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IN THE PLANNING AND ENVIRONMENT P & E Appeal No 3136 of
COURT 1997

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

JONES FLINT & PIKE PTY LTD Appellant

AND

COUNCIL OF THE CITY OF LOGAN Respondent

AND

KEILAR FOX AND MCGHIE PTY LTD Respondent by Election

REASONS FOR JUDGMENT - QUIRK D.C.J.

Delivered the 7 day of Oct 1997

This novel appeal has been lodged by an objector against the imposition of a condition upon an approval for the rezoning of land from the rural zone to the residential A zone. The land is located in the Browns Plains area and there is no suggestion that its rezoning was in any way inappropriate in a town planning sense.

The appellant is the owner of an area to the west of the subject land which has been developed progressively for residential use. The area of the appellant's land immediately adjoining the subject land has been described conveniently as Stage 8. Further to the west is an area, Stage 7, which is separated from Stage 8 by Scrubby Creek. Stage 7 has been subdivided. Stage 8 has been rezoned to a residential zoning but no application for subdivisional approval has been made in respect of it as yet.

Drawings submitted to the council indicate that when Stage 8 is developed a crossing of Scrubby Creek will be constructed and Lamberth Road, a major local road in the area which has already been extended from Waller Road through Stage 7, will continue on across the creek, through Stage 8 to the boundary of the subject land through which it will, in turn, be extended to Bayliss Road. What is important in this case is that residential development of the subject land does not depend, for the provision of access to the local road system, on any extension of Lamberth Road across Scrubby Creek. Such access will be readily provided by Bayliss Road.

The condition under examination was as follows:

"A contribution of \$5,000 is offered towards the cost of the construction of a bridge on Lamberth Road East across Scrubby Creek to finalise the road network connection between Bayliss Road and Waller Road. To be complied at the time of the sealing of the plan of survey".

The genesis of this dispute appears to be in negotiations that took place between the appellant and the council at the time of the determination of the rezoning approval in respect of Stage 8. On 2 June 1992 the council had indicated in a letter to the appellant that:

"Council will seek as a condition of rezoning and/or subdivision of the (subject land) contributions (as determined by the council) amounting to 50% of the final cost of the creek crossing of the Lamberth Road extension through the subject land. Such contributions are to be reimbursed to Design Resources Pty Ltd as and when monies have been received by way of contribution from the before mentioned land".

However, when the matter was settled and a consent order allowing the rezoning of Stage 8 was made in this Court, no reference to the indication in the letter appeared in the consent order.

In this appeal, the appellant argues that the contribution sought in the disputed condition should be lifted to \$52,500, being 30% of a likely total cost of

the bridge, that proportion reflecting the likely level of usage of the bridge by residents of the subject land when all expected development in the area had taken place. For the purposes of disposing of the case, all parties were prepared to accept the accuracy of the projected cost and likely level of usage without further argument.

The position adopted by the respondent-by-election in respect of the appeal was stated as follows:

- "(a) The applicant contends that no contribution towards the construction of the culverts or bridge across Scrubby Creek within the appellant's lands is "reasonably required"; but
- (b) The contribution of \$5,000 towards such construction (as offered to the council by the applicant) is "relevant" but only on the grounds that the developer offered that contribution to the council and the council accepted that offer in imposing the condition".

The attitude of the appellant is not surprising in the light of the indication it had earlier received from the council regarding a likely future contribution towards the cost of the bridge which had to be constructed to give the planned access to Stage 8. That indication is however of no real assistance in the determination of this appeal.

The matters to be considered in the determination of an application for rezoning approval are found in s.4.4(3) of the Act. The power to impose conditions on an approval is given by s.4.4(5). The prohibition against the imposition of conditions neither relevant to nor reasonably required by a rezoning approval is set out in s.6.1(1C). The operation of this provision was usefully discussed by His Honour Judge Skoien in Crengate Pty Ltd v. Caloundra City Council (1995) QPLR 247. His Honour pointed out (at pages 248-49) that the decision of the Court of Appeal in Proctor v. Brisbane City Council (1993) 81 LGERA 398 accepted that the appropriate test of what may be "reasonably required" is that found in the

judgment of the High Court in Cardwell Shire Council v. King Ranch Australia (1984) 54 LGRA 110, the relevant passage of which was cited by His Honour.

The decision in Proctor went on to point out that the current legislation (by the use of the disjunctive "or") provides that a condition which is not reasonably required may nevertheless be lawful because relevant. The Court added that the mere fact that a condition is relevant will not necessarily be sufficient to justify its imposition and, at page 404, set out a test of relevance being whether it is "defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located".

The evidence in this matter does not support a finding that the contribution sought by the appellant is reasonably required by this rezoning. The rezoning will indicate a recognition of the suitability of the land for further development for residential purposes, but it is not necessary for those purposes that access be provided from the estate across Scrubby Creek to the areas to the west. Although such access will undoubtedly facilitate the movement of vehicles to areas to the west, such a benefit is one which ordinarily arises from the progressive development of separate areas of undeveloped land. It might be pointed out that development of the subject land as intended and the extension of Lamberth Road through to Bayliss Road will make access to areas to the north and east easier for residents of the appellants subdivision and other areas to the west.

Indeed, it should be recognised that other conditions of this approval will involve;

- (1) the dedication of land for road widening purposes in Bayliss Road to the east and Kimridge Drive to the west;
- (2) dedication of land for and contribution to the cost of the construction of a roundabout at the intersection of Lamberth Road East and the extension of Kimridge Drive;

- (3) construction of a two lane roundabout at the intersection of Bayliss Road, Lamberth Road East and Hawthorne Street; and
- (4) construction of road works external to the site along the Bayliss Road frontage.

All of these matters will result in a general overall improvement in local road conditions.

Although it is not determinative of this appeal, it was pointed out by Mr. Beard, a traffic engineering consultant with a close association with the development industry over a long period, that:

"It is normally subdivisional practice for subdividers to construct all of the local roads on their site up to the standard of Lamberth Road. Contributions (or part construction arrangements) are normally only sought for works on higher order roads having arterial function. Developers pay less for lands for subdivision which include major creek crossings or major intersections because they lead to higher development costs per block. For example, (and by way of comparison) there will be significant costs for the developer of the subject land associated with the intersection of Lambert Road and Bayliss Road".

This general acceptance is instructive in that it is, no doubt, an indication of a balance being struck between the inclination of a developer to protect his interests and the reality of development practice. It would also appear to me to be a reasonable approach.

Could it be said then that the condition sought by the appellant is:

"defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located"?

This was certainly not the approach taken by the respondent planning authority who argued, through its council, that:

"It would be inappropriate to impose a condition, the logical consequence of which would require that the

council administer, throughout its planning scheme area, numerous local programs of cross-contributions; apportioning the cost of internal roadworks as between the owners of adjoining or adjacent land regardless of the timing of the developments proposed".

The respondent's council gave a useful example of what would be a condition that might be imposed "in the interests of rational and orderly development", namely a condition that required Lamberth Road to be constructed through the subject land in a position that would conveniently join with the construction of that road through Stage 8. He distinguished the contribution here being sought by the appellant as being one;

"intended to achieve reimbursement of the cost of construction of part of Lamberth Road which will need to be there for Stage 8 regardless of the need for rational or orderly development in the area".

These submissions are, in my view, persuasive and I accept them. I find that the amendment to the conditions sought by the appellant is neither relevant to nor reasonably required by this approval. I am satisfied on the whole of the evidence the onus of showing that the application should be approved in the manner that it has been discharged. The appeal must therefore be dismissed.