

## Appeals about infrastructure

20 October 2008

### 1. Appeals against infrastructure contributions conditions

Pursuant to sections 6.1.31 (Conditions about infrastructure for applications) and 6.1.32 (Conditions about infrastructure for applications under interim development control provisions or subdivision of land by-laws) of the *Integrated Planning Act 1997* ["IPA"], Local Governments may impose conditions about trunk infrastructure pursuant to:

- (a) a planning scheme policy, either under a transitional planning scheme or an IPA planning scheme;
- (b) an interim development control provision; or
- (c) a subdivision of land by-law continued in effect under section 8.10(7) of the repealed *Local Government (Planning and Environment) Act 1990*.

#### 1.1 Commencement of planning scheme policy

The key point to note is that sections 6.1.31 and 6.1.32 IPA only apply at the time when the assessment manager is deciding the development application. The Supreme Court has determined that notwithstanding section 3.5.6 IPA, if a planning scheme policy about infrastructure has come into effect after the commencement of the decision stage, it can still be lawfully considered by the assessment manager.<sup>1</sup>

That said, it is for the assessment manager to determine whether it wishes to impose a condition about infrastructure in reliance upon the power conferred by a particular infrastructure policy.<sup>2</sup> Therefore, if the assessment manager elects not to impose a condition, or inadvertently fails to do so, then the infrastructure policy will not apply to the development proposal.<sup>3</sup>

#### 1.2 Cancellation of planning scheme policy

Relevantly, pursuant to section 6.1.21 IPA (IPA planning schemes cancel existing planning scheme policies), the commencement of an IPA planning scheme, or the conversion of a transitional planning scheme into an IPA planning scheme, results in the cancellation of all existing planning scheme policies.

If this occurs after 30 June 2008,<sup>4</sup> then it will not be possible for a local government authority to adopt new transitional infrastructure contributions policies. Rather, it will be necessary for the local government authority to prepare an infrastructure charges schedule and priority infrastructure plan.

Therefore, before commencing an appeal (or imposing a condition as an assessment manager) in respect of an infrastructure contributions condition, it may be beneficial to

consider the legal status of the planning scheme policy pursuant to which the condition is purportedly imposed.

### 1.3 Reasonableness and relevance test

Conditions about infrastructure pursuant to sections 6.1.31 or 6.1.32 IPA, or conditions about non-trunk infrastructure, are subject to the twin tests of reasonableness and relevance set out in section 3.5.30 IPA (Conditions must be reasonable or relevant).<sup>5</sup> The reasonableness and relevance tests apply despite the laws and policies<sup>6</sup> administered by the assessment manager and or a concurrence agency.

The Court has observed that it may not be an easy task to persuade the Court that conditions complying with section 6.1.31(2)(c) IPA are unreasonable or irrelevant.<sup>7</sup> However, the legal entitlement to challenge an infrastructure contributions condition on this basis remains open. This has been supported in the judgment of *Clift & Anor v Gold Coast City Council*<sup>8</sup> in which a developer successfully appealed against the imposition of unreasonable infrastructure contribution conditions.

The Court determined that infrastructure contributions calculated on the maximum potential development yield of a site were unreasonable, and favoured contributions calculated on the basis of maximum practical development yield, determined by reference to compliance with the ordinary development standards set out in acceptable solutions.<sup>9</sup>

### 1.4 Restriction on infrastructure conditions

A condition cannot be lawfully imposed requiring a monetary payment for the establishment, operating and maintenance costs of infrastructure, or works to be carried out for the infrastructure, if the condition is for infrastructure pursuant to which Chapter 5 Part 1 IPA (Infrastructure planning and funding) applies.<sup>10</sup>

Broadly speaking, this refers to infrastructure which the subject of contributions made pursuant to an infrastructure charges notice, and not a condition of a development approval.

However, there are two exceptions in which local governments may impose conditions in respect of infrastructure, even if it is infrastructure pursuant to which Chapter 5 Part 1 IPA applies, namely:

- (a) conditions requiring the supply of additional trunk infrastructure pursuant to section 5.1.24 IPA (Conditions local governments may impose for necessary trunk infrastructure); and
- (b) conditions requiring the payment of additional trunk infrastructure costs pursuant to section 5.1.25 IPA (Conditions local governments may impose for additional trunk infrastructure costs).

## **2. Conditions for supply of additional trunk infrastructure pursuant to Chapter 5 Part 1 IPA**

Local governments may lawfully impose conditions for necessary trunk infrastructure if:

- (a) existing trunk infrastructure necessary to service the premises is not adequate; or
- (b) trunk infrastructure to service the premises is necessary but is not yet available; or
- (c) trunk infrastructure is located on (eg. crosses or traverses) the premises.<sup>11</sup>

In all cases, the trunk infrastructure which services or crosses the premises must be identified in the priority infrastructure plan. However, the local government can require

different trunk infrastructure to be provided to that identified in the priority infrastructure plan if it delivers the same standard of service to the relevant network.

#### 2.1 Refund/offset if infrastructure services other premises

A condition requiring the provision of additional infrastructure may be imposed by the local government even if the infrastructure will service other premises. However, if the amount of the value of the infrastructure is more than the amount of the value of the charge for the network for the premises, the applicant:

- (a) does not have to pay an infrastructure charge for the network; and
- (b) is entitled to a refund from the infrastructure provider, on agreed terms, for the proportion of the establishment cost that can be reasonably apportioned to the other users' premises, and which is collected under an infrastructure charges schedule (or alternately, the amount must be offset against any charge that may be levied for the premises pursuant to an infrastructure charges notice).<sup>12</sup>

If the value of the constructed infrastructure is less than the value of the infrastructure charge, the local government is required to offset the value of any infrastructure required to be constructed against the contribution otherwise payable.<sup>13</sup>

#### 2.2 Grounds to appeal condition

Although it is possible to challenge the validity of a condition of this nature in the Planning and Environment Court, a condition imposed pursuant to section 5.1.24 IPA is not unreasonable or irrelevant:

- (a) to the extent the infrastructure is necessary to service the premises; or
- (b) if the infrastructure is the most efficient and cost effective solution for service the premises.

If this criterion is met, or a condition is not an unreasonable imposition on the development or the subsequent use of the premises, then it will not be possible to challenge the validity of the condition pursuant to section 3.5.30 IPA.

### **3. Conditions for additional trunk infrastructure costs pursuant to Chapter 5 Part 1 IPA**

A local government may impose a condition requiring the payment of additional trunk infrastructure costs if the development:

- (a) is
  - i inconsistent with the assumptions about the type, scale, location or timing of future development stated in the priority infrastructure plan; or
  - ii for premises completely or partly outside the priority infrastructure area; and
- (b) would impose additional trunk infrastructure costs on the infrastructure provider after taking into account either or both of the following:
  - i infrastructure charges or regulated infrastructure charges levied for the development;
  - ii trunk infrastructure supplied, or to be supplied by the applicant under Divisions 4 to 6 of IPA.<sup>14</sup>

It is important to note that the additional cost of providing infrastructure does not impact upon the merits of a particular proposal, and normal planning criterion must be addressed in the assessment of the development application irrespective of the applicant's

willingness to pay any additional costs.

### 3.1 Obligation to give prior acknowledgment notice

A condition requiring the payment of additional trunk infrastructure costs cannot be lawfully imposed unless the local government has previously given the applicant an acknowledgment notice pursuant to section 3.2.4 IPA (Acknowledgment notices for development inconsistent with priority infrastructure plans).

This is to ensure that the applicant is given early notice that additional trunk infrastructure costs may be payable.

### 3.2 Refund if development approval lapses

If the development approval no longer has effect (i.e. the approval has lapsed or has been cancelled at the request of the landowner) and construction of the infrastructure has not substantially commenced before the approval ceased having effect, then the local government must repay any part of the payment the local government has not spent, or contracted to spend, on the design and construction of the infrastructure.<sup>15</sup>

A condition imposed for the payment of additional trunk infrastructure costs may be challenged in the Planning and Environment Court. However, a condition of this nature complies with section 3.5.30 IPA to the extent that the trunk infrastructure is necessary, but not yet available, to service development, even if the infrastructure is also intended to service other development.<sup>16</sup>

## 4. Appeals against Infrastructure charges notices

Section 4.1.36 IPA (Appeals about particular infrastructure charges) provides a mechanism for a person who has been given an infrastructure charges notice or a regulated State infrastructure charges notice to appeal.

Importantly, appeals about conditions requiring drainage and transport infrastructure contributions imposed pursuant to a planning scheme policy forming part of an IPA scheme, prepared in accordance with section 6.1.20 IPA (Planning scheme policies for infrastructure)<sup>17</sup> must also be commenced pursuant to this section.<sup>18</sup>

### 4.1 Timeframe to commence appeal

An appeal made pursuant to section 4.1.36 IPA must be commenced by the person who was given the notice within 20 business days after:

- (a) the day the applicant is given notice of the decision about the approval - if the notice is given because of a development approval or master plan approval; or
- (b) otherwise – the day the notice is given to the person.

### 4.2 Limitation on grounds of appeal

Critically, an appeal may only be made about the following matters:

- (a) whether a charge in the notice is so unreasonable that no reasonable relevant local government, State infrastructure provider or coordinating agency could have imposed it; or
- (b) an error in the calculation of the charge.

The grounds upon which an appeal may be commenced pursuant to section 4.1.36 IPA were changed on 18 July 2008. Prior to this date, it was possible to appeal about the

methodology used to establish the charge in the infrastructure charges schedule, in addition to an error in the calculation. Appeals against the methodology are now expressly precluded by section 4.1.36(5) IPA.

### 4.3 Appeal to Court or tribunal

An appeal may be made to the Planning and Environment Court, or to a tribunal if the matter is one in which the tribunal has jurisdiction.<sup>19</sup> However, an appeal to a tribunal is limited to an error in the calculation of the charge, and cannot be made in respect of the unreasonableness of the charge.

- 1 Hervey Bay City Council v BGM Projects Pty Ltd (2007) 154 LGERA 330.
- 2 Hickey Lawyers (a firm) & Ors v Gold Coast City Council [2005] QEPLR 597 at paragraph 45.
- 3 Stockland Developments Pty Ltd v Gold Coast City Council & Anor (2008) QPEC 16 at paragraph 18.
- 4 Or such other dated nominated by the Minister by gazette notice pursuant to section 6.1.20(4) IPA.
- 5 Hickey Lawyers (a firm) & Ors v Gold Coast City Council [2005] QEPLR 597 at paragraph 46.
- 6 However, reference to "policies" in section 3.5.30(2) IPA does not refer to a valid planning scheme policy – Hickey Lawyers (a firm) & Ors v Gold Coast City Council [2005] QEPLR 597.
- 7 Hickey Lawyers (a firm) & Ors v Gold Coast City Council [2005] QEPLR 597 at paragraph 49.
- 8 [2006] QEPLR 280.
- 9 At paragraph 28.
- 10 Section 3.5.32(1)(b) IPA.
- 11 Section 5.1.24 IPA.
- 12 Section 5.1.24(7) IPA.
- 13 Section 5.1.24(7) IPA.
- 14 Section 5.1.25 IPA.
- 15 Section 5.1.25(6) IPA.
- 16 Section 5.1.25(7) IPA.
- 17 Section 6.1.20 IPA ceases to have effect on 30 June 2008 or such later date nominated by the Minister, by gazette notice, for a particular planning scheme.
- 18 Section 6.2.10 IPA.
- 19 Section 4.2.7(2)(c) IPA.

**If you have any questions, please contact:**

Petter Bittner  
(07) 3002 6743

Danielle Bland  
(07) 3002 6777

If you do not wish to receive further e-Alerts from our Planning, Environment & Government Group, please reply 'remove to this email.'