

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Spring Lake Holdings Pty Ltd* (ACN: 156 492 885) *as Trustee for Spring Lake Trust v Ipswich City Council & Anor* [2023] QPEC 1

PARTIES: **SPRING LAKE HOLDINGS PTY LTD (ACN 156 492 885) AS TRUSTEE FOR SPRING LAKE TRUST**  
(Appellant)

v

**IPSWICH CITY COUNCIL**  
(Respondent)

**CHIEF EXECUTIVE, DEPARTMENT OF STATE  
DEVELOPMENT, MANUFACTURING,  
INFRASTRUCTURE AND PLANNING**

(Co-Respondent by Election)

FILE NO/S: 1428/2021

DIVISION: Planning & Environment

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning & Environment Court, Brisbane

DELIVERED ON: 27 January 2023

DELIVERED AT: Brisbane

HEARING DATE: 21 February 2022, with further mentions on 3 March 2022, 13 April 2022 and 12 July 2022 and further submissions on 22 July 2022.

JUDGE: McDonnell DCJ

ORDER: **The Planning and Environment Court does not have jurisdiction to hear and determine the appeal from an application to amend the area development plan approved under the Springfield Structure Plan.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – whether the Planning and Environment Court has jurisdiction to hear and determine an appeal from the deemed refusal of an amendment of an Area Development Plan approved under the Springfield Structure Plan – whether an Area Development Plan is a development application for the purposes of the *Planning Act 2016* (Qld)

CASES: *BGM Projects Pty Ltd v Zacka* [2019] QPELR 885

*Friend & Ors v Brisbane City Council & Ors* (2013) 196 LGERA 337

*Gault v South Burnett Regional Council & Ors; Robbins v South Burnett Regional Council & Ors; Rodgers v South Burnett Regional Council & Ors* [2009] QPELR 540

*Hamill & Anor v Brisbane City Council and Preretirement Resorts Pty Ltd* [2005] QPELR 23

*Jeffrey and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75

*Lacey v Attorney-General (Qld)* (2011) 242 CLR 573

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

*Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2019] QPELR 96

*R v His Honour Judge Noud, ex-parte MacNamara* [1991] 2 Qd R 86

*Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd* [2019] 3 Qd R 40

*Stevens v Trewin and Van Den Broek* [1968] Qd R 411

*Sunshine Coast Regional Council v D Agostini Property Pty Ltd & Ors (No. 2)* [2022] QPELR 545

*Waterman v Logan City Council* [2018] QPELR 46

*Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QPELR 686

LEGISLATION: *Planning Act 2016* (Qld) ss 8, 44, 49, 229(1), 316(4), schs 1, 2

*Planning and Environment Court Act 2016* (Qld) s 7

*Sustainable Planning Act 2009* (Qld) s 857

COUNSEL: JD Houston for the Appellant

J Brien for the Respondent

SOLICITORS: Birch & Co Solicitors Pty Ltd for the Appellant

Clayton Utz for the Respondent

## Introduction

- [1] As a preliminary issue in the appeal, the Council seeks a declaration that the Planning and Environment Court does not have jurisdiction to hear and determine

an appeal from an application to amend an Area Development Plan (ADP) approved under the Springfield Structure Plan (SSP).<sup>1</sup>

[2] On 4 March 2022, Spring Lake Holdings Pty Ltd (ACN 156 492 885) as Trustee for Spring Lake Trust (SLH) filed an amended Notice of Appeal against the Council's deemed refusal of its applications to amend an existing approved ADP, for a development permit for a material change of use and for a development permit for operational work on land situated at Springfield Lakes, Queensland (the Land).

[3] Prior to the hearing, the parties appropriately agreed the issues for determination by the Court. These issues were further refined on 3 March 2022, 12 April 2022 and 19 April 2022 such that the questions to be determined by the Court are:

1. (a) Does the *Planning Act* 2016 (*Planning Act*) or any other Act confer a right of appeal such that the appeal to the Planning and Environment Court, to the extent it relates to the deemed refusal by the Council of an application by the Appellant to amend an existing approved ADP approved under the SSP, is competent (first issue).
- (b) If the answer to (a) is no, does the Planning and Environment Court nevertheless have jurisdiction to hear that part of the appeal in respect of the amendment the ADP (second issue).
2. In addressing the first issue, the following specific questions arise:
  - (b) is that part of SLH's application which sought approval to amend the existing approved ADP a "development application" for the purposes of the *Planning Act*;
  - (c) is Council's deemed refusal of the application to amend the existing approved ADP a decision to which s 11 of the SSP applies; and
  - (d) is the mechanism for addressing Council's deemed refusal in respect of the application to amend the existing approved ADP limited to s 11 of the SSP.

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<sup>1</sup> Outline of Submissions of the Respondent [3(a)].

3. In addressing the second issue, the following specific question arises:

- (c) if so, is the deemed refusal of the application which sought to amend the existing approved ADP, however characterised under 2(a), properly justiciable as part of that Appeal.<sup>2</sup>

[4] All submissions were on the basis of the original Notice of Appeal, not the Amended Notice of Appeal, and the parties indicated they sought a decision on the basis of the submissions made. The parties had the opportunity to make further submissions and did not. That they did not revise their submissions in view of the Amended Notice of Appeal and revised issues caused difficulties in addressing the preliminary issue.

[5] Questions 2(c) and (d) do not arise as preliminary issues in this appeal. The questions posed are hypothetical as the time for giving notice under s 11 of the Springfield Structure Plan has passed and there was no evidence such notice has been given. Accordingly, these questions have not been determined.

[6] The Co-Respondent by Election was excused from any active steps or involvement in the hearing and determination of the preliminary point.<sup>3</sup>

### **The planning framework**

[7] The 1997 Springfield Development Control Plan (Springfield DCP) was made on 24 January 1997, and an amended version of the Springfield DCP titled the “Springfield Structure Plan” (SSP) has been part of the planning schemes for the Ipswich local government area since March 1998.

[8] The SSP now forms Part 14 of the Ipswich Planning Scheme 2006 (IPS 2006).

[9] The history of the SSP through the legislative regimes applicable since it came into effect was examined by the Court of Appeal in *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd & Anor.*<sup>4</sup>

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<sup>2</sup> Ex 4, Agreed List of Questions to be Addressed by the Court, as amended at mention 13 April 2022, and in accordance with Ex 7.

<sup>3</sup> Order of His Honour Judge Williamson QC 25 October 2021.

<sup>4</sup> [2019] 3 Qd R 40.

- [10] The SSP is expressly preserved in the *Planning Act* and continues to apply to land subject to it by the operation of s 316 of the *Planning Act*.<sup>5</sup> Section 857 of the *Sustainable Planning Act 2009* (Qld) (SPA) continues to apply to the SSP.<sup>6</sup> Section 857(1) of SPA is satisfied for the SSP, and therefore the balance of s 857 of SPA continues to apply to the SSP.<sup>7</sup>
- [11] The SSP is to take precedence over any inconsistent provision elsewhere in the IPS 2006<sup>8</sup> and provides a comprehensive suite of planning controls for the area of the SSP subject to it.<sup>9</sup>
- [12] The Court of Appeal considered the applicable principles for the construction of planning documents in *Zappala Family Co Pty Ltd v Brisbane City Council* saying:

“[52] The same principles which apply to statutory construction apply to the construction of planning documents. The High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* said:

[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole.’ *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus the process of construction must always begin by examining the context of the provision that is being construed.

[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provision to achieve that result which will best give effect to the purpose and language of the provisions while maintaining the unit of all of the statutory provisions. Reconciling conflicting provisions will often require the court ‘to determine which is the leading provision and the subordinate provision, and which must give way to the other’.

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<sup>5</sup> *Mirvac Queensland Pty Ltd v Ipswich City Council* [2020] QPELR 786 [6].

<sup>6</sup> *Planning Act* s 316.

<sup>7</sup> *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd* [2019] 3 Qd R 40 [27].

<sup>8</sup> Ex 2, p 27, SSP s 1.6.

<sup>9</sup> *Mirvac Queensland Pty Ltd v Ipswich City Council* [2020] QPELR 786 [6].

Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Bershet* to support the proposition that it was ‘a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.’

....

[78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning...’

...

[55] The correct approach to statutory interpretation must begin and end with the text itself. At the same time it must be borne in mind that the:

‘Modern approach to statutory interpretation... (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense...’

[56] The fact that planning documents are to be construed precisely in the same way as statutes still allows for the expressed view that such documents needs to be read in a way which is practical, and read as a whole and as intending to achieve balance between outcomes.<sup>10</sup> (Footnotes omitted).

### **Background to the application**

[13] SLH operates the Spring Lake Metro Shopping Centre on the Land. Development of the Land is subject to the SSP.

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<sup>10</sup> [2014] QPELR 686.

- [14] On or about 7 December 2017, SLH applied to the Council for a development permit for a material change of use and a development permit for operational works in respect of the Land.
- [15] On or about 14 December 2017, the Council issued a notice to SLH stating that the application was not a properly made application under the SSP because:
- (a) the application forms did not identify the application as an ADP application, referring to s 2.3.2 of the SSP; and
  - (b) the application was not accompanied by the correct fee.<sup>11</sup>
- [16] SLH:
- (a) lodged an ADP form on or about 14 December 2017; and
  - (b) paid the fee on or about 8 January 2018.
- [17] Between January 2018 and March 2021, amongst other things, the Council issued information requests and SLH responded to them.
- [18] It was common ground at the hearing that the time for a decision by the Council about the amendment of the ADP had passed, that the Council had not made a decision and that it was deemed refused by the Council.<sup>12</sup> Council said the deemed refusal occurred by operation of s 2.3.2 of the SSP,<sup>13</sup> while SLH said because of the approach taken by the Council during its consideration of the amendment of the ADP, the deemed refusal occurred either pursuant to s 2.2.4 or s 2.3.2 of the SSP.<sup>14</sup>
- [19] To the extent the Council treated this as an approval of an ADP pursuant to s 2.2.4 of the SSP it is not. There is a process for amendment of an ADP, and it is set out in s 2.3 of the SSP, which the parties accepted.<sup>15</sup>
- [20] SLH further said that part of the application which sought a development permit for a material change of use and that part of the application which sought a development permit for operational works are now deemed to be refused. During

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<sup>11</sup> Ex 1, pp 127 – 128.

<sup>12</sup> Outline of Submissions of the Respondent [15]; Amended Notice of Appeal.

<sup>13</sup> Outline of Submissions of the Respondent [15].

<sup>14</sup> T1-40, ll 29 – 30, 21 February 2022.

<sup>15</sup> Updated Appellant's Outline of Submissions in Reply Preliminary Point [74]; Outline of Submissions of the Respondent [15].

the hearing the Council accepted that the material change of use and operational works applications are deemed refused and that there is a right of appeal with respect to those components.<sup>16</sup>

[21] The parties agreed that:

- (a) as at the date of the application in 2018 there was an existing approved ADP for the Land that was approved by Council on 1 December 2017;<sup>17</sup> and
- (b) the proposed amendments to the ADP are minor for the purposes of s 2.3.3 of the SSP.<sup>18</sup>

### **Relevant provisions of the SSP**

[22] The relevant provisions of the SSP are set out below:

#### **“2.2 Local Area Plans**

Due to the long-term nature of the development of the Springfield area the planning process created by this Structure Plan must recognise that it is not possible to create a “blueprint” for the area and that the Structure Plan must be able to respond to changes in market demand, technology and society itself.

Consequently, whilst the Structure Plan provides the guidance or “footprint” for the development of the area, local area plans will be necessary to provide a basis for sound planning decisions and for Council to assess development applications. The local area plans must be designed within the framework of the Structure Plan.

Local Area Plans comprise the Land Use Concept Master Plan, the Town Centre Concept Plan, Precinct Plans and Area Development Plans. They operate at a series of levels from the general concept plans to the more specific Area Development Plans.

Sections 2.2.1 to 2.2.4 inclusive outline each type of Local Area Plan, their role and application for and approval of Local Area Plans. Section 2.3 deals with amendments to Local Area Plans.

...

#### **2.2.4 Area Development Plans**

##### **2.2.4.1 Role of Area Development Plans**

Area Developments Plans are the mechanism whereby the master planning of the Structure Plan area (outlined the

<sup>16</sup> T1-2, ll 38 – 41, 3 March 2022.

<sup>17</sup> Outline of Submissions of the Respondent [12]; Updated Appellant’s Outline of Submissions in Reply Preliminary Point [17], [18], [62].

<sup>18</sup> Updated Appellant’s Outline of Submissions in Reply Preliminary Point [66]; Outline of Submissions of the Respondent [11].



Concept Plans) is put into effect. Area Development Plans function as reconfiguration or land use proposals to produce an integrated plan for the development of the particular area covered by the plan. Specifically, development of any land included within the Structure Plan area cannot take place within any of the five Structure Plan designations unless—

- (i) there is an Area Development Plan over the land to be developed which has been approved by Council; and
- (ii) the development is shown on or consistent with the Approved Development Plan.

...

#### **2.2.4.2 Nature of Area Development Plans**

Upon its approval, an Area Development Plan—

- authorises the reconfiguration of land covered by the Plan in the manner in the Plan; or
- authorises the use of the land (or particular reconfigured parcels of the land) covered by the Plan for the purpose or purposes shown or nominated thereon, and if applicable at their location(s) or on the site or sites shown or nominated on the Area Development Plan, provided the use of the land is in compliance with the Table of Development relating to the respective Structure Plan designations.

#### **2.2.4.3. Application for Approval of Area Development Plan**

Prior to any development being carried out on the land the subject of this Structure Plan, an application must be made to the Council for approval of an Area Development Plan which includes the land to be developed.

...

### **2.3 Amendments to local area plans**

...

#### **2.3.2 Area Development Plans.**

An approved Area Development Plan may be amended at any time by the approval of a subsequent Area Development Plan over the whole or any part of the land the subject of the Approved Area Development Plan. However if—

- (b) The amendment is other than minor; and
- (c) The development pursuant to Area Development Plan has substantially commenced

development in accordance with the proposed amendment shall be deemed to require development approval pursuant to the impact assessment process of the Act.

If Council has not decided an Area Development Plan which amends a prior Area Development Plan within the following time periods, that is—

- (a) in the case of a minor amendment, within forty (40) days after application for approval of the amending Area Development Plan is made to Council;
- (b) in any other case within the time specified in the Act in respect of development approval pursuant to the impact assessment process

the Council shall be deemed to have refused the amending Area Development Plan.

In respect of land covered by an approved amending Area Development Plan the previously approved Area Development Plan is superseded.

### **2.3.3 Definitions**

...

*‘minor’* means anything consistent with, ordinarily incidental or allied to or compatible with or contemplated by the approved Local Area Plan or this Structure Plan or the principles set out in them or which is of a similar nature or impact to the particular purpose indicated on the approved Plan

## **2.4 Tables of Development and Assessing Development Applications**

This structure plan must be read together with the IPA.

...

### **Categories of Development Assessment**

Under the IPA development may be categorised as either exempt development, self-assessable development or assessable development.

...

#### **2.4.1 Application for Approval for Assessable Development Subject to the Code Assessment Process**

A person may make application for the approval of assessable development subject to the code assessment process in the manner specified in the IPA.

In addition to the matters which the Council would otherwise assess under its Planning Scheme

(including this Structure Plan), the Council must also assess the extent to which the application is consistent with any approved Area Development Plan which includes the subject land.

Council shall notify the applicant of its decision on such application within the time and in the manner prescribed by the IPA.

An application for such approval can be made concurrently with any application in respect of an Area Development Plan.”

**Jurisdiction of the Planning and Environment Court to hear the appeal against the deemed refusal of the amendment of the ADP**

[23] It was not contentious that:<sup>19</sup>

- (a) an appeal is a creature of statute, and subject to constitutional limitations, the precise nature of the appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context;<sup>20</sup> and
- (b) the Planning and Environment Court is a court of statutory jurisdiction.<sup>21</sup> Section 7 of the *Planning and Environment Court Act* 2016 (Qld) (PECA) provides that the Planning and Environment Court has jurisdiction given to it under any Act including the *Planning Act*.<sup>22</sup>

[24] SLH said the Planning and Environment Court is entitled to address the “entire controversy” being the three components of the appeal, under either its inherent jurisdiction or an accrued jurisdiction.<sup>23</sup> In relation to the Court’s power to control its own processes SLH referred to *Stevens v Trewin and Van Den Broek*,<sup>24</sup> *R v His Honour Judge Noud, ex-parte MacNamara*<sup>25</sup> and *Gault v South Burnett Regional Council & Ors; Robbins v South Burnett Regional Council & Ors; Rodgers v South Burnett Regional Council & Ors*.<sup>26</sup>

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<sup>19</sup> Outline of Submissions of the Respondent [16], [17]; Updated Appellant’s Outcome of Submissions in Reply Preliminary Point [91].

<sup>20</sup> *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 [56] cited in *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2019] QPELR 96 [35].

<sup>21</sup> *Waterman v Logan City Council* [2018] QPELR 46 [21].

<sup>22</sup> *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2019] QPELR 96 [36]; *Waterman v Logan City Council* [2018] QPELR 46 [21].

<sup>23</sup> Updated Appellant’s Outline of Submissions in Reply Preliminary Point [142].

<sup>24</sup> [1968] Qd R 411, 416-417.

<sup>25</sup> [1991] 2 Qd R 86, 93, 115 – 25.

<sup>26</sup> [2009] QPELR 540, 547.

- [25] Those cases dealt with a court considering its power to stay proceedings and exercising incidental jurisdiction as necessary for the effective exercise of its primary or express jurisdiction. That is quite different to the present circumstances.
- [26] Save to the extent to which the Planning and Environment Court may control its own processes to prevent abuse of processes,<sup>27</sup> including to strike out appeals,<sup>28</sup> stay proceedings<sup>29</sup> (including permanent stays)<sup>30</sup> and to regulate its own proceedings, including to set aside a subpoena, the Planning and Environment Court does not have inherent jurisdiction.<sup>31</sup>
- [27] The Court cannot, where appropriately seized of jurisdiction in relation to two aspects of an appeal, decide to also adjudicate the third component, absent jurisdiction.
- [28] SLH said that there is “no express intent in the SSP to oust the appeal jurisdiction of the Planning and Environment Court and such an intent would not be likely inferred”.<sup>32</sup> That approaches the issue through the wrong lens. The jurisdiction of the Court is derived from statute.
- [29] Appeal rights are found in Chapter 6, Part 1 of the *Planning Act*. Section 229(1) of the *Planning Act* provides that Schedule 1 states the matters that may be appealed to the Planning and Environment Court.
- [30] Schedule 1, 1(1) provides that Table 1 states the matters that may be appealed to the Planning and Environment Court and, for certain matters, to a tribunal in relation to:
- (a) a development application;
  - (b) a change application;

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<sup>27</sup> Outline of Submissions of the Respondent [16] - [17]; *Jeffrey and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 [28] the High Court outlined the relevant principles in relation to the inherent jurisdiction of any court to control its process and noted that in Australia “the categories of abuse of process are not closed”. Cited in *Friend & Ors v Brisbane City Council & Ors* (2013) 196 LGERA 337 [15].

<sup>28</sup> *Hamill & Anor v Brisbane City Council and Preretirement Resorts Pty Ltd* [2005] QPELR 23 [18], [25].

<sup>29</sup> *Gault v South Burnett Regional Council & Ors; Robbins v South Burnett Regional Council & Ors; Rodgers v South Burnett Regional Council & Ors* [2009] QPELR 540 [20].

<sup>30</sup> *BGM Projects Pty Ltd v Zacka* [2019] QPELR 885 [5].

<sup>31</sup> *Sunshine Coast Regional Council v D Agostini Property Pty Ltd & Ors (No. 2)* [2021] QPELR 545 [25].

<sup>32</sup> T1-3, ll 15-17, dated 21 February 2022.

- (c) an extension application;
- (d) an infrastructure charges notice;
- (e) conversion applications; and
- (f) enforcement notices.<sup>33</sup>

[31] Schedule 1, 1(4) provides that Table 2 states the matters that may be appealed to the Planning and Environment Court only. It does not confer jurisdiction in the present circumstances.

[32] Thus, Schedule 1 of the *Planning Act*:

- (a) Does not identify an application to amend an ADP pursuant to the SSP as a matter that may be appealed to the Planning and Environment Court; and
- (b) States that a development application is a matter that may be appealed.

[33] There are no other relevant provisions of the *Planning Act* or the *PECA* that provide for appeals to the Planning and Environment Court in relation to the amendment of an ADP under the SSP. The parties did not suggest that there is any other legislation that conferred jurisdiction.

[34] The SSP is a development control plan (DCP) for the purposes of s 857 of SPA.<sup>34</sup>

[35] Section 857(5) of SPA (as applied by s 316 of the *Planning Act*), relevantly states:

“To the extent the development control plan includes a process for making and approving plans, however called, with which development must comply in addition to, or instead of, the planning scheme or provides for appeals against decisions under the plan-

....

- (b) development under the development control plan must comply with the plans in the way stated in the development control plan; and
- (c) if the development control plan states that an appeal may be made, and an appeal is made, the appeal is validly made.

<sup>33</sup> *Planning Act* sch 1, s 1(1).

<sup>34</sup> *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd & Anor* [2019] 3 Qd R 40 [27]-[28].

- [36] It was not disputed that the SSP does not state that an appeal against decisions under the SSP may be made.<sup>35</sup>

**Is that part of the Appellant’s application which sought approval to amend the existing approved ADP a “development application” for the purposes of the *Planning Act*?**

- [37] SLH said its proposal to amend the ADP is an application in respect of ‘development’, being a material change in the intensity or scale of the use of premises as described in the definition of material change of use.<sup>36</sup> In so saying, it drew support from:

- (a) s 2.2.4.1 of the SSP which states, in part, that ADPs ‘function as ....land use proposals to produce an integrated development of a particular area’ and goes on to state that ‘development of any land within the Structure Plan area cannot take place unless there is an Area Development Plan over the land to be developed which has been approved by council’ and ‘the development is shown on or consistent with the approved Area Development Plan’ (emphasis added); and
- (b) s 2.2.4.2 of the SSP which provides that ‘upon its approval, an Area Development Plan authorises the use of the land covered by the Plan for the purpose or purposes or nominated thereon’ which it suggested is consistent with the definition of ‘development permit’, in so far as it authorises the carrying out of assessable development to the extent stated in the decision notice.

- [38] The Council did not agree that amending an ADP under the SSP is a development application. Further, it says that:

- (a) the use of the word “development” in s 2.2.4.1 of the SSP is not the same as the concept of development which has the three limbs in the *Planning Act*; and
- (b) s 2.2.4.2 of the SSP makes it clear that development as dealt with in the *Planning Act* is not being approved.

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<sup>35</sup> Outline of Submissions of the Respondent [27]; Updated Appellant’s Outcome of Submissions in Reply Preliminary Point [120].

<sup>36</sup> Amended Appellant’s Outline of Submissions in Reply Preliminary Point [112].

[39] That this is so, it says, is reinforced by the proper construction of s 2.4.1 of the SSP which provides that an application for approval for assessable development subject to the code assessment process under the *Planning Act* can be made concurrently with any application in respect of an ADP. SLH sought to amend the ADP pursuant to s2.3.2 and made concurrent applications seeking:

- (a) a development permit for a material change of use for:
  - (i) an additional child care centre;
  - (ii) a motel (extension);
  - (iii) additional ground level tenancies; and
- (b) a development permit for optional works for advertising structures.

[40] Following the conclusion of the hearing, the Court requested submissions from the parties addressing whether the amendment of the ADP is an application for a preliminary approval under the *Planning Act*.

[41] SLH submitted that the application to amend the ADP is properly characterised as an application for preliminary approval under the *Planning Act*. SLH considered the definition of “preliminary approval” under the *Planning Act* and said similarly that the ADP authorises development in accordance with the ADP, but not the carrying out of assessable development which is subject to further assessment under s 2.4.1 of the SSP. The Council submitted it is not.

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

[43] “Development application” is defined in the *Planning Act* to mean “an application for a development approval”.<sup>37</sup>

[44] “Development approval” is defined in s 49(1) of the *Planning Act* as:

- “A development approval is:
  - (a) a preliminary approval; or
  - (b) a development permit; or
  - (c) a combination of a preliminary approval and a development permit.”

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<sup>37</sup> *Planning Act* sch 2 Dictionary.

[45] Section 49(2) of the *Planning Act* provides:

“a *preliminary approval* is the part of a decision notice for a development application that—

- (a) approves the development to the extent stated in the decision notice; but
- (b) does not authorise the carrying out of assessable development.”

[46] Section 49(3) of the *Planning Act* provides:

“a *development permit* is the part of a decision notice for a development application that authorises the carrying out of the assessable development to the extent stated in the decision notice.”

[47] “Assessable development” is defined in s 44(3) of the *Planning Act* as “development for which a development approval is required”.

[48] “Development” is defined in Schedule 2 of the *Planning Act* to mean:

“(a) carrying out—

- (i) building work; or
- (ii) plumbing or drainage work; or
- (iii) operational work; or
- (b) reconfiguring of a lot; or
- (c) making a material change of use of premises.”

[49] Under Schedule 2 of the *Planning Act*, “material change of use” is defined as follows:

“material change of use, of premises, means any of the following that a regulation made under s 284(2)(a) does not prescribe to be a minor change of use—

- (a) the start of a new use of the premises;
- (b) the re-establishment on the premises of a use that has been abandoned;
- (c) a material increase in the intensity or scale of the use of the premises.”

[50] SLH’s reliance upon s 2.2.4.2 is not supportable. ‘Use’ is not the same as ‘development’. They are separately and differently defined in the IPS 2006. While a development permit authorises the carrying out of assessable development to the extent stated in the decision notice, s 2.2.4.2 provides that upon approval an



ADP authorises the use of land. The ADP is the plan against which a development application is to be assessed. This is supported by the structure of the applications required to be made being an amendment of the ADP and concurrent applications for a development permit for a material change of use and a development permit for operational works.

- [51] Nor does s 2.2.4.1 support SLH's position. This provision simply requires that an approved ADP be in effect over the land to be developed. An approved ADP is a precondition to development. That this is so is confirmed by s 2.2.4.3 which requires that:

“Prior to any development being carried out on the land the subject of this Structure Plan, an application must be made to the Council for approval of an Area Development Plan which includes the land to be developed.”<sup>38</sup>

- [52] That an amendment of an ADP is a development application is not supported by the structure of the SSP. The SSP distinguishes between applications for assessable development for which a development approval is required and amendments to an ADP. The SSP provides a specific process for amending an ADP in s 2.3.2. A separate and distinct process for an application for assessable development subject to the code assessment process is provided in s 2.4.1. Such an application, being for assessable development, requires development approval, and is a development application for the purposes of the *Planning Act*. That a development application may be made concurrently with any application in respect of an ADP<sup>39</sup> reinforces that amending an ADP is not a development application as envisaged under s 2.4 of the SSP. Amending an ADP, or plan making, is distinct from an application for assessable development under s 2.4.1 of the SSP.

- [53] Local Area Plans, which include ADPs, “provide a basis for sound planning decisions and for Council to assess development applications”.<sup>40</sup> This provision suggests that an ADP does not authorise the carrying out of assessable development and that amending an ADP is not itself a development application. Development of land within the SSP area cannot occur unless there is an approved ADP, and the development is shown on or consistent with the approved ADP. The ADP is the plan against which development applications must be assessed.

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<sup>38</sup> Ex 2, s 2.2.4.3, p 37.

<sup>39</sup> Ex 2, s 2.4.1, p 44.

<sup>40</sup> Ex 2, s 2.2, p 30.

- [54] The amendment of the ADP seeks to change the ADP. A “variation request” under the *Planning Act* is a development application for a preliminary approval that seeks to vary the effect of any local planning instrument in effect for the premises.<sup>41</sup> A “local planning instrument” is a planning instrument made by a local government and is either a planning scheme, a TLPI or a planning scheme policy.<sup>42</sup> The SSP establishes a framework for the development of local area plans, which include ADPs.<sup>43</sup> The SSP is part of the IPS 2006. However, while the ADPs are made under the SSP, an approved ADP is not said to form part of the planning scheme and otherwise does not meet the definition of a local planning instrument.<sup>44</sup>
- [55] As an approved ADP is not a local planning instrument, a variation request in the nature of an application for a preliminary approval to vary the effect of the approved ADP was not an application SLH could make. Only the SSP, not the general provisions in the *Planning Act*, apply to amending an ADP. The SSP provides for different processes to that in the *Planning Act*, and deals with amendments of an ADP in s 2.3.2. ADPs, including their amendment, are governed by the SSP.<sup>45</sup> The effect of an ADP and a preliminary approval under the *Planning Act* are different.<sup>46</sup>
- [56] For these reasons, I am satisfied that the amendment of an ADP is not a development application for the purposes of the *Planning Act*.
- [57] This position is supported by the Court of Appeal’s decision in *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd*<sup>47</sup> which identified that the ADP process (and thus the process for the amendment of an ADP) is part of the “process for making and approving plans”<sup>48</sup> under the SSP, with which development must comply.
- [58] That amending an ADP is not a development application is further supported by s 316(4) of the *Planning Act*, which provides:

“The Minister’s powers under Chapter 3, Part 7 of this Act apply to a plan or an amendment to a plan under the old Act, s 857(5) as if:

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<sup>41</sup> *Planning Act* sch 2 Dictionary.

<sup>42</sup> *Planning Act* s 8(3).

<sup>43</sup> Ex. 2, s 1.3, p 25 and s 2.2, p 30.

<sup>44</sup> *Planning Act* sch 2 Dictionary.

<sup>45</sup> ss 2.2.4, 2.3.2.

<sup>46</sup> SSP s 2.2.4.2; *Planning Act* s 49(2).

<sup>47</sup> [2019] QPELR 319.

<sup>48</sup> *Ibid* [59].

- (a) the process for making the plan were the development assessment process for a development application; and
- (b) the plan or amendment were a development approval; and
- (c) the local government were the assessment manager for the development application for the approval.”

[59] While this provision relates to the Minister’s powers, the use of the words ‘as if’ indicates that it is not intended that the amendment of an ADP is a development application. Rather, the amendment of an ADP must be treated ‘as if’ it is a development application in specific circumstances.

[60] Having found that the amendment of an ADP is not a development application under the *Planning Act*, in respect of Question 1(a) I am satisfied that neither the *Planning Act* nor any other Act confer a right of appeal to the Planning and Environment Court in respect of the deemed refusal of the amendment of the existing approved ADP.

**Does the Planning and Environment Court nevertheless have jurisdiction to hear that part of the appeal in respect of the amendment of the ADP?**

[61] It is convenient to address Question 3(c) at the same time.

[62] This issue as originally posed made reference to the Notice of Appeal as originally filed and that is the basis upon which the parties made submissions. An amended Notice of Appeal has since been filed and this issue amended. The submissions made about this issue are not particularly relevant to the issue as now stated.

[63] Section 857(5) SPA preserves the process for making and approving plans with which development of land under the SSP must comply including, if the DCP provides, any appeal rights.<sup>49</sup> Thus, it envisages that a DCP may not provide such appeal rights.

[64] Section 2.2.4 of the SSP provides a process for making and approving an ADP. Section 2.3 of the SSP provides for a process of amending Local Area Plans, including an ADP. Just as the SSP makes no provision for appeal rights in respect of the making of an ADP, there are no provisions for appeal rights in respect of the amendment of an ADP. The deemed refusal provisions in relation to amending

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<sup>49</sup> *Springfield Land Corporation Pty Ltd v Cherish Enterprises Pty Ltd* [2019] 3 Qd R 40 [62(c)].

an ADP bring the process of the amendment of the ADP to an end if the Council fails to make a decision within the requisite time.

- [65] For these reasons I am satisfied that the Planning and Environment Court does not have jurisdiction to hear that part of the appeal in respect of the amendment of the ADP.

### **Conclusion**

- [66] There is no Act that confers jurisdiction, and the SSP itself does not confer jurisdiction to the Planning and Environment Court in relation to a deemed refusal of an amendment of an ADP.
- [67] Thus, I am satisfied that the Planning and Environment Court does not have jurisdiction to hear and determine that part of the appeal in respect of the deemed refusal of the amendment of the ADP.

### **Order**

- [68] The Planning and Environment Court does not have jurisdiction to hear and determine the appeal from an application to amend the area development plan approved under the Springfield Structure Plan.