COURT REVIEW IN PLANNING MATTERS: OBSERVATIONS RE STEVENSON'S CASE, JURISDICTIONAL ERROR, AND UNLAWFULNESS

Robert A. Quirk[1]

Introduction

[1] This paper examines the Court of Appeal's decision in *Stevenson Group Investments Pty Ltd v Nunn*[2] (***Stevenson***) and whether it remains good law having regard to the Court of Appeal's decision in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*[3] (***BM Alliance***), and the court's earlier decision in *Barro Group Pty Ltd v Redland Shire Council*[4] (***Barro***).

[2] This paper will first review the judgments in the Planning and Environment Court (**PEC**) and the Court of Appeal, and then consider a potential jurisdictional error not dealt with in those proceedings. It will then review the Court of Appeal's decisions in *BM Alliance* and *Barro*, and discuss court review generally for unlawfulness and jurisdictional error. Lastly, the writer will identify some markers to look for when considering whether a decision maker has made a jurisdictional error.

Stevenson

[3] In *Stevenson* the Court of Appeal (Margaret McMurdo P, Fraser JA and Mullins J agreeing) dismissed an application for leave to appeal from a decision of the PEC. The PEC had given summary judgement against the applicant dismissing its application for declaratory relief. The applicant had sought to have a development approval for building work for a 16 unit development dated 28 July 2004 (**building approval**) declared void and of no legal effect.[5]

[4] The main responding parties were described as the "Tangalooma respondents".

[5] The Court of Appeal considered the merits of the grounds of appeal in determining whether to grant leave, with the consent of the parties.[6]

[6] The applicant relied upon three main grounds, which it said were errors of law that materially affected the PEC's decision:[7]

---

1 Barrister-at-Law. I thank those who have provided comments on this paper.

2 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351.

3 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394.

4 *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206; (2009) LGERA 326; [2009] QCA 310.

5 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [1]. Reprint 5 of *Integrated Planning Act 1997* was applicable: [2012] QCA 351, [1].

6 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351 at [7].

7 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [8], [10]-[13].

- The failure to refer the development application to the Queensland Fire and Rescue Service (QFRS), as an advice agency (**referral failure**);
- Approving the building application which was inconsistent with the existing development approval for a material change of use (**planning approval**), contrary to section 5.3.4 of the *Integrated Planning Act 1997* (**Planning Act**)(this Act is now repealed), in that it was not generally in accordance with the plans in the planning approval (**inconsistency failure**);
- The building certifier's decision conflicted with the *Building Act 1975* pursuant to section 3.5.13(3)(a) of the IPA, because it was contrary to that Act by failing to include a condition required by section 22 of the *Standard Building Regulation 1993* (SBR) (**condition failure**).

[7] Another challenge to the PEC's decision was that the PEC erred in holding that a court would not exercise its discretion to make the declaration sought, relevantly to this paper because of inadequate reasons (**inadequate reasons ground**).[8]

[8] In should be noted, at this stage, that in relation to the inconsistency failure it was alleged that, amongst other things, the building approval approved an extra 13,000m^2 of floor space, being an increase of 37 per cent, and approved commercial/retail development in one of the buildings, where only residential development was involved in the planning approval (**use facts**).[9]

[9] There was an additional matter raised during argument in the Court of Appeal relating to a failure to comply with the conditions of the planning approval contrary to section 4.3.3(f) of the Planning Act. The Court of Appeal considered there were a number of problematic issues with this argument, and did not consider it in a substantial way.[10]

Decision in the PEC

[10] The PEC held that the relevant noncompliances were within the jurisdiction to certify.[11] Although it was not strictly necessary for it to deal with the issue, the court concluded that even if the applicant established that the approval was void *ab initio*, it would not grant the declaration sought.[12] In this regard, it considered the types of matters that were referred to in *Warringah Shire Council v Sedevcic*.[13] As a result, the PEC took the rare, if not unique, step in the PEC of granting summary judgment. In doing so, given its conclusions on matters of

---

8 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [57].

9 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [11]; *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [13]-[14], [41]. The inconsistency failure also included an allegation that the building approval was inconsistent with an earlier planning approval.

10 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351 at [12].

11 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [90].

12 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [108].

13 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339-341 was referred to in *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151 at [92].

law, and in relation to whether a court would make a declaration, the granting of summary judgment was not remarkable.[14]

[11] The PEC seems to have accepted the Tangalooma respondents' submission with respect to the inconsistency failure that it was a matter of opinion and therefore could not be a jurisdictional error, with reference to *Buck v Bavone*.[15] There appears to a lack of reasons for the acceptance of this submission given the principle relied upon from *Buck v Bavone*, which is set out below. This will be considered further.

Court of Appeal

[12] The Court of Appeal set out some general observations as to the construction of the Planning Act before dealing with each of the grounds relied upon by the applicant. Central to the court's reasoning was the following:[16]

> "[37] It is significant that there is no express provision in IPA to the effect that any non-compliance with IPA provisions (whether generally or as specified) results in the invalidity of a subsequent decision. It is true that many provisions of IPA, including many relating to IDAS, use the word "must". But as *Project Blue Sky* recognises, that does not mean non-compliance with those provisions would necessarily result in a subsequent decision approving a development application being liable to be declared void and of no legal effect. That is especially so where, as here, the declaration is not sought until many years after the decision was made and the development completed and on-sold.
>
> [38] On the contrary, **the legislature has given the Planning & Environment Court power in s 4.1.5A to excuse partial compliance or non-compliance with any provision in IPA where the absence of compliance has not substantially restricted the opportunity to exercise rights conferred under IPA or other Acts. This provision strongly militates against the applicant's construction.**
>
> [39] I am unpersuaded that any of the alleged contraventions were errors depriving Mr Nunn of jurisdiction under the IPA to issue the permit in the sense discussed in *Craig v South Australia* and *Minister for Immigration and Multicultural Affairs v Yusuf.* I consider the permit was not a nullity vitiated by jurisdictional error. It authorised the development to occur until the permit was set aside. Accepting that the applicant was able to establish its proposed case, the permit would remain valid and effective until the grant of the declaration. That is because s 3.1.5(3) states that a permit authorises assessable development to the extent stated in the permit. It follows that the permit was valid during the construction period: see *Calvin v Carr*. **And even if any of the alleged non-compliances amounted to jurisdictional error, I remain unpersuaded that the intention of IPA**

---

14 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [110]-[111].

15 *Buck v Bavone* (1975-76) 135 CLR 110, 118-119; *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [65]-[66], [90].

16 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351.

is that the permit was necessarily void and of no legal effect in the circumstances here where the declaration was not sought until long after the building was completed and on-sold." (**emphasis mine** – footnotes omitted in all extracts in this paper)

[13] Significant to the President's reasons for finding that there was no jurisdictional error on the part of the private certifier was also the following:

- The referral of a development application is not always critical, and the failure in this case to refer to an advice agency, where the certifier was not required to adopt any QFRS recommendation or advice, cf. that of a concurrence agency which may impose conditions or refuse the development application; and that it seemed unlikely that the failure to refer the development application "necessarily" resulted in invalidity of the development approval, or deprived the certifier of jurisdiction to make a decision.[17]
- Whether the development application was inconsistent with the current development approval involved matters of degree and judgment and "[i]t follows that, consistent with *Buck v Bavone,* the applicant could only succeed in overturning his decision if it showed one of the following: that he did not act in good faith; that he acted arbitrarily or capriciously; that he misdirected himself in law; that he failed to consider relevant matters or took irrelevant matters into account; or that his decision was one that no reasonable assessment manager could have arrived at it. It follows that any error made by Mr Nunn [the certifier] in issuing the permit on the basis that he wrongly considered the building works to be consistent with the earlier approved plans was not an error amounting to the exceeding of his jurisdiction thereby depriving his decision to grant the permit of legal effect".[18]
- The failure to include a condition required by section 22 of the SBR was not something that went to the certifier's jurisdiction to grant the development approval (although it may be if "significant").[19]

[14] It is interesting to note that in relation to each argument raised by the applicant the court indicated that given the long delay in applying to the PEC it would if called upon exercise the excusal power,[20] to waive any non-compliance or reissue the development approval.[21] This raises the question of whether the court has power to effectively grant a development approval, if the decision maker has committed a jurisdictional error in doing so. These issues will be discussed further below.

---

17 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [49].

18 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [53].

19 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [55].

20 In that case, under section 4.1.5A of the Planning Act, now found in section 440 of the current Planning Act.

21 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [50], [54], [55].

[15] The Court of Appeal also did not give any reasons as to why the inconsistency failure, having regard to the use facts, did not give rise to a decision that no reasonable certifier could come to.

[16] In relation to the inadequacy of the PEC's reasons the Court of Appeal reviewed the PEC's consideration of the discretion, which referred to the discretion guidelines in *Warringah Shire Council v Sedevcic*,[22] and determined that the challenge based on the inadequate reasons ground failed.

Discussion

[17] As with the application for summary judgment before the PEC, I will rely on the facts as alleged by the applicants and as stated by the courts. It may be that the Tangalooma respondents had complete answers to the applicant's case, however, the case was to be determined on the basis of the applicant's pleaded facts.[23]

Referral failure

[18] In *Stevenson* the Court of Appeal said:

> "The first prong is the alleged referral agency failure. Accepting that the developer, contrary to the mandatory terms of s 3.3.3, did not provide a copy of its material to the QFRS, **it is difficult to understand why this made the subsequently issued permit void and of no legal effect.** The scheme of IPA, does not envisage that failure to provide a copy of the development application to a referral agency like QFRS **is an absolute prohibition on the assessment manager deciding the application**. The four stages of IDAS are only "possible stages" and not all stages or parts of a stage apply to all applications (s 3.1.9). The information and referral stage is not always critical." (**emphasis mine**)

[19] The following is, in my submission, at least one reason why the building approval was void in relation to the referral failure. The court had earlier identified that the failure to refer an application within 3 months meant that it would lapse.[24] As a result of the time in which the building application was processed, just over two months,[25] the building application had not lapsed at the time that the building certifier purported to decide the application.[26]

[20] If the date of the building approval was as alleged by the Tangalooma respondents, and there had been no referral within the referral period, the building application would have lapsed before a decision was made by the

---

22 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339-341.

23 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [3].

24 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [10].

25 See Further Amended Statement of Claim on eCourts, [29]-[30].

26 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [45]: Tangalooma says 17 January 2005.

private certifier.[27] That would mean that there was nothing to decide. This would, of itself, be a jurisdictional error.[28]

[21] However, despite there being an extant application, because there was a referral agency the information and referral stage had not ended, and the decision stage had not started, no decision could be made on the application. The Planning Act explicitly states this.[29] This was a jurisdictional error because an essential event had not occurred or been satisfied, being at the very least, the commencement of the decision stage.[30] Accordingly, it appears the application lapsed under a month after the building certifier purported to grant the building approval.

[22] In short, the building certifier assumed jurisdiction to make a decision that the Planning Act did not grant to him. This was not an act done in breach of a condition regulating the exercise of the power to decide.

[23] This means that applications that unlawfully, but notionally, pass through the IDAS stages do not avoid the lapsing provisions.[31] The alternative is that if you can get the assessment manager to make a quick decision, you can avoid compliance with the Act. It is submitted this cannot be the proper construction of the Planning Act.

[24] That the failure to refer led to a lapsing of the development application was recognized in *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council* (***M&G No 1***),[32] although that decision was under the *Sustainable Planning Act 2009* (**current Planning Act**). In that case, the PEC concluded that the failure to refer the development application to a referral agency (concurrence agency cf. advice agency in *Stevenson*) led to the development application lapsing. The court used the excusatory power to retroactively revive the development application.[33] This ensured that the development approval was not invalid. If this had not been done, albeit retroactively, there would have been no application for the assessment manager to decide.

[25] It can also be observed that the passages relied upon by the Court of Appeal from *Project Blue Sky*,[34] and that case itself, relate to whether an act done in breach of a condition regulating the exercise of the power is invalid, and not the question of jurisdictional error. Jurisdictional error was not an issue in *Project Blue Sky*.

---

27 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [45].

28 *Craig v South Australia* (1995) 184 CLR 163, [12].

29 *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [26], [29]-[32]. *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [20], [22] refers to the relevant provisions.

30 *Craig v South Australia* (1995) 184 CLR 163, [12].

31 See *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council* [2013] QPEC 2.

32 *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council* [2013] QPEC 2.

33 *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council* [2013] QPEC 2, [92].

34 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351 at [31]-[32], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at 388-391.

Inconsistency failure

[26] Both the PEC and the Court of Appeal relied upon *Buck v Bavone*.[35] The Tangalooma respondents referred the PEC to the following passage from *Buck v Bavone* with respect to decisions of the type under challenge:[36]

> "the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached."

[27] The Tangalooma respondents submitted that as a matter of opinion was involved, the arguable error could only be within jurisdiction.[37] This was accepted by the PEC.[38] This conclusion was despite the clear statement in *Buck v Bavone* that what was required was a finding that the applicant did not satisfy the court that no reasonable private certifier could have come to the decision.

[28] The Court of Appeal said "[t]he question whether the application was inconsistent with the current approval involved matters of degree and judgment for Mr Nunn as assessment manager", it then referred to the same part of *Buck v Bavone*[39] and concluded:

> "It follows that any error made by Mr Nunn in issuing the permit on the basis that he wrongly considered the building works to be consistent with the earlier approved plans was not an error amounting to the exceeding of his jurisdiction thereby depriving his decision to grant the permit of legal effect"

[29] The Court of Appeal did not explain why this was so. Given it was alleged that the building application involved development with an additional 13,000m^2, 37 percent, in floor space and the inclusion of a commercial element, it is submitted that it is not obvious, or able to be dismissed out of hand, as to why no reasonable private certifier could have come to this decision.

[30] With respect to this issue it is acknowledged that the use facts must be considered in the context of the approved plans. However, as *Buck v Bavone* states, just because a matter of opinion is involved does not mean that it cannot be shown that no reasonable decision maker could come to the decision; it is just difficult.

[31] It is submitted that given the application for summary judgment proceeded on the basis of the inconsistency alleged by the applicant, including the use facts, an explanation as to why it was not possible to conclude that no reasonable certifier could come to the decision, was required. It may have been that the

---

35 *Buck v Bavone* (1975-76) 135 CLR 110, 118-119.

36 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [65].

37 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [65]-[66].

38 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [87], [88], [90].

39 The Court of Appeal also referred to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* and *Timbarra Protection Coalition Inv v Ross Mining NL* at [53].

courts considered that there was no significant inconsistency, however, that is not clear from the judgments.

Condition failure

[32] The Court of Appeal stated that this was not a jurisdictional error.[40] It is not proposed to consider this issue in any further detail. Whether or not it involved a jurisdictional error is probably due a paper in itself given the types of matters that can potentially impact on the conclusion.[41] It is noted, however, in *Glastonbury v Townsville City Council*[42] the PEC held that a failure to provide a statement of sufficient grounds under section 3.5.15(2)(l) was not a matter going to the jurisdiction of the decision maker.

Potential jurisdictional error not dealt with by the proceeding

[33] Under section 3.2.2 of the Planning Act where a structure or works may not be used without a development approval for a material change of use, there is no development approval for a material change of use, and there is no separate application for the material change of use, the application is deemed to include an application for a material change of use.[43]

[34] Given the use facts, one would normally expect that a development approval for a material change of use would have been required.[44] It appears that both parties' experts agreed that there was a material change of use.[45] If there was, it may have also been impact assessable.[46] However, the PEC did not deal with the issue because it did not form part of the applicants pleading at the time that the Tangalooma respondents made their application.[47]

[35] The applicant sought to rely on the material change of use in defence of the submission that the Tangalooma respondents could rely on the excusatory power.[48] The PEC would not permit this because it involved a question of fact that was not pleaded.[49] This was also a basis upon which the Court of Appeal distinguished the PEC's decision in *Hooper*.[50]

---

40 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [55].

41 Aronson et al., *Judicial Review of Administrative Action*, Third Ed., 2004, LBC, 216.

42 *Glastonbury & Anor v Townsville City Council & Ors* [2011] QPEC 128, [223]. The grounds must be identified in the decision otherwise that will be a jurisdictional error: *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [79].

43 See also section 265 under the current Planning Act. See also *Knobel Consulting Pty Ltd v Gold Coast City Council* [2005] QPEC 082.

44 See section 1.3.5 of the Planning Act – "material change of use".

45 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [106(vii)].

46 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [106(vii)].

47 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [106(vii)].

48 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [106(vii)].

49 *Stevenson Group Investments Pty Ltd v Nunn* [2011] QPEC 151, [106(vii)].

50 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [44].

[36] If the building application included an application for a material change of use, it was an application that was beyond the power of the building certifier to determine because the council would have had to approve the material change of use.[51]

[37] Whether there is a material change of use, and whether section 3.2.2 applied, are not matters of opinion.[52]

[38] In addition, if there was a material change of use included in the building application, for IDAS timings, it was taken not to have been received by the building certifier at the time that he decided it.[53]

[39] Accordingly, there would have been a clear excess of the "theoretical limits" of the functions and powers granted to the private certifier, and a jurisdictional error.[54]

BM Alliance

Jurisdictional error generally

[40] Fortuitously, the Court of Appeal recently considered jurisdictional error and its consequences in *BM Alliance*. In that case the Court of Appeal said:

> "[71] Whatever the position might be if the parties to an adjudication make no complaint about the adjudication decision, the decisions of the High Court relied on by BMA make it plain that **once a court determines that a decision of the type in question is affected by jurisdictional error, the decision cannot give rise to legal consequences.**
>
> [72] On 13 November 2012, not only did the primary judge find jurisdictional error resulting in the invalidity of the adjudication decision, he declared the decision void. **Even without the declaration, it necessarily followed from the findings in the 13 November reasons, that the adjudication decision had no legal effect.** It is difficult to see how the declaration that the decision was void could have been revoked, but no issue about that was raised in the grounds of appeal or in argument.
>
> …
>
> [74] In order to justify the revocation of the 13 November 2012 declaration and the making of the 22 March 2013 orders, the primary judge relied on the existence of a discretion as to whether to grant declaratory relief even though a legal basis for the making of the subject declaration existed. His Honour identified as a relevant circumstance the existence of —alternative and adequate remedies for the wrong of which complaint is made.

---

51 See section 5.3.5 of the Planning Act, section 31 of the *Building Act 1975*.

52 Section 3.2.2 of the Planning Act.

53 Section 5.3.5(5)(b) of the Planning Act.

54 *Craig v South Australia* (1995) 184 CLR 163, [12].

> [75] The primary judge then, with respect, proceeded to deny BMA the **remedy dictated by the finding of jurisdictional error.** In so doing, the primary judge was motivated by a desire to allow BGC to retain the amounts which the adjudicator had allowed and to which BGC would have been entitled had there been no jurisdictional error.
>
> **In his Honour's view, —[s]uch a course advances the policy of the Act.** It is not clear what connection, if any, existed between this rationale and the existence of an alternative and adequate remedy.
>
> [76] As previously discussed, there is nothing in the Act which would support the denial to a respondent to a payment claim of its rights and entitlements under the Act except to the extent that the Act expressly or implicitly so provided. **Nor is there any principle identified which would authorise a court to deny a litigant a legal right or remedy on the grounds that the policy of an Act would thereby be advanced.** …
>
> [77] … His Honour also erred in finding in his 22 March 2013 reasons that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or make an order quashing or setting aside the decision.
>
> [78] For the above reasons, the primary judge's orders of 22 March 2013 should be set aside."

[41] The Court of Appeal also said in *BM Alliance* that:

> [62] In Bhardwaj, Gaudron and Gummow JJ, with whose reasons McHugh J relevantly agreed, said:
>
> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. **A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.** A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.
>
> [63] To like effect, Hayne J said:
>
> In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there is no challenge to the legal effect of what has been done. Where there is

a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.

This is not to adopt what has sometimes been called a theory of absolute nullity' or to argue from an a priori classification of what has been done as being void', voidable' or a nullity'. It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for jurisdictional error, the statutory power given to the Tribunal has not been exercised ...

Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. **Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences**."

[64] In Plaintiff S157/2002, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to passages from the reasons of Gaudron and Gummow JJ, McHugh J and Hayne J in Bhardwaj, said: This Court has clearly held that an administrative decision which involves jurisdictional error is regarded, in law, as no decision at all'. (citations omitted)

[65] Finkelstein J observed in Leung, in a passage implicitly approved of by Gleeson CJ in Bhardwaj:

There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.

[66] BGC relied on these observations and on a number of decisions of the Full Court of the Federal Court, including Jadwan, which expressed the view that whether jurisdictional error on the part of a tribunal or decision maker will render the decision nugatory for all purposes may depend on the terms of the statute under which the decision was made. **That proposition, with respect, may be accepted**

> **but, absent statutory provisions necessitating a contrary conclusion, the general principle identified in paragraphs [62]–[64] above applies**." (**emphasis mine**)

[42] A number of matters can be taken from/confirmed by *BM Alliance*, they are:

- Once a court finds that a decision is affected by jurisdictional error it cannot give rise to legal consequences, subject to a statutory provision(s) "necessitating" a contrary conclusion.
- It is unnecessary for the court to make a declaration that the decision is void or invalid, that arises from the finding.
- As a result, the discretion to refuse relief is necessarily very limited in the case of jurisdictional error.
- Relief cannot be denied because the policy of the relevant Act would be advanced.

Barro

[43] The decision, and reasoning, in *Stevenson* is also contrary to what the Court of Appeal (Keane JA, McMurdo P and Wilson J agreeing) said in *Barro*:

> "[54] **Finally in relation to this aspect of Barro's argument, the very circumstance that s 4.1.5A is made available to the P & E Court on an appeal from a decision of the local authority to cure non-compliance with the requirements of the IPA is itself an indication that non-compliance with the requirements of the IPA may well be fatal to a development application.** Barro's submissions recognise that the predecessor of s 4.1.5A was introduced into the then applicable town planning legislation as a response to the decision in Scurr's Case. **But they do not recognise that s 4.1.5A is predicated, as was its predecessor, upon the consequences which might otherwise ensue from a substantial failure to adhere to the legislative scheme that permits the alteration of land use rights**." (**emphasis mine**)

[44] Both *Stevenson* and *Barro* involved construction of the Planning Act, consideration of the excusatory power and the effect its existence had on the construction of other provisions in the Act, and the effect of noncompliance. Unfortunately, it is clear that the construction of the Planning Act, and the holding with respect to the effect of noncompliance, in *Stevenson* cannot sit with that in *Barro*. They lead to different conclusions with respect to the effect of noncompliance or substantial noncompliance.

[45] The High Court said in *Nguyen v Nguyen*[55] that:

> "20. The extent to which the Full Court of the Supreme Court of a State regards itself as free to depart from its own previous decisions must be a matter of practice for the court to determine for itself. …
>
> 21. **Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of**

55 *Nguyen v Nguyen* (1990) 91 ALR 161.

> **precedent and the predictability of the law**: see Queensland v. The Commonwealth (1977) 139 CLR 585 per Aickin J at pp 620 et seq.
>
> 22. … now that appeals to the High Court are by special leave only, the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes. … In these circumstances, **it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions.** In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty." (**emphasis mine**)

[46] The Court of Appeal is not strictly bound by its earlier decisions.[56]

[47] Accordingly, if the Court of Appeal was going to depart from its decision in *Barro*, on the construction of the Planning Act, it should have done so "cautiously and only when compelled to the conclusion that the earlier decision [was] wrong".[57] The reasons in *Stevenson* do not indicate that the court gave consideration to the Court of Appeal's reasoning in *Barro* with respect to the construction of the Planning Act, and its holding in relation to the effect of noncompliance, and decided to overrule it, in the manner suggested by the High Court in *Nguyen v Nguyen*.[58] This compares with the Court of Appeal's overruling of *Oakden Investments Pty Ltd v Pine Rivers Shire Council*[59] in *Barro*.[60]

[48] Accordingly, is submitted that *Barro* remains good law and has not been overruled by the decision in *Stevenson*.

[49] Whether *Barro* or *Stevenson* is to be preferred will have to await further clarification from the Court of Appeal.

[50] It is noted that the version of the Planning Act under consideration in *Stevenson* was reprint 5, and in Barro reprint 7D rv. Accordingly, the Act, if there is considered to be a significant difference between the two versions, that more closely aligns with the current Planning Act is the one in *Barro* not *Stevenson*.

Court review for unlawfulness and jurisdictional error

[51] Jurisdictional error aside, if the construction of the Planning Act in *Stevenson* is correct and all that occurred was a breach in a condition regulating the exercise

---

56 See for example in *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206 at [72]-[86].

57 *Nguyen v Nguyen* (1990) 91 ALR 161, [21].

58 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [40]. The Court of Appeal proceeded on the instant factual situation rather than the more elaborate line of principle in *Barro*. The building in question had been constructed and sold to third parties, including the applicant, and the application to the PEC was made about 5 years after the development approval issued and 4 years after the applicant purchased its units: [35].

59 *Oakden Investments Pty Ltd v Pine Rivers Shire Council* [2003] 2 Qd R 539.

60 *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [85]-[86].

of a statutory power, or possibly some other breach that did not lead to invalidity, the development approval would remain valid.[61]

[52] However, as the High Court stated in *Project Blue Sky*, where there is a breach of a condition regulating the exercise of a statutory power and it does not lead to invalidity, that does not mean that the applicant had no rights. It had the ability to apply for a declaration and injunction restraining any further action based on the unlawful action.[62]

[53] In *Stevenson*, if there was an unapproved material change of use, it is also likely to be a continuing development offence. This is something that could have been restrained under section 604 of the current Planning Act.

[54] Where there is a jurisdictional error in an administrative decision, however, the issue is not whether it was a purpose of the legislation that an act done in breach of the provision should be invalid,[63] but rather whether there is any statutory provision necessitating a conclusion that the decision is not invalid for all purposes.[64]

[55] In *Stevenson*, the court, relying on *Calvin v Carr*,[65] said that even if there was jurisdictional error the approval was valid during the construction period because it would remain valid until the declaration, and as a result, it had statutory effect because of section 3.1.5(3) of the Planning Act.[66] That section authorizes development to the extent stated in the approval.

[56] The Court of Appeal did not refer to the High Court's decision in *Bhardwaj* with respect to this issue.[67] It is unnecessary to compare what was said in *Calvin v Carr* with *Bhardwaj* in light of the Court of Appeal's review of jurisdictional error in *BM Alliance*. It is submitted that following *BM Alliance* the proposition that a decision involving jurisdictional error, embodied in a development approval, is valid until a declaration is made cannot stand in the absence of a provision, or provisions, necessitating such a conclusion, because there is "no decision at all".[68]

[57] In terms of the current Planning Act, this is also confirmed by sections 324, 327, 334 and 335, which indicate that the power to give an approval only arises after

---

61 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388-391, 393.

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

63 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390 [93].

64 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394, [66].

65 *Calvin v Carr* [1980] AC 574, 580-590.

66 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [39].

67 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

68 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394 at [62] and [64] citing *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-5 [51], 645-7 [151]-[153], and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 507 [76].

a decision has been made.[69] Sections 334 and 335 require written notice of the decision and for the decision notice to include, amongst other things, the day of the decision and whether the development is approved, approved subject to conditions or refused. Section 339 of the current Planning Act provides that where the development application is approved or approved subject to conditions the decision notice or negotiated decision notice takes effect as a development approval as indicated in that section. By virtue of section 340 of the current Planning Act development cannot start until the development approval takes effect. Section 243 of the current Planning Act enacts the substance of section 3.1.5(3) of the Planning Act. Therefore, it can be seen that whatever protection section 243 may provide, it is illusory until there has been a decision, at least not involving a jurisdictional error, approving the development application, with or without conditions, and it has taken effect.

[58] That this is the correct construction is further confirmed by section 578 of the current Planning Act which provides that it is an offence to carry out assessable development unless there is an "effective" development approval for the development. That is, it is not enough to have a development approval, it must also have taken effect.

[59] It is difficult to identify a provision, or provisions, in the Planning Act or the current Planning Act that necessitates the conclusion identified in *BM Alliance*.[70] *Stevenson* and *Barro* identify different reasons why different conclusions may be reached on this issue;[71] and that there can be different conclusions may indicate that there is no provision(s) "necessitating" the required conclusion.

[60] In that case it would seem there would be very little, if any, discretion to refuse a declaration that a decision infected by jurisdictional error is invalid. This is because the finding that it was affected by jurisdictional error means that it is already invalid without the declaration. As the Supreme Court has recently said "in a case where a decision is affected by want or excess of jurisdiction, and the applicant for relief is a party aggrieved by the decision, relief will be granted 'almost as of right'".[72]

---

69 See also *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [26], [29]-[32], which requires that the development application also actually lawfully reach the decision stage.

70 Cf. section 101 of the *Environmental Planning and Assessment Act 1979* (NSW) which may provide an example of a provision that protects development approvals: **101 Validity of development consents and complying development certificates -** If public notice of the granting of a consent or a complying development certificate is given in accordance with the regulations by a consent authority or an accredited certifier, the validity of the consent or certificate cannot be questioned in any legal proceedings except those commenced in the Court by any person at any time before the expiration of 3 months from the date on which public notice was so given.

71 See *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [36] cf *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [54].

72 *J Hutchinson Pty Ltd v Cada Formwork Pty Ltd* [2014] QSC 63, [79], citing *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185, 194 per Gibbs CJ; discussed in *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 657 at [7].

[61] This may lead to a need to review the types of matters that are normally considered when exercising the declaratory power where jurisdictional error is involved.[73] It also raises the real question of what is left for the court to do after there is a finding of jurisdictional error.

[62] It is submitted that under the current Planning Act neither the PEC nor the Supreme Court would have power to actually make a decision replacing that of the decision maker where jurisdictional error is involved.[74] The denial of relief in circumstances where jurisdictional error is involved could amount to a merits conclusion by the court in what is only a legal review.

[63] This then raises the issue of whether the excusatory power under section 440 may be able to be used to preserve a development approval where jurisdictional error is found. The excusatory power is a broad and untrammelled one.[75] Some examples are considered below.

[64] In *Holcim (Australia) Pty Ltd v Brisbane City Council* (*Holcim*)[76] the PEC held that there was jurisdictional error in relation to Council properly considering the issue of amenity in a code assessable development application; it failed to consider all aspects of amenity.[77] The court stated that "[i]t cannot be said the omission is insignificant so as not to have materially affected the decision" and it was a factor of "prime importance" which was "at the core of the Council's considerations".[78] One of the respondents submitted that relief should be refused, because even if the Council proceeded on an incorrect basis, the impacts would be appropriately managed and there was no utility in remitting the application.[79]

[65] The PEC proceeded on the basis that it did have a discretion but made it clear that the proceeding was only dealing with a legal review not the merits, that issue would have to await a merits review and was not a matter for the court (and the court also had its doubts on that issue), and it said that the Council had made a "fundamental error" in an "important decision making process".[80]

---

73 See *NRMCA (QLD) Ltd v Andrews* [1993] 2 Qd R 706, 712-713 and *Mudie v Gainriver Pty Ltd* [2002] 2 Qd R 53, 58-59 [13], citing with approval *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339-341, *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67, 82-83 and *Tynan v Meharg* (1998) 101 LGERA 255, 259-260; *Glastonbury & Anor v Townsville City Council & Ors* [2011] QPEC 128 at [128]-[131].

74 Sections 456 cf. 496 of the current Planning Act. See also with respect the nature of declaratory proceedings *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [3]; *Westfield Management Ltd v Brisbane City Council & Anor* [2003] QPEC 010, [57]. See *Netstar Pty Ltd v Caloundra City Council* [2005] 1 Qd R 287 regarding the jurisdiction of the Supreme Court.

75 *Maryborough Investments Pty Ltd v Fraser Coast Regional Counci* [2010] QPEC 113 at [18], [30] and [33]-[34].

76 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32.

77 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [76], [79].

78 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [71], [76].

79 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [81].

80 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [3], [76]-[77], [81]

[66] For *Holcim* if the excusatory power was going to be exercised to excuse the jurisdictional error, the court would need to embark on a hearing to satisfy itself that the development application should be approved, and if so, whether the conditions imposed in the development approval were the appropriate conditions with respect to amenity, and if not, order that the development approval be amended to impose additional appropriate conditions. This would be a merits review, not a legal review.

[67] Similarly in *Stevenson*, on the assumption that the issue contemplated in [33]-[39] above was a part of the proceeding and correct, it is difficult to see how section 440 could be used to excuse an assumption of jurisdiction by the building certifier to determine the material change of use, which was within the council's power to decide, and also to excuse the notification stage altogether.[81]

[68] Could the excusatory power be used though in the situation where there has been a failure to refer to a development application to a concurrence agency, say SARA - Department of Environment and Heritage Protection (**Department**) with respect to contaminated land, which was not identified in the development application? This example will be considered on the assumption that the development application was impact assessable and the council had proceeded to approve it despite not having the benefit of the Department's response and that there were submitters but none had appealed.

[69] If a person then applied to have the development approval declared invalid on the basis of jurisdictional error, could the excusatory power be used to preserve the development approval? Assuming further that after the proceeding was commenced the developer asks the Department to consider the development application and provide a response for use in the proceeding. It does so and indicates that it would have approved the development and provides a set of conditions it would have imposed.

[70] The excusatory power can be used where the development application has lapsed. Section 440 says that it can be used in that situation. Accordingly, the use of the excusatory power in that instance could revive the development application, retroactively.

[71] The excusatory power could also address the fact that the development application did not leave the information and referral stage.

[72] Section 440 could not, it is submitted, cure the fact that the council committed jurisdictional error by failing to amongst other things, ask itself under section 324 whether it should approve the development application having regard to the contamination, and in failing to consider, amongst other things, the following relevant matters:[82]

a. an assessment of the development application against the relevant provisions of the planning scheme with respect to contaminated land;

---

81 *Maryborough Investments Pty Ltd v Fraser Coast Regional Council & Anor* [2010] QPEC 113 at [18], [30] and [33]-[34]; *Metrostar Pty Ltd v Gold Coast City Council* (2006) 154 LGERA 245 at [17] and [33].

82 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [76]-[77].

b. an assessment of the development application against the Department's response; and

c. any submission that might have addressed the contamination, if the matter had been addressed in the development application and Department's response.

[73] There would also be no conditions imposed by the council or the Department with respect to the contamination.

[74] The submitters have also lost the right to consider, submit and appeal in relation to the issue. The Department has indicated what it would have done, but its response, including the conditions, do not form part of the development approval.

[75] It is submitted that only way to excuse the failure would be to have a merits hearing with respect to whether the development should be approved, and if so, on what conditions. This is beyond the function of the court in this type of situation.

[76] Despite these examples, the writer does not exclude the possibility that there may be some situations where there is jurisdictional error and the excusatory power may be available. It is submitted though that they are likely to be rare.

[77] Therefore, where a breach of the current Planning Act is involved there are three possible outcomes where a decision has notionally been made; they are:[83]

a. If jurisdictional error is involved, the decision is invalid;

b. If there is unlawfulness and it is a purpose of the Act that the further processing or decision is invalid, the court will have a discretion to make the declaration and to also use the excusatory power; and

c. If there is unlawfulness but it is not a purpose of the Act that the further processing or decision is invalid, the decision is valid.

[78] As a result, where an applicant seeks to challenge a development approval, how the proceeding is framed will be critical. If jurisdictional error can be identified this will provide the strongest basis for an application challenging a development approval. It is submitted that the excusatory power will have a more limited role where jurisdictional error is involved compared to where unlawfulness is found.

Identifying jurisdictional error

[79] In *Kirk v Industrial Relations Commission*[84] the High Court, referring to *Craig v South Australia*,[85] said:

> "… the Court amplified what was said about **an inferior court acting beyond jurisdiction** by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:
>
> (a) the absence of a jurisdictional fact;

---

83 [76] b. and c. are, of course, predicated on the basis that the unlawfulness has not resulted in a jurisdictional error.

84 *Kirk v Industrial Relations Commission* [2010] HCA 1.

85 *Craig v South Australia* (1995) 184 CLR 163.

(b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

The Court said of this last example that 'the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern' and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes*, *R v Gray; Ex parte Marsh* and *Public Service Association (SA) v Federated Clerks' Union*."

[80] In *Minister for Immigration and Multicultural Affairs v Yusuf*[86] the High Court said the following with respect to jurisdictional error:[87]

"It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an **administrative tribunal** (like the Tribunal)

'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is **not exhaustive**. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that **identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.** Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law." (**emphasis mine**)

---

86 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

87 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82] per McHugh, Gummow and Hayne JJ, Gleeson CJ agreeing at [1].

[81] It can be seen that the types of matters that can give rise to a jurisdictional error are many of those types of matters that are regularly raised in judicial review applications. Once one, or more, of those matters is identified it is necessary to ask the question whether the matter affected the exercise or purported exercise of the power. This requires a consideration of the all of the evidence, including the decision itself, and the applicable statute to determine whether there has been a jurisdictional error. The decision is not to be reviewed "minutely and finely with an eye keenly attuned to the perception of error".[88]

[82] The difficulty is that there is no one single test, theory or logical process for determining whether an error is jurisdictional or non-jurisdictional.[89] Despite this, inherent to the concept of jurisdictional error is the requirement that the power must be exercised for the purpose for which it was conferred, and in the manner in which it was intended to be exercised.[90]

[83] Sometimes a conclusion that there is jurisdictional error will be relatively easy to reach. Examples may include: a building certifier granting an approval that is not even theoretically within the limits of his functions and powers; or a council deciding an impact assessable development application before notification has been undertaken. Some, including whether a relevant consideration like amenity has been properly considered, as in *Holcim*, are much more complicated and require a more nuanced approach.

CONCLUSION

[84] The Court of Appeal's decision in *BM Alliance* reviewed the consequences of jurisdictional error and stated that in the absence of a provision(s) necessitating a contrary conclusion the decision has no legal consequences. It is difficult to identify a provision in the current Planning Act that meets the requirement identified in *BM Alliance*. The statement of principle in *BM Alliance* provides the clearest guidance as to the correct state of the law and is to be preferred to what the court said in its earlier judgment in *Stevenson*, where it refused leave to appeal.

[85] Due to the limited way that *Barro* was dealt with in *Stevenson*, it has not been overruled. Those two decisions now suggest competing approaches as to how the current Planning Act should be construed, particularly in the event of noncompliance.

[86] There may need to be a review of the factors usually considered relevant to court's discretion where jurisdictional error is involved. In addition, there also seems to be a limit on the ability of the excusatory power to provide relief in instances of jurisdictional error because of the nature of the review being undertaken. In some cases jurisdictional error will be easy to identify, however, in others it can be difficult to distinguish from non-jurisdictional error.

Robert A. Quirk

---

88 *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259, 272.

89 Spiegelman J.J., *The Centrality of Jurisdictional Error* (2010) 21 PLR 77.

90 Spiegelman J.J., *The Centrality of Jurisdictional Error* (2010) 21 PLR 77.