

Planning and Environment Quarterly Case Review: December 2023

18 December 2023

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Worthwhile read for: Town Planners, Local Governments, Property Developers, Environmental Consultants

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Welcome to the final Planning and Environment Quarterly Case Review of the year! In this festive edition, we bring you summaries of:

- the P&E Court's power to grant a stay in an appeal about an enforcement notice concerning alleged vegetation clearing;
- an interesting heritage case, involving the Ashgrove Methodist church, which adds to the line of P&E Court authority on some important legal points; and
- a submitter appeal about a proposed luxury hotel in Airlie Beach, which examines non-compliance with a maximum building height provision.

Glesk v Chief Executive of the Department of Environment and Science **[2023] QPEC 43**

The preliminary point in this case concerned whether the P&E Court could order a stay in an appeal against the giving of an enforcement notice, where the enforcement notice was about vegetation clearing.

In most cases, an appeal against an enforcement notice will automatically stay the operation of the notice. There is an important carve out though – the automatic stay does not apply where the enforcement notice is about a matter stated in section 167(5)(a) of the Planning Act, which includes vegetation clearing (amongst other things).

Here, the Department had issued an enforcement notice relating to the alleged clearing of native vegetation within an area mapped as a koala habitat area but outside of a koala priority area, carried out in 2021. The enforcement notice required the landowner to take prompt steps to rehabilitate the land. There was no prospect the appeal could be heard and determined before the time frames in the enforcement notice had passed. The appellant sought a stay to preserve the utility of the appeal and, without the stay, it would have been in breach of the enforcement notice which was, itself, a development offence. The Department did not oppose the request for a stay.

The Court was satisfied that it could grant the stay, observing that:

- there are broad powers under the *Uniform Civil Procedure Rules 1999 (UCPR)* for the Court to make any order that the nature of the case requires;
- there is no limitation (express or implied) in the Planning Act constraining that broad power;
- an alternative construction of the Court's powers may have the effect of rendering an appeal nugatory and deprive the appellant, in a practical sense, of the appeal rights granted under the PA. If that was the statutory intention, there would need to be clear words in the legislation to that effect – and there was not.

Factual matters relevant to the Courts consideration included that the vegetation clearing was alleged to have occurred nearly three years ago. There was no suggestion of some pressing need for the

rehabilitation to be carried out immediately to avoid adverse ongoing environmental impacts. The stay would do no more than preserve the status quo, pending the determination of the appeal in that context. The appeal was not frivolous or unarguable.

The Court was satisfied that it was appropriate for an order to be made granting the stay.

The Uniting Church in Australia Property Trust (Q.) ABN 25 548 385 225 v Queensland Heritage Council [2023] QPEC 40

Heritage cases are always interesting, and this case is no exception. The case involved an appeal against the decision of the Queensland Heritage Council to list the Ashgrove Methodist church in the State Heritage Register.

The case adds to the line of P&E Court authority on a couple of important legal questions: who bears the onus of proof in an appeal of this kind and the role of the statement of significance.

Her Honour Judge McDonnell determined that:

- The appellant, being the entity that sought to disturb the status quo in the sense that it sought to set the heritage listing aside, bore the onus of proof in the appeal.
- The Court was not bound by the entry in the Queensland heritage register. The appeal was a hearing anew, and it was for the Court to decide whether the place satisfied the criteria for entry having regard to the evidence in the appeal.

The Queensland Heritage Council had decided to list the church on the basis that it satisfied two of the listing criteria in the *Queensland Heritage Act 1992* namely:

- Criterion (a) – the place was important in demonstrating the evolution or pattern of Queensland’s history.
- Criterion (e) – the place was important because of its aesthetic significance.

To satisfy criteria (a) and (e), the place had to meet the important qualification of being ‘important’.

Her Honour observed that the term ‘important’ meant beyond commonplace, but not out of ordinary or exceptional. Her Honour also highlighted the difference between what is of importance at the State level under the Queensland Heritage Act, against what may be the focus of local importance.

Despite the place having significance to the Methodist community, the local area, and being the first of its kind in Brisbane, the Court found the place was not significant to the evolution or pattern of Queensland’s history. In terms of aesthetic significance, the Court considered the beauty of the place and the threshold indicators in the Guideline: intactness, setting and location, and demonstrated representativeness. There were issues in that alterations (elevated walkway, unsympathetic fence and air-conditioning ducting and unit) had substantially compromised the intactness of the building, the building itself had a limited colour and materials palette, and the setting impeded the visibility of the building, causing it to have poor landmark quality and limited picturesque attributes.

The Court made orders that the Queensland Heritage Council’s decision to list the Ashgrove Methodist Church in the State Heritage Register be set aside, and replaced with a decision not to enter it on the State Heritage Register.

Save Our Foreshore Inc v Whitsunday Regional Council & Ors; Meridien AB

Pty Ltd (Receivers & Managers Appointed) (In Liquidation) & Anor v Whitsunday Regional Council & Anor [2023] QPEC 34

This case involved a submitter appeal against Council's decision to approve a development application for a resort complex in Airlie Beach. The proposed resort complex building was 12 storeys (including a roof terrace) and 46.7 metres high. It had a podium and tower form, and included a conference/function centre, retail and dining components, 180 hotel rooms/suites and roof terrace with rooftop bar and amenities. The concept was for a luxury standard facility, where there was none presently available in Airlie Beach.

The submitters were a community organisation, who opposed the preliminary approval primarily on the basis of height. The Council and developer contended that there were no impacts stemming from the proposed height – especially viewed in context – and there were a range of other factors that supported approval.

There was only one assessment benchmark that specifically mentioned building height. It was an overall outcome in the mixed use zone code, and it said that development should not exceed the nominated maximum building height of 18 metres. It was uncontroversial that the development did not comply with this provision. The community group pointed out that the provision was relatively strong in providing an unequivocal “maximum” building height, and did so in an overall outcome rather than a performance outcome of acceptable outcome which was apt to engender community expectations that the nominated height would not be exceeded. Unsurprisingly, a number of submissions made about the development application took issue with the height proposed.

The case is an example of the balancing exercise the Court must go through in deciding the application, and the requirement to consider the consequences of the proposal's non-compliance with respect to height. The Court noted that building height can have a number of different consequences, and that height controls can serve a range of purposes. It observed that a logical starting point, in considering the gravity of the consequences of non-compliance with respect to height – was the purpose intended to be served by the height control. The planning scheme was silent about that.

Looking at typical visual amenity concerns, there was no criticism about the standard of architecture or landscaping. There were no impacts associated with overlooking, privacy or overshadowing. The criticism was about impacts on character associated with the height. These impacts were addressed by the planning and visual amenity experts. The visual amenity experts concluded (and the Court accepted) that the building was not “monolithic” and had been thoughtfully designed to reduce its visual bulk through modulation and articulation of built form. The design included appropriate setbacks. Views would still be “panoramic”, and the resort would have only a minor impact. It was relevant also, that the character of the area was diverse, and would change over time. Finally, the development would sit on relatively flat, reclaimed land near the coast and was not sited intrusively in the landscape. The Court was satisfied that the development would, in fact, make a positive contribution to the character of the area, and contribute to a high standard of amenity.

The Court was satisfied that the proposal offered a range of benefits and that, taken together, they outweighed any adverse impact arising from the non-compliance as to height.

The submitter appeal was dismissed.

For further information and discussion on any of these cases, please contact our [Planning](#) and [Environment](#) team.

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