PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98
PARTIES:	**TAMBORINE MOUNTAIN PROGRESS ASSOCIATION INCORPORATED** *Applicant* v **SCENIC RIM REGIONAL COUNCIL** *First respondent* And **HYACINTH DEVELOPMENTS PTY LTD (ACN 100 627 709)** *Second respondent*
FILE NO/S:	3122/2008
DIVISION:	Planning and Environment
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court of Queensland, at Brisbane
DELIVERED ON:	20 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2009; further written submissions received up to 24 September 2009
JUDGE:	**Alan Wilson SC, DCJ**
ORDER:	**1. Declare that the approvals referred to in paragraph 1 of the applicant's Amended Originating Application filed by leave on 7 September 2009 were *ultra vires* and have no lawful effect.** **2. Declare that the plan of development which the respondent purported to approve by letter to the second respondent dated 12 March 2008 is not generally in accordance with the plan of development approved as part of the original rezoning of the site.** **3. Refuse the relief sought in paragraphs 3 & 7 of the Amended Originating Application.**

4. **Declare that development of the site in accordance with any of the approvals referred to in paragraphs 1 & 2 above is unlawful.**

5. **Declare that any purported approval of building work on the site in accordance with those approvals is *ultra vires* and has no lawful effect.**

6. **Order that all work on the site other than work which has lawful approval is to cease immediately.**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – VALIDITY – where Respondent Council approved rezoning of land in 1990 – where terms of original approval altered by three further approvals given between 2004 and 2006 – where Developer Second Respondent acquired land in 2005 - whether three further approvals made by Respondent Council were beyond power – whether the plan of development approved by the Respondent Council in March 2008 is generally in accordance with the plan of development approved as part of the original rezoning – whether the Respondent Council had the power to approve the reconfiguration application and the subsequent change to it – whether the Appellant has caused undue delay in these proceedings – whether work on the site that does not have lawful approval should cease

Integrated Planning Act 1997 s 3.5.24, s 3.5.33, s 4.3(1), s 4.3(4), s 4.4(5), s 4.15(1), s 5.1(3), s 6.1.29(3)(b), s 6.1.35A, *Local Government (Planning and Environment) Act* 1990 s 4.3(1), s 4.3(4), s 4.4(5), s415(1), s 8.10(9), s 8.10(9(A))

Cases considered:
Bon Accorde Pty Ltd v Brisbane City Council (2008) 163 LGERA 288
Cameron v Mt Isa City Council [1981] QPLR 183
Stubberfield v Redland Shire Council [1995] 1 Qd R 332
Walker v Noosa Shire Council [1983] 2 Qd R 86
Warringah Shire Council v Sedevic (1987) 10 NSWLR 355
Young v Gosford City Council (2001) 120 LGERA 243

COUNSEL: *M Labone* for applicant
M Hinson SC and *N Andreatidis* for first respondent
N Markham, director of the second respondent, in person

SOLICITORS: *MacAllan Lawyers* for applicant
Corrs Chambers Westgarth for first respondent
Second respondent self-represented

[1] In 1990 the Beaudesert Shire Council approved the rezoning of land at Mt Tamborine from 'rural' to 'special facilities' to accommodate a proposed tourist facility. The original rezoning approval for the land[1] described the 'Special Facility' as '*tourist facility including restaurant, fruit tree and flower farm, crafts, fruit tree produce and flower sales; motel and residential units (maximum of 135 bedrooms); office and manager's residence generally in accordance with Plan No. 8891/24 dated 9 August 1990'* .

[2] The terms of the original approval have been significantly altered as a result of three further approvals in 2004 – 2006; and, by Council's determination in early 2008 that additional changes were 'generally in accordance with' the original approved plan of development; and, by Council's approval, later in 2008, of a development application for reconfiguration of the land from 3 lots into 52 lots under a community title scheme.

[3] These matters exercised the Progress Association (and attracted a lot of publicity in the local community) and last year it commenced proceedings for declarations that those changes were unlawful. Scenic Rim Regional Council, which absorbed Beaudesert Shire Council in recent local authority amalgamations, now agrees with some of the Association's contentions.

[4] Ms Peat, the secretary of the Progress Association, has filed[2] a vast affidavit with some nine hundred pages of attachments including many of the documents relating to the changes wrought to the original proposal over the past two decades. The most striking change is from the composite position of the residential units originally proposed, namely, 50 two and three bedroomed attached or semi-detached dwellings, to 135 single bedroom tourist accommodation units comprised of 43 detached units, and 92 residential units in one and two storey blocks with parking for 20 coaches and about 85 visitor parking bays.

[5] Mr Markham, director of Hyacinth Developments, says it is an innocent, but now much persecuted[3], party in these events; and that the Progress Association's delay in bringing these proceedings warrants refusing the relief it seeks, on discretionary grounds.

[6] The Association's amended application[4] seeks declarations that the three purported amendments in 2004-2006 (called, by the parties, the 'Minor Change' applications) were beyond the Council's power and of no effect; that the approval of the plan of development approved in early 2008 as being 'generally in accordance with' the plan of development approved at the time of the original rezoning could not, in truth, be described in that way; and that the reconfiguration or subdivision approval was also unlawful. It is convenient to deal with these matters in the same order.

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1 The land is Lot 4 on RP 109956 and Lots 4 and 5 on RP 178733 and is situated at 78 – 88 Curtis Road, 211 – 223 and 225 – 231 Long Road, and 25 Tamborine-Oxenford Road, at North Tamborine.

2 On 8 July 2009, court documents No. 22-27.

3 See Mr Markham's supplementary affidavit sworn 11 September 2009 and exhibits to it.

4 Filed by leave on 7 September 2009.

The Minor Change Applications

[7] The original rezoning application was approved by the Council on 4 September 1990, but not finally approved by the Governor-in-Council until notified in the Government Gazette on 8 April 1993. In the intervening period the *Local Government (Planning and Environment) Act* 1990 (the P&E Act) came into effect on 15 April 1991, and the original application for rezoning became subject to its transitional provisions.

[8] They included s 8.10(9) and (9(A)) which provided that an application which had been made, but not finally approved by the Governor-in-Council before the commencement of the P&E Act, was to be dealt with as if that Act had not commenced; and, that if the application was subsequently approved it was to have force and effect as if approved under the P&E Act (but any conditions attaching to it would still apply as if that Act had not commenced). Later, the P&E Act was repealed by the *Integrated Planning Act* 1997 (IPA) after which any proposed changes to the original rezoning and its conditions became subject to IPA's transitional provisions.

[9] Each of the minor change applications approved by Council in December 2004, July 2005 and December 2006 required, as the evidence conclusively establishes, changes to the conditions attached to the original rezoning. IPA has a transitional provision, s 6.1.35A, which directs that applications to change conditions of rezoning approvals under the repealed P&E Act require either a development application to achieve the change, or an application under s 4.3(1) or 4.15(1) of the P&E Act. Section 6.1.35A of IPA applied because the minor change applications were applications to change original conditions of approval deemed to have been given under s 4.4(5) of the P&E Act (pursuant to the transitional provision 8.10(9A) mentioned earlier).

[10] Each of the applications was, however, made on its face under s 3.5.24 or 3.5.33 of IPA which, Council now concedes, did not apply. The concession is proper and necessary because a rezoning approval is not a 'development approval' as defined by IPA or, therefore, something which can be changed under s 3.5.24. Nor is a request under s 3.5.33 an application under s 4.3(1) of the P&E Act.

[11] There is also authority that a change to the description of a special facility zone requires a rezoning of the site itself: *Cameron v Mt Isa City Council* [1981] QPLR 183. That would be impact assessable under IPA's provisions and require a development application. None of those things occurred.

[12] Finally, the planning scheme in force at the time of the minor change applications was the transitional Beaudesert Shire Planning Scheme 1985 which remained in force until replaced by the Beaudesert Shire Planning Scheme 2007, which came into effect after 30 March 2007. An amendment to the original rezoning required an amendment to the Planning Scheme and, therefore, public notification under the repealed Act, s 4.3(4).

[13] For a number of reasons, then, Council did not have the power to act under IPA s 3.5.24, or 3.5.33 and its three minor change approvals were beyond power, and of no legal effect, and the Progress Association should have the declaration sought in clause 1.

The 'generally in accordance' Determination

[14] Clause 2 of the originating application seeks a declaration that the plan of development which Council purported to approve by letter of 12 March 2008 is not generally in accordance with the plan of development approved as part of the original rezoning. Again, Council concedes this point.

[15] As set out in paragraph [1] above, the original rezoning in 1993 required development of the site to be 'generally in accordance with' an approved plan. When Hyacinth sought to change the development in 2007 Council pointed out that it could not do so under IPA s 3.5.33 ('Request to change or cancel conditions') because the original approval was a rezoning under the earlier repealed legislation, but suggested the change could be affected if, as it indicated it was prepared to do, Council recognised the changes remained 'generally in accordance with' the original approval.

[16] There were, however, two difficulties with this proposition. The immediate problem is that the plan Council apparently used for the purpose of comparison was not the plan approved in the original rezoning, but a much later one. Secondly, as a report from a town planner, Mr Panaretos[5], vividly illustrates the changes were much too dramatic to qualify within the ordinary meaning of that phrase, whichever plan was used for comparison.

[17] As his unchallenged evidence showed, the changes (when compared with the original plan accompanying the rezoning) included two new uses; would trigger the involvement of new referral agencies; and, (as I accept) would have been likely to prompt additional submissions. Comparison with the plan Council used (which was probably produced in 2007) was similarly unhelpful; it involved a significant intensification, with the introduction of 92 additional residential units and such things as a waste water plant which represented assessable activity.

[18] Council's decision is, with respect, inexplicable and incomprehensible. It's concession on this point at the hearing before me was, again, proper and necessary. For these reasons the Association ought to have the second declaration it seeks.

The Subdivision Approval

[19] In August 2006 Hyacinth made a development application seeking to reconfigure the land, in a way which included a proposed use for *'50 residential lots and tourist facilities'*. Council approved the application in June 2007, and an amendment to it in November 2008. The Progress Association says both decisions were unlawful, and invalid. Council disagrees.

[20] There is an ancillary point, connected with this part of the proceedings here. Hyacinth did not apply for a material change of use but Council's decision notice of 5 June 2007 recorded that the application was approved in full with conditions, and those conditions included a development permit for a material change of use. Council accepts that it cannot approve something not sought in the development

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5 Exhibit 6.

application and to the extent that the reconfiguration approval purports to be an approval for a material change of use it was beyond power, and of no effect.

[21] Otherwise, however, I am persuaded that the approval for reconfiguration was lawfully given, and the later change was lawfully approved. In particular, it is clear that Hyacinth was entitled to make a development application and Council had power to assess and decide it. Much of the Progress Association's attack upon these events amounted, in effect, to an identification of matters that go, not to Council's power to decide the application, but, rather, its merits – which, for present purposes, are largely irrelevant.

[22] As submissions for Council show, the original approval under the 1985 Planning Schemes included a right to develop residential units. That term was not, however, defined in the Scheme and in its ordinary meaning would generally refer to both temporary and permanent residential accommodation. Here, the opening words of the Zone Description for the rezoned land ('*special facilities (tourist facility ...')* limit the residential units to temporary accommodation for use by tourists, and not by permanent residents. Otherwise, relevantly, the Table of Zones for that zone in the 1985 Scheme provided that the purposes for which buildings or other structures could be erected or used, without the consent of Council, were the particular purposes indicated on the Scheme Map – and, here, those purposes incorporated all the terms in the original approval set out in paragraph [1].

[23] There was, then, a use right for residential units but neither the zoning nor the old planning scheme required all of the permitted uses to be developed at the same time, or in any particular order; nor did they prevent development of the residential unit use first. It follows that the reconfiguration was not, on its face, discordant with the rezoning approval.

[24] Reconfiguration of a lot is an assessable development under IPA, and requires Code assessment. Under s 6.1.29(3)(b) and (h) Council was required to assess the application having regard, amongst other things, to the Transitional Planning Scheme, matters set out in s 5.1(3) of the repealed P&E Act, and any other matter with which regard had to be given if the application had been made under that repealed Act.

[25] Under s 5.1(3) assessment was directed towards the proposed use of each of the proposed allotments; the provisions of the Planning Scheme which regulated subdivision; and, any other relevant matters. The 1985 Planning Scheme included a subdivision by-law and the Progress Association draws attention to some of its clauses but they are not, I am satisfied, relevant here.

[26] The Association also argues that the reconfiguration approval is unlawful because it is based on a plan of development that had no lawful effect; that Council took into account, irrelevantly, unlawful approvals and failed to pay proper heed to the only relevant consideration, ie the lawful rezoning approval in 1993; and, that the approval is contrary to the zoning.

[27] Certainly, Council was bound to consider the zoning of the land when deciding the subdivision application but, it appears, it did so. The Association submits that the plan of development in the old zone description must inform the decision to approve the subdivision and that the allotments in it have boundaries which do not accord

with the old plan. As Council submits, however, the old rezoning approval does not purport to deal with subdivision. The land consisted of only three allotments and nothing, in it, is relevant to subdivision as a process. Once that is appreciated, it will also be understood that the old plan of development did not identify any required or preferred subdivision layout.

[28] Otherwise, the rezoning of the land amended the old Planning Scheme and determined the purposes for which land or buildings could be used. The Scheme expressly provided that the extent of subdivision which could be undertaken would be determined, in each case, on receipt of detailed information.

[29] As Council says, that information was provided with the reconfiguration application. Approval of that application authorises the subdivision into separate lots, with separate titles. The question whether the use of the subdivided lots is lawful depends on the nature of the use and the planning controls relating to it – which is a different question from anything relating to the power, itself, to reconfigure.[6] Should further approval be necessary to use the lots produced by the subdivision, the merits of that proposed use will be properly dealt with when the application is made.[7]

[30] It is clear, that Council did have the power to approve the reconfiguration application and the subsequent change to it and was not bound to refuse either. But the third declaration sought by the Association should, then, be refused.

Discretion to Grant or Refuse Relief

[31] Mr Markham pointed to circumstances showing that Hyacinth Developments did not acquire the land until 2005 and, thereafter, used reputable agents and advisers and believed throughout that it had acted, and was acting, properly. It is also said that Hyacinth had no reason to believe that the approvals it obtained from Council were anything but lawful, and it has always acted in accordance with them; and, that it has already undertaken substantial works and has very large borrowings, and is incurring interest at the rate of over $100,000 per month while these proceedings delay its development.

[32] Further, it is submitted that the Association has been guilty of undue delay. Mr Markham points to the affidavit evidence filed for the Association which shows that it first began to correspond with the Council as early as 2001, at which time it gave notice of its belief that the 1990 approvals were 'unacceptable'. Mr Markham's submissions refer to the factors relevant to the discretion associated with the relief of the kind the Association seeks and, in particular, the well known decision in *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 355 and, more recently the decision of this court in *Bon Accorde Pty Ltd v Brisbane City Council* (2008) 163 LGERA 288.

[33] As Council properly conceded, however, some of the approvals granted in recent years were plainly beyond power and matters touching public interest, and the

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6 *Stubberfield v Redland Shire Council* [1995] 1 Qd R 332, at 336-7.

7 *Walker v Noosa Shire Council* [1983] 2 Qd R 86; *Young v Gosford City Council* (2001) 120 LGERA 243 at 255.

Council's public duty; support the making of the necessary orders. So far as the actions of the Association was concerned, it is material that there was no process for public notification or community consultation for any of the applications to amend the original rezoning and a perusal of the Council's files would show that, apparently, Council's decisions were lawful. It was only when those decisions were considered in the context of legal advice after significant changes were approved by Council in March 2008 that the unlawfulness of some of Council's actions became apparent to the Association – which is, also, a community organisation.

[34] Finally, Hyacinth (as its own submissions and Mr Markham's affidavit show) consulted diligently with Council from time to time about its applications and, if that process miscarried, that is no basis for imposing unlawful development upon the community.

[35] The obvious consequences attract a degree of sympathy for Hyacinth but, in the weighing of the various discretionary elements, major errors in the approval process must be the principal factor, and delay in discovering them and pursuing the appropriate remedies does not overcome the compelling need to ensure the unlawful consequences are rectified.

Other Relief

[36] The Association's application seeks declaratory relief in paragraphs 1 – 5 inclusive; in paragraph 6, that work other than lawfully approved work cease; and, in paragraph 7, that the reconfiguration approval be set aside.

[37] For the reasons explored above in respect of the minor change, and 'generally in accordance' with, approvals, the orders sought in paragraphs 1 and 2 should be made.

[38] Again, for the reasons given, the relief sought in paragraphs 3 and 7 relating to the reconfiguration approval should be refused; as should that part of paragraph 4 which relates to that approval. Otherwise the Association is, however, entitled to an order in terms of that part of paragraph 4 which relates to the minor change and 'generally in accordance with' declarations. The same conclusion applies to paragraph 5.

[39] Paragraph 6 seeks an order that all work on the site, other than the work which has lawful approval, is to cease immediately. I was not assisted by submissions from Council, but it does seem self evident that work which does not have lawful approval ought not to proceed.