approvals in relation to the filling of the river. However this RTI did reveal documents that show the

sump excavated in the river at the same time and a subsequent levee bank were illegally constructed without licence to do so as shown on Document 4 Page 7 of Exhibit PSL2. I can only conclude that Mr Schneider's statement in relation to this issue is false. A copy of the RTI scope is Document 3 page 4 of Exhibit PSL3.

5. I refute Mr Schneider's statement at [62] (3) that "the entire processing area of Disturbance Footprint is wholly inside the boundary of Lot 43 on CPW31376". A copy of [62] (3) is Document 2 page 3 of Exhibit PSL3.

6. Mr Schneider bases this statement on a draft plan of survey compiled by the Appellant's surveyor in 2007 using information in part from 1871, 1879, 1919, and 1981 survey plans. I strongly disagree that this survey represents the last known, at law, ambulatory boundary of the Pimpama River. This draft survey plan has not been authenticated on ground and has no legal standing until a signed survey plan has been registered with the titles office. My understanding is that the Crown is unlikely to agree that the survey represents the at law boundary of the Pimpama River and is currently investigating the issue as advised by letter on 10 April 2012 to Mr Tim Gregg, President of the Ormeau Progress Association. A copy this letter is Document 4 page 5 of Exhibit PSL3.

7. I believe the Disturbance Footprint of the proposed development includes the at law alignment of the Pimpama River. The Appellant was notified by their own surveyor's report. Preliminary Advice on Riparian boundary of Lot 43 on W31376, 30 August 2007 that their quarry operations encroached on the Pimpama River and that they were required to issue an encroachment notice to the Department of Natural Resources and Water. The Appellant shelved this surveyors report and ignored recommendations that they either purchase the affected land from the State or reinstate the creek (Pimpama River) bed and banks to its former position. A copy of the relevant page of this report is Document 18 page 40 of Exhibit PSL2.

8. In the face of their 2007 surveyors preliminary report the Appellant proceeded at their own risk with their proposed development knowing that the onus was on them to prove any changes in the ambulatory boundary and that their proposed alignment would be subject to acceptance by the Department of Natural Resources and Water. The last know (sic) authoritive data as to the ambulatory boundary of the Pimpama River is on aerial photos held by the former the Department of Natural Resources and Water. The Appellant has recently received a 22 June 2012 surveyor's report, Review of Preliminary Advice on Riparian (Ambulatory) Boundary of Lot 43 on W31376. This report contains 1944, 1974, 1978 aerial photos showing the natural ambulatory movement of the watercourse. A 1983 aerial photo included in this report shows a section of the natural watercourse has been artificially filled by the quarry and a new artificial watercourse crated to the east. Attention is drawn to the remaining section of the natural watercourse in 1983 just to the

> north of the filled area. I have overlaid the proposed development disturbance foot print onto this 1983 aerial photo and it can be clearly seen that the processing stockpiles and conveyors associated with Product Screening Module #1 are over the top of the 1983 alignment of the Pimpama River which is the 'at law' alignment.
>
> A copy of this 1983 photo plan with overlay is Document 5 page 6 of Exhibit PSL3.
>
> 9. This watercourse land is physically required by the river for environmental processes and must be returned to the watercourse. The Appellant did not gain permission to use this State resource and therefore the development application the subject of this appeal is a not properly made application."

[26] For the reasons given by Mr Dalton, it is not possible to identify any ambulatory boundary location as the "legal" boundary so as to supplant surveyed boundaries in registered plans. Even in this regard there are (slightly) conflicting boundaries; Mr Dalton's justification for relying on the later (1919) one is persuasive. I confess to finding the situation confusing. Once again the State authorities' standing mute seems to me significant. The letter to Mr Gregg (which it is convenient to reproduce in a footnote)[4] cannot be taken to reveal any disquiet given the authorities' failure to take up the invitation offered to participate in the hearing. Although this consideration may strictly be irrelevant, Mr Dalton has investigated implications for his work in 2007 of amendments to the *Water Act 2000* made in 2010 to introduce new ambulatory boundary provisions. If the new principles applied they would "have not significantly altered our previous boundary determination, especially in the area of concern"; he confirmed that the entire processing area disturbance footprint falls completely inside the boundary of lot 43. No development is proposed within any of the three potential Pimpama Creek alignments acknowledged by Mr Dalton – which, of course, do not include the one contended for by Mr Lehmann, which may (but has not been shown to) have had relevance in the early 1980s.

Resource entitlement issue

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[4] "The Department of Environment and Resource Management (the department) has received your letter of complaint in regards to modifications made by Boral Resources (Qld) Pty Ltd (Boral) to the natural alignment of the Pimpama River, in addition to carrying out operational activities within the registered boundary position of the Pimpama River. These activities have allegedly taken place on land adjacent to the Boral Ormeau Quarry located at located at (sic) Upper Ormeau Road Ormeau, 4208 on land described as Lot 43 W31376 and Lot 1 RP29989.

Please be advised that the department have commenced investigation into these allegations and will keep you informed of the outcomes of the investigation. Any supporting information in regards to this matter is appreciated.

Following recent discussions with the department, you advised that there were a number of environmental nuisance concerns relating to the operation of the Ormeau Quarry, such as sediment and dust leaving the site due to vehicle movements. If these matters are still of concern, you are invited to provide written notification to this office so that the department can investigate these matters.

Should you have any further enquiries, please do not hesitate to contact …"

[27] The resource entitlement issue is dealt with in this way in Mr Lehmann's final affidavit:

> "10. NEW ACCESS CULVERTS are to be constructed in the Pimpama River to replace the existing structure as seen in photos. A copy of these photos is Document 6 page 7 of PSL3.
>
> 11. I note from the culvert plans that the eastern half of the structure consists of culverts whereas the western half of the structure is a deck constructed on fill within the watercourse. A copy of culvert plan and an enlargement of the entry design is Document 7 pages 8 and 9 of Exhibit PSL3.
>
> 12. In his email to Mr Schneider on Saturday 3/11/2007 at 9.54 am Mr Fox gives a final answer in relation to the culvert within the watercourse that all that is required is a Riverine Protection Permit from Water Services. However by email Saturday 3/11/2007 at 4.44 pm Mr Fox supplies an answer to a subsequent question that resource entitlement is required as you are using a State resource. Copies of the 3/11/2007 emails are Document 8 pages 10-12 of Exhibit PSL3.
>
> 13. I can only speculate that a request had been made to Mr Fox for permission to place the culvert on the fill that had been placed in the watercourse against the west bank of the river. The active width of the culverts specified is only 5 metres where the ambulatory boundaries would be closer to twice that. The culverts and fill as specified will block part of the watercourse and will interfere with the flow of water. A licence to interfere with the flow of water was required to be submitted with the development application and therefore the application has not been properly made. The correct process would have been to notify the Department of Natural Resources and Water of the encroachment of fill into the watercourse so that the actual ambulatory boundaries could be determined and appropriately sized culverts specified to suit the river boundaries after the fill was removed. Appropriately installed culverts would have a width of around 10 metres and be fitted to the ambulatory boundaries of the watercourse so as not to interfere with the flow of water.
>
> …
>
> 28. The General Authority quoted by Mr Schneider [91] (2) does not give authority as implied as it does not cover operational works for the taking or interfering with water. It really only covers overland flow and in any case was not current at the time of this application. A copy of [91] (2) and the General Authority is Document 15 page 26-27 of Exhibit PSL3."

[28] The difficulty is that the problems paragraph 12 may be thought to give rise to have been overcome or appreciated not to represent difficulties at later dates, as is confirmed by Mr Fox's subsequent detailed letter of 4 May 2012 set out extensively in paragraph [14] of these reasons. The continued appropriateness of the contents of that letter (relevantly for present purposes) is affirmed by subsequent

communications from departmental officers. The allegation is understood to be one that although relevance of a State resource entitlement has been obtained for the culvert crossing, it was the wrong type of entitlement. The appellant understood the suggestion to be that item 14 or item 15 of Schedule 10 (or both) applied, a contention disposed of elsewhere. The "evidence" in relation to State resources is supplied by the Department's letter of 25 January 2008 included in the Development Application:

> "**Consent to take or interfere with a State resource - section 3.2.1(5) of the *Integrated Planning Act 1997* (IPA)**
> The State resource subject to this proposal is described as part of the bed and banks of the non-tidal watercourse, separating lot 43 on W31376 and lot 1 on RP172507, and described in item 6 of Schedule 10 of the *Integrated Planning Regulation 1998* as land that is unallocated State land (USL) under the *Land Act 1994*, that is not a canal under the *Coastal Protection and Management Act 1995*, and not subject to Items 11, 12, 13, 14, or 15 of Schedule 10.
>
> Under s.3.2.1 (5) of IPA and Schedule 10 of the *Integrated Planning Regulation 1998*, an applicant is required to obtain evidence that the chief executive of the relevant department is satisfied that the development is consistent with an allocation of, or entitlement to, the resource; or the development application may proceed in the absence of an allocation of, or entitlement to, the resource.
>
> The Department of Natural Resources and Water is the Department administering the State Resource of USL on behalf of the State of Queensland
>
> This letter may be taken as providing the necessary evidence that the chief executive of the Department administering the resource is satisfied the development application may proceed in the absence of an allocation of the resource.
>
> In accordance with section 3.2.1(5A) of IPA, which allows for an expiry date for the "evidence of resource entitlement", the evidence regarding resource entitlement may not be used under 3.2.1(5) after 29 August 2008. It this development application has not been lodged by that date, the applicant will need to seek further evidence of resource entitlement from this Department.
>
> The Department's consent does not remove the obligation on the applicant to obtain all necessary development approvals from other relevant regulatory authorities."

It is inappropriate that such communication to an applicant apparently setting out in a serious way to obtain relevant "evidence" be denied affect by being analysed too critically: cf *WAW Developments Pty Ltd v Brisbane City Council* [2011] QCA 47.

[29] It is true that the General Authority & Chief Executive Consent in respect of the State's Water Resource issued from the Department of Environment and Resource Management on 19 July 2011 (a copy of which is at p 247 of Mr Schneider's long report) which expressly satisfies the requirements corresponding with those of concern here under the SPA and *Sustainable Planning Regulation 2009* regime,

does not help, as it comes too late. However, it is an indication that if the appellant were to start again, it would not encounter the resource entitlement evidence the court is concerned with now.

[30] Although the appellant made no application for non-compliance to be excused under s 820 of SPA, electing to await the court's determination that relief might be necessary, I am prepared to say that the present represents a clear case for favourable application of the section. The circumstances are hardly distinguishable from those in *Neilsens Quality Gravels Pty Ltd v Brisbane City Council* [2011] QPEC 101. The developer there had proceeded consistently with advice from the relevant State department that no "evidence" to satisfy s 3.2.1(5) was required. Then a different view was taken. Both State and local government authorities were supportive of the development application being allowed to proceed, even if the section had not been satisfied. That appellant, like Boral, was shown to have taken reasonable steps to identify what was needed by way of evidence as to any State resource entitlement. It cannot be said that rights or entitlements of members of the public have been limited or adversely affected by any shortcoming of the kind complained of here. A successful outcome for Boral on these preliminary points does not stand in the way of a full examination of the merits of its proposal generally, and in relation to matters to do with Pimpama Creek and the crossing in particular, when the appeal proper comes before the court for hearing. Finally, a significant waste of public and private resources would be entailed here, as it would have been there, had a whole new development application and assessment process been forced on the developer.

The water licence issue

[31] Mr Lehmann says:

> "16. INDUSTRIAL WATER LICENCE No. 47506C to interfere with the flow of water in the Pimpama River by impounding water on or adjoining land described as Lot 43 on W31376 was renewed by the Appellant 2 December 2009 and remains current until 2 December 2014. The licence is attached to the land the quarry is on and allows for a sump/dam to be constructed in the river. A copy of this licence is Document 31 page 67 of Exhibit PSL1.
>
> 17. As seen in photos of the dam/sump the water is stagnant and green with algae growth indicating the combination of sunlight, weeds and rotting vegetation are having an obvious negative effect on water quality. The Appellant did not properly make the application by declaring the State resource licenses and entitlements associated with the land at Mandatory Part A Question 10 Table J of the development application. The onus of proof is on the Appellant to prove that the water licence is meeting the desired environmental outcomes of the Gold Coast City Council but the Appellant did not inform the Council of this licence or the issues associated with it. A copy of these photos is Document 10 page 16 of Exhibit PSL3.
>
> 18. INDUSTRIAL WATER LICENCE No. 47505C to take water from the Pimpama River was renewed by the Appellant 2 December 2009 and remains current until 2 December 2014. This licence is obviously being held for a reason. While the Appellant

> included in their application to Council that they will use water from on site they legally can at any time start pumping water from the Pimpama River under their State licence and Council would be powerless to act as the State licence over-rides local government conditions. The Appellant did not properly make the application by declaring the State resource licences and entitlements associated with the land at Mandatory Part A Question 10 Table J of the development application. The local government had the right to knowledge of the environmental impacts of the proposed development and Council has denied the right to properly assess the application and place conditions on the development. A copy of this licence is Document 31 page 66 of Exhibit PSL1."

I agree with Mr Gore that the contention appears to be that the development application relies upon industrial water licences for the taking of or interference with water in Pimpama Creek. That is a misrepresentation of the proposal, which is that all water to be used on the site as part of the development will be taken from an on-site dam, as has happened in existing operations, after that water has been captured on site. See Appendix P (pp 251 ff) in Mr Schneider's report. Even if the allegations are correct, they are irrelevant to the present question, which is whether the development application was properly made. The concern really seems to be that the appellant will proceed in a different fashion. There is no basis on which the court can anticipate such a scenario. One would assume that the licensing regime would prove capable of responding appropriately to any abuse of it.

The existing approval issue

[32] An issue as to whether the appellant's present proposal is in some way dependent on an earlier approval was raised by Mr Lehmann in his first affidavit in this way:

> "72. The Integrated Planning Act 1997, October 2004, Section 3.2.5 "Acknowledgement notices for applications under superseded planning schemes", directs in section 3.2.5(5) that the applicant must start a development under a superseded planning scheme within the specified time. A copy of this section is Document 42 Page 91-93 of Exhibit PSL1.
>
> 73. Section 3.5.21 directs when development approval lapsed. A copy of this section is Document 49 Page 116-118 of Exhibit PSL1.
>
> 74. As can be seen by the Ormeau Quarry Site Layout and Area of Disturbance Plan no substantial development occurred on Lot 1 RP164904. A copy of this plan is Document 8 Page 11 of Exhibit PSL1.
>
> 75. The appellant makes the statement in 2.1.2 of the development application that the existing quarry operation is largely contained within Lot 43 on CPW31376 however, the approved extent of the quarry pit also extends into Lot 1 on RP164904. The development was not started within the specified time and therefore the approval on this lot has lapsed. A copy of this paper is Document 25 Page 50 of Exhibit PSL1.

> 76. The appellant relies on this previous lapsed approval as the basis for the current development application and in this respect the application is not properly made as it relies on a lapsed approval of Lot 1 RP 164904."

and brought up to date in his third and final one:

> "27. I contest that the aerial photo provided by Mr Schneider on behalf of the Appellant shows substantial development on Lot 1 RP 164904. While they have obviously been recently redone when this photo was taken it shows no more than the existing fire trails/breaks that have existed on the property since it was a farm. I refer to DNR&W78QAP36073755 taken 28/8/78 which shows these fire trails in 1978. I also refer to Sun Map, Qld Gov, Department of Natural Resources and Water, Beenleigh 2009, DIG70034668 taken 8/7/2009 only some months after the Appellant's photo showing the fire trails a lot less bare than the Appellant's photo. Current imagery of the site such as nearmap.com 14 June 2012 show there is still only fire trails/breaks on this land. I also refer to photos that I am told were taken on the fire trails this year. The onus of proof is on the developer who had not proved there was any substantial development within the required time on Lot 1 RP164904. A copy of these photos is Document 14 pages 22-25 of Exhibit PSL3."

[33] Section 3.5.21 is in terms of an approval lapsing "if the first change of use under" it does not happen within the relevant period, here four years starting the day the approval took effect. All that s 3.2.5 requires is that a developer "start the development". This, in my opinion, is satisfied if, where a development is approved for two lots, it is started on one of them. Boral contends that the approval which it had secured by way of a Development Application (Superseded Planning Scheme) of 29 October 2004 could be implemented by development being started on either lot 43 (as it was before the deadline of 24 December 2008) or on lot 1. In my opinion Boral did preserve its existing use rights over both lot 43 and lot 1 by starting its development on lot 43. Mr Schneider's report in paragraph [100] contains the following explanation, which is coincident with my views:

> "[99] The earlier 'development approval' to which Mr Lehmann refers is, in fact, not a development approval.
>
> [100] The existing Extractive Industry operations on Lot 43 on CPW31376 and Lot 1 on RP164904 are carried out as Self Assessable development under the superseded 1995 Albert Shire Council Planning Scheme and pursuant to a Development Application (Superseded Planning Scheme) that was made by Boral on 29 October 2004.
>
> [101] By way of background, the current Gold Coast City Council Planning Scheme 2003 superseded the 1995 Albert Shire Council Planning Scheme on 18 August 2003. Within the statutory two year period then provided by the *Integrated Planning Act 1997*, Boral lodged a Development Application (Superseded Planning

Scheme) for Extractive Industry: Methods of Staging of Quarry Operations (**2004 DA(SPS)**).

[102] The 2004 DA(SPS) advised Gold Coast Council that Boral proposed to carry out development under the superseded planning scheme and submitted a Final Pit Design Plan.

[103] On 22 December 2004, the Council, through its delegate, resolved that *'the development be assessed under the superseded planning scheme'* and went on to advise that *'the development can proceed without any further planning approvals provided that it complies in full with the provisions of the superseded planning scheme.'* Thereby, Gold Coast City Council approved Boral to proceed, as proposed, to quarry the full extent of the final pit design as if the development were to be carried out under the superseded planning scheme and the provisions thereof, pursuant to which Executive Industry was Permitted (i.e. Self Assessable) Development in the Extractive Industry Zone.

[104] A copy of Council's Acknowledgment Notice in respect of the 2004 DA(SPS) is attached at **Appendix Q**.

[105] The Final Pit Design Plan that formed part of the 2004 DA(SPS) is attached at **Appendix R**.

[106] Pursuant to sections 3.2.5(4) and 3.2.5(5a) of the *Integrated Planning Act 1997*, Boral was obligated to start the development that was the subject of the 2004 DA(SPS) before 24 December 2008.

[107] Boral have provided me with an aerial photograph of the site that I am advised was taken in November 2008. The aerial photograph clearly shows that works had commenced on both Lot 43CPW31376 and Lot 1 on RP164904. A copy of the photograph is attached at **Appendix S**.

[108] It is my opinion that the development that was the subject of the 2004 DA(SPS) was started on both Lot 43CPW31376 and Lot 1 on RP164904 prior to the 24 December 2008.

[109] I dispute Mr Lehmann's allegation on this basis. In my opinion, there is no need to further investigate this issue."

It is difficult, in any event, to discern the relevance of this issue to whether the appellant's present development application was a properly made one.

Mr Gregg

[34] Mr Gregg's submission, made as President of the local Progress Association focused on concerns about traffic and water (disturbance of underwater aquifers and discharge into Pimpama Creek) in consequence of an apprehended trebling of quarry production. The Council determined that the submission was out of time and thus not a properly made one – in which case Mr Gregg would lack any entitlement to participate in this appeal. However, the parties were content to allow him to participate at the hearing of the preliminary points.

Opinions of people not giving evidence

[35] The appellant's case has been served well by the various experts engaged by it to respond to the co-respondents' points. Their views have proved persuasive, notwithstanding the challenges that were made to the evidence and opinions (by means other than competing expert evidence). The court should be careful about acting on assertions or opinions by or attributed to various people who could not be questioned. There are instances of the appellant's experts invoking apparently coinciding opinions of others and of Mr Lehmann invoking certain thoughts and opinions of persons holding relevant official positions that he considered helpful (in some respects contradicted by later thinking). In the end, I have treated this material with reserve. These comments do not gainsay the reliance reasonably placed upon final expressed views of the State authorities (taken to be appropriately informed), the burden of which is that, representing the responsible entities, they consider that the development application was properly made, that further input by them was not required.

Conclusion

[36] The present decision establishes no more than that the appellant's conditions appeal may proceed to a hearing, that it arises from a development application that was properly made which the Council, and now the court could assess and decide. Mr Lehmann's contentions might have defeated the appellant totally by requiring it to begin again with a new development application, this time a "properly made" one. His failure in this respect does not limit his or any co-respondent submitter's ability to argue against Boral's proposal on relevant planning grounds, whether by reference to conditions that have been or should be imposed in any approval or by arguing that there should be no approval at all: *cf Morgan v Toowoomba Regional Council* [2011] QPEC 61; [2011] QPELR 620 at [5].