PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Kin Kin Community Group Inc. v Sunshine Coast Regional Council & Ors* [2010] QPEC
PARTIES:	**KIN KIN COMMUNITY GROUP INC.** *Applicant* **v** **SUNSHINE COAST REGIONAL COUNCIL** *First Respondent* **and** **JOHN WALLACE SHEPPERSON** *Second Respondent* **and** **NEILSENS QUALITY GRAVELS PTY LTD ACN 010 620 916** *Third Respondent*
FILE NO:	**32 of 2010**
DIVISION:	Planning and Environment Court, Maroochydore
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	21 December 2010
DELIVERED AT:	Maroochydore
HEARING DATES:	4, 5, 6, 7, 12, 13 and 14 October 2010
JUDGE:	K.S. Dodds DCJ
ORDER:	**The application is dismissed.**
CATCHWORDS:	PLANNING – PLANNING LAW – DECLARATIONS AND ORDERS – whether town planning consent for extractive industry (the approval) in 1987 with conditions was ultra vires and unlawful – whether orders of Local Government Court on appeal from the town planning consent were made without jurisdiction PLANNING – PLANNING LAW – JURISDICTION – whether Planning and Environment Court has power to declare an order of the Local Government Court was made without jurisdiction

PLANNING – PLANNING LAW – whether the approval was limited by the application – whether quarry management plans required by a condition of the approval were limited by the application – whether commencement of use required compliance with conditions – whether approval lapsed because conditions not complied with

PLANNING – PLANNING LAW – whether extension of the term of approval by council unlawful

PLANNING – PLANNING LAW – discretion to make declarations and consequential orders

City of Brisbane (Town Planning) Act 1964 s 27, s 28

Integrated Planning Act 1997 s 1.3.5

Local Government Act 1936 – 1985 s 30, s 32(13), s 33(18), s 33(18C)

Local Government Act 1993 s 656

Local Government (Planning and Environment) Act 1990 s 8.10(8), s 8.10(8B), s 4.13(18), s 4.15

Sustainable Planning Act 2009 s 456, s 757, s 818

Cases cited:

ACR Trading Pty Ltd & Anor v Fat-Sel Pty Ltd & Anor (1987) 11 NSWLR 67

Auburn Municipal Council v Szabo & Anor (1971) 67 LGRA 427

Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493

Barakat Properties Pty Ltd v Pine Rivers Shire Council & Anor (1994) 85 LGERA 99

Briginshaw v Briginshaw & Anor (1938) 60 CLR 336

Cornerstone Properties Ltd v Caloundra City Council & Anor [2005] QPELR 96

Di Marco v Brisbane City Council & Ors [2006] QPELR 731

Eaton & Sons Pty. Limited v The Council of the Shire of Warringah (1972) 129 CLR 270

Eremenco v Rutherford & Calliope Shire Council [1996] QPELR 153

Eschenko v Cummins [2000] QPELR 386

Fatsel Pty Ltd & Anor v ACR Trading Pty Ltd & Anor (No. 3) (1987) 64 LGRA 177

Hawkins & Anor v Permarig & Anor (No. 1) [2001] QPELR 414

Hockey v Yelland & Ors (1984) 157 CLR 124

House of Peace Pty Ltd & Anor v Bankstown City Council (2000) 106 LGERA 440

Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc (1992) 81 LGERA 132

Jones & Anor v Sutherland Shire Council (1979) 40 LGRA 323

Kirk & Anor v Industrial Court of New South Wales & Anor (2010) 239 CLR 531

Leichhardt Municipal Council v Terminals Pty Ltd (1970) 21 LGRA 44

Lidcombe Developments Pty Ltd v Warringah Shire Council (1980) 41 LGRA 420

Lockhart River Aboriginal Council v Cook Shire Council [1992] 1 Qd R 50

McDonald v Douglas Shire Council [2004] 1 Qd R 131

Mac Services Group Ltd v Belyando Shire Council & Ors [2008] QPELR 503

Mudie v Gainriver P/L & Ors [2001] QCA 382

NRMCA (Qld) Ltd v Andrew [1993] 2 Qd R 706

Pad-Mac Pty Ltd v Hotel Wickham Investments Pty Ltd (1995) 88 LGERA 157

Parramatta City Council & Anor v Hale & Ors (1982) 47 LGRA 319

Parramatta City Council v Shell Co. of Australia Ltd [1972] 2 NSWLR 632

P E Bakers Pty Ltd & Ors v Yehuda & Anor (1988) 15 NSWLR 437

Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors (1980) 145 CLR 485

Project Blue Sky Inc & Ors v Australian Broadcasting Authority (1998) 194 CLR 355

Rowley v New South Wales Leather and Trading Co. Pty Ltd & Anor (1980) 46 LGRA 250

Ryde Municipal Council v The Royal Ryde Homes & Anor (1970) 19 LGRA 321

Scurr & Ors v Brisbane City Council & Anor (1973) 133 CLR 242

Serenity Lakes Noosa v Noosa Shire Council [2007] QPELR 334

Sericott Pty Ltd v Snowy River Shire Council (1999) 108 LGERA 66

Sydney Serviced Apartments Pty Ltd v North Sydney Municipal Council (No. 2) (1993) 78 LGERA 404

Thiess Services Pty Ltd & Anor v Mareeba Shire Council & Ors [2009] QPELR 1

Vaughan-Taylor v Mitchell-Melcann Pty Ltd & Anor (1991) 73 LGRA 366

Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335

Westfield Management Ltd v Brisbane City Council & Anor [2003] QPELR 520

Weston Aluminium Pty Ltd v Environmental Protection Agency & Ors (2007) 156 LGERA 283

COUNSEL:	M Hinson SC with M Labone for the applicant
	N Kefford for the first respondent
	A Skoien for the second respondent
	J Gallagher QC with M Johnston for the third respondent
SOLICITORS:	p&e Law for the applicant
	Wakefield Sykes, Solicitor for the first respondent
	Jeffery, Cuddihy & Joyce Solicitors for the second respondent
	Minter Ellison Lawyers for the third respondent

[1] In this matter the incorporated applicant (Kin Kin) has sought declarations pursuant to sections 456 and 818 of the *Sustainable Planning Act 2009* (SPA). The declarations relate to a town planning consent (TPC). On 31 March 1987 the second respondent (Shepperson) applied for a TPC to use Lot 259 Parish of Noosa (259) for "extractive industry – hard rock quarry". On 21 July 1987 Noosa Shire Council (Noosa) approved "TPC 1899 J. Shepperson for an Extractive Industry on Portion 259 Murrays Road via Kin Kin subject to the conditions contained in the Shire Planner's report dated 4 June 1987".[1] On the same date it wrote to Shepperson "Re: TPC 1899 – Extractive Industry – Portion 259 Murrays Road via Kin Kin" advising it had resolved to approve his application subject to conditions which followed. Shepperson was and is still the owner of 259 and the adjoining lot, portion 258 (258). Shepperson appealed against some of the conditions to which the approval was subject. On 13 May

[1] Council Minute, Tab 8, Section 251 Certificate.

1988 the then Local Government Court allowed the appeal, removing and varying some of the conditions.

[2] The power to make declarations was first provided to the Court by the *Local Government (Planning and Environment) Act 1990* (the P and E Act), although in more limited terms than presently enacted. The power continued in the *Integrated Planning Act 1997* (IPA) and SPA. The power is discretionary, that is, whether a declaration is made, lies within the Court's discretion.

[3] On 28 January 2010 Kin Kin filed its original application for declarations. On 12 February 2010 the Court gave directions to ready the matter for hearing including matters such as requests for and provision of particulars, filing and exchange by the parties of statements of facts, matters and contentions, filing and exchange of affidavits, the holding of a without prejudice conference and participation in a mediation. Time limits were set for these steps. The issues in dispute were ordered limited to those matters set out in the originating application and statements of facts, matters and contentions. The matters was set down for review on 21 May 2010 and for hearing for five days commencing 16 June 2010.

[4] On 30 April 2010 the order of 12 February 2010 was varied. Further orders were made for particulars, for disclosure, for amended statement of facts, matters and contentions, for replies thereto and regarding the filing of affidavits upon which parties intended to rely at the hearing. It was ordered that the issues in dispute in the proceeding be limited to those matters in the originating application, amended statements of facts, matters and contentions, replies to statements of facts, matters and contentions and amended statements of facts, matters and contentions and to all further and better particulars.

[5] On the review date of 21 May 2010, Kin Kin wished to amend its application. The hearing dates were vacated and Kin Kin was ordered to file its amended application on or before 28 May 2010. This it did. Further directions orders were made and the proceeding was set down for hearing for 7 days commencing 4 October 2010. It was ordered the issues in dispute be limited to the matters set out in the amended originating application, the amended statements of facts, matters and contentions and replies thereto (including any further and better particulars of such pleadings) as were filed in the proceeding.

[6] The declarations sought in the amended application are:

- the first respondent's decision to approve the use subject to conditions was unlawful;
- the order of the Local Government Court was made without jurisdiction;
- the approval has lapsed pursuant to section 4.13(18) and section 8.10(8B) of the P and E Act and there is thus no lawful approval for use of the land for the purposes of extractive industry;
- the use of the land for extractive industry as approved and subject to the conditions of the approval is limited to the use and area of land particularised in the application for town planning consent for extractive industry hard rock quarry dated 31 March 1987;

- use of the land for extractive industry other than in accordance with the 1987 approval is unlawful;
- the decision of the first respondent to approve the Kin Kin Quarry Management Statement and Development Plan dated July 1991 is ultra vires and unlawful;
- the decision of the first respondent to approve the Quarry Management Plan Kin Kin Quarry dated 20 March 2005 is ultra vires and unlawful;
- there is no lawful approval for any extension of the term of the approval beyond the term specified in the order of the Local Government Court of 13 May 1988.

[7] Consequential orders are sought to effectively prevent any construction or excavation work for quarry purposes "until an effective development permit for that work is obtained" alternatively to limit any construction or excavation work for quarry purposes.

[8] The evidence in this proceeding consisted of:

- a large volume of documentation discovered from Noosa's records since 1986, exhibited to affidavits:
    - for Kin Kin, of Madonna Louise Griffin (Griffin);
    - for Neilsens, of Hannah Lucy Riggs (Riggs);
    - for Noosa, attached to a section 251 *Local Government Act 2009* Certificate under the hand of John Knaggs, Chief Executive Officer of the Sunshine Coast Regional Council (section 251 Certificate);
- oral evidence from two ex-employees of Noosa;
- affidavits from Mr Holland, a traffic engineer, from persons who live or who have interests in the vicinity of Kin Kin and/or 259, some of whom are members of the applicant and from Mr Christofis, a cadastral consulting surveyor;
- affidavits and oral evidence from two town planners, from Shepperson and Mr Neilsen who was the founding director and chief executive officer of the Neilsen group of companies, now chairman of the board.

During these reasons I will refer to portions of it.

[9] The first respondent, created in the recent amalgamation of local authorities, now embodies Noosa. The third respondent (Neilsens) is a commercial entity currently intending to quarry 259 and the author of the Quarry Management Plan Kin Kin Quarry dated 25 March 2005 (the Neilsens Plan). It sought and obtained a Standard Planning and Development Certificate in accordance with section 5.7.10 of IPA in August 2003 regarding 259. Such a certificate was required to disclose, inter alia, "a copy of every decision notice for a

development approval that has not lapsed".[2] That certificate disclosed the existence of TPC 1899 for extractive industry approved on 21 July 1987, the order of the Local Government Court of 13 May 1988 and a currency of 30 years. In reliance upon the Certificate various other steps were taken by Neilsens and Noosa which are not necessary to describe at this point. In July 2008 Noosa surrendered its lease of 259 from Shepperson. Following that, Neilsens leased 259 from Shepperson and an agreement was entered into for Neilsens to undertake quarrying on 259.

[10] Senior Counsel for Kin Kin, in his opening statement distilled the issues for determination as:

- was the town planning consent approval given by Noosa Shire Council in 1987 lawfully given;
- was the order made by the Local Government Court on 13 May 1988, allowing the appeal against some conditions to which the Noosa Shire Council subjected its approval and varying conditions, made within jurisdiction;
- in the event the approval of the Council was lawfully given and the Court's orders were within its jurisdiction, did the town planning consent approval lapse;
- in the event the approval has not lapsed, is the use of Portion 259 for quarry purposes for extractive industry, limited to the area and scale of development particularised in the application for town planning consent and the town planning consent limited only until 2018.

[11] Senior Counsel for Kin Kin in his submissions informed the Court that it no longer wished to contend there had been cessation of the use for a period of at least 12 months. That aspect of the application may be put to one side.

[12] It is appropriate to touch upon some general issues first.

[13] Section 456 of SPA provides that <u>any person</u> may bring a proceeding in the Court for a declaration about specified matters (my underlining). The only limitation provided is in the subject matter. The proceeding must be about one or more of the specified matters. Two of them, called upon by the applicant, were:

> "(a) a matter done to be done or that should have been done for this Act---.
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> ----
>
> (e) the lawfulness of land use or development".

[14] The 1987 approval and the subsequent order of the Local Government Court occurred when the legislative framework for approval of a consent use of the type sought in the Noosa local authority area was the *Local Government Act 1936*, as amended (the LG Act) section 33, the Town Planning Scheme for the whole of the Shire of Noosa (the 1985 Schedule) and Chapter XLIV of Noosa's by-laws (the by-laws). Subsequently the P and E Act came into force, to be

[2] *Integrated Planning Act 1997* section 5.7.10(1)(a).

followed in turn by IPA and then SPA. For present purposes the respective commencement dates for the P & E Act, IPA and SPA were 15 April 1991, 30 March 1998 and 18 December 2009.

[15] Various of the respondents submitted that one or both of sub-paragraphs (a) and (e) of section 456(1) of SPA did not empower this Court to make the declarations sought with respect to the lawfulness of Noosa's approval of 21 July 1987 and the order of the Local Government Court of 13 May 1988. Regarding subsection (a) it was submitted that matters done, or that should have been done were not for SPA. There was an absence of connection between the applicant's allegations in support of what it contended for and SPA. The allegations called into question the legitimacy of a process under long since repealed legislation and the jurisdiction of the Local Government Court. Some provision was made in SPA to bring proceedings for a declaration under IPA. Section 818(2) permited declaratory proceedings brought under IPA in relation to some matters which may have been brought under IPA but not to lawfulness of land use. It did not provide for proceedings relating to matters done, to be done, or that should have been done for the P and E Act or the LG Act. Regarding subsection (e) it was submitted that lawfulness of land use related to lawfulness in the context of SPA, rather than in respect of another Act. Reference was made to the judgment of Rackemann DCJ in *Cornerstone Properties Ltd v Caloundra City Council & Anor* [2005] QPELR 96 at 103, paragraph 48 where His Honour held that lawfulness of land use or development when used in section 4.1.21 of IPA (for present purposes, a provision equivalent to section 456 of SPA) should be construed as referring to lawfulness in the context of IPA rather than in respect of the *Water Act 2000.* A question in issue was whether destruction of particular vegetation required a permit under the *Water Act 2000.*

[16] The applicant submitted that to lawfully operate a quarry on 259 Neilsens required a valid town planning consent. The only consent which could be relied upon was TPC 1899. To the extent the consent existed in 1987/1988, absent subsequent lapse, it continued to exist according to its terms through the various manifestations of planning legislation until the present time under SPA. A valid consent was a matter to be done for SPA. Similarly a valid consent was required for the land use to be lawful. The applicant was therefore entitled to bring its proceeding for a declaration.

[17] In my view the applicant's submission accurately expresses the position. The section is cast in wide terms. The lawfulness of land use of 259 rests upon TPC 1899. A lawful use under the 1987, 1988 legislation, provided it has not been abandoned or has lapsed, remains a lawful use according to its terms under SPA.

[18] The third respondent additionally submitted that the applicant, as opposed to its members, who were not parties to the proceeding, had not established any sufficient interest in the approval or the quarry such that as a matter of fact or at least as a matter of discretion the Court should decline to make the declarations sought and consequential orders. The decision of the Queensland Court of Appeal in *NRMCA (Qld) Ltd v Andrew* [1993] 2 Qd R 706 was on point.

[19] *NCRMA* was an appeal against a decision of a Judge of the Planning and Environment Court, refusing an order under section 2.24 of the P and E Act which provided that any person may bring proceedings in that Court for a declaration in respect of specified matters. At 710 the Court of Appeal said:

> "A curious and, perhaps, unique feature of the case is that the material gives no indication of the identity of the Appellant named in the papers. It is not even proved to exist, nor is any indication given of its place of incorporation (if any), nor whether it carries on any business. It was suggested from the bar table that one might suspect it to be a competitor of the respondents in the concrete business: but there is nothing in the material to suggest that the appellant's interests, whatever they may be, would be in any way affected by the continuation of the activities of which it complains. One would have expected the Appellant to indicate to the P E Court the nature of its interests, but it has not done so and in our view that is an important gap in its case. The only evidence on behalf of the appellant consisted of two affidavits filed by a law clerk in the employ of its solicitors."

The Court went on to refer to decisions in New South Wales dealing with similar legislation – section 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) – *Rowley v New South Wales Leather and Trading Co. Pty Ltd & Anor* (1980) 46 LGRA 250 at 260; *ACR Trading Pty Ltd & Anor v Fat-Sel Pty Ltd & Anor* (1987) 11 NSWLR 67 at 82-83; *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 334 at 339-341 and remarked that ignorance of the New South Wales practice should not be imputed to the Queensland legislation when considering these sorts of applications made by private persons. Where a private applicant applied, the court had a wide discretion and was not constrained by any rule that it must enjoin the illegality unless special circumstances were shown.

[20] It was said that the incorporated applicant operated as a forum for local issues on behalf of the "entire community". Its current membership was 86 local residents. It held a meeting in May 2009 attended by 15 members at which a summary of the Neilsens plan was presented. In December 2009 it hosted a meeting attended by approximately 200 local residents at which detail about the quarrying Neilsens proposed was presented. These matters appear in paragraph 9, 10 and 14 of an affidavit by Mr Martin[3], who since 2009 has been President of the applicant. There was no evidence about its objects or its articles. There was some other evidence, in the form of affidavits, that some deponents living or having interests in the general vicinity of 259, are members of the applicant but that did not provide standing to the incorporated body.[4] Its only standing derives from its existence as a legal person and thus within section 456. "Person" is defined in the dictionary of SPA, Schedule 3 to include a body of persons whether incorporated or unincorporated.

[21] These considerations do not prevent the applicant from bringing this proceeding. They are, however, relevant to the exercise of discretion whether to make declarations sought which I will deal with in due course.

[22] As to the onus and standard of proof and the Court's approach:

> the applicant bears the onus of proving matters necessary to the declarations it seeks, and of persuading the Court that declarations and orders should be made.[5]

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[3] Filed 19 April 2010.
[4] *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493.
[5] *Parramatta City Council & Anor v Hale & Ors* (1982) 47 LGRA 319 at 335.

In *Jones & Anor v Sutherland Shire Council*[6] Hutley JA expressed it as "Where a person seeks a declaration, he has to prove all the facts which are necessary to enable that declaration to be obtained. This means that he takes upon himself to prove all the conditions necessary to be established including matters which he could require the other party to prove if he were the defendant". His Honour went on to express the opinion that "a Court should refrain from making a declaration as to the existence of a fact when there is no evidence one way or other of the fact, though in certain other litigation by reason of the burden of proof assigned by-law to the other party, the person applying for the declaration might succeed in that contest";

the onus of proof is to be discharged to the civil standard which will be informed by the gravity of the issues involved;[7]

this is not an appeal where the merits of the use such as traffic, road conditions, nuisance, are a matter for consideration. It may be accepted that the road system in the area, according to current standards is deficient for the number and type of vehicle likely to be using them if and when Neilsens quarry is operational. In a proceeding such as this, the Court is not concerned with the merits of the development, rather it is concerned with the validity of what has occurred.[8]

[23] Use of land for extractive industry is not a static use. The nature of the use means that within the physical confines of the area over which the consent authorises the use, quarrying may occur depending on the availability of the resource and the economics of extracting it. Establishing a quarry and quarrying is expensive. An adequate return is required to justify the expense. The full extent and quality of the resource, where it is buried rock can only be known as quarrying proceeds, although exploratory drilling may provide some indication. In *Vaughan-Taylor v Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366 at 369 Mahoney JA touched on this when His Honour said "The ordinary operation of the quarry or mine will involve not merely digging down into the earth but also expanding laterally the quarry or mine. In a practical sense operations of this kind will be entered into only if, in the ordinary circumstances, there are reserves of stone available to be mined over such a period in the future as will warrant the expense and difficulty of setting up the operation and the continuation of it." The use commences when extraction of rock for use or crushing begins.

[24] 258 and 259 comprise part of the Wahpunga Range area. Geological survey work in the area was done in the 1970's by one D.L. Trezise, published as "Reconnaissance of Extractive Resources in the Noosa Shire". Noosa also conducted its own geological investigations.

[25] As observed earlier 259 is owned by Shepperson, as is 258. 258 adjoins 259. 259 comprises 60.02 hectares. 258 comprises 84.422 hectares. Both have been in the Shepperson family since the early 1900's. Shepperson continues to conduct dairying on 258. Shepperson's dwelling is on 258. 259 is bounded on its south-western border by a dedicated but unformed road, Murrays Road and on its south-eastern border by another dedicated but unformed road, Simpsons

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[6] (1979) 40 LGRA 323 at 327.
[7] *Briginshaw v Briginshaw & Anor* (1938) 60 CLR 336.
[8] *Eschenko v Cummins* [2000] QPELR 386; *Westfield Management Ltd v Brisbane City Council & Anor* [2003] QPELR 520; *Di Marco v Brisbane City Council & Ors* [2006] QPELR 731.

Road. Its north-western border is common with 258. A dedicated and formed gravel road, Sheppersons Lane, gave access to 258 at its northern corner. Sheppersons Lane as a dedicated but unformed road continued along the north-eastern border of 258 to the northern corner of 259.[9]

[26] In 1987, 1988 both portions were in the Rural Pursuits Zone in the 1985 Schedule. In that zone, extractive industry was a consent use. In due course the 1985 Schedule was replaced by the 1990 Town Planning Scheme for Noosa Shire, gazetted on 15 December 1990 (the 1990 scheme). In the 1990 scheme, 258 and 259 were in the Rural Pursuits Zone. In that zone extractive industry was a consent use.

[27] In 1986 Noosa was aware that the Wahpunga Range was a major quarry resource, that 259 was a likely source of hard rock for its purposes and was actively considering pursuing it. Its Strategic Plan gazetted on 5 September 1997 located 258 and 259 in the Kin Kin-Cootharaba/Boreen Point Locality. The vision for the locality recognised extractive resources as one of the three major economic activities of the locality. Preferred dominant land uses were extractive resource precinct, rural, rural conservation and open space – conservation and waterway protection. One of the objectives of the locality was to preserve extractive resources from the locality for continued or further use.

[28] On 3 February 2006, Noosa Plan 2006 commenced. As amended, it is the current Planning Scheme for what was the Noosa local authority area. In it 258 and 259 are designated as rural, area of ecological significance, extractive resources on the strategy map. They are within the Boreen Point, Kin Kin and Cootharaba Locality and within the rural zone. Portion 259 is affected by a number of overlays. One of those is the locality natural resources overlay map. On it two thirds of 259 is mapped as a key resource/processing area with the remainder as a resource/processing separation area. Another is the Biodiversity Overlay Map. On it the southern third of 259 is mapped as an Environmental Protection Area. Use of 259 for Type 3 extractive use is a consistent use in the zone. An application for the use requires impact assessment.

[29] Pursuant to section 30 of the LG Act Noosa had the power and authority to undertake, construct, maintain and manage quarries. By letter dated 19 August 1986 Noosa wrote to Shepperson referring to earlier correspondence and informing him that percussion drilling by Council on 259 had indicated the existence of rock. It informed of an intention to enter and carry out an extraction and crushing operation to test the suitability of the material. Depending on the result of tests, it intended either to restore the disturbed area to its original condition or undertake a management plan for "future quarry operations from within the site".

[30] On 18 December 1986 Noosa wrote to Shepperson informing him it had recently completed a study of known areas of quarry material as outlined in the work of Trezise earlier referred to. Two sites had been chosen for future quarries, one of which was 259 "off Sheppersons Lane" and staff had been authorised to "commence negotiations for acquisition of these sites". Shepperson was requested to attend a meeting with the Shire Clerk and senior engineering staff to discuss the Council's proposal.

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[9] Affidavit of Russell Leo Christofis filed by leave on 12 October 2010; Affidavit of Hannah Lucy Riggs filed by leave on 5 October 2010.

[31] Following that on 20 February 1987, solicitors for Shepperson wrote to the first respondent in the following terms:

> "We act on behalf of the abovenamed and hereby make application for an extractive industries permit for our clients to extract blue metal from portions 258 and 259, County of March, Parish of Noosa.
>
> Our clients have had geological tests carried out over their property and have ascertained that blue metal on their property would be suitable for road maintenance, construction and screenings. The blue metal would be processed by a plant to be built on our clients' property.
>
> Our clients are negotiating with a company to mine and process the blue metal. There will be a clause in the agreement with the developing company to supply Council with as much blue metal as Council requires at the then current price. The company our clients are dealing with are experienced in this field and have all the necessary machinery to make the mining of blue metal economically viable.
>
> Our clients oppose the granting of an extractive industries permit to anyone other than themselves. The granting of such a permit to anyone other than our clients would in essence mean that our clients would lose effective control over their land. As permit holders our clients could ensure that the blue metal pit is utilised to its full potential.
>
> Private enterprise would work the pit to its full capacity and create employment in the region.
>
> Having blue metal mined on our clients' land would lower the value of our clients' land for living and grazing purposes. If the blue metal pit was not utilised to its full capacity then the value of our clients' land would be lowered and our clients may not be receiving sufficient compensation for the lowering in value by way of royalties.
>
> We request that you give our clients' application favourable consideration."

[32] Minutes of a Noosa meeting of 31 March 1987, reveal that the preferred development strategy for the proposed quarry on 259 was for development of the deposit to be by Shepperson as a private enterprise concern, that it consider at an early date, an application from Shepperson for "rezoning of an appropriate area for extractive industry" and "that during the negotiations some guarantee be sought to ensure the long term availability of the product to Council for road maintenance and general development work".[10]

[33] On 31 March 1987, one Simes of Noosa Planning Service (NPS) on behalf of Shepperson, wrote to the Shire Clerk regarding a "Town Planning Consent Application for Extractive Industry on portion 259 Parish of Noosa". An application for town planning consent and accompanying documents was included. The letter read:

> "We refer to previous correspondence in this matter and in particular to Council's letter to our client dated 18 December 1986.

[10] Affidavit of Hannah Lucy Riggs, tab 4.

Council is aware of the potential size and quality of the extractive resource on this property having carried out preliminary drilling tests recently.

Please see the attached application for town planning consent, accompanying plans and enlarged air photograph of the site.

We understand that Council supports such a private planning application by our client to establish the right to extract material from the site.

Site Development and Supply of Material:

We refer to a letter dated 20/02/87 from our client's solicitor, Vivienne H. Tozer and Jeffery to Council.

It is proposed that an experienced extractive industry company operate the quarry. It is intended the material will be made available to Council for a long term period on reasonable terms and conditions which the owner seeks to discuss and negotiate.

Development Requirements:

Possible conditions of approval have been initially discussed with Council's works engineer Mr Peter Wright.

Matters such as the standard of access roads, and the internal haul roads, stormwater management, dust suppression and the like are sought to be negotiated between the applicant and Council. This will enable practical solutions to be determined to allow some extraction to commence as quickly as possible.

Initial proposals are indicated in the relevant section of the application form and on the accompanying plans and photograph.

Summary:

Council's support of the application to facilitate the utilisation of this valuable resource for Council purposes in the public interest and for needed private purposes is justified.

Our client would welcome the opportunity to discuss any matters associated with Council's need for the quarry material and the subject application to enable the early determination of the planning application on reasonable and relevant conditons.

Mr Shepperson and myself seek an appointment to meet with the works and services committee and/or the development and town planning committee at the appropriate time."

[34] The documents included with the letter were an application form having the appearance of a pre-printed Noosa form with information added to it by Shepperson or NPS, an extract from a topographic map showing contours with the boundaries of 259 traced onto it and within the traced 259, a compass drawn circle which appears to have been intended to give an indication of the location of rock to be quarried. A solid line was drawn from that circle to the north-western boundary of 259 and continuing through what would be 258 to the point

where the formed Sheppersons Lane met the northern corner of 258 and a dotted line was drawn from the circle through 259 to its northern corner where the unformed portion of Sheppersons Lane met that corner. Also accompanying the application form was an extract from a cadastral map showing the whole of 259 circled, the same circle as drawn on the topographic map drawn in the same position inside 259 and a hand drawn plan with some contour lines and labelled 'excavation site – (general location)'. No enlarged air photograph has been able to be located.

[35] Kin Kin contended that the respondent's town planning consent dated 21 July 1987 and the order of the Local Government Court of 13 May 1988 were not lawfully given. That was because:

- the application which founded the purported consent did not comply in full with the requirements of Noosa's by-laws and was therefore deemed not to have been made. There was thus no valid application to which Noosa could consent;

- the application did not include all the land to be used in the proposed use and was incomplete. There was thus no valid application to which Noosa could consent;

Therefore Noosa had no power to approve the application and the Local Government Court had no jurisdiction to hear and determine the appeal against conditions.

[36] The material by-laws were contained in Part B, Division 2 of Noosa's by-laws gazetted on 2 May 1985. By-law 1(2) provided that an application such as in this case was required, inter alia, to be in writing, signed by the applicant, addressed to the Shire Clerk and "truly set forth the following particulars". A list of particular items followed which were not entirely replicated on the printed application form used. By-law 1(2)(d)(xiii) required plans showing specific matters to accompany the application. By-law 2 then provided that "An application made pursuant to by-law 1 of this Division shall be deemed not to have been made unless the requirements of that by-law have been complied with in full". By-law 3 provided that the Shire Clerk could request an applicant under by-law 1 to furnish any further information and particulars as thought fit. By-law 6 provided that upon "consideration of an application for consent made pursuant to this Division, the Council may, subject to the Act" give or refuse consent or give consent subject to reasonable and relevant conditions.

[37] In considering Kin Kin's contention it is relevant, I think, to keep in mind the background to the application. Shepperson was aware that Noosa had conducted its own geological investigations on 259 and there had been meetings between Shepperson, his representatives and Council officers regarding quarrying on 259.

[38] The application and accompanying plans may be described as basic in form and brusque as to detail but by and large responded to the requirements of by-law 1(2). The application set out the real property description, postal address and present use of 259, the area of the land and road frontages of Murrays Road and Simpsons Road, the name of the registered proprietor and occupier of 259, the use proposed, that there would be an office of 3 metres x 3 metres and a crusher of 3 metres x 10 metres with a height of approximately 10 metres, although it did not specify a number of storeys, or set out a site layout and an elevation of

buildings, or other structures, the zoning of the land, the number of persons proposed to be engaged on the land and the number of vehicles for which parking provision was to be made, although it did not describe the number of car parking spaces to be provided with the location, and dimensions indicated on a layout plan. It described the machinery proposed to be used on the land. In short, it responded to questions on the printed application form which differed to an extent from by-law 1(2) and to the by-law. It was also accompanied by the plans earlier described in purported compliance with by-law 1(2)(xiii) which required that for applications for consent to carry out an extractive industry the application be accompanied by plans showing certain specified matters. The plans provided indicated excavation site general location, lines which in light of the letter accompanying the application would convey to persons familiar with the area a road through 258 giving access to 259 and a connection from the excavation area to the end of the surveyed but unformed part of Shepperson's Land where it touched 259. Contours were shown on the enlarged topographic map and the hand drawn plan also showed some lines which may be understood as indicating contours but without any further detail. The plans did not specifically indicate the limits of the area proposed to be excavated as by-law 1(2)(xiii) required. Rather, in the application itself in answer to a printed question asking about the percentage of the site to be covered by buildings or other structures, Shepperson said "Excavation area – approx. 10 hectares – approx. 17% of the site". Each of the requirements of by-law 1(2)(xiii) were addressed in writing in the application itself. Noosa was referred to the enlarged topographic location plan and enlarged aerial photograph for the location of the proposed excavation and its approximate outline, and to the enlarged topographic plan showing approximate contours. Estimated depth and circumstances of the proposed excavation was indicated as up to 50 metres at any one point with excavated basins up to approximately 150 metres in diameter. Estimated depth of over burden present was indicated at approximately one to five metres. It was indicated no buildings were proposed for the site except for a small site office, removed from the quarry face and located adjacent to the proposed haul road through 258 "to Sheppersons Lane where it meets the common boundary between portions 258 and 259". It was indicated the proposed excavation was no closer than 100 metres from adjacent significant water courses and streams and that ponded stormwater would be removed by provision for settling ponds with weirs discharging into existing streams on the site designed to Council's reasonable requirements.

[39] I do not accept the applicant's submission that because of the content of the application and accompanying documents the terms of by-law 2 resulted in there being no application to which Noosa could consent pursuant to by-law 6. The application was not so deficient in compliance with the by-law, that it should be deemed not to have been made and Noosa required to reject it. The application and accompanying documents responded to the printed application form and by-law 1(2)(d). The respondent plainly considered the application was adequate in terms of its content for it did not reject it but requested further information as it was empowered to do under by-law 3. That led to a meeting between Shepperson, Simes, the Shire Chairman and Council officers. A letter to Noosa from Simes followed, providing some information.

[40] Kin Kin submitted that the proposed use of 259 for extractive industry necessarily involved the use of 258 because a haul road from the quarry to a public road was a necessary component of the use of land for extractive industry.

It cited the High Court decision of *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors* (1980) 145 CLR 485. The failure to include the land proposed to be used for the haul route, 258, resulted in the application being invalid. It submitted that strict compliance with section 33(18) of the LG Act was a condition precedent to consideration of the application by Noosa. It referred to the decision of the Court of Appeal in *Lockhart River Aboriginal Council v Cook Shire Council* [1992] 1 Qd R 50. The application did not include all details of the land in the proposed use. Noosa has no power to consider and consent to the application. The Local Government Court had no jurisdiction to hear and determine the appeal.

[41] In *Lockhart River* the appellant had applied for declarations that notice of a rezoning application had not been given to it, that public notice of the application by posting of notices on the land had not been given as required by section 33(18) of the LG Act. The Court of Appeal concluded that "on the evidence presently available--- there has not been strict compliance" with respect to giving the public notice and that "therefore a condition precedent to consideration by the first respondent (the Council) had not been satisfied". The appeal was allowed. The Court held that if the applicant wished to seek the benefit of section 33(18C)(2) of the LG Act, that question may be determined in separate proceedings.

[42] In *Pioneer* (the appellant) had applied to the Brisbane City Council to use an un-subdivided area of land forming part of two portions on different registered plans for extractive industry. Both portions were owned by a company associated with the appellant. The plan attached to the application "showed the subject land was bounded on the west by an unnamed road which led northwards to another road, Grandview Road. In fact both those roads were dedicated but unformed. Neither the plan or the application showed the means by which the extracted rock would be removed from the subject land and the plan did not extend far south enough to show a formed road, Mount Crosby Road, which it now appears would have been used for that purpose".[11] On appeal to the Local Government Court, after the respondent failed to decide the application within the required time, the Court allowed the appeal and applied conditions to its approval of the application. Objections to the Court's jurisdiction by the respondent and by a number of objectors were overruled. An appeal to the Full Court succeeded and the orders of the Local Government Court were set aside. On appeal to the High Court, the appeal was dismissed. Stephen J with whom Murphy J agreed said at 500 "where as here, the use proposed is a single use, no piecemeal series of applications is permissible, at least under the City of Brisbane's town planning measures; instead that use must be stated in appropriate detail in one application and all the land involved in the use must be the subject of the application. When applied to the facts of the present appeal, this means that the applicant ought to have applied in the one application for consent not only to extract and process quarry products but also to construct and use the access road along which those products were to be carried from the processing site to a public highway. It follows that the area of land the subject of the application should have included the route of that access road." At 506 His Honour held that the consequence of the applicant having failed in its application to specify the whole of the land to which its application related or applied, deprived the Local Government Court of jurisdiction to determine the application. Wilson J who also held the appeal be

[11] Per Gibbs J at 488.

dismissed said at 504 "The extent of the land in respect of which an applicant must seek consent is dictated by the proposed use including all incidental uses necessarily associated with the primary use in respect of which consent is required". His Honour held that the failure to include in the description of the land the subject of the application the other land over which it was proposed to transport quarried materials, was fatal to the proceeding in the Local Government Court. That Court had no jurisdiction due to the invalidity of the application.

[43] The respondents submitted that the facts in the present case distinguished it from *Pioneer*. A reading of the application material exposed that the intention was to use a haul route through 258 for quarry access. The application itself referred in paragraph 10(f) to a proposed haul route through 258, the plan had marked upon it the proposed haul route through 258 and the letter accompanying the application referred to the letter of 20 February 1987 from Shepperson's solicitors to Noosa making "application for an Extractive Industries Permit for our client to extract blue metal from Portions 258 and 259".

[44] It is plain from the application and accompanying material that Shepperson was contemplating, and Noosa understood, that material quarried on 259 could be carried out to the formed Sheppersons Lane through his 258. It would also seem apparent that the author of the lines earlier referred to on the plans accompanying the application, was conscious of the unformed portion of Sheppersons Lane continuing to the northernmost corner of portion 259 for there would seem to be no other reason for the dotted line from the circle on the plan to that portion of the boundary. I have no doubt Noosa would have been aware of it. I think it highly likely other residents in the area, particularly the neighbour on the other side of the boundary of 258 to which it was adjacent would also have been aware of it.

[45] There are factual differences between this case and *Pioneer*. In *Pioneer* the application which had been made, made no mention about a proposed haul route. In the present case once the application is read in its entirety the intention to have a haul route across 258 was plain. The contemplated haul route was over Sheppersons land. In *Pioneer* the access route which emerged during the Court proceedings, was through other land in private ownership. Stephen J said at 502 "Since in this case access to and from the public highway is only to be gained by the traversing of other land in private ownership lying between the site and the public highway, this use of that other land appears to me to be an integral part of the use to which the site itself is to be part". In *Pioneer* the land the subject of the application had no access to a public road. In the present case it does, Sheppersons Lane, albeit unformed for some distance before it reaches the corner of 259.

[46] Section 33(18) of the LG Act required that "public notice of the application" be given including the postal address and real property description of the land to which the application related or applied and the nature of the proposed use.

[47] The purpose of public notification was identified by Stephen J in *Scurr & Ors v Brisbane City Council & Anor* (1973) 133 CLR 242 at 251-2 as securing "the attainment of two important goals". They were to provide the Council with the views of those who oppose an application, and to provide objectors an

opportunity to make their views known and appeal against the Council's decision if adverse to their view.

[48] The evidence about public notification appears from documents retained in Noosa's records; a statutory declaration by Simes and documents annexed to it. In the absence of evidence to the contrary, they appear to establish that the public notices were posted on the land and notice of the application was served on adjoining owners as required. Those documents referred to the land to which the application related or applied as 259, Sheppersons Lane as the postal address of the land to which the application related or applied, the nature of the use as "extractive industry" and the length of road frontage to Murrays Road and Simpsons Road. The advertisement in the newspaper set out the information required.

[49] Section 33(18C) of the LG Act was inserted by Act 50 of 1978. It gave the Local Government Court, if it were necessary, the power to excuse non-compliance with any provision of section 33 of the Act or of a by-law in respect of an application for consent to use land where the court considered there had been substantial compliance with the provision and no person had been adversely effected by the non-compliance. It did so by providing that the Court may direct that it be taken that such provisions had been complied with.

[50] The third respondent submitted that application of the principles articulated in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 supported a submission that any alleged non-compliance in the present case did not result in the application or the approval being invalid. In *Project Blue Sky* it was said whether or not that was so depended upon "whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matters and objects and the consequences for the parties of holding void every act done in breach of the condition--- a better test for determining the test for validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[12] It was submitted that the availability of section 33(18C)(2) of the LG Act indicated that even if all or any of the alleged shortcomings were established, that did not necessarily result in an invalid application.

[51] The public notification in the present case was apt to alert any person who read any of it, that there was proposed a quarry on 259, that particulars of the application and accompanying documents were open to inspection at the Council offices and that objections could be lodged. No submissions or objections were lodged. There was no evidence that any person attended at Noosa's offices and inspected the application and accompanying documents despite there being a number of affidavits from persons, some of whom were residents in the area at the time. Any person who inspected the application and accompanying documents could not have failed to realise that Shepperson proposed access across his portion 258, which had access to the formed Sheppersons Lane to provide vehicle access. Nor that what was shown in the documents were "initial proposals" and that he intended to engage a commercial quarry operator to operate the quarry to its full potential.

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[12] Per McHugh, Gummow, Kirby and Hayne JJ at 389-390.

[52] Shepperson appealed against conditions to which the approval by Noosa was subject. On 13 May 1988 Row DCJ, having heard the solicitors for the appellant and counsel for the respondent, by consent ordered that the decision of the respondent be varied. Condition 1 was deleted and a different condition 1 substituted. Conditions 4 and 12 were deleted. Condition 10 was varied by providing a currency period of 30 years. His Honour's order is the operative approval for the use of portion 259 for extractive industry. As such, it is notice to all of the Town Planning Consent, its currency and the conditions to which it is subject. So long as it exists, it authorises the use of portion 259 for extractive industry.

[53] Regarding section 33(18C)(2) it was said by Kin Kin there was no evidence His Honour proceeded pursuant to that provision, because no words to that effect were included in the Court's order. There is only limited material about proceedings before His Honour so long ago[13] but it appears from the terms of his order that he did not direct in terms of the subsection.

[54] I do not think it should be assumed His Honour, who was very experienced in the jurisdiction, proceeded without regard to the facts or the law. Dr Fogg in his text 'Land Development Law in Queensland' at page 213 cites a decision of Row DCJ, *Stevenson v Propserpine Shire Council,* Local Government Appeal 1/83, 13 April 1984 where His Honour held that the Court was deprived of jurisdiction where the application referred only to one allotment despite it being clear that the applicant proposed to employ other allotments to provide access to the intended development. Here the local authority, Noosa, had supported Shepperson's application, there were no objections, no respondents by election. His Honour had the power to excuse any non-compliance with section 33 or the by-laws and in my view this was plainly a case where, if it was necessary, the circumstances supported that being done. His order approved what had been applied for, the use of 259 for extractive industry. The result is a judgment of the Local Government Court. It ran with the land. It has operated since, for in excess of 20 years, without challenge, according to its terms. Others have relied upon it.

[55] Much of what I have discussed to this point would be relevant to the exercise of the discretion whether to make the declarations in the event Kin Kin has established a basis for that to be done. Apart from that though, I do not consider I am empowered to declare that the order of the Local Government Court was made without jurisdiction.

[56] Section 27 of the *City of Brisbane (Town Planning) Act 1964* (the CBTP Act) established the Court. Section 28 provided:

> "(1) The Court shall hear and determine all matters which by this Act or any other Act are required to be heard and determined by the Court, including every appeal which under this Act may be made to the Court.
>
> (2) Save as described by subsection 3 of this section, the jurisdiction of the Court under this Act shall be exclusive and every decision of the Court shall be final and conclusive and shall not be impeached for any informality or want of form, or be appealed against, reviewed, quashed or in any way called in question in any Court.

[13] Affidavit of Mark Baker-Jones, filed 24 September 2010.

(3) If the Council or any person feels aggrieved by a decision of the Court on the ground of error or mistake in law on the part of the Court, or that the Court had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision, the Council or such person may, in accordance with the rules of Court, appeal from the decision to the Full Court of the Supreme Court of Queensland".

The Court was continued as the Planning and Environment Court by the P and E Act, IPA and SPA. Provisions in similar terms to section 28 were enacted in each of those statutes.

[57] In short, the decision of the Local Government Court was "final and conclusive" and "could not be impeached for any informality or want of form or be appealed against, reviewed, quashed or in any way called into question in any court" except as prescribed by subsection (3) which provided for an appeal to the "Full Court of the Supreme Court" on the ground of "error or mistake in law". Similar provisions appear in the P and E Act, IPA and SPA with the Court of Appeal substituted for the Full Court. Those provisions however did not oust a writ of *certiorari* for want or excess of jurisdiction.[14]

[58] The *Judicial Review Act 1991* abolished prerogative writs replacing them with judicial review. SPA, in section 757, as did IPA, provides that the *Judicial Review Act 1991* does not apply to specified matters "under" SPA. Subsection (3) provides that for subsection (1) the Supreme Court does not have jurisdiction to hear and determine applications made to it under the *Judicial Review Act 1991* part 3 or part 5 in relation to the specified matters. Kin Kin submitted that the intention of the legislature was that the Planning and Environment Court's declaratory jurisdiction would enable it to undertake what the Supreme Court could otherwise have done.

[59] I do not consider that the Planning and Environment Court is empowered by its declaratory jurisdiction to declare that an order of the Local Government Court in 1988 was made without jurisdiction. Nor that section 757 of SPA has the result that the jurisdiction of the Supreme Court has been removed with respect to an order of the Local Government Court made in 1988. The order of the Local Government Court was not a matter done, to be done or that should have been done for SPA. Nor was it a matter under SPA.[15] The Court's order, absent other causes rendering the use unlawful, established the lawfulness of the use of the land for extractive industry according to its terms. "The granting of the consent was a public act affecting the status of the land. The consent was also a thing in itself deriving its status from the statute and instruments made pursuant to the statute".[16] Other than *certiorari* for want of jurisdiction the only means by which the order of the Court could have been challenged was provided by section 28(3) of the CBTP Act.

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[14] *Hockey v Yelland & Ors* (1984) 157 CLR 124; *Kirk & Anor v Industrial Court of New South Wales & Anor* (2010) 239 CLR 531.
[15] *Sustainable Planning Act 2009* section 757(1).
[16] *P E Bakers Pty Ltd & Ors v Yehuda & Anor* (1988) 15 NSWLR 437 per Hope JA with whom Samuels J and McHugh JA agreed, at page 445.

Lapse of TPC 1899

[60] Relevantly for the purposes of the present matter, conditions attaching to the approval pursuant to the order of the Local Government Court were:

> "1. The applicant shall carry out the following external roadworks to the satisfaction of the Shire Engineer:-
>
> (i) Upgrade the intersection of Sheppersons Lane and Kin Kin Road to the requirements of the Main Roads Department to which the Council will contribute the sum of $4000.00.
>
> (ii) Upgrading on the existing timber bridge within Sheppersons Lane following completion of an engineer's investigation to a standard required for quarry generated traffic.
>
> (iii) Widen and upgrade Sheppersons Lane from the intersection with Kin Kin Road to the access point to the site using selected gravel fill or material approved by the Shire Engineer from the quarry site.
>
> (iv) All the above works to be completed prior to the quarry commencing operations.
>
> The design of the above works shall be prepared by a registered civil engineer and shall be submitted to the Shire Engineer for approval prior to commencement of construction. The registered civil engineer shall certify that the works have been constructed in accordance with the approved plans."
>
> "2. Detailed management plans are to be submitted to Council for approval by the Shire Engineer and Shire Planner following further investigation by the applicant. Such management plans shall address:-
>
> (i) the location of siltation ponds;
>
> (ii) the extent of the proposed excavation;
>
> (iii) the proposed access locations;
>
> (iv) the proposed location of the gravel crusher and site office;
>
> (v) provision of buffer areas to adjoining property boundaries;
>
> (vi) the location of the area proposed to be leased to Council; and
>
> (vii) rehabilitation procedures.
>
> No construction or excavation works are to be commenced without prior approval of the Shire Engineer until such time as management plans are approved. Council reserves the right to expand upon the conditions contained within this approval following submission of detailed management plans."
>
> "10. This approval remains current for a period of 30 years, provided that Council may grant extensions to the approval period where an application for extension is lodged at least 3 months prior to the approval expiry date. Council's decision will be made prior to the expiry date in order that its

> decision has force and effect. Council may approve or refuse such an application. Should an extension be granted, the terms and conditions of this approval may be varied if considered warranted."

[61] TPC 1899 had not lapsed by the time the P and E Act came into force on 15 April 1991. It continued to have force and effect under the P and E Act.[17] The effect of sections 8.10(8B) and 4.13(18) of the P and E Act was that it would not lapse until 4 years after commencement of the Act. Consequently if it is to be found that TPC 1899 lapsed, the applicant must establish that Shepperson had not commenced use of the land for extractive industry until 4 years after 15 April 1991.

[62] *McDonald v Douglas Shire Council* [2004] 1 Qd R 131 was a case where the continuing validity of a planning consent depended on the use commencing within 4 years.[18] Some work had been carried out. In the Court of Appeal it was held the work carried out was not the subject of the approval. To prevent lapse what had to be commenced within the four year period was the use which was the subject of the approval. A subsidiary or subordinate use was insufficient.

[63] It was common ground that Noosa had undertaken quarrying on 259 in 1994 pursuant to a deed of licence it entered into with Shepperson. There was no other activity on 259 during the relevant period which may qualify to prevent lapse. Kin Kin contended that this quarrying could not be regarded as a commencement of the approved use because:

> conditions to which the use was subject, which were to be complied with prior to commencement of the use, had not been complied with;
>
> the quarrying carried out by Noosa was not an "extractive industry" as defined in the 1985 Schedule. It was rather, done pursuant to section 32(13) of the *Local Government Act 1936.*

[64] In 1991 Readymix entered into an agreement with Shepperson to carry out quarrying operations on 259 in accordance with TPC 1899. Management plans (the Readymix plans) were prepared addressing those matters required to be addressed by condition 2 and submitted to Noosa under cover of a letter dated 11 July 1991.[19] By letter dated 24 December 1991 Noosa advised Readymix of what it considered to be deficiencies in the management plans. On 21 April 1992 Readymix responded and on 20 August 1992 Noosa wrote to Readymix referring to Readymix's proposed amendements advising they were satisfactory to overcome the deficiencies identified. The letter requested Readymix to "proceed with with amendments to the management plan and submit a final copy for Council approval".

[65] In the event Readymix decided not to proceed with quarrying 259. On 12 August 1993 the Shire Engineer queried a Mr Preston who was a technical officer works for Noosa about the area Noosa was proposing to quarry "in relation to the investigation that Readymix carried out". By 3 December 1993, the Deputy Shire Engineer had prepared a report in which he observed the quarry site was able to produce 20 million m^3 of material. The resource was

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[17] *Local Government (Planning and Environment) Act 1990* section 8.10(8).
[18] *Local Government (Planning and Environment) Act 1990* section 4.13(18).
[19] Section 251 Certificate, tab 13.

important to Noosa. He proposed a trial be carried out to ascertain the suitability of the product as road base material. Costs of work were estimated, both immediate and longer term. He recommended the first respondent agree to a trial crushing and pavement construction operation for material at the quarry site. That generated a committee report of 17 January 1994 containing a draft agreement for a trial crushing and construction exercise.[20] It set out that Noosa should agree to:

> "undertake roadworks and drainage from Sheppersons Lane to the quarry site located on portion 259, suitable and adequate for the trial project and generally in accordance with the management plans (these could only be the Readymix management plans);
>
> undertake a trial road base crushing exercise for the production of approximately 15,000m³ of road base, 5000m³ of which is expected to be used on construction of internal access works;
>
> entry into a long term agreement with the second respondent should the trial prove successful---."

[66] On 24 January 1994, Shepperson approved the terms of the proposed draft agreement to that effect and on 25 March 1994, Noosa and Shepperson entered into a deed granting a licence to Noosa to enter 259 to quarry and crush rock for use in road construction and other commercial purposes for a trial period in order to test its suitability for use in road construction. It was to expire on 30 June 1995 or upon production and removal from the land of 15,000m³ of road base, or upon the parties entering into a lease. It was plainly to quarry to prove the resource before proceeding to a longer term arrangement. The deed contemplated excavation and crushing of rock and stockpiling. Shepperson was to be paid $1.10 per cubic metre with provision for adjustment. It included an option for Noosa to lease 259. The works were to be carried out in accordance with an attached management plan. Stockpiling was to occur as shown on the management plan. There was to be access to a dam on 258 as shown on the management plan. According to the documentation discovered from Noosa's records, attached was a plan of the area of extraction and associated infrastructure from the Readymix management plan. In fact a report of the Deputy Shire Engineer of 6 June 1995 reported that approximately 20,000m³ of rock was crushed for use on council roads. This was stored on 259 and used as needed.

[67] Kin Kin's contention the quarrying carried out by Noosa in 1994 was not extractive industry and so did not amount to commencement of the use, was not particularised in Kin Kin's amended originating application.

[68] The meaning of the phrase 'extractive industry' for present purposes is derived from Part A of the 1985 Schedule:

> "Extractive Industry - any premise used or intended for use for the extraction or quarrying of gravel--rock--stone or similar materials--- for use as such--- and including when carried out on such land from which any such materials are extracted or on any land adjacent thereto, the treatment and storage of such materials and the manufacture of products from such

[20] Affidavit of Hannah Lucy Riggs, tab 54.

materials. The term does not include the removal of materials authorised by section 32(13) of the *Local Government Act 1936 – 1984*---"

[69] Section 32(13) of the LG Act provided "The local authority may authorise any officer or any other person to enter and search for, dig, raise, gather, take, and carry away on and from any land within the local authority area--- any materials necessary for constructing, making or maintaining any matter or thing which the local authority is by this Act, or any other Act, authorised to construct, make or maintain---. The local authority shall make compensation to the owners and occupiers of such land for any damage which they may sustain through the exercise of any of the powers conferred by this subsection, including in the case of owners, the full value of any materials so taken". The LG Act was repealed and replaced by the *Local Government Act 1993* on 26 March 1994. Section 656 thereof materially is in similar terms.

[70] The discovered documents from Noosa's records show that in 1986/7 Noosa contemplated quarrying 259. Let it be hypothesised Noosa was possibly contemplating exercising its powers under section 32(13) of the LG Act. When Shepperson indicated he wished, himself, to exploit the resource Noosa plainly regarded that as its preferred course, subject to it being guaranteed supply. After Readymix decided not to proceed, Noosa then elected to undertake a trial quarrying on 259 prepatory to a long term arrangement. To that end it entered into the deed of licence with Shepperson. Subsequently it leased 259 for quarrying purposes.

[71] The deed of licence made no reference to either the TPC or section 32(13) of the LG Act. In truth Noosa did not require a licence to enter 259 to quarry. Internal Council documents preceding its preparation and execution provide no support that Noosa was exercising powers under section 32(13). To the contrary, Noosa was conscious of Shepperson's TPC.[21] See also Appendix 1 to a Business Plan 1998 – 2001 for what were described as council quarries, adopted by Noosa in 1998. For Shepperson's Quarry there is reference to the TPC described as the "original extractive industry permit" being taken over by noosa under a lease arrangement with Shepperson and to conditions in the permit which Noosa "must abide by so as to operate".[22] On the other hand, clause 9 of the deed referred to Noosa carrying out the external road works required by condition 1 of the order of the Local Government Court which was annexed to the deed if Noosa exercised the option granted by the clause for a lease. Noosa stored quarried material on 259, itself an aspect of extractive industry, but not referred to as authorised in section 32(13), using it from time to time as needed. If it were necessary, I would not conclude that Noosa was exercising powers under section 32(13).

[72] In its amended originating application Kin Kin contended that use of the land pursuant to the deed of licence could not be a commencement of the use because the deed granted rights not approved under the TPC; access over portion 258, access to a dam on portion 258. I do not agree. The deed was an agreement between Noosa and Shepperson licensing Noosa to enter and quarry on 259. Quarrying was what was approved. Its terms included payment to Shepperson on the basis of material quarried. The grant of access over 258 and the use of

[21] See the draft agreements in the Council's reports dated 17 January 1994: Affidavit of Hannah Lucy Riggs, Tab 54; The Services Report 3 December 1994: Affidavit of Hannah Lucy Riggs, Tab 53.
[22] Section 251 Certificate, tab 144.

water from a dam on 258 by Shepperson did not alter the fact that Noosa commenced quarrying on 259 in 1994.

[73] Regarding conditions 1 and 2 of the TPC, Kin Kin submitted quarrying activities by Noosa in 1994 could not be the commencement of the use the subject of the consent, because the consent did not authorise extractive industry to occur until conditions 1 and 2 had been complied with. It submitted that for the extractive industry use to have commenced, activity on the land had to be referable to and authorised by the consent. Thus, activity which was contrary to the terms of the conditions, did not prevent lapse. *Pad-Mac Pty Ltd v Hotel Wickham Investments Pty Ltd* (1995) 88 LGERA 157 and *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc* (1992) 81 LGERA 132 were cited in support.

[74] In *Pad-Mac* a consent was subject to conditions which were introduced by the words "prior to" building work commencing or commencement of the use. Unless the use was an existing lawful use under section 3.1(1) of the P and E Act it was unlawful under subsequent development control plans. At issue was whether the use being engaged in was unlawful because of breach of a condition to which it was subject. The Court of Appeal in Queensland held that resolution of that issue depended upon construction of the permit granting the consent. Not every breach of a condition attaching to a permit would make use unlawful. The terms of the permit however meant that consent was given to use the premises as the permit specified but on the basis that the use under the permit may commence only when certain conditions were fulfilled.

[75] In *Iron Gates* the Court of Appeal in New South Wales held that engineering work done on land in a subdivision for which development consent had been granted, did not prevent lapse of the development consent where a condition of the development consent prohibited such work until an external access road had been constructed. Handley JA with whom the other members of the Court agreed, found that the engineering work relied on as preventing lapse, could not be regarded as "engineering work--- relating to the development--- on the land to which the consent applied" because it was prohibited by the consent, and therefore was not "the subject of that consent".

[76] The respondents submitted that on the proper construction of section 4.13.18(a) of the P and E Act, non fulfilment of requirements of conditions 1 and/or 2 of the approval did not result in non-commencement of the use. It was not necessary for the conditions to be complied with for there to be commencement of the use. A decision of Waddell J in *Lidcombe Developments Pty Ltd v Warringah Shire Council* (1980) 41 LGRA 420 was cited. The case concerned whether a building approval had lapsed. Conditions had attached to the approval. At page 427 His Honour recorded that some conditions had not been complied with and concluded that non compliance did not have the effect of revoking the use consent. He added that if the Council wished to safeguard its position properly it could have provided in the use consent that building work should not commence until the conditions in question had been complied with. It was submitted *Iron Gates* was a decision in the context the *Environmental Planning and Assessment Act 1979* (NSW). Its provisions were materially different from section 4.13(18) of the P and E Act. Section 99 of the NSW Act provided that a development consent lapsed:

"(1)(a) unless the development the subject of that consent is commenced –

(i) within two years--- of the date on which that consent become effective;

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(2) For the purposes of subsection (1)(a) –

where development comprises--- the subdivision (involving physical work) of land--- that development is commenced when building, engineering or construction work relating to that development is physically commenced on the land to which the consent applies".

Section 4.13(18) on the other hand, provided for lapse when "the use of land the subject of the approval in respect of which the permit was issued had not been commenced within 4 years of the date of issue of the permit". There was no reference to work relating to the development contained in the conditions to have also commenced. It was submitted that in any event, condition 1 was not strictly a condition precedent to commencement of the use because it authorised the use of selected gravel fill or at least material from 259 for widening and upgrading Sheppersons Lane (subparagraph (iii) of the condition), prior to the quarry commencing operations. Extracting that material involved using 259 for extractive industry. Moreover the work undertaken by Noosa prior to crushing starting in the quarry in August 1994 referred to in a file note by Mr Preston dated 23 May 1995 had not been shown not to be compliant or at least substantially compliant with the work condition 1 required.

[77] Condition 1 required that certain "external roadworks be carried out to the satisfaction of the Shire Engineer--- to be completed prior to the quarry commencing operations". Additionally it authorised use of material from the quarry site approved by the Shire Engineer for the widening and upgrading of Shepperson's Lane which was one of the external roadworks in the condition. It also required that the design of the works be prepared by a registered civil engineer and submitted to the Shire Engineer for approval prior to commencement of construction. The registered civil engineer was to certify that the works had been constructed in accordance with the approved plans.

[78] A large quantity of documentary material unearthed from Noosa's records is in evidence. Two ex-employees of Noosa gave evidence, a Mr Williams who was employed by the first respondent from 1981 to 2002, first as Deputy Shire Engineer and then from 1985, as Shire Engineer and a Mr Wright who was employed by the first respondent as Works Engineer in 1984 and worked in that role until retirement in 1999. After listening to the evidence of each of them, it was apparent neither had little, certainly not any reliable independent recollection of matters when documentation from Council files was shown to them during their evidence. I do not regard the evidence of either when examined about documents placed in front of them, as adding anything to the documents themselves.

[79] Other than the absence in the discovered documents of any reference to a design or certification, there was no evidence one way or the other about the design or certification of roadworks by a registered civil engineer or an engineer's investigation of the existing timber bridge in Sheppersons Lane. There is

reference to the requirements of the Main Roads Department in a file note made by the Shire Engineer on 15 June 1987 to the effect the department's only requirement was upgrading of the intersection of Sheppersons Lane with Kin Kin Road.[23] There is a Council file note from Mr Preston to Mr Wright dated 23 May 1995 regarding Noosa's quarrying on 259 which sets out that crushing started in the Quarry in August 1994 and completed on 19 October 1994. It says that prior to it commencing "the following works were undertaken:

> May 6th – Wolvi/Kin Kin Road, all shoulders gravelled and graded, site distance clearing opposite Sheppersons Lane intersection
>
> June 20th – Grade and sheet gravel, Sheppersons Lane, form and gravel new access through Sheppersons property
>
> July 18th – The bridgegang replaced the running planks and tightened up the whole structure".[24]

[80] I think it likely this report was a response to follow up action referred to in a Council file note by Mr Williams[25] dated 17 May 1995 following a meeting with Shepperson to discuss Noosa's option for a permanent lease of the quarry. Noosa's rights pursuant to the deed were to expire on 30 June 1995. It appears from that file note that Mr Williams considered Noosa should prepare a management plan for the quarry, consideration be given to taking up a permanent lease and that a lease (perhaps reference to the licence) be entered into for a further trial year, so that Noosa's position could be better assessed. On 30 June 1995 Noosa's solicitor advised Shepperson Noosa wished to exercise its option granted in the deed to lease 259. Following that, dispute arose about terms of the lease which resolved in 1996. On 28 June 1996 Noosa and Shepperson executed a lease whereby Noosa leased 259 from Shepperson for the purpose of quarrying, crushing and removal of rock and gravel. The lease commenced on 1 July 1995 and was to expire on 20 July 2017.

[81] The works referred to in Mr Preston's file note as having been done prior to the quarrying commencing included works of the type contemplated in condition 1 of the town planning approval; namely upgrading the intersection of Sheppersons Lane and Kin Kin Road to the requirements of the Main Roads Department, upgrading the existing timber bridge within Sheppersons Lane and widening and upgrading Shepperson's Lane from the intersection with Kin Kin Road to the access point to the site. (On one reading of the latter requirement it could be read as to the point where the unformed Sheppersons Lane met the northern point of 259, for the site for which the use was approved was 259.) I am satisfied the work was done as Mr Preston recorded. It may be inferred the work was done to the satisfaction of the Shire Engineer because it seems it was done by Noosa's staff.

[82] It seems likely that the works Mr Preston described as completed on 19 October 1994 were probably done because Noosa was entering pursuant to the licence to quarry 259. Some of the works, form and gravel track from quarry to Sheppersons Lane, upgrade Sheppersons Lane including dust retardant past Agnew Farm (it appears Agnew Farm or Agni Farm is the Living Valley Springs

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[23] Affidavit of Hannah Lucy Riggs, tab 14.
[24] Affidavit of Hannah Lucy Riggs, tab 58.
[25] Affidavit of Hannah Lucy Riggs, tab 59.

property of Mr Martin, on the corner of Sheppersons Lane and Kin Kin Road), were proposed and costed in a services report by the Deputy Shire Engineer dated 3 December 1993 recommending that Noosa agree to a trial crushing and pavement construction operation for material at 259 resulting in due course in the deed of licence.[26]

[83] I think it likely that when the conditions were settled it was contemplated an experienced commercial operator such as Readymix would be doing the quarrying. When Readymix decided not to proceed and Noosa then decided it would quarry 259, it did the sort of work in conditions (i), (ii) and (iii) of condition 1 as described by Mr Preston. That work partially answered the condition 1 requirements. The deed of licence suggests it was contemplating more fully addressing the conditions on leasing 259.

[84] The documentary material discloses more extensive work was done later when Noosa was leasing 259. There is some reference to that in a letter from Noosa's director of business to Shepperson's solicitors dated 31 January 2001[27] and in a memorandum by Mr Preston dated 11 January 2001 to the director of business[28] referring to the conditions in the TPC. It may be noted in passing that the director of business appears to have been working from the original council approval, not the Local Government Court approval.

[85] Condition 2 of the TPC required that detailed management plans were to be submitted to Council for approval by the Shire Engineer and Shire Planner following further investigation by the applicant. It set out what the management plans were to address. No construction or excavation works were to be commenced without prior approval of the Shire Engineer until such time as management plans were approved.

[86] In reality the Readymix plans were approved. On 20 August 1992 the shire engineer wrote to Readymix, advising that amendments Readymix had proposed in a letter to the Shire Clerk dated 21 April 1992, were satisfactory.[29] The amendments were to address concerns Noosa had expressed about its management plans.[30] He asked Readymix to proceed with the amendments and submit a final copy for Council approval. That was not done before Readymix decided not to proceed with the quarry. Had it proceeded, that formality would no doubt have been attended to. Those plans or parts of them with the amendments Readymix proposed were referenced in the deed of licence and used by Noosa as management plans for its quarrying when it leased 259 for quarrying purposes from 1 July 1995. The notations made by Mr Williams and Mr Wright on a copy of the Readymix management plans with the Readymix proposed amendments added, were, in all probability, made in respect of Noosa leasing 259 to continue its quarrying upon it.[31]

[87] In any event, condition 2 permitted construction or excavation works to be commenced prior to approval of management plans, if construction or excavation works commencing was approved by the Shire Engineer. It seems to

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[26] Affidavit of Hannah Lucy Riggs, tab 53.
[27] Affidavit of Hannah Lucy Riggs, tab 124.
[28] Affidavit of Hannah Lucy Riggs, tab 118.
[29] Exhibit 7.
[30] Section 251 Certificate, tab 17.
[31] Section 251 Certificate, tab 13.

me it may be inferred that the Shire Engineer approved construction, excavation works on 259 for Noosa's quarrying in 1994.

Material Change of Use

[88] When IPA came into force on 30 March 1998 it introduced the concept of a "material change of use". For present purposes the meaning of the phrase included "a material change in the intensity or scale of the use of the premises".[32] Section 1.4.6 of IPA provided that a lawful use immediately before the commencement of IPA remained a lawful use under IPA, so long as there was no material change of use since the commencement. It may be noted that the evidence about Neilsens activities on 259 so far, does not establish any material change of use. Kin Kin rather referred to proposals in its management plans. That does not establish that there has been a material change of use.[33] Kin Kin submitted that because the Neilsens plans approved by Noosa proposed a material change in the intensity and scale of the approved use a further application for development consent was required. It submitted that the excavation area on portion 259 was limited to the area indicated in the application and shown on the plans accompanying the application, that no extension of that area had been lawfully approved and that the scale and intensity of the use was that approved in 1988. It also submitted as I understood it, that the use, if a lawful use, was limited by the extent of what had been occurring on 259 as it was quarried by Noosa. This latter submission has no support in Kin Kin's amended application or in any subsequent pleadings in response. The whole thrust of all its applications was to the effect that the approval was limited to the area and extent of 259 referred to in the application.

What was approved

[89] Shepperson's application was to use 259 for the purpose of extractive industry, hard rock quarry. What was approved is set out earlier. It may be accepted that the Readymix plans and the Neilsens' plans later approved by the first respondent indicate a considerably greater quarry operation than was described in the application documents. They both indicate an extraction method and area represented by eleven fifteen metre benches. Each indicates a primary crusher, secondary crusher, processing plant and stockpile. The plant is not described in the same areas. The stockpile is. In the Neilsens plans the stockpile indicates a larger area. Both indicate generally similar parking, office and workshop areas. Both indicate siltation pond. The Neilsens plan is somewhat more detailed. Water storage areas are displayed. In the Readymix plans which, as indicated above, were in reality approved by Noosa, Readymix expressed difficulty with accurately estimating annual production and sale output. It provided an initial estimate of an annual turnover of 140,000 tonnes.

[90] The Readymix plans were prior to IPA. The Neilsens plans were after IPA had commenced. On 6 August 2003, Neilsens agent Groundwork EMS wrote to Shepperson's solicitors advising that there was no intention on the part of Neilsens to increase the scale of the operation from that contemplated in TPC 1899. On the same date Groundwork EMS advised Neilsens that the Readymix plans estimated an annual production of 140,000 tonnes for the quarry and that

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[32] *Integrated Planning Act 1997* section 1.3.5. See also *Sustainable Planning Act 2009* section 10(1).
[33] *Thiess Services Pty Ltd & Anor v Mareeba Shire Council & Ors* [2009] QPELR 1 at 5, paragraph 17; *Mac Services Group Ltd v Belyando Shire Council & Ors* [2008] QPELR 503 at 507, paragraph 27.

Noosa may interpret that to represent the scale of the project. Following that, Shepperson applied to extend the term of the approval. On 27 November 2003 Noosa approved an extension to 12 May 2033 subject to conditions. The conditions included:

> "B. Advise the applicant that the use is to comply with the scale and intensity allowed in the current approval and any increase in scale and intensity of operations on the site will be the subject of further application for material change of use".

This was conveyed to Shepperson by letter to his solicitors dated 2 December 2003. This is consistent with Noosa's view that it had approved the Readymix plans.

[91] The purpose of a quarry is to obtain the resource being quarried. The resource is a valuable community commodity. As earlier observed establishing a quarry and quarrying is expensive and the full extent and quality of the resource, where it is buried rock can only be known as the quarrying operation proceeds. It is not akin to a building plan or subdivision which may be presented with clear boundaries on a plan. A TPC may, by its terms, limit the boundaries of the area to be quarried or it may, as here, approve the use conditioned by a requirement for Council approval of detailed management plans.

[92] Land use rights resulting from local authority approvals are determined from the terms of the approval which may include such other documents as are expressly or by necessary implication incorporated into the approval. That this is so appears from a number of decisions in appeals about planning matters.[34] "The nature and extent of the approved development must be determined by construing the document of approval including any plan or other document which it incorporates aided only by that evidence admissible in relation to construction which establishes, or helps to establish the true meaning of the document as the act of the relevant authority, not the result of a bilateral transaction between the applicant and the council".[35] "It is not personal to the applicant, but enures (sic)[36] for the benefit of subsequent owners and occupiers and in some respects a consent is equivalent to a document of title".[37] The principles are further set out at paragraph 6 of the judgment of Wilson SC DCJ, as he then was, in *Serenity Lakes Noosa v Noosa Shire Council* [2007] QPELR 334 at 335.

[93] TPC 1899 is in clear terms. It does not either expressly or by necessary implication incorporate plans attached to the application, or the application itself into the approval. The only plans to become incorporated are management plans to be approved by the first respondent referred to in condition 2 of the approval.

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[34] *Leichhardt Municipal Council v Terminals Pty Ltd* (1970) 21 LGERA 44 at 50-51; *Sydney Serviced Apartments Pty Ltd v North Sydney Municipal Council (No. 2)* (1993) 78 LGERA 404 at 407; *Auburn Municipal Council v Szabo & Anor* (1971) 67 LGRA 427 at 433-4; *House of Peace Pty Ltd & Anor v Bankstown City Council* (2000) 106 LGERA 440 at 449; *Eaton & Sons Pty. Limited v The Council of the Shire of Warringah* (1972) 129 CLR 270 at 293; *Ryde Municipal Council v The Royal Ryde Homes & Anor* (1970) 19 LGRA 321 at 324 per Else-Mitchell J; *Hawkins & Anor v Permarig & Anor (No. 1)* [2001] QPELR 414 at 416; *Sericott Pty Ltd v Snowy River Shire Council* (1999) 108 LGERA 66.

[35] *Parramatta City Council v Shell Co. of Australia Ltd* [1972] 2 NSWLR 632 at 637 per Hope J.

[36] Endures.

[37] *Ryde Municipal Council v The Royal Ryde Homes & Anor* (1970) 19 LGRA 321 at 324 per Else-Mitchell J.

In due course these were the Readymix plans. Subsequently the Neilsens plans were approved.

[94] Senior Counsel for Kin Kin submitted that the TPC could not approve more than was applied for. In support he referred to a passage in the judgment of the High Court in *Weston Aluminium Pty Ltd v Environmental Protection Agency & Ors* (2007) 156 LGERA 283 at 288 (14) to the effect that it was the application made by the party seeking development consent that marked out the boundaries of the consent sought. I do not consider the judgment supports the submission. The part of the judgment referred to in support of the submission was a part of the appellant's submission to the Court. Following that, with reference to the construction of development consents, the Court said it was not necessary to examine whether in construing a development consent, reference may not be made to anything other than the consent itself and any documents incorporated expressly or by necessary implication. It was not necessary "to consider what reference may be made to the development application to which the consent responds".[38]

[95] He also submitted that condition 2 of the consent could not be relied upon to justify an enlargement of the extraction area. One of the matters the condition required to be addressed in the management plans was "the extent of the proposed excavations". These were set out in the application. The condition did not contemplate any substantial alteration of the area to which the consent applied. It was rather a subordinate or ancillary provision designed to better define the area applied for and approved. In support, he referred to *Eremenco v Rutherford & Calliope Shire Council* [1996] QPELR 153 at 156, (G) to (H).

[96] *Eremenco* was an application for declarations under IPA. An application for a quarry had been approved on land and subsequently, after an appeal had been withdrawn, a permit issued. A condition of the approval and of the permit provided for the extraction of material "from the area of the subject land as identified by the application on a plan lodged with the application--- prior to commencement of operations the applicant shall peg the area of operation---". The plans lodged with the application were found by the Judge presiding over the declaration proceedings to be imprecisely drawn and without professional assistance. They did however, depict the quarry area in a location on the land quite different from an area pegged out which was only 60 metres from the applicant's home. The Court concluded that approval of the pegged area for the quarry was void. The reference in the condition to approval for an area pegged was a subordinate and ancillary provision designed merely to give a better definition of the area by pegging. "On its proper construction condition 2 of the permit does not--- contemplate the pegging out process will result in any substantial alteration of the area to which the permit applies".

[97] In *Eremenco* the approval itself limited the area of extraction to that shown on a plan lodged with the application. In this case the approval did not incorporate any plan in the application. It was, by its terms, an approval of extractive industry on Portion 259.

[98] He also submitted that the decision of the Court of Appeal in *Barakat Properties Pty Ltd v Pine Rivers Shire Council & Anor* (1994) 85 LGERA 99 applied. The relevant legislation in *Barakat* was the P and E Act. Section 4.15 related to

[38] *Weston Aluminium Pty Ltd v Environmental Protection Agency & Ors* (2007) 156 LGERA 283 at 288.

modification of applications, approvals or conditions of approvals for rezonings, town planning consents etc. by the local authority. Section 4.15(2) limited the local authority's power to approve an application to modify where, inter alia, the modification was not of a minor nature. The Court of Appeal held that the power of the local authority to impose conditions on an approval did not entitle it to impose a condition that an application be modified in a manner in which the local authority could not approve if an application seeking the modification was made. It was submitted that what condition 2 required were management plans to manage what had been applied for and approved, that if it purported to do more than that, to that extent it was invalid for the reasons identified in *Barakat.*

[99] The submission faces the same problem. The approval was for extractive industry on portion 259 subject to the conditions. It did not incorporate into it any of the content of the application or the plans accompanying the application. What had been applied for was approval for extractive industry on portion 259 and that was what was approved.

[100] He also submitted that when the Readymix management plans were submitted to Noosa, the P and E Act had come into force. Section 4.15(2)(c) thereof provided the first respondent could not approve an application to modify an approval made under section 4.15(1) where the approval was the subject of an appeal and the Court had made a determination in the appeal. It followed, according to the submission, that the management plans could not modify the approval.

[101] This submission faces the same problem. The management plans do not modify the approval, the subject of the Court's order on the appeal. What was approved was an extractive industry on Portion 259 for which management plans dealing with specified matters were to be prepared, to be approved by the first respondent. The applicant's submissions take as the premise that the use approved was limited to the size and scale mentioned in the application. If that was so, I would agree. But as I have endeavoured to show, what was approved was not so limited. To the extent it was limited, it was limited by the size and scale in the Readymix management plans if approved pursuant to condition 2. The Neilsens plans approved in 2005 are of a similar size and scale to that plan.

Extension of the Currency Period

[102] In November 2003 Noosa approved extension of the term of the approval period for the extractive industry use on Portion 259 until 12 May 2033.[39] The applicant submitted the approval was not operative because conditions it was subjected to, conditions 2, 8 and 9 had not been complied with.

[103] The approval was advised by letter, dated 2 December 2003. It was subject to conditions one of which, condition 1, was that updated management plans be prepared by appropriately qualified persons to the reasonable satisfaction of Noosa within 6 months, addressing the criteria set out in condition 2 thereof.

[104] In response management plans were submitted on 25 May 2004, then amended according to Noosa's requirements and re-submitted. On 18 May 2005, Noosa expressed its satisfaction with the plans.

[39] Affidavit of Hannah Lucy Riggs, tab 156.

[105] The applicant submitted that the management plans did not comply with two of the criteria in condition 2, namely a traffic management plan with predictions for the next 30 years and a sediment and erosion control plan.

[106] The management plan submitted contained a traffic management plan but it did not include predictions for the next 30 years. Rather it explained that until the quarry was established and had developed consistent demand for product, it was not possible to predict the volume of trucks entering or leaving the site on a weekly basis. Noosa was apparently satisfied with that response for it approved the management plans. The management plans also contained a sediment and erosion control plan. A stormwater and sediment control plan accompanied the management plans. Erosion control measures were outlined in the management plans, clause 3.6.4, and the stormwater and sediment control plan was referenced. Reference was made to designing erosion controls and devices in accordance with a publication of the Institute of Engineers. That was what the condition required the management plans to include. Again Noosa was apparently satisfied with the response.

[107] Condition 8 required compliance with the updated management plans. Condition 9 was a condition which required that detailed staged sediment and erosion control plans be prepared for the site to the reasonable satisfaction of Noosa and in accordance with specified engineering guidelines.

[108] The applicant referred to a show cause notice recently served on the third respondent. The notice asserted that plans submitted by Neilsens in 2010 regarding sediment and erosion control were not to the reasonable satisfaction of the first respondent, that the use had commenced and the condition had not been complied with.

[109] Condition 9 was a separate condition which did not require the plans it referred to, to be contained in the updated management plan. It simply required that the plans referred to in condition 9, be prepared to the reasonable satisfaction of the first respondent. It was a condition of the approval of the updated management plans, that condition 9 be satisfied. No time limit was otherwise attached to supply of the detailed plans the condition required and it appears in the show cause notice, plans (deemed not to the reasonable satisfaction of the first respondent) were not provided until March 2010. The condition will have to be satisfied but non-compliance to date (if that in fact be the case) does not render the approval inoperative.

Whether declarations should be made

[110] In the event that Kin Kin has made out a case for any declaration sought, the Court has a wide discretion The Court's function is "to perform a balancing exercise with a view to matters of both private and public interest".[40] In *Mudie* the Court endorsed as useful a checklist of points which may need consideration per Kirby P (as he then was) in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341. His Honour also said "In exercising the discretion it must be kept in mind that the restraint sought is not in its nature the enforcement of a private right whether in equity or otherwise. It is the enforcement of a public duty imposed by or under an Act of Parliament by which Parliament has expressed itself on the public interest which exists in the orderly development

[40] *Mudie v Gainriver P/L & Ors* [2001] QCA 382 at [13].

and use of the environment--- There is indicated a legislative purpose of upholding, in the normal sense, the integrated and coordinated matter of planning law".

[111] I have already set out a passage from *NRMCA (QLD) Ltd v Andrew* [1993] 2 Qd R 706. The Court of Appeal remarked that in New South Wales the discretion was very wide and ignorance of that should not be imputed to the Queensland legislature. The Court observed "that, at least where a private applicant applies, the Court has a wide discretion to grant or refuse an injunction and is not constrained by any rule that it must enjoin the illegality unless special circumstances are shown".[41]

[112] The wide discretion must be exercised judicially: *Fatsel Pty Ltd & Anor v ACR Trading Pty Ltd & Anor (No. 3)* (1987) 64 LGRA 177 at 192. Kirby P, speaking of the wide discretion (conferred by the New South Wales legislation) reminded that it was not a warrant to substitute the personal opinion of the Judge hearing the case for the operation of the law but "on the other hand it would be equally erroneous to ignore the discretion or to give it an unduly restricted operation. It is just as much part of the structure and scheme of the Act for the enforcement of planning law as are the other parts---".

[113] Kin Kin submitted that if it be the case that it had established any of the matters, which by its amended originating application, were grounds for a declaration sought, then declarations should be made. There was a clear public interest in upholding and enforcing planning law. Unless this was done equal justice may not be secured but instead private advantage may be won by a particular individual which others cannot enjoy.[42] It was an offence to carry out assessable development without a development permit,[43] or not to comply with a development approval.[44] It further submitted that the purposes and advancement thereof of SPA, sections 3, 4 and 4, supported making of declarations sought if grounds were established. A purpose of SPA was to achieve "ecological sustainability" by "managing the process by which development takes place including ensuring the process is accountable, effective and efficient, and delivers sustainable outcomes" and by "managing the effects of development on the environment including managing the use of premises". The Court was one of the entities charged with advancing the purposes of SPA, one of which was to provide for community involvement in decision making. SPA's purposes were not advanced by denying relief if Kin Kin had established a basis for a declaration to be made. Another consideration was that TPC 1899 was given more than 20 years ago under a different planning regime and without regard to a range of matters, now legislated as relevant if a development application is required to be made. A purpose of SPA was to manage the effects of development on the environment so as to achieve ecological sustainability. Advancing that purpose included avoiding or otherwise lessening adverse environmental effects of development. To deny relief, if a basis for it was made out, would mean there would be no assessment of the proposed development on the environment. The purpose of SPA was not advanced by a denial of declarations and orders, which may achieve such an assessment.

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[41] At 713.
[42] *Mudie v Gainriver P/L & Ors* [2001] QCA 382 at [13].
[43] *Sustainable Planning Act 2009* section 578.
[44] *Sustainable Planning Act 2009* section 580.

[114] These are plainly important matters to be taken into account.

[115] Other matters advanced by the respondents included:

> Kin Kin does not have the same standing as an applicant as does a local authority which may be regarded as representing the public interest. Kin Kin's interest was not clearly exposed. Some of its members appeared to be persons living or having interests in the area, but that did not establish its interest. On the other hand, the community of the wider north coast area had an interest in the local availability of the hard rock resource on 259 for community infrastructure. The local authority actively did not support Kin Kin's application but resisted it. Its officer, the Shire Engineer was a person to be satisfied or to approve with respect to requirements of conditions 1 and 2 of the approval.
>
> TPC 1899 by its terms established use rights for 259. Absent lapse, it has existed for 22 years. All persons were entitled to rely upon it for the use rights existing for 259. Neilsens was one of those persons. It has incurred considerable expense in reliance upon it.
>
> For 22 years the TPC has existed without challenge. The present application was not commenced until 2010. It was considerably expanded by amendment in 2010, delaying resolution of it. There is evidence that people in the area were aware of the quarry. Mr Stewart's affidavit[45] and Mr Glasby's affidavit[46] suggest that in the mid 1990's concern was being expressed about the quarry but no legal steps were taken regarding the approval or its validity for another 13 years or so.
>
> The quarry resource in the Wahpunga range and on 259 in particular has long been recognised in planning documents as of "strategic significance". There was a wider public interest in being able to make full use of the resource. The resource was finite and expensive to develop, and the interests of the wider community are served if the resource is able to be fully utlised.
>
> It was not shown that the first and second respondents, throughout the whole 22 years were acting other than on the reasonable assumption that the approval by the Court (and Noosa) was lawful. No issue was raised challenging compliance with conditions 1 and/or 2 for 15 or 16 years. If it be assumed that there had not been full and strict compliance with conditions 1 and/or 2, work required by the conditions was done at considerable expense and the use of the quarry for the winning and crushing of the rock and storage of the crushed rock commenced before 15 April 1995.
>
> Lawful access to 259 could be by the yet unformed but surveyed and dedicated Sheppersons Lane. Yet there was probably no utility in that. It would be closer and probably more offensive to the nearest neighbour, Mr Glasby, the topography of the land resulted in the present access over 258 being flatter and not in view of any neighbour. Shepperson owned 258 and consented to the present access over it, there was a registered lease to

[45] Filed document marked 33 on Court file.
[46] Filed document marked 27 on Court file.

protect that access, it has been used as the access for at least 16 years and Noosa and Neilsens supported use of it. The quarry is subject to all the usual regulation dealing with safety and environmental issues.

[116] I have said above that I do not consider I am empowered to declare the order of the Local Government Court was made without jurisdiction. It will be apparent though from what I have discussed above that the aspects of Kin Kin's application which could arguably provide a basis for declarations sought are Shepperson's failure to include 258 in his application and that Noosa, before proceeding to quarry 259 in 1994, did not fully comply with condition 1 of the TPC. In respect of the latter, a further question arises whether therefore Noosa's quarrying could not amount to commencement of a lawful use pursuant to the TPC. The terms of the condition could arguably have that effect. In respect of the former, despite the factual differences, what the High Court held in *Pioneer* could arguably apply to the present case, for what was contemplated in the application was a haulage route over 258. It was not included in what was applied for and in the public notification.

[117] As observed above the considerations relevant to the discretion advanced by Senior Council for Kin Kin are important. There is a clear community interest in upholding and advancing the provisions of the planning laws. The concerns of residents in this rural area expressed in the affidavits filed also require consideration. I have no doubt they are genuinely held.

[118] However, in the exercise of the discretion I would not make any of the declarations sought even had I the power to declare the order of the Local Government Court was made without jurisdiction. In my opinion, the following considerations tip the balance:

So far as the evidence shows Kin Kin's interest is as an incorporated body claiming to be a community forum in the Kin Kin area. Evidence about its membership and objects is limited;

The use of 259 for extractive industry was publicly advertised. Any person who responded to the public advertising could not have failed to understand that Shepperson was intending to have a commercial quarrying operator do the quarrying, that what was indicated in the documents comprising the application were initial proposals and that it was proposed a haul route would be across his 258 upon which he lived and had his dairying operation;

There were no submissions or objections to Shepperson's application;

Noosa as the elected local authority supported Shepperson's application, continues to support the approval and actively opposes the present application;

In its dealings regarding quarrying on 259, Noosa has consistently proceeded on the basis of Shepperson's TPC. It has consistently, over the years, regarded the TPC as not having lapsed;

The Local Government Court had the power to excuse non-compliance with any provision of section 33 of the LG Act or a by-law and as observed above this was an appropriate case in which to do that if it was necessary;

TPC 1899 and its conditions, resulting from the decision of the Local Government Court, have been in existence, unchallenged, for in excess of 20 years;

Persons were entitled to and did rely upon it as establishing the approved use of 259 according to its terms;

With regard to any non-compliance with condition 1, Noosa did work of the nature set out in condition 1 before commencing to quarry in 1994. If it be accepted that those works did not amount to compliance with the requirements of condition 1, it produced no adverse effect on anybody, other than, arguably, Shepperson. Noosa did further works of a similar nature but more extensive later, after it had leased 259, for instance, it replaced the bridge with a culvert.

[119] The application is dismissed.