Enforcement Options and the Unchallengeable Enforcement Notice

Judge W G Everson

Planning and Environment Court of Queensland

Introduction

[1] The focus of this paper is the various options for enforcing non-compliance with planning or development controls pursuant to the *Sustainable Planning Act 2009* (Qld) ("SPA").[1] I will, however, briefly comment on the similar approach under the *Environmental Protection Act 1994* (Qld) ("EPA").

[2] I will also discuss constraints which exist in challenging an enforcement notice as a consequence of the recent decision in *Gold Coast City Council v Lear & Anor*.[2]

Different options for enforcing planning or development controls

[3] Pursuant to s 597 of SPA, a prosecution may be brought in the Magistrates Court on a complaint for an offence against Chapter 7, Part 3.[3] A proceeding for an offence against SPA is a summary proceeding pursuant to the *Justices Act 1886* (Qld),[4] ("JA") and must be started either within one year after the commission of the offence or within six months after the offence comes to the complainant's knowledge.[5] The criminal standard of proof, beyond reasonable doubt, applies.

[4] The Magistrates Court has broad jurisdiction to make orders it considers appropriate. In addition to, or in substitution for, any penalty the Court may otherwise impose, it may require the defendant to do such things as stop development, stop carrying on a use, undertake demolition or remediation work, or apply for a development permit.[6]

[5] The Planning and Environment Court has no criminal jurisdiction. However, pursuant to s 601 of SPA, a person may apply for an enforcement order to remedy or restrain the commission of a development offence or for an interim enforcement order

---

1 The use of the term 'planning or development controls' contemplates breaches of both legislated planning controls and conditions of a development approval.
2 [2016] QDC 215.
3 *Sustainable Planning Act 2009* (Qld) s 597(1).
4 Ibid s 609.
5 Ibid s 610.
6 Ibid s 599.

pending the determination of the matter.[7] This relief mirrors injunctive relief available in the District Court or the Supreme Court.[8] The criminal standard of proof does not apply. The applicable standard is the balance of probabilities, with reference to the sliding standard as articulated in *Briginshaw v Briginshaw*.[9]

[6] A similar regime applies under the EPA although it expressly includes both indictable and summary offences.[10] Again, the Planning and Environment Court effectively has an injunctive jurisdiction by way of restraint orders and interim orders pursuant to ss 505 and 506 of the EPA.[11]

[7] The general powers pursuant to s 456 of SPA are arguably also wide enough to contemplate a declaration that development has occurred in breach of planning or development controls and consequential orders akin to appropriate injunctive relief.[12]

[8] Fortunately, s 457 of SPA acknowledges that it is appropriate to award costs, including the costs of any investigation, where successful proceedings for an enforcement order in a Planning and Environment Court are brought.[13]

[9] Despite the extended power of Magistrates to make consequential orders of an injunctive character pursuant to s 599 of SPA, the most appropriate course is usually to commence a proceeding in the Planning and Environment Court seeking an enforcement order and an interim enforcement order pending this. This reflects the need to stop a breach of planning or development controls in an urgent or timely way and limit its consequences. For example, where environmental harm is occurring or where an unlawful structure is being built. Once appropriate relief has been obtained and the consequences of the breach of the planning or development controls have been addressed, the opportunity remains to commence a criminal prosecution in the Magistrates Court and obtain a substantial fine upon conviction. Obviously care must be taken to ensure that any prosecution in the Magistrates Court occurs within the time limitations pursuant to s 610 of SPA noted above.

---

7 Ibid s 601.
8 Ibid ss 603-607.
9 [1938] HCA 34.
10 *Environmental Protection Act 1994* (Qld) ss 494-495.
11 Ibid ss 505-506.
12 *Sustainable Planning Act 2009* (Qld) s 456(7). See *Mac Services Group Limited v Belyando Shire Council* [2008] QPELR 503, 508.
13 Ibid s 467(6)-(9).

[10] This approach proved successful in *Gold Coast City Council v Metrostar Pty Ltd & Ors*,[14] where interim orders requiring remediation works after unlawful development, which damaged and removed vegetation, were obtained. These orders were not complied with and it was necessary for the Planning and Environment Court to make further orders. The flagrant non-compliance by the developer with the earlier orders of the Court resulted in an award of indemnity costs for the first time in the history of the Court.[15] After the development site had been stabilised and rehabilitation works had been undertaken, the developer was successfully prosecuted in the Magistrates Court for the unlawful removal of vegetation and a substantial fine was imposed.

[11] The other enforcement option is for an assessment authority that reasonably believes a person has committed or is committing a development offence to issue an enforcement notice. Generally before doing so the assessing authority must give the person a show cause notice inviting that person to show cause why the enforcement notice should not given.[16] However, this is not mandatory if the assessing authority reasonably considers it is not appropriate in the circumstances to give the notice,[17] for example, where urgent action is required to address a danger to public health or safety.[18] Both show cause notices and enforcement notices must comply with a number of specified requirements.[19] A person who is given an enforcement notice must comply with it to avoid the potential imposition of a penalty of up to 1,665 penalty units.[20]

[12] In my experience, resort to an enforcement notice is most appropriate where the breach of the planning or development control is of a relatively minor nature. It is not a process which is likely to bring about a timely resolution of the breach. However, the major attraction of this approach is that it enables assessing authorities such as local governments to address non-compliance at minimal cost.

---

14 [2004] QPEC 024.
15 *Gold Coast City Council v Metrostar Pty Ltd & Ors* [2004] QPEC 029.
16 *Sustainable Planning Act 2009* (Qld) s 588(2).
17 Ibid s 588(3).
18 Ibid s 588(3).
19 Ibid ss 589, 592.
20 Ibid 594.

The limits to challenging an enforcement notice

[13] An issue which recently arose for consideration in the District Court in an appeal pursuant to s 222 of the JA, was whether an enforcement notice that was formally valid on its face could be challenged in a proceeding in the Magistrates Court upon prosecution for failing to comply with it.[21] Pursuant to s 473 of SPA, a person who is given an enforcement notice may appeal to the Planning and Environment Court against the giving of the notice but the appeal must be started within 20 business days after the day the notice is given. This provision clearly places an obligation on a party given an enforcement notice to challenge it within the prescribed time period. The validity of the enforcement notice may also be challenged pursuant to the *Judicial Review Act 1991* (Qld) ("JRA"), for example, on the ground it had been given for an improper purpose. However, there is no privative clause in SPA or elsewhere which states that an enforcement notice which is not the subject of an appeal pursuant to s 473, or a challenge pursuant to the JRA, may not otherwise be challenged.

[14] In *R v Wicks*,[22] the House of Lords concluded that there were sufficient avenues to change an enforcement notice pursuant to the statutory regime in the *Town and Country Planning Act 1990* (UK) by way of a statutory appeal and in judicial review proceedings and held that there was no opportunity to change the lawfulness of the enforcement notice upon a prosecution for failure to comply with it. Lord Hoffmann analysed the context of an enforcement notice within the relevant legislative framework in the following terms:

> "The history shows that over the years there has been a consistent policy of progressively restricting the kind of issues which a person served with an enforcement notice can raise when he is prosecuted for failing to comply. The reasons for this policy of restriction are clear: they relate, first, to the unsuitability of the subject matter for decision by the criminal court; secondly, to the need for the validity of the notice to be conclusively determined quickly enough to enable planning control to be effective and to allow the timetable for service of such notices in the Act to be operated; and thirdly, to the fact that the criminal proceedings are part of the mechanism for securing the enforcement of planning control in the public interest."[23]

---

21 *Gold Coast City Council v Lear & Anor* [2016] QDC 215.
22 [1998] AC 92.
23 Ibid 119.

[15] The decision in *Wicks* was distinguished in the New South Wales Land and Environment Court in *Gray v Woollahra Municipal Council*.[24] In the course of his Honour's judgment, Whealy J drew attention to the privative clause which applied in *Wicks:*

> "Subject to the provisions of this section, the validity of an enforcement notice shall not, except by way of appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."[25]

[16] In the context of challenge to the validity of the Council demolition order in a prosecution proceeding in the local court, Whealy J relevantly stated:

> "In the end, I have come to the conclusion that the entitlement to do so has not been taken away…There are two essential reasons why I think this is so.
>
> …
>
> If the legislature had wished to oust the ability of the local court to deal with such a defence, it would have been a simple matter to have included it in the legislation.
>
> Secondly, it seems to me that only the clearest language in a statute should be held to have taken away the right of a defendant in criminal proceedings to challenge the lawfulness of an administrative decision made against him where the prosecution is premised on its validity."[26]

[17] The decision in *Gray* was followed by the Planning and Environment Court of Queensland in *Howe & Anor v Harris*,[27] in the context of a prosecution for failing to comply with an enforcement notice given pursuant to the statutory regime of the *Integrated Planning Act 1997* (Qld) which preceded the current statutory regime and which was substantively the same.

[18] Since *Howe* was decided, the Full Court of the Supreme Court of Tasmania considered the decision in *Wicks* in *Krulow v Glamorgan Spring Bay Council*.[28] Relevantly, the question that arose for determination by the Full Court was whether the appellants were permitted to challenge the validity of orders of the Resource Management and Planning Appeal Tribunal when prosecuted for contravention of

---

24 [2004] NSWSC 112.
25 *R v Wicks* [1998] AC 92, 111.
26 *Gray v Woollahra Municipal Council* [2004] NSWSC 112, [108]-[111].
27 Unreported, District Court, Maroochydore 13 May 2005.
28 (2013) 23 Tas R 264.

them. The appellant submitted that there was no express provision in any of the relevant legislation which made valid and binding a jurisdictionally flawed decision of the Tribunal, and that such a decision must be invalid. In response to this submission, Estcourt J stated:

> "In my view the necessary implication stems firstly, from the fact that the Tribunal's orders made under s 64 of the LUPA Act are open to appeal to this court under s 65 of the Act, and secondly, from the fact that the legislation gives the Tribunal no power to enforce its own orders made under s 64, but rather, requires enforcement to be by way of summary prosecution. The result of that seems to me, sensibly to be, that the text, context and purpose of the Act allow that a person may exercise the right to appeal against an order directed to him or her, but require that in the event of failing to do so the order is to be presumed valid for enforcement purposes."[29]

[19] In *Krulow*, the absence of a privative clause was not of any consequence. You will note that the structure of the relevant legislation was similar to that relating to an enforcement notice in SPA.

[20] In *Conquest & Anor v Bundaberg Regional Council*,[30] the Court of Appeal recently declined to determine the issue of whether a valid enforcement notice issued pursuant to SPA could be challenged in a subsequent prosecution.[31]

[21] In *Gold Coast City Council v Lear & Anor*, the District Court concluded that, consistently with how the decision in *Wicks* was applied in *Krulow*, the absence of a privative clause was not of any consequence. The Court stated:

> "It is not in the public interest that the recipient of an enforcement notice be permitted to do nothing in response to it and challenge its validity much later, when the offence of failing to comply with the enforcement notice finally becomes before the Magistrates Court. The legislative regime provides more than ample redress to the recipient of an enforcement notice who wishes to challenge it."[32]

Conclusion

[22] There are clearly a number of enforcement options where there has been a breach of planning or development controls. Where an assessing authority wishes to take action

---

29 Ibid 300-301.
30 [2016] QCA 203.
31 Ibid [42]-[43] (Fraser JA).
32 Ibid [25]-[26].

in this regard, the most effective way of securing compliance is by bringing proceedings seeking enforcement orders, or equivalent relief if the jurisdiction arises pursuant to the EPA, in the Planning and Environment Court.[33]

[23] If the assessing agency proceeds to issue an enforcement notice, the recipient of such a notice must challenge it, by way of appeal pursuant to s 473 of SPA or through a challenge pursuant to the JRA. Otherwise, if the enforcement notice is valid on its face, it cannot be challenged in any subsequent proceedings to enforce it in the Magistrates Court.

---

[33] This relief is not limited to an assessing authority, however, as pursuant to s 601 of SPA "a person" may bring such a proceeding.