PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

No 1434 of 2007

BRISBANE LAND PTY LTD Appellant

and

PINE RIVERS SHIRE COUNCIL Respondent

BRISBANE

..DATE 10/09/2007

ORDER

CATCHWORDS: Integrated Planning Act 1997 s 3.5.21, s 3.5.22, s 4.1.5A - where development approval lapsed at expiration of the "relevant period" (currency period) - whether timely written notice "before approval lapses" of an extension being asked is a "requirement of the Act" held that there was a discretion to extend time where such notice was given late and that it should be exercised favourably

HIS HONOUR: This application within the underlying appeal against the Council's refusal of its "Request to Extend [a] Currency Period of [a] Development Permit" seeks relief under section 4.1.5A of the Integrated Planning Act 1997 by way of an extension of time for giving written notice by such a request. The applicant is in the embarrassing situation of its development permit having lapsed under section 3.5.21 of the Act:

"3.5.21 When approval lapses if development not started

(1) To the extent a development approval is for a material change of use of premises, the approval lapses if the first change of use under the approval does not happen within the following period (the ***relevant period***) -

(a) 4 years starting the day the approval takes effect; or

(b) if the approval states a different period from when the approval takes effect - the stated period.

2. To the extent a development approval is for reconfiguring a lot, the approval lapses if a plan for the reconfiguration is not given to the local government under section 3.7.2(2) within the following period (also the ***relevant period***) -

(a) for reconfiguration not requiring operational works - 2 years starting the day the approval takes effect;

(b) for reconfiguration requiring operational works - 4 years starting the day the approval takes effect;

(c) if the approval states a different period from when the approval takes effect - the stated period.

3. To the extent a development approval is for development other than a material change of use of premises or reconfiguring a lot, the approval lapses if the development does not substantially start within the following period (also the ***relevant period***) -

(a) 2 years starting the day the approval takes effect;

(b) if the approval states a different period from when the approval takes effect - the stated period.

(4) Despite subsections (1) and (2), if there is 1 or more related approvals for a development approval mentioned in subsection (1) and (2), the relevant period is taken to have started on the day the latest related approval takes effect.

(5) If a monetary security has been given in relation to any development approval, the security must be released if the approval lapses under this section.

(6) The lapsing of a development approval for a material change of use of premises or reconfiguring a lot does not cause an approval mentioned in subsection (3) to lapse.

(7) In this section -

related approval, for a development approval for a material change of use of premises (the ***earlier approval***), means -

(a) the first development approval for a development application made to a local government or private certifier within 2 years of the start of the relevant period, that is-

(i) to the extent the earlier approval is a preliminary approval-a development permit for the material change of use of premises; or

(ii) to the extent the earlier approval is a development permit or a preliminary approval for development mentioned in section 3.1.6(3)(a)(ii) or (iii) - a development permit for building work or operational work necessary for the material change of use of premises to take place; and

(b) each further development permit, for a development application made to a local government or private certifier within 2 years of the day the last related approval takes effect, that is for building work or operational work necessary for the material change of use of premises to take place.

related approval, for a development approval for reconfiguring a lot (also the ***earlier approval***), means-

(a) the first development permit for a development application made to a local government within 2 years of the start of the relevant period, that is -

(i) to the extent the earlier approval is a preliminary approval - for the reconfiguration; or

(ii) to the extent the earlier approval is a work related to the reconfiguration; and

(b) each further development permit, for a development application made to a local government within 2 years of the day the last related approval takes effect, that is for operational work related to the reconfiguration."

Although the applicant was aware of the limited duration of its development approval, (indeed, concedes it had advice from a consultant of 23 January 2007 that the currency period would be "ending in 2007", the issue of compliance in a timely way with section 3.5.22:

"3.5.22 Request to extend period in s 3.5.21

(1) If, before a development approval lapses under section 3.5.21, a person wants to extend a period mentioned in that section, the person must, by written notice -

(a) advise each entity that was a concurrence agency that the person is asking for an extension of the period; and

(b) ask the assessment manager to extend the period.

(2) The notices must be given at about the same time, and the notice to the assessment manager must include a copy of each notice given under subsection 1(a).

(3) If the person is not the owner of the land to which the approval attaches, the request must be accompanied by the owner's consent.

(4) Subsection (5) applies if an application for the approval were made at the time the request is made and evidence under section 3.2.1(5) would be required to support the application.

(5) The request must also be accompanied by the written agreement of the chief executive from whom evidence would need to be obtained under section 3.2.1(5).

(6) If the assessment manager has a form for the request, the request must be in the form and be accompanied by the fee -

(a) if the assessment manager is a local government - set by a resolution of the local government; or

(b) if the assessment manager is another public sector entity - prescribed under a regulation under this or another Act.

(7) A request under this section may not be withdrawn."

was overlooked.

The relevant development permit, which (among other things) approves a material change of use for some 32 residential lots in the previously rezoned lot 7 - part of stage B10, Glenwood Estates; was issued by the Council on 15 March, 2003, received by the applicant on the 18th. The requisite written notice was not given to the Council until 30 March 2007, a modest couple of weeks late.

The explanation for that was that delays occurred in the obtaining of authority thought to be required for removal of vegetation.

Ultimately the State authority concerned in that aspect (the Department of Natural Resources) advised that it was not necessary for the applicant to obtain any such authority in the circumstances. The explanation apparently lies in official mapping of vegetation being changed.

If there had been a development permit for vegetation clearing obtained from the Department of Natural Resources, the issue of it would have had the effect of extending the period open to the applicant for getting on with its development. See s 3.5.21(4).

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It may or may not be reasonable to attribute some of the responsibility for delay to the Department of Natural Resources, in that it took a long time to advise the conclusion that it had no need to issue any permit. The application for vegetation clearing was lodged on 14 October 2004, the advice issued on 19 February 2007.

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The overall development project the applicant is engaged on is, by common consent, well advanced. Hundreds of lots have been produced and sold. The Council is supportive of the development and to the extent that its attitude is known from a number of communications from its offices, if there had been a timely request for extension of what used to be called the

"currency period" - in section 3.5.22 it is now differently described - the Council would have been willing to grant the extension sought. It took the view that it could not grant an extension upon a request made by written notice after the development approval lapsed on 15 March 2007.

For what it is worth, the applicant has continued to be engaged in seeking various authorities in respect of relatively minor matters in Stage B10, such as provision of electricity.

Section 4.1.5A is in the following terms:

> "4.1.5A How court may deal with matters involving substantial compliance
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> (1) Subsection (2) applies if in a proceeding before the court, the court-
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> (a) finds a requirement of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with; but
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> (b) is satisfied the non-compliance, or partial compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred on the person by this or the other Act.
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> (2) The court may deal with the matter in the way the court considers appropriate."

The difficulty which the Council points to as confronting the applicant - although its attitude today is to abide the Court's order - arises from the Court of Appeal decision in Lamb v. Brisbane City Council [2007] QCA 149, in particular, from paragraph [46] on: there must be identified before section 4.1.5A can be available a "requirement" of the Act.

In the circumstances of Lamb, there was no way in which the Act could be said to produce a requirement that a person entitled to make a "development application (superseded planning scheme)" was required or obliged to make such an application. Such a person might well have been content if any planning application were made to make it under the current planning scheme.

Lamb has occasioned some change in the generous approach to the application of section 4.1.5A which had come to be adopted in this Court. The change is exemplified in McNab Developments Pty Ltd v. Toowoomba City Council [2007] QPEC 069; the Court was concerned with the entitlement of Glenvale Properties Pty Ltd to be joined as a co-respondent in an appeal by a developer seeking to achieve a development permit rather than the preliminary approval which the respondent council had granted. Entitlement to participate in the appeal depended upon the applicant there having made a "properly made submission". Although the provisions in the Act and actual practice gave rise to possibilities of the council entertaining a submission other than a "properly made" one, the entitlement to appeal depended on the submission being

"properly made". Although Judge Rackemann accepted that Glenvale's intention was to make a properly made submission, in the document completed, its address did not appear, so that definition of "properly made submission" was not satisfied.

The question before his Honour was discussed in paragraph [7] and following in light of the decision in Lamb. He concluded that there could not be identified any requirement of the Act given that, among other things, it was not incumbent upon a person wishing to make a submission to make a "properly made" one.

Shortly before McNab Developments, Judge Wilson in National Properties Group v. Toowoomba City Council [2007] QPEC 074 published the judgment on which Mr Gore QC, for the applicant here, relies.

I agree entirely with what his Honour said at paragraphs 12 to 15 and take the liberty of repeating it here:

> "[12] The emphasis on the word *requirement* in s 4.1.5A(1)(a) is to be understood in the context of the circumstances arising in each of these cases where, in each instance, it was not a procedural step in the IDAS path which fell for consideration but, rather, the primal question whether the process which brought the matter before the court was deficient in some fundamental respect.
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> [13] At first blush, the applicant here might be thought to face the same difficulty: as it is framed, s 3.2.12 does not immediately present as something expressing a 'requirement'. It is simply a lapsing provision, which applies automatically where the onus to take the next step under the IDAS process falls upon an applicant. In other words, it does not 'require' an applicant under the IDAS process to commence the notification stage; rather, it simply states what will happen if the applicant does not do so within the nominated period.

> [14] The provision plainly cannot, however, be read in a vacuum. It is an element of the procedures set up in the complex IDAS system, which have a consistent theme - to ensure the development assessment process is undertaken fairly, logically and progressively, and without undue delay. It depends, for its operation, upon the occurrence (or not) of events referrable to ss 3.4.4, and 3.4.3. Read together - as, logically, they must be - these provisions point inexorably, it seems to me, to a clear 'requirement' of IPA: that for a development application to remain alive and effective (for the purposes of the IDAS process) between the *Information and Referral* and *Notification* stages, the latter must be commenced within 20 days of completion of the former.
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> [15] This construction sits comfortably on the broader canvas of Chapter 3 of IPA, where to speak of the many other progressive, logical and interlinked steps within the IDAS process and the various time limits applicable to them as something other than 'requirements' of the legislation would be to ignore both the nature of the processes themselves and, also, the ordinary meaning of the word including its primary, dictionary meanings - eg, the Macquarie first defines 'require' as *'need; depend for success or fulfilment'.*"

National Properties Group was concerned with section 3.2.12 as the lapsing provision in the Act, whereas the applicant's concern here is with section 3.5.21.

In my view the considerations are the same; I have not thought it necessary to devote time to further deliberations after today's hearing, in which the Court was greatly assisted by written submissions filed by the applicant. In view of may having taken the opportunity to read the relevant filed material and the submissions and also in view of my having considered similar matters in the pre-Lamb era on a number of occasions. The first occasion was Roy Somerville Projects Pty Ltd v Logan City Council [2006] QPEC 021, when I noted the decision in Ramsgrove v Beaudesert Shire Council [2005] QPEC

116, which, at that time, was the subject of an application to the Court of Appeal for leave to appeal. It was understood that the question for the Court of Appeal was the presently pertinent one of whether an application (or, presumably, an approval) which has lapsed by force of the Act can be revived by the Court taking action under section 4.1.5A.

What I said on that occasion indicates that I was somewhat sceptical about the possibility of something which has lapsed in that way reviving. A similar question arose in Coolong Pty Ltd v Gold Coast City Council [2006] QPEC 027, in which I took the opportunity to look into the consequences of a statutory "lapse" in some detail, referring to authorities including the decision of Fullager J in Esso Research and Engineering Company v Commissioner of Patents 102 CLR 347, 34 ALJR 83 which contains an interesting discussion of the ability of a tribunal to extend a period to prevent something lapsing after it has by definition lapsed. The reasons in Coolong refer to a number of the decisions in this Court in which section 4.1.5A was used in the way the applicant seeks here. A third matter was Samford Child Care Centre v Pine Rivers Shire Council [2006] QPEC 036, in particular paragraph [9], where it was opined that there was "some question of the Court's ability to revive a lapsed application by recourse to section 4.1.5A as occurred in Ramsgrove." I noted again that the views of the Court of Appeal were awaited. My understanding is that because the would-be appellant elected not to devote further funding to the exercise, the application to the Court of Appeal for leave was abandoned.

All of the potential discretionary considerations strongly tend to support that of s 4.1.5A as sought by the present applicant, assuming the section is available. The Court of Appeal's views may now not be sought for some time.

In those circumstances the decisions in this Court which I collected and Judge Wilson's recent one are a persuasive collection of authorities favouring the applicant, assuming that there is statutory "requirements not complied with" properly identified. There would be introduced a possibly mischievous conflict of decisions in this Court were I to yield to my expressed misgiving.

The inclusion in the Act of provisions such as 3.5.21 serves a very useful purpose. No-one would want to have development approvals extant forever, reserving to the owner of a site a never-ending ability to effect a particular development which, as the years pass, might become highly inappropriate for the site in its locality. The books contain examples of cases of that kind in which local governments have declined to extend currency periods. The present circumstances, for all that appears, are very different, with the Council supportive of the development. There is little attraction in an outcome which determines that an approval in such circumstances has irretrievably lapsed. The point upon which I agree with Judge Wilson is that, for section 4.1.5A purposes, a step that must be taken to prevent the lapsing of an application or approval may properly be seen as a "requirement" of the Act. It would

be unfortunate to have to reach any other decision, given the Council's attitude and the determination of the applicant, which has persisted over the years and still persists, to pursue its development. It is unnecessary here to give any attention to the case in which an application or approval appears to have been abandoned.

Given the role reserved to concurrence agencies by section 3.5.22(1)(a), which is relevant in the present circumstances, Mr Gore has taken the cautious approach that, rather than seek an order disposing of the whole appeal in his client's favour today, matters ought to be put in the state that would pertain had a timely application been made under section 3.5.22; that, I think, is entirely appropriate.

The Court's order is, therefore, that in respect of the development permit reproduced at page 81 of the affidavit of R M Caswell, filed the 13th of July 2007, the time for giving written notice as required by section 3.5.22(1) of the Integrated Planning Act 1997 be extended to the date seven days after the date of this order. Liberty to apply is granted as well.

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