



VERDANT VERGES

The Sunshine Coast Regional Council has recently become embroiled in a turf war over footpath planting. Its response is to provide a Permit Application process under the local laws. This may not be the right process. Development is defined in the *Planning Act 2016* and includes “operational work” which is:

operational work means work, other than building work or plumbing or drainage work, in, on, over or under premises that materially affects premises or the use of premises. (Underlining added)

It is important to note that there must be a “material” affectation.

Materiality must be considered in the context of the use. At common law the use of a road is for a “right of passage”. That use has probably been extended by statutory rights given in relation to the placement of essential services in the road reserve but the extent of those rights may be subject to the history of the creation of the road.

“Premises” is defined in the *Planning Act 2016* as:

premises means—

- (a) a building or other structure; or
- (b) Land, whether or not a building or other structure is on the land.

A road is land that is vested in the State¹ and over which the State has given control, in some circumstances, to local government².

Sunshine Coast Planning Scheme 2014 sets out in table 5.8 categories of development and also in Table 5.8.1 categories of assessment.

¹ Land Act 1994 section **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- (a) this Act, or an Act repealed by this Act or repealed by the repealed Act;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.

² Local Government Act 2009 section **60 Control of roads**

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

VERDANT VERGES (CONT'D)

Assuming that there is a material affectation, an owner of an existing dwelling house simply wishing to landscape the road verge would apply that part of the table under the subheading “Operational work-not otherwise specified in this table”.

That development is categorised as “Accepted Development”, which does not require an application, and there are no assessment benchmarks to regulate that development.

If there is no material affectation it would appear there is little reason for any local government to be concerned. Material affectation may occur as a consequence of interference with other road users and/or the services to be provided in the road.

If the local government wishes to regulate planting vegetation in a council controlled road verge, because it says it is having a “material affect” then it is arguable that it is operational works landscaping, and so is “Acceptable Development”, regulated by the Planning Scheme and Planning Act.

A local government cannot make a local law creating a process to allow development.

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- (1) A local government must not make a local law that establishes an alternative development process.*
- (2) An alternative development process is a process that is similar to or duplicates all or part of the development assessment process under the Planning Act.*
- (3) However, if a local law already contains a provision that establishes an alternative development process, the council may amend or repeal the provision at any time.*
- (4) A local law has no effect to the extent that it is contrary to this section.*
- (5) This section does not apply to a local government's local law about any of the following matters unless the matter is covered by the local government's planning scheme, the Planning Act or another instrument made under that Act—*

- (a) advertising devices;*
- (b) gates and grids;*
- (c) roadside dining.*

In light of section 37 of the *Local Government Act 2009* perhaps a local law is not the right mechanism to permit those verdant verges to bloom.

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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