In the Planning and Environment Court **No. 54 of 2015**

Held at Cairns

Between:	**WARREN GEORGE SAVAGE**	First Applicant
	SAVAGE RESORTS PTY LTD (ACN 150 197 256) AS TRUSTEE FOR THE ETERNITY TRUST UNDER INSTRUMENT NO. 714445096	Second Applicant
And:	**CAIRNS REGIONAL COUNCIL**	First Respondent

APPLICANTS' OUTLINE OF SUBMISSIONS
9 June 2015

Table of Contents

Preliminary 2
Background 2
General Description: Il Centro 3
Legal Principles: Challenging the Validity of Council Decisions on Administrative Law Grounds 4
Material Before the Decision-Maker[s] 5
The 1994 Town Planning Consent Permit 7
Principles of Construction Applicable to Consent Permits/Development Approvals 9
The Nature of the Approve Use Under the Consent Permit 9
The Modification of the Consent Permit 10
Summary: The approved use under the Consent Permit [Development approval] 14
The Principal Grounds of Challenge to the Decisions 14
Ground 1 – Breach of Procedural Provisions: the *Project Blue Sky* ground 15
Ground 2 - Failure to take into account relevant considerations that the decision maker was bound to take into account: the *Peko Wallsend* ground 18
Ground 3 - the decision was "manifestly unreasonable": the *Wednesbury Corporation* approach. 20
The First Development Application 22
The Second Development Application 23
The Decision Notices 23
The Statutory Scheme 24
The Contents of the IDAS Forms 29
Making a Material Change of Use 31
Applications not properly made: Consent of the Body Corporate Was Required 32
Other Fundamental Defects in the Development Applications 35
Declarations 3 and 4: Meaning of Multiple Dwelling / Holiday Accommodation 35
Relevant Provisions of *CairnsPlan* 2009: The Assessment tables 37
Development Applications Impact Assessable Not Code Assessable 38
Discretionary Matters and section 440 of the *SPA* 40

Preliminary

1. The First and Second Applicants (**Applicants**) seek, inter alia, declarations (and consequential orders) that two decisions made by the First Respondent (**Council**) on 13 August 2014 and a delegate of the Council on 26 February 2015 granting development approvals for a material change of use from holiday accommodation to holiday accommodation and multiple dwelling (**dual use**) in respect of certain strata title lots in a unit building in Cairns known as "**Il Centro**" were invalid.

2. The two decisions which are challenged are:

    (a) the resolution purportedly made by the Council on 13 August 2014 to approve the development application for Multiple Dwellings and Holiday Accommodation over land/buildings described as Lots 8, 18, 23, 29, 32, 36, 39 on BUP 101919, located at 26-30, Sheridan Street Cairns City;[1]

    (b) the decision purportedly made on 26 February 2015 by Kelly Reaston, General Manager, Planning and Environment (**Delegate**) under an Instrument of Delegation to approve the development application for Multiple Dwellings and Holiday Accommodation over land/buildings described as Lots 3, 9,10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919, located at 26 – 30 Sheridan Street, Cairns City.[2]

3. In these proceedings, the Applicants do not dispute that the Council's powers as assessment manager under the *SPA* were lawfully delegated to Kelly Reaston, General Manager, Planning and Environment under an Instrument of Delegation.[3]

Background

4. Unless otherwise stated, where reference is made in these submissions to evidence contained in affidavits, the reference will be to the Court Document Number; the last name of the person who swore the affidavit; the date of filing, the exhibit number and relevant the page number[s].

5. Unless otherwise stated, where reference is made in these submissions to "the **decision makers**," that reference is to read as a reference to the First Respondent and the Delegate.

6. The Applicants are Mr Warren Savage and Savage Resorts Pty Ltd ACN 150 197 256 ATF the Eternity Trust (**Savage Resorts**) trading as "Il Centro Apartment Hotel".

7. The community title scheme for Il Centro is "Il Centro Community Titles Scheme 17438". The name of the body corporate is "Body Corporate for Il Centro Community Title Scheme" 17348 (**body corporate**).

8. The First Applicant, Warren Savage, owns and permanently occupies unit 2 (Lot 2 BUP 101919). He is required under the Caretaking Agreement to reside permanently in Il Centro.[4]

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1 A copy of the resolution is Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 13, pages 100-101.

2 A copy of the decision notice is Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 15, pages 156-165.

3 Court Document 15, affidavit Maruna filed 05.06.15, Exhibit VVM-A Item 7, pages 50 -56.

4 Court Document 7, affidavit Savage filed 01.06.15, paragraph 15.

9. By deed of assignment dated 29 June 2011, on 1 July 2011, Il Centro Apartments Pty Ltd ACN 122 306 736 (**Il Centro Apartments**) transferred to Savage Resorts all right, title, estate and interest as manager in the management rights[5] of Il Centro. The Body Corporate for Il Centro Community Titles Scheme 1748 (**CTS**) consented to the assignment.[6]

10. The First Applicant is the Licensed Resident Letting Agent (No. 3469859) for Il Centro in his capacity as director of Savage Resorts. The company also holds a licence (No. 3469858) to conduct a letting business from Il Centro.[7]

General Description: Il Centro

11. Il Centro is located at 26-32 Sheridan Street, Cairns. It was built in 1995, has a ground level and 3 upper levels (with internal access by lift and stairs) and contains 38 strata title one-bedroom units and the two-bedroom unit which is owned and occupied by the First Applicant.

12. Each unit comprises approximately 54m^2 and has a kitchenette, dining/TV area, bathroom which includes the toilet and washing machine and dryer. Each unit also has a balcony.

13. Il Centro has 39 car parks which are located on the ground level. Each lot has a car park attached to the title to each lot. The land area is 1,523m^2.

14. The unit complex has, as part of the common property, a swimming pool forming part of a 400m^2 outdoor recreation/pool area.

15. Since 1997 the resident caretaker manager of Il Centro has conducted a management rights business taking accommodation bookings for the units in the letting pool.

16. When the First Applicant took over the business in July 2011 there were 30 units in the letting pool and 6 units permanently occupied.[8]

17. As at the end May 2015 there were 25 units in the letting pool and 7 units permanently occupied.[9]

18. The owners of Lots 3,8,9,10,1,14,15,17,18,19,21,23,24,25,28,29,31,32,34,36,37,38,39 and 40 that are currently in the letting pool are also respondents to this proceeding.

19. The Respondents identified as being in the letting pool did not enter an appearance in these proceedings.

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5 The "Management Rights" assigned were those rights of a letting agent for a CTS as defined in Schedule 6 of the *Body Corporate and Community Management Act 1997*: Clause 1.1 (5) Deed of Assignment of Caretaking and Management Agreement: Court Document 7, affidavit Savage, filed 01.06.15, Exhibit WGS-A, Item 5, page 54.

6 By deed dated 25 February 2010 between the Body Corporate and the former manager of Il Centro, Il Centro Apartments, the term of the caretaking and letting agreement was extended, initially from 2 March 2010 until 1 March 2018 on the same terms and conditions as the then in force "Caretaking Agreement and Letting Agreement" and thereafter, by deed dated 15 October 2010, subject to the exercise of 3 option periods, until 1 March 2033: Court Document 7, affidavit Savage, filed 01.06.15, Exhibit WGS-A, Item 4, page 50.

7 Court Document 7, affidavit Savage, filed 01.06.15 Exhibit WGS-A, Item 11, page 96, Item 12, page 97.

8 Court Document 7, affidavit Savage, filed 01.06.15, paragraph 9.

9 Court Document 7, affidavit Savage, filed 01.06.15, paragraph 9.

20. The main duration of stay at Il Centro Apartments is seven (7) nights. Three (3) to four (4) night stays are also common. The maximum stay for any booking is three (3) months.[10]

Legal Principles: Challenging the Validity of Council Decisions on Administrative Law Grounds

21. The Applicants seek declaratory relief under the *Sustainable Planning Act 2009* (***SPA***) pursuant to subsections 456 (1)(a); 456(1)(b) and 456(1)(e)[11] concerning, inter alia, the validity of two development approvals granted under the *SPA* and consequential orders about that relief pursuant to s 456(7) of the *SPA*.

22. The Cairns Regional Council as the assessment manager[12] under the *SPA* is a proper respondent to the originating application.[13]

23. In such proceedings, where the decisions which are the subject of challenge are made by a Council in its capacity as a planning authority exercising statutory power, the Court is not directly concerned with the merits of the approvals in question but rather must consider whether the approvals were validly given.

24. That is, the Court must be satisfied whether the decisions involved a valid exercise of statutory power by the Council and its delegate as assessment manager[s] under the *SPA*.

25. The Court's role is to declare and enforce the law "…which determines the limits and governs the exercise of the …" Council's power. The Court has no jurisdiction "simply to cure administrative injustice or error."[14]

26. The validity of the assessment manager's approval must be upheld if it was reasonably open to it to grant it. The relevant principle of law is that the opinion of the decision maker [assessment manager] must be accepted unless it can be shown to have been one that no reasonable assessment manager could have formed or that it was based on irrelevant consideration or that it was in some other way unjustifiable.[15]

27. In circumstances where the validity of the assessment manager depends on obedience to the provisions of a planning instrument, '…the requirements of the planning scheme have the force of law and may not be departed from unless the opportunity to do so is provided by law': *Telfrid Corporation Pty Ltd v Logan City Council* (2000) QPELR 91 at 94.

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10 Court Document 7, affidavit Savage, filed 01.06.15, paragraph 11.

11 Section 456(1) of the *SPA* provides: "any person may bring a proceeding in the Court for a declaration about any of the following: (a) a matter done, to be done or that should have been done for this Act other than a matter for Chapter 6, Part 11; (b) the construction of this Act, planning instruments under this Act…"; (e) the lawfulness of land use or development…".

12 Pursuant to section 246(1) *SPA*, "the ***assessment manager*** for an application is the entity prescribed under a regulation as the assessment manager for the application".

13 *Cutliffe v Lithgow City Council* (2006) 147 LGERA 330 at 333 [4] per Biscoe J.

14 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J cited with approval in *MCC Energy Pty Ltd v Wyong Shire Council* (2006) 149 LGERA 59 at [42] per Jagot J.

15 *Lyons v Misty Morn Developments Pty Ltd* (1998) QPELR 268 at 272 per Skoien S.J.D.C. cited with approval and applied in *Eschenko v Cummins* (2000) QPELR at [21] per Newton D.C.J.

28. The onus of establishing the invalidity of the decisions, or material error on administrative law grounds, is on the Applicant.[16]

29. In order to discharge that onus the Applicants must prove, by direct evidence or by way of inference, the matters and material considered by the Council at the meeting of 13 August 2014 when the Council resolved to grant the development approval.[17]

30. The decision to approve the first development application was made by the unanimous resolution of the 8 councilors present at the meeting in accordance with the procedures governing local government meetings set out in Part 2 Chapter 8 of the *Local Government Regulation 2012*.

31. "…[I]t is the collegiate body functioning as such in passing the consent resolution which must take the matters [required to be taken into account under the statute] which must take the matters in question into consideration." Further, on the question whether the collegiate body has taken into consideration certain matters, "…it is the collegiate mind in passing the resolution which is relevant: *Parramatta City Council v Hale* (1982) 47 L.G.R.A. 319 at 346.

32. Where the decision maker is a collegiate body such as the Council, the members of the Council can rely on the considerations and conclusions of a planning officer's (or officers) report if that was considered by the Council members.[18]

33. It follows that the only evidence that is relevant and therefore admissible for the purposes of these proceedings which involve a review of the Council's decision is that material that was tabled before or was considered by the whole Council acting as a collegiate body when the decision was made on 13 August 2014.

34. It necessarily also follows that where the powers of the Council as the assessment manager obliged to decide the development application under the *SPA*[19] have been lawfully delegated, in turn, the Delegate can rely on the consideration and conclusions of a planning officer's report.[20]

Material Before the Decision-Maker[s]

35. Pursuant to Order 2 made by this Court on 6 May 2015, the First Respondent was ordered to disclose **all** documents that were considered by the First Respondent to make the decisions on 13 August 2014 and 26 February 2015. The First Respondent provided a List of Documents to the Applicants on 13 May 2015.

36. Whilst the terms of the order reflect that the decision on 26 February 2015 was made by the Council – clearly it was not. That decision was made by the Delegate under an Instrument of Delegation.

37. The imperfection in the wording of the order is of no consequence as the solicitors for the Council have subsequently identified from the List of Documents and confirmed in

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16 *Eschenko v Cummins* [2000] QPELR 386 at [20] per Newton DCJ citing with approval, *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 335,393; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [164]

17 *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 339-340, 345 per Moffit P.

18 *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 346; *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [59]; *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 at [54]-[55]; *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 153 [35]; *Golder v Maranoa Regional Council* [2014] QPEC 68 at [39] –[53] per Robertson DCJ.

19 *Golder v Maranoa Regional Council* [2014] QPEC 68 at [37].

20 Cf. *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 371-372.

writing the document[s] which were considered by the Council and the Delegate when they made their respective decisions.

38. The orders of the Court, the List of Documents and the subsequent correspondence from the solicitors for the Council which together confirm the material before the decision maker[s] are exhibited to the affidavit of Vanessa Maruna filed on 5 June 2015.

39. The *only* material that was before the decision-maker – the Council - on 13 August 2014 when purportedly approving the first development application was a copy of the report of the Planning and Economic Committee dated 13 August 2014 (**Committee Report**).[21]

40. Any documents that were considered by the planning officer[s] who *prepared* the Committee Report (Gary Warner, Coordinator – Development Assessment) and, the Delegated Authority Report (Kelly Coppin, Planning Officer) are irrelevant and inadmissible: *Golder v Maranoa Regional Council* [2014] QPEC 68 [46] – [53].

41. The Committee Report that was considered and adopted by the Council in this case is evidence of what the Council as the decision maker has said, written or done: *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at [35].

42. The Delegate has sworn an affidavit on 3 June 2015 for the purposes of these proceedings.

43. At paragraph 19 of that affidavit the Delegate deposes to the maters that she "relied upon" when assessing and approving the second development application. The matters are stated to include:

    (a) "My existing knowledge of the issues raised in the second development application;
    (b) My discussions with lot owners and other Council officers;
    (c) My knowledge of *CairnsPlan 2009* and the relevant provisions of the *Sustainable Planning Act 2009*; and
    (d) The Delegated Authority Report dated 18 February 2015 from planning officer Kelly Coppin."

44. At paragraph 20 of the affidavit the Delegate deposes that she "…read and considered carefully the delegated authority report. In doing so, I did not consider myself bound by the recommendation in the delegated authority report. I formed my own opinion about whether to approve or refuse the second development application."

45. The *only* material that was before the decision-maker – the Delegate - on 26 February 2015 when purportedly approving the second development application was a copy of the report dated 18 February 2015 prepared by Kelly Coppin, Planning Officer (**Delegated Authority Report**).[22]

46. The Applicants have given notice to the Council that they require the Delegate for cross examination.

47. As assessment manager of the second development application, the matters that an assessment manager under the *SPA* was expressly or impliedly bound to consider or be satisfied of are only those matters provided for in the *SPA*.

48. It follows that for the purposes of these submissions the errors that have been identified in the decision making process of the Delegate are confined to those matters that may

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21 Court Document 2, affidavit Maruna, filed 02.04.2015, Exhibit VVM-1, Item 12, pages 77- 99.

22 Court Document 12, affidavit Coppin, filed 03.06.15, Exhibit A, Item 2, pages 18 – 37.

be reasonably inferred or are apparent from the content of her evidence as set out above.

49. The Delegated Authority Report that was considered and adopted by the is prima facie evidence of what the Delegate as the decision maker has said, written or done in reaching her decision: *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at [35].

50. From what is not stated in the Committee Report and the Delegated Authority Report, the decision makers did not, it may be inferred, review or consider, as they were bound to do:

    (a) the development application[s]: IDAS Form 1 [Application details] and IDAS Form 5 [Material change of use assessable against a planning scheme];
    (b) the relevant provisions of *CairnsPlan 2009* which clearly included the "CBD-North Cairns – District Assessment Table – **Initial** Level of Assessment – Material Change of Use];
    (c) the relevant provisions of the *Sustainable Planning Act 2009* insofar as they related to identifying assessable "development" that involved making a material change of use.

The 1994 Town Planning Consent Permit

51. Subject to the Court being satisfied it has jurisdiction to do so,[23] the Applicants seek declarations at paragraphs 15 and 16 of the "relief" in the Originating Application as to the lawful use rights approved under Town Planning Consent Permit 3902/93 (**Consent Permit**) in respect of each of the lots that are the subject of the two decisions that are challenged in these proceedings.

52. There is utility in making such orders in order to confirm the nature of the use rights which govern the use of each of the lots in Il Centro.

53. The declarations sought at paragraphs 15 and 16 will, if made, confirm that the use rights granted under the consent permit for "accommodation units" was for "holiday apartments" to be used for short term accommodation by tourist and travellers.

54. It is submitted that the Court has jurisdiction to grant the declarations under section 456(1)(e) of the *SPA*.

55. The Applicants will, at the hearing of the originating application seek leave to amend the declaratory orders sought at paragraph 15 and 16 to insert the word "lawful" before the word "use" where that word appears in the orders.[24]

56. The consent permit was applied for and approved under the *Local Government (Planning and Environment) Act 1990 (**P&E Act**).*[25]

57. Notwithstanding that the two development approvals that were granted by the decision makers are approvals for a material change of use *from* "holiday accommodation" to "holiday accommodation and multiple dwelling", the First Respondent now, for the purposes of these proceedings, identifies at paragraph 4 of the "List of Disputed Issues" the following issues as being in dispute:

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23 *Hazeldell* v *The Commonwealth* (1924) 34 CLR 442 at 446: "The very first duty of any Court, in approaching a cause before it, is to consider its jurisdiction." per Isaacs ACJ (with whom Gavan Duffy J agreed).

24 The word "lawful" was omitted by inadvertence.

25 The P&E Act commenced on 15 April 1991 and was repealed on 30 March 1998, on the commencement of the *Integrated Planning Act 1997* (***IPA***).

"(b) whether the approved use was for short term accommodation by tourists and travellers; and
(c) whether the approved use included permanent residential accommodation."

58. As to 4(b) and (c) of the List of Disputed Issues, as a threshold matter the Council now seemingly purports to deny that the use approved under the 1994 consent permit for "accommodation units" was confined to "holiday accommodation" but included "permanent residential accommodation."

59. Further, the Council has on three (3) occasions in early 2014 exercised its statutory power under section 588 of the *SPA* to issue show cause notices to 3 different lot owners in Il Centro. Each of those notices were issued on the basis of a reasonable belief held by the Council that a development offence was being committed because the relevant lots (Lot 14,29 and 35) were being used for permanent residential accommodation and were not being used for their lawful use namely short term holiday [or motel] accommodation.

60. The issue as to what use was approved under the consent permit turns on the proper construction of the permit.

61. If on its proper construction, the consent permit authorised the dual use, the legal consequence is that this Court would necessarily decline to make the declarations sought at paragraphs 15 and 16 which in turn would mean that there would have been no need for the decision makers to accept, assess and approve the two applications for a material change of use under IDAS, Chapter 6 of the *SPA*.

62. The invocation of the process under IDAS by the respective applicants that culminated in the decision makers granting the two development approvals would not have been required because the dual use has always existed and, by operation of the law, continues as the lawful use of each of the of the lots in Il Centro by reason of the fact that the consent permit is now a "development approval" under the *SPA*.[26]

63. It also would follow that, in the administrative law context, such a construction of the consent permit means that the decision[s] to grant the development approvals would amount to a *second* exercise of power to grant approval[s] for uses that have an existing development approval that was originally granted when the *first* decision of the Cairns City Council [the statutory predecessor of the First Respondent] was made to grant the consent permit in February 1994.

64. If the proper construction of the consent permit is that it always permitted the dual use, the result is that the decisions that are under challenge to grant the development applications are *ultra vires* or beyond power because the decision makers, each of them, have made a second decision to grant approval[s] in respect of the use rights of lots in Il Centro in circumstances where that power has already been exercised or spent when the first decision was made in 1994: *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211.[27]

65. However, as the subsequent analysis establishes, the proper construction of the consent permit as to the use approved under the consent permit is that it is limited to the use of each unit for short term accommodation by tourist and travellers.

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26 The relevant statutory provisions are set out in paragraph 12(d)-(g) of the grounds of the Originating Application.

27 *Kurtovic* was referred to with approval by Robin QC DCJ in *Seymour CBD v Noosa Shire Council* (2001) QPEC 66 at {34] –[35].

Principles of Construction Applicable to Consent Permits/Development Approvals

66. When construing an approval and determining what use was approved by the Council the Court will, as a general rule and, in the absence of any ambiguity in the wording of the consent or development approval itself, confine its consideration to the approval itself including any documents (for example the approved plans) incorporated, expressly or impliedly by reference.

67. The **intention** of the Council or what the applicant may have understood is irrelevant.[28]

68. The reason is that a consent permit or development approval is a public document constituting the decision of the Council expressed in a formal manner and intended to operate in accordance with its terms. It is not personal to the lot owners. It attaches to the land and binds successors in title and the occupiers of each of the lots in Il Centro.[29]

69. If there is ambiguity in the wording of the consent permit [development approval] recourse may then be had to the application. If that course is necessary, it is required to be construed objectively.[30] That is "….deficiencies [in the application for consent] may not be remedied by a process of reference being had to external matters, such as the anticipated terms of the [consent] that would result if the application were granted or the contents of planning documents".[31]

70. For reasons explained in more detail below it is submitted that it is unnecessary to have regard to the application for the consent permit and the subsequent application to modify the approval given under that permit

The Nature of the Approve Use Under the Consent Permit

71. Prior to the two development approvals being granted on 13 August 2014 and 26 February 2015 respectively, the use of each of the relevant lots in Il Centro that were the subject of the development application[s] was governed by the consent permit which was originally approved on 1 February 1994 by a resolution the Cairns City Council.

72. As explained further hereunder, on 17 May 1994 the Cairns City Council subsequently granted a modification of the approval under section 4.15(1)(b) of the *P&E Act*. The modification of the approval is taken to be part of the original approval granted on 1 February 1994: section 4.15(13) of the *P&E Act*. Pursuant to section 4.13(16), the consent permit attached to the land and is binding on successors in title until it is superseded by the commencement of another use: section 4.13(16)(d) of the *P&E Act.*

73. As set out in sub-paragraphs 12(d) to (g) of the grounds to the Originating Application, the consent permit continued, as and from the 18 December 2009, the date of commencement of the *SPA*, as a development approval under the *SPA*.

74. The relevant planning scheme in force at the time was the 1971 *Town Planning Scheme for the City of Cairns*.

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28 *Aqua Blue Resort Pty Ltd v Noosa Shire Council* [2005] QPELR 318 at 325 [38] per Dodds D.C.J.

29 Section 245(1) of the *SPA*; *Brisville Pty Ltd v Brisbane City Council* (2007) QPELR 637 at 639 [7] –[9] per Rackemann D.C.J; *Quarry Products (Newcastle) Pty Ltd v Roads and Maritime Services (No 3)* [2012] NSWLEC 57 [43] –[45].

30 *Stockland v Thuringowa City Council* (2007) 157 LGERA 49 at 69 [42] per Keane JA.

31 *Lagoon Gardens Pty Ltd v Whitsunday Regional Council; Proserpine Co-Operative Sugar Milling Association Limited v Whitsunday Regional Council* (2010) QPELR 74 at 87 [28] per Robin QC D.C.J following *Stockland Developments Pty Ltd v Thuringowa City Council* [2007] QCA 384; 157 LGERA 49 at [42].

75. The Cairns City Council resolved to grant the consent, subject to sixteen (16) conditions, on 1 February 1994.[32]

76. Accordingly, the decision by the Council – deciding an application made to it under section 4.12 - was one made under section 4.13(5)(b) of the *P&E Act* namely, to approve the application, subject to conditions.

77. On 8 February 1994, the town planning consent permit (namely the document) was issued, subject to conditions, on 8 February 1994 for the erection and use of a building for the purpose of 38 x 1 bedroom and 1 x 2 bedroom "accommodation units."

78. There is no distinction between the terms of the resolution on the one hand and the terms of the consent permit that issued on. Accordingly, it does not matter whether one construes the consent by reference to the terms of the resolution or the terms of the consent permit – the document: *Pselletes v Randwick City Council* (2009) 168 LGERA 59 at [42].

79. Section 4.13(17) of the *P&E Act* provided that an approval by the Council in respect of an application under section 4.12 ''…has no force or effect until a permit has been issued by the Chief Executive Officer."

80. The consent permit was issued by B.A Hedley, Director – Planning and Development. It may be presumed, in accordance with legal maxim, the presumption of regularity, that B.A. Hedley had been delegated to do so by the Chief Executive Officer.

81. In *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154, McHugh JA described and explained the reasons for the application of the maxim in the following way:

> "In my opinion, this was a classic case for the application of the maxim whose rationale was explained by Lord Simonds in *Morris v Kanssen* [1946] AC 459, a company case, where his Lordship said (at 475):
>
> > "…One of the fundamental maxims of the law is the maxim 'omnia praesumuntur rite esse acta'. It has many applications… The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order."
>
> The natural home of the maxim is public law. Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled." **33** (Emphasis added).

82. The presumption is rebuttable. The burden of proof is on the party attacking the presumption. The presumption is designed for the protection of those who are entitled to assume, because they cannot know, that the person with whom they deal, has the authority which is claimed.[34]

The Modification of the Consent Permit

83. The resolution by the Council on 1 February 1994 was passed notwithstanding that the proposed development did not comply with the town planning by-laws for car parking. The proposal was for 39 spaces. The by-laws required 48.

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32 Court document 8, affidavit Maruna, filed 01.06.15, Exhibit VVM-A at Item 3 pages 13-15.

33 (1987) 9 NSWLR 154 at 164 per McHugh JA (as he then was). The presumption of regularity was held to apply to prove that the secretary of the Western Lands Commission who executed the grant of the relevant permissive occupancy had been duly delegated to do so by the Minister under s 17A of the *Crown Lands Consolidation Act* 1913.

34 *Corporation of the Town of Gawler v Minister for Transport and Urban Planning & the State of South Australia* (2002) 119 LGERA 287 at 296, paragraph [29] –[30] per Debelle J.

84. The Council as part of the resolution made on 1 February 1994 resolved to accept a contribution ($16,000 per space for 9 spaces) in lieu of the car parking shortfall and the resolution records that the Architects of the project be advised to that effect.

85. The definition of accommodation units under the 1971 planning scheme did not distinguish between the use of the units as short-term holiday accommodation or permanent accommodation.

86. On its face, the resolution the Council made on 1 February 1994 did not identify that the proposed use that was approved was for short term holiday accommodation. The resolution of the Council refers only to "accommodation units" as does the application for the consent which was received by the Council on 16 December 1993.[35]

87. The Land Use definitions under the 1971 Scheme for accommodation units identified three definitions:

- Accommodation Units (High Density);
- Accommodation Units (Medium Density); and
- Accommodation Units (Low Density).[36]

88. The definitions of Accommodation Units (High Density) and Accommodation Units (Medium Density) both included the wording:

> "any land, building or other structure used or intended for use as flats and home units, serviced rooms, boarding houses, guest houses, hostels, unlicensed hotels, old people's homes, motels or residential club".

89. The difference between the two definitions was that 'high density' referred to a site population density exceeding 300 persons per hectare but not exceeding 800 persons per hectare while the 'medium density' referred to a site population density of not more than 300 persons per hectare and to a height not in excess of 10 metres.

90. Condition 1 of the 1994 Consent provided:

> **1.** "Provision shall be made on the site for carparking spaces and access thereto at the rate current at the time the Building Application is submitted as well as for the loading/unloading of vehicles. Such carparking, access and loading/unloading areas shall be constructed in accordance with the requirements of the City of Cairns Town Planning Scheme and By-laws and the approved plans and to the reasonable satisfaction of the City Engineer. **On the present method of calculation 48 spaces would be required.**
>
> **A minimum of 39 spaces shall be provided on the site."** (Emphasis added).

91. Rather than pay the contribution in lieu of the carparking shortfall, on 22 April 1994 Ainsley Bell + Murchsion Architects for the project (**Project Architects**) made application by letter to the Council to vary condition 1:

> "RE: CONSENT REFERENCE 3902/93 'IL CENTRO'
>
> We refer you to the Consent Condition No. 1 for the above project, being required carparking calculations.
>
> The 'Il Centro' project has been designed within the limitations of the existing town plan for a market that it not catered for in the existing Town Plan, but thankfully is now recognised in the new Town Plan viz. Holiday Apartments.

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35 Court document 8, affidavit Maruna, filed 01.06.15, Exhibit VVM-A at Item 1, pages 1-3.

36 The definition of Accommodation Units (Low Density) in the 1971 Scheme is not relevant. It referred to development comprising two flats or two home units only in accordance with the Council policy and not in excess of 7.5 metres in height.

Clearly the 'Il Centro' design is for Holiday Apartments – re: Single bedroom apartments with a convenience kitchenette, 'on-site' management and a breakfast room – bigger than a motel room but too small for permanent living.

These apartments are designed to supplement the deficiency of hotel rooms in the city.

Your carpark calculations have been based on the old Town Plan with 1 car per unit plus one visitors car per four units. We ask that in keeping with the intent of the new Town Plan and in recognition of the Holiday Apartment needs for the city, the carpark calculations for this project be re-calculated at the New Holiday Apartment rate of 1 car per unit.

The new calculation would now be:-
1 per unit
= 39 x 1 = 39 cars
No. of cars actually provided = 39 cars
Therefore there is no shortfall in car spaces

We ask that you give urgent consideration to this request in the interests of supporting positive tourist development in Cairns."

92. On 17 May 1994,[37] the Council at its ordinary meeting resolved, inter alia, to vary Condition 1 in accordance with the application made by the Project Architects.

93. By letter dated 18 May 1994, from E.A Taylor Acting Director - Planning and Development, Cairns City Council[38] gave written notice to the Project Architects that the Council had on 17 May 1994 approved the variation applied for in respect of Condition 1. As with the consent permit there was no distinction between the terms of the resolution and the "letter of approval" which is set out below.

94. The "letter of approval" issued by an officer of the Council dated 18 May 1994 stated:

"RE: REQUESTS FOR VARIATION TO CARPARKING REQUIREMENTS – PROPOSED HOLIDAY APARTMENTS

I refer to your letters concerning requests for variations to car parking requirements. Your requests were considered by Council at the recent Ordinary meeting [17 May 1994].

After considering your requests in detail, Council resolved to support an on site car parking rate of one space for each accommodation unit for developments at –

26 – 30 Sheridan Street
20 – 24 Sheridan Street
62 – 66A Abbott Street
141 – 143 Grafton Street

on the basis that:-

- **The proposed developments will have on-site management and are intended to operate as holiday apartments;**
- Council's Policy currently requires one car **space for each strata titled self-contained motel unit which is considered to be a similar use to the proposed holiday apartments**; and
- The **proposed holiday apartments** are unlikely to generate the same level of on-site carparking as permanent accommodation due to the short term occupancy of residents and due to the location of the proposed developments in the Central Business District.

Council Officers will calculate the on-site car parking requirement of any other applications for holiday apartments with on-site management in the Central Business District at the rate of one car space for each apartment." (Emphasis added).

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37 See a copy of the resolution "10.4 Variation to car parking requirements proposed holiday apartments, 14307 - Ordinary Meeting of the Council 17 May 1994": Court document 8, affidavit Maruna, filed 01.06.15, Exhibit VVM-A, Item 8 page 25.

38 In the top left hand corner of the letter Mr B Hedley's name appears. He was the Director of Planning & Development.

95. The evidence establishes that the wording of the resolution made on 17 May 1994 is identical in all material respects to the wording of the "letter of approval".

96. The resolution made on 17 May 1994 and the "letter of approval" are the only 'approval' documents that provide any specific information that identifies that the approved use for "accommodation units" was an approval of a [proposed] use of the units in Il Centro for "holiday apartments."

97. The application was an application to vary *an approval* to which section 4.15(1) of the *P&E Act* applied.

98. Section 4.15(1B)(a) of the *P&E Act* provided, inter alia, that: "This section applies to *any approval* given following the making of an application to which this section applies."

99. Section 4.15 applied to any application made under - section 4.12(1) (Application for town planning consent).

100. The 'approval' granted on 1 February 1994 was an approval of the application [for town planning consent], subject to [16] conditions: section 4.13(5)(b) of the *P&E Act*.

101. The modification to the car parking requirements provided for in Condition 1 was of a "minor nature" as it did not vary the use of the land the subject of the modification (ie. the land to be used for car parking) by the addition of [any] different use: section 4.15(3)(a) of the *P&E Act*.

102. As the modification was of a "minor nature", the Council was not prohibited from approving the application under section 4.15(2)(a) of the P&E Act.

103. However as with section 4.13(17), section 4.15(15) of the *P&E Act* provided: "An approval by the Local Government…in respect of an application to modify referred to in subsection (1) has no force and effect until an approval or a permit has issued in accordance with subsection (14)."

104. Section 4.15(14) provided, inter alia, that "…the chief executive officer must issue an approval or permit, as the case may require, incorporating the modification so approved."

105. In the present case, it was E.A Taylor the Acting Director - Planning and Development from the Cairns City Council who issued the "letter of approval".

106. In order for the variation of condition 1 to constitute a valid approval for the purposes of s 4.15(14) of the *P&E Act,* "E.A Taylor" would require delegated authority from the Chief Executive to issue approvals under s 4.15(14) of the *P&E Act*.

107. The presumption of regularity referred to previously applies, it is submitted, with equal force to the exercise of power – the issue of the "letter of approval". Again, no evidence has been adduced by the Council to rebut the presumption. Accordingly it may be presumed that the modification to the permit, prima facie, had force and effect as from 18 May 1994.

108. The resolutions made on 1 February 1994 and 17 May 1994 are deemed to be valid until declared by a Court of competent jurisdiction to be invalid.[39]

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39 *Swadling v Sutherland Shire Council* (1994) 82 LGERA 431 at 436; *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at 630-633, [101] to [108]; *Morgan and Griffin Pty Ltd v Fraser Coast Regional Council* (2013) QPELR 328 [61] – [62].

109. Pursuant to section 4.15(13) of the *P&E Act*, the application to modify as approved on 17 May 1994 – "…is taken to be part of the application which the application to modify sought to modify and which is yet to be decided by the local government.'

110. It follows that the resolution to approve the application for the consent permit made under section 4.13(5)(b) on 1 February 1994 and the resolution to grant the application to modify made under section 4.15(7)(a) on 17 May 1994 are - for the purposes of determining the nature of the approved use – to be read as the one approval of one "merged" application namely the two applications – the original application for consent (dated 13 December 1993) and the application to modify the consent dated 22 April 1994.

111. It would seem to follow from the foregoing that, perforce the terms of sections 4.13(17), 4.15(15) and 4.15(13) of the *P&E Act,* when those provisions are construed together to achieve "harmonious goals"[40], the consent permit – as modified – has force and effect from 8 February 1994, the date when the consent permit was issued by B.A. Hedley.

Summary: The approved use under the Consent Permit [Development approval]

112. As the preceding analysis establishes, when the two resolutions (1 February 1994 and 17 May 1994) or, the consent permit (8 February 1994) and the modification (the "letter of approval" dated 18 May 1994), are read together as one approval, it is clear that the approved use of "accommodation units" was an approval for "holiday apartments" namely short term accommodation for tourist and travellers and not for permanent residential accommodation.

113. As submitted earlier, Il Centro was constructed in 1995 with 39 car parks in conformity with the modified consent. The 38 lots approved as "accommodation units" have been used primarily for holiday accommodation since that date.

114. The express reference to "holiday apartments" in the terms of the resolution made on 17 May 1994 and the "letter of approval" dated 18 May 1994 make clear that the proposed and approved use of Il Centro was for holiday apartments.

115. In the alternative, if the Court finds it necessary to do so, it would be permissible in order to resolve any ambiguity as to the specific nature of the use approved to have regard to extrinsic evidence namely the letter applying for the modification of the consent from the project architects dated 22 April 1994.[41]

116. In short, it would be permissible to have regard to the letter of application to understand the *purpose* behind the variation of Condition 1 in respect of the car parking requirements: *Hawkins and Izzard v Permarig Pty Ltd and Brisbane City Council* (2001) QPELR 414 at 415.

The Principal Grounds of Challenge to the Decisions

117. In the Originating Application the Applicants challenge the validity of the two decisions in question on three (3) principal grounds:

    (a) breach of procedural provisions: the *Project Blue Sky* ground;
    (b) failure to take into account relevant considerations that the decision maker was bound to take into account: the *Peko Wallsend* ground;

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40 *Zappala Family Company Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at 94 - 96 [52] applying the principles of statutory construction from *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

41 Court Document 8, affidavit Maruna, filed 01.06.15, Exhibit VVM-A Item 6, page 20.

(c) the decision was "manifestly unreasonable": the *Wednesbury Corporation* ground.

118. As was the case in respect of the consent permit, the resolutions made on 13 August 2014 and the decision made on 26 February 2015 are deemed to be valid until declared by a Court of competent jurisdiction to be invalid.[42]

119. The *Project Blue Sky* ground and the *Peko Wallsend* ground are the principal grounds relied upon by the Applicants.

Ground 1 – Breach of Procedural Provisions: the *Project Blue Sky* ground

120. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court held that there is a fundamental difference between a provision which simply regulates a function or power which has already been conferred on the decision-maker and a provision which establishes an essential precondition to the valid exercise of the function or power.[43]

121. Non-compliance with a provision which can be characterised as of the latter kind will render a subsequent decision invalid.

122. In New South Wales, the Land and Environment Court (and the Court of Appeal)[44] have referred to the essential precondition to a valid exercise of power for the purposes of establishing the validity of a development approval as a "jurisdictional fact": *Casa v City of Ryde Council* (2009) 171 LGERA 348 at [57] –[64].

123. In *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120 at [43], the High Court explained the meaning of the expression "jurisdictional fact":

> "Generally the expression is used to identify the criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. If the criterion is not satisfied then the decision purportedly made in the exercise of the power or discretion will have been made without the necessary statutory authority of the decision maker."

124. Prior to *Gedeon*, in *Project Blue Sky*, Brennan CJ without using the expression "jurisdictional fact," explained the circumstances under which there will be an invalid exercise of power in very similar terms. At paragraph [36] the Chief Justice stated:

> "If the power exercised by a repository is within the ambit of the power reposed, there can be no unlawfulness on the part of the repository in exercising it. Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise in the manner in which the repository has purported to exercise it and the purported exercise is invalid".

125. In *Project Blue Sky,* a New Zealand media company challenged the validity of a television broadcast standard made by the Australian Broadcasting Authority (ABA) under the *Broadcasting Services Act 1992* (Cth).

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42 *Swadling v Sutherland Shire Council* (1994) 82 LGERA 431 at 436; *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at 630-633, [101] to [108]; *Morgan and Griffin Pty Ltd v Fraser Coast Regional Council* (2013) QPELR 328 [61] – [62].

43 (1998) 194 CLR 355 per Brennan CJ at [38]-[42] and the joint judgment of McHugh, Gummow, Kirby and Hayne JJ at [91]-[93].

44 See for example: *Barrick Australia Ltd v Williams* (2009) 168 LGERA 43 referred to in *Casa v City of Ryde Council* (2009) 172 LGERA 348 at 365 [61]; [2009] NSWLEC 212.

126. Under the Act, the provisions authorising the ABA to make standards required the ABA to perform its functions in a manner consistent with any convention to which Australia was a party or under any agreement between Australia and a foreign country.

127. One of the relevant provisions of the Act also prohibited the ABA from making a standard that was inconsistent with the Trade Agreement or Protocol.

128. Australia had signed a trade agreement with New Zealand under which each country agreed to give the other equal access to its markets.

129. The appellant *Project Blue Sky* argued that the standard - which in fact specified at least 55% of all television programs that were aired between certain times must be Australian – was contrary to the provision of the Act which required it to perform its functions consistent with any treaty obligation or trade agreement.

130. In *Project Blue Sky*, the High Court characterised the provision requiring observance of treaty obligations as one which simply regulated a function already conferred on the Australian Broadcasting Authority, rather than one which established an essential precondition to the valid exercise of that function.

131. In adopting that characterisation, the High Court considered as relevant that the provision in question did not have an easily identifiable rule-like quality. It also held that the Courts have accepted that it was unlikely that it was a purpose of legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be the likely to result and that in this case public inconvenience would result from a ruling that the standard was invalid.[45] In the present proceedings, it is submitted that no public inconvenience will arise by the Court adopting the construction of the *SPA* upon which the Applicants rely.

132. The High Court emphasised that accepted canons of statutory interpretation require a determination of the legal (rather than the literal) meaning of the provision in question by reference to the statute as a whole.[46] The focus is on the manner in which the relevant provision operates on the decision-making power.

133. On this basis, as the High Court held that the standard was not invalidated by a breach of the relevant provision.

134. However, the High Court held that the standard was nonetheless "unlawful" because it involved a breach of a provision of the Act and a person with a sufficient interest could seek a declaration to that effect or (in an appropriate case) an injunction restraining further action in reliance upon it.[47]

135. Thus, when an assessment manager under the *SPA* breaches a provision of the Act, either by act or omission, properly characterised, any such contravention of the Act is unlawful.[48]

136. However as outlined above, the further and more important question is whether the unlawful exercise (or failure to exercise) statutory power – namely the breach of the relevant provision[s] - results in invalidity.

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45 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392 [97].

46 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 – 385 per McHugh, Gummow, Kirby and Hayne JJ.

47 Ibid, at pages 393 [100].

48 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100].

137. In summary, the *Project Blue Sky* ground requires - in the context of a determination as to whether a particular exercise of power results in invalidity of the decision - whether it can be concluded from construing the relevant provision in the context of the statute as a whole, that it was intention of the legislature that non-compliance or failure to apply a particular provision would result in invalidity.

138. In *Morgan and Griffin Pty Ltd v Fraser Coast Regional Council,*[49] Jones DCJ considered an application for declaratory relief under the *SPA*. The Court had to decide three principal issues:

(i) whether the First Respondent Council had power to a development application for a preliminary approval for a material change of use of land for a shopping centre;
(ii) whether the approval of the development application was beyond power, invalid and of no effect;
(iii) whether failure to refer a development application to a concurrence agency caused the development application to lapse.

139. The Court considered and applied the reasoning from *Project Blue Sky.* His Honour stated*:*

> "Whether an act done (or a failure to do an act) in breach of a legislative provision results in invalidity is to be determined from the construction of the relevant statute.
>
> *In Project Blue Sky v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ stated:
>
> > [91] An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether respondent referred to it is depends 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 matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.
> >
> > …
> >
> > [93] … a court determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision**. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute**". [Footnotes omitted] (Emphasis added).[50]

140. In addition to applying the principles of statutory construction from *Project Blue Sky,* when determining the meaning of the particular provisions of the *SPA,* that meaning is also to understood in light of the provisions of the *Acts Interpretation Act 1954 (**AIA**).* "The scheme of that legislation is to state general principles that apply unless a contrary intention is manifested in [the] particular Act." [51]

141. There are a number of sections of the *AIA* that have relevance in the context of these proceedings. They are set below.

142. Section 14A(1) of the *AIA* provides: "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

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49 (2013) QPELR 328.

50 (2013) QPELR 328 at [52].

51 *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 492-493 [8] per Gleeson CJ.

143. Section 32CA of the *AIA* is entitled "Meaning of may and must etc" It provides:

> (1) "In an Act, the word ***may***, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
> (2) In an Act, the word ***must***, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation."

144. Sections 32A and 32AA of the *AIA* provide for the manner in which definitions are to be read and applied:-

> **"32A Definitions to be read in context**
> Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires.
>
> **32AA Definitions generally apply to entire Act**
> A definition in or applying to an Act applies to the entire Act."

Ground 2 - Failure to take into account relevant considerations that the decision maker was bound to take into account: the *Peko Wallsend* ground

145. It is well-established that a decision maker falls into procedural error and errs in law by failing to take into account a relevant consideration that it is bound to take into account in making the decision.[52] This is to be contrasted with the situation where the decision maker was *entitled* to consider.[53]

146. Mason J summarised the key principles in relation to the application of this ground of review in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*.[54]

> (i) Determining what considerations a decision-maker must take account of in the exercise of a statutory power is a matter of construing the statute which confers the discretion;
> (ii) Where the statute expressly lists considerations which must be taken account of, it is then necessary to determine whether or not the list is exhaustive or merely inclusive;
> (iii) If the list is merely inclusive or if the statute is silent, it will be necessary to determine what considerations are **impliedly** specified by the statute. This means having regard to the subject matter, scope and purpose of the legislation.
> (iv) In the case of an unconfined discretion, a determination that factors must be considered depends upon the identification of an implied direction to that effect in the statute;
> (v) Once it is determined that the decision-maker failed to take account of a relevant consideration that he was bound to take into account, it must be shown that the factor was not so insignificant that the failure to consider it could not have materially affected the decision;
> (vi) It is not for the court to determine the appropriate weight to be given to relevant considerations;
> (vii) It is important to bear in mind the limited role of a court exercising judicial review – insofar as its function is not to substitute its own decision but to set lawful limits on the exercise of the discretion.

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52 *Golder v Maranoa Regional Council* [2014] QPEC 68 at [35] per Robertson DCJ. *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J.

53 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 374 per Deane J.

54 (1986) 162 CLR 24 at pages 39-42. These principles were referred to with approval and summarised in *Alliance to Save Hinchinbrook Inc. v Cook* [2007] 1 Qd R 102 at 109-110 [26] per Jones J.

147. There are clearly common features between this ground of challenge and the *Project Blue Sky* ground. In particular, the paramount requirement of properly construing the statute when considering the obligations imposed on the decision maker.

148. Whilst both grounds are concerned with the *manner* of exercise of the power conferred on the decision maker, the *Project Blue Sky* approach directs particular focus on a determination as to whether the relevant provision which has been contravened was an essential precondition to a valid exercise of power.

149. In respect of both grounds, the same principles of statutory construction that are found in *Project Blue Sky* apply when construing the provisions of a planning scheme[55] "…whilst still allow[ing] for the expressed view that such documents need to be read in a way which is practical and read as a whole and as intending to achieve balance between outcomes".[56]

150. The assessment manager has a duty to consider relevant matters and merely referring to them is insufficient consideration.[57]

151. Consideration of relevant matters therefore involves more than the matters merely being adverted to or given "lip service".[58]

152. There needs to be an understanding of the relevant matters and their significance to the decision required to be made, as well as a process of evaluation sufficient to warrant the description of the matters being taken into consideration.[59]

153. Further, as was explained by His Honour Judge Robertson in *Golder* "… [i]t is fundamental that the decision must be made by the decision maker upon whom authority is conferred by the relevant statute. In consequence, it is an error of law for a decision maker to act at the dictational behest of another or to give '…no real independent attention to the discretion which is conferred on him or her, so that the exercise of discretion is really the exercise of that discretion by some other person.'[60]

154. If the decision maker relies entirely on a summary or report (as is clear in the present case in respect of the decision by the Council and prima facie, in the case of the decision of the Delegate) that fails to bring to his or her attention a material fact that he or she is bound to consider, and which cannot be dismissed as insignificant, the consequence is that the decision maker will have failed to take that material fact into account and will not have formed *his or her* satisfaction in accordance with the law.[61]

155. The question of whether a relevant matter has been considered is an evaluative process based on what the decision-maker has said, written or done.[62]

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55 *Zappala Family Company Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at 94 - 96 [52]-[58] per Morrison JA citing with approval *Project Blue Sky* at [69]-[71], [78].

56 *Zappala* (supra) at page 95 [56].

57 *McGovern v Ku-ring-gai Council* (2007) 153 LGERA 308 at 348 [120].

58 *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 152 [32]. See also *Anderson v Director-General, Department of Environmental and Climate Change* (2008) 163 LGERA 400 at [58]; *McGovern v Ku-ring-gai Council* (2007) 153 LGERA 308 at 348 [120].

59 *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 152 [32].

60 *Golder* (supra) at [35], His Honour cited with approval *Telstra Corporation Limited v Kendall* (1994) 55 FCR 221 at 231

61 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 31 per Gibbs C.J.

62 *Anderson v Director-General, Department of Environmental and Climate Change* (2008) 163 LGERA 400 at [58], [60]. This principle was applied in *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 153 [35] per Preston J.

156. Where the decision-maker is a collegiate body (such as a council), the members of the local council can rely on the consideration and conclusions in the officer's report considered by the members.[63]

157. As noted previously, if the Council relies exclusively on a report prepared by planning officer[s], the contents of the report are evidence of what the Council as the decision maker has said, written or done.[64]

158. In respect of the Council's decision, it did rely only on the contents of the Committee Report – which has the result that the contents of that report are – for the purposes of reviewing the process by which the decision was reached – the evidence of what the Council has 'said, written or done'.

159. As also noted previously, in respect of the Delegate's decision, on the available evidence, the contents of the Delegated Authority Report is to be regarded as the evidence of what the Delegate has 'said, written or done' in reaching her decision.

160. The Applicant bears the onus of proving:

    (a) there was a failure by the decision maker to take into account a mandatory relevant consideration; and
    (b) that the error is material.[65]

Ground 3 - the decision was "manifestly unreasonable": the *Wednesbury Corporation* approach.

161. This ground of review is extremely confined. It is only relied upon by way of a further alternative by the Applicants.[66]

162. It is most unlikely that will be necessary for the Court to consider the application of this ground as it is submitted that it is clear that the decisions which are challenged are invalid on both the *Project Blue Sky* ground and the *Peko-Wallsend* ground.

163. However the Court *may* reject completely the 2 principal grounds. It *may* determine that the relevant exercise[s] of power by the decision makers did not result in the invalidity of those decisions. Such a finding would be open if the Court rejects the Applicants' submissions and concludes that whilst the decision makers contravened various provisions of the *SPA,* such non-compliance did not – on a proper construction of the Act - result in the invalidity of the decisions.

164. In the circumstances identified above, it would then, at least arguably, be open to the Court to determine that the decisions which approved a material change of use for "holiday accommodation and multiple dwelling" in respect of each of the relevant lots and the development permit that authorised those use[s] could be simultaneously commenced and 'carried on' year round - were decision[s] that were so unreasonable that no reasonable assessment manager could have come to them.

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63 *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 153 [35] per Preston J; see also *Parramatta City Council v Hale* (1982) 42 LGRA 319 at 346.

64 *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at 153 [35] per Preston J.

65 *McGovern v Ku-ring-gai Council* (2007) 153 LGERA 308 at 349 [123]; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J; applied by Basten J in *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 295 (Handley JA and Hunt AJA concurring).

66 See paragraphs 61(c); 62(c); 99(a)(iii); 101(a)(iii); 104(c) and 106(c) of the Grounds of the Originating Application.

165. Accordingly, to the limited extent stated above, the Applicants' maintain their reliance on this further alternative ground to establish the invalidity of the decisions.

166. The legal principles applicable to the review for *Wednesbury* unreasonableness are set out in *Save Our Street Inc v Settree* (2006) 149 LGERA 30 at paragraphs [27] - [31] per Biscoe J. For completeness, these paragraphs are set out hereunder:

> **"[27]** Unreasonableness in the administrative law sense means "manifest" unreasonableness which is often eponymously referred to as "*Wednesbury*" unreasonableness after *Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. There Lord Greene MR said at 233–234:
>
> > *The court is entitled to investigate the … authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. **Once that question is answered in favour of the … authority**, it may be still possible to say that, although the … authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the … authority, but as a judicial authority which is concerned, and concerned only, to see whether the … authority have contravened the law by acting in excess of the power which parliament has confided in them.*
>
> **[28]** In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] 162 CLR 24 at 41, Mason J, with whom Dawson J agreed, said:
>
> > *… in some circumstances a court may set aside an administrative decision which has failed to give **adequate weight** to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'. This ground of review was considered by Lord Greene MR in Wednesbury Corporation [1948] 1 KB, pp 230, 233–234, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in ss 5(2)(g) and 6(2)(g) of the Administrative Decisions (Judicial Review) Act 1977 (Cth). This test has been embraced in both Australia and England … In the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.*
>
> The last sentence was quoted in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 [44] by Gleeson CJ and McHugh J.
>
> **[29]** The test of manifest (*Wednesbury*) unreasonableness has been stated in various ways. In *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821, Lord Diplock said that the test was whether the decision: "**looked at objectively, [was] so devoid of any plausible justification that no reasonable body or persons could have reached [it]".** In *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 410, Lord Diplock said that the decision must be "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*".
>
> It has been said that "The test is stringent … The decision must amount to an abuse of power (*Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36) or be so devoid of plausible justification that no reasonable person could have taken that course (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290)": *Weal v Bathurst City Council* (2000) 111 LGERA 181 (NSWCA) at 188 [27]; *Wyong Shire Council v MCC Energy Pty Ltd* (2005) 139 LGERA 296 (NSWCA) at 312 [79].
>
> In *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at 725 [91], Spigelman CJ (with whom Mason P agreed) said that the test was whether a decision "was so plainly incorrect as to satisfy the stringent requirements of the *Wednesbury* unreasonableness test". In *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* (2005) 138 LGERA 11 at 45 [129], Spigelman CJ (with whom Beazley and Tobias JJA agreed) said: "Perhaps the most appropriate formulation is whether the decision is 'illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds': *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* (2003) 77 ALJR 1165 at [52] and [37], [173]; see also *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [38]'.
>
> The formulation in *Murrumbidgee* was quoted in *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 at [71] by Tobias JA In *Andary v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 211 at [10], the Full court of the Federal Court thought there was a great deal of wisdom and practicality Lord Cooke of Thorndon's observations in *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260. His Lordship said in that case at 1228–1289:

> It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the Courts of United Kingdom and beyond. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene M.R twice uses (at pp 230 and 234) the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it'. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1997] AC 1014, the precise meaning of 'unreasonably' in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the court of Appeal and the two judgments in the Divisional court all succeeded in avoiding needless complexity. **The simple test used throughout was whether the decision in question was one which a reasonable authority could reach.** *The converse was described by Lord Diplock, at p 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.*

[30] In *Norbis v Norbis* (1986) 161 CLR 513 at 541, Brennan J compared the appellate review of a judicial discretion with the review of an administrative discretion and concluded that: '*it is harder to be satisfied that an administrative body has acted unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience*.'

[31] **There is a distinction between a decision which the court considers is unreasonable, and a decision which the court considers is so unreasonable that no reasonable body could have come to it. The latter requires 'something overwhelming'**: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 [44] per Gleeson CJ and McHugh J, citing Lord Greene MR in *Wednesbury* (above) at 230.

I agree with Rares J in *Tran v Minister for Immigration & Multicultural Affairs* [2006] FCA 1229 at [27]–[29] that there is a spectrum of unreasonableness and '*that between its extreme ends are many categories of decision with which courts might not agree or which they could regard as unreasonable but which a reasonable person could have made. The latter category of decision is immunised from judicial review because the legislature has confided to the decision-maker the task of forming the opinion or arriving at the state of satisfaction on the materials before him or her … Administrative decision-making, of its nature, involves the formation of value judgments … Value judgments are ones in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right: cf Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ; 540–541 per Brennan J; see too at 535 per Wilson and Dawson JJ'." (Emphasis added).

The First Development Application

167. The development application was dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014.[67] The "applicant"[68] was Robert P Palethorpe, a solicitor from Port Douglas.

168. On 4 July 2014, Graham Boyd (Manager Development & Regulatory Services, Cairns Regional Council sent a letter to the Applicant stating inter alia, "Council officers have commenced assessment of your development application and advise you that no further information is required".

169. The letter was not an Acknowledgement Notice. It did not comply with s 268 of the *SPA* which prescribes the content required for an acknowledgement notice.

170. Further, because the decision maker accepted the development application and thereafter unlawfully accepted the first development application as a "properly made" application code assessable instead of impact assessable, pursuant to s 267(2)(a) of the *SPA*, the Council, as assessment manager was not required to give the applicant an acknowledgement notice.

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67 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 7, pages 15-57.

68 For the purposes of IDAS [Chapter 6 *SPA*]: see IDAS Form 1: Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 7, page 16.

171. On 31 July 2014, an officer of the Council, one Gary Warner (Coordinator-Development Assessment Development and Regulatory Services) forwarded an email to the Applicant advising, inter alia:

    (i) that the Council had extended the decision-making period to enable the application to be placed before the next Council meeting on 13 August 2014; and
    (ii) that given the background to this proposal "…it is not a matter that we can deal with under delegation and, as noted in the letter, this extension is required to enable the proposal to be placed before the next available Council meeting".

172. On a date unknown after 4 July 2014, the assessment manager sought 'advice' about the application from Bruce Hedley, a Town Planning Consultant from "Planning Far North Pty Ltd".

173. That advice was provided by letter dated 6 August 2014.[69] As noted in the letter, Bruce Hedley was previously a Director of Planning and Development with the Council.

The Second Development Application

174. The second development application was dated 31 December 2014.[70] It was received by the Council on 7 January 2015. The applicant was Mark Jones who is also one of persons named as the Eighth Respondent.

175. Save for the differences in the lot descriptions (each of them) which were the subject of the application and the names of the owners who provided their consent, the content of the IDAS form 1 [Application details] and IDAS form 5 [Material change of use assessable against planning scheme] for the second development application was the same as for the first development application.

The Decision Notices

176. On 13 August 2014,[71] the decision to purportedly approve the first development application for a material change of use was made by the Council (as distinct from an officer of the Council under delegated authority).

177. Written notice of the decision in the approved form (**first decision notice**)[72] was given to the applicant under cover of a letter dated "8 August 2014" (clearly a mistake) from one Graham Boyd, Manager Development & Regulatory Services.

178. On 26 February 2015, the decision to purportedly approve the second development application was made by the Delegate.

179. Written notice of the second decision in the approved form (**second decision notice**) was given to the applicant under cover of a letter from one Peter Boyd, Manager Strategic Planning & Approvals.[73]

180. There were no conditions attaching to the first or the second development approval.

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69 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 10, pages 61-66.

70 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 14, pages 102-155.

71 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 11, pages 67-76.

72 Section 334(1)(a) of the *SPA* provides that the assessment manager must give written notice of the decision in the approved form (**decision notice**) to the applicant. The decision notice must be given within 5 business days after the decision was made: s 334(2) of the *SPA*.

73 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 15, pages 156-165.

181. The "assessable development" purportedly applied for and purportedly approved in the two Decision Notices (identified by the description of the proposed use under the heading "Proposal") was a "material change of use" for "Multiple Dwellings **and** Holiday Accommodation," that is the "dual use".

182. The content of the two decision notices is identical save for the description of the lots and the Appendices and the inclusion of Appendix 2 as part of the second decision notice.[74] This document is described as a "Notice of Intention to Commence Use". It has no statutory basis. The date of commencement of the use is prescribed – in the case of this purported approval – by section 339(1)(a)(i) and section 340(1)(a) of the *SPA*. The dual use that was purportedly approved could have been commenced as from the date the decision notice was given, 26 February 2015.

183. Each of the Decision Notice[s] states, inter alia:

> "DOES THE ASSESSMENT MANAGER CONSIDER THE APPLICATION TO BE IN CONFLICT WITH APPLICABLE CODES, PLANNING SCHEME, STATE PLANNING POLICIES OR PRIORITY INFRASTRUCTURE PLAN (IF YES, INCLUDE STATEMENT OF REASONS)
> Not in conflict.
>
> APPROVED DRAWING(S) AND/OR DOCUMENT(S)
> The term 'approved drawing(s) and / or document(s)' or other similar expressions means:
>
> | Drawing or Document | Reference | Date |
> |---|---|---|
> | Plan of Survey for Units | BUP101919 | 25/01/1995 |
>
> …
> **LAND USE DEFINITIONS**
>
> In accordance with the approved land uses of Multiple Dwellings & Holiday Accommodation defined as:
>
> **Multiple Dwelling**:
>
> Means; the use of premises comprising six or more dwelling units of self-contained accommodation on one lot for residential purposes. The use includes accommodation commonly described as flats, home units, apartments, townhouses or villa houses.
>
> **Holiday Accommodation:**
>
> Means; the use of premises for the accommodation of tourists or travellers.
>
> The use may include restaurants, bars, meeting and function facilities, dining room, facilities for the provision of meals to guests and a manager's unit and office when these facilities are an integral part of the accommodation. The use includes facilities commonly described as holiday apartments or suites, international or resort hotel or motel." [75]
>
> * This definition is provided for convenience only. **The development permit is limited to the specifications, facts and circumstances as set out in the application submitted to Council and subject to the above mentioned conditions of approval** and the requirements of Council's Planning Scheme and the FNQROC Manual" (Emphasis added).

The Statutory Scheme

184. Pursuant to section 3 of the *SPA* the *purpose* of the Act is to achieve ecological sustainability by-

> (a) "managing the *process* by which development takes place, including ensuring the *process* is **accountable**, **effective and efficient** and delivers sustainable outcomes; and

74 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 15, page 165.

75 Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1 Item 11, pages 69 - 70.

(b) managing the effects of development on the environment, including managing the use of premises; and
(c) continuing the coordination and integration of planning at the local, regional and State levels." (Emphasis added).

185. Section 4 of the *SPA* deals with advancing the Act's purpose. It relevantly provides:

"(1) If, under this Act, a function or power is conferred on an entity, **the entity must**—
(a) unless paragraph (b) or (c) applies—perform the function or exercise the power in a way that advances this Act's purpose; or
(b) if the entity is an assessment manager other than a local government—in assessing and deciding a matter under this Act, have regard to this Act's purpose; or
(c) if the entity is a referral agency other than a local government (unless the local government is acting as a referral agency under devolved or delegated powers)—in assessing and deciding a matter under this Act, have regard to this Act's purpose.
(2) Subsection (1) does not apply to code assessment or compliance assessment under this Act." (Emphasis added).

186. Section 5 of the *SPA* describes what advancing the Act's purpose includes. It provides, inter alia:-

"(1) Advancing this Act's purpose includes—
(a) ensuring decision-making processes—
(i) are **accountable**, coordinated, **effective** and efficient; and
…
(g) providing opportunities for community involvement in decision making."

187. Section 7 of the *SPA* identifies the categories of development. It states:

"***Development*** is any of the following—

(a) carrying out building work;
(b) carrying out plumbing or drainage work;
(c) carrying out operational work;
(d) reconfiguring a lot;
(e) **making** a material change of use of premises."

188. Section 9 states the meaning of "lawful use" It provides:

"A use of premises is a ***lawful use*** of the premises if—
(a) the use is a natural and ordinary consequence of making a material change of use of the premises; and
(b) the making of the material change of use was in compliance with this Act."

189. Section 14(1) of the *SPA* provides that "this Act binds all persons, including the State…".

190. The Cairns Regional Council is the "assessment manager" for the two development applications as it is the entity prescribed under the *Sustainable Planning Regulation 2009* (***Regulation***) as the assessment manager for the application.

191. Pursuant to section 247 of the *SPA*, the assessment manager for the application "administers and decides the application" but may not always assess all aspect of the development application.

192. The decision makers in their respective capacities as assessment manager[s][76] are bound by the *SPA*[77] when exercising any statutory power under the *SPA* when:

(a) accepting a development application ;
(b) assessing a development application;
(c) deciding a development application;
(d) giving notice of the decision- in the form of a development permit authorising assessable development [to take place] to the extent stated in the development permit.

193. Section 257(1) of the *SPA*, identifies the possible stages of [Integrated Development assessment system] which are contained in Chapter 6 of the *SPA.*

194. The 5 possible stages of IDAS are:

- application stage
- information and referral stage
- notification stage
- decision stage
- compliance stage

195. The relevant provisions at the application stage include s 260 [Applying for development approval]; s 261 [When application is a properly made application], s 263 [When owner's consent is required for application] s 266 [Notice about application that is not a properly made application] and s 267 [Notice about properly made application] of the *SPA*.

196. Section 267(1) provides: "This section applies **if** the application is a properly made application." Section 267(2) provides that: "The assessment manager must give the applicant a notice (the acknowledgement notice) unless –(a) the application relates to development that requires code assessment only."

197. These provisions appear in Part 2 [Application stage] Division 1 [Application process] Subdivision 1 [Applying for development approvals] and Subdivision 2 [Notices about receipt of applications] of Chapter 6 [IDAS].

198. Section 268 [Content of an acknowledgement notice] provides:

> The acknowledgement notice must state the following—
> (a) the type of approval applied for;
> (b) which of the following aspects of development the application seeks a development approval for—
> (i) carrying out building work;
> (ii) carrying out plumbing or drainage work;
> (iii) carrying out operational work;
> (iv) reconfiguring a lot;
> (v) making a material change of use of premises;
> (c) whether an aspect of the development applied for requires code assessment, and if so, the names of all the codes the assessment manager considers to be applicable codes for the development;
> (d) whether an aspect of the development applied for requires impact assessment, and if so, the public notification requirements;
> (e) the name and address of each referral agency for the application, and whether the referral agency is an advice or concurrence agency;
> (f) if the assessment manager does not intend to make an information request under section 276—the assessment manager does not intend to make an information request;
> (g) if there are referral agencies for the application—the application will lapse unless the applicant

76 Subsections 13(c); 246(1) of the *SPA*; s 12 of the *Regulation* and Schedule 6, Table 1, Item 1 of the *Regulation.*

77 Section 14(1) of the *SPA* provides that "this Act binds all persons, including the State…".

gives to each referral agency the referral agency material within the period mentioned in section 272(2).

199. Section 269 identifies when the application stage ends. It provides:

> "The application stage for a properly made application ends—
> (a) if the application is an application that requires an acknowledgement notice to be given—the day the acknowledgement notice is given; or
> (b) if the application is an application that does not require an acknowledgement notice to be given—the day the properly made application was received."

200. Both development applications were, it is submitted, unlawfully accepted as properly made applications. Accordingly the decision makers did not give the applicant[s], each of them, an acknowledgement notice.

201. Considered in isolation, the provisions in the Application stage of the *SPA* are procedural in nature. They provide for the "start" or commencement of the IDAS process and prima facie, the consequences of any breach of these provisions, in terms of any resultant invalidity, has to be read in the context of section 440 of the *SPA* which expressly confers a discretion on the Court to excuse non-compliance with the requirements of section 260.

202. However, as explained subsequently, section 440 is not to be construed as a vehicle for excusing non-compliance *by the assessment manager* of its obligations under the *SPA.*

203. The decision makers, as the assessment managers of the development applications under the *SPA*, were, it is submitted, bound to consider and decide – at the application stage- whether each application was:

(a) a properly made application – this obligation on the assessment manager is clear from the express wording sections 261(1)(a) and s 266 of the *SPA*;
(b) for "development" under the *SPA* whereby it was capable of being processed under Chapter 6 [IDAS] of the *SPA*; and
(c) if it was "development", whether it was a code assessable or impact assessable application –this obligation on the assessment manager is clear from section 267(1) and section 267(2)(a) of the *SPA* .

204. In respect of "(b)" in the above paragraph, the obligation on the assessment manager to decide that the development application is one made for "development" that is either code assessable or impact assessable is clear from:

(a) sections 3,4,5 (set out above):- Advancing Act's purposes;
(b) section 7: the meaning of "development";
(c) section 9 – the meaning of "lawful use";
(d) section 238 [Assessable Development]:- "A development permit is necessary for assessable development";
(e) section 240 [Types of approval]- "The types of approval under this Act for IDAS are –(b) a development permit;
(f) section 246(1) –[Who is the assessment manager];
(g) section 247 – [Role of assessment manager];
(h) section 324 (1)– [Decision generally] –In deciding an application, the assessment manager must –(a) approve all or part of the application; or (b)approve all or approve all or part of the application subject to conditions decided by the assessment manager; or(c) refuse the application;
(i) section 324(2) The assessment manager's decision must be based on the assessments made under division 2 [Assessment Process];
(j) section 313 [code assessment generally]
(k) section 314 [impact assessment]

(l) section 578 [Carrying out assessable development without a permit]
(m) the definition of "assessable development" under Schedule 3 of the *SPA*;
(n) the definition of "development approval" under Schedule 3 of the *SPA*;
(o) the definition of "development permit"

205. The Council and the Delegate both breached or did not comply with all of those requirements. It is submitted that it cannot have been the intention of the legislature - at the application stage - to excuse non-compliance by the assessment manager of the relevant provisions of the *SPA* to decide the matters set out above.

206. In the *Project Blue Sky* sense, it was a necessary precondition to the subsequent exercise of power by the assessment manager[s] when assessing and deciding the development applications, that those applications could lawfully be assessed in accordance with the IDAS process.

207. In the *Peko-Wallsend* sense, the determination at the application stage of whether the development application was in point of law, for "development" and whether it was either code assessable or impact assessable development were relevant considerations the decision makers were bound to take into account.

208. It would be contrary to the purposes of the Act that require efficiency and effectiveness of any exercise of power, if at the start of the IDAS process, an assessment manager could simply pay "lip service" to the contents of a development application or not even consider it and – as occurred in the present case – that wrongful exercise of power resulted in a patently defective application being subsequently unlawfully assessed and subsequently unlawfully approved. The requirement imposed on the assessment manager to properly consider the development application is confirmed by reference to section 266 which requires notice to be given of when application is *not* properly made.

209. Clearly in order to determine if a development application is "properly made" or not, the assessment manager must review and consider the contents of the application (the document) itself against the relevant provisions of the *SPA* and the planning scheme . That was not done by either decision maker.

210. In the alternative, if the Applicants are wrong about it being a necessary pre-condition to the exercise of power that the matters referred to above are considered and decided by the assessment manager at the application stage, it is submitted that the necessary precondition (or relevant consideration) must arise at the commencement of the *assessment stage.*

211. That is because pursuant to section 324(2) of the *SPA*, the assessment manager's decision must be based on an assessment under Division 2 of Part 5 of Chapter 6. If the assessment manager *has not* determined whether the application requires impact assessment at this stage (again as was the case with the present applications) then clearly the requirements of the *SPA* for impact assessment will not be satisfied, which must in turn, it is submitted, result in the invalidity of the decision.

212. The foregoing submissions are supported by the cases referred to hereunder.

213. In *Stockland Developments Pty Ltd v Thuringowa City Council* [2007] QCA 384, two members of the Court expressly held "void" an application on which a development approval had been granted.

214. In *Lagoon Gardens Pty Ltd v Whitsunday Regional Council* (2010) QPERLR 74 at [10] Robin QC, DCJ referring to *Stockland* stated: "…Court of Appeal decisions establish that in appropriate circumstances the Court should declare development applications ones which cannot proceed to assessment or have consequences under the *IPA*.

215. The content of the IDAS applications is considered in the context of the foregoing submissions in further detail below.

The Contents of the IDAS Forms

216. It was the Applicants' obligation to properly complete and lodge with the development application[s] the IDAS Form 1 and the IDAS Form 5.[78]

217. It was the decision makers' obligation to ensure the development application was properly made before embarking on the other stages of the IDAS process.[79] As the actions of the decision makers are deemed to be those recorded in the respective reports that were before them – which they adopted and relied on, it may readily be concluded the decision makers did not have regard to the omissions and defects in the applications.

218. There is no reference in the reports (apart from the issue as to the consent of the body corporate) to any of the deficiencies or omissions in the development applications which documents were not before the decision makers. In short there was no proper consideration by the decision makers as to whether the development applications were properly made. Again, this is clearly contrary to the purposes of the *SPA* which requires accountability, effectiveness and efficiency in the decision making processes.

219. The IDAS form 1 [Application Details] Item 1 reveals that the "nature of the development proposed [applied for] was a "material change of use". Item 1(b) [the approval type][80] was not completed.

220. Item 1(c) [A brief description of the proposal including use definition and number of buildings] was recorded as to:- "change use" from "holiday accommodation"[81] to "holiday accommodation/multiple dwelling." The symbol "*/*" as is reflected in the wording of the approval itself was construed by the Council as "and". That is the only construction that is open on an objective reading of the application.

221. In respect of the question in Table 1(d):-

> "What is the level of assessment? The Applicant marked an "X" in the box next to Code Assessment".

222. As is revealed by the contents of the Committee Report which was before the Council and the Delegated Authority Report – which was relied upon by the Delegate, the decision makers ignored or paid lip service to the nature of the development –as defined under the *SPA* and considered in the context of the provisions of *CairnsPlan2009* - for which approval[s] were sought.

223. As is shown by reference to the content of the first and second development applications – which were identical in all material respects – and as is clear from what is not referred to in the reports that were before the decision makers – they did not turn their minds to whether or not the applicants were applying for "development" that could be approved under the *SPA*. They simply did not consider this threshold requirement at all.

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78 *Gates v Gold Coast City Council* (2012) QPELR 20 at 25 [22].

79 Cf. *Botany Bay City Council v Remath Investments No. 6* (2000) 50 NSWLR 312.

80 Preliminary approval under s 241 of the *SPA*.

81 IDAS Form 1, Table A, 1(c); Table E: Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1, Item 7, pages 17 – 18.

224. They simply accepted– without any further consideration – that the 'development" applied for was "development" under the *SPA* and subsequently assessed the application[s] as a code assessable application in conformity with what the IDAS application[s] stated.

225. Item 1 of the Mandatory Requirements of the IDAS Form 5 [Material Change of Use Assessable Against a Planning Scheme][82] requires the applicant to provide a "General Explanation of the Proposed Use". The explanation provided was: "Holiday Accommodation/Multiple Dwelling".

226. Item 1 also requires the "No. of Dwelling units (if applicable) or gross floor area (if applicable) to be stated. The applicant stated "one each". Item 1 also required the "days and hours of operation (if applicable)" to be stated. The applicant stated "**year round**".

227. It follows that the proposed use approved by the Council and the Delegate in accordance with what was applied for in the IDAS Form 5,[83] is an approval for a material change of use in respect of each of the relevant lots from "holiday accommodation" to "holiday accommodation [and] multiple dwelling" and that dual use was proposed to be commenced when the approval took effect[84] and carried on "year round".

228. It is submitted that, having regard to the relevant statutory definition of material change of use under the *SPA,* a material change of use for BOTH "multiple dwelling [permanent accommodation] **and** holiday accommodation [temporary accommodation]" cannot commence because those uses are mutually exclusive "use[s]".

229. Further, each lot owner cannot lawfully use each unit, whereby the dual use being carried on is "…a natural and ordinary consequence of making [starting] a material change of use of premises."[85]

230. The uses are mutually exclusive in the sense that they cannot be "started" or carried on –"year round" - at the same time, because one is a permanent "residential use" and one is "short term accommodation use".

231. As was correctly observed (albeit without further analysis or reasons) in Committee Report, the "multiple dwelling" use is "permanent self-contained accommodation".

232. It is submitted that on a proper construction of the legislative scheme which includes both the provisions of the *SPA* and *CairnsPlan 2009,* the proposed "development" applied for in both development applications was not "development" that was defined and that could be approved, under the *SPA*.[86]

233. For reasons also explained further below, as a result of applying settled principles of statutory construction as those principles apply to statutes - to the provisions of the planning scheme,[87] the conclusion is that under *CairnsPlan 2009* the "multiple dwelling" use is a permanent use that does not provide for "holiday accommodation".

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82 See the IDAS Form 5: Court Document 2, affidavit Maruna filed 02.04.15, Exhibit VVM-1, Item 7, pages 23 – 25.

83 See s 13(1) and definition of "development approval": Schedule 3 of the *SPA.*

84 Namely, when the decision notice was given: s 339 of the *SPA.*

85 See meaning of "lawful use": s 9 of the *SPA.*

86 Cf *Lagoon Gardens Pty Ltd v Whitsunday Regional Council; Proserpine Co-Operative Sugar Milling Association Limited v Whitsunday Regional Council* (2010) QPELR 74 at [33].

87 *Zappala Family Company Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at 94 - 96 [52]-[58].

234. It is plainly obvious based on the natural and ordinary meaning of the term that "holiday accommodation" is short term or temporary accommodation.

Making a Material Change of Use

235. The proposed development stated in each development application was a "material change of use" of the relevant lots.

236. As previously observed, a development application is necessary for "assessable development" because "assessable development" cannot be carried out without an effective development permit.[88]

237. Under Schedule 3 of the *SPA*, "assessable development" for a planning scheme area – includes other "development" not prescribed under a regulation to be assessable development but declared to be assessable development under the planning scheme for the area.

238. The "assessable development" proposed in the development application[s] for a material change of use [the start of a new use of premises] from "holiday accommodation" to "holiday accommodation and multiple dwelling" (the dual use) is not prescribed under a regulation.

239. Rather it is, prima facie, declared to be "assessable development" under the planning scheme, *CairnsPlan 2009*.

240. Accordingly each decision maker as the assessment manager, in order to decide whether the development application applied for "assessable development" under *CairnsPlan 2009*, was obliged to look at the development application itself and then consider the relevant provisions of *CairnsPlan 2009* that declared what was, and what was not, assessable development under the planning scheme.

241. Where the development applied for is 'development" that is a material change of use, that development must be, in conformity with meaning of development in section 7(e) of the *SPA*, the "making" a material change of use of premises because otherwise the use cannot – if approved - be a *lawful use* as defined in section 9.[89]

242. "Material Change of Use" is defined under section 10 of the *SPA* as:

> (a) **the start of a new use**[90] **of premises**;
> (b) the re-establishment on the premises of a use that has been abandoned; or
> (c) a material increase in the intensity or scale of the use of the premises.[91]

243. Having regard to the content of the development application[s], the only relevant aspect of the definition to the proposed [and approved] "assessable development" is sub-paragraph (a). Sub-paragraphs (b) and (c) of the definition clearly do not apply to the proposed new "use" for "multiple dwelling and holiday accommodation".

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88 Sections 238 and 578 of the *SPA*. A development permit is not necessary for "self - assessable" development: s 236(1) of the *SPA*.

89 See definition of "Premises" under Schedule 3 [Dictionary] of the *SPA*.

90 "Use" in relation to premises, includes any use incidental to and necessarily associated with the use of the premises: Schedule 3 [Dictionary], the *SPA*.

91 This definition of "material change of use" was inserted into the *SPA* by s 64 of the *Environmental Protection Greentape Reduction and Other Legislation Amendment Act 2012* (***EPGROLAA***). Section 64 of the *EPGROLAA* commenced on **31 March 2013** (2013 SL No. 24). Accordingly, it was in force at the date the development application was made [27.06.2014] and the development approval was granted [13.08.2014].

244. Pursuant to s 12 of the *SPA*, if the meaning of a word[92] in a "planning instrument"[93] which includes a planning scheme is inconsistent with the meaning of the same word in the *SPA*, the meaning of the word in the *SPA* prevails.

245. It follows that for the purposes of construing the provisions of *CairnsPlan 2009*, the definition of "material change of use" in the *SPA* is the definition to be applied when determining the validity or otherwise of the two decisions that are challenged in these proceedings.

246. It is respectfully submitted that it is important when reviewing the procedures under the *SPA* that were purportedly followed by the decision makers to bear in mind that a "development approval" is defined in Schedule 3 of the *SPA*, to mean a development approval for the application (s 13(i) of the *SPA*) *in the form* of a decision notice or negotiated decision notice **that approves wholly or partially, development applied for in the development application** (whether or not the approval has conditions attached to it).

247. As set out previously, a 'development permit" is a type of approval under the *SPA*: s 240(b) of the *SPA*.

248. A development permit is necessary for assessable development because it authorizes assessable development to take place **to the extent stated in the permit**, subject to the conditions of the permit: s 243(a) and (b) of the *SPA*. It is an offence to carry out assessable development without a development permit: ss 238 and 578 of the *SPA*.

Applications not properly made: Consent of the Body Corporate Was Required

249. Table F of the IDAS Form 1 requires the signature of the "owners' of the land [the subject of application: s 263(1)(a) of the *SPA*] to provide their consent to the making of the application.

250. Table H of the IDAS Form 1 permits a declaration to be made by the applicant declaring that the owner[s] (the names of which are to be stated) have given written consent to the making of the application.

251. The applicant duly marked "X" in the relevant box and made the declaration. The names of each of the 7 lot owners formed part of the application as an annexure to "Table D & H".

252. The consent of the body corporate (as *owner*[94] of the common property for the purposes of the *SPA*) was not obtained under s 263(1)(a) of the *SPA*.

253. It is submitted that that such consent was required and the failure to obtain it should not be excused under section 440 of the *SPA*.

254. The fee simple of the common property of Il Centro CTS 17438 is registered under separate title, title reference 50050405.

255. Under s 41BA of the *Land Title Act 1994 (**LTA**)* and s 35 of the *Body Corporate and Community Management Act 1997 (**BCCMA**)*:

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92 Pursuant to s 32C of the *Acts Interpretation Act 1954*, in an Act words in the singular include the plural.

93 A "planning instrument" includes a planning scheme: Schedule 3 [Dictionary] of the *SPA*.

94 The "owner" of land is defined in Schedule 3 of the *SPA* as "…the person entitled to receive rent for it if it were let to a tenant at rent."

(a) the common property for a community title scheme is owned by the owners of the lot included in the scheme as tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots;
(b) an owners interest in the a lot is inseparable from the owner's interest in the common property; and
(c) accordingly for the purposes of the *LTA* and the *BCCMA*, the owners of that part of the common property which is the subject of the development application are each of the owners of the lots in the scheme.[95]

256. However under the *SPA*, where the written consent of the "owner" of the land the subject of the application is required under s 263(1)(a) if the application is for a material change of use, the "owner" is "….the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant for rent."

257. In *Wright v Brisbane City Council* (2008) QPELR 10, Rackemann DCJ held that whilst it is the owners of the lots who own the common property as tenants in common, for the purposes of the *Body Corporate and Community Management Act 1997 (**BCCMA**)* and the *Land Title Act 1994 **(LTA**),* it is the body corporate which is the entity which would be entitled to receive the rent for the lease of the common property, were it let to a tenant and thus it was the body corporate which for the purposes of the *IPA* (now *SPA*), is the "owner" of the common property.

258. In *Wright,* the appeal was against a decision of the Brisbane City Council to approve a Development Application for a development permit for a material change of use for a nightclub and for a preliminary approval for building work in respect of land situated at Stanley Street, Woolloongabba. The Court heard, as preliminary points, two issues relevantly:

(i) that the application was not a properly made application; and
(ii) the application was not properly notified.

259. The Development Application related to a lot in a community titles scheme and part of the common property which was part of the rear of the relevant lot.

260. In *Wright*, Rackemann DCJ determined that, had the application been deficient for want of written consent from the adjoining land owners, then the Court would have exercised the discretion under s 4.1.5(a) of the Integrated Planning Act 1997 to permit the appeal to proceed.

261. In *Davis v Miriam Vale Shire Council* (2006) QPELR 737, Robin QC DCJ considered an application for a declaration regarding a material change of use for a backpacker premise and a development on land the subject of an existing Community Titles Scheme.

262. The Council had refused to issue an acknowledgment notice on the basis that the application proposed development on a common property driveway, involving impact on that common property through increased traffic and other activity. It was contended that application required the signatures of all owners of lots with an interest in the common property.

263. The Applicant had subsequently obtained the consent of all of the owners in the scheme except for 2 lots. The Applicants sought to excuse the non-compliance in respect of obtaining the consent of 2 of the lot owners under s 4.1.5(a) of the *IPA*.

95 *Wright v Brisbane City Council* (2008) QPELR 10 at [12].

264. The evidence in the case showed that the Body Corporate would not be seeking to oppose the application.

265. In *Davis,* at [15], Robin QC DCJ stated:

> "It is only when the land the subject of the application is identified, that it is known what consents are required."

266. He went on to say that:

> "I do not think there is room for any blanket rule that the common property need not be included where a development application, on its face, relates to some particular lot(s). It may be that associated use of facilities on common property, such as a garden, barbeque area, swimming pool or toilets will be an important part of the proposed use, in which case they are part of the land the subject of the application.
>
> Use of common property for its established function of providing access has been held not to require its inclusion as part of the land. It would seem undesirable to depart from decisions in the Court to that effect." [Authorities omitted].

267. Also in *Davis*, at [23], the Court accepted as correct the submission of the solicitor, Mr Fahl who appeared for the Applicants that:

> "…determination of the requirement for consents <u>does not go directly to the interests of the person whose consent might be needed</u>; the concern is with the procedural requirements of the IPA, a matter for the applicants and the Council at this stage. If the development application is allowed to advance to the notification stage, the lot owners will have the opportunity to make submissions, and participate in any appeal to this court. The submissions might canvass the "properly made application" issue, any determination made in proceedings in which the submitter was not a party not being binding upon such a submitter." (Emphasis added).

268. *Davis* was clearly concerned with an impact assessable development application which obviously differs to a code assessable application for a material change of use where public notification is not required and submissions are not made.

269. It is submitted that the reason the body corporate is required to provide consent where the material change of use application involves or affects common property is that, prior to the assessment manager embarking on the IDAS process, the assessment manager is aware that the proposal is supported by the owners of the land.

270. If it is assumed for the sake of argument that it was possible to commence the dual use of "holiday accommodation and multiple dwelling", that use cannot commence if access via the common area is not obtained. In simple terms, the new use cannot "start".

271. As was observed by Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485:

> the "…use of land in any active sense as distinct from any such passive use as was considered in *Newcastle City Council v Royal Newcastle Hospital* (1997) 96 CLR 493 requires that there be access to the land".

272. The term "use" as it is defined in Schedule 3 of the *SPA* means use in relation to premises [and] includes any use incidental to and necessarily associated with the use of premises.

273. It follows that where the common property provides the only means of access to each of the lots and that such access is necessarily associated with the commencement of the new use of the premises, that "common property" must form part of "the land the subject of [the] application" for the purposes of s 263(1)(a) of the *SPA*.

274. As Stephen J observed in *Pioneer Concrete*, following his consideration of the definition of 'use' under section 3 of the *City of Brisbane Town Planning Act 1974-1996*, makes clear that "…just as permission granted for a particular use will extend to permit all incidental and necessarily associated uses, so too land devoted to the latter will be as much land to which the application relates or applies as will be the land which is devoted to the principal use". The definition of "use" considered in *Pioneer Concrete* is the same as the definition of 'use' in the *SPA.*

275. It is respectfully submitted reasoning in *Pioneer Concrete* should be followed and applied by this Court. It provides a complete answer to the issue as to whether the consent of the body corporate as "owner" of the common property is required.

276. To the extent the decision makers relied on "legal advice" when accepting that the consent of the body corporate was not required – that advice was not before them when they made their decisions[96], and it was, with respect, incorrect as revealed by the plain terms of section 263(1)(a) of the *SPA* and the *Pioneer Concrete* decision.

277. In the absence of recourse to the relevant statutory provisions and to the advice itself, the decision makers failed to employ any process of evaluation on the significant issue of whether the body corporate was required to give consent. They therefore failed to take into account a mandatory relevant consideration and that failure amounted to a material error that on the *Peko Wallsend* ground, invalidated the decisions to grant the approvals.

Other Fundamental Defects in the Development Applications

278. The mandatory information required in part 4 of IDAS Form 5 [Material change of use assessable against a planning scheme] namely "…a statement about how the proposed development addresses the local government's planning scheme and any other planning instruments or documents relevant to the application…" was not completed.

279. Clearly that information – if included – would have necessarily have had to have included reference to the Table of Assessment and the other relevant provisions of *Cairns Plan 2009* referred to elsewhere in these submissions. That information, in turn, should have highlighted the fundamental defect (one of them) in the applications, namely that they were not seeking approval for code assessable development, rather it was impact assessable development.

280. Notwithstanding this clear breach of section 260(3) of the *SPA*, the decision makers did not decide that the applications were not properly made and give notice to that effect under section 266 of the *SPA*. This in turn meant that the information contained in the acknowledgement notice under section 268 of the *SPA,* in particular those aspects requiring code or impact assessment and public notification, were never addressed by the decision makers.

Declarations 3 and 4: Meaning of Multiple Dwelling / Holiday Accommodation

281. Chapter 5 of Cairns Plan contains the definitions which are arranged in two groups.

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96 The Applicants have requested a copy of the advice be disclosed. To date, it has not been disclosed by the First Respondent.

282. Section 5.3 contains the "Land Use Definitions" which have a specific meaning for the purpose of the Assessment Tables and assessment of the development.

283. The land uses defined in the planning scheme are grouped in seven categories of similar uses. The categories include "Residential Uses" and "Tourist and Short Term Accommodation Uses".

284. "Multiple dwelling" falls within the "Residential Use" category (section 5.3.1 page 5-4).

285. "Holiday accommodation" falls within the "Tourist and Short Term Accommodation" category (section 5.3.2, page 5-5).

286. If the drafters of *CairnsPlan 2009* Council had wanted to ensure that it was permissible to have short term or holiday accommodation within the "multiple dwelling" use, wording to that effect would have been incorporated into the definition of "multiple dwelling" as it appears in section 5.3.1 (at page 5-3) of the *CairnsPlan 2009*.

287. It is clear by reference to the other defined uses falling within the category of "Residential Uses", that was not the intention of the drafters of the planning scheme.

288. Accordingly, adopting a "purposive" approach to the construction of the planning scheme,[97] the "purpose" of the "Multiple Dwelling" use which includes accommodation commonly described as flats, home units, apartments, townhouses or villa houses was that any use of those premises was to be confined to "permanent" or long term accommodation.

289. The separately defined uses that are "Residential Uses" are defined in section 5.3.1 of *CairnsPlan 2009*. Those uses include house; illuminated tennis court; caretaker's residence; dual occupancy; multiple dwelling (small scale development); multiple dwelling; retirement village; special residential accommodation; home activity and home based business.

290. Recourse to the definitions of "House" and "Home Based Business" confirm that the drafters of the scheme clearly gave consideration to whether a particular defined use within the "residential use" category should or should not include short term letting for the purposes of holiday accommodation or accommodation for tourists.

291. The definition of "House" states:

> "Means the use of premises comprising self-contained accommodation located on a lot for the exclusive residential use of one household. The use includes:
>
> - Outbuildings and structures incidental to and necessarily associated with the residential use;
> - The care of children in accordance with the Child Care Act 2002;
> - Accommodation for a member or members of the extended family of the household occupying the house or for personal staff. The accommodation may be self-contained, but may not be separately let.
> - **The short term letting of a house for the purpose of holiday rental accommodation."** (Emphasis added)

292. The definition of "Home Based Business" states:

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97 Section 14A(1) of the *Acts Interpretation Act 1954*; *Zappala Family Company Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82 at 94 - 96 [51]-[58].

"Means the use of a house or an ancillary building on the lot containing the house, by the permanent resident/s of the house for the conduct of a business, commercial or professional enterprise which does not involve the manufacture or processing of any product and which may involve the employment of persons other than the residents of the house.

The use includes the provision of accommodation to tourists or travellers, commonly described as bed and breakfast accommodation (no more than 2 bedrooms) or farm-stay accommodation." (Emphasis added)

293. By contrast, "Holiday Accommodation" is defined under heading 5.3.2 "Tourist and Short Term Accommodation Uses" within Chapter 5 of the *CairnsPlan 2009* in the following way:

"Means the use of premises for the accommodation of tourists or travellers.

The use may include restaurants, bars, meeting and function facilities, dining room, facilities for the provision of meals to guests and a manager's unit and office when these facilities are an integral part of the accommodation.

The use includes facilities commonly described as holiday apartments or suits, international or resort hotel or motel."

294. As set out earlier, the definition of "Multiple Dwelling" does not include any reference to short term letting for the purpose of holiday [rental] accommodation.

295. The foregoing analysis confirms that the defined uses of "Holiday Accommodation" and "Multiple Dwelling" are mutually exclusive in the sense previously explained

Relevant Provisions of *CairnsPlan* 2009: The Assessment tables

296. Under *CairnsPlan 2009,* Il Centro is located within the "CBD – North Cairns" district[98] and the "City Centre" Planning Area.[99] The Planning Areas identify the dominant land uses preferred in each District. There is a District Plan for each District.[100]

297. There are Assessment Tables for each District. The Assessment Tables **identify** the level of assessment for components of development. The tables also provide a guide to the Codes applicable to the components of development.[101]

298. Planning areas identify areas of similar or compatible land use and identify the dominant land use preferred for each Planning Area. Overall outcomes for each Planning Area are set out in the Planning Area codes and any specific outcomes for a Planning Area which are particular to a district are identified.[102]

299. If the proposed "development" was in point of law, "development", it was impact assessable because, properly construed, the provisions of *CairnsPlan 2009*, including the "CBD – North Cairns – District Assessment Table [Initial Level of assessment- Material Change of Use]" (**Assessment Table**)[103] make clear that the defined uses for

98 There are 12 districts. Each district is the subject of a District Plan which provides detailed information on the preferred pattern of development and the Overlays applicable to the District.

99 There are 19 Planning Areas under *CairnPlan 2009.*

100 Section 3-1 [Overview], page 3-1, *CairnsPlan* 2009.

101 Section 3.2 [Identified Districts], page 3-1, *CairnsPlan 2009*.

102 Section 3-3 [Planning Areas], page 3-2, *CairnsPlan 2009*.

103 The Assessment Table is found at pages 3-57 to 3-59, *CairnsPlan 2009.*

"multiple dwelling" and "holiday accommodation" are separate uses and mutually exclusive whereby they cannot be simultaneously commenced and carried on "year round".

300. The dual use **is not** a separately "defined use" under the planning scheme.

301. Under the Assessment Table, because the dual use is not separately defined, the prescribed level of assessment defaults to "All other Material Change of Use (unless otherwise specified in Schedule 8 of *IPA*)"[104] which in turn, prescribes any such "other MCU" as impact assessable.

302. However, as previously submitted, for that category of "non-defined" use to be "assessable development" that could be approved upon the granting of a development approval and, pursuant to the development permit [decision notice], authorised to commence as "assessable development", the proposed use of "multiple dwelling and holiday accommodation" must, as an essential precondition have been a "use" that is capable of satisfying the definition of material change of use [namely, "development"] under the *SPA.*

Development Applications Impact Assessable Not Code Assessable

303. If the Court rejects the Applicants' previous submissions that the decisions were unlawfully made and invalid because the proposed development was not "development" that could be identified under the *SPA* and assessed under the stages of IDAS, then the alternative primary ground of invalidity is that the assessment of the development application as code assessable by the Council was unlawful,[105] in breach of subsections 295(1)(a);[106] ; 314 (2)(g)[107] and 314(3)(a) and (b)[108] and 324(2) of the *SPA.*

304. In the alternative, the resultant decisions approving the development application[s] are invalid by reason of the decision makers failing to apply provisions (by ignoring them) that each decision maker was bound to apply when assessing the respective development applications.[109]

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104 See s 9(1)(a) of the *Regulation* and Schedule 3 Part 1 Column 2 [Assessable Development] Table 2 [Material change of use of premises] of the *Regulation*.

105 As set out earlier, an [administrative] act done in breach of a provision of a statute is **unlawful**: *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100]. In addition to being unlawful, the "act" may, as in this case, also be invalid; see also *Morgan and Griffin Pty Ltd v Fraser Coast Regional Council* (2013) QPELR 328 where Jones DCJ confirmed that, whether an act done (or a failure to do an act in breach of a legislative provision) resulted in invalidity, is to be determined from the construction of the relevant statute.

106 Section 295(1)(a) of the *SPA* provides:- " The notification stage applies to an application if either of the following applies- (a) any part the application requires impact assessment."

107 Section 314(1) – this section applies to any part of an application requiring impact assessment; s 314(2)(g) of the *SPA* states: "The assessment manager **must assess** the part of the application against each of the following matters or things to the extent that matter or thing is relevant to the development – (g) a **planning scheme**."

108 Section 314(3)(a) and (B) provides: "In addition to the matter or things against which the assessment manager must assess the application under subsection (2), the assessment manager must assess the part of the application having regard to the following – (a) the common material; (b) **any development approval for, and any lawful use of, the premises the subject of the application or adjacent premises**." The term "**common material**" for a development application is relevantly defined in Schedule 3 of the *SPA* as:- " all the material about the application the assessment manager has received in the first 3 stages of IDAS, including – (i) any… contents of submissions that have been accepted by the assessment manager; and (ii) any [third party] advice or comment about the application received under s 256; and (b) if a development approval for the development has not lapsed - the approval; and (c)…

109 *Eschenko v Cummins* (2000) QPELR 386 at 389 [20] per Newton D.C.J.

305. It is patently clear from both the provisions of *CairnsPlan 2000* that the application which was made as a "code assessable application" was "impact assessable" because there is no separately defined "Land Use Definition"[110] for "holiday accommodation and multiple dwelling."

306. It follows that in respect of the development application which stated in Table A "(d)" of IDAS Form 1 [Application Details] that the level of assessment was "code assessment", that statement was wrong. However as noted neither decision maker considered the development application.

307. Section 5.2 (page 5-1) of *CairnsPlan 2009* is entitled "Undefined Terms of Development". The section states, inter alia: "The Council will determine any question as to the definition or classification of any use or proposed use."

308. The Committee Report did make a determination as to the nature of the "proposed use" which by its decision on 13 August 2014, the Council accepted.

309. The Delegated Authority Report also made the same determination which the Delegate also accepted. Both decisions were made without recourse to the Table of Assessment and the relevant definitions of "holiday accommodation" and "multiple dwelling" in *CairnsPlan 2009*.

310. That determination is recorded at page 7 the report of the committee in "CairnsPlan Assessment" table.[111] That determination was plainly wrong.

311. As was noted, it was "undefined" in the sense that the combined use does not fall under any separately defined use within either the "Residential Use" category of the "Tourist and Short term Accommodation uses" category.

312. This is not an instance of applying the so described "best fit" principle of construing planning scheme definitions which was considered (and doubted) by the Queensland Court of Appeal in *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44.[112] That is because there is only "one fit", namely a non-defined dual use which, by its plain terms, *CairnsPlan 2009* declares that use "impact assessable" development.

313. In simple terms the decision makers have, in order to approve the proposed 'development', lumped together two (2) separately defined uses, treated them as "code assessable" whilst ignoring, contrary to the requirements of *CairnsPlan 2009*, the true nature of the material change of use application which clearly fell within the separately defined use in the Assessment Table:- "All other Material Change of Use (unless otherwise specified in Schedule 8 of IPA)" which was impact assessable.

314. The result is that the decision makers, each of them, "…impermissibly abrogated its duty to properly assess the application…" and therefore the decision[s] are invalid.[113]

315. As is apparent from the wording of section 294, the purpose of the *SPA*, in respect of development that is impact assessable, is, inter alia, to prescribe rights to persons to make submissions [including objections] to the proposed development before the development application is decided and to secure a right of appeal to the Planning and Environment Court about the assessment manager's decision.

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110 The "Land Use Definitions" have a specific meaning for the purpose of the Assessment Tables: sections 5.1 5.3, page 5-3 *CairnsPlan 2009.*

111 The Table appears at page 7 the Committee Report.

112 (2012) 186 LGERA 390.

113 Cf. *Golder v Maranoa Regional Council* [2014] QPEC 68 [55] per Robertson DCJ.

316. By wrongly accepting and assessing the development application[s] as "code assessable", the Council and the delegate thereby denied other lot owners and the Body Corporate, their statutory rights to object and to appeal the decisions.

317. Clearly the denial of rights to object and appeal is a breach of section 4(1)(a) of the *SPA* which required the assessment manager[s] to exercise their powers in away that advanced the Act's purposes. Those express purposes include ensuring that the decision making processes are accountable and effective and provide opportunities for community involvement in decision making.[114]

Discretionary Matters and section 440 of the *SPA*

318. The Court has a discretion to grant declaratory relief and to make consequential orders[115] under s 456 of the *SPA.*

319. The Court will generally exercise its discretion to grant relief where it is satisfied that a breach of the *SPA* has been committed by the assessment manager or will be committed unless restrained by order of the Court.[116]

320. The Court will generally only decline to exercise its discretion to refuse relief where the grant of relief would work such an injustice as to be disproportionate to the ends secured by enforcement of the legislation.[117] Further, there is clearly a public interest in upholding the law and seeing it is obeyed.[118]

321. Evidence may be adduced by either party that establishes facts that bear upon the exercise of the Court's discretion. The admissibility of such evidence does not depend on the relevance of the evidence in question to some distinct issue of fact stated in the grounds of the Originating Application.[119]

322. It is submitted that it is a relevant fact going to the Court's discretion to grant the relief sought by the Applicants that not a single lot owner who now has the benefit of the development approval[s] has entered an appearance to these proceedings.

323. It also relevant to a favourable exercise of the Court's discretion that 24 lots that are owned by respondents in these proceedings, remain in the "letting pool" for "holiday accommodation". That is the evidence from Mr Savage discloses that the majority of the lots continue to be used as holiday apartments in conformity with use rights originally granted under the 1994 consent permit.

324. Section 440 of the *SPA* is entitled: "How court may deal with matters involving non-compliance". Under section 440(2) of the *SPA* the Court has a discretion to "excuse" a breach of the *SPA* or another Act in its application to the *SPA*.

325. As the Council is bound by the provisions of the *SPA*, the discretion given under section 440(2) prima facie also applies to breaches of or non-compliance with provisions of the *SPA* by an assessment manager under the Act.

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114 Section 3(a), 5(1)(a)(i) and 5(1)(g) of the *SPA* - set out earlier in these submissions.

115 *Queensland Cement Ltd v United Global Cement Pty Ltd* (1999) QPELR 167.

116 *Livingstone Shire Council v Brian Hooper & M3 Architecture* (2004) QPELR 308 at 333 [62] per Robin QC D.C.J.

117 *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67 at 82 per Kirby P.

118 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-340 per Kirby P; *Brutone Pty Ltd v Townsville City Council* [2009] QPEC 143 at [94] per Durward SC D.C.J.

119 *Ward v Williams* (1955-1955) 92 CLR 497 at 514 per Dixon C.J., Webb J, Fullagar J, Kitto J and Taylor J.

326. The Court thus has a discretion under s 440 of the *SPA* to "excuse" the fact that the application was unlawfully or not properly assessed by the Council as a code assessable application and to excuse the fact that the Council treated the application as properly made when it was not.

327. Section 440 of the *SPA* has been judicially construed as a provision which should be given its full meaning and effect and not be unnecessarily read down.[120]

328. However as was explained by His Honour Judge Robertson in *Golder*[121] having regard to the explanatory notes to the second reading of the *SPA,* the purpose of the section 440 is not to excuse what in that case amounted to an unlawful decision by the Council as assessment manager.

329. The reasoning in *Golder* also accords with the wording of section 440(3) of the *SPA*: "To remove any doubt, it is declared that this section applies in relation to a development application that has lapsed or is not a properly made application". This subsection is consistent with a construction of section 440(2) that the "non-compliance" to which the section is directed is non-compliance by an applicant for a development application and not non-compliance by the assessment manager.

330. Specifically the explanatory notes state: "The purpose of this clause is to ensure a person's rights to hearings are not compromised on the basis of technicalities concerning processes."

331. In the present proceedings, where the subject development applications that have been approved are for a material change of use for "development" that was not, in point of law, "development" that was capable of being assessed under the *SPA*, it is submitted that such "non-compliance" or abrogation of statutory responsibility is such a fundamental defect in the process that resulted in the approval, that the discretion under s 440 should not be exercised.

332. Further or in the alternative, where the application is not code-assessable but rather impact-assessable, and it has been unlawfully assessed and approved as code assessable by the assessment manager, in such circumstances for the same reasons set out above, the discretion under section 440 should not be exercised.

333. For the reasons set out in these submissions, it is respectfully submitted the Applicants are entitled to the orders sought in the Originating Application.

334. These submissions will be supplemented by oral submissions at the hearing.

Grant Allan
Counsel for the Applicants
Brisbane Chambers
9 June 2015

120 See *Morgan and Griffin Pty Ltd v Fraser Coast Regional Council* (2013) QPELR 328 at 348 [83].

121 *Golder v Maranoa Regional Council* [2014] QPEC 68 at [58] per Robertson DCJ.