PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Landel Pty Ltd & Anor v. Redland Shire Council & Anor* [2000] QPE 082
PARTIES:	**LANDEL PTY LTD** **(ACN 010 889 193) as Trustee of the Lancini Family Discretionary Trust and** **LANDREX PTY LTD** **(ACN 010 740 191 As Trustee of the IDL Investment Trust** Applicants and **REDLAND SHIRE COUNCIL** First Respondent And **LIPOMA PTY LTD** **(ACN 002 203 581)** Second Respondent
FILE NO/S:	No 4020 of 2000
DIVISION:	Planning and Environment
PROCEEDING:	
ORIGINATING COURT:	Brisbane
DELIVERED ON:	21 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2000
JUDGE:	Judge Quirk
ORDER:	
CATCHWORDS:	
COUNSEL:	Mr C.Hughes for the aaplicants Mr S.Ure for the first respondent Mr S.Doyle SC and Mr M.Rackemann for the second respondent
SOLICITORS:	Suthers Taylor for the applicants King and Company for the first respondent Minter Ellison for the second respondent

[1] In this matter declaratory and other relief is sought in respect of an application for a development permit for a material change of use of land at Bunker Road, Victoria Point. The relevant application was made by the second respondent, Lipoma, and

approved by the council. The applicants are the owners of land on the opposite side of Cleveland-Redland Bay Road which is in the process of development.

[2] The applicants are concerned at the impact upon their development of several of the features of the Lipoma proposal and the merits of these concerns were the subject of affidavit material placed before the court. However, for the purpose of dealing with the application it is unnecessary to go into these factual matters.

[3] The specific relief sought is set out in paragraphs 1 to 7 of the originating application. For convenience, the orders sought can be grouped into a number of categories.

[4] At the outset senior counsel for Lipoma pointed out that it would be futile to make the declarations sought as no direct attack had been made upon the development approval granted to Lipoma by the council. Even though Lipoma has lodged an appeal against some of the conditions imposed by the council, the relevant approval has gained the status of a "development approval" by reason of section 3.5.19 of the *Integrated Planning Act* even though its effect is suspended pending the decision of the appeal (section 3.5.19(c)).

[5] It is the development approval which confers rights to develop a particular piece of land and s.4.1.22 which deals with the making of orders about declarations provides in (2):-

> "However, if the order amends or cancels a development approval, the court may only make the order if the court is satisfied the approval was obtained by fraud by the applicant."

There was, in this case, no suggestion of fraud. While it may be that this provision deterred any direct attack on the development appproval it has given rise to some difficulty in construction and fortunately it is unnecessary to rely upon it (or the issue of futility) in deciding this case.

[6] I will deal separately with the various categories of declarations sought.

1. Whether the development approval was one which was code assessable (as the council treated it).

[7] The Lipoma land is, in the relevant town planning scheme (a "transitional scheme" under Chapter 6 of the *Integrated Planning Act*) included in the Shopping zone. Part of the land was included in that zone following approval of an application to amend the town planning scheme by a court order obtained by Lipoma's predecessor in title Chin Hawk. A number of conditions attached to that rezoning approval, and the development proposed by Lipoma, is not entirely consistent with those conditions (e.g., C1 requires that the development be carried out in accordance with plans different to those reflecting Lipoma's intended development).

[8] In December 1999 Lipoma applied to the council for a development for approval of a material change of use and for preliminary approval for building works. While, within the Shopping zone development of the type proposed by Lipoma, is "as of right" under column III (a), the proposal did not comply with certain performance standards under the transitional planning scheme. This took the matter outside the realm of "Self assesable " development and a development permit for a material

change of use and a preliminary for building work was required. The performance standards in respect of which relaxation was required related to car parking and landscaping areas.

[9] The application was one to which Division 8 of Chapter 6 of the *Integrated Planning Act (*particularly S.6.1.28) applied. The application was not one, which, under the repealed *Local Government (Planning and Environment) Act* required public notification. Such a requirement was, under that act, confined to proposals where rezonings (section 4.3(iv)) or town planning consent (s.4.12(iii)) were involved. Accordingly, by reason of s.6.1.28(iii)(a) the relevant application was one which required code assessment only. This was the position which the council accepted.

[10] The applicants here argued that Lipoma was required to apply to change the conditions attached to the Chin Hawk rezoning because they remained attached to the land by reason of s.6.1.24(ii)(a) and Lipoma's proposal is inconsistent with those conditions. The applicant further argued that the only options available to Lipoma are found in s.6.1.35A which deal with applications to change conditions of rezoning approvals under the repealed Act. Sub-section (2) provides

> "A person may –
> (a) make a development application to achieve the change; or
>
> (b) apply under s.4.3(1) or 4.15(1) of the repealed Act to change the conditions."

The applicants went on to contend that, either way, the giving of public notice and impact assessment was called for.

[11] In my view, the latter contention is misconceived and my reasons for holding that view are based on s.6.1.35B which provides:-

> "A development approval given under this Act prevails, to the extent the approval is inconsistent with a condition –
> (a) of an approval given under s.4.4(v) of the repealed Act; or
>
> (b) decided under s.2.19(iii) of the repealed Act."

[12] Accordingly, the Act contemplates the making (and approval) of an application which is not consistent with conditions attached to a rezoning approval under s.4.4.(v) of the repealed Act (as the Chin Hawk conditions were). By reason of s.6.1.35B the relevant development approval prevails to the extent of such inconsistency. The development approval made by Lipoma was applied for and approved under the *Integrated Planning Act* and as I have earlier indicated, public notification was not required and it was an application which required code assessment only. Accordingly the declarations sought in this context can not be made.

2. Declarations in respect of conditionC21 of the Chin Hawk approval

[13] For reasons set out above, I do not believe that it was necessary for Lipoma to rely on condition C21 which provided:-

> "These conditions imposed by council on its approval are binding on successors in title unless otherwise agreed in writing between the appellate and the respondent or unless amended or superceded by subsequent application for rezoning or staged rezoning pursuant to the *Local Government (Planning and Environment) Act* 1990 as amended."

The same can be said of the assertions made that what Lipoma proposes is more than a minor modification of the Chin Hawk approval.

3. As an alternative to declarations regarding the need to change the Chin Hawk conditions, the applicants sought relief in the form of a restraining order preventing Lipoma and the Council from proceeding with the former's appeal against certain of the conditions imposed in the relevant approval. As a further alternative, an order that the applicants be added as respondents to this appeal was sought.

[14] On the material before me there is no basis shown for the injunction sought. Such a remedy could be given only pursuant to s.4.1.22 and would need to be consequential to a declaration made under s.4.1.21. As I have indicated, no such declaration is warranted in this case.

[15] As to the joinder sought, there is nothing in the *Integrated Planning Act* which would appear to give the applicants any right to be:

- Identified as a co-respondent to the appeal
- To elect to become such a co-respondent
- To be otherwise heard as a party to the appeal.

[16] Nor do the rules provide any comfort to the applicants. The Planning and Environment Court Rules (by reason of rule 3(2)) pick up rule 69(1)(b) of the *Uniform Civil Procedure Rules* which provides

> "(1) the court may at any stage of a proceeding order that –
> …
> (b) any of the following persons to be included as a party –
> (i) person whose presence before the court is necessary to enable the court to adjudicate effectually and completely in all matters in dispute in the proceedings;
> (ii) a person whose presence before the court would be desirable, just and convenient to

> enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding."

[17] I am not satisfied on the material before me that the applicants fall into either of those categories. The principles relevant to such a question are conveniently discussed in the recent decision of the Court of Appeal in *Interchase Corporation Limited v. FAI General Insurance Company Limited* 2000 2 Qd.R. 301.

4. Finally the applicants sought a declaration that

> "any determination made in Appeal No D3486 of 2000 with respect to the second respondents lawful point or points of discharge in respect of the subject land cannot bind the applicants unless they are parties to the said appeal."

[18] As was pointed out by senior counsel for Lipoma, if the applicants are not parties to the appeal, no issue estoppel can arise in respect to them. Furthermore, the point was well made (and supported by ample authority) that-

> "Whatever order is made by the court in the appeal, while not binding non-parties in the sense of requiring them to do or to refrain from doing things, or controlling what they can or cannot do, it is conclusive as against the applicants as indeed as against the rest of the world. A judgment is conclusive as to the existence of the order, its state and legal consequences. In that sense it does bind them."

[19] I accept these submissions and I am not prepared to make such a declaration.

[20] For the reasons given, the onus of showing that the applications sought should be made has not been discharged and the application must be dismissed.

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