PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Brennan v Brisbane City Council & Anor* [2020] QPEC 39
PARTIES:	**MARLENE RUTH BRENNAN AND GEOFFREY RICHARD BRENNAN** (Applicants) **v** **BRISBANE CITY COUNCIL** (First Respondent) and **DEPARTMENT OF STATE DEVELOPMENT, MANUFACTURING, INFRASTRUCTURE AND PLANNING** (Second Respondent)
FILE NO:	654 of 2020
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court Brisbane
DELIVERED ON:	29 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2020
JUDGE:	Everson DCJ
ORDER:	**The originating application is dismissed**
CATCHWORDS:	PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – whether reconfiguring a lot in the Regional Landscape and Rural Production Area is prohibited development.
LEGISLATION:	*Acts Interpretation Act 1954* (Qld) *Integrated Planning Act 1997* (Qld) *Planning Act 2016* (Qld) *Planning Regulation 2017* (Qld)
CASES:	*Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] 224 LGERA 166 *Minister for Environment v Simes* (2007) 98 SASR 481 *R v A2* (2019) 93 ALJR 1106

COUNSEL:	M Batty for the Applicant B D Job QC for the First Respondent D O'Brien QC and ND Loos for the Second Respondent
SOLICITORS:	Hopgood Ganim Lawyers for the Applicant City Legal for the First Respondent Corrs Chambers Westgarth for the Second Respondent

Introduction

[1] This is an originating application seeking a declaration that a development application lodged by the applicant with the first respondent on 23 September 2019 over land at 222 Gap Creek Road, Kenmore Hills ("the site") for a development permit for reconfiguring a lot (one lot into three lots and access easement) ("the Development Application") is a properly made application under the *Planning Act 2016* (Qld) ("PA").

[2] The respondent decided not to issue a Confirmation Notice in respect of the Development Application as it is of the view that it is for prohibited development pursuant to the *Planning Regulation 2017* (Qld) ("PR").[1]

[3] Prohibited development is defined in the PA as "development for which a development application may not be made".[2] The site is in the Regional Landscape and Rural Production Area ("RLRPA") pursuant to the South East Queensland Regional Plan 2017 ("SEQRP"). The intent of the RLRPA is to, inter alia, "protect the values of this land from encroachment by urban and rural residential development" and protect it from "inappropriate development, particularly from urban and rural residential development".[3] The intent of the RLRPA is, in turn stated to be supported by regulatory provisions which "limit further fragmentation of land holdings and restrict various forms of urban activity".[4]

[4] Relevantly, section 23 the PR states:

> "(1) Reconfiguring a lot is prohibited development to the extent the lot is in the SEQ regional landscape and rural production area, if the reconfiguration-

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1 Affidavit of Gemma Katie Chadwick, filed 3 March 2020, Exhibit "GKC-1" p 216.
2 *Planning Act 2016* (Qld) s 44(2).
3 South East Queensland Regional Plan 2017, p 100.
4 Ibid.

(a) is a subdivision; and

(b) is assessable development under section 21.

(2) However, subsection (1) does not apply if-

(a) the reconfiguration is an exempt subdivision;"

[5] The term "***exempt subdivision***" is relevantly defined in Schedule 24 of the PR as meaning a subdivision that:

> "(e) is consistent with a material change of use approved under a development approval that applies to the lot being subdivided, if the application for the development approval was properly made under the repealed IPA before 31 October 2006; or
>
> (f) is stated in an application for a development approval for a material change of use to be necessary for the material change of use, if…"

[6] It is uncontentious that on 30 November 2001 the first respondent issued a Development Permit for a Material Change of Use for Short-term Accommodation (2 eco-tourism cottages) ("the Development Approval") in respect of the site under the *Integrated Planning Act 1997* (Qld) ("IPA").[5]

[7] The two eco-tourism cottages have now been built on the site, which has significant environmental values, pursuant to the approved plan of development.[6] The purpose of the Development Application is to subdivide the site from one lot into three lots with each additional lot containing a constructed cottage.[7] In the planning report which accompanied the Development Application it is stated that the intention "is to ensure that each dwelling is contained on its own freehold allotment for improved management purposes".[8]

[8] The question which arises for determination is essentially whether the Development Application "is consistent with" the Development Approval and therefore an exempt subdivision pursuant to Schedule 24(e) of the PR.

[9] In support of their arguments the applicants submit that the Development Application is consistent with the Development Approval as it is compatible with it

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5 Affidavit of Ms Chadwick, Exhibit "GKC-1" pp 15-30.
6 Ibid, pp 6 and 15 and Exhibit 4.
7 Ibid, p 90.
8 Ibid, p 65.

and capable of existing in harmony with it. Essentially, they argue that there is no difference whether the approved development operates over one lot or three lots. In support of the wide definition of "consistency" contended for by the applicants I was referred to the observations of Bowskill DCJ in *Lake Maroona Pty Ltd v Gladstone Regional Council* where she observed:

> "The ordinary meaning of the word "consistency", as reflected in the *Macquarie Dictionary*, is "agreement, harmony, or compatibility". The definition in the *Oxford English Dictionary* is to the same effect (the "quality, state, or fact of being consistent; agreement, harmony, compatibility (*with* something, *of* things, or *of* one thing *with* another)"). "Consistent" is relevantly defined in the former as "agreeing or accordant; compatible, not self-opposed or self-contradictory" and, similarly, in the latter as "agreeing or according in substance or form; congruous, compatible."[9]

[10] It is also submitted that the scenario is materially different to one where a subdivision is necessary for the material change of use as this is separately addressed in Schedule 24(f) of the PR quoted above.

[11] Conversely each of the respondents cautions against a liberal approach to the phrase pointing to the caution expressed by the Full Court of the Supreme Court of South Australia in *Minister for Environment v Simes* where Bleby J observed:

> "The phrase "in harmony with" does not necessarily mean "consistent with". In a symphony orchestra, a French horn player will only play the instrument consistent with the score for the French horn by following the appropriate line of music in that score. The player can play in harmony with that score by playing a different line which is not consistent with the relevant score. It is the phrase used in the Act and not some other phrase which must be applied to the circumstances of the case."[10]

[12] It is significant that the *Acts Interpretation Act 1954* (Qld) provides that the interpretation that will best achieve the purpose of a statutory provision "is to be preferred to any other interpretation".[11] This accords with the approach of the High Court in *R v A2*, where Kiefel CJ and Keane J observed:

> "A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is

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9 [2017] 224 LGERA 166 at 171 [16].
10 (2007) 98 SASR 481 at 491 [45].
11 *Acts Interpretation Act 1954* (Qld) s 14A(1).

> now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete."[12]

Subsequently their Honours further noted:

> "When a literal meaning of words in a statue does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning."[13]

[13] Accordingly, while the applicants submit that the proposed subdivision would do no more than coincide with the current use of the site and not, of itself alter it, each of the respondents points to a lack of any relationship between the proposed subdivision of the site and the existing lawful use pursuant to the Development Approval. There is no evidence before me that the Development Approval contemplated a subdivision of the site where the use authorised by it is to occur. Such a circumstance may arise where a material change of use contemplated a subdivision in accordance with an approved plan. Should the developer subsequently wish to stage the subdivision, this may still be viewed as consistent with the original Development Approval. However, on the facts before me, the Development Approval only ever contemplated the approved use being conducted on one lot, namely the site.

[14] Where the SEQRP intended to restrict urban and rural residential development in the RLRPA and contained provisions to limit further fragmentation of land holdings within this area, it is clear that subdividing the site as proposed by the applicants is not consistent with the Development Approval which contemplated only a short-term accommodation, eco-tourism use operating on one lot.

[15] The development the subject of the Development Application is therefore prohibited development and the Development Application is not a properly made application.

[16] I dismiss the originating application.

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12 (2019) 93 ALJR 1106 at 1117 [32].
13 Ibid at 1118 [37].