PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Multus v Rockhampton Regional Council & Ors* [2012] QPEC 85

PARTIES:

MULTUS PTY LTD AS TRUSTEE FOR THE MULTUS TRUST TRADING AS MAXIME
(Applicant/Appellant)

V

ROCKHAMPTON REGIONAL COUNCIL
(Respondent)

and

CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS
(First Co-Respondent by Election)

And

CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT
(Second Co-Respondent by Election)

and

SALLY-ANNE KIRK
(Third Co-Respondent by Election)

and

BAJOOL, MARMOR AND DISTRICT RATEPAYERS ASSOCIATION
(Fourth Co-Respondent by Election)

and

EVAN MYLES IRELAND AND MARILYN MURIEL IRELAND
(Fifth Co-Respondent by Election)

and

BRUCE JOHN McCAMLEY AND HELEN FAY McCAMLEY
(Sixth Co-Respondent by Election)

and

GEOFF BESCH
(Seventh Co-Respondent by Election)

and

EWEN DAVID BESCH
(Eight Co-Respondent by Election)

and

COLIN FRANCIS WEEKS
(Ninth Co-Respondent by Election)

and

TREVOR GEORGE OFFORD
(Tenth Co-Respondent by Election)

and

MICHAEL STEVEN DAHLER
(Eleventh Co-Respondent by Election)

and

CAROLINE JOANNE DAHLER
(Twelfth Co-Respondent by Election)

FILE NO/S:	D192/2012 and Appeal No. D178/2011
DIVISION:	Planning and Environment
PROCEEDING:	Application and Appeal
ORIGINATING COURT:	Planning and Environment Court, Maroochydore
DELIVERED ON:	21 December 2012
DELIVERED AT:	Maroochydore
HEARING DATE:	8 November 2012
JUDGE:	Long SC DCJ
ORDER:	**The application is allowed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING - DEVELOPMENT APPLICATION – Where the applicant seeks a material change of use to facilitate development application – Where there has been a failure to comply with time frames and notification requirements in accordance with the IDAS process pursuant to *Integrated Planning Act* 1997 – Where there has been no identifiable prejudice to any party and where most of the non-compliance issues were identified and addressed prior to the completion of the IDAS process - Where the applicant applies to the Court to exercise its discretion pursuant to s 820(1) of the *Sustainable Planning Act* 2009, to excuse acts of non-compliance with the IDAS requirements.

CASES:	*Demiscto Pty Ltd v. Brisbane City Council* [2008] QPEC 22.
	Fancourt v. Mercantile Credits Ltd (1983) 154 CLR 87.
	Hay and Ors v Rockhampton Regional Council; No. 622 of 2011.
	Lewani Springs Resort Pty Ltd v Gold Coast City Council [2010] QPELR 321
	Lewani Springs Resort Pty Ltd v. Gold Coast City Council & Anor [2010] QCA 145.
	Maryborough Investments v Fraser Coast Regional Council [2010] QPEC 113.
	Metrostar Pty Ltd v Gold Coast City Council [2006] QPEC 22.
	Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.
	Rufus and Ors v Rockhampton Regional Council; Nos. 118, 119 and 120 of 200.
	Towers v. Building and Development Dispute Resolution Committee [2012] QPEC 13
	Wynne v Beaudesert Shire Council [2007] QPEC 131.
LEGISLATION:	*Acts Interpretation Act 1954,* s.39A.
	Integrated Planning Act 1997, s.3.2.8, s.3.4.3(3),s 3.4.5(a), s 4.1.5A, s.6.7.1A
	Integrated Planning Regulation 1998, Schedule 2
	Sustainable Planning Act 2009, s 819(5)(a), (6) and(7), s 820.
COUNSEL:	B.D. Job for the Applicant/Appellant.
	R. Livingston-Ward, solicitor, for the Respondent.
	H.J Schindler, solicitor, for the First Co-Respondent by Election.
SOLICITORS:	IPA Law for the Applicant/Appellant.
	King and Company for the Respondent.
	Norton Rose for the First Co-Respondent by Election.

Background

[1] On 12 August 2011, the applicant filed a Notice of Appeal against the decision of the respondent, made on 12 July 2011, to refuse a development application for a development permit for a material change of use for a high impact industry (explosive storage facilities), a development permit for a material change of use for a caretaker's residence and a development permit for an environmentally relevant activity (ERA 8 - chemical storage), for land at Lot 2107 Bajool-Ulam Road, Bajool and more particularly described as Lot 2107 on DT4067 and Lot 2115 on DT4069[1]

[2] By way of background overview, the applicant describes that:

> "13. The subject land comprises approximately 230 ha, at South Ulam Road, Bajool. It is contained within the Rural Zone and is presently used for grazing purposes. The predominant land use surrounding the land is also grazing, with commercial uses closer to Bajool, such as an explosives reserve owned by the State Government.[2]
>
> 14. The development application sought a development permit for a material change of use to facilitate a privately owned dangerous goods and explosive storage facility, together with a fertiliser blending plant.[3]
>
> 15. The facility is to occupy only a very small portion of the overall subject land. The total GFA for buildings associated with the facility is 2,099 m^2(or less than 0.1 per cent of the land).
>
> 16. A concept plan of the proposal[4] identifies the proposed layout of the facility; the approximate line of a creek which adjoins the western boundary of the subject land; and Easement A being an electricity transmission easement."[5]

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1 See Document 1 in File No. D178 of 2011.
2 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH 1, p.24.
3 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.26-27.
4 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p.106.
5 Applicant's outline of submissions filed on 8 November 2012 at paras 13-16.

The Application

[3] On 9 October 2012 and as a result of some correspondence with the first respondent, the applicant filed an application seeking various declarations and orders excusing non-compliance with process under the *Integrated Planning Act* 1997 as follows:

> "2. Declarations that:
>
> a. The Chief Executive administering the *Transport Infrastructure Act* 1994 (DTMR) is a concurrence agency for a development application made by the applicant to the respondent for a material change of use for a high impact industry (dangerous goods and explosive storage facility) with caretaker's residence including environmentally relevant activity 8(1)(a) chemical storage in relation to land at Lot 2107 Bajool-Ulam Road (South) Bajool in the State of Queensland and more particularly described as Lot 2107 on DT4067 and Lot 2115 on DT4069, bearing Rockhampton Regional Council reference number D/1774-2009 ('the development application')
>
> b. The Chief Executive of the distribution entity Ergon Energy is not a referral agency for the development application
>
> c. The Chief Executive of the transmission entity Queensland Electricity Transmission Corporation Limited trading as Powerlink Queensland ('Powerlink'), is not a referral agency for the development application
>
> d. For the development application, the applicant:
>
> (i) Responded to the information request of the DTMR on or about 5 September 2010
>
> (ii) Commenced the notification stage prematurely on 31 January 2010
>
> e. There is a wetland on the land subject of a development application
>
> f. The required notification period for the development application is 30 business days.
>
> g. The notice was placed on the land for 20 business days from 31 January 2010 to 26 February 2010, with a submission closing date of 24 February 2010.
>
> h. The notice was published in a newspaper on 3 February 2010, with a submission closing date of 24 February 2010

i. The notices to the owners of adjoining land were given in the ordinary course of post on 4 February 2010 with a submission closing date of 24 February 2010

j. The actual notification period completed for the development application was 14 business days

k. Powerlink is a submitter for the development application the subject of this proceeding

3. An order that the applicant's failure to notify the development application for the required notification period of 30 days is excused.

4. An order that the applicant's premature commencement of the notification stage is excused.

5. An order that the time for the applicant to serve a copy of the Notice of Appeal commencing Maroochydore Planning and Environment Court Appeal D178 of 2011 on Powerlink is extended to 12 October 2012."

[4] The first order sought in the application was that the appeal and this application be heard together. Because the orders sought in the latter application are necessary in order to make the earlier appeal competent, such an order was made on 16 October 2012.

[5] Whilst there are a number of co-respondents by election, in this matter, only the respondent and the first co-respondent by election appeared on the application. With the exception of the third co-respondent by election, there was evidence before the Court that each of the co-respondents by election had knowledge of and did not wish to be heard on the application.[6] In the case of the third co-respondent by election, there was evidence of service of the application and no appearance at the designated time for hearing of the application.[7]

[6] Neither the respondent nor the first co-respondent by election who did appear on the hearing of the application, sought to actively oppose it. This application arose because of the identification by the respondent, of aspects of non-compliance with

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6 See Exhibit 2, in respect of the position of the fourth to twelfth co-respondents by election and Exhibit 3 in respect of the position of the second co-respondent by election (who had earlier been excused from active participation in the appeal).

7 Affidavit of CN Wirz filed 16 November 2012 at [9] and Ex 'CNW-1' at p 5.

process under the *Integrated Planning Act* 1997 ("IPA"). In that regard the applicant seeks orders pursuant to s 820(1) of the *Sustainable Planning Act* 2009 ("SPA"), excusing those aspects of non-compliance. Whilst most aspects of non-compliance are not in contention, it is first a matter of identifying what is being excused and the applicant proposed that by way of the declarations that are sought.

[7] Although recognising that any excusal of non-compliance is ultimately a matter for the Court, the respondent expressed agreement with each of the declarations sought in paragraph 2 of the application and the excusal sought in respect of that non-compliance, except for 2(a), (g) and (k). In respect of those aspects of the application to which there was not express agreement, a neutral position was taken, with the respondent pointing to some of its recent experiences before the Court.[8]

[8] However and as will become apparent, once these reasons are considered, it may be necessary to reformulate the formal orders to be made.

The Excusal Power

[9] Notwithstanding that the development application was lodged prior to the commencement of SPA and was consequently processed under the IPA regime, s 820 of SPA applies pursuant to ss 819(5)(a) and (6) and also s 819(7) of SPA. Although the Court is required to hear and decide the appeal instituted in this matter under the repealed IPA, as if SPA had not commenced, the power to excuse non-compliance with a provision of the IPA is found in s 820 of SPA. That provision therefore replaces the previous power of excusal pursuant to s 4.1.5A of IPA.

[10] In *Maryborough Investments v Fraser Coast Regional Council*[9] the differences between the former power and the power which now exists pursuant to s 820 of SPA was analysed. After a consideration of statutory context and the purposes of SPA and reference to the explanatory notes for the *Sustainable Planning Bill* 2009, a "broad and untrammelled" discretionary power was recognised.[10] The reference

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8 In *Rufus and Ors v Rockhampton Regional Council*; Nos. 118, 119 and 120 of 2009, delivered on 14/9/10; and *Hay and Ors v Rockhampton Regional Council*; No. 622 of 2011, delivered on 4/5/12.

9 [2010] QPEC 113.

10 Ibid at [30].

made to the explanatory notes revealed an expressly stated purpose of preserving rights to hearings notwithstanding technicalities concerning processes."[11]

[11] Further and in the determination of that matter, the Court identified non-compliance by omission, that had arisen through oversight and that there was no identifiable impact on any planning outcome. Also if the consequence of non-compliance was not relieved the development application would have to be renewed at significant cost, delay and inconvenience to the parties and that where the non-compliance was in reality a town planners administrative error which, in the end result had not prejudiced any party and was of the nature of technical oversight, the discretion relieving non-compliance was exercised.

Consideration

[12] The aspects of non-compliance to which the orders sought on this application are directed, may be summarized as follows:

1. public notification of the development application commenced prior to the start of the notification stage of IDAS. That is, the applicant had not completed its responses to Information Requests, or had not provided copies of those responses, to Council prior to commencement of public notification;
2. public notification was not carried out for the required 30 business day period;
3. the development application lapsed as a consequence of non-compliance with notification requirements;
4. signage on the land identified (for a brief period) different dates for the closing of submissions;
5. material which was available for the public to inspect at Council during the notification period was incomplete, as it did not include all of the referral agencies' Information Requests, and the applicant's' responses to them; and
6. the development application required referral to Powerlink as an advice agency, but was not referred to that entity.

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11 Ibid at [17].

[13] Each aspect may be considered in turn.

Premature Commencement of Public Notification and Information available for inspection during the public notification period

[14] The commencement of the notification stage is governed by Section 3.4.3 of IPA. Section 3.4.3(3) applies where (as here) an Information Request has been made, and provides:

> "*... the applicant may start the notification period as soon as the applicant gives:*
>
> *(a) all information request responses to all information requests made; and*
>
> *(b) copies of the responses to the assessment manager*"

[15] The relevant facts associated with this aspect of non-compliance are as follows:

(a) The respondent ("Council") was the assessment manager and by way of its second Acknowledgement Notice[12] identified the Department of Environment and Resource Management ("DERM") and the Department of Emergency Services ("DES"), as concurrence agencies and Ergon Energy as an advice agency[13];

(b) those referral agencies were given proper notice of the development application[14];

(c) Council issued an Information Request on 10 December 2009[15];

(d) on 23 December 2009 Ergon Energy indicated that it had "*no objections*" to the application provided conditions were met (and copied its letter to Council)[16];

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12 The first Acknowledgement Notice incorrectly described the use applied for – Affidavit of AJ Hannay filed 17 October 2012, paragraph 7.

13 Acknowledgement Notice, Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.59-60.

14 Affidavit of AJ Hannay, paras 8 & 10 and Ex AJH-1, pp.62-121 (DES); 122-123 (DERM); and 124-125 (Ergon Energy). Confirmation of that was provided to Council on 15 December 2009 – Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.129-130.

15 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.126-128.

16 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p.136.

(e) on 25 January 2010 DERM issued its Information Request[17] and provided it to Council - in accordance with s.3.3.6(5) IPA;

(f) by letters dated 30 January 2010 and posted on 2 February 2010, the applicant responded to the Council Information Request[18]; DERM's Information Request; and provided information to DES[19]. It is confirmed that the correspondence is stamped as received by Council on 5 February 2010.[20]

(g) the notification process initially commenced (albeit briefly) on 28 January 2010 when notice was first given to adjoining owners[21]. However, as a corresponding notice did not appear in the newspaper when proposed, the notification process recommenced almost immediately thereafter; and

(h) the recommenced notification was carried out as follows:

(i) notices were placed on the land on 31 January 2010[22];

(ii) notices dated 29 January 2010 were sent to the 2 adjoining owners (Ireland and Besch) on 2 February 2010[23]; and

(iii) a notice appeared in the newspaper on 3 February 2010[24].

[16] It is of significance to note that whilst s 3.4.3 of IPA is headed "When can notification stage start", only subsection (1) is couched in terms referring to starting "the notification stage", whereas subsection (3) is couched in terms referring to starting the "notification period". Section 3.4.3(3) of IPA is to be read with s.3.4.5(a). The latter indicates that the "notification period" for the application "*starts*" on the day after the last action under s.3.4.4(1) is carried out.

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17 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.137-139.

18 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.140-142 (plus attachments) & 212 and Further Affidavit of AJ Hannay filed 8 October 2012 at [9] .

19 Affidavit of AJ Hannay filed 17 October 2012,Ex AJH-1, pp.143-145 and 146-147 respectively – with the relevant attachments at pp.148-209.

20 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p.369 and Exhibit 3 in these proceedings.

21 Affidavit of AJ Hannay filed 17 October 2012, para 22.

22 Affidavit of AJ Hannay filed 17 October 2012, para 21(ii), and Ex AJH-1, p.346.

23 Affidavit of AJ Hannay filed 17 October 2012, para 21(iii), and Ex AJH-1, p.348; Further Affidavit of AJ Hannay filed on 8 November 2012, para 10

24 Affidavit of AJ Hannay filed 17 October 2012, para 21(i), and Ex AJH-1, pp.346 -347

[17] In that regard, s.39A of the *Acts Interpretation Act 1954* (**AIA**) provides that notice given by prepaid post "*is taken to be effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved*". Here, the ordinary course of post is the second business day for mail between country areas[25]. The fact that registered mail receipts were not signed until afterwards does not displace that presumption.[26]

[18] This Court has observed in a similar context[27] that time limits under the IPA "*…bodes to become unworkable if the time limits which people reasonably rely on are to be extended, perhaps without limit, until a communication actually comes to the attention of some individual or other*".[28]

[19] Accordingly and as the notices to adjoining owners were posted on 2 February 2010, they are taken to have been "*given*" on 4 February 2010. The giving of that notice on 4 February was the last of the required notification steps. Consequently the "*notification period*" to which ss.3.4.3(3) and 3.4.5(a) refer, started on the day after that action. That is on 5 February 2010. There does not appear to be any non-compliance to be excused in respect of steps taken pursuant to s 3.4.4(1), prior to that date.

[20] However, a complicating factor is the fact that all parties overlooked the necessity to include the Department of Transport and Main Roads ("DTMR") as a concurrence agency for the development application. That did not occur until 16 February 2010.[29] DTMR subsequently made an Information Request on 19 February 2010 and (after discussions) a response was provided on 5 September 2010.[30]

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25 Affidavit of AC Davis filed on 8 November 2012.

26 *Eg. Towers v. Building and Development Dispute Resolution Committee* [2012] QPEC 13 at pp.4-5, referring to *Fancourt v. Mercantile Credits Ltd* (1983) 154 CLR 87 at 95-97.

27 Referring to s.39A Acts Interpretation Act 1954 and Fancourt.

28 *Demiscto Pty Ltd v. Brisbane City Council* [2008] QPEC 22 at [11] – concerning calculation of the date notice of the institution of an appeal was given to a submitter

29 Affidavit of AJ Hannay filed 17 October 2012, para 25, Ex AJH-1, pp.30-372.

30 Affidavit of AJ Hannay filed 17 October 2012, paras 25 and 43.

[21] On that basis and in consequence of that error and because the information and referral stage had not ended in accordance with s 3.3.20, notification did commence earlier than stipulated by s.3.4.3(3).

[22] An associated issue raised by Council[31] is that the material that was available for the public to inspect during the notification period was incomplete as it did not include the DTMR Information Request or the applicant's response to that Request.

[23] However the applicant points out that s.3.2.8 of IPA obliges Council to keep the following documents associated with development applications, available for inspection and purchase: the development application, including supporting material; any Acknowledgement Notice; any Information Request; any properly made submission; and any referral agency response. That obligation continues from the time the assessment manager receives the development application until, relevantly, the end of any appeal period. Accordingly the requests for information from DERM and DES; the applicant's responses to DERM and DES; and Ergon's response would have been on the Council's file.

[24] In *Wynne v Beaudesert Shire Council*[32] the Court considered an application in respect of which notification had commenced prematurely, and a consequential allegation of lapse of the development application. That decision involved the absence of a report regarding site contamination. Even under the narrower regime of s.4.1.5A, the Court determined to excuse that non-compliance. In so doing the Court observed:

> "In my respectful opinion, it would be better to look at the reality of what actually happened, rather than automatically assuming that an irregular process inevitably caused the application to lapse. It is better to recognise it as an effective notification process, and then deal with the consequences of the irregularity.
>
> On these facts, it would be wrong in principle to say that the actual notification was ineffective. It is not every defective notification that will be ineffective, and void. Attention has to be paid to the notification that was made, and the information that was outstanding. Even if there is a defect in the notification, it does not necessarily mean that it is void and that the application has lapsed.

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31 Item 5 of the letter from King and Company dated 11 May 2012

32 [2007] QPEC 131.

> Other consequences may have to be considered, including this Court's power to deal with the non-compliance.
>
> So, in this case, attention should be focused on the irregularity, and its consequences."[33]

[25] In this instance, an exercise of discretion to excuse these aspects of non-compliance may be warranted by regard to the following considerations:

(a) the requests for information from the referral agencies other than DTMR, and the applicant's responses to those requests, were all available on Council's file during the notification period;

(b) in terms of the DTMR response, the material which was available to potential submitters included traffic engineering information. A traffic engineering report was provided to Council in response to its Information Request[34];

(c) DTMR ultimately approved the application subject to conditions[35];

(d) the non-compliance does not appear to have adversely affected the decision-making role of any of the referral agencies or Council; and

(e) submitters raised traffic engineering issues including with respect to the State-controlled highway[36], and any party has the entitlement to raise traffic engineering issues in the appeal, should it be permitted to proceed to determination on the merits.

Shorter notification period

[26] Ordinarily, s.3.4.5 of IPA prescribes a minimum 15 business day notification period. In this instance however, the development application triggered a 30 business day notification period, as the land contained or shared a common boundary with a "wetland", at its western boundary.

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33 at [15] – [17] – referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
34 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.195-209.
35 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.489-501.
36 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.572 – 588.

[27] It may be accepted that the failure to notify the application for the required 30 business day period was an oversight,[37] having regard to the circumstances that public notification requirements are expressly set out in Chapter 3, Part 4 of IPA, (under the obvious heading of "*Notification stage*"), but the 30 business day trigger is to be found in s.6.7.1A, read in conjunction with Schedule 8 of the of the *Integrated Planning Regulation 1998* ("IPR").[38]

[28] Further, it can be noted that:

(a) each of the three Council Acknowledgement Notices stated the notification period as being 15 business days;

(b) the 30 business day requirement was not realised by Council or DERM (or anyone else) during the course of the application. That was despite the fact that the application material identified the existence of the wetland[39], and that DERM carried out its referral agency functions accordingly[40]; and

(c) DERM does not oppose the application.[41]

[29] The public notification period was calculated to commence on the day after the last action required by s 3.4.4 of IPA, being the notice in the local newspaper on 3 February 2010[42] and allowed for 15 business days, being to 24 February 2010[43]. But it is conceded that the notification period was, because of the effect of the legislative requirements, only 14 business days.[44] Although the actuality of notification was:

(a) in respect of the notices on the land, 18 business days; and

(b) in respect of the newspaper advertisement, 15 business days.

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37 Further Affidavit of AJ Hannay filed on 8 November 2012, para 5.

38 The applicant's description "hidden away" is not entirely inapt.

39 Environmental Management Plan – Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.154-155 (which depicted the riverine wetland on the land's western boundary in Fig.2).

40 Eg DERM Information Request of 25 January 2010 at Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.137.

41 *Lewani Springs* [2010] QCA 145 at [29].

42 The reference to "2009" is obviously an error – see para 21(i), and Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.346 -347.

43 Affidavit of AJ Hannay filed 17 October 2012, para 21(iv).

44 The period between 5 and 24 February inclusive.

[30] Notwithstanding that abridged notification, the following matters may warrant a favourable exercise of discretion:

(a) as noted, the existence of the wetland was identified in material which supported the application, and it was also identified as an aspect of the development with which DERM was involved, on the DERM Information Request of 25 January 2010. Any person sufficiently interested in the proposal, or the wetland, is unlikely to have been misled. Indeed, the submissions lodged with Council expressly refer to concerns about impacts upon the adjoining creek[45];

(b) the effect of this non-compliance is that notification was not carried out for the full period. Whilst the period was shorter, the notification which was carried out identified the period within which submissions could be made.

(c) there is no evidence of any late submission, or even any complaint that a potential submitter had insufficient time to lodge a submission[46];

(d) there is no evidence of any unacceptable impact of the proposal on the wetland. As noted, DERM provided suggested conditions of approval as part of its agency response[47]. The scale of the subject land is relevant in that regard. By reference to the Concept Plan, it can be seen that there is considerable separation between the proposed facility and the wetland;

(e) neither Council nor the referral agencies have been adversely affected by the non-compliance; and

(f) to the extent that any other party wishes to challenge DERM's concurrence agency response, or raise issues regarding the wetland, they may do so as part of any hearing of the appeal on the merits.

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45 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.571, 577, 581, 583, 587 and 588.
46 See *Lewani Springs* – [2010] QPELR 321 at [18]; and [2010] QCA 145 at [25-26] and cf: [100-101].
47 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p.540.

Alleged lapse of development application pursuant to s.3.4.6(2) of IPA and for failure to undertake public notification within 20 business days

[31] Section 3.4.6(3) of IPA requires that the various notification steps (as prescribed by s.3.4.4(1)) must be completed within 5 business days after the first of the actions is carried out pursuant to s.3.4.6.

[32] This aspect of non-compliance is related to s.3.2.12 of the IPA which provides the circumstances in which development applications lapse. In particular, s.3.2.12(2)(c) nominates a 20 business day period for carrying out public notification in accordance with s.3.4.4. That section, in turn, flows from s.3.4.3 which identifies when the notification stage can start.[48]

[33] The chronology of the steps that were taken, namely notices on the land on 31 January 2010; notices sent to adjoining owners on 2 February 2010; and notice in the newspaper on 3 February 2010, confirm that s.3.4.6(3) was complied with.

[34] However that is only a correct analysis if the impact of the error in respect of referral to DTMR is put aside and, as the respondent contends, when regard is had to what actually occurred in respect of that referral, the development application lapsed on or about 7 October 2010, because public notification should have commenced within 20 business days of 8 September 2010. That contention relates to the Information Request by DMR, and the applicant's response to it.[49]

[35] It can be concluded that this aspect of non-compliance is merely technical and flows from the earlier discussed non-compliance issues and any relief for it would follow any conclusion in respect of those issues.

[36] Even under the tighter s.4.1.5A regime, the Court was prepared to excuse lapsing of this nature[50]. As noted, s.820(3) expressly confirms the Court's jurisdiction to excuse a lapse.

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48 In this case s.3.4.3(3).

49 Council's particulars – Affidavit of AJ Hannay filed 17 October 2012, Exhibit AJH-1, p.634, para (3).

50 For example, the various decisions referred to in *Maryborough Investments* (supra) at [19] –[23]

Different dates for the closing of submissions on notices on the land

[37] A further issue raised by Council is that "public notice of development signage contained different dates for the closing of submissions".[51]

[38] The discrepancy with respect to the dates on the signs is explained in correspondence to Council dated 19 August 2010.[52] In short, notices were placed upon the land in anticipation that an identical notice would appear in the newspaper several days before 3 February 2010. That notice did not appear in the newspaper on that date, but did on 3 February 2010. The notice which appeared identified the closing date as 24 February 2010. As a consequence, the notice on the land was changed to accord with that date for submissions.

[39] In accordance with leave granted at the hearing of the application, there is evidence that after being erected with reference to the closing date for submissions as 17 February 2010, the notice on the land was, on 3 February 2010, amended to read 24 February 2010, as the closing date and remained in that condition until removed on 26 February 2010.[53]

[40] To the extent that this may amount to non-compliance with the IDAS requirements, no person could have been materially affected by it. Any person who was sufficiently interested in the notice and wished to lodge a submission, would have done so by either 17 or 24 February 2010. Put another way, the correct closing date for submissions was later than that which initially (and temporarily) appeared on the notice on the land.

[41] Accordingly, excusal for any non-compliance on this account should also follow any excusal in respect of the shortened notification period.

Powerlink as an advice agency

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51 Affidavit of R. Livingstone-Ward filed 1 November 2012, relates to that issue. It, in turn, refers to the letter from Council to the Applicant dated 21 May 2010 - Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1 at p 397-398.

52 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.399-401.1; also Further Affidavit of AJ Hannay filed on 8 November 2012, para 7.

53 See affidavit of ME Dingley, filed on 16 October 2012.

[42] Council also correctly contends that the development application required referral to Powerlink as an advice agency, but the application was not referred to that entity.

[43] Schedule 2 of the *Integrated Planning Regulation 1998* identifies referral agencies and their jurisdiction. Table 3, Item 8 applies to a material change of use in circumstances where, relevantly, any part of the premises is subject to an easement in favour of a distribution entity or transmission entity under the *Electricity Act 1994*, and any structure or work that is the natural and ordinary consequence of the use is, or will be, located wholly or partly within the easement.

[44] Unfortunate confusion appears to have arisen as a consequence of the fact that the IDAS application forms incorrectly suggested that referral to Ergon Energy was "triggered". Despite that, the applicant contends that the supporting application material made it clear that no structure or works are to be located within the easement.[54] However, the respondent contends that this is not clear, when reference is had to all of the material.[55]

[45] It is not necessary or indeed possible on the materials to categorically resolve the issue as to whether it was necessary for referral to this advice agency. The fact of the matter is that the applicant and respondent each acted upon the basis that such referral was required, but wrongly identified, Ergon Energy as the agency. Ergon Energy also responded. However, the correct agency (assuming referral was necessary), Powerlink, also corresponded with the respondent (having been alerted by the public notice published by newspaper on 3 February 2010), by letter dated 12 February and which was received by the respondent on 17 February 2010.[56]

[46] In any event, both Ergon Energy, and subsequently Powerlink, have each stated that they do not oppose the proposal, on the basis of conditions identified by them.[57]

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54 Eg. Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, pp.35, 38, 124.

55 Eg: Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p 106 and Further Affidavit of AJ Hannay filed on 8 November 2012, Ex AJH-1 at p 6, in reference to some potential encroachment of a roadway or car park.

56 See Further Affidavit of AJ Hannay filed on 8 November 2012, Ex AJH-1 at pp 1-2.

57 Affidavit of AJ Hannay filed 17 October 2012, Ex AJH-1, p.136 Further Affidavit of AJ Hannay filed on 8 November 2012, Ex. AJH-1, pp.1-6.

[47] Powerlink expressly sought that its letter be treated as a properly made submission but it appears that the respondent failed to acknowledge this. The solution proposed by the applicant whereby that non-compliance is corrected by declaration that Powerlink be treated as a submitter, with the necessary consequential orders so that its rights of participation in the appeal are protected, is appropriate.

[48] However, the respondent suggested in argument that it may be necessary to go a step further and also excuse any non-compliance in the failure to actually refer the application to this advice agency.[58] However, I am not satisfied that this is appropriate or necessary where there is an unresolved dispute as to whether the trigger for such referral was or is actually engaged and because any such excusal, if required, could be regarded as implicit in the orders proposed by the applicant.[59]

Discretionary Considerations

[49] Although there have been various aspects of non-compliance, many of them are technical in nature and some arise as a consequence of some other non-compliance. Particularly having regard to the stated purpose of the notification stage in s 3.4.1 of IPA, the most significant aspect is the shortened notification period.

[50] In this regard and as has been noted, the Court's excusatory power under s.820 is very broad. It is considerably broader than that which previously applied under s.4.1.5A of the IPA. For instance, the Court is not expressly required to consider whether it is satisfied that the non-compliance has "not substantially restricted the opportunity for a person to exercise the rights conferred on the person". Nevertheless, and although each case is to be determined on its own merits, some comfort may be derived from previous decisions of this Court where similar aspects of non-compliance have been excused, even under that more restricted regime.[60]

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58 As required by s 3.3.3(1) of IPA.

59 Accordingly it will be necessary to reconsider the declaration sought at 2(c) of the application.

60 For example: *Lagoon Gardens Pty Ltd v Whitsunday Shire Council* [2006] QPELR 490; *Kunapippi Springs Pty Ltd v Whitsunday Shire Council* [2006] QPELR 490; *Consolidated Properties Group Pty Ltd v Brisbane City Council* [2008] QPELR 729; *Lewani Springs Resort Pty Ltd v Gold Coast City Council* [2010] QPELR 321; and *Lewani Springs Resort Pty Ltd v Gold Coast City Council* [2010] QCA 145 (application for special leave to appeal to the High Court refused). In *Lewani Springs*, two other decisions of *Stockland Developments Pty Ltd v Thuringowa City Council* [2007] QPELR 430 and *Jahnke v Cassowary Coast Regional Council* [2009] QPEC 39 were distinguished.

[51] I agree with the effect of the observations made in *Maryborough Investments v Fraser Coast Regional Council,* [61] that whilst under the excusal powers provided in SPA, the court is not expressly required to consider whether any non-compliance "has not substantially restricted the opportunity" of exercise of the rights given to persons under the legislation, as a consideration to be satisfied before exercise of discretion to excuse non-compliance, evidence of restriction of such rights would remain relevant to such an exercise of discretion. This may be particularly so in respect of non-compliance relating to the notification stage, because of the stated purposes in s 3.4.1 of providing:

> " (a) the opportunity to make submissions, including objections, that must be taken into account before an application is decided; and
> (b) the opportunity to secure the right to appeal to the court about the assessment manager's decision."

[52] Similar considerations potentially arise in respect of the position of the referral agency, Powerlink. However and as has been noted, not only was the advice of this agency obtained and considered in the assessment process, but the applicant's proposal in respect of protecting the ongoing rights of that agency are practically effective and in accordance with the original request of Powerlink.

[53] Further and as confirmed by the majority judgement in *Lewani Springs Resort v. Gold Coast City Council,*[62] where there is (such as the respondent here) a party who may be expected to be aware of and place before the court any evidence of complaint of any such restriction, absence of any such evidence may in the particular circumstances support an inference that there has not been or it is unlikely there has been any such restriction. That conclusion was reached in circumstances where the requirements of s 4.1.5A of IPA were in issue and under the excusal powers in SPA, the mere absence of evidence of any such prejudice may be of greater significance.

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61 [2010] QPEC 113 at [33]-[34].
62 [2010] QCA 145 at [25]-[26].

[54] In this instance it is particularly relevant to the issue of public notification, that the development proposal was the subject of a "high degree of community awareness".[63] In addition to the formal public notification that was carried out:

(a) the application received "significant public exposure in the newspaper and on the television, before, during and after the notification period"[64];

(b) public meeting was held at the Bajool Community Hall not long after the development application was lodged at which the proposal was discussed[65];

(c) an information session was also held at the Community Hall on 12 April 2010 to inform local residents of the development application and its assessment process[66];

(d) during the course of the decision-making period community members and media representatives interviewed various councillors, community members and Ms Hannay at those meetings, and radio, television and newspapers ran several stories reporting the development assessment[67];

(e) Multus released media statements and information sheets, including paid advertisements, about the proposal.[68]

(f) Ms Hannay's experience from talking with members of the community was that there was a high degree of community awareness with respect to the development application[69]; and

(g) submitters were given the opportunity to address Council's Strategic Planning Committee at its meeting of 14 June 2011 to discuss the development application[70].

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63 Affidavit of AJ Hannay filed 17 October 2012, para 59.
64 Affidavit of AJ Hannay filed 17 October 2012, para 59.
65 Affidavit of AJ Hannay filed 17 October 2012, para 60.
66 Affidavit of AJ Hannay filed 17 October 2012, para 61.
67 Affidavit of AJ Hannay filed 17 October 2012, paras 52 and 61; also Ex AJH-1, pp.618.1 – 618.5.
68 Affidavit of AJ Hannay filed 17 October 2012, para 53, and Ex AJH-1, pp.618.6 – 618.8.
69 Affidavit of AJ Hannay filed 17 October 2012, paras 64 & 65.
70 Affidavit of AJ Hannay filed 17 October 2012, paragraph 51

[55] In addition to the factors which have been identified in respect of the individual aspects of non-compliance, the following matters support a favourable exercise of the discretion under s.820:

(a) whilst the applicant accepted that it was ultimately responsible for compliance with the IDAS process, in this instance it also pointed to inadvertent complicity by the Council as the assessment manager, and the various referral agencies, in aspects of the non-compliance. By way of example, Council issued three Acknowledgement Notices throughout the course of the development application and on each instance incorrectly identified the notification period as the "standard" 15 business days;

(b) the existence of the wetland was not concealed. It was identified in development application material; recognised by the relevant authority, DERM and any approval is to be conditioned accordingly;

(c) in the main, the aspects of non-compliance arise, at least in part, as a consequence of the rather complicated processes under IDAS and the non-compliance which has arisen, occurred by way of oversight and the applicant has derived no discernable benefit from it;

(d) Ms Hannay's evidence is that whilst compliance issues were raised during the course of the assessment of the development application, it was concluded following discussions with Council and agency officers that the application could proceed[71];

(e) some of the aspects of non-compliance arise as a direct consequence of other non-compliance. For example, the alleged lapsing of the application only arises as a direct consequence of the non-compliance with the strictures of timing of public notification;

(f) there is no complaint of any missed opportunity to lodge a submission. Indeed, submissions were lodged, by local residents, and also by the Ratepayers Organisation, which is now the 4th Co-

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71 Affidavit of AJ Hannay filed 17 October 2012, paras 24, 29, 30, 33, 40 and 41; and Further Affidavit of AJ Hannay filed by leave on 8 November 2012, paras 3 and 4

Respondent by Election to the appeal, and represents "a large proportion of the Bajool, Marmor population"[72] and

(g) accordingly there is no suggestion of any relevant prejudice to anyone.

[56] Neither of the decisions which engaged the concern of the respondent is other than an instance of exercise of discretion according to particular facts and circumstances.

[57] In *Rufus v Rockhampton Regional Council and Miller Incorporated*[73], the conclusion of declining an exercise of discretion to excuse non-compliance with a public notification requirement, under s 820 of SPA, was reached in the context of:

(a) a conclusion (in a submitters appeal) that the application made by an incorporated association for a material change of use of land, was not properly made, due to the absence of an appropriate resolution of the association (and for that reason, as contended by the applicant here, an unnecessary conclusion); and

(b) a specific finding that "in light of the relatively large number of submissions received, it cannot be said that had the application been properly advertised for the mandatory period of 30 business days, it is unlikely that further submissions would have been received"[74], made in the further context of evidence of submitters whose submissions were made after the advertised closing date and who, it was therefore found, had lost a right of appeal which they deposed would have been exercised. [75]

[58] In *Hay v Ors v Rockhampton Regional Council*[76], the entreaty was to an exercise of discretion under s 440 of SPA (an equivalent provision to s 820 of SPA). Although there were a number of aspects of non-compliance, in relation to public notification by signage on site, many of which were regarded as capable of excusal, the refusal

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72 According to its submission – Exhibit JH-1, p.587
73 File Nos. 118, 119 and 120 of 200.
74 Ibid at [47].
75 Ibid at [43].
76 File No 622 of 2011 at p. 7.

to finally excuse (in respect of what was regarded as a controversial development) turned on a finding that it was impossible to favourably answer the last question identified by Skoien DCJ in *Metrostar Pty Ltd v Gold Coast City Council*[77], in terms:

> "Will the exercise of the discretion in favour of the developer be likely to shut out some submitter with a legitimate case to put?"

This was because of a finding that the erected signs had erroneously contained a closing date for submissions that substantially pre-dated the date of erection and accordingly, may have misled interested persons into a belief "that they had missed the opportunity to participate in the process by making a submission concerning the development".

[59] Notwithstanding the combination of difficulties in the nature of non-compliance in this case, it also differs from each of the cases that concerned the respondent, in that it can be confidently concluded that there is not only no evidence of any potential submitter being restricted in any opportunity of involvement in the process and the appeal which may be subsequently heard in this court but also no likelihood that this had occurred.

[60] Further and whilst the onus remains on the applicant to satisfy the court that an exercise of discretion is warranted, no party has indicated that it opposes the non-compliance being excused and favourable exercise of the discretion sought by the applicant, will enable the merits appeal to proceed in the usual way. In so doing, all parties to the appeal will be entitled to raise and have the Court consider, merits issues with a view to determining whether or not the development proposal should be approved.[78] There would be no useful purpose in requiring the development application to recommence the IDAS process. Indeed, to do so would involve significant cost, delay and inconvenience to all parties[79], in circumstances where except in respect of the 30 day notification period, the compliance issues were identified and practically addressed prior to the conclusion of the process whereby the decision, which is the subject of the appeal, was made.

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77 [2006] QPEC 22.
78 *Lewani Springs Resort v. Gold Coast City Council* [2010] QCA 145 at [37].
79 See eg *Maryborough Investments* at [28].

[61] Notwithstanding that the development proposal is an apparently controversial one, as indicated by the number of co-respondents by election, this is an appropriate outcome in the absence of any evidence of prejudice to any interest.

Conclusion

[62] Accordingly, there will be orders of the kind sought by the applicant to excuse the aspects of non-compliance and to deal with any consequential issues, as identified in these reasons. I will hear the parties as to the precise form of those orders.