[2009] QPEC 126

PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

P & E Appeal No 2846 of 2009

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| KELLY CONSOLIDATED PTY LTD | Applicant |
| and | |
| IPSWICH CITY COUNCIL | Respondent |
| and | |
| CHIEF EXECTUIVE DEPARTMENT OF TRANSPORT AND MAIN ROADS | Co-Respondent |

BRISBANE

..DATE 23/10/2009

ORDER

CATCHWORDS

Integrated Planning Act 1997 s 3.5.33

Directions made for conduct of application - application seeks change of development conditions set by court precluding sale of lots in a subdivision until completion of certain roadworks - developer wishes to implement "stages 1, 2 and 3" - condition was imposed at behest of Council in an appeal in which Main Roads Department (a concurrence agency which refrained from imposing conditions) was inactive - Department now wishes to be able to argue for retention of condition (which Council is willing to relax) - developer foreshadows application to exclude Department as a party - Department loathe to incur substantial costs in that situation

HIS HONOUR: This is a fight about directions. The applicant developer is proceeding with a large subdivision at Yamanto ultimately to contain in excess of 200 lots under the authority of development approval constituted by an order of the court in May 2008.

The parties were the same as those in the present application which seeks under section 3.5.33 of the Integrated Planning Act 1997 to have conditions incorporated in the court's order changed. The condition of concern provides that no plan of survey shall be sealed until such time as roadworks described as the "Kerners Road deviation" have been constructed. The council is responsible for construction of that deviation.

Mr Connor, for the applicant, tells the court he understands that things are well advanced so far as allocation of funds and the like is concerned. He is anxious to get reliable information from the council as to progress. If that is sufficiently heartening, it may affect the attitude of the co-respondent.

Mr Connor's client has been disappointed at progress in relation to the Kerners Road deviation to date. For perfectly understandable commercial reasons, it doesn't wish to commit the large amounts of money that would be required for development of its subdivision until it has some clear idea of when it will be able to sell lots and generate a cashflow.

The council are sympathetic to the application which seeks relaxation of the condition so that it will allow the first

three stages comprising 81 lots to go ahead.

The difficulty in the way of the court's dealing with the matter almost immediately is the co-respondent's stance. The co-respondent wants some time to formulate an attitude to the application which was filed only on 2 October this year.

The situation is unusual in that the co-respondent was inactive in the appeal. The relevant condition was imposed by the council. It could have been imposed by the co-respondent, which has standing in the matter, because part of the site abuts the Centenary Highway extension. Mr Connor appeared to me to be asserting that the co-respondent really had no business intervening now, potentially in defence of the relevant condition, it being one imposed by the council, in circumstances where the co-respondent has, as a concurrence agency, deliberately refrained from suggesting a condition. Mr Connor nevertheless took the cautious approach of joining the co-respondent in this application which he correctly says nothing in the Integrated Planning Act appears to require him to do.

My own approach, for what it is worth, is that prima facie parties to the proceeding in the court which results in a development approval are appropriate parties in a separate application designed to change it. There will, of course, be many exceptional cases. I have been involved in some myself.

The co-respondent's department has the mandate to ensure the safe and efficient operation of the State

controlled roads system, which ought to be respected. In my view, the court ought to be cautious about overriding the department's views, although I have recently been persuaded in an appeal that that was the appropriate outcome: Keith L Noble & Sons Pty Ltd v Caboolture Shire Council [2009] QPEC 49.

As it happens, the considerations that are relevant apply to parts of the road system, State controlled and other, remote from the site and from the Centenary Highway extension. The condition appears to have been designed to divert traffic moving to and from the Warwick Road via Kerners Road, North Deebing Creek Road and Ash Street which provide the link from the subject site to Warwick Road, far to the north. The link is accessed by the existing overpass constructed across the Cunningham Highway. The Kerners Road deviation represents a shortcut, indeed the shortest side of what's effectively as isosceles triangle.

Mr Connor, obligingly, stated that I was close to the mark in hypothesising that there might have been objections from local residents in the three streets I've named to increased local traffic generated by the development.

Mr Connor has foreshadowed that an application might be brought to have the co-respondent excluded from participation in this application. The Court's not asked to resolve any such question today. The mere posing of it concerns the co-respondent in a relevant way. There is no enthusiasm for directions which oblige the co-respondent to engage experts

and commit them to activities beyond the point of meeting and preparing a joint report to the preparation of separate points.

Ms Brien indicates her client doesn't wish to be at risk of wasting expenditure should her client be excluded from further participation in the proceeding.

The court is pleased to hear that the department has appointed a traffic consultant and has no difficulty about the relevant experts, including that consultant, meeting and preparing a joint report.
The court's made an order, the terms of which are as follows:

> Upon the Court being satisfied that there has been compliance with the provisions of the Integrated Planning Act 1997 with respect to service of the originating application -
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> It is ordered that:
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> (1) by 4 November 2009 the co-respondent and respondent serve on the appellant a notice setting out its position with respect to the application to change conditions, the respondent to set out progress made and anticipated in construction of the Kerners Road deviation to the best of its ability;
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> (2) by 4 November 2009 any party that opposes the changes

sought to conditions must serve on the parties a list of disputed issues about the proposed changed condition;

(3) the grounds of dispute in this application are those identified in the Originating Application and identified pursuant to paragraph 2 herein;

(4) by 6 November 2009 the parties must serve a list specifying the name and field of expertise of each expert intended to be called by them to give evidence at the hearing of the application;

(5) by 12 November 2009 each of the experts identified must meet with their corresponding expert to discuss the disputed issues relevant to their field of expertise with a view to settling or limiting the disputed issues in the application and prepare a joint report;

(6) the matter be set down for mention on 13 November 2009;

(7) the appeal be allocated two days for a hearing in the March 2010 pool with liberty to apply for an earlier hearing if Court time becomes available;

(8) any application by the applicant to have the co-respondent excluded from the proceeding must be filed and served by 6 November 2009;

(9) the parties have liberty to apply on the giving of two business days' notice.

The terms are an amalgam of Ms Brien's proposed draft and Mr Connor's, the latter in respect of allocation to a 2010 pool, and seeking to require provision of information from the council.

It is a matter of regret that the February pool has been closed off at this early stage. I have made provision for the application to come on sooner should court time become available.
The applicant, I think I have indicated, in March 2008 failed to get authority to get its development underway to the point of selling some allotments. That was supposedly attributed to a rosy view being taken of when the Kerners Road deviation might be in operation.

The applicant has a general and valid commercial concern which the Court ought to accommodate as well as it can. It is important, given mandate referred to, that the co-respondent have adequate time to formulate an attitude, but I think the court should be astute to do what it can to ensure that, having gained the council's cooperation, the applicant isn't held up any more than is absolutely necessary.

Order as per initialled draft.

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