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Insights into appealing adopted infrastructure charges under the 2011 SPA amendments

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INGRAINED INTELLIGENCE

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Insights into appealing adopted infrastructure charges under the 2011 SPA amendments

The adopted infrastructure charges notice (AICN) regime, introduced under amendments to the *Sustainable Planning Act 2009* (SPA) in July 2011, aims to limit the growth of infrastructure charges.

Here, partner David Nicholls and associate Olivia Williamson consider some of the unusual outcomes thrown up by the regime, and discuss the complexities now involved in attempting to appeal against charge notices.

Key points

- Section 478 of the SPA, as amended in June 2011 by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011*, gives those who have been given, and are dissatisfied with, an adopted infrastructure charges notice the right to appeal against the notice to the Court on the grounds of unreasonableness or an error in the calculation of the charge.

- Section 496(1) enables the Court to cancel or modify an infrastructure charges notice.

- On its face, there is uneasiness between section 478(4) and section 495. However, the two provisions are capable of being read together without any need to imply a restriction on the Court's powers in such appeals.

Case study: Service centre development

The AICN system appears to break the link between infrastructure charges and network usage by development. This is vividly demonstrated through the facts of an appeal we instituted for a client against a condition imposed on a development approval issued on 29 June 2011, as compared to what the situation would have been under the AICN system.

The relevant facts are as follows:

- The development approved was a major highway service centre at an interchange on a motorway.

- The land was a single lot created by a large industrial subdivision under which various infrastructure charges had been paid previously.

- The development permit imposed a condition requiring payment of several millions of dollars for transport infrastructure under the local government's infrastructure planning scheme policy.

- The traffic generated by the service centre impacted only on the interchange and the motorway, which is a toll road. A separate charge for the interchange road was separately conditioned under a different planning scheme policy.

- The policy under which the transport charge had been imposed was based on the premise that development uses up capacity on the local government's road network. The toll road was not part of the local government's network and the policy did not apply to its use.

- The infrastructure contribution was reduced to zero in consequence of the appeal.

Under the adopted infrastructure charges resolution, a transport and community purposes networks total charge, in addition to a sewerage network charge, water supply network charge and a stormwater network charge, would be levied for the same development.

An AICN was avoided because the assessment manager decided the application before 30 June 2011 under a policy which collected money based on impact on the road network. The condition was unlawful because there was no connection whatsoever between the development and the relevant infrastructure. This highlights the apparent change in

approach under the new AICN system, which prompts us to pose the question: would an adopted charge for this development, which includes a transport infrastructure component, be able to be challenged?

Legislative requirements

Section 495 of the SPA provides that appeals to the Planning and Environment Court are by way of hearing anew. Such appeals proceed as hearings on their merits rather than as an administrative review of the original decision. In deciding an appeal, the Court may make the orders and directions it considers appropriate[1], including confirming, changing or setting aside the decision appealed against, and making a decision replacing the decision set aside.[2]

Section 478 of the SPA, as amended in June 2011 by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011*, gives those who have been given, and are dissatisfied with, an adopted infrastructure charges notice the right to appeal against the notice to the Court.

Section 478(4) sets out the limited grounds of appeal:

> *"(4) An appeal under this section may only be about –*
>
> *(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."*

Section 478(4)(a) appears to be based on the administrative law test for unreasonableness derived from *Associated Provincial Picture Houses v Wednesbury Corporation*[3] which is now universally applied by the Courts in judicial review proceedings. In that case, Lord Greene MR formulated a test in the following terms:

> *"There may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."*

The test has been described as stringent and confined. As noted by His Honour Judge Rackemann in *Bon Accord Pty Ltd v Brisbane City Council & Ors*[4]:

> *"It is not sufficient to establish that, as a matter of merit, a different decision ought to have been preferred. What must be established is that no decision maker, acting reasonably, could have made that decision. In applying that standard, a court must proceed with caution, lest it exceed its supervisory role, by reviewing a decision on the merits."*[5]

Bon Accord was an originating application for declarations rather than a notice of appeal. As such, the Court was not required to conduct a merits hearing.

On its face, there is uneasiness between section 478(4) and section 495. There is nothing in section 495 to indicate that appeals related to infrastructure charges are different from other appeals.

This potential tension was first recognised by the Court in *GPD Services v Gold Coast City Council*[6], in considering the equivalent provisions of the Integrated Planning Act (IPA). It is useful to look at the predecessor to section 478(4) of the SPA, section 4.1.36(4) of the IPA. That section (at the time it was repealed) stated the relevant grounds of appeal as follows:

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[1] Section 496 of the SPA
[2] Section 496(2) of the SPA
[3] [1948] 1 KB 223
[4] [2008] QPEC 119
[5] At [112]
[6] [2009] QPEC 112

> *"Whether a charge in the notice is so unreasonable that no reasonable relevant local government or State infrastructure provider or coordinating agency could have imposed it."*

This sub-section is identical to section 478(4)(a) of the SPA.

In *GPD Services*, His Honour Judge Rackemann observed that the Explanatory Notes to section 4.1.36, as first enacted, referred to the intention to create a merits assessment. In that regard, the Explanatory Notes stated:

> *"However, a number of stakeholders were concerned that declaratory actions would be limited to procedural matters and subjected to a higher legal test by the Courts rather than a merits assessment of the issue in question. Section 4.1.36 is intended to clarify the scope of legal action in respect of infrastructure charges."*

The Explanatory Notes to section 4.1.36, as at the time of repeal (and as now replicated in section 478), stated:

> *"Instead a new appeal right is introduced stating that appeals must not be about the methodology but an appeal may be made about whether the charge in the schedule is so unreasonable that no reasonable local government could have imposed the charge. While this is a higher test at law it is consistent with the tests applied to other local government charges."*

What is meant by an appeal against the methodology used to establish the charge?

Historically, the earlier iteration of section 4.1.36 permitted an appeal about the methodology used to calculate the change. However, subsection (5) of the later version of section 4.1.36, and now section 478(5) of SPA, prohibits such appeals. Section 478(5) of SPA provides:

> *"(5) To remove any doubt, it is declared that an appeal under this section can not be about the methodology used to establish an adopted infrastructure charge or the charge in a relevant infrastructure charges schedule, regulated infrastructure charges schedule or regulated State infrastructure charges schedule."*

It is important to note that section 478(5) of SPA applies to both sub-sections (4)(a) and (4)(b). The Explanatory Notes, however, suggest that sub-section (4)(b) remains unaffected. The appropriate conclusion seems to be that under neither sub-sections (4)(a) or (b) can the appeal be about the methodology used to establish the charge - indeed, sub-section (4)(b) was always intended to confer a completely different basis for appealing.

What is the nature of the appeal right?

Section 496(1) states:

> *"(1) In deciding an appeal the court may make the orders and directions it considers appropriate."*

A merits appeal is consistent with this broad power. This section enables the Court to do justice between the parties, including, in the instance of infrastructure charges, by cancelling or modifying an infrastructure charges notice, as it did in the *GPD Services* case.

Section 478 is framed in terms of an appeal about particular charges for infrastructure. The section applies to a person who has been given, and is dissatisfied with, a notice. The appeal right in section 478 is to the Court against the "notice" as opposed to a "decision", as is the case for other appeals. In this regard, section 496 sets out the orders and directions the Court may make in deciding an appeal - for example, confirming, changing or setting aside the "decision" appealed against.

The particular reference in section 478 to a "notice" rather than to a "decision" recognises that infrastructure charges notices involve a mechanical exercise of issuing a notice, which operates like a rates notice. No "decision" is actually involved.

Again, it is important to bear in mind that the grounds for appealing an infrastructure charges notice using section 478 are confined to two categories, unreasonableness and an error in the calculation of the charge.[7] Such appeals are merits based involving a de novo hearing. This is at odds with the usual circumstance, where the Court makes a fresh "decision" or confirms a Council's decision. Further, only one of the merits grounds is related to a *Wednesbury* unreasonableness type of test.

How do you rationalise the tension between section 478, section 495(1) and section 496(1) and (2), bearing in mind that there is no "decision" involved in the giving of an AICN?

Where the appeal is brought under section 478(4)(b), the challenge is not related to the unreasonableness test in section 478(4)(a). The Explanatory Notes indicate that Parliament has used the *Wednesbury* formulation in section 478(4)(a) and called it "a higher legal test". On consideration of an appeal under section 478(4)(a), the Court should, in our respectful view, simply give effect to the words the legislature has used, and not consider itself constrained to notices which involve or exhibit inherent errors of law. If the facts show that it would have been irrational to issue the notice, or that no reasonable basis for issuing it can be found, the Court should, acting on the merits, strike out or amend the notice.

The difference between the situation under administrative law and that under section 478(4)(a) is that there is nothing in the language of the provisions which expressly stops the Court from substituting a new notice or an amended notice for the one issued by the Council. The legal nature of the appeal and the Court's powers in deciding it give rise to different considerations to those attending judicial review proceedings where, if one view is reasonably open to a decision maker, that is the end of the matter.

It has been suggested that any inconsistency may be resolved by section 478(4) prevailing to the extent of any inconsistency with section 495. Commentary on the SPA suggests that "it seems unlikely that the Court can make its own determination of a lower and more "reasonable" charge in such circumstances."[8] The author of this commentary believes that although section 495(2)(a) confers an apparently broad power to change the decision appealed against, the Court's powers are generally no greater than those of the Council.[9]

This same author also notes that the scope of section 495(4)(a) is limited to cases where the "mis-match" between the level of the charge payable under the relevant instrument on the one hand, and infrastructure demand or impact from the development or use in question on the other, is so striking that the latter cannot, on any rational view, justify the former. In our view, it's not appropriate to read words into the statute which would constrain the Court's powers in deciding an appeal.[10] It is quite conceivable that the Court would consider an adopted infrastructure charge which is devoid of any connection whatsoever with development, because, for example, no relevant infrastructure exists, or the development is of a type which has no possible or conceivable connection with the infrastructure network to be "so unreasonable that no reasonable local government could have imposed it". In our view, once the threshold is crossed, the Court's usual powers in determining the appeal are not constrained in any way.

How might the Court deal with infrastructure charges notices appeals filed before, but remaining undecided, as at 1 July 2011?

This question is best answered by a recent example. The matter of *Hungry Jacks Australia Pty Ltd v Gold Coast City Council & Allconnex Water*[11] involved an appeal against infrastructure charges notices issued by the Gold Coast City Council and Allconnex Water, dated October 2010. These were attached to a negotiated decision notice issued by the Council, dated April 2011. The appeal was lodged in May 2011. As a consequence of a submitter appeal lodged in relation to the subject development, the Court approved an amended form of the development in November 2011. Shortly after the submitter appeal was resolved, the appellant obtained final orders resolving the infrastructure charges notice appeal on the following basis:

[7] Section 478(4) of the SPA
[8] *A Commentary on the Sustainable Planning Act 2009* by Stephen Fynes-Clinton
[9] At page 247
[10] *Metroplex Management P/L v Brisbane City Council & Ors* [2010] QCA 333
[11] Planning and Environment Court No. 1682 of 2011

- The appeal was allowed on the basis that the infrastructure charges notices were superseded due to the judgment of the Court in the submitter appeal.

- The infrastructure charges notices were set aside.

- The Council and Allconnex Water were required to give the appellant adopted infrastructure charges notices related to the subject development.

This outcome is appropriate in our opinion. The submitter appeal resulted in a fresh approval on the basis of changed plans. Therefore, the earlier infrastructure charges notices issued in respect of an earlier plan of development had been superseded.

Final thoughts

There appears, at first sight, to be a tension between the limited grounds for appeals under section 478 and section 495, which provides for appeals to be by way of hearing anew. However, the two provisions are capable of being read together without any need to imply a restriction on the Court's powers in such appeals. If the facts in an appeal properly give rise to a finding that the charge imposed by a notice is irrational or by some other measure highly unreasonable in the sense conveyed by the words of section 478, then the Court may deal with the appeal in a way which produces a just outcome. This may involve an order which substitutes or corrects all or a component of the charge.

Returning to the case mentioned earlier, it is our view that statutory power to give an AICN should not be permitted to operate in a way which imposes obviously unreasonable charges. The purpose of the AICN reforms was to limit the growth of infrastructure charges rather than to permit new charges to apply where none would have previously applied, especially in the case of development which has no connection with the infrastructure for which the charge is imposed. The fact that the AICN regime is capable of giving rise to new charges where none would have lawfully arisen before suggests that the regime is capable of operating irrationally in some circumstances. Each case will, of course, turn on its own particular facts and circumstances, but the appeal right conferred under section 478 of the SPA is capable, in our view, of dealing with such situations.