SUPREME COURT OF QUEENSLAND

CITATION:	*Ure v Noosa Shire Council* [2002] QCA 208
PARTIES:	**RONALD WILLIAM URE** (applicant/appellant) v **NOOSA SHIRE COUNCIL** (respondent/respondent)
FILE NO/S:	Appeal No 817 of 2000 P&E No 4605 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2002
JUDGES:	McMurdo P, Davies JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Order that the appellant pay the respondent's costs to be assessed**
CATCHWORDS:	ENVIRONMENT AND PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - LAPSE OF CONSENT - where application for consent to erect a dwelling house approved by the respondent Council subject to conditions - where applicant appealed to the Planning and Environment against those conditions and the Court by consent allowed the appeal subject to conditions - where the conditions required the submission of a security - where the conditions provided that the approval lapsed where the use of erection of a building or other structure had not been commenced within four years of the date of issue of approval - whether s 4.13(6A) of the *Local Government (Planning and Environment) Act* 1990 (Qld) which requires a security be lodged within two years or such longer period as may be agreed to by the local government applies - whether the conditions constitute an agreement by the respondent Council for a longer period than two years within which the security is to be lodged

ENVIRONMENT AND PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - VALIDITY - GENERALLY - whether the provision of a security under s 4.13(6A) *Local Government (Planning and Environment) Act* 1990 (Qld) is a pre-condition to the issue of a valid town planning permit under s 4.13(12) of the Act

Local Government (Planning and Environment) Act 1990 (Qld), s 4.12(1), s 4.13, s 4.13(6), s 4.13(6A), s 4.13(12), s 4.13(13)

Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 QdR 593, considered
General Credits Ltd v Ebsworth [1986] 2 QdR 162, considered
Rayner v Rayner [1986] QWN 42, considered
Spann v Starwell Pty Ltd [1984] 1 QdR 29, considered

COUNSEL: P A Keane QC, with J D Houston, for the appellant
P J Lyons QC, with T N Trotter, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Wakefield Sykes (in-house solicitor) for the respondent

[1] **McMURDO P:** I have read the reasons for judgment of Davies JA in which the facts and issues are stated. I will repeat only those necessary to explain my own brief reasons for reaching the same conclusion.

[2] The relevant statutory scheme for town planning consent applications is set out in s 4.13 *Local Government (Planning and Environment) Act* 1990 (Qld) ("the Act"). A local government may approve such an application subject to conditions[1] and may require as a condition the lodgment of security to ensure the applicant complies with other conditions imposed.[2]

[3] Section 4.13(6A) the Act provides that where such security is required to be lodged "and the security has not been lodged within 2 years of the date of the local government's decision or the Court's order, as the case may be, or such longer period as may be agreed to by the local government, the decision in respect of the application is void."

[4] Here, the Planning and Environment Court made a consent order giving town planning approval for the erection of a dwelling house on the land, subject to conditions.[3] One of those conditions was, prior to issue of a building approval, the lodging of $50,000 from the developer and $25,000 from the building contractor, to ensure compliance with other conditions of town planning approval.[4] Under condition 27 of the conditions of approval to the consent order, the approval lapses where, relevantly:

> "(a) the use or erection of a building or other structure associated with the use has not been commenced within four (4) years

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1 s 4.13(5).
2 s 4.13(6).
3 See Annexure A to the Order of 15 November 1995, P&E Appeal No 114 of 1992.
4 Condition 25.

> of the date of issue of the approval, unless application is made and approved by Council for an extension; ."

The appellant did not lodge the security within two years. The issue is whether condition 27(a) above was "such longer period as may be agreed to by the local government" within s 4.13(6A) the Act, so as to avoid the consequences of that subsection.

[5] I agree with Davies JA that the requirement under the conditions of approval to the consent order to lodge the security "prior to the issue of building approval" is an additional requirement to that set out in s 4.13(6A) the Act. A careful reading of s 4.13(6A) in its context within the Act and of the conditions of approval demonstrate plainly enough that their combined effect is that the appellant's town planning approval was conditional upon the appellants lodging the specified security prior to the issue of building approval within two years of the consent order or such longer period as may be agreed to by the local government. Condition 27(a) of the conditions of approval to the consent order was not an agreement by the local government to extend the two year period in s 4.13(6A) the Act. It was merely a further condition of the town planning approval which provided that even if the specified securities were given prior to the issue of the building approval and within two years of the consent order,[5] then if the appellant failed to use or erect the dwelling house within four years of the approval, or some extended period approved by the respondent, the approval lapses.[6]

[6] Here the appellants did not lodge the specified security prior to the issuing of the building approval within two years or any extended period agreed to by the respondent; under s 4.13(6A) the Act the decision approving town planning consent was void before condition 27(a) of the consent order became relevant.

[7] The decision approving the application[7] is void[8] and any permit based on that approval[9] is consequently invalid.

[8] The learned primary judge rightly refused to make the declaration sought. The appeal should be dismissed and the appellant should pay the respondent's costs of and incidental to the appeal, including the costs of the application for leave to appeal, to be assessed.

[9] **DAVIES JA:** This is an appeal pursuant to leave granted on 28 February 2000 against a refusal by a judge of the Planning and Environment Court on 20 December 1999 to grant a declaration that the use of the applicant's land at Noosa Heads for a dwelling house with easement access over adjoining property is lawful.

[10] The applicant's land is situated in the Noosa Shire in the non-urban zone under the town planning scheme for that Shire. In that zone a dwelling house was not, at relevant times, a permitted use but was a permissible use. In June 1991 the applicant applied to the Council for consent to the erection of a dwelling house on that land.

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5 s 4.13(6A) the Act.
6 cf s 4.13(18) the Act.
7 s 4.13(5) the Act.
8 s 4.13(6A).
9 s 4.13(12) the Act.

[11] The application was approved by the respondent Council on 19 March 1992 subject to conditions. The applicant appealed to the Planning and Environment Court against those conditions and on 15 November 1995, the Court, by consent, allowed the appeal subject to conditions.

[12] Those conditions were, relevantly:

> "1 Submission to and approval by Council of building plans in accordance with the Building Act, Council's By-laws and Policies, the conditions of this approval and substantially in accordance with plans drawn by Peter Thompsett numbered … and the Shire of Noosa Planning Scheme apart from where amendments are required or dispensations have been granted in conjunction with this approval.
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> 25 Submission of a cash bond or trading bank guarantee to the sum of $75,000 prior to the issue of Building Approval:-
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> (a) $50,000 from the developer to ensure compliance with the conditions of approval
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> (b) $25,000 from the building contractor to ensure compliance with the conditions of approval.
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> The cash bond or trading bank guarantee will be returned upon payment of the required sums and performance of the conditions of approval.
>
> 26 The provisions of this approval are to be effected, prior to the commencement of the approved use. Council reserves the right to call upon the bond or guaranteed sum referred to in this approval for the purposes of litigation should the use not be conducted in accordance with this approval.
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> 27 This approval lapses where:-
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> a. the use or erection of a building or other structure associated with the use, has not been commenced within four (4) years of the date of issue of the approval, unless application is made and approved by Council for an extension; or
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> b. the use of any premises pursuant to the approval ceases for a period of twelve (12) months."

[13] Then on 6 February 1996 the respondent issued, or purported to issue a town planning consent permit.[10]

[14] The application for the above declaration was prompted by the Council's response to a letter from the applicant dated 12 October 1999 applying for an extension of the time specified in condition 27a. By that date erection of a building had not commenced, no building approval had been obtained for any such erection and no bond or guarantee had been submitted pursuant to condition 25. That application was rejected by the Council by its letter dated 16 November 1999, the Council asserting that, no bond or guarantee having been submitted within two years of the order of the Court, the approval and permit were void by reason of s 4.13(6A) of the *Local Government (Planning and Environment) Act* 1990.

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[10] *Local Government (Planning and Environment) Act* 1990 s 4.13(12), (13).

[15] The question before the learned primary judge and this Court is whether that section invalidates the approval and the permit issued or purportedly issued pursuant to it. In this Court the appellant repeats the alternative contentions rejected by the learned primary judge that:

1. condition 25, read with condition 27, constitutes an agreement by the Council for a longer period than two years within which security is required to be lodged within the meaning of s 4.13(6A); and
2. whatever effect s 4.13(6A) may have on an approval prior to the issue of a town planning consent permit pursuant to s 4.13(12), once that permit has issued, it cannot be invalidated pursuant to s 4.13(6A).

[16] Before turning specifically to those contentions something should be said about the relevant statutory provisions, in the form in which they were at relevant times, and their application to the facts of this case. Section 4.12 of the *Local Government (Planning and Environment) Act* provided relevantly:

> "(1) A person may make application for the consent of a local government by the issue of a town planning consent permit ... where -
>
> (a) the erection of any building … or the use of any premises is a permissible use;
>
> … "

[17] Section 4.13 provides that the local government may make its decision on such an application by approving it, approving it subject to conditions or refusing it: subsection (5). The section then continues:

> "(6) Where a local government approves an application under subsection (5) subject to conditions, it may require as a condition the lodgement of security to its satisfaction by the applicant that the applicant will execute work to be done in relation to the application and the decision pursuant to it within such time as may be determined by the local government.
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> (6A) Where security is required to be lodged to ensure compliance with the conditions of the local government or by order of the Court and the security has not been lodged within 2 years of the date of the local government's decision or the Court's order, as the case may be, or such longer period as may be agreed to by the local government, the decision in respect of the application is void.
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> …
>
> (12) Where in respect of an application for consent -
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> …
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> (b) the Court, upon the hearing of an appeal, determines that the application should be approved and referred to the local government;
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> …
>
> the chief executive officer is to forthwith issue a town planning consent permit … .
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> (13) A permit issued pursuant to subsection (12) is to be issued -
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> …
>
> (b) where an appeal has been instituted -
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> (i) within 14 days (or such longer period as may be ordered by the Court) of the date of the

> determination of the appeal by the Court or the date of withdrawal from the Court of the appeal; or
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> (ii) where, as a result of the determination by the Court or a withdrawal of the appeal by the Court, it is necessary for the local government to obtain security from the applicant to ensure compliance with the conditions of the local government - within 14 days of the date of lodgment of security and the fulfilment of any other preconditions whichever is the later.
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> …
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> (16) Where a permit is issued pursuant to subsection (12), the right to use premises and to erect … any buildings or other structures for the purposes specified in the permit is, subject to the conditions contained in the permit … to attach to the land and be binding on successors in title and continues in force until -
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> (a) it is revoked pursuant to section 4.14; or
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> (b) it lapses in accordance with subsection (18); or
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> (c) the use ceases to be a lawful use pursuant to section 3.1; or
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> (d) it is superseded by the commencement of another use.
>
> (17) An approval by the local government or the Court in respect of an application made to a local government pursuant to this section has no force or effect until a permit has been issued by the chief executive officer.
>
> (18) A permit issued pursuant to subsection (12) lapses where -
>
> (a) the use of land or the use or erection of a building or other structure on land, the subject of the approval in respect of which the permit was issued, has not been commenced within 4 years of the date of issue of the permit or such extended period or periods as the local government upon application being made to it therefor approves; or
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> (b) a use of any premises established pursuant to the permit has ceased for a period of at least 12 months."

[18] There was no question of revocation of the permit pursuant to s 4.14 or of the use ceasing to be lawful pursuant to s 3.1.

Whether the effect of the conditions constituted an agreement by the local government

[19] The appellant's argument is that, because condition 27a. contemplates that the applicant will have four years from the date of issue of the approval to commence the erection of the building proposed and condition 25 contemplated only that the security there referred to would be lodged prior to the issue of building approval, the conditions contemplated that building approval, and consequently prior lodgement of the security, would not be required until such time as would permit commencement of erection of the building within four years of the date of issue of the approval. That part of this security was required to be provided by the building contractor, it is submitted, supports this contention because it would be unlikely that that would be required until immediately before it was contemplated that erection of the building would commence. Therefore, it is said, the conditions are effectively

an agreement to extend the time for the lodgement of such security beyond the two years otherwise required by subsection (6A).

[20] There are obvious difficulties construing condition 25 in this way. In the first place, condition 25 is not, in terms, an agreement to extend the time of two years within which security be lodged. On the contrary, it appears to state an event ***prior to which*** it must be lodged; and that event may be either more or less than two years from the date of the court's order. That indicates an intention rather to state a requirement, with respect to the lodgement of security, additional to that stated in subsection (6A).

[21] Secondly it is not, on its face, an agreement by the local government. It is an order of the court. To that Mr Keane QC for the appellant answers that an order by consent may nevertheless also constitute an agreement by the parties. So it may.[11] But subsection (6A) appears to contemplate an agreement made by the local government after the local government's decision or the court's order for it appears to contrast the local government's decision and the court's order, on the one hand, with the agreement by the local government on the other.

[22] For those reasons I would not construe condition 25 as an agreement by the Council to extend, for a period longer than two years, the time within which security must be lodged.

[23] There is, nevertheless, a difficulty construing condition 25, indeed in giving it any sensible meaning; and that difficulty is relevant to a second contention of the appellant. The difficulty arises from the apparent intention of the legislature that the lodgement of security be a pre-condition of the issue of a town planning permit. This arises in the following way.

[24] Although it follows from s 4.12(1) and 4.13(17) that approval is "issued" by issue of a permit, s 4.13 nevertheless contains, in effect, two limitation periods. The first is for lodgement of security to ensure compliance with conditions of the local government or order of the court which is two years from the date of the local government's decision or court's order.[12] The second is for commencement of erection or use which is four years from the date of issue of the permit.[13]

[25] One reason why the first of these limitation periods, but not the second of them, must date from the date of the local government's decision or the court's order appears to be a requirement that some conditions, namely the requirement for lodgement of security to ensure compliance with the conditions of the local government and other "pre-conditions", must be complied with as pre-conditions of the issue of a town planning permit. That compliance with a condition that the local government obtain security from an applicant to ensure compliance with its conditions is a pre-condition of the issue of a permit is implicit from the reference, in each of s 4.13(13)(a)(i) and s 4.13(13)(b)(ii), to the requirement that a permit

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11 *Rayner v Rayner* [1968] QWN 42; *Spann v Starwell Pty Ltd* [1984] 1 QdR 29 at 35, 39; *General Credits Ltd v Ebsworth* [1986] 2 QdR 162 at 163; *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 QdR 593 at 599.

12 Section 4.13(6A); see also s 4.13(7), s 7.1(2).

13 Section 4.13(18)(a); see also s 4.14(3).

must issue within 14 days of the date of lodgement of that security and the fulfilment of any ***other*** pre-conditions whichever is the later.

[26] If I am correct in that conclusion, security in this case had to be lodged before a permit could validly issue. It is difficult to see, in that case, how that would not always have been prior to issue of a building approval. However the consequence of that is no more than that condition 25, like condition 27, is saying no more than what is required by law in any event.

[27] Mr Keane QC sought to argue that s 4.13(13)(b)(ii) applied only when a court had ordered that such security be a pre-condition of the issue of a permit. But that is not what that section says. Rather it assumes that where, as a result of the court's determination, it is necessary to provide security to ensure compliance with the conditions of the local government, as ordered by the court, provision of that security will always be a pre-condition of the issue of a permit. That follows, as I have said, from the statement that the permit must be issued within 14 days of "the date of lodgement of security and the fulfilment of any ***other*** pre-conditions whichever is the later".

The effect of issue of the permit

[28] The appellant's second argument assumes that the permit purportedly issued on 6 February 1996 was a valid town planning consent permit. However, if the construction of the relevant provisions, to which I have referred, is correct, the permit was not validly issued. It could not have been validly issued until after the security required to be lodged had been lodged (and other pre-conditions fulfilled). It follows that the permit purportedly issued is of no force or effect.

[29] Accordingly this argument also fails and the learned Planning and Environment Court judge was correct in refusing the declarations sought.

Orders

1. Dismiss the appeal.
2. Order that the appellant pay the respondent's costs to be assessed.

[30] **FRYBERG J:** Most of the facts which I regard as material are set out in the judgment of Davies JA, which I have had the benefit of reading. I need supplement them only a little.

Additional facts and statutory provisions

[31] Davies JA has set out several of the conditions which were attached to the consent order made in the Planning and Environment Court on 15 November 1995. The following were also conditions:

> "6. No trees or vegetation of any kind whatsoever on the site are to be removed without the written approval of the Council and advice from the Applicant's geotechnical engineer that no detrimental results will occur. No disturbance of any land below the dwelling house or on the Park Road road reserve will be permitted.
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> 7. A landscaping plan prepared in accordance with the requirements of the Noosa Design Manual is to be submitted to the Shire Planner for approval prior to the issue of

building approval. Landscaping is to be carried out as approved prior to the premises being occupied and shall be maintained at all times thereafter to the reasonable satisfaction of the Shire Planner.

…

19. There is to be no detrimental effect upon the amenity of the neighbourhood by reason of the creation of excessive noise, lighting nuisance or other emissions."

Numerous conditions relating solely to the execution of work in relation to the application were also imposed.

[32] The Planning and Environment Court found that apart from the issue of a town planning permit on 6 February 1996, no relevant events occurred until 12 October 1999. I take it to be implicit in that finding that none of the work referred to in the conditions had been commenced, let alone completed, by that date.

[33] Section 4.13(13) of the *Local Government (Planning and Environment) Act 1990* provided:

"**(13)** A permit issued pursuant to subsection (12) to be issued—

(a) where the time for institution of an appeal has expired and no appeal has been instituted—

(i) where security is required to be lodged to ensure compliance with the conditions of the local government—within 14 days of the date of lodgment of that security and the fulfilment of any other preconditions, whichever is later; or

(ii) where security is not required—within 14 days of the date of expiration of the appeal period and the fulfilment of any other preconditions, which is later.

(b) where an appeal has been instituted—

(i) within 14 days (or such longer period as may be ordered by the Court) of the date of the determination of the appeal by the Court or the date of withdrawal from the Court of the appeal; or

(ii) where, as a result of the determination by the Court or a withdrawal of the appeal by the Court, it is necessary for the local government to obtain security from the applicant to ensure compliance with the conditions of the local government—within 14 days of the date of lodgment of security and the fulfilment of any other preconditions, whichever is later."

Other relevant provisions have been set out by Davies JA.

[34] The appellant sought a declaration that the use of certain land for a dwelling house was lawful. In the circumstances, such a use could be lawful only if it were permitted under a valid town planning permit issued under the Act. The first question, logically, was whether the permit, as issued on 6 February 1996, was valid. The second (and related) question was: if so, was it subject to retrospective invalidation by s 4.13(6A) of the Act. The third question was: if so, was it saved by reason of an agreement under that section.

The validity of the town planning permit

[35] The initial validity of the permit depends upon the proper construction and application of s 4.13(13) of the Act. That subsection defines when a permit must be issued. Read with subs (12), it requires the chief executive officer of the local government to issue the permit within 14 days from a relevant event. Clearly, it sets a latest time for the performance of the obligation. Does it define the period during which the obligation must be performed? The expression "within 14 days of the date of [an event]" is apt to define the period during which an event must occur; but it might only mean, as the appellant argued (citing *Re Dallyn Investments Pty Ltd*[14]), "not later than 14 days after" the date of the event.

[36] The subsection covers four cases, one for each of its four paragraphs. They are defined by reference to whether an appeal has been instituted or whether time for an appeal has expired without one; and (within each of those sets) whether or not security is required to be lodged. Although there is far from perfect symmetry amongst the four paragraphs, they should be given equivalent constructions in the present context. Whether a permit can validly issue before the specified event would not be expected to vary depending upon which paragraph one is looking at.

[37] Two of the paragraphs deal with the case where there is no requirement for the lodgement of security.[15] In those cases, the prescribed time (ignoring the possibility of other preconditions having to be satisfied) is within 14 days of the date of expiration of the appeal period and within 14 days of the date of the determination of the appeal or its withdrawal. In such cases, a permit issued before the relevant time began to run could, if valid, easily frustrate a possible appeal, where the likely issue would be whether a permit should issue or on what conditions. That is a powerful reason for holding not only that there is no obligation to issue a permit until the statutory period begins to run but also that there is a distinct obligation not to do so.

[38] Is there any reason why a similar approach should not be adopted in respect of the other two paragraphs in the subsection? They apply to the situation where security is required to be lodged to ensure compliance with the conditions of the local government. In these cases too, a permit issued early enough could, if valid, frustrate a possible appeal. In addition, s 4.13(6) empowers a local government to require lodgement of "security … that the applicant will execute work to be done in relation to the application and the decision pursuant to it within such time as may be determined by the Local Government". It is easy to understand why the legislature might have thought it desirable that such security should be lodged before a permit is issued. Once security has been given, a developer has every incentive to get on with the job. That is consistent with the evident policy of subs (6A). These factors reinforce a uniform interpretation of each of the paragraphs of subs (13) so far as the present matter is concerned. The submission that "within 14 days of the date" means "no later than 14 days after the date" should be rejected.

[39] The obligation not to issue a permit before the commencement of the statutory period produces the consequence that a permit issued in breach of the obligation is invalid. The same is not necessarily true of a permit issued after the end of the period. As presently advised, I would not construe the statute as imposing a

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14 [1989] 1 Qd R 121.

15 Paras (a)(ii) and (b)(i).

prohibition on issuing a permit after the end of the period, although a chief executive who failed to act in time would be in breach of his duty.

[40] In the alternative, the appellant submitted that subs (13)(b)(ii) applies only to cases where the requirement to lodge security exists as a precondition to the issue of a permit, and does not apply to cases where the requirement is simply a condition of the approval or of the permit. This argument fastened upon the words "other preconditions" in three of the four paragraphs of the subsection. It was submitted that these words imply that the requirement for security referred to in the subsection is also a precondition to the grant of a permit. The present case, it was submitted, is one where provision of security was to be a condition of the permit, not a precondition.

[41] In two of the four paragraphs of subs (13), the trigger for the application of the paragraph is the existence of the need for security "to ensure compliance with of the conditions of the local government". That is the same phrase as occurs in s 4.13(6A). In both subsections the phrase is used to describe a precondition for the operation of the subsection. In one case the precondition introduces a provision describing the timing of the duty to issue a permit. In the other, it imposes a time limit on the lodgement of security. It should be given the same meaning in each case.

[42] The legislative history of the Act and its predecessor throws some light on that meaning. In the Act as passed in 1990, subss (6) and (6A) were numbered as paras (a) and (b) of subs (6). They did not assume their later form until the publication of the first reprint of the Act in 1994. They were then renumbered not by the Parliament, but on the authority of Parliamentary Counsel, apparently to satisfy some then-current fad of drafting practice. The impression of dissociation created by the numeration is therefore misleading. To understand the meaning of subs (6A), it is necessary to refer also to subs (6).

[43] Subsection (6) provides that a local government "may require as a condition the lodgement of security … that the applicant will execute work to be done in relation to the application and the decision pursuant to it within such time as may be determined by the Local Government". This was the first time that such a provision appeared in the planning legislation. Until 1990, the general topic of work required by an application was dealt with in s 33 of the *Local Government Act 1936*. Conditions requiring the performance of such work or a contribution toward its cost had been the subject of much contention for many years, particularly where they related to work external to land the subject of the application. By 1990, s 33 defined when the local government could require contributions for external works or headworks and provided that it could make an agreement with the applicant for the latter to carry out such works at his own expense and within the time specified in the agreement. Such an agreement could contain a term requiring the applicant to give security "that he will fulfil his obligations under the agreement".[16] The principal obligation was, of course, to perform the work within the specified time.

[44] Section 4.13(6), as enacted, demonstrated its concern with such obligations, though not limited to external works. However, it operated in a somewhat different context. The new statutory regime provided a two-step process: approval and

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16 *Local Government Act 1936*, s 33(18E)(k).

permit. It is fairly clear from the wording of the provision that the condition for security authorised by para (a) as enacted (now subs (6)) was one which was attached to the approval. Paragraph (b), as enacted (now subs (6A)) applied where "security is required to be lodged to ensure compliance with the conditions of the local government". That covers cases where the local government has required security as a condition under para (a). In terms, it is capable of a wider application. In its context, I do not think it was intended to have a wider application. A two year time limit on the provision of security for the performance of works, which almost invariably will be required before the use the subject of the application commences, is perfectly understandable. On the other hand, such a limit would be likely to cause great inconvenience if it were applied to the provision of security related to an ongoing use which, in the types of cases where security would be required, would frequently not commence for a considerable time.

[45] In short, because of the legislative history of the provisions and their wording, the better conclusion is that s 4.13(6A) was intended to cover only cases to which s 4.13(6) applied. In all such cases, the provision of security can sensibly be understood as a precondition to the issue of a permit. References to security in s 4.13(13) are, therefore, references to security required under s 4.13(6).

[46] The requirement for the provision of security in the present case was covered by s 4.13(6). The large majority (if not all) of the conditions for the performance of which security was required related to work to be done in relation to the application. It is true that the condition requiring security was not limited to such conditions, but that does not take the case outside s 4.13(6). It follows that this was a case where, under s 4.13(13)(b)(ii), the chief executive officer could not validly issue a permit until the time specified therein began to run.

[47] That is the basis upon which I decide this appeal. In deference to the arguments of counsel, I will add some brief observations on the question of an agreement for a longer period under s 4.13(6A).

Agreement under s 4.13(6A)

[48] The appellant's argument that there was such an agreement fails because no such agreement was proved. The bare fact that the Court made a consent order does not prove the existence of an agreement. Consent orders can be made without there having been any prior agreement. Had there been an agreement for a longer period as described in the subsection, evidence could have been given about it. It is quite conceivable that condition 25 was unilaterally imposed by the Council and not challenged by the appellant. Nor do I accept that a bare consent order may constitute an agreement. Cases such as *Spann v Starwell Pty Ltd*[17], *General Credits Ltd v Ebsworth*[18] and *Fylas Pty Ltd v Vynal Pty Ltd*[19] show that a consent order may reflect an agreement or may evidence an agreement or may be one result of the performance of an agreement. There is a dictum of Lucas J in *Rayner v Rayner*[20] which, at first sight, suggests a consent order may constitute an agreement, but it does not support that view when read in context.[21]

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17 [1984] 1 Qd R 29.
18 [1986] 2 Qd R 162.
19 [1992] 2 Qd R 593.
20 [1968] QWN 42.
21 See also *Alford v Ebbage* [2002] QCA 194.

[49] I leave open the question whether an agreement under s 4.13(6A) can only be made after the local government's decision or the Court's order.

[50] In any event, I agree with Davies JA, for the reasons which he gives, that the terms of condition 25 cannot be construed as an agreement.

Conclusion

[51] The appeal should be dismissed with costs.