PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Rivermount Education Pty Ltd v Gold Coast City Council* [2005] QPEC 098
PARTIES:	**RIVERMOUNT EDUCATION PTY LTD (ACN 011 048 981) Appellant** **and** **GOLD COAST CITY COUNCIL Respondent**
FILE NO/S:	BD 2496/2003
DIVISION:	Planning & Environment Court
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	11 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2005
JUDGE:	Judge Alan Wilson SC, DCJ
ORDER:	**Respondent's application dismissed**
CATCHWORDS:	PLANNING LAW – JURISDICTION – Jurisdiction of Planning & Environment Court PLANNING LAW – CONSTRUCTION OF STATUTES – construction of *Integrated Planning Act* 1997, s6.1.1 PLANNING LAW – POWER TO EXCUSE NON-COMPLIANCE WITH AN ACT – Scope of power – *Integrated Planning Act* 1997 Section 4.1.5A *Integrated Planning Act 1997* Cases considered: *Evans v Gold Coast City Council* [2004] QPELR 588 *Harderan Pty Ltd v Logan City Council* (1989) 1 Qd R 524 *Livingstone Shire Council v Brian Hooper & M3 Architecture* [2003] QPEC 063

Oakden Investments Pty Ltd v Pine Rivers Shire Council (2003) 2 Qd R 539

Silva & Fantin v Cairns City Council [2002] QPELR 201

COUNSEL: Mr. J. Houston for the Appellant

Mr. W G. Everson for the Respondent

SOLICITORS: Phillips Fox for the Appellant

McCullough Robertson for the Respondent

[1] Rivermount College is a primary and secondary school at Yatala, with 800 students. It opened in 1992. Its primary access is via Rivermount Drive, but since 1998 its representatives have been engaged in discussions with Council officers about opening up another access via an unmade road from Belair Drive. In 2000 Rivermount formally sought permission to construct that road, and the following year the Council granted a preliminary approval.

[2] Subsequently, Council sought to resile from that approval after receiving a petition against it from local residents. In 2003, when the preliminary approval would have lapsed, Rivermount asked for an extension. Council refused, saying it would be futile, since the original application and preliminary approval were invalid because Rivermount had not obtained, as it should, the consent of the owner of the land – the State. Rivermount took that to be a form of deemed refusal and bought this appeal.

[3] Council now raises, as a preliminary point, the contention that the appeal itself is not within the jurisdiction of this court. It also contends the court has no power to permit works on a road reserve; that the preliminary approval was unlawful and invalid without the written consent of the owner; and, that Rivermount's request to extend the currency period of the preliminary approval was not, in the absence of that consent, properly made.

[4] Ownership of roads is vested, in Queensland, in the State[1]. It is common ground that Rivermount's application for a development permit to build the road was not accompanied by the written consent of the State of Queensland, as required by the *Integrated Planning Act* 1997, s 3.2.1(3). In preceding discussions, Council had never suggested that was required, and did not raise it before granting the preliminary approval, presumably because it did not believe consent was necessary.

[5] The belief is not surprising: under the *Local Government Act* 1993, s 901, a local authority has control of roads and the capacity to take all steps for their construction and improvement – as Council advised Rivermount in a letter of 29 November 1999, before the application was lodged.

[6] Much later, when the matter was raised with it, the State (in the guise of the Department of Natural Resources and Mines) advised that if its consent had been sought, it would have been given[2].

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[1] *Real Property Act*, 1861, Section 119; *Land Act* 1994, Sections 94 & 95; *Land Title Act*, Section 2000

[2] letter Department of Natural Resources and Mines to Phillips Fox, 28 August 2003

[7] Among the associated hurdles Council has now sought to place in Rivermount's path is the contention, too, that Rivermount failed to use the right form and process for its application. Council had plainly accepted the power it had been granted under section 901, and exercised it through its Local Law No.11 (Roads and Malls), which addresses the circumstance where a person seeks to effect changes or improvements to a road, stipulates what the applicant must tell the Council, and enables the latter to impose conditions.

[8] Although Rivermount lodged a form of application now used under the IPA process (IDAS), correspondence which preceded and accompanied Rivermount's application contained references to the Local Law, of which both parties were plainly aware. There is no suggestion the form did not contain information, or address matters, in the sufficiency required under that Law.

[9] Certainly, Council did not raise the matter, and seems to have been quite untroubled by it, when advising Rivermount[3] that it had granted a preliminary approval[4] for operational works to construct the access road, subject to specified conditions including the lodgement of an application for operational works which would include detailed engineering drawings. Council did not, and could not, contend that the process actually used deviated from that which might have occurred under Local Law No.11, in any way which caused prejudice to it.

[10] Council now says, however, that because the local transitional planning scheme in force at the time did not include roads in any of its zones, applications concerning developments on roads cannot attract the jurisdiction of this court. Council traces a path to this submission through various IPA provisions[5] but the argument ultimately hinges upon the meaning of the phrase "assessable development" in IPA, which has a definition of it in s6.1.1.

[11] Under that section, assessable development includes development which under the previous legislation would have required an application to be made for a continuing approval, including development on State land[6]. The inclusion of the latter might appear to go some way to resolving the matter but, because the application lodged by Rivermount does not immediately fall into any of the categories set out in Part 17 of the former planning scheme[7], and because this process involved, in truth, an application for a permit under Local Law No.11, Council persists with the contention that it does not involve something which can qualify under the definition.

[12] While it is true that roads were excluded from zones under the former planning scheme[8] they nevertheless remain, of course, a part of the local government area, and subject to specific controls (and powers) in respect of which this Council's predecessor accepted responsibility, under Local Law No.11. The limited construction propounded by Council ignores other provisions of IPA, including

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[3] letter 2 April 2001

[4] A *preliminary approval* is a creature of IPA, which approves development but does not authorise its actual occurrence, and requires the applicant to obtain a subsequent development permit.

[5] Sections 3.1.4, 3.1.5, 4.1.2, 4.1.30, 6.1.1, 6.1.2, Schedule 10

[6] which would otherwise have been exempt under the former legislation, the local government (Planning & Environment) Act 1990

[7] Albert Shire Planning Scheme

[8] Clause 3.2.2

s6.1.23(1)(d) which makes it clear that the phrase "continuing approval" in section 6.1.1 encompasses a term of very wide ambit. As the learned authors of *Planning and Development (Queensland)*[9] suggest, references to development under the former legislation in the definition of "assessable development" do not limit it only to matters for which there was an approval process under that legislation, but give effect to the various forms of approval under planning schemes, by whatever name they were called[10].

[13] It would be surprising if Council could escape, by this route, the consequences of its own conduct in giving approval (in circumstances where it had power to do so, under the Local Law) but, even ignoring that aspect of the matter, it seems clear that the drafters of IPA intended to include, within assessable development, such things as the form of approval originally granted here. In the event, I am satisfied the matter lies within the court's jurisdiction.

[14] Secondly, Council contends that, even with jurisdiction, this court has no power to order the Respondent to permit the carrying out of works on the road reserve. There is certainly good authority for the proposition that a court will not order local government to carry out things like road works,[11] but that is not what Rivermount ever sought.

[15] Finally, Council argues that without the written consent of the owner the preliminary approval was unlawful and invalid, and the request to extend its currency period futile. The court has power, however, to excuse non-compliance with IPA provisions[12] and has been prepared to exercise that discretion in circumstances like those arising here[13].

[16] There are a number of factors which would attract the exercise of that discretion in Rivermounts favour, and tell against granting Council the relief it seeks. Rivermount brought its application in accordance with advice and directions from Council, and no objection was taken to that until many years later; the proposed development is in a road reserve and there must always have been an expectation by the public that development would, eventually, occur; there is evidence of need for it to happen; and, the owner of the land would not have objected. In any event, the carrying out of the work is still subject to proceedings for the extension of the existing approval and a further application for, and the granting of a development permit.

[17] The Respondents application is dismissed. I did not understand the proceeding before me to include an application by Rivermount under section 4.1.5A but, if that was intended, will hear further submissions.

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[9] Fogg, Meurling & Hodgetts, Para 7185
[10] *Livingstone Shire Council v Brian Hooper & M3 Architecture* [2003] QPEC 063, at [33] and [39]
[11] *Harderan Pty Ltd v Logan City Council* (1989) 1 Qd R 524 (FC)
[12] Section 4.1.5A
[13] *Oakden Investments Pty Ltd v Pine Rivers Shire Council* (2003) 2 Qd R 539; *Evans v Gold Coast City Council* [2004] QPELR 588 at [8]; *Silver & Fantin v Cairns City Council* [2002] QPELR 201 at [12]