[2011] QPEC 78

THE PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

No 3343 of 2011

WEST END COMMUNITY ASSOCIATION Applicant

and

BRISBANE CITY COUNCIL & ORS Respondent

BRISBANE

..DATE 06/06/2011

ORDER

CATCHWORDS

Sustainable Planning Act 2009 s 350
Planning and Environment Court Rules 2010 r 5, r 27

Submitter appeal - dates for steps to be taken in existing directions extended (against submitter's opposition) - developer's difficulties occasioned by inundation of the site (likely showing that the proposal should be changed) in the flood of January 2011 and by its being placed in receivership - title of co-respondent changed to show that receivers and managers appointed - experts authorized to have contact with those engaging them before producing joint reports to facilitate consideration of possible changes to the development proposal

HIS HONOUR: The court has made an order in terms of the initialled draft after the luxury of lengthy argument about what those orders ought to be.

The appeal is a submitter appeal against a development approval granted by the respondent council for the carrying out of building work, that's a preliminary approval, and a development permit for material change of use for a multiunit dwelling, shop and restaurant at Lot 2 on Registered Plan 141824. The site is at 321 Montague Road, West End.

My understanding is that that approval relates to a 12 storey building containing nearly 500 units representing an expansion of what is permitted under an earlier approval for the same site for a similar development of eight storeys with some 70 fewer units.

That approval emerged following an appeal in this court.

The association appellant, I understand, was a party in that proceeding. It is in the unusual position for a submitter of having the potential of advancing its position, which I take it is one of general opposition to development of the scale proposed, by taking advantage reverses that have befallen the co-respondent developer company.

One was the January 2011 floods which inundated the site which the court understands was the location of the former gas works. It may well be that the large excavation on the site

was subject to inundation even before the floods mentioned.

I have presided at mentions of the appeal on 18 February 2011 (see 2011 QPEC 36) and 11 March 2011 (see 2011 QPEC 40).

It emerged from what was said at those mentions that the proposal is likely to require some redesign to take account of lessons learned in the recent flooding.

One particular respect that was mentioned concerned the proposal to locate important electrical installations at basement level, an arrangement that experience in this City last January indicates is better avoided in tall buildings.

What also emerged at those earlier mentions was that the co-respondent developer was experiencing financial difficulties.

The appellant certainly takes the view that the extent of those was understated. If that was the case, the appellant's lay representative Mr Bratchford was able to reveal more of those financial difficulties.

In March hope was still being entertained by the co-respondent that finance could be obtained from sources in Korea. It rather appears that nothing came of that.

The applications before the court today include one by receivers and managers of the company seeking to have their

role in the matter acknowledged by a change in the description of the co-respondent to record in the title that receivers and managers have been appointed.

There has been a double appointment at the instance of Eastcote Pty Ltd, a finance provider for the developer.

The first appointment occurred at the end of April 2011. It was limited to the co-respondent's documentation in relation to the development application and a wide range of associated matters to do with the site.

It is easily inferred that the purpose of that limited receivership was to give the receivers and managers and, no doubt, the principals of Eastcote the best information they could get regarding the wisdom of proceeding with the current development proposal.

Late last month, by an appointment dated 31 May 2011, and accepted on that date, the receivers and managers were placed in charge of all the present and future rights, property and undertaking of the co-respondent, whether real or personal anywhere and of any kind.

On the next day, the receivers and managers caused the application mentioned above to be filed.

The selection of today for the hearing is explained by Judge Rackemann's having on 13 May 2011 set down for today the

hearing of an application by the appellant for an order that the appeal be allowed and, presumably, on the basis that the co-respondent was not genuinely pursuing it.

Mr Quirk of counsel appearing for the appellant informed me that the application was made orally. It is clear that everyone knew what it was all about.

Judge Rackemann vacated existing directions which required any steps to be taken before 6 June 2011.

On the two dates mentioned in relation to myself, orders had been made extending the dates for compliance with Judge Rackemann's original directions for the conduct of this appeal of 9 December 2010.

The first extension was by 12 weeks; the subsequent one by a further four weeks. Those times were less than Ms Morris, who appeared for the co-respondent on the days, had been requesting.

It was an unusual situation, as I already indicated, of a submitter appellant able to seek what maybe very crucial tactical advantages by forcing a developer co-respondent confronting various difficulties on to an earlier hearing.

I am willing to accept that were the boot on the other foot, so that it was the association seeking to bring about delays in a timetable set by the court, the association might receive

a short shift in the ordinary circumstances.

The general approach is that developer parties have most at stake and that delay costs money which developers, other things being equal, are entitled not to be forced to waste.

This relates not only to legal costs which it became clear on 13 May that the association too is now having to bear; Mr Bratchford who represented the association earlier may well have indicated that he was having to pay for legal advice. Holding costs of the land are, inevitably, going to trouble a Developer.

Although Mr Quirk has submitted, in effect, that all parties ought to be treated equally by the court, from the point of view of being ready to progress an appeal, I am of the view that things, particularly in the context like the present are different for individual parties and that the developer can reasonably expect special consideration.

One reason for that is that under the legislation, it is not for submitter appellants to show that the appeal should succeed, it is for the co-respondent developer to prove that it ought to fail. If the court is uncertain which way to jump, the appeal succeeds. A developer, in those circumstances, in my view, ought to be given a reasonable opportunity to mount its best case.

It would be unrealistic for the court not to acknowledge and

wrong for it not to give significant weight to the difficulties in the developer's camp here.

An event such as the 2011 floods may change things greatly and has done so here. On top of that (maybe to an extent in consequence), come the developer's financial difficulties, which have now seen its principals lose control to the receivers. Mr Quirk is right, that recognition of the receivers and managers, as now having the conduct of the proceeding, does not change the identity of the party. However, in my view it does change things by introducing cold, so to speak, new minds which have to come to grips with the situation and work out what ought to be done about any redesign of the proposal - indeed, what ought to be done about continuing to resist the appeal.

Mr Quirk submits that appearances indicate that the corespondent in whatever emanation is not really interested in advancing the appeal. In part he relies on the protracted timetable which Miss Fitzgibbon, who has been engaged by the receivers and managers, was proposing. It looked to a hearing of the appeal in March 2012 when the original directions envisaged the same five day hearing in April 2011.

Mr Quirk relies on the statement of grounds for the receiver and manager's application referring to a Notice of Exercise of Power of Sale dated the 1st of March 2011 having been served on the developer company, and perhaps on other circumstances, to contend that there's no interest by anyone in pursuing the development physically, that all interest is centred on

selling the property. Even if that were so, I think it wouldn't matter. If Mr Quirk was suggesting that there's some expectation that an applicant in a development application will itself construct the development if it's approved or even intends to do so, I would not accept that at all. The court frequently encounters circumstances where the applicant for a development approval is someone hopeful of winning an approval which will induce the real developer to make or complete a contract of purchase, the parameters of which are already known.

Mr Quirk correctly reminds the court that currently the site is already in a state which permits it to be sold with a valuable development approval for an eight-storey multi-building development.

There's no compelling reason, in his submission, why the court ought to indulge the corespondent by delaying the hearing of the appeal so that it can seek to retain the approval that the council has given for an even larger development. Those considerations, in my view, have no relevant part to play in what the Court has to decide today. There is no good reason for shifting out those who presently have a chance of preserving a further or more valuable approval.

In the end, Mr Quirk has had considerable success in defeating the attempt of Miss Fitzgibbon, which has the support of Ms Mitchell representing the council, to defer a substantive hearing until next year. Miss Fitzgibbon's timetable has been

capable of being adjusted in fairly minor ways, in other words, by one or two weeks only, to allow for the possibility of a hearing in December and indeed the appeal is allocated by the order that I've initialled to the December sittings. That's done on the basis that Miss Fitzgibbon at least is foreshadowing that the parties might have difficulties in keeping up with the timetable that's not terribly different in essentials from the one she proposed. However, her clients are at a very preliminary stage.

As Ms Mitchell has said, getting a hearing in December or getting ready for a hearing in December now involves a certain amount of haste. The directions order is unusual in containing provision for Miss Thompson's firm which is on the record representing the corespondent to withdraw if, for some reason, Miss Fitzgobbon's undertaking to file a Notice of Change of Solicitors for the corespondent isn't achieved by tomorrow evening. It would have been presumptuous of Miss Fitzgibbon to file a Notice of Change of Solicitors in advance of the court hearing her application. Needless to say, Mr Quirk indicated that in the circumstances of her application it had been judged not appropriate to proceed with the appellant's application which had been set down for today. Today became a fight over timetabling.

The court has its own concern that the appeal might be complicated by the proposing of changes to the development proposal which, it seems to me, are likely. There may already have been some discussion with the council with a view to determining what it would be prepared to accept as minor

change, minor in the sense that the appeal could proceed on the basis of such changes.

I'm concerned that at some point if there's contest in this regard it might become necessary for the court to have a hearing as to whether changes proposed, assuming there will be some, are really minor change. It proved difficult to slot provision about this into the order.

One of the complicating features is rule 27(1) of the Planning and Environment Court Rules 2010 which forbids experts attending a meeting of experts from any reference to or receiving any instruction from the parties before preparation of the joint report.

Rule 5 allows the court to waive compliance with that and the conventional direction which the court makes for meetings of experts in various fields and subsequent reports is qualified by a provision to this effect: pursuant to rule 5, compliance with rule 27(1) is waived to permit experts to make reference to the parties with a view to proposing or considering changes to the development proposal that the corespondent contends would constitute minor change within section 350 of the Sustainable Planning Act 2009.

I don't think it's reasonable in the circumstances to require the corespondent to notify changes by some date in advance of the experts' meeting. I take that approach on the basis that the experts' meetings may produce better proposals for changes

than the experts yet to be engaged by the corespondent might propose.

I'm grateful to the participants today for their assistance and make an order in terms of the initialled draft.
