BALANCING FLEXIBILITY AND ACCOUNTABILITY IN THE PLANNING AND ENVIRONMENT COURT OF QUEENSLAND – A NOOSA PERSPECTIVE

By Judge W G Everson

[1] I have a long personal and professional relationship with Noosa. I first remember coming to Noosa Heads as a very young child on a family holiday. I recall staying in a low-set brick unit in Hastings Street and watching a man catching large bream with a hand line on the main beach. Over the years, I spent periods of my youth wandering in the national park and surfing the points. More recently I was a surf life saver at Noosa Surf Lifesaving Club and patrolled the same beach I came to associate with an abundance of fish as a young child. I still regularly swim between the surf club and Tea Tree Bay. It is therefore Noosa Heads which is the focus of this paper.

[2] I love the natural beauty of Laguna Bay and the national park and I consider it one of the most picturesque locations in Australia. I acknowledge the efforts of members of the community and successive councils to protect Noosa from both overdevelopment and inappropriate development. As a barrister I was regularly briefed by the Noosa Shire Council. I was well aware of the council's desire to "protect the Noosa brand", which it considered "internationally renowned".

[3] This "brand" extended to an aversion to both traffic lights and high-rise development. Planning schemes tended to be prescriptive and planning controls were vigorously

enforced. Overall, the approach of the council ensured the maintenance of the environmental values and distinctive charm of Noosa Heads. In my opinion at times this approach also lacked flexibility. What is wrong with a mixture of traffic lights and roundabouts in managing traffic in the local government area? Do a few extra storeys ruin an environmentally focused aesthetic from an amenity perspective?

[4] The current legislative regime pursuant to the *Planning and Environment Court Act 2016* ("PECA") and the *Planning Act 2016* ("PA") gives the Planning and Environment Court of Queensland ("the Court") much more flexibility in determining the merits of an impact assessable development proposal than previous recent legislative regimes, including the regime under the *Sustainable Planning Act 2009*.

[5] Section 45(5) of the PA provides that impact assessment must be carried out against the relevant assessment benchmarks in a categorising instrument which is usually the planning scheme. It must also be carried out having regard to any matters prescribed by regulation. Notably the assessment may also be carried out having regard to "any other relevant matter, other than a person's personal circumstances, financial or otherwise". Because s 43 of the PECA states an appeal is by way of hearing anew and s 46 provides that the Court's decision is as if it were that of the assessment manager, a broad jurisdiction to determine an appeal about impact assessable development is conferred on the Court pursuant to s 60(3) of the PA.

[6] The effect of these provisions was summarised by Williamson QC DCJ in *Ashvan v Brisbane City Council* [2019] QPELR 793 at 808 [60] in the following terms:

> The manner in which the balance between rigidity and flexibility is struck in any given case does not lend itself to a general statement of principle, or precise formulation. The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. It is a discretion that is to be exercised based on the assessment carried out under s 45 of the PA. It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances, if any, identified with an assessment benchmark.

[7] The above passage was endorsed and quoted by Mullins JA in *Abeleda v Brisbane City Council* (2020) 6 QR 441 at 462 [56]. Her Honour also noted at 457 [40] that:

> … the outcome of the development application is not necessarily determined by the degree of compliance against the assessment benchmarks and the decision-maker is permitted to have regard to other relevant matters, in addition to the mandatory assessment against the assessment benchmarks in the planning scheme.

Further, Mullins JA observed at 457 [42] that:

> The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the assessment benchmarks in the relevant planning scheme and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any non-compliance is also weighted according to the circumstances), in order to be considered and balanced by the decision-maker with any other relevant factors.

[8] There is no doubt about the importance of the planning scheme in the assessment process. As Mullins JA subsequently observed in *Wilhelm v Logan City Council* [2021] QPELR 1321 at 1339 [77], the change in the regime "has not affected the fundamental nature of a planning scheme as the reflection of the public interest in the appropriate development of land." Consideration of provisions of the planning scheme is however only part of the assessment and decision-making process which the Court may undertake on an appeal concerning an impact assessable development application. The Court on appeal may be more flexible in exercising its discretion, and place more weight on relevant matters, than the council previously did when deciding the development application.

[9] As to the potential consideration of relevant matters in the assessment and decision-making process, I will return to an observation I made some years ago in *Hotel Property Investments v Council of City of Gold Coast* [2019] QPELR 554 at 557 [13]:

> Accordingly, pursuant to the regime in the PA there is much more scope for a consideration of the site specific benefits of a proposed development in assessing a development application. This in turn leads to greater scope for the use of expert evidence in the assessment process.

No doubt the experts in the room will be pleased about this. Examples of relevant matters are given in s 45(5) of the PA, including planning need and the legitimacy and relevance of the assessment benchmarks, but these are by no means prescriptive.

[10] An extreme example of what an accumulation of relevant matters might look like is to be found in the Bosco Verticale in Milan. It is scarcely imaginable that the vista of such an historic city could be so well complemented by two major residential towers. Boeri Studio's design is packed with greenery, adorned by more than 20,000 trees and plants that can reportedly transform 44,000 pounds of carbon dioxide into oxygen annually.[1] This integration of vegetation and high density dwellings, which results in a vertical forest aesthetic, is a powerful example of an urban planning and architectural response to challenges ranging from the impacts of multiple dwellings on visual amenity to limiting the impacts of carbon emissions.

[1] The Verge, *High-rise forests in Italy are fighting air pollution* (9 August 2017) <https://www.theverge.com/2017/8/9/16112758/milan-vertical-forest-stefano-boeri-video>.

[11] Prescriptive assessment benchmarks in a planning scheme are necessary to ensure the maintenance of environmental values and amenity in a place such as Noosa. However, over application of such planning controls could stifle innovative design solutions which may be otherwise meritorious. The Court has the flexibility to assess their unique benefits in the context of the relevant assessment benchmarks when hearing and determining an appeal in respect of an impact assessable development. This enables the balancing of flexibility and accountability in determining such a proceeding. Hopefully this leads to good planning outcomes for Noosa.