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The Decision Rules Revisited: An analysis of the Westlink saga

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The decision rules under the *Sustainable Planning Act 2009* (SPA) are unnecessarily complex, and in my view, not conducive to achieving balanced performance-based planning outcomes. Indeed, in a recent paper, I argued for the need for reform of the decision rules (see *Unlocking the power of positive planning policy: Returning flexibility to Queensland's planning system*[1]).

The suite of decisions by the Planning and Environment Court and the Queensland Court of Appeal[2] relating to a proposed gas-fired peak demand electricity generator at Gatton in the Lockyer Valley demonstrates the complexity of the decision rules. In this series of four judgments, the appeal to the Planning and Environment Court against the Council's decision to refuse the application was returned to the Planning and Environment Court for a second time for re-hearing. Without putting too fine a point on it, this appears to be a case in which the proponent won on the merits, but lost on the law due to the technical complexity of the decision rules. The primary judge attempted to balance the competing considerations at play in the application to arrive at a planning outcome that was in the public interest, but seems to have failed due to technical difficulties arising from the operation of the decision rules related to a use deemed to be 'inconsistent' under the planning scheme.

Partner David Nicholls analyses the four judgments and shares his observations on the outcomes of each.

Making and interpreting planning laws

A discussion of these judgments should start with an acknowledgement that the Parliament makes planning laws and the Courts interpret and apply those laws. It must also be acknowledged that it is for local governments to make planning schemes, and for the Court to work within the policy framework so established. That said, however, the Court has a role in merits appeals in balancing relevant competing considerations to reach a decision that is in the public interest, having regard to the policy of the planning scheme as a whole. This has become much more difficult for the Court over the last decade or so, due to the effect of the decision rules when applied to a contemporary planning scheme drafting technique that attempts to create de facto prohibition.

Planning and Environment Court: The first decision

The Planning and Environment Court judge heard the appeal, which was filed in August 2010, over five days in May 2011, and delivered judgment on 9 June 2011. It was accepted by the parties and the Court, for the purposes of the appeal, that the proposed peak load power station was not defined as a use by the planning scheme, although it had the potential to be within the definition of 'special purpose' if undertaken by a government or statutory body. Because this was not the case, the use fell outside the list of uses made consistent with the purpose of the rural zone code, and was therefore an 'inconsistent use'.

The proponent, Westlink, called expert evidence in the fields of town planning, visual amenity, need, air quality, odour, noise, light, health and safety risks, flora and fauna. The local government only called evidence on town planning and visual amenity. The primary judge preferred the proponent's experts to those of the Council on those subjects, and accepted all the proponent's other witnesses without qualification. The local community group that joined the appeal called no evidence.

It appears that the Council had been content to run its case without putting any alternative expert evidence before the Court on the issue of need and community benefit. The Council's position was that the planning scheme strongly opposed development of the electricity generator on the subject land because of the wording of the overall outcome for the rural zone, and the fact that the zone code, through a default mechanism, made the proposed use (which was not defined in the scheme) inconsistent with the purpose of the zone.

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1 Nicholls, D. *Unlocking the power of positive planning policy: Returning flexibility to Queensland's planning system,* December 2012: http://www.hopgoodganim.com.au/page/Publications/Planning_and_Environment_Paper_Unlocking_the_Power_of_Positive_Planning_Policy_Returning_flexibility_to_Queenslands_planning_system_-_18_December_2012/

2 *Westlink Pty Ltd v The Lockyer Valley Regional Council* (2011) QPEC96; *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* (2011) QCA358; *Westlink Pty Ltd v Lockyer Valley Regional Council & Ors* (2012) QPEC31; *Lockyer Valley Regional Council v Westlink Pty Ltd* (2012) QCA370

The primary judge found, with some justification in my respectful view, that the planning scheme contained no specific guidance as to the Council's preferences for siting a development of the type proposed. The judge noted that if the proponent had been a public utility provider, the use would have been consistent with the purpose of the rural zone. The judge also noted that a number of intensive uses contemplated for the rural zone could have similar impacts to those possible as a result of the proposed electricity generator. It should also be noted that - although it attracted only passing reference in the Court of Appeal's first judgment - there was no specific encouragement for the proposed use in the industrial zone. The reason for this appears to be that electricity generation is not within the definition of the industry and falls within 'special purpose' only when carried out by a public entity, even in the industrial zone.

In the end, leaving aside the argument about interpretation of the planning scheme, the worst that can be said about the proposal was that the tip of its exhaust and intake stacks would be visible from vehicles travelling from the west on the Warrego Highway. It was accepted that the proposed site was adjacent to the Roma to Brisbane Gas Pipeline, the Gatton Gas Compressor Station and the Gatton Electricity Bulk Supply Substation, all of which had been included in the Community Facility Zone under the planning scheme. Also, the Gatton waste disposal landfill was some 300 metres to the southwest of the site.

The primary judge found that if the proposal was established on the industrially-zoned land on the opposite side of the Warrego Highway, the development would be more visually exposed, and would not be co-located with the Brisbane to Roma Gas Pipeline. The judge accepted evidence about the benefits that would flow from the proposal to the local and wider community, but because he considered that the application did not conflict with the planning scheme, he did not go on to make findings that there were nevertheless sufficient grounds to approve the application despite the conflict with the scheme. The judge's basis for not finding conflict with the planning scheme was that when the scheme was read as a whole, such conflict was not readily apparent, as the default mechanism was insufficient of itself to give rise to a conflict. In the result, the primary judge allowed the appeal and approved the development, subject to the resolution of suitable conditions.

Court of Appeal: The first judgment

The Council appealed to the Court of Appeal of the Supreme Court of Queensland on a number of grounds. The appeal was heard on 11 November 2011, and judgment delivered on 9 December 2011. Focusing on those grounds that found traction with the Court of Appeal, His Honour Justice Fraser, with whom the other members of the Court agreed, rejected a number of the Council's grounds of appeal. However, with respect to the ground relating to section 4.12(k) of the *Rural General Zone Code,* it was held that the primary judge erred in finding that there was no conflict with the planning scheme. His Honour Justice Fraser said:

> *"[33] Accordingly, the effect of s 4.12(k) is that the proposed use is 'not consistent' with the purpose of the zone for which it was proposed. The expression 'not consistent' is used as a synonym for the word 'inconsistent', as is suggested also by the general provision in s 1.11(2) that '[u]ses not specifically identified in column 1 of each assessment table are considered to be inconsistent uses.' Having regard also to the context supplied by s 4.9, s 4.10, and s 4.11, s 4.12(k) conveys that the proposed use is inconsistent with the Rural General zone code. The fact that the Planning Scheme eschews any express statement of a 'conflict' or 'inconsistency' between the scheme and a decision on an application concerning this proposed use, or any particular use, does not detract from that conclusion. Nor does the presence of the specific provision in s 4.11(2)(b) supply a ground for reading down the clear words of s 4.12(k). In the absence of any other provision which qualifies the operation of s 4.12(k) in relation to the proposed use, that paragraph requires the conclusion that a decision to approve the application is at variance with the Planning Scheme."*

The error was found to be material, the appeal to the Court of Appeal was allowed, and the matter was remitted to the Planning and Environment Court for determination according to law. This meant that the primary judge was required to conduct a further hearing to determine whether there was sufficient grounds to approve the application, despite the fact that such a decision conflicted with the provisions of the planning scheme.

Planning and Environment Court: The second judgment

The Planning and Environment Court conducted the second hearing on 9 March 2012 and delivered judgment on 27 April 2012, determining that there were sufficient grounds to approve the development application despite that decision's conflict with the relevant provisions of the planning scheme. His Honour found that section 4.12(k) was in the nature of the default provision, rather than a specific expression of policy directed at the type of use proposed, which, in the context of the non-rural uses that were consistent with the purpose of the zone, resulted in the conflict being towards the minor end of the spectrum. His Honour found the following sufficient grounds for approval of the application:

> *"(a) Were this proposal to be developed by a public utility it would qualify as a Special Purpose within the Scheme in which case s 4.12(k) would have no application.*
>
> *(b) The proposal will be of benefit to the community in assisting in meeting its increased demand for electricity providing fast start peak power generation capable of being brought on line quickly to meet daily short term peak demand and to avoid power outages. This can be done, Mr Welchman has said, with nitrogen dioxide, particulate matter, sulphate dioxide and carbon monoxide emissions 'well below both short-term and long-term air quality objectives' for protecting human health, amenity, agriculture and vegetation.*
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> *(c) The proposed location of the development is ideally located to meet the public demand for electricity at peak times given its co-location with the Roma to Brisbane Gas Pipeline along with the Gatton Gas Compressor Station joining the site to the east and the Gatton Electricity Bulk Supply Sub-Station directly opposite the site to the south. I do not agree with the Council that the scheme provides a better location than the Gatton North Enterprise Opportunity Area or any other area. That addresses the qualification placed on the Council's acceptance of the community need for a peak power station.*
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> *(d) It is located amongst what I see as not incompatible land uses including the Gatton Waste Disposal Landfill fronting Forge Road and the Warrego Highway, the Gatton Sewerage Treatment Plant, the Gatton Electricity Bulk Supply Sub-Station.*
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> *(e) The topography of the area is such that the proposal is physically disconnected, well screened and separated from rural residential localities. I accept that the absence of a negative impact is not, of itself, a proper ground for consideration but the screening I speak of is part of the issue of any impact on the amenity of the area;*
>
> *(f) Apart from contributing towards the minimisation of electricity costs to the community it will also provide an economic stimulus to the community resulting from the inflow of capital and the creation of employment both short-term and long-term therefrom;*
>
> *(g) The proposal is consistent with the outcomes sought to be achieved by SEQRP and purposes of both IPA and SPA on the issue of ecological sustainability."*

In the result the appeal was allowed, and the development approved subject to the resolution of suitable conditions.

Court of Appeal: The second judgment

The Council appealed against the primary judge's second judgment on a number of grounds, not all of which were accepted by the Court of Appeal. However, the Court agreed with the Council's argument that the fact that the same use, if conducted by a public utility, would be consistent with the purpose of the zone, was an irrelevant consideration. Her Honour Justice Holmes, with whose reasons the other members of the Court agreed, said:

> *"[27] I doubt that the fact that a public enterprise's undertaking will generally be self-assessable as a 'special purpose' has any bearing on the desirability of the same undertaking when conducted by private enterprise. Considerations for public as opposed to private undertakings are so dissimilar, for both historical and contemporary reasons, that it can be of no assistance that one is contemplated by the scheme and the other not. And the logic that if the activity undertaken by a public utility does not conflict with the planning scheme, that fact must render it a 'matter of public interest', does not withstand closer*

scrutiny. I agree with the Council's submission: this was an irrelevant consideration in considering the sufficiency of grounds."

The Council also argued that the primary judge had not adequately considered and dealt with its submission that the Gatton North Enterprise Opportunity area provided a possible site, consistent with the SEQ Regional Plan, at which the development could have been carried out with the same public advantages. Justice Holmes found that this was a relevant consideration that the primary judge had failed to address in his reasons.

Consequently, the matter was again remitted to the Planning and Environment Court for determination according to law, but the Court ordered that that hearing was to be conducted by a different judge.

Observations

The Court of Appeal's reasons in each of its judgments mean that drafting mechanisms which define a use as 'inconsistent' will effectively create a conflict with the planning scheme, the scale of which will depend on the way in which the inconsistency is expressed. Such provisions may textually create a major conflict, which the Court of Appeal seems to suggest was the case with respect to section 4.12(k) of the Gatton Scheme. On the facts of the case, it seems to have been accepted by the Court that the conflict could not be minor where the drafting mechanism made all other uses inconsistent with the purpose of the zone. The use of such drafting mechanisms may have unintended consequences, placing uses in major conflict with a planning scheme that might otherwise be considered desirable.

The primary judge should be forgiven for thinking that the suitability of the same use, if carried out by a public entity, had some relevance. Planning is concerned with land use. These days many services that were previously provided by the public sector have been privatised, and it is not uncommon for private/public partnerships to be formed for major pieces of infrastructure. Logically, if an electricity generating plant is consistent with the purpose of the zone, why, in planning terms, is it inappropriate if developed by the private sector? The Court of Appeal's approach to this issue may be correct as a matter of strict interpretation of the planning scheme, but from a planning perspective, the result of the Court's decision is theoretical rather than practical.

The Council's argument, which the Court of Appeal accepted, was that sufficient grounds had to be matters of public interest. The fact that the development could be undertaken by the public sector consistently with the purpose of the zone did not qualify as a matter of 'public interest', and was therefore an irrelevant consideration. The 'considerations' the Court of Appeal referenced in the paragraph of its reasons quoted above were not identified. It seems unlikely that the planning considerations relevant to such a use would be different if it is accepted that the power plant is needed, and consistent with broader public policy relating to energy production.

It seems likely that the factor foremost in the primary judge's mind was that the actual uses will be the same and would have the same impacts irrespective of the identity of the proponent. Such reasoning is logically correct in planning terms. So what exactly were the considerations that were "so dissimilar as to render this point of no assistance on the issue of public need for such facilities"?

Bearing in mind that planning schemes are to be interpreted broadly, fairly and practically, and that the context concerns finding excusatory 'grounds' that the primary judge had otherwise concluded were sufficient, it is difficult to see how the erroneous inclusion of this particular ground materially affected the outcome.

The other ground on which the Council succeeded related to ground (c) of the primary judge's reasons quoted above. The council's complaint was that the primary judge had not understood and responded to its submission, which was that "it was not that the Gatton North Enterprise Opportunity Area provided a better location but that the development could have been carried out with the same advantages, consistent with the Regional Plan." The Court of Appeal found that the primary judge's reasons did not explain why the Council's submission had been rejected.

The question of whether the community need would have been satisfied at the Gatton North Enterprise Opportunity Area consistently with the SEQ Regional Plan was addressed in the primary judge's first judgment, based on the joint evidence of the planners, to the effect that the proposal was consistent with the SEQ Regional Plan. Further, the planning scheme's support for the development on land zoned industrial could not be assumed. If the use was a 'special purpose', the outcome would be similar for both the rural and industrial zones, and being undefined, it was not specifically dealt with as either consistent or inconsistent in the industrial zone. It was simply an impact assessable use in that zone. That

is the basis on which this ground ought to have been considered for comparative purposes, and again the question arises as to whether the error found by the Court of Appeal was in reality material to the outcome.

Some other interesting points emerge from the Court of Appeal's second judgment:

1. The previous judgment of the Court in *Weightman*[3] does not distinguish, with respect to weight, between grounds directed specifically at conflict with the scheme and general grounds for overcoming conflict:

   "[21] *The Council's attempt at construing Weightman so as to add another layer of explication to Atkinson J's explanation of the section (in its earlier form) should be rejected. There is no warrant in s 3.5.14(2)(b) itself for applying different weight to different grounds. To do so would be to impose an entirely artificial set of fetters on the decision-making required. The importance of the ground must depend on what it is, not where it falls in the three-step approach in Weightman.*"

2. The decisions of the Court of Appeal in *Grosser*[4] and of the Planning and Environment Court in *Palyaris*[5] do **not** establish that absence of a negative impact is not a relevant consideration with respect to sufficient grounds. Those cases were decided under repealed legislation that referred to 'planning grounds'. It was a matter of 'public interest' that the proposed electricity generating plant would not be detrimental to local amenity due to existing vegetation and proposed landscape screening. The Court of Appeal said that while the mere absence of adverse effects alone will not amount to sufficient grounds to outweigh conflict with the planning scheme, "it does not follow that the absence of a negative impact or detrimental effect is not a relevant consideration... It must be a matter of public interest, for example, that the project under consideration will not destroy local amenity..."

Overall, the Westlink judgments clearly demonstrate that the decision rules are overly complex and in need of reform.

The legal errors found by the Court of Appeal do not detract from what appears, on the face of the reasons in all four judgments, to be the correct decision on the merits by the primary judge. It remains to be seen whether a different judge of the Planning and Environment Court will reach a different conclusion.

[3] *Weightman v Gold Coast City Council* (2003) 2 QdR 441
[4] *Grosser v City of Gold Coast* (2001) 117 LEGRA 153
[5] *Palyaris v Gold Coast City Council* (2004) QPELR 162