title conferred by the Register may occur, based on statutes other than the RPA. As a general matter, in purchases of land from public authorities, the purchaser's due diligence should extend to a proper (and not superficial) review of the authority's power to sell the land, in the context of any statutory limitations imposed.

Drake-Brockman v Minister for Planning & Anor [2007] NSWLEC 490 –

by Kristy Robinson – Solicitor, Henry Davis York

This case concerned the CUB development at Broadway. The applicant, an objector, raised the issue of whether the proposal took into account climate change impacts. The decision alleviates some uncertainty about the application of a recent decision of *Gray v The Minister for Planning & Ors [2006] NSWLEC 720*, which held that the proponent of the proposed Anvil Hill coal mine had failed to adequately assess the impacts of the project on climate change.

The Applicant relied upon *Gray* arguing that the Minister failed to consider ecologically sustainable development (**ESD**) principles and, in particular, the impact on climate change in approving the concept plan for the CUB site. The Court ultimately rejected all of the Applicant's arguments. In determining whether the Minister was bound to consider greenhouse gas emissions as part of the requirement to consider ecologically sustainable development, the Court distinguished the *Gray* decision and emphasised the limited scope of the Court's inquiry in 'administrative review' proceedings. In these appeals, the Court is concerned only with the legality of the administrative decision and not with the merits. The Court noted that the decision in *Gray* turned on its own particular facts and:

> 'does not stand for a general proposition that Part 3A of the EPA Act requires any particular form of assessment of greenhouse gas emissions for each and every project to which that Part applies.'

QUEENSLAND

Tolocorp Pty Ltd v Noosa Shire Council & Anor [2007] QCA 33

by Robert A. Quirk, Barrister-at-Law

In *Tolocorp Pty Ltd v Noosa Shire Council*[1] the Queensland Court of Appeal ("Court") refused an application by the State of Queensland for leave to appeal a declaration made by the Planning and Environment Court ("PEC"). The PEC's declaration, in favour of Tolocorp Pty Ltd ("Tolocorp"), was that its development application was a "properly made application" for the purposes of s. 3.2.1(7) of the *Integrated Planning Act* 1997 (*"IPA"*).[2] As is common in applications for leave to appeal relating to questions of law, the Court heard the application and the merits of the appeal together.[3]

The proceeding in the PEC had been commenced by way of an originating application. It arose because the Council had refused to accept Tolocorp's application for reconfiguration on the basis that it was prohibited by the regulatory provisions of the *South East Queensland Regional Plan 2005 – 2026* (*"Regional Plan"*).[4]

The development application sought to reconfigure land at Gwandallan Drive at Lake McDonald ("Land"). The Land was a single lot of just over 8 hectares in area. There were eight houses and other facilities on the Land that were permitted to be used as "live in care and training centre (accommodation units)" pursuant to a town planning consent granted in 1985. Tolocorp's proposal was to reconfigure the Land into five lots, on which five of the houses would remain, with the other three being removed. It was proposed that three of the lots would have an area of one hectare, with the other two being 1.3 hectares and 3.55 hectares in size.

1 [2007] QCA 33. The PEC's judgment is *Tolocorp Pty Ltd v Noosa Shire Council & Anor* [2006] QPEC 033.
2 Ibid, [1]. The actual declaration is set out in *Tolocorp Pty Ltd v Noosa Shire Council & Anor* [2006] QPEC 084, [1].
3 Ibid, [5], [10], [58].
4 Ibid, [12], [55]. See also *Tolocorp Pty Ltd v Noosa Shire Council & Anor* [2006] QPEC 033, [2], [4].

"It was ... common ground that the subject land was in the "Rural Pursuits Zone" under the Noosa Shire Council Planning Scheme ("*NSCPS*"). Under the Noosa Shire Council Strategic Plan ("*NSCSP*"), there were three preferred dominant uses relating to proportions of the land. Calculated by reference to the non-cadastral map, they were rural residential settlement (37.5 per cent), rural settlement (11.25 per cent) and rural conservation (51.25 per cent)."[5]

Section 3.2.1(7) of the *IPA* provided that an application will be a properly made application if it complies with the six requirements set out in subsection (7). The requirement in s. 3.2.1(7)(f) provided that:

> "The development would not be contrary to the regulatory provisions or the draft regulatory provisions."

It was also common ground that in the appeal that the land was in the Regional Landscape and Rural Production Area under the Regional Plan, that s. 5(2)(c) of the Regional Plan's regulatory provisions prohibited subdivision in those areas unless the land fell within the exception in s. 5(3)(d) because the proposed lots were less than 100 hectares in area, and that the reconfiguration was for rural residential purposes.[6] The central issue was whether the land fell within the exception in s. 5(3)(d).[7]

Section 5(3)(d) provided:

> "However subsection (2) does not apply if the subdivision -
>
> ...
>
> (d) is:
>
> (i) for rural residential purposes on land zoned for rural residential purposes; and
>
> (ii) carried out under a development approval for reconfiguring a lot, if the development application to which the approval relates is properly made before the 27th October 2006."

The regulatory provisions included the following definitions:

> "**rural residential purpose** means a purpose that is predominantly a residential purpose involving a single dwelling on a lot greater than 2000m.
> **zoned** means allocated or identified as a zone or other like term such as domain or area in a Planning Scheme, including in a strategic plan under a transitional Planning Scheme."

The Court comprised McMurdo P, and Mackenzie Fryberg JJ. Each gave separate reasons, with the President and Mackenzie J concurring as to the orders made.

Her Honour the President said that the State had not persuaded her that the PEC's "approach, on what is essentially an interlocutory matter, was attended with sufficient doubt to warrant [the] ... Court's reconsideration to prevent a substantial injustice."[8] This was the basis upon which McMurdo P resolved the application.[9]

In the course of her reasons for judgment McMurdo P set out a summary of the PEC's approach to the matter, including in relation to how "predominantly" was treated within the definition of rural residential purpose. The PEC had treated the term predominantly as not necessarily meaning that the rural residential purpose must be the prevailing purpose in the zone for land to be "zoned for rural residential purposes" under s. 5(3)(d)(i).[10]

5 Ibid, [19].
6 Ibid, [19], [64].
7 Ibid, [18], [64].
8 Ibid, [8].
9 Ibid, [5], [8].
10 Ibid, [7].

In relation to the issue of the PEC's judgment concerning a matter that was essentially interlocutory, her Honour said:

> "in determining whether leave should be granted it is highly relevant that the order and declaration concerned an essentially interlocutory matter, namely whether s 5 of the regulatory provisions of the regional plan entitled the Noosa Shire Council to refuse to assess Tolocorp's development application. The primary judge's order and declaration had the effect only that Tolocorp's development application to the Noosa Shire Council would then be determined on its merits in accordance with the provisions of the IPA, the regional plan, its regulatory provisions and the planning scheme. Any subsequent determination of Tolocorp's development application would be subject to the appeal provisions under the IPA."

Justice Mackenzie did not deal with the issue of whether the matter was interlocutory or not.[11] In relation to the central issue his Honour said:[12]

> "The ultimate question is whether the land is zoned for a purpose that is predominantly a residential purpose involving a subdivision on a lot of not less than 2000m^2. ... Finally, there is some difficulty, in my view, with the notion that what has to be done is to identify what is the predominant use in a particular zone. That is a different question from whether, in this case, the land is zoned for predominantly a residential purpose. It is difficult to see why land may not be zoned predominantly for a particular purpose even if it is not the only purpose or use for which it is zoned. ...
>
> The aggregation of these features leaves me unpersuaded that it was correct in this case for the Assessment Manager to refuse to treat the application as a properly made application at the outset. I am not persuaded that the learned judge of the PEC erred in deciding that he should make the declaration that has generated this application."

His Honour Mackenzie J said in relation to the practicality of the assessment manager determining whether a development application is contrary to the regulatory provisions:[13]

> "it may be the case that in some instances it will be possible to conclude that an application, when measured against all relevant criteria, will inevitably be contrary to the regulatory provisions but in others, especially where there is discretion that may be exercised such as that in s 7.6.3 of the Schedule,[14] the same conclusion cannot be reached without further assessment. Where the borderline lies cannot be definitively stated. But unless it can be definitively stated in the individual case then under consideration that the outcome will be contrary to the regulatory provisions, the application should *prima facie* be treated as a properly made application. In cases where it is subsequently discovered that the development would be contrary to the regulatory provisions, s 3.2.1(10) *IPA* would preserve its status as an application that was not properly made."

Mackenzie J concluded that he was "not persuaded that the learned judge of the PEC erred in deciding that he should make the declaration".[15]

11 Ibid, [40].
12 Ibid, [40], [51].
13 Ibid, [40].
14 This section is referred to in his Honour's reasons at [25]. He said in relation to it: "Section 7.6.3 allows the Council to dispense with or modify those provisions in certain defined circumstances. Such dispensing or modification depends on the Council forming a judgment that it is justified, having regard to criteria peculiar to the land which is the subject of the application."
15 Ibid, [52].

Justice Fryberg summarised the competing interpretations as follows:[16]

> "For the State it was submitted (in effect) that to give effect to the word it was necessary to identify rural residential purposes as predominant among the purposes for which the land was zoned. For Tolocorp it was submitted that the inquiry should focus solely on the purposes of the particular development."

His Honour Fryberg J ultimately accepted the approach advocated by the State, he said:[17]

> "Interpreting the Regulatory Provisions in the manner described above in the light of the town planning scheme for the shire, I have reached the conclusion that Tolocorp's land was not zoned for purposes that are predominantly residential purposes involving a single dwelling on a lot greater than 2000m^2."

In relation to the question of whether the matter was interlocutory, Fryberg J disagreed with McMurdo P. His Honour said:[18]

> "The proceedings below came before the Planning and Environment Court not by way of appeal from the Council's decision but by collateral application for a declaration. The application invoked that court's original jurisdiction conferred by s 4.1.21(1) of the Act. Subject to an irrelevant exception, the court's decision on the application
>
> > "is final and conclusive and is not to 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."
>
> If the declaration below is allowed to stand, the Council will be obliged to consider the application on its merits. However it will not be able to consider whether the subdivision was contrary to the Regulatory Provisions. On that question it will, as the President has observed, be bound by the declaration. ...
>
> ... With great respect for the President's opinion that the decision was interlocutory only, it seems to me strongly arguable that it was final. Because this question was not addressed by the parties, or even raised with them, I do not wish to express a concluded opinion upon it. It is unnecessary for me to do so. The fact that the matter is in doubt is sufficient. (footnotes omitted)

Justice Fryberg also expressed the view that the utility in s. 3.5.11(4A) of the *IPA* lay in the opportunity for the assessment manager to rectify the situation if it had mistakenly accepted an application as a properly made application, where it was in fact contrary to the regulatory provisions, by requiring it to make a decision that was not contrary to the regulatory provisions.[19]

Conclusion

Despite the fact that the judgment is 30 pages in length, no ratio emerges from the reasons of the Court except that it was inappropriate to grant leave in this particular case.

Discussion

Treatment of applications contrary to the regulatory provisions or draft regulatory provisions

The statement by Mackenzie J that an application which cannot be definitively stated as being contrary to the regulatory provisions should be treated as *prima facie* properly made application appears to be contrary to the Court's decision in *Chang v Laidley Shire Council* ("*Chang*")[20]. In *Chang* a differently constituted court held that:[21]

16 Ibid, [90].
17 Ibid, [96].
18 Ibid, [59], [60].
19 Ibid, [69], [71].
20 [2006] QCA 172.
21 Ibid, [75], [77].

"In my respectful opinion, it is clear that s. 3.2.1(7)(f) and s. 3.2.1(10)(b) of the IPA, as amended by IPOLA, apply to any development application made after the commencement of IPOLA to prevent assessment by the local authority of such an application. ...

The general provisions of s. 4.1.5A cannot prevail against the specific provisions of s. 3.2.1(7)(f) and s. 3.2.1(10)(b) which are directly concerned to ensure that an application for a development permit for development which is contrary to the DRP should not even be received by the assessment manager."

Chang would seem to preclude the approach suggested by Mackenzie J. The Court's approach in *Chang* is also supported by s. 3.2.15 of the *IPA* which provides that the application stage only ends for those applications that are properly made applications, or taken to be so, by virtue of s. 3.2.1(9) of the *IPA*. Where an application is in fact for development that is contrary to the regulatory provisions or draft regulatory provisions it cannot ever proceed past the application stage, as it cannot be a properly made application or be taken to be a properly made application.[22]

It is also submitted that the utility in s. 3.5.11(4A) is not to provide an opportunity to correct mistakes by the assessment manager but a separate check within the IDAS process to ensure the assessment manager's decision is not contrary to the regulatory provisions or draft regulatory provisions. This is because s. 3.2.1(7)(f) is directed towards "development" whereas the subject of s. 3.5.11(4A) is the assessment manager's "decision".

Final or interlocutory

The proceeding before the PEC was in the court's original jurisdiction under s. 4.1.21(1) of the *IPA*. That section provided:

"Any person may bring proceedings in the court for a declaration about—

(a) a matter done, to be done or that should have been done for this Act other than a matter for chapter 3, part 6, division 2; and
(b) the construction of this Act and planning instruments under this Act; and
(c) the lawfulness of land use or development."

The declaration was made by the PEC after a trial and the delivery of reasons for judgment. The court's decision brought the proceeding to an end, at least in so far as the application for reconfiguration was concerned.[23]

For an order to be a final order it must finally dispose of the rights of the parties in the proceeding.[24] An order made in the course of a proceeding that does not conclude the rights of the parties *inter se*, although it may conclude the fate of the particular application in which it is made, is interlocutory only.[25]

Therefore, whether an order is final or interlocutory depends on whether it finally disposes of the rights of the parties to the proceeding, rather than whether the subject of the order is merely a step within a larger process. The declaration would seem to be a final order as it finally disposed of the rights of the parties to the originating application. Accordingly, it is submitted that the tentative view expressed by Fryberg J is to be preferred regarding whether the PEC's decision was final or interlocutory.

22 *IPA*, s 3 2 15, s 3 2 1(10)(b)
23 *Tolocorp Pty Ltd v Noosa Shire Council & Anor* [2006] QCA 33, [56], *Tolocorp Pty Ltd v Noosa Shire Council & Anor* [2006] QPEC 033, [5]
24 *Lieul v Corney* (1976) 8 ALR 437, 446, *Hall v Nominal Defendant* (1966) 117 CLR 423, 439, 440
25 *Hall v Nominal Defendant* (1966) 117 CLR 423, 439, 440