PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Cordwell Resources Pty Ltd* ACN 066 294 773 *v Noosa Shire Council* [2024] QPEC 18
PARTIES:	**CORDWELL RESOURCES PTY LD** (Appellant) **v** **NOOSA SHIRE COUNCIL** (Respondent)
FILE NO:	D16/2024
PROCEEDING:	Application in pending proceedings
ORIGINATING COURT:	District Court, Maroochydore
DELIVERED ON:	4 April 2024 (Orders) 11 April 2024 (Reasons)
DELIVERED AT:	Maroochydore
HEARING DATE:	4 April 2024
JUDGE:	Judge Long SC

ORDER:

1 **Subject to paragraphs 2 and 3, the Appellant must allow the Respondent's retained experts Mr Christopher Buckley, Mr Donald Reed, Mr Paul King and Mr Stuart Holland to access the land which is the subject of this proceeding during business hours and within 7 days of the Respondent giving notice of the preferred dates and times of its experts to undertake that inspection.**

2 **The Appellant may elect to have one of its representatives accompany the Respondent's experts on the inspection of the land and may require the Respondent's experts to comply with workplace health and safety requirements while on the land, including by completing an on-site safety induction at the start of the inspection.**

3 **All observations and information obtained by the experts from the site inspection to be conducted in accordance with paragraph 1 must only be used for the purposes of this proceeding.**

CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – Appeal against enforcement notice – Where the appellant is occupier of land upon which it operates a quarry – Where the enforcement notice requires the removal or relocation of a processing plant – Where is it sought that the enforcement notice is set aside – Whether the respondent's retained experts should be allowed access to inspect the land the subject of these proceedings
CASES:	*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 *Evans Deacon Pty Ltd v Orekinetiks Pty Ltd* [2002] 2 Qd R 345 *MC Property Investments Pty Ltd v Sunshine Coast Regional Council* [2011] QPEC 99 *Scenic Rim Regional Council v Brecevic* [2010] QPEC 3 *Serratore & Ors v Noosa Shire Council* [2019] QPEC 57 *Warringah Shire Council v Sedevic* (1987)10 NSWLR 335
LEGISLATION:	*Planning Act 2016*, ss 164, 168, 174, 229 *Planning and Environment Court Act 2016*, ss 43, 45, 47 *Planning and Environment Court Rules 2018*, r 4 *Uniform Civil Procedure Rules 1999*, r 250
COUNSEL:	E Morzone KC for the Appellant
	M Batty and S Hedge for the Respondent
SOLICITORS:	Carter Newell Lawyers for the Appellant
	McCullough Robertson Lawyers for the Respondent

[1] These are the reasons for orders made on 4 April 2024 which, amongst other directions as to the future conduct of the substantive appeal before this Court, determined an issue between the parties by the making of orders allowing and relating to, inspection of the property where the issues which are the subject of the appeal allegedly arise. The proposed inspection is to be by each of the experts engaged by the Respondent for the appeal, being a town planner, an engineer specialising in acoustics, air quality and environmental management, a geologist with extensive experience in the quarrying industry and an expert in traffic and vehicle movement issues. Those particular orders were:

> "1 Subject to paragraphs 2 and 3, the Appellant must allow the Respondent's retained experts Mr Christopher Buckley, Mr Donald Reed, Mr Paul King and Mr Stuart Holland to access the land which is the subject of this proceeding during business hours and within 7 days of the Respondent giving notice of the preferred dates and times of its experts to undertake that inspection.
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> 2 The Appellant may elect to have one of its representatives accompany the Respondent's experts on the inspection of the land and may require the Respondent's experts to comply with workplace health and safety requirements while on the land, including by completing an on-site safety induction at the start of the inspection.
>
> 3 All observations and information obtained by the experts from the site inspection to be conducted in accordance with paragraph 1 must only be used for the purposes of this proceeding."

[2] That issue arose upon an application by the Respondent Council in an appeal made to this Court, to the effect of allowing inspections by its experts, pursuant to r 250 of the *Uniform Civil Procedure Rules 1999* ("*UCPR*") and r 4 of the *Planning and Environment Court Rules 2018*, of the situation and operation of a plant at the land upon which the Appellant conducts a quarry at Kin Kin.

[3] The Notice of Appeal was filed by the Appellant on 15 February 2024 and is brought against the giving, by the Respondent to the Appellant as occupier of the land and operator thereon of the quarry pursuant to a town planning consent for Extractive Industry to be conducted on that land, of an enforcement notice dated 17 January 2023. The enforcement notice prescribed certain actions to be taken as to the removal of the plant in issue, or relocation of it to what is described as the "Approved Fixed Plant Area" identified in the Quarry Management Plan ("QMP"), pursuant to which the approved use is to be conducted.

[4] Accordingly, that appeal is brought pursuant to s 229(1) and Schedule 1 Table 1 Item 6 of the *Planning Act 2016* ("*PA*"), as such an appeal is allowed to this Court. It is primarily sought that the enforcement notice be set aside. Strictly speaking, the appeal is against the decision to give the enforcement notice and engages the powers of this Court in s 47 of the *Planning and Environment Court Act 2016* ("*PECA*") and the specifically relevant power pursuant to s 47(1)(c), for the decision appealed against, is to:

> "(c) set it aside and -
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> (i) make a decision replacing it; or
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> (ii) return the matter to the entity that made the decision appealed against with directions the P&E Court considers appropriate."

Otherwise, the further available powers pursuant to s 47(1)(a) and (b) are, respectively, to confirm or change the decision appealed against.

[5] By s 43 of the *PECA*, the appeal "is by way of hearing anew" and pursuant to s 45(3), it is provided that "the enforcement authority that gave the notice must establish that the appeal should be dismissed".

[6] The power of the Respondent as to the issue of an enforcement notice, is found in s 168(1) of the *PA*, as follows (including the definition of an enforcement notice in s 168(2)):

> "(1) If an enforcement authority reasonably believes a person has committed, or is committing, a development offence, the authority may give an enforcement notice to—
> (a) the person; and
> (b) if the offence involves premises and the person is not the owner of the premises—the owner of the premises.
> (2) An ***enforcement notice*** is a notice that requires a person to do either or both of the following—
> (a) to refrain from committing a development offence;
> (b) to remedy the effect of a development offence in a stated way.

Examples are then provided as to what an enforcement notice may require, including "to demolish or remove development". However, by s 168(4), it is provided that:

> "(4) The notice may require demolition or removal of all or part of works if the enforcement authority reasonably believes it is not possible or practical to take steps—
> (a) to make the development accepted development; or
> (b) to make the works comply with a development approval; or
> (c) if the works are dangerous—to remove the danger."

[7] The reasonable belief purported in the enforcement notice was as to the commission of a development offence under s 164 of the *PA*, in that there is contravention of the development approval under which the quarry is permitted to operate because of contravention of a condition of approval requiring that:

> "The quarry is to be operated generally in accordance with the Quarry Management Plan dated February 2016 ("the Approved Quarry Management Plan")."

More particularly, the contention is that a "fixed plant" screener for use in producing manufactured sand ("the Plant") has been constructed and located outside of the "Approved Plant and Infrastructure Areas" identified in the Approved Quarry Management Plan.

[8] Although the enforcement notice requires the removal or relocation of the Plant, the Notice of Appeal does not expressly seek to engage s 168(4) but rather asserts that the enforcement notice should be set aside:

(a) for the reasons that the Court could not be reasonably satisfied that:

  (i) the enforcement notice has satisfactorily established that the alleged development offence has been committed; and

  (ii) the alleged development offence is continuing to be committed; and

(b) that otherwise the enforcement notice should be set aside "in the exercise of the Court's residual discretion".

[9] The Notice of Appeal proceeds to identify contentions, that:

(a) for a combination of reasons, the Plant does not constitute "fixed plant" as described in the Approved Quarry Management Plan;

(b) "the Approved Quarry Management Plan does not provide definite structural requirements to enable flexibility and to ensure that advances in technology

or science relating to quarrying or environmental management, may be utilised during the development of the Quarry";

(c) the use of the Plant for further refinement of product and reduction of noise, dust and waste from the Quarry is in accordance with what is provided in the Approved Quarry Management Plan; and

(d) to the extent that there is any, unadmitted, deviation from the Approved Quarry Management Plan, the requirement is only as to operation of the Quarry "generally in accordance with the Approved Quarry Management Plan".

It is also contended that on 31 August 2023, the Appellant obtained a development permit for building work in respect of the Plant and that "therefore the alleged offence is not continuing to be committed".

[10] More particularly in respect of "exercise of the Court's residual discretion to set aside the enforcement notice", the stated reasons are:

"(a) the Plant has been designed to be relocated;

(b) the Plant has been designed to reduce dust, noise and transport movements from the Quarry; and

(c) the use of portable processing plants beside the sediment pond will defer the need for further clearing of vegetation and land disturbances while the Quarry is further established."

The respondent accepts that the exercise of this Court's jurisdiction in respect of this appeal may include discretionary considerations, such as acknowledged in *Warringah Shire Council v Sedevic* (1987)10 NSWLR 335.

[11] The Appellant does not dispute the power of the Court to make the orders sought in this application, nor is there dispute as to satisfaction of the pre-conditions for engagement of *UCPR* 250.

[12] The respondent does, correctly seek to engage the observations in *Evans Deacon Pty Ltd v Orekinetiks Pty Ltd*,[1] in ultimately settling upon a test of demonstration of "sufficient grounds for intruding on the defendant's property". That approach was

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1 [2002] 2 Qd R 345 at 19. See also, *Serratore & Ors v Noosa Shire Council* [2019] QPEC 57 at [30] – [31].

accepted by the Appellant. However, the Appellant does seek to emphasise that mere relevance of information sought to be obtained by such inspection, may not be sufficient, particularly in the context of the considerations as to:

(a) what is described as the "quasi criminal" nature of the proceedings; and

(b) the extent to which there has been prior inspection of the property by officers of the respondent and the gathering of evidence, particularly in terms of photographs, as material upon which the decision to issue the enforcement notice must have been premised and which is available to inform any further evidence from the respondent's experts.

[13] The respondent cavils with a characterisation of these proceedings as "quasi criminal" in nature. Such description may be seen as arising from an understanding that the core of the proceeding is a question as to the commission of a development offence. However and as the parties accepted, the question is not actually as to whether such an offence is established.

[14] In the first instance the authority for the giving of the enforcement notice by the respondent is to be found in s 168(1) of the *PA*, in terms that such a notice may be given if "an enforcement authority reasonably believes a person has committed a development offence".[2] As the Appellant has done here, the recipient of an enforcement notice may appeal the decision to give that notice and as has been noted, the effect is not limited to a review of the basis upon which the respondent proceeded in giving the enforcement notice. Rather, the effect is to engage the jurisdiction of this Court for a hearing anew of that decision, where the respondent bears the onus of satisfying this Court that there is reasonable belief that the Appellant has committed or is committing a development offence. Necessarily, that must devolve to the establishment of reasonable grounds for such belief, with a practical effect of the presentation of evidence tending to prove or establish the commission of such an offence. However, it remains unnecessary to actually prove the commission of such an offence. Further, the fact that the evidence upon which the jurisdiction of this Court may be engaged, may differ from that upon which the Respondent acted in giving the enforcement notice, is at the heart of this application.

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2 Here there is no issue raised as to the respondent being an "enforcement authority", pursuant to the definition in Schedule 2 of the PA.

[15] Accordingly, there is necessarily limitation as to any characterisation of this proceeding as "quasi criminal" in nature. And as noted in *Serratore,*[3] there is nothing in the obtaining of evidence for the purpose of this proceeding that would "of itself expose the Appellant to prosecution for an offence under s 168(5) of the *PA*", and "whilst the evidence obtained on a r 250 inspection might assist the Council in upholding the enforcement notices, it is the subsequent contravention of the notices, rather than the orders in this appeal, which could potentially expose the Appellants to prosecution for an offence under s 168(5) of the *PA*". But and as the reasoning in *Serratore*[4] proceeded, the underlying issue as to the commission of a development offence, (past and/or continuing) remains a relevant consideration and as was there observed:

> "The relief sought under r 250 is not as of right and should not, in my view, be granted lightly in these circumstances."

[16] In this context, it should also be observed that the *PA* permits the prosecution of a complaint for a development offence, pursuant to s 174. It was the concurrence of such proceedings with those in this Court, in the nature of an originating application seeking enforcement orders, which was a particular matter of concern in the decision in *Scenic Rim Regional Council v Brecevic*[5]. For present purposes the relevance of the decision is in noting that, in those circumstances, the order allowing the inspection pursuant to *UCPR* 250 for the purpose of the proceeding which was before this Court, was accompanied by an additional order restraining the use of such evidence in the proceeding commenced on complaint and summons in respect of a development offence. It may also be noted that a similar restriction was placed on the allowance of a *UCPR* 250 inspection in *MC Property Investments Pty Ltd v Sunshine Coast Regional Council*[6], in the context an argument raised, in that case, that the application was an abuse of process and for an ulterior purpose.

[17] To the extent that an underlying concern of the Appellant lay in notions of compulsory self-incrimination, it was properly conceded that the Appellant here, as a corporation, had no such privilege to protect.[7] Also, it is unnecessary to dwell upon what was noted in the *Brecevic* decision as to any broader concept of

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3 [2019] QPEC 57 at [29].
4 Ibid at [30].
5 [2010] QPEC 3.
6 [2011] QPEC 99.
7 See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. Although, there remained some expression of concern as to any potential liability of individual office holders.

reluctance of Courts in lending "their compulsive processes in aid of proceedings to expose persons to punishment or consequences in the nature of a penalty".[8] This is because, as was ultimately accepted by the Appellant, the raised concerns are adequately met by the Respondent's proposal of an accompanying order to the effect of limiting the use of any evidence obtained upon the inspection, to this proceeding.

[18] Accordingly, the relevant issue devolved to being whether the material filed in support of the Respondent's application demonstrated sufficient grounds for allowing the intrusion onto the Appellant's property and the gathering of evidence in support of the Respondent's case, as it was directed against the Appellant's interests. Some immediately relevant considerations may be seen as lying in the public interest considerations underpinning the concern at which the enforcement notice is directed, as being an allegation of development which is unlawful, in the sense of not being authorised by a development approval. Reliance was also placed upon the notation as to allowance of any such inspection permitting an expert to comply with the code of conduct adopted in the *Planning and Environment Court Rules 2018,* in confirmation that "all enquiries considered appropriate" have been made. The latter consideration is one to which only limited weight may be given because the appropriateness of the enquiry may well be determined by any inability to make it.

[19] Of more importance in the context of the proceeding which is now before the Court pursuant to the appeal filed by the Appellant and more particularly the issues identified in that Notice of Appeal, including as they extend to the potential engagement of discretionary considerations as to any orders ultimately to be made by this Court, is that allowing the inspection will facilitate the proof of the Respondent's case. That, as was properly conceded for the Appellant, is in adoption of an aspect of the reasoning towards the conclusion of requiring sufficient grounds

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[8] [2010] QPEC 3 at [6], or what, in more contemporary decisions such as are discussed in *R v Van Eps* [2024] QCA 46, is recognised as a "companion rule" to the "accusatorial principle" arising from the onus of proof attaching to an allegation of a criminal offence: "that the accused cannot be required to assist in proof of the offence charged". It may also be noted that Practice Direction Number 5 of 2023 (as it is directed entirely at the determination of proceedings involving enforcement notices and enforcement orders and as has been adapted pursuant to practice direction 1 of 2023, at [6], to apply in the Maroochydore Registry as from 15 February 2024), explicitly contemplates election rather than expectation as to any reliance on evidence, in such proceedings, by a person to whom an enforcement notice has been or an application for an enforcement order is, directed.

for intruding on the defendant's property in the *Evans Deacon Pty Ltd*[9] decision, in the further context of the notation there, that the purpose of *UCPR* 250 is "to promote the efficient and economical conduct of litigation".

[20] Here it suffices to note that the Respondent's application was supported by evidence from three of the four engaged experts, in respect of whom allowance of inspection of the Plant and the property was sought, in terms of identification of the desirability of such ability to observe that property and the Plant in its operating context; that is, in conjunction with the operation of the quarry in the approved fixed plant areas. Therefore may be seen as properly directed at the ability of the respondent to deal with the relevant considerations that arise in the context of the Notice of Appeal, including assessment of amenity impacts of the Plant as contended to arise both generally and in respect of the "discretionary considerations". That is, in respect of inspection of the Plant and the operation of it in terms extending beyond the benefit to be obtained from any presently available evidence, in photographic or other documentary form.

[21] The exception was that in respect of Mr Holland whose area of expertise lies in matters relating to traffic and vehicle movements, as the Respondent had been unable, in the time available before the hearing of the application, to obtain any such evidence from him. The reliance was upon an inference arising as to the similar considerations as were commonly identified in the evidence of each of the other three experts. It should be noted that, sensibly, in the circumstances, the Appellant conceded that if this Court was prepared to allow inspection by the other experts, on the basis of the material relied upon, then there was no maintenance of any separate objection to an inspection also being allowed for Mr Holland.

[22] In the circumstances the appropriate conclusion is that there has been demonstration of sufficient grounds for allowing intrusion onto the Appellant's property to allow for the inspection of it by each of the Respondent's four experts, particularly because of satisfaction that such an inspection would properly assist or facilitate the evidence to be given by each of those experts and therefore by assisting the evidence to be obtained by such witnesses, in relation to identified issues in the

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9 [2002] 2 Qd R 345.

Notice of Appeal, thereby serving to promote the efficient and economical conduct of this litigation.