TRANSCRIPT OF PROCEEDINGS



PLANNING AND ENVIRONMENT COURT P&E No 15 of 1993

O'SULLIVAN DCJ

ALBERTON INVESTMENTS PTY LTD Appellant

and

PINE RIVERS SHIRE COUNCIL Respondent

BRISBANE

.. DATE 26/08/93

JUDGMENT

HER HONOUR: I will deliver my judgment in Planning and Environment application 15 of 1993. I publish my reasons.

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IN THE PLANNING AND ENVIRONMENT COURT P & E Application No. 15 of 1993

HELD AT BRISBANE

QUEENSLAND

Before O'Sullivan D.C.J.

[Re: Alberton Investments P/L v Pine Rivers Shire Council]

BETWEEN:

ALBERTON INVESTMENTS PTY LTD (Applicant)

- and -

PINE RIVERS SHIRE COUNCIL (Respondent)

REASONS FOR JUDGMENT

Judgment delivered: 26th August 1993

Catchwords:

Declaration re validity of certain conditions in Town Planning Consent permits - Extractive industry - Dedication of land to Respondent upon completion - tests to be applied re validity of conditions attaching to Planning Permits - severance of conditions - discretion whether to make Declarations - relevant factors

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| Counsel: | Mr D. Gore Q.C. with him Mr E.J. Howard (Applicant) |
| | Mr C. Hughes (Respondent) |
| Solicitors: | Trilby Misso & Co. (Applicant) |
| | Mr R. Forbes Shire Solicitor (Respondent) |
| Hearing Date: | 4th August 1993 |

IN THE PLANNING AND ENVIRONMENT COURT

P & E Application No. 15 of 1993

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

ALBERTON INVESTMENTS PTY LTD Applicant

AND:

PINE RIVERS SHIRE COUNCIL Respondent

REASONS FOR JUDGMENT

Judgment delivered: 26th August 1993

This is an Application by Alberton Investments Pty Ltd for the following Declarations:

"(1) A declaration that Condition 28 of Town Planning Consent Permit No 690 and Condition 33 of Town Planning Consent Permit 736 are invalid.

(2) A declaration that Town Planning Consent Permit No 690 and Town Planning Consent Permit No 736 remain in force and effect excluding conditions 28 and 33 respectively."

Condition 28 of Town Planning Consent Permit 690 is as follows:

"(a) On completion of the extraction of material from the subject lands and from the adjoining Subdivision 2 of Portion 91, the permittee shall dedicate the land containing the river bank, the land containing the lake together with appropriate buffer areas on the northern, western and southern sides of the lake as park at no cost to Council. Further, an appropriate strip of minimum width of 40 metres and extending from the northern end of the lake to the southern boundary of Johnstone Road shall be dedicated as park at no cost to Council.

(b) ....."

Condition 33 of Town Planning Consent Permit No. 736 is as follows:

"(a) Upon the completion of the extraction of material from the subject lands the permittee shall dedicate the land containing the river bank, the land containing the lake together with appropriate buffer areas on the northern, western and southern sides of the lake at no cost to Council.

(b) ....."

For the purposes of this Application, Conditions 28 and 33 are similar and in these Reasons I shall therefore call them "the Conditions".

Permit 459 was issued on 20 November 1979 for land containing 14.771 hectares and described as Subdivision 2 of Portion 91. This land has frontage to the South Pine River and Johnstone Road. Permit 690 was issued on 24 October 1984 for land containing 9.647 hectares which abuts the land the subject of Permit 459. It has frontage to Johnstone Road and, to a lesser extent, the South Pine River. Permit 736 was issued on 10 December 1985 for land containing 38.66 hectares which abuts the land the subject of Permit 690. It has substantial frontage to the South Pine River.

Counsel for the Applicant submitted that the Conditions are invalid because:

"(a) the stipulated dedications were not required by the permitted extractive industry use, let alone reasonably required;

(b) they were beyond power;

(c) condition 28(a) purports to apply to land which was not the subject of the 1984 application for consent."

They contended that the relevant law is section 33 (16C) of the **Local Government Act (1936) (as amended).**

Counsel for the Applicant referred me in particular to **Hall & Co. Ltd v Shoreham-by-Sea UDC** (1964) 1 WLR 240 and **Bradford City Metropolitan Council v Secretary of State for the Environment** (1986) 1 EGLR 199.

In **Hall** (supra) the condition in question was as follows:

> "(the plaintiffs) shall construct an ancillary road over the entire frontage of the site at their own expense, as and when required by the local planning authority and shall give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land..."

The Court of Appeal held that although the object sought to be attained by the defendants was a perfectly

reasonable one, the terms of the conditions, requiring the plaintiffs to construct an ancillary road at their own expense for the use of persons proceeding to and from adjoining properties and amounting to a requirement that the plaintiffs should in effect dedicate the road to the public without any right to compensation, there being a more regular course available under the **Highways Act, 1959**, were so unreasonable that they were ultra vires.

In Bradford (supra) the Court of Appeal applied Hall (supra). It concerned a road widening condition. The Court said that if the proposed condition is manifestly unreasonable, then it is beyond the powers of the planning authority to impose it, even if the developer consents to it.

In **R v Westminster CC ex parte Monahan** (1990) 1 QB 87 the Court of Appeal referred to **Hall** (supra) and **Bradford** (supra), and went on to make the point that in most instances of a grant of planning permission coupled with a condition based on an ulterior motive, the motive will no doubt be financial or have some financial implications. It noted that in both **Hall** and **Bradford** a condition with financial implications had been imposed with the ulterior motive of furthering the purposes of the local authority.

In attempting to better understand the Conditions, little assistance is obtained from a perusal of the relevant Minutes of the Respondent. The approval generally, and the Conditions in particular, appear in a number of places in the Minutes. I do not propose to set these out in full. They include the following:

Minutes of 2 October 1984:

> "(Referring to six submissions objecting to the proposal), It is agreed that rehabilitation and appropriate planning/landscaping of the areas surrounding the pit or lake should be carried out progressively rather than be left to the time when the operation is almost completed. The Department is of the opinion that the area adjacent to the river bank should ultimately be obtained as park".

> "Committee discuss the future dedication of the river bank and excavated area as a public garden or recreation space with the Shire Planner (Refer to Condition 28)".

Minutes of 17 September 1985:

> (Under the heading 'Site Development and Rehabilitation'), "No specific after extraction land use has been proposed at this time, although fish farming, water based recreation and entertainment and wildlife facilities have been proposed. The applicants have stated that they wish to retain freehold title to the land upon the completion of the extraction".

I am not persuaded from a perusal of the Minutes as a whole, and all the other material put before me, that the dedication proposed was (as Counsel for the Respondent argued) "for the ongoing maintenance and rehabilitation directly required as a result of the dramatic change in the landform being brought about progressively by the extractive industry on the land".

Using the test advanced by Counsel for the Applicant, I find that the Conditions are not reasonably required by the permitted development. They are beyond the power of the Respondent to impose them.

Counsel for the Respondent submitted that the relevant tests as to invalidity are different to those used by Counsel for the Applicant. He submitted that the relevant tests are those contained in **Newbury District Council v Secretary of the State for the Environment** (1981) A.C. 578, **Pyx Granite Co. Ltd v Ministry of Housing and Local Government** (1958) 1 QB 554 and **Kingsway Investments (Kent) Ltd v Kent County Council** (1971) AC 72. These are:

"(i) First, it must have a planning purpose;

(ii) Second, it must relate to the permitted development to which it is annexed; and

(iii) Third, the condition must be reasonable "in the special sense of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** (1948) 1 KB

223, at p. 229, that is it will be invalid if it is "so clearly unreasonable that no reasonable planning authority could have imposed it".

As to test (i), he submitted that the planning purpose of the Conditions was to deal with land use and rehabilitation problems associated with the extraction of sand and gravel in the locality of South Pine River flats. He submitted that this purpose is reflected in various passages in the Minutes of the Respondent to which he took me. He submitted that at the time of imposition of the Conditions the Respondent was mindful of the problem of land ownership in small parcels and the feasibility of land adjacent to the river bank being ultimately obtained as park.

I find that the Conditions are for the purpose of dedication of land to the Respondent, in part for the benefit of the community as parkland. I am not persuaded that the Conditions can be characterized as being for the planning purpose of post-extractive industry land use and rehabilitation.

As to test (ii), he submitted that the imposition of the Conditions with respect to rehabilitation and end use relates to the permitted development. He stressed that the proposal will result in an altered land form within a river flat, and extractive industry can (particularly in sensitive areas such as the vicinity of river banks) have the potential to impact dramatically not just upon the land the subject of the use, but on distant land affected by the network of drainage, rivers and streams. Responsibility for the land and its maintenance after the landform is altered by extractive industry is a matter going to the heart of whether the land should be used for such purposes, and if so, under what conditions.

I accept the validity of these submissions, and consider that they are the reasons why rehabilitation and maintenance conditions are often imposed. However, as I have already stated, I consider that the Conditions are not for this purpose.

I find that the Conditions do not relate to the permitted development to which they are annexed.

As to test (iii), he submitted that it could not be said that no reasonable planning authority faced with the choice of the land remaining in private ownership or part of it being dedicated to the local authority would not, in some circumstances, elect to take responsibility for the ongoing maintenance of part of the land affected by extractive industry. This is particularly so when the locality is environmentally sensitive and where the locality has been subjected to detailed planning consideration. I accept the validity of these submissions. However, I consider that the Conditions go beyond this, and provide for dedication of land to the Respondent.

I find that the Conditions are so clearly unreasonable that no reasonable planning authority could have imposed them.

Using the tests adopted by Counsel for the Respondent, I find that the Conditions are beyond power.

Thus, under any of the tests advanced by Counsel for both parties, the Conditions are invalid.

In view of the findings I have made, it is not necessary for me to canvass the further ground of invalidity raised by Counsel for the Applicant, namely, Condition 28(a) purports to apply to land which was not the subject of the 1984 application for consent.

Counsel for the Applicant submitted that the Conditions can be severed from the approval. They submitted that the fact that the Conditions do not operate until after the use is completed highlights the ease with which severance may be effected.

In **Kingsway Investments v Kent CC** (1971) A.C. 72 the House of Lords referred to the relevant tests. Lord Upjohn referred to whether the invalid conditions went to the root or substance of the planning permission itself and severely restricted the permission applied for;

whether they were purely collateral; whether they were the substance of the grant of permission itself. Lord Morris referred to the difference between cases where permission is granted and where some conditions are super-imposed and other cases in which the condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it. He cited Wilmer L.J. in **Hall** (supra) who referred to conditions which are "fundamental to the whole of the planning permission".

Lord Reid referred to whether the striking out of the invalid conditions would alter the character of the permissions. He also said, at page 90: "Suppose that a planning authority purports to impose a condition which has nothing whatever to do with planning considerations but is only calculated to achieve some ulterior object thought to be in the public interest. Clearly, in my view the condition should be severed and the permission should stand." This passage was cited with approval and applied in **Crichton v City of Moorabbin** (1992) V.R. 372.

Adopting these tests, I find that the Conditions (which I have found to be invalid) can be severed from the Consent Permits.

Counsel agreed that because conditions are invalid as being beyond power, and they can be severed from the approval, it does not automatically follow that the Declarations sought by the Applicant will be granted. They agreed that a discretion is involved.

Counsel for the Applicant submitted that it is doubtful whether the traditional barriers which normally apply to equitable relief apply to Declarations sought under s. 2.23 of the **Local Government (Planning and Environment) Act (1990-1992)** because the Declarations are statutory.

They submitted, in the alternative, that in any event those traditional barriers do not arise here. There has been no delay because the invalid Conditions relate to a future event. The Respondent has not suffered any prejudice. The grant of the Declarations does not prevent

the Respondent from obtaining the desired land as park, in accordance with the usual compulsory acquisition procedures, including the payment of compensation.

Counsel for the Respondent submitted that there are a number of reasons why I ought not exercise my discretion to grant the Declarations sought.

First, he submitted that it is 8 and 9 years respectively since the Conditions were imposed. In that time, the Respondent has adopted a new Town Planning Scheme, the zoning of the land has been changed, the land has been placed in a zone where extractive industry is a prohibited use and the Respondent has adopted new planning documents which deal specifically with extractive industry in this locality. I agree that these are relevant factors in the exercise of my discretion.

There was no evidence concerning the reasons for the delay. Senior Counsel for the Applicant pointed out that the conditions in their terms do not call for operation even now in 1993, and the legal decision in 1984 or 1985 would have been the same.

Secondly, Counsel for the Respondent referred to the availability of an appeal at the time of the imposition of the Conditions. That this is a relevant factor in the exercise of the discretion to grant a Declaration was recognised in **Toadolla Co. Pty Ltd v Dumaresq Shire Council** (1993) 78 LGRA 261, 264. I consider that it is a relevant factor. There was no evidence concerning the reason for the failure to appeal against the Conditions at the relevant time. Since then the Applicant has obtained the benefit of the Consent Permits.

The Respondent has lost the opportunity to impose or argue for the imposition of appropriate security provisions or appropriate rehabilitation conditions, in the absence of the Conditions now found to be invalid. This is a different issue from the one raised by Counsel for the Applicant namely that the rehabilitation goals may be achieved by another route namely compulsory acquisition.

Thirdly, he submitted that Courts will usually decline to grant a Declaration in circumstances where a right of appeal is provided to another specialist tribunal, and cited **Salmar Holdings Pty Ltd v Hornsby Shire Council** (1971) 23 LGRA 14, 23 and **Burwood Municipal Council v Sydney Legacy Appeals Fund** (1980) 39 LGRA 299, 302. Counsel for the Applicant distinguished these authorities on the basis that they concerned circumstances in which the appeal to the specialist tribunal was still available for exercise. This is of course not the situation here.

Fourthly, he submitted that a further relevant factor is that the Respondent has in its Strategic Plan gazetted on 14 May 1988 specifically incorporated the following words, at page 257: "Generally, ownership of inundated land and immediate surrounds after extraction is completed is to be vested with the Council". This passage appears within the implementation provisions of Objective (c) for the Preferred Extractive Industry Areas. These in turn refer to the Strathpine Lawnton Development Control Plan No 8. Within Precinct E4 of the Sand and Gravel Extraction Precincts the Intent refers to use of the land following completion of extraction and rehabilitation for intensive sport and recreational purposes and passive, informal recreation in the remaining parts closer to the South Pine River.

I consider that these are relevant factors in the exercise of my discretion. However it must also be remembered that these planning strategies are capable of implementation by means of compulsory acquisition.

I consider that taking into account all the factors relevant to the exercise of my discretion, the Declarations sought ought not be granted.

I refuse the Declarations sought by the Applicant.