SUPREME COURT OF QUEENSLAND

CITATION:	*Mimehaven P/L v Cairns CC* [2002] QCA 276
PARTIES:	**MIMEHAVEN PTY LTD** ACN 010 979 389 (applicant/respondent) v **CAIRNS CITY COUNCIL** (respondent/applicant)
FILE NO/S:	Appeal No 935 of 2002 P & E Application No 5 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Cairns
DELIVERED ON:	2 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2002
JUDGES:	McMurdo P, Byrne and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Leave to appeal be refused; and** **2. The applicant pay the respondent's costs to be assessed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – REZONING APPLICATIONS – CONDITIONS – where application made for rezoning approval – where application approved subject to conditions in 1994 – where new town planning scheme came into force in 1996 – whether respondent bound by conditions of 1994 rezoning approval after new town planning scheme introduced – whether conditions continued to be binding after the commencement of the *Integrated Planning Act* 1997 – proper construction of s 4.4(3) and s 3.4 of the *Local Government (Planning and Environment)* Act 1990 – proper construction of conditions of rezoning approval *Acts Interpretation Act* 1954 (Qld), s 20(2) *Integrated Planning Act* 1997 (Qld), s 4.1.21, s 4.1.22, s 4.1.56, s 4.1.57, s 6.1.24, s 6.1.24(2) *Local Government (Planning and Environment) Act* 1990 (Qld), s 3.4, s 3.4(2), s 3.4(3), s 3.4(4), s 4.3.1, s 4.4(5),

s 4.4(13), s 4.5(12)

COUNSEL: P J Lyons QC for the applicant
M D Hinson SC for the respondent

SOLICITORS: McDonnells for the applicant
Gaylor Cleland Towne for the respondent

[1] **McMURDO P:** I have read the reasons for judgment of Philippides J in which the facts and issues are set out.

[2] I agree that, for those reasons, the conditions of approval in the 1994 consent order relating to the proposed development of Lots 5 and 6 (a development which did not proceed) have no application to the respondent's completely different development recently undertaken on Lot 5 alone.

[3] I also agree with the primary judge's conclusion that the respondent's development, an as of right permitted development under the 1996 Scheme, was constructed under rights arising from that Scheme, not under rights arising from either the 1994 consent order giving conditional approval to a different development on Lots 5 and 6 or from the subsequent related 1995 amendment to the 1993 Scheme.

[4] Consequently, the application for leave to appeal should be refused with costs to be assessed.

[5] **BYRNE J:** The facts mentioned by Philippides J reveal that the respondent's development was a "permitted development", lawfully undertaken pursuant to an entitlement deriving from the 1996 Planning Scheme, not by virtue of the earlier rezoning. The conditions of that rezoning are therefore not germane to the development to which this application relates.

[6] Accordingly, I agree in the orders Philippides J proposes.

PHILIPPIDES J:

The Application

[7] The applicant seeks the leave of this Court under s 4.1.57 of the *Integrated Planning Act* 1997 ("IPA") to appeal against a decision of the Planning and Environment Court of 12 December 2001 on the grounds of error or mistake in law.

Background Facts

[8] The land, the subject of these proceedings, is described as Lot 5 on Registered Plan 717301, Parish of Cairns, County of Nares, and is situated at 11 Stratford Parade, Stratford, Cairns. It was formerly included under the Mulgrave Shire Council Planning Scheme, which came into force in December 1993 ("the 1993 Scheme"), in the Tourist Facilities (Caravan Park Dwelling and 63 Tourist Site) Zone.

[9] An application was made pursuant to s 4.3.1 of the *Local Government (Planning and Environment) Act* 1990[1] ("the 1990 Act") to rezone both Lot 5 and a nearby lot, being Lot 6, to the Medium Density Residential Zone, based on a proposal to develop 24 two bedroom multiple dwelling units on Lot 5 and 96 two bedroom units on Lot 6. Pursuant to s 4.4(5) of the 1990 Act, the local authority approved the application subject to conditions. On 11 November 1994, a consent order was made in the Planning and Environment Court, approving the application subject to the conditions. An order in Council giving effect to the rezoning was published in the Queensland Government Gazette on 10 February 1995. The Caravan Park Use ceased in February 1995 with no development having been undertaken of the land.

[10] On 29 November 1996, a new planning scheme ("the 1996 Scheme") came into force, pursuant to which, the land is designated as being within the Residential 3 Zone. The respondent thereafter purchased the land and commenced a development of the land for 16 town houses in two stages. Under the 1996 Scheme, that development is appropriately described as multiple dwellings (max 2 stories), which is a "permitted development" pursuant to the table of development relevant to the Residential 3 Zone. Pursuant to the IPA, the development is code assessable and accordingly, the respondent proceeded with the development without obtaining any prior consent of the local authority.

The Decision of the Planning and Environment Court

[11] An application was brought by the respondent before the Planning and Environment Court seeking declarations that it was not bound by the conditions of the 1994 rezoning approval. The applicant asserted before that Court that the conditions continued to apply and that the respondent was liable to pay the water supply and sewerage head-works contributions as required by conditions 13 and 14 of the 1994 rezoning approval. The learned primary judge determined the issue in the respondent's favour and made declarations accordingly.

[12] The learned primary judge held that the conditions in question, being conditions of an amendment to the 1993 scheme by way of rezoning, ceased to have effect upon the 1996 scheme coming into force. His Honour determined that upon its gazettal, the "1996 scheme acquired the force of law and the 1993 scheme was effectively repealed and no longer had any force of law, except that the rights acquired by the [respondent] pursuant to the rezoning approval of 11 November 1994 continued as provided for in subsection 3.4(3) [of the 1990 Act]."

[13] His Honour concluded that:[2]

> "….The only circumstances under which the conditions imposed by the local government on its approval of the amendment to the planning scheme gazetted on 10 February 1995 could apply, is if the original applicant or its successor in title … exercises the rights given by the amendment to the 1993 scheme in accordance with subsection 3.4(3) of the [1990] Act.

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1 The 1990 Act was repealed by s 6.2.1 of the IPA on 30 March 1998.

2 At para [11] – [12].

> In this case, the conduct of the present applicant can in no way be construed as an exercise of rights accruing from the 1995 amendment to the superseded planning scheme. It is clear that the present applicant, in constructing the development which is almost completed, is exercising its right pursuant to the 1996 planning scheme which remains current. The development nearing completion is substantially different to that applied for in 1994 in support of the rezoning approved. The present applicant is constructing a development on one only of the two parcels of land which were subject to that application. It is also of some relevance that the development upon which the 1994 rezoning was based was a Column 2 Development (Permitted Development Subject to Conditions) under the 1993 Scheme whereas the present development is a Column 1 Permitted Development as of right under the 1996 Scheme."

[14] Given that conclusion, his Honour considered that it was not necessary to consider the effect of the repeal of the 1990 Act by the IPA and in particular s 6.1.24(2) of the IPA. Nevertheless, his Honour proceeded as a matter of completeness, to consider the submission that s 6.1.24(2) of the IPA preserved the attachment of the conditions of the 1994 rezoning approval to the subject land in spite of the repeal of the 1990 Act, which submission he rejected. His Honour also rejected the submission that s 4.3(c) of the 1996 scheme, which deals with the preservation of earlier conditions of approval where "the land retains the same zoning as it had immediately prior to the commencement of this scheme", was applicable to preserve the conditions in question.

Leave and Grounds of Appeal

[15] It was submitted that leave should be granted on the grounds that the appeal raises the following important questions:

(a) the proper construction of s 4.4(13) and s 3.4 of the 1990 Act and whether the conditions imposed on a rezoning approval granted in the life of a planning scheme under the 1990 Act continue to be binding when a new planning scheme is introduced under that Act;
(b) whether such the conditions continued to be binding after the commencement of the IPA, given s 6.1.24 of the IPA;
(c) the proper construction of conditions 13 and 14.

[16] The respondent did not oppose leave being granted on the grounds sought. The parties were content that the hearing of the application for leave be treated as a hearing of the appeal, if leave were granted. The proposed grounds of the appeal are that the primary judge erred:

(a) in failing properly to construe and give effect to s 4.4(13) of the 1990 Act;
(b) in law in concluding that the conditions imposed on the 1994 rezoning approval ceased to be effective upon the introduction of the 1996 scheme, because the rights described in s 3.4(3) of the 1990 Act had not by then been exercised;

(c) in finding that there were no provisions of the 1990 Act or the IPA, which require the respondent to comply with those conditions;
(d) in holding that s 6.1.24 of the IPA did not preserve the operation of those conditions;
(e) in failing to construe s 4.3 of the 1996 scheme as preserving the effect of those conditions.

[17] The applicant contended that the conditions imposed under the 1993 scheme survived the replacement of that scheme by the 1996 scheme. The applicant contended that s 4.4(13) of the 1990 Act[3] was unrestricted in terms and did not limit the operation of the conditions in issue to the lifetime of the scheme amended by the rezoning. The applicant also relied on the provisions of s 3.4(2) and (4) and s 4.5(12) of the 1990 Act. In particular, it was said that the significance of s 3.4(4) of the 1990 Act was that it was drawn on an assumption that s 4.4(13) of the 1990 Act preserved the operation of the 1994 conditions, even after a new scheme came into force. It was said that s 3.4(3) of the 1990 Act, upon which the learned primary judge had placed emphasis, was not directed to the operation of s 4.4(13) and that his Honour erred in placing reliance on it.

[18] On the basis that the conditions remained in force on the commencement of the IPA, it was further submitted that s 6.1.24(2) of the IPA had the result that the conditions continued to have effect, notwithstanding the repeal of the 1990 Act.[4] Section 6.1.24(2) of the IPA sets out the circumstances in which conditions, approved under the repealed 1990 Act, which attached to an amendment of "a former planning scheme"[5], continue to attach to the land and be binding on successors in title.

[19] In addition, the applicant contended that, in any event, s 4.3(c) of the 1996 scheme had the effect that the conditions continue to attach to the land and therefore bind the respondent.

[20] The respondent submitted that the conditions ceased to be effective upon the 1993 scheme, being replaced by the 1996 scheme, and contended that s 6.1.24 of the IPA did not operate to preserve the conditions on the repeal of the 1990 Act, because the conditions were attached to an amendment of the 1993 scheme, which was not "a former planning scheme" for the purposes of s 6.1.24 of the IPA. Further, it was said that since the rights in respect of the 1994 rezoning were not exercised in the life of the 1993 scheme, the conditions did not continue to bind the applicant. It was also submitted that if, as contended by the respondents, the IPA does not preserve the operation of the conditions, s 4.3(c) of the 1996 scheme was of no avail, as the 1996 statutory instrument cannot prevail over the 1997 statute.

[21] An additional submission more fully developed in oral argument was that the rights under the 1994 approval were rights which were capable of being exercised under s 3.4(3) of the 1990 Act. However, it was said the respondent was availing itself of the rights conferred by the 1996 scheme, which put the relevant use, multiple

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3 Section 4.4(13) of the 1990 Act provides that "The conditions imposed by the local government on its approval under subsection (5) (as subsequently amended under this Act) attach to the land and are binding on successors in title."

4 It was also submitted that s 20(2) of the *Acts Interpretation Act* 1954 had the effect that the conditions continued to be operative notwithstanding the repeal of the 1990 Act.

5 Defined in s 6.1.1 of the IPA.

dwellings, in column 1 as a "permitted development" and as such, an as of right development. It was submitted that the conditions in question by their terms were not referrable to that development. That submission has much force and leads to the result that, even were the applicant to succeed on its submissions, the conditions would not bind the respondent in respect of the development which has taken place.

[22] In my view, that submission reveals a fundamental difficulty with the applicant's case. That is that, even assuming as contended by the applicant that the 1994 conditions continue to attach to the land and therefore to bind the respondent, those conditions, by their terms, only apply to a particular development, that is, a development "in accordance with the facts and circumstances of the [1994] application". So much is apparent from condition 1, which provides that "[t]he applicant shall at all times during development of the subject land carry out the development and construction of any buildings thereon in accordance with the facts and circumstances of the application as modified by these conditions".

[23] Other conditions are also clearly premised on the assumption that the relevant development is that, the subject of the 1994 application, covering both Lots 5 and 6. For example, condition 5 states that the applicant "shall lodge a Permitted Development Subject to Conditions application for the use of the land for Multiple Dwelling purposes". That is referable to the fact that, under the 1993 scheme, the development, the subject of the 1994 application, fell within column 2 of the table of development as a "permitted development subject to conditions". Condition 9 makes provision for site cover in respect of the "development", making specific provision for the calculation of maximum site cover and developable area for Lot 6. Condition 11 makes provision for the calculation of population density for Lot 6 being based on the area of Lot 6 at the time of lodgement of the application. Condition 18 refers to landscaping obligations in respect of both Lots 5 and 6. Condition 23 requires replacement of existing driveway crossovers for both Lots 5 and 6. Condition 24 specifies that the applicant "shall be responsible to provide a 12 metre wide road dedication … along the western boundary of Lot 6 generally in accordance with Drawing 9403-SP1 (dated 21 September 1994)". Condition 27 specifies that no access "shall be permitted to Lot 6 from Stratford Connection Road via Lot 5" and specifies the manner of vehicular access to Lot 6.

[24] It appears to have been common ground before the primary judge that the development that was proceeded with was not the development in respect of which rezoning approval had been given. Indeed so much was conceded in this Court by the applicant's counsel. I consider that the learned primary judge was correct in concluding that the only circumstance under which the 1994 conditions could apply was if the respondent were exercising rights under the 1994 approval. However, in my view that conclusion follows from the terms of the conditions themselves. In those circumstances, I am unable to see how, on the basis of the matters raised, the applicant would be entitled to the relief it seeks in respect of the development which has taken place.

[25] Further issues arise as to whether the consent order amounted to a contract and, if so, whether, given that the applicant did not seek to enforce condition 1, it may nevertheless enforce other conditions such as conditions 13 and 14. However, those matters, as conceded by both counsel, involved factual issues, which were not litigated before the Planning and Environment Court and therefore could not be dealt with on this appeal.

[26] In the circumstances, it becomes neither necessary nor appropriate to consider the matters raised in the proposed grounds of appeal concerning the interpretation of the provisions of the 1990 Act and the IPA and the issue of whether the conditions in question bind the respondent. Accordingly, I do not consider that this is an appropriate case in which leave to appeal should be granted.

[27] I would order that:

(a) leave to appeal be refused; and
(b) the applicant pay the respondent's costs to be assessed.