PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*McKean v Council of the City of Gold Coast* [2018] QPEC 61
PARTIES:	**GLENN ROBERT MCKEAN** (Appellant) and **COUNCIL OF THE CITY OF GOLD COAST** (Respondent)
FILE NO/S:	D91of 2018
DIVISION:	Planning and Environment Court, Southport
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court of Queensland, Southport
DELIVERED ON:	14 December 2018
DELIVERED AT:	Southport
HEARING DATE:	10 October 2018
JUDGE:	Kent QC DCJ

ORDER:

1. **Pursuant to s 14(1) of the *Planning and Environment Court Act* 2016 (*PEC Act*), the Respondent's amended Application in Pending Proceeding dated 9 November 2018 be taken to have started by way of originating application;**
2. **The Respondent's Amended Application be allowed and, pursuant to s 37(1) of the *PEC Act*, that:**
   (a) **The non-compliance with respect to section 260(3) of the *Sustainable Planning Act* 2009 (Qld) (*SPA*), being the failure to correctly identify the development the subject of the Development Application as being impact assessable, be excused;**
   (b) **The Development Application be taken not to have lapsed; and**
   (c) **The Development Application be remitted to the commencement of the Notification Stage prescribed by Chapter 6, Part 4 of the *SPA*.**
3. **The Application in Pending Proceeding filed by the**

Appellant on 2 October 2018 be dismissed;

4. **The appeal be otherwise dismissed;**

5. **Each party bears its own costs.**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL IMPACT ASSESSMENT AND APPROVAL – OTHER STATES AND TERRITORIES – where the respondent refused the appellant's development application – where the matter was listed for hearing – where prior to the commencement of the hearing the respondent made an application that the hearing be vacated on the basis of a jurisdictional issue – where the appellant erred in lodging the application as being code assessable only and the relevant council officers did not detect the problem – whether the court has jurisdiction to hear the appeal

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – MODIFICATIONS – SUBSTANTIALLY SAME DEVELOPMENT – where the respondent refused the appellant's application to reconfigure his land – where the matter was listed for hearing – where prior to the commencement of the hearing the respondent became aware that the application was improperly classified as code assessable rather than impact assessable – where the appellant contends that changing it from a community management scheme to freehold title cures this defect – whether this constitutes a 'minor change'

COUNSEL: G R McKean self-represented for the Appellant

K W Wylie for the Respondent

SOLICITORS: G R McKean self-represented for the Appellant

McInnes Wilson for the Respondent

Introduction

[1] On or about 31 January 2016, the appellant lodged with the respondent council a development application for reconfiguring his land at 110 Valley Drive, Tallebudgera into six "park living" lots.

[2] Council refused the application on 12 December 2017 whereupon the appellant commenced this appeal on 4 April 2018. The matter was listed for hearing in October 2018, however shortly prior to the hearing, the respondent made an application in a pending proceeding, in essence saying that there was a basic jurisdictional problem, such that the hearing should be vacated and the appeal should not proceed; rather the appellant's development application be remitted to

the commencement of the notification stage prescribed by the relevant division of the *Sustainable Planning Act* 2009 (Qld) – in force at the relevant time.

[3] At the hearing of the application, judgment was reserved, however it was indicated that the result was likely to be broadly along the lines contended for by the council. Notably, neither the appellant nor the respondent at that stage wished the appeal, in its original form to proceed, for reasons which will become apparent.

[4] Since reserving judgment, the parties have made further written submissions, discussed below.

Background

[5] The basic issue with which the parties have been grappling is that the development application lodged by Mr McKean and his supporting town planning report treated the application as being code assessable, with the result that there was no public notification of the application as was required for impact assessable development[1] and council assessed and determined the application on the code assessment provisions.[2]

[6] The council nevertheless considered the application and refused it on 12 December 2017. The appeal process followed. Pursuant to pre-trial directions, the parties' town planning experts produced a joint report which was available from 20 September 2018. Mr Schomburgk, the council's town planner, first identified the problem, which was that as the average lot size of the development proposed by Mr McKean was less than 8,000m², the application should have been impact assessable pursuant to the development scheme.[3] In the park living domain provision of the 2003 scheme, development for reconfiguring a lot was code assessable if it resulted in lots with an average lot size of no less than 8,000m², however was impact assessable if the average lot size was less than 8,000m².

[7] The application comprised six lots with sizes between 4,003m² and 5,419m², as well as a "public open space" with an additional 2.067 hectares.[4] The average lot size was therefore less than 8,000m². On the site analysis plan the average lot size was described as 4,702m².[5]

[8] A planning scheme is an instrument made by a local government for integrated planning policy in a particular area.[6] It has various essential elements including the identification of assessable development requiring either code or impact assessment, or both.[7] Code assessment is assessment by a manager under s 313. Impact assessment under s 314 involves consideration of the environmental effects of proposed development and the ways of dealing with the effects.

[9] Where the application requires impact assessment, the notification stage, including the public notice process described in s 297 of the Act, is engaged. This was not

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1 *Sustainable Planning Act* 2009 (Qld) s 295(1)(a).
2 Affidavit of Ms McCabe filed 26 September 2018, para 11(a); *Sustainable Planning Act* 2009 (Qld) s 313 and s 314.
3 The now superseded *Living City – 2003 Gold Coast Planning Scheme (Version 1.2)*.
4 Affidavit of Ms McCabe filed 26 September 2018, paras 67, 142 and 143.
5 *Ibid*, para 142.
6 *Sustainable Planning Act* 2009 (Qld) s 79.
7 *Ibid* s 88.

done in this case, so it is said, because the appellant erred in lodging the application as being code assessable only and the relevant council officers did not detect the problem.

[10] Assuming the correctness of the matters outlined above, the consequence according to the council is that the application should have been subject to impact assessment, thus was not properly made; it was, in effect, a nullity. Thus the application lapsed pursuant to s 302(1)(a) of the Act and in any event, the decision by council refusing the application was void. Thus the jurisdiction of this court to entertain an appeal from that decision is simply not engaged; that is, there is no jurisdiction.

Mr McKean's position

[11] Mr McKean was made aware of this issue shortly before the hearing was listed to proceed. His response was to make an application to somewhat reconfigure the development design, changing it from a community management scheme to freehold title and making the previous communal area part of Lot 1, thus attempting to cure the average lot size problem, and treating this as a "minor change". This would be a way, in effect, of retrospectively validating the original application and avoiding the jurisdictional issue by curing the "lot size" problem. Thus Mr McKean argues the matter can proceed in this way. Lot 1 would have responsibilities previously falling on the body corporate pursuant to an environmental covenant and an access easement over the previously communal property.

[12] He refers to the further report of his town planner, Mr Ransom, who endorses this approach.

[13] If successful, this would engage s 46 of the *Planning and Environment Court Act* 2016 (Qld) (the "PEC Act") and the *Planning Act* (Qld). Section 46 of the PEC Act relevantly provides in relation to the nature of such an appeal:

> "(3) The P&E Court cannot consider a change to the development application unless the change is only a minor change to the application."

[14] "Minor change" is relevantly described in the *Planning Act*, Schedule 2, as one which does not result in a substantially different development, and if the application including the change would not cause public notification where such had not previously been required.

Council's Submissions as to "Minor Change"

[15] There are criteria for what is a "substantially different development" in the development assessment rules produced pursuant to s 68 of the *Planning Act*. The council's position is that Mr McKean's proposed "minor" change from a community management scheme development to a freehold development (by which the previous communal area would be absorbed into one of the lots and therefore have the effect of increasing average lot size) would change the manner in which the development would operate, casting communal responsibilities, unacceptably, on Lot 1:

(a) road and driveway ownership and maintenance would change;

(b) residents other than lot 1 would no longer have access to the common property;
(c) there would be no binding community management statement to deal with various relevant matters such as bushfire management and load reduction.

[16] Council further submits that the proposed change would potentially introduce new impacts or exacerbate known impacts by removal of effective mechanisms to deal with problems such as bushfire management, road maintenance, slope stability and vegetation management requirements. It also becomes more cumbersome to enforce lot owners' obligations such as bushfire mitigation, in a context which in truth requires communal obligations and co-operation.

[17] The council refers to Mr Ransom's report and his raising the fact that a development permit had been issued recently by a private certifier for building work on a residence on proposed lot 6, which would tend to support the idea that the development application had been endorsed. The council contends, however, that there are doubts as to whether the permit was lawfully issued, referring to s 83(1)(a) of the *Building Act* 1975 (Qld); the current planning scheme, Gold Coast City Plan, part 5.3.3(2); and the fact that the development does not comply with the required outcomes in the bushfire hazard overlay code. Thus it is submitted that the development permit may well not have been issued lawfully.

[18] The council also submits that a matter of overriding importance in this case is the effect of shutting out of the public from the development assessment process where normally, and in accordance with the scheme, the public would be entitled to be heard as part of the notification process. The council points to the fact that the definition of 'minor change' emphasises the importance of proper public involvement in the development assessment process. Further, the proposed development is one in which members of the public may be particularly interested. It is a sensitive area. Persons live adjacent or nearby. They may well seek to make a submission. They may well have genuine concerns about the nature of the development, particularly in the areas of access, slope stability, bushfire management, vegetation management and clearing, and services/infrastructure.

[19] The council also points to the fact that the application was properly made under the previous planning scheme, however under the current scheme development of this type would be impact assessable if each lot did not achieve a minimum lot size of 16,000 m² and in calculating average lot sizes, access strips or access easement areas for rear lots are excluded. This indicates the importance of complying with the impact assessment process.

[20] Thus the council submits that the proposed changes are not a minor change, particularly where there are real issues relating to bushfire safety. In any case, it is not necessary to determine this issue, because the fundamental problem is that there is no lawful appeal on foot to change, whether the changes could be characterised as a 'minor change' or not. The council submits that the original application was not 'properly made' consistent with s 621(1) of the *Sustainable Planning Act*. It was mandatory for the applicant to identify whether the level of assessment was code or impact and the appellant made a fundamental error by selecting 'code assessment'.

Thus the application was not properly made and was not able to proceed to subsequent stages of the assessment process.[8]

[21] The council submits that the application would have lapsed prior to being considered by the council; see s 302 of the SPA. Thus the council's refusal of the application under this appeal are without a jurisdictional basis.

[22] The council also points to the wrongful shutting out of potential submitters. Wrongly characterising an application as code assessable rather than impact assessable renders the application void; see *Fox & Anor v Brisbane City Council & Ors*.[9]

[23] Thus the council submits that the basic problem with the application and the consequent council decision render the decision under appeal a nullity, such that there is no jurisdiction in this court to consider the matter; accordingly the findings outlined above should be made. It further submits that the situation can then be remediated in the following way:

(a) Pursuant to s 37(1) of the *Planning and Environment Court Act* 2016 the non-compliance of the original application with the requirement to correctly identify the development as being impact assessable can be excused;
(b) The application may be taken not to have lapsed;
(c) The application can then be remitted to the commencement of the notification stage set out in chapter 6, part 4 of the SPA in order to achieve the purposes of giving interested persons the opportunity to make submissions or objections, or indeed the right to appeal;
(d) The appeal otherwise to be dismissed.

[24] This would achieve the result that Mr McKean would be able to continue with the original application, with the relevant error addressed, however he would still be able to have the matter dealt with under the same regime as originally, with any attendant benefits; apart from regrettable delay (to which he mistakenly contributed), he would not be significantly worse off.

Amended application

[25] Since reserving the judgment in this matter for the delivery of proper reasons, there has been further communication from the parties. An issue was raised by the council and further submissions were received prior to the formulation of these reasons.

[26] The issue raised by the council arose out of the recent decision in *Perivall Pty Ltd v Rockhampton Regional Council & Ors*.[10] The question is essentially procedural. In *Perivall* there were certain preliminary points raised including the possible lapsing of a development application because it was not properly made. The discussion in that case was whether collateral challenges of this kind to conduct which is said to have been anterior to the appealed decision could be considered in an appeal (given

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8 *Barro Group Pty Ltd v Redland Shire Council & Ors* (2009) 169 LGERA 326 per Keane JA at [55]; *Genamson Holdings Pty Ltd v Caboolture Shire Council* (2009) QPELR 15 at [31].
9 (2003) QPELR 215 at [73]-[76]; also *Textor v Brisbane City Council & Ors* (2008) QPELR 625.
10 [2018] QPEC 46.

the nature of the statutory right of appeal under the *Planning Act*) or whether there should be a separate proceeding initiated by originating application. As considered in *Perivall*, there is a qualitative difference between an appeal against a decision to refuse a development application and a collateral challenge to the validity of the application itself as having not been properly made in the first instance. Clearly this has parallels in the present case. In *Perivall* it was determined that the latter was not properly characterised as an appeal against the council's decision[11].

[27] The council thus seeks to cure this problem by an amended application in a pending proceeding raising the same issues discussed above, but also seeking an order that the application in a pending proceeding to be taken to have been started by way of originating application. Such an approach was rejected in *Perivall*, largely for reasons associated with the merits of the point under discussion. However there was also concern that, the right being akin to judicial review, there had been no request for reasons as to the challenged point, as would be conventional in judicial review. There has, similarly, been no such request in this case; however in my view this is not an obstacle, given the nature of the error and the fact that the problem is being raised by the council itself, not a submitter or objector. If asked, the council would not provide reasons excusing the anterior point; rather, it would concede the application was invalid and should have been regarded as such.

[28] The application is purely procedural and would not seem to have any impact on the merits of the matter as outlined above.

[29] On this topic Mr McKean has filed supplementary written submissions. Those submissions do not, with respect, seem to deal in any detail with the procedural issue now raised by the council. They are in reference to the average lot size and matters relevant to the original argument. Nevertheless, Mr McKean submits that the council's application in a pending proceeding and the further amended application should be refused. He refers to *Waterman v Logan City Council***.**[12] That case dealt with a situation where a respondent council sought to raise a number of issues in dispute not limited to identifying the bases on which the council had joined issue with the appellant's ground of appeal. Council then sought to contend that the development application (originally granted by it) should be refused. The court in analysing those matters took the view that these collateral challenges (by the council, to the correctness of its own decision) should not, for the most part, be permitted to expand the dispute in the appeal.

It was said at [56]

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> "In those circumstances, and having regard to the purpose of the *Planning Act 2016*, this court should be slow to give its imprimatur to a local authority expanding the issues to be determined in an appeal in the absence of an adequate explanation for the change in its position as notified in the decision notice. The degree of caution is heightened where a local authority seeks to convert an approval into a refusal in a conditions appeal. To do so could undermine public confidence in the development assessment process."

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11 At para [42]-[43]. Further, see the analysis at [47] – [64] setting out the reasoning including the prescriptive nature of the appeal provision; the defined appeal period; the defined powers on appeal; and the express declaratory powers in ss 11 and 76(4) of the *Planning and Environment Court Act 2016*, consistent with judicial review rather than appeal.

12 [2018] QPEC 44.

[30] It is not clear to me that the present case resembles *Waterman*. The court there was concerned with a council mounting a collateral attack on its own decision and propounding new reasons for refusal. In my view, the present circumstances are not analogous. Here, there is a basic jurisdictional problem, and the council has not reversed its position.

[31] In the result there should be orders in terms of the draft provided, in essence dismissing the present appeal because of the problem with the original application, but excusing the non-compliance and remitting the application to the notification stage; and dismissing the application by Mr McKean of 2 October.