SUPREME COURT OF QUEENSLAND

CITATION:	*Caloundra City Council v Pelican Links P/L & Anor* [2005] QCA 84
PARTIES:	**CALOUNDRA CITY COUNCIL** (applicant/respondent) v **PELICAN LINKS PTY LTD** ACN 107 914 590 (first respondent/applicant) **OCC HOLDINGS PTY LTD** ACN 104 553 497 **T/A TITANIUM ENTERPRISES** (second respondent/applicant)
FILE NO/S:	Appeal No 9650 of 2004 P & E Appeal No 252 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	1 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2005
JUDGES:	McMurdo P, Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal dismissed** **2. Applicants to pay respondent's costs of the application to be assessed**
CATCHWORDS:	ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - PLANNING SCHEMES AND INSTRUMENTS - QUEENSLAND - REZONING APPLICATIONS - CONDITIONS - applicants developers of land - granted rezoning in 1996 subject to conditions - one of those conditions was that clearing of native vegetation was to be carried out only with approval - respondent sought declaration in Planning and Environment Court that clearing carried out by applicants was in contravention of that condition and constituted a development offence - whether the condition on rezoning approval was invalid for lack of finality - whether the condition was invalid because it precludes or restrains development permitted as of right by rezoning approval - whether the Council had power to make

condition

Integrated Planning Act 1997 (Qld)
Local Government (Planning and Environment Act) 1990 (Qld), s 4.4, s 4.5
Planning and Environment Act 1990 (Qld)

Great Western Railway v Bristol Corporation (1918) 87 LJ Ch 414, cited
Mison & Ors v Randwick Municipal Council (1991) 23 NSWLR 734, considered
Ogilvie v Foljambe (1817) 3 Mer 53; 36 ER 21, cited
Winn v Director General of National Parks and Wildlife (2001) 130 LGERA 508, considered

COUNSEL: D R Gore QC, with T N Trotter, for the applicants
P J Lyons QC, with R A I Myers, for the respondent

SOLICITORS: Connor O'Meara for the applicants
Heiner & Doyle (Caloundra) for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for ordering that the application for leave to appeal be dismissed with costs to be assessed.

[2] **KEANE JA:** The applicants seek leave to appeal pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) ("the IPA") from a decision of the Planning and Environment Court ("the primary judge") of 24 September 2004. The primary judge declared that certain land clearing carried out by the applicants on their land on 21 July 2004 constituted a development offence.

Background

[3] The cleared area was on the western undeveloped part of land described as Lot 65 SP166661. Lot 65 was purchased by the applicants in May 2004. It comprises 157.4 hectares. It was originally part of a larger parcel which the Caloundra City Council ("the Council") resolved on 5 December 1996 to rezone to "Special Residential, Comprehensive Development (now Special Development), Special Facilities (Service Station Shop and Car Wash) and Special Facilities (Golf Course, Licensed Club, Meeting Rooms, Reception Rooms, Restaurant, Night Practice Range, Gymnasium, Tennis Courts and Practice Range)".

[4] The Council's application to the primary judge proceeded pursuant to s 4.3.3(1), (4) of the IPA on the footing that the applicants had committed a development offence by the contravention of a condition of the rezoning approval. The condition in question was condition A12, which was in the following terms:

> "no clearing of native vegetation is to occur on the subject development site without the prior written approval of Council's Environment Branch. It will be necessary for the applicant and any subsequent owners to make a formal application (including plan) outlining reasons for clearing and identifying the impacts of such clearing".

[5] Lot 65 is covered by Plan of Development No 63, which was prepared pursuant to condition C2 of the rezoning approval and was issued in 1997. The different zones

referred to above applied to different parts of the original parcel, and that part which has since been subdivided as Lot 65 is zoned Special Facilities "Golf Course, Licensed Club, Meeting Rooms, Reception Rooms, Restaurant, Night Practice Range, Gymnasium, Tennis Courts and Practice Range". Lot 65 has been (in part) developed as an 18 hole golf course with facilities.

[6] The applicants' defence to the Council's application was that condition A12 was invalid.

[7] Mr Tamblyn, a consulting engineer, whose evidence was unchallenged, said that prior to April 1995, a major clearing of most of the area the subject of the 1996 rezoning decision had been effected by the original owner so that the only areas of vegetation which remained were kept by the original owner for their environmental and aesthetic value, and for buffering and site management purposes.

The issues

[8] The applicants contend that condition A12 is invalid on grounds which they summarize as:

(a) the finality principle point;
(b) the as of right point;
(c) the legislative power point.

[9] Each of these points depends on the contention that condition A12 was fundamental to the rezoning approval, in the sense that the restriction on clearing imposed by the condition was apt to suspend, or detract from, the rights conferred by the rezoning approval. In aid of this argument, the applicants contend that the learned primary judge erred in taking into account the fact that development had taken place subsequent to the rezoning approval in 1996 in order to reject the applicants' fundamental proposition. The applicants say that the course of development is irrelevant to the proper construction of the terms of the rezoning approval; and that reference by his Honour to the evidence as to the state of the land at the time of the granting of the rezoning approval was impermissible as an aid to the proper construction of condition A12.

[10] The applicants contend, by way of a further and alternative argument, that, even if reference to the physical state of the land at the time of the rezoning was permissible, nevertheless the primary judge's decision was erroneous in concluding that condition A12 can be saved on the footing that it was merely "ancillary" to the rezoning approval.

[11] These contentions were fully developed in argument; and the Court reserved its decision on the question whether leave to appeal should be granted.

The arguments of the parties

[12] The applicants contend that condition A12 "on its face, … has the potential to preclude any development without the prior written approval to which it refers". They argue that this condition could, by a later decision made under it, rob the rezoning approval of its fundamental or substantial operation because that which was contemplated by way of development under the rezoning approval might, by the exercise of a discretion reposed in the Council's environment branch, alter the proposed development in a fundamental way. In this way, so the argument goes, it

infringes the finality principle, as that principle has been elaborated in the authorities.[1]

[13] In relation to the as of right point, the applicants' contention is that condition A12 is so wide on its face, that it may preclude or restrain development permitted as of right by the rezoning approval.[2]

[14] The legislative power point has the same underlying basis as the preceding points, with the further contention in relation to this point being that the primary judge was wrong to regard condition A12 as relating to the "administration" of the planning scheme, rather than to its "substance". The applicants' contention is that condition A12 was concerned, not with "administration", but with the substance of the rights conferred upon the applicants by the rezoning.[3]

[15] It can be seen that the applicants' arguments express, in different ways, the consequences of their primary contention; which is that the restrictions imposed by condition A12 were void because they were apt to suspend, or detract from, the use rights conferred by the rezoning approval.

[16] It may be noted that the consequences of accepting the applicants' contention would seem to be that the whole scheme effected by the rezoning approval is void; and indeed, that it has been void from its inception.[4] The applicants suggest that this startling conclusion may be avoided by the severance of condition A12 from the balance of the rezoning approval.[5] Further, they also submit that, even if severance is not possible, and the whole rezoning approval is and has always been void, it remains the case that they cannot be guilty of the development offence in question. The equanimity of the applicants in the face of the invalidity of the whole scheme may be explicable because the development originally effected on Lot 65, under the rezoning approval, has largely been completed. A return to the status quo ante may well be unthinkable from the Council's point of view.

[17] However that may be, the applicants argue that the consequences of the application of the legal principles on which they rely (if those consequences cannot be avoided by a process of severance) are not to be denied in order to avoid inconvenience, even inconvenience on a grand scale. This approach may be correct, but it does mean that the arguments which lead to such an outcome must be considered with circumspection.

[18] The arguments developed in this Court have undergone some refinement since the proceedings before the primary judge. Stripped to its essentials the applicants' first argument is that condition A12 is apt, potentially at least, to suspend or preclude the exercise of the land use rights conferred by the rezoning approval. This is said to be

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1 The applicants relied in particular upon *Mison & Ors v Randwick Municipal Council* (1991) 23 NSWLR 734 at 739 - 740, *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347 at 352, *McBain v Clifton Shire Council* [1996] 2 Qd R 493 at 496 - 497, *Scott v Wollongong City Council* (1992) 75 LGRA 112 at 116 - 119.

2 Cf *Transcontinental Development Pty Ltd v Pine Rivers Shire Council* (1969) 25 LGRA 7 at 12.

3 Cf *Concore Pty Ltd v Mulgrave Shire Council* [1988] 2 Qd R 395 at 402, 403, *Kwiksnax Mobile Industrial and General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291 at 297.

4 See *Mison & Ors v Randwick Municipal Council* (1991) 23 NSWLR 734 at 739, *Winn v Director General of National Parks and Wildlife* (2001) 130 LGERA 508 at 533 [125], 547 [214] - [215]. Cf *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347 at 352.

5 *McBain v Clifton Shire Council* [1996] 2 Qd R 493 at 496 - 497.

because condition A12 was, by reason of the width of its terms, understood without reference to the physical state of the site when the rezoning approval was granted, apt to prevent completely the use of the land permitted by the rezoning in the form proposed at the time of the rezoning approval. The applicants' alternative argument is that, even if regard may lawfully be had to the state of land as at the time of the rezoning approval, condition A12 was still void because of its potential to affect the use of Lot 65 in the future for some of the possible forms of use permitted by its zoning. It is possible, so the argument goes, that any one of the possible forms of permitted use might require the removal of native vegetation, including regrowth from earlier lawful clearing. If condition A12 means that any one or more of the possible forms of use in accordance with the zoning at any time in the future might be confronted by the restriction on clearing in condition A12, then the condition must be void because it is apt to deny the use of the land permitted by the rezoning. I shall consider these arguments in turn.

[19] As to the applicants' first argument, the respondent points out that, when condition A12 restricted the clearing of native vegetation on the "subject development site" as a condition of the rezoning in 1996, it was speaking of the site as it was when that rezoning approval was granted. In this regard, the uncontradicted evidence shows that the site had been cleared of vegetation to the extent necessary to facilitate the development effected pursuant to the rezoning approval and Plan of Development No 63. As a result, the force of the applicants' arguments, that condition A12 might be relied upon to subject the rights conferred by the rezoning approval to a further decision of the Council's environment branch (the finality point) or to stymie such development altogether (the as of right point), largely disappears. Equally, the legislative power point would fail because condition A12 could not affect the development then proposed at all. The restrictions imposed by condition A12 were irrelevant to the actual exercise of the rights of development conferred by the rezoning and Plan of Development No 63 because there was no native vegetation on those parts of the site where development was contemplated. There was, accordingly, no conflict between the of use rights conferred by the rezoning and the restriction on the removal of native vegetation.

[20] The applicants' first argument must fail, in my opinion, because it was, in fact, plainly possible for the development proposed at the time of rezoning to proceed unaffected by the restriction in condition A12.

[21] The argument of the respondent, at least as it was put in this Court, is not that the course of development can be relied upon as an aid to the true construction of the planning scheme. The relevance of the state of the land is to identify the subject matter of condition A12. The relevance of the fact that the development has been carried out since 1996 without a consent to the clearing of native vegetation is not as an aid in the proper construction of the planning scheme; but as confirmation that, because there was no native vegetation in the way of the development contemplated by the rezoning approval and Plan of Development No 63, the operation of the restriction contained in condition A12 was not apt to impede the exercise, or detract from the enjoyment, of the use rights conferred by the rezoning approval and the associated plan of development. In this regard, the respondent points out that there is no evidence that any further approval was sought or obtained to enable the golf course development to proceed as it did.

[22] As to the relevance of the evidence of the physical state of the land and the course of development, it would be remarkable, in point of principle, if an understanding of the operation of the rezoning approval, subject to condition A12, could not be informed by reference to an appreciation of the physical state of the land at the time the rezoning approval was granted and the plan of development prepared and issued. The impact of the activities contemplated by a proposal for rezoning could not begin to be understood, much less assessed by a planning authority,[6] without an appreciation of the physical realities of the land sought to be rezoned. This understanding of the relevance of the physical reality to a proper understanding of the operation of planning instruments seems to accord with the approach taken in *Mison & Ors v Randwick Municipal Council*.[7]

[23] Further, it would be contrary to long standing authority, to the effect that a written instrument which deals with rights and duties in relation to each unique plot of land must be connected with the physical reality, to deny recourse to evidence which establishes that physical reality. Extrinsic evidence has always been regarded as admissible to identify the plot of land of which the instrument speaks. Thus Lord Wrenbury said in *Great Western Railway v Bristol Corporation*:[8]

> "A contract for sale of Blackacre is unmeaning until you know by evidence what the name Blackacre conveys."

[24] Similarly in *Ogilvie v Foljambe*,[9] the parties agreed upon the sale of "Mr Ogilvie's house"; and evidence was admitted to identify the house. Sir William Grant MR said:

> "The subject matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. The Defendant speaks of 'Mr Ogilvie's house', and agrees 'to give £14,000, for *the premises*'; and parol evidence has always been admitted, in such a case, to shew to what house, and to what premises, the treaty related."

[25] So in this case, reference to extrinsic evidence enables one to identify the native vegetation which is referred to in condition A12.[10] That condition imposed a restriction in relation to the native vegetation which was on the site at the date of the rezoning approval. It may also be the case that it imposed a restriction on the removal of future regrowth upon areas which had been cleared as at 1996; but it is not necessary to resolve that issue because it is clear that the vegetation removed by the applicants was not regrowth on land cleared in 1996.[11]

[26] The applicants sought to support their argument as to the irrelevance and inadmissibility of evidence of the physical condition of the site at the time of the rezoning by reference to the decision of the New South Wales Court of Appeal in *Winn v Director General of National Parks and Wildlife*.[12] In that case it was held that a development consent should be construed by reference to the terms in which

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6 See esp *Local Government (Planning and Environment) Act* 1990 s 4.4(3)(f) which obliged the local government to assess "the impact of the proposal on the environment".

7 (1991) 23 NSWLR 734 at 740.

8 (1918) 87 LJ Ch 414.

9 (1817) 3 Mer 53, 61; 36 ER 21, 24.

10 See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

11 Cf reasons for judgment [35].

12 (2001) 130 LGERA 508 esp at 513 [3] - [5], 544 - 545 [199].

the consent is expressed, and not by reference to documents accompanying the application for the consent unless those documents are incorporated expressly or by necessary implication. This case is not concerned with such a question. Here one is concerned to identify the subject matter of a condition of the rezoning approval.

[27] Once the physical reality of the land which was the subject of the rezoning approval is understood in the light of the evidence of Mr Tamblyn, which his Honour clearly accepted, it seems to me that there was no possibility that the substantive rights of use of the land granted by the rezoning approval and the plan of development contemplated thereby might be entirely defeated by condition A12 or postponed or restricted by a decision by the Environment Branch of the Council.

[28] It is necessary then to turn to a consideration of the applicants' alternative contention, which was that, even if regard is had to the physical state of the land at the time of the rezoning, the potential of condition A12 to suspend, or detract from the use of the site in the future, for example when regrowth had occurred, meant that it was void by reason of one or more of the points relating to finality, as of right use, and the legislative administrative dichotomy.

[29] On the view I take of condition A12, as a condition of the rezoning approval, this argument must be rejected. Condition A12 simply says that to the extent that the applicants, or any other owner of the land, might seek to exercise the use rights conferred by the rezoning of the land in a way which involves the clearing of native vegetation, a further consent must be obtained. To say that is simply not to say that the land may not be used for the purposes for which it was rezoned at the end of 1996, or that its use for such purposes is subject to some further decision by the Council's Environment Branch. To say that a particular development may not be able to proceed because of the necessity to clear native vegetation is a far cry from saying the land may not be used for the purposes for which it has been zoned, or that the zoning is apt to be denied its intended effect.

[30] The applicants' alternative argument depends upon acceptance of the proposition that a condition of a rezoning will be void if it, actually or potentially, places limits or restrictions upon the particular exercise of uses permitted by the rezoning.

[31] Under the *Local Government (Planning and Environment) Act* 1990 (Qld), a local authority which had assessed an application for the amendment of a planning scheme by the rezoning of land pursuant to s 4.4 was authorized by s 4.4(5)(b) to "approve the application, subject to conditions". By virtue of s 4.4(13) the conditions so imposed were said to "attach to the land and [to be] binding on successors in title". Under s 4.5(6) the Governor-in-Council was authorized either to approve the amendment of the planning scheme or to refuse to approve the amendment of the planning scheme. The applicants argue that the absence of a power in the Governor-in-Council to impose its own conditions or to alter the conditions to which the local authority's approval of the application is subject is indicative of a legislative intention that these conditions must be subordinated to the use rights created upon the approval by the Governor-in-Council of the application to alter the rezoning of the land.

[32] The text of the legislation affords no support for such an argument; and not surprisingly there is no support in authority for this view of the legislation. Restrictions, imposed by way of condition on the manner in which land zoned for a

given use is actually used in particular cases, does not mean that the land is used for a different use. It simply cannot be maintained that a zoning of land whereby certain uses are permitted means that any and all forms of permitted land use may be pursued free of any conditions imposed as conditions. The legislation expressly contemplated that the local authority might **subject** its approval of an application for rezoning to conditions. No doubt the conditions must be reasonable and relevant, but there is no suggestion that condition A12 was unreasonable or irrelevant to the approval of the application for rezoning.

[33] The applicants' argument emphasized that Plan of Development No 63 did not impose restrictions on the use permitted by the rezoning by reference to the clearing of native vegetation. In doing so, the applicants seemed to accept that such restrictions, had they been imposed in the plan of development contemplated by condition C2, would have been valid. I cannot see why a similar result cannot be achieved by the use of conditions. There is no reason in authority, principle or the text of the relevant legislation to suppose that a condition of the Council's approval of the rezoning might not limit the particular exercise of the use rights conferred by the rezoning, without altering the kind of use which is permitted. Indeed, in the case of a rezoning to a Special Facilities zone, use rights can be expected to be made site specific. Under the Caloundra City Council Planning Scheme conditions such as condition A12 simply do not purport to alter the uses permitted in a particular zone. They are properly described as "ancillary" to the rezoning approval in the sense that they are apt to regulate the permitted uses of the land without purporting to change those uses.

[34] For these reasons I consider that the applicants' arguments cannot be accepted.

Conclusion

[35] Leave to appeal should not be granted unless the decision from which it is sought to appeal is attended with sufficient doubt to warrant its being reconsidered.[13] I am of the view that any appeal pursuant to a grant of leave would fail on the footing that there is no real doubt that the decision of the primary judge should be upheld.

[36] I would, therefore, dismiss the application for leave, and order the applicants to pay the respondent's costs of the application to be assessed.

[37] **DOUGLAS J:** I have had the advantage of reading the reasons for judgment of Keane JA and agree with them and the orders proposed by his Honour.

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13 *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398 - 400; *Rayner v Whiting* [2000] 2 Qd R 552 at 553.