

PLANNING & ENVIRONMENT UPDATE

March 2018

p&e Law



ROADS—A PUBLIC RIGHT OF PASSAGE

There needs to be an accord between community and government when considering the use of roads.

There has been an abject lack of accord in some local government areas recently, and community meetings and open forums can be a positive attempt to advance agreement.

An understanding of the common law basis of roads and the statutory variations to the common law may lead to a better appreciation of the need for an accord. That understanding may lead to a clearer consideration of questions like those following:

Whose responsibility is it to mow the footpath?

Can you plant a tree on the footpath?

Can you construct the pathway across the footpath to your property boundary?

Can you hold a sporting event on a road?

Do you need permission from Council or someone else?

COMMON LAW

The Supreme Court of Norfolk Island considered the common law position of a highway:

At common law, since the public right in a highway is a rite of passage only, an owner of land over which the highway passes retains his property in the soil usque ad inferos and in the airspace above the surface of the land usque ad coelum Halsbury, supra, paras 94, 100, 101 and 102. The principles of the common law are in force as laws of Norfolk Island, subject to any contrary Legislation: Judicial Ordinance 1960, section 3. In the absence of statutory provisions to the contrary, the owner of the soil of a highway “has right to all above and underground, except only the rite of passage for the King and his people”: Goodtitle d Chester: v Alker & Elmes (1757) 1 Burr 133 at 146. The owner may exercise all rights of ownership not inconsistent with the public right of passage: Vestry of St Mary Newington v Jacobs (1871) LR 7 QB 47; cf River Lee Navigation Conservators v Button (1881) 6 App Cas 685¹

¹. *Prentice v Mercantile House Pty Ltd and Others* 107 ALR

ROADS—A PUBLIC RIGHT OF PASSAGE (CONT'D)

The High Court noted:²

*The common law right was to use the whole width of the highway.*³

When the owner of land intentionally dedicates any part of the land as a highway and it is used as a highway by right of passage the public has accepted that dedication. Acceptance was and is important as roads are maintainable by government.

The owner of land retained rights in the soil under the road and air space above the road, subject to the right of passage. Owners on either side of a road held those rights to the centre line of the road.

STATUTORY VARIATIONS

The land in a road is now vested in the State and the control of many roads is given to local government.

95 Roads vest in the State

The land in all roads dedicated and opened for public use under the following Acts vests in, or remains vested in, the State—

(a) *this Act, or an Act repealed by this Act or repealed by the repealed Act;*

(b) *The Land Title Act 1994.*⁴

The breadth of the controls that are vested in local government is wide:

(b) *the Land Title Act 1994.*

60 Control of roads

(1) *A local government has control of all roads in its local government area.*

(2) *This control includes being able to—*

(a) *survey and resurvey roads; and*

(b) *construct, maintain and improve roads; and*

(c) *approve the naming and numbering of private roads; and*

(d) *name and number other roads; and*

(e) *make a local law to regulate the use of roads, including—*

(i) the movement of traffic on roads, subject to the Transport Operations (Road Use Management) Act 1995; and

(ii) the parking of vehicles on roads, subject to the Transport Operations (Road Use Management) Act 1995 (including the maximum time that a vehicle may be parked in a designated rest area that adjoins a road, for example); and

² *Widgee Shire Council v Bonney* 4CLR (1907) 977 at 978

³ *Rex v Wright* 3B. & Ad., 681 at p. 683

⁴ *Land Act 1994* section 95

ROADS—A PUBLIC RIGHT OF PASSAGE (CONT'D)

(iii) by imposing obligations on the owner of land that adjoins a road (including an obligation to fence the land to prevent animals going on the road, for example); and

(f) make a local law to regulate the construction, maintenance and use of—

(i) public utilities along, in, over or under roads; and

(ii) ancillary works and encroachments along, in, over or under roads; and

(g) realign a road in order to widen the road; and

(h) acquire land for use as a road.⁵ (Underlining added)

Interestingly the control includes a power to maintain a road.

The installation of public utilities in roads is permitted, and the common law background under which the adjoining land owner maintains a right to the soil under the road is overcome by this statutory provision.

Local laws may be made in relation to roads and we are not aware of a local government that has not made such local laws.

Many but not all local governments in Queensland adopted a precedent set of local laws and subordinate local laws called the “model local laws”.⁶

A local law cannot be made that establishes an alternative development process except in relation to advertising devices, gates and grids and road side dining.

The *Planning Act 2016* identifies what is development.

TYPICAL LOCAL LAW

Using an example of a model local law, Gympie Regional Council Administration Local Law No. 1 relevantly provides:

Part 2 provides the process for making, considering and deciding applications for prescribed activities and identifying the types of conditions that can be imposed. The Part makes it an offence to carry out a prescribed activity without an approval. It also deals with matters post an approval such as amending, transferring and cancelling approvals.

Part 8 provides for the making of subordinate local laws.

Schedule 2 identifies types of prescribed activities which include:

- alteration or improvement to local government controlled areas and roads;
- commercial use of local government controlled areas and roads;
- operation of temporary entertainment events; and
- undertaking regulated activities on local government controlled areas and roads.

⁵ *Local Government Act 2009* section 60

⁶ *Local Government Act 2009* section 26

⁷ *Local Government Act 2009* section 37

ROADS—A PUBLIC RIGHT OF PASSAGE (CONT'D)

TYPICAL SUBORDINATE LOCAL LAW

Gympie Regional Council Subordinate local Law No.1 (Administration) 2011 relevantly makes matters referred to in the attached schedules prescribed activities for which an approval is required.

We have only included text from 2 of the schedules and simply refer to the headings of the balance.

This is typical of the model local laws.

Schedule 5 Public place activities that are prescribed activities

- 1 discharging a firearm or other weapon in, over or across a local government controlled area*
- 2 a private (invitation only) function attended by more than 75 people*
- 3 a wedding or other ceremony*
- 4 directing or procuring a performance other than a temporary entertainment event*
- 5 conducting a survey*

Schedule 6 Alteration or improvement to local government controlled areas and roads

1 Prescribed activity

Alteration or improvement to local government controlled areas and roads

2 Activities that do not require approval under the authorising local law

(1) An approval under the authorising local law is not required for any of the following activities, provided that the activity is not likely to create a risk to public health, safety and amenity or cause environmental nuisance or harm—

(a) vegetation maintenance by a person of a footpath area immediately adjacent to the person's property;

(b) vegetation maintenance by a person of an area of up to 1.5 metres from the person's side or rear property boundary;

(c) tree planting by a person on the footpath area immediately adjacent to the person's property in the following circumstances—

(i) no more than one tree is planted per road frontage for an urban property; and

(ii) the tree is listed on the preferred tree species list in the local government's planning scheme; and

(iii) the tree does not obstruct visibility of vehicular traffic; and

(iv) the tree is not planted over or under infrastructure and will not be likely to impact on infrastructure;

(d) maintenance of a driveway access;

(e)(Underlining added)

ROADS—A PUBLIC RIGHT OF PASSAGE (CONT'D)

Schedule 7 Commercial use of local government controlled areas and roads

Schedule 11 Operation of temporary entertainment events

Schedule 14 Undertaking regulated activities on local government controlled areas and roads— (a) driving or leading of animals to cross a road

Schedule 15 Undertaking regulated activities on local government controlled areas and roads— (b) depositing of goods or materials

Schedule 16 Undertaking regulated activities on local government controlled areas and roads— (c) undertaking of a public place activity prescribed by subordinate local law

Schedule 18 Parking contrary to an indication on an official traffic sign regulating parking by time or payment of a fee

Schedule 19 Parking in a loading zone by displaying a commercial vehicle identification label

Schedule 20 Carrying out works on a road or interfering with a road or its operation

CONSENT TO DO WORKS IN A ROAD

Consent is required to do works on a road in a local government area.

75 Unauthorised works on roads

(1) *This section applies to a road in a local government area.*

(2) *A person must not, without lawful excuse (including under another Act, for example), or the written approval of the local government—*

(a) carry out works on a road; or

(b) interfere with a road or its operation.

Maximum penalty—200 penalty units.

(3) *Works do not include the maintenance of ancillary works and encroachments, or landscaping, that does not interfere with the road or its operation.⁸*

State controlled roads also have similar requirements in relation to consent.

33 Prohibition on road works etc. on State-controlled roads

(1) *A person must not, without lawful excuse or the written approval of the chief executive—*

(a) carry out road works on a State-controlled road; or

(b) interfere with a State-controlled road or its operation.

Maximum penalty—200 penalty units.

⁸. Local Government Act 2009 section 75

ROADS—A PUBLIC RIGHT OF PASSAGE (CONT'D)

(4) Subsection (1) does not apply to a person who carries out maintenance of ancillary works and encroachments or landscaping that does not interfere with a State-controlled road or its operation.⁹

Interestingly, works do not include landscaping that does not interfere with the road or its operation and consent is not required in those circumstances.

There is a power to impose conditions, require removal, undertake removal and charge the cost of removal for noncompliance.

CONSIDERATION

Local Laws and Subordinate local laws will generally relate to “activities” as opposed to “works”, which are development for the *Planning Act 2016*.

The breadth of application of local laws and subordinate local laws can be gleaned from the Schedule headings.

For example, personal trainers who use Council controlled areas and roads are undertaking a commercial use of those areas.

The activity of maintaining footpaths, part of the road, is excluded from being a prescribed activity requiring an approval.

It does not alter the control given to the Council to maintain the road.

The Council and the community would prefer to see the footpaths properly maintained. That can be achieved where the community and Council work together.

Operational works, such as excavation and fill or vehicle crossovers are matters about which development applications may be needed and about which local laws cannot be made.

This may bring into doubt the legality of subordinate local law schedule 20 Carrying out works on a road or interfering with a road or its operation insofar as it provides an alternative development process.

The local laws are able to be drafted by local government to meet the needs of their constituents.

Consultation and participation by both Council and community in relation to the local laws is to be encouraged and the local laws can be changed to meet those community needs.

⁹ *Transport Infrastructure Act 1994* section 33

If you would like more information on the above topic or advice generally,

Freecall 1300 303 866

please do not hesitate to contact

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