PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Southern Downs Regional Council v Homeworthy inspection services* [2020] QPEC 7
PARTIES:	**SOUTHERN DOWNS REGIONAL COUNCIL** (appellant) **v** **HOMEWORTHY INSPECTION SERVICES (AS AGENTS FOR ROBERT NEWMAN AND CHERYL NEWMAN)** (respondent)
FILE NO/S:	2974 of 2018
DIVISION:	Planning and Environment Court
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	17 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2020, with supplementary submissions filed on 12 and 17 February and 13 March 2020
JUDGE:	Williamson QC DCJ
ORDER:	**Orders in accordance with paragraph [91] of these reasons for judgment**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – where appeal against decision of the Building and Development Tribunal – where appeal allowed and the decision of the Tribunal set aside – whether matter should be remitted to the Tribunal – whether the re-exercise of the discretion is conducted by way of a hearing anew – whether r 766(1) of the *Uniform Civil Procedure Rules 1999* applies to the appeal – whether leave should be granted for the appellant to lead fresh evidence.
LEGISLATION:	*Planning Act 2016*, ss 45, 229 & Schedule 1. *Planning & Environment Court Act 2016*, ss 9, 43 & 47. *Planning & Environment Court Rules 2016*, s 4. *Uniform Civil Procedure Rules 1999*, rr 766, 782 & 785.
CASES:	*CDJ v VAJ* (1998) 197 CLR 172 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 *Knight v FP Special Assets* (1992) 174 CLR 178

Lacey v Attorney General (Qld) (2011) 242 CLR 573
Regional Land Corporation No.1 Pty Ltd v Banana Shire Council [2009] QCA 140
Zarb v Brisbane City Council [2005] QPELR 707

COUNSEL: Mr M Connor (Sol) for the appellant
Mr M Labone (Direct brief) for the respondent

SOLICITORS: Connor O'Meara solicitors for the appellant
Respondent self-represented

Introduction

[1] Council seeks an order under r 766(1)(c) of the *Uniform Civil Procedure Rules 1999* (**UCPR**). The order, if granted, would permit Council to lead further evidence about a question of fact in this proceeding, which is an appeal against a decision of the Building and Development Tribunal (**the Tribunal**). The application is opposed by the respondent.

[2] The application was listed for hearing on 3 February 2020. Both parties filed and served written submissions in advance of the hearing. The submissions assumed r 766 of the UCPR applies to this proceeding. This rule provides for the appeal to be conducted as a rehearing. As I understand it, both parties adopted this position given the nature of the appeal right to this court, which is limited to the demonstration of an error of law, or excess of jurisdiction on the part of the Tribunal.

[3] It was not immediately obvious during the course of oral argument that it was correct to assume r 766 of the UCPR applied to this appeal. As a consequence, I gave leave for both parties to file supplementary submissions addressing this point. Supplementary submissions were filed on behalf of both parties.

[4] The supplementary submissions filed on behalf of Council contend, on reflection, that r 766 does not apply, but if it does, leave should be granted for it to lead fresh evidence at the rehearing. The submissions filed on behalf of the respondent contend the nature of the appeal is akin to judicial review, and the court's jurisdiction is limited to a review of the legalities, and not the merits, of the Tribunal's decision. In this context, the respondent contends the matter should be remitted to the Tribunal for consideration according to law. If the matter was remitted as contended for by the respondent, the application before the court would be rendered otiose.

[5] Taking all of the submissions made, the issues to be determined in this application can be identified as follows:

(a) whether the development application the subject of the appeal should be remitted to the Tribunal?

(b) whether the appeal before this court is a hearing anew?

(c) whether r 766(1)(c) of the UCPR applies to this proceeding? and

(d) if r 766(1)(c) applies, whether leave should be granted to permit Council to lead fresh evidence?

[6] Given the nature of the issues to be determined, it is necessary to set out some relevant background.

Background

[7] In late September 2017, the respondent made a development application to Council for the purpose of regularising a Dwelling house that had been constructed unlawfully on land at Leyburn. The development application sought approval for a material change of use (Dwelling house). A development approval is required to authorise the use of the land for this purpose because it is affected by the Flood hazard overlay code in Council's planning scheme.

[8] The development application was refused by Council. The respondent appealed to the Tribunal against the refusal. The Chief Executive established a Tribunal for the proceeding comprising a Chair and two members. The appeal was heard on 12 June 2018. For the reasons contained in the decision notice dated 19 July 2018, the Tribunal set aside Council's decision and replaced it with an approval, granted subject to conditions[1].

[9] Council appealed to this court against the Tribunal's decision. The prayer for relief in the notice of appeal seeks two orders, namely the appeal be allowed and the respondent's development application be refused. The court made a number of directions after the appeal was commenced to prepare the matter for hearing. The directions included a requirement for each party to file an outline of argument.

[10] The outline of argument filed on behalf of Council identified seven (7) errors in the Tribunal's decision. The first error was articulated in the outline of argument as follows[2]:

> "*In this case, the Council alleges that the Tribunal erred in 7 respects, namely:*
>
> *(a) by failing to directly address and to give adequate reasons relating to the non-compliance alleged with the assessment benchmarks, contained in Part E in the State Planning Policy 2017 ("**Error 1**");…*"

[11] The appeal was listed for hearing before her Honour Judge Kefford on 27 September 2019. Mr Connor appeared for Council. Mr Trewavas of Counsel appeared for the respondent.

[12] During the course of oral submissions, Mr Trewavas made three material concessions on behalf of the respondent. The concessions, taken in combination, were tantamount to an acceptance that the Tribunal failed to have regard to, and consider, a mandatory consideration in the exercise of its discretion. The failure to have regard to a mandatory consideration in the exercise of a discretion constitutes an error of law.

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1 Court doc. # 12.

2 Court doc. # 15.

[13] The three matters conceded by Mr Trewavas were as follows: (1) the Tribunal was required to undertake its assessment of the respondent's development application in accordance with s 45 of the *Planning Act 2016* (**PA**)[3]; (2) the State Planning Policy referred to in Error 1 of Council's outline of argument was a mandatory consideration for the Tribunal in its assessment under s 45 of the PA[4]; and (3) the Tribunal's published decision does not contain any assessment against, or finding of fact about, the State Planning Policy[5].

[14] After each of the above concessions were made, the appeal was stood down for Mr Trewavas to obtain instructions from the respondent about the disposition of the appeal[6]. The hearing was adjourned for approximately 15 minutes while this occurred. Upon the resumption of the hearing, Mr Trewavas informed the court he was instructed to concede the appeal[7]. He also informed the court that, save for one matter, draft orders had been agreed between the parties[8]. The parties disagreed about the question of remittal.

[15] Mr Connor submitted it was Council's preference that the matter remain before this court for determination. In support of his submission, he directed the court's attention to s 9(1) of the *Planning and Environment Court Act 2016* (**PECA**), which states:

> "***When P&E Court must remit to tribunal***
>
> *(1) If—*
>
> *(a) a P&E Court proceeding is, or includes, a matter within a tribunal's jurisdiction; and*
>
> *(b) the court is satisfied the matter should be dealt with by the tribunal;*
>
> *the court must, by order, remit the matter to the tribunal.*"

[16] Mr Connor made the following oral submission about s 9(1) of PECA[9]:

> "*...Section 9 deals with the circumstances where an appeal must be remitted. It requires two factors. The Council concedes that factor (a) is satisfied; factor (b) is about the court's satisfaction that: ... the matter should be dealt with by the tribunal.*
>
> *There's a few things to say, your Honour. It's probably unsurprising, in this complex modern era of code assessment, rules and assessment, state planning policies,...planning instruments and the like that this statutory discretion is miscarried and miscarried, in the Council's submission, in a manifest way. We say that is in part because, your Honour, that legal representation's (sic) not allowed before the Development Tribunal, and, in circumstances where there is this complex matrix of competing provisions...the tribunal or a court would be much better placed to understand and deal with these issues if legal representation is provided.*

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3 T1-8, Line 29 to 33.
4 T1-8, Line 41 to T1-9, Line 43.
5 T1-10, Line 18 to 30.
6 T1-10, Line 36 to T1-11, Line 21.
7 T1-11, Line 31.
8 T1-11, Line 35 to 46.
9 T1-12, Line 33 to T1-13, Line 43.

> *And, in those circumstances, we say that there is a basis for the matter to be dealt with by the Planning and Environment Court.*
>
> *The other thing, your Honour, which is a related submission to the first submission, is it's (sic) really the Council's submission that that discretion badly miscarried. It wasn't by a small amount. If your Honour thinks of the submissions that have been made, even though your Honour doesn't have to consider them, they're all there. They failed to take into account a relevant consideration,…they took into account…the irrelevant consideration, they didn't provide proper reasons, they misconstrued the provisions, in the Council's view, of the planning scheme, and it led to a position, your Honour, where, for the first time ever, my firm was able to make a submission that suggested that their decision was irrational.*
>
> *…*
>
> *…we' re not being critical of the tribunal , although we point to the manifest errors. What we say is that the parties and the decision maker would benefit from having legal submissions in relation to these matters, and that will assist in the decision making and provide confidence to this court and the community that these things are decided in accordance with law.*"

[17] After making the above submission, her Honour asked Mr Connor about the nature of the hearing before this court, assuming it was not remitted[10]. In response, Mr Connor submitted[11]:

> "*the court now is seized of the matter. It's like the Court of Appeal deciding a matter which is not remitted. I understand from my friend - and we've only had some very preliminary discussions and he's – this clearly couldn't be his final instructions, but …his client doesn't propose to call new evidence…And so, in our view, it would be just a further date, written submissions, and the court makes a determination… Now, his position might well have changed …Not suggesting that additional evidence is something which may not be considered, but that would be another factor, your Honour, which might point to the court retaining the* - - - (appeal)*."*

[18] Mr Trewavas conceded the court has power under s 47 of PECA to rehear the matter for the purposes of replacing the appealed decision with a new decision[12]. He submitted the court would, however, in the circumstances of this case, be inclined to remit the matter to a differently constituted Tribunal[13]. Two reasons were advanced in support of remittal. It was submitted the nature of the matter was such that remittal was appropriate – the appeal involves an application for a modest one bedroom house. It was further submitted that parliament provided an appropriate mechanism for the resolution of the dispute, namely the Tribunal. Mr Trewavas emphasised that no party may appear before the Tribunal with legal representation. This was said to have the effect of reducing costs incurred by each party to the appeal.

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10 T1-14, Line 6 to 8.
11 T1-14, Line 10 to 42.
12 T1-15, Line 7 to 17.
13 T1-15, Line 36 to T1-17, Line 8.

[19] At the completion of Mr Trewavas' oral submissions, the transcript records that her Honour said[14]:

> "*...I won't be remitting the matter. I'm not persuaded that the matter should be dealt with by a tribunal. ...this particular case has the complicating factors of trying to grapple with a code assessment process that mandates approval in certain circumstances. Overlaid on that is the complexity of the weight question that arises in this case, but need not always arise. And there is the very significant issue of safety of persons. So I'm not persuaded that the matter should be remitted to the tribunal.*"

[20] The court made two orders on 27 September 2019, namely[15]: (1) the appeal be allowed and the Tribunal's decision of 19 July 2018 be set aside; and (2) the appeal be listed for review on 11 October 2019 for the purpose of making directions about the conduct of the further hearing[16]. Neither party requested reasons for the orders made.

[21] The next substantive step taken in the appeal occurred on 4 November 2019. On that date, the appeal was listed for review. His Honour Judge Everson ordered that any party wishing to file and serve an application, and any supporting material, for the admission of further evidence do so before 20 November 2019[17]. Council filed and served such an application on 21 November 2019[18]. By order of 13 December 2019, Council's application to lead further evidence was listed for hearing on 3 February 2020[19].

[22] Council's application to lead further evidence came on for hearing on 3 February 2020. Mr Connor appeared for Council. The respondent was represented by Ms Newman. She made no oral submissions. Rather, an election was made by the respondent to rely upon written submissions prepared by Mr Labone of Counsel, dated '*29 February 2020*'. The submissions advanced by both parties assumed r 782 of the UCPR was engaged, which states:

> "*Subject to any Act, this part applies to an appeal or case stated to a court other than the Court of Appeal.*" (emphasis added)

[23] Both parties also assumed r 785(1) applies to this appeal. This rule states that Chapter 18, Part 1 of the UCPR applies to an appeal to a court other than the Court of Appeal. Rule 765(1) is included in this part of the UCPR. It states that an appeal to which the rule applies is an appeal by way of '*rehearing*'. Mr Connor relied upon the combination of these rules to establish the appeal was by way of rehearing.

[24] The position advanced by Mr Connor as to the nature of the hearing proceeded on the footing that: (1) the introductory words to r 782, which have been emphasised above, are not engaged by the PA; and (2) s 43 of PECA is displaced by r 782. This provision of PECA states:

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14 T1-17, Line 10 to 17.
15 T1-18, Line 10 to 12.
16 Court doc. # 21.
17 Court doc. # 22.
18 Court doc. # 23.
19 Court doc. # 26.

> "*Subject to any relevant enabling Act, an appeal to the P&E Court is by way of hearing anew.*"

[25] I granted leave for supplementary submissions to be filed in relation to the matters discussed in paragraphs [23] and [24]. Both parties took up that opportunity.

[26] The supplementary submissions filed on behalf of Council commenced with the observation that the '*true nature of the appeal is not perfectly clear*'[20]. After traversing relevant statutory context and examining like legislative provisions, it was ultimately submitted on behalf of Council[21]:

> "*All in all, and in the absence of any clear authority on point, it seems the better view may be that once the appeal is allowed, the Court may embark on a consideration of the issues the Tribunal considered, but that outcome is not without doubt.*"

[27] The supplementary submissions filed on behalf of the respondent introduced the proposition that the appeal is in the nature of '*judicial review*' because the court's jurisdiction arises from the legality of the Tribunal's decision, not its merits[22]. It was further submitted on behalf of the respondent that the function of the court to judicially review the lawfulness of the Tribunal's decision had been exercised, with the consequence that the relevant decision was set aside by order of 27 September 2019[23]. This was said to leave only one remaining step to dispose of the appeal. In this regard, the respondent invited the court to decline to make a new decision, and remit the matter to the Tribunal for reconsideration according to law[24]. The remittal was opposed by Council.

[28] I will now turn to consider the issues identified in paragraph [5].

Should the matter be remitted to the Tribunal?

[29] It was uncontroversial that the court's power to remit this matter to the Tribunal is contained in s 47(1)(c) of PECA. I agree with this point of common ground. The real dispute between the parties turned on: (1) whether the question of remittal was determined on 27 September 2019; and (2) if not, whether the matter should be remitted to the Tribunal.

[30] It was submitted on behalf of the respondent that the question of remittal was not finally determined by her Honour Judge Kefford, and further, the matter should be remitted to the Tribunal.

[31] I reject both submissions.

[32] It is clear from the transcript of the hearing on 27 September 2019 that her Honour was asked to determine the question of remittal. The question was asked and answered by her Honour in circumstances where it was contested, and both parties were given an opportunity to be heard.

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20 Further submissions dated 12 February 2020, paragraph 2.
21 Further submissions dated 12 February 2020, paragraph 23.
22 Outline of submissions dated 19 February 2020, paragraph 8.
23 Outline of submissions dated 19 February 2020, paragraph 12.
24 Outline of submissions dated 19 February 2020, paragraph 14.

[33] With the benefit of oral submissions, her Honour exercised her discretion to: (1) set aside the decision of the Tribunal; and (2) make directions that facilitate the court re-exercising the discretion conferred on the Tribunal, as is envisaged by s 47(1)(c)(i) of PECA. That the discretion was exercised in this way is patently clear from the passage of the transcript set out at paragraph [19]. It is also clear from the steps that occurred in the appeal after 27 September 2019, which are identified in paragraph [21].

[34] Given the above, I accept the submission made by Mr Connor that I am not permitted to re-visit the question of remittal. As Senior Judge Skoien said in *Zarb v Brisbane City Council* [2005] QPELR 707 at [15], '*a disappointed litigant cannot go from judge to judge, re-litigating a point in the hope of securing a favourable decision*'. The only remedy for the respondent is to seek leave to appeal to the Court of Appeal.

[35] If, contrary to the above, the question of remittal was a matter that was open for re-consideration, I would have declined to remit the matter in any event. My reasons for doing so can be simply stated. I adopt the substance of the reasoning expressed by her Honour Judge Kefford, which is set out at paragraph [19]. Like her Honour, I am satisfied the nature of the issues in dispute between the parties are complicated by a number of questions of statutory construction. The issues also involve technical engineering matters, the outcome of which will be influenced by '*public safety*' considerations. This court, in my view, is well placed to deal with such matters. In the circumstances, I am not satisfied the matter must be dealt with by the Tribunal.

[36] The appeal will remain in this court for determination. The only issue left to be determined involves whether the discretion conferred by s 47(1)(c)(i) of PECA should be exercised in favour of approval, or refusal.

What is the nature of the appeal?

[37] Council's application under r 766(1)(c) proceeds on the footing the appeal to this court is conducted by way of rehearing. An appeal by way of rehearing is to be conducted on the material before the Tribunal[25].

[38] After considering the supplementary submissions filed on behalf of both parties, I am persuaded this proceeding is not, as the respondent contends, '*judicial review*' in nature. It is an appeal. The appeal is against a decision of the Tribunal, which is to be conducted as a rehearing. This is so having regard to s 43 of PECA, the right of appeal created by the PA and the court rules.

[39] Section 43 of PECA is set out in paragraph [24]. The provision states the general position - an appeal to this court is by way of hearing anew. This general statement is, however, qualified. It is subject to the relevant enabling Act conferring jurisdiction on the court.

[40] The enabling Act for this appeal is the PA.

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25 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, [57].

[41] Section 229(1)(a)(iii) of the PA confers a right of appeal against the Tribunal's decision, which is expressed in Schedule 1, Table 2 of the PA in the following terms:

> "*1. Appeals from tribunal*
>
> *An appeal may be made against a decision of the tribunal, other than a decision under section 252, on the ground of -*
>
> *(a) an error or mistake in law on the part of the tribunal; or*
>
> *(b) jurisdictional error.*"

[42] The appeal right created by s 229(1) and Schedule 1 of the PA is expressly limited to errors of law, or excess of jurisdiction. These grounds of appeal, by their very nature, do not empower the court to embark upon a fresh review of the merits of the development application before the Tribunal, regardless of error. An error of law or excess of jurisdiction must be established. That such an error must be established before appellate powers are exercised is the hallmark of an appeal conducted by way of rehearing. This is different to a hearing anew. In a hearing anew, the court hears the matter afresh, and may overturn the original decision regardless of error[26].

[43] In this appeal, one of the grounds of appeal stated in Schedule 1, Table 2 of the PA must be established before the court may exercise its appellate powers. The appellate powers are set out in s 47 of PECA.

[44] Section 47(1)(c)(i) of PECA empowers the court to set aside the decision of the Tribunal, and make a new decision in its place. It is a power conferred on the court; it is broadly expressed; it is not subject to any express limitation; it is to be exercised judicially. It is noted, as a matter of principle, that the interpretation of a statutory provision with these characteristics is to be approached in the manner discussed by Gaudron J in *Knight v FP Special Assets* (1992) 174 CLR 178 at 205. Her Honour said the necessity for a power conferred on a court to be exercised judicially tends in favour of the most liberal construction. This principle can be accepted as having application to s 47 of PECA. It does not, however, provide support for the proposition that the provision is to be liberally construed to the point it expands the nature of the appeal right conferred by the PA. The provision does not empower the court to review the merits of the respondent's development application by way of hearing anew.

[45] As a matter of statutory interpretation, it is well established that the nature of an appeal right informs the construction of statutory provisions conferring appellate powers in deciding the appeal[27]. The nature of the appeal right conferred by the PA here is for the correction of legal error. The appellate powers conferred by s 47 of PECA are to be construed in this context. The result of that construction, again, is the hallmark of an appeal conducted by way of rehearing.

[46] The conclusion that s 43 of PECA is displaced by the nature of the appeal right created by the PA against a decision of the Tribunal is also confirmed by the

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26 *Lacey* (Supra), [57].

27 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, [14].

consequences that follow if the alternative position is adopted. This was a point well made by Mr Connor in his supplementary submissions.

[47] If, contrary to the above, this appeal is to be conducted as a hearing anew, this would, in effect, permit a party dissatisfied with a decision of the Tribunal to secure a second merits hearing before this court, conducted on new material. The nature of such an appeal would be more expansive than that conducted before the Tribunal at first instance and have the practical effect of '*obliterating the distinction between original and appellate jurisdiction*'[28]. An outcome such as this is a strong indicator the alternative construction is not to be preferred. To obliterate the distinction between original and appellate jurisdiction in the circumstances here would be inconsistent with the appeal right conferred by s 229 of the PA.

[48] That the appeal is to be conducted as a rehearing is confirmed by the rules of the court, namely the *Planning & Environment Court Rules 2016* (**PECR**) and the UCPR.

[49] The PECR does not contain any rule that is directed towards the nature of an appeal against a decision of the Tribunal. As a consequence, r 4(2) of the PECR is engaged, which directs the reader to the UCPR.

[50] Chapter 18, Part 3 of the UCPR deals with '*Appellate proceedings*', namely '*other appeals*'. Rule 782 provides that Part 3 of the UCPR applies, subject to any Act, to an appeal to a court other than the Court of Appeal. There is no Act of relevance here that can be said to displace r 782 for the purposes of ascertaining the nature of the appeal before this court. As a consequence, Chapter 18, Part 3 of the UCPR applies to an appeal against a decision of the Tribunal, subject to necessary changes.

[51] Rule 785 forms part of Chapter 18, Part 3 of the UCPR. It is to be read with r 765. These rules, read in combination, confirm the hearing of the appeal is to be conducted by way of rehearing. This is consistent with the nature of the appeal right conferred by the PA.

Does r 766(1)(c) of the UCPR have application to the appeal?

[52] The answer to this question is in the affirmative.

[53] Rule 766(1) applies to this appeal because of r 785(1). The latter rule states:

> "*(1) Part 1, other than rules 746, 753, 758, 766(3), 767, 776 and 777, applies to appeals under this part, with necessary changes, and subject to any practice direction of the court in which the appeal is brought.*"

[54] Rule 766(1) is included in Chapter 18, Part 1 of the UCPR and applies, with necessary changes.

[55] The general powers for the appeal are contained in r 766 of the UCPR. Rule 766(1)(a) and (c) state:

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28 *CDJ v VAJ* (1998) 197 CLR 172, [111] and *Lacey* (Supra), [51].

> "*(1) The Court of Appeal –*
>
> *(a) has all the powers and duties of the court that made the decision appealed from; and*
>
> *…*
>
> *(c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, or by affidavit or in another way; …*"

Exercise of the discretion under r 766(1)(c)

[56] Rule 766(1)(c) of the UCPR contemplates this court may receive further evidence on the rehearing of this appeal. The further evidence is to go to a '*question of fact*'. The discretion to receive the evidence is subject to a '*special grounds*' test. The court may receive such further evidence in the form it considers appropriate.

[57] The exercise of the discretion under r 766(1)(c) requires consideration to be given to the issues in dispute at first instance.

[58] What were the issues for determination before the Tribunal?

[59] A central issue for determination at first instance was whether the development application complied with the Flood hazard overlay code in Council's planning scheme. One of the code provisions in issue was Performance outcome PO1, which states[29]:

> "*Development siting and layout responds to flooding potential and maintains personal safety at all times.*"

[60] Compliance with overall outcomes (2)(a) and (b) of the Flood hazard overlay code was also in issue. These overall outcomes state:

> "*(a) Development maintains the safety of people on the development site from flood events and minimises the potential damage from flooding to property;*
>
> *(b) Development does not result in adverse impacts on people's safety, the environment or the capacity to use land within the floodplain…*"

[61] To discharge its onus in the appeal, and prove compliance with Council's code, the respondent relied upon a 2014 flood study, which had been prepared for Council to assist in the preparation of its planning scheme. This study is titled '*Leyburn Flood Risk Management Study*', and dated June 2014 (**the flood study**). The respondent's material before the Tribunal included a number of written representations about the contents of the flood study and its implications for development on the land. The following submission was made on behalf of the respondent before the Tribunal, and was said to favour approval:

> "*The applicant proposes to construct a one (1) bedroom Dwelling House on the subject land that will be constructed on steel piers/posts (not slab on ground). The 'raised' construction of the Dwelling will ensure that the*

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[29] Court doc. #12.

> *Dwelling House's floor level is a minimum of 1.5 metres above ground level (and a minimum of 0.5m above the highest known/predicted flood level – potentially 0.5m to 1m above). The design of the posts and its footings are by an Engineer who has taken into account potential flood impacts (depth and velocity).*" (emphasis added)

[62] The above submission was accepted by the Tribunal. So much is clear from paragraph [12] of the decision notice dated 19 July 2018, which states:

> "***Findings of Fact***
> *The Tribunal makes the following findings of fact:*
> ...
> *12. The raising of the dwelling house places it above the level of predicted flooding.*"

[63] This is not the only finding made by the Tribunal having regard to representations made on behalf of the respondent about the flood study. It appears from the published decision that the Tribunal was satisfied compliance had been demonstrated with Council's planning scheme based on findings drawn directly from submissions made on behalf of the respondent about the flood study. In this regard, the decision of the Tribunal reflects it made findings about: (1) the elevation of the Dwelling house relative to ground level; (2) a maximum flood event; (3) the height of flooding inundation during a so-called maximum flood event; (4) the period of time residents have to evacuate during a flood event having regard to the velocity of flow of flood waters; (5) the levels of inundation on evacuation routes during flood events; and (6) the risk attending local residents traversing roads whilst evacuating during flood events.

[64] Council seeks an order that it be permitted to rely upon the evidence of Mr Neil Collins as part of the rehearing. Mr Collins is a senior engineer who is known to the court as an expert in the field of flooding and hydraulics. He has prepared a report, which is exhibited to an affidavit. The report raises a number of concerns with the Tribunal's findings about matters relevant to flooding and inundation, all of which were drawn from, or based on, the flood study and representations made about the study on behalf of the respondent.

[65] The views expressed by Mr Collins are founded upon a technical analysis of the flood study that was before the Tribunal. In short, the effect of Mr Collins' evidence is that the flood study has been misapplied and/or misunderstood by the Tribunal. This can be demonstrated by reference to particular aspects of Mr Collins' report.

[66] As a starting point, Mr Collins, at section 2.2 of his report, said this about the flood study:

> "*A detailed flood risk management investigation was carried out as detailed in a report by SKM (June 2014). This investigation quantified flooding in and around Leyburn, including on the land. Based on my review, this is a comprehensive and detailed investigation, based on best practice hydrologic and flood modelling, and provides the most accurate assessments of flooding available for the Land.*"

[67] Based on his review of the flood study, Mr Collins '*deduced*' a number of matters relevant to flooding and inundation on the land, and access to it. The '*deductions*'

are set out in sections 2.3 and 3 of the report. By reference to these matters, and Mr Collins' consideration of, inter alia, Council's planning scheme, he was critical of a number of findings made by the Tribunal. The particular findings, and Mr Collins' evidence about them, are as follows.

[68] In determining compliance with the planning scheme in the respondent's favour, the Tribunal's decision records the following finding:

> "*The entire property and evacuation routes are located in a low hazard area with reference to the Flood Hazard Overlay Map.*"

[69] With respect to this finding, Mr Collins said:

> "*Based on Council's hazard mapping, the entire property is not all located in a low hazard flood area, with over a third of the property having a high hazard…*"

[70] The Tribunal's decision records the following finding:

> "*The raising of the dwelling house places it above the level of predicted flooding.*"

[71] With respect to this finding, Mr Collins said:

> "*The dwelling house has not been raised above the level of predicted flooding, but above the 1% AEP (1 in 100 year ARI) flood event, with larger floods precited (sic) to overtop the habitable floor of the dwelling. These larger floods can and do occur, with a 22% and 10% chance respectively of getting a 1 in 200 year and 1 in 500 year flood in the next 50 years.*"

[72] The reasons for the decision record the following finding with respect to compliance with the purpose, and overall outcomes (2)(a) and (b), of the Flood hazard overlay code:

> "*…the house is situated in an appropriate part of the property with respect to access to Tummaville Road; and further, its construction above the expected flood event minimises risk and accordingly, meets clause…(2)(a) and (b).*"

[73] With respect to this finding, Mr Collins said:

> "*Access to Tummaville Road is not the issue. Evacuation in a flood cannot be south to the township of Leyburn as the main channel of Canal Creek has to be crossed, and this crossing is cut early in a flood. Evacuation can therefore only be to the north, and flood depths progressively increase from the site driveway entry point north to Falla Lane.*"

[74] The reasons for the decision also record the following finding with respect to compliance with the purpose, and overall outcomes (2)(a) and (b), of the Flood hazard overlay code:

> "*…it is concluded that the siting and design of the proposed development does respond to flooding potential and given the elevation of the dwelling*

> *house, it is considered that personal safety is maintained at all times. House occupants may remain in the dwelling during the maximum flood event or, alternatively, have the ability to evacuate given the time in which a maximum flood event is likely to occur…*"

[75] With respect to the above finding, Mr Collins said:

> "*Personal safety is not maintained at all times. In floods larger than the 1% AEP event, over floor flooding occurs, and in all major flood events, including the 1% AEP event, flood debris load could place the structure at risk of damage or collapse.*
>
> *…*
>
> *When flood commences, there is no way of knowing how severe it will be. Unless the property is evacuated every time it rains (which is impractical and would lead to an unacceptably high number of false alarms), evacuation times available are likely to be very short and inadequate.*
>
> *During severe to extreme flood events, the evacuation route would be highly hazardous.*"

[76] Council's application to lead evidence from Mr Collins is opposed. It is said that Mr Collins' evidence is not fresh evidence. It is said to be a rework of material already before the Tribunal. It was also said that Mr Collins' evidence was, in any event, inadmissible because the opinions expressed by him impermissibly criticise the Tribunal's decision, and swear the ultimate issue.

[77] The flood study is a lengthy and technical document. It exceeds 150 pages in length. It is a document that, in my view, needs to be translated from technical terms into terms that a lay person can understand to examine the disputed issues in this appeal. This is largely because the results of the flood study, which are presented in various forms, need to be examined and interrogated. This is not an easy task. It is a matter for an appropriately qualified expert in the field of flooding and hydraulics. Mr Collins is such an expert.

[78] Mr Collins' evidence presents the results of his interrogation and examination of the flood study in a way that is readily understandable. His analysis can be applied to an assessment of the application against the planning scheme. There was no like opinion evidence of this kind before the Tribunal at first instance. His evidence demonstrates there is a serious question to be considered, namely whether the submissions made about the flood study on behalf of the respondent at first instance were factually correct. Further, it raises a genuine concern that the respondent's development application may not comply with provisions of Council's flood overlay code, which is directed, in part, to the maintenance of an appropriate level of safety for the public during flood events.

[79] I reject the submission that Mr Collins' evidence is a rework of material that was before the Tribunal.

[80] A review of the material before the Tribunal reveals a number of documents were prepared by a Town Planner on behalf of the respondent. Those documents contain assertions about matters relevant to flooding and inundation, all of which were said to be derived from the flood study. Mr Collins' evidence is not a rework of those

assertions. Rather, Council seeks to lead the evidence to correct erroneous assertions made about the contents of the flood study at first instance.

[81] In my view, Mr Collins' evidence establishes there is a genuine concern that technical assertions made by the respondent's Town Planner at first instance about the flood study led the Tribunal into error. This is in circumstances where the representations made about the flood study were critical to, and favoured, the respondent's case for an approval. The matter of concern for this court is to ensure error, if any, is not perpetuated in the rehearing. To perpetuate an error is highly unsatisfactory given the flood study underpins the respondent's contention that an appropriate level of safety for people and property can be achieved during defined flood events. This was a central issue for determination in the proceeding.

[82] It does not, however, follow from paragraph [81] that Council should necessarily be granted leave to lead evidence from Mr Collins. It bears the onus of establishing the evidence is fresh evidence going to a question of fact. It also bears the onus of establishing special grounds.

[83] Given the purpose for which Council seeks to lead Mr Collins' evidence, I accept it is fresh evidence. It goes to a question of fact, namely whether compliance has been demonstrated with key provisions of Council's Flood hazard overlay code[30].

[84] The parties agreed that the outcome of an application to lead fresh evidence on appeal is guided by the identification of '*special grounds*'. Relevant authorities establish that this calls for three propositions to be examined, namely: (1) whether the further evidence could have been obtained with reasonable diligence for use at the trial; (2) whether the evidence, if given, would probably have an important influence on the result, although it need not be decisive; and (3) whether the evidence is apparently credible.

[85] As to item (1), Council readily accepts Mr Collins' evidence could have been obtained with reasonable diligence for use at the trial. The failure to lead the evidence was explained by Ms Doherty. She is a Town Planner employed by Council and appeared at the hearing before the Tribunal. In her affidavit, she said it never occurred to her that Council could call, and rely upon, expert evidence. Ms Doherty says she was under the impression the hearing was conducted on the basis of the material before the Council as assessment manager.

[86] The explanation given by Ms Doherty was not the subject of challenge. It establishes that the absence of Mr Collins' evidence at first instance was not the product of a forensic, or deliberate, decision. It was the product of a misunderstanding as to the law in circumstances where Council was not permitted to appear by legal representation at the hearing before the Tribunal.

[87] As to items (2) and (3), Council submits Mr Collins' evidence would have had an important influence on the result, particularly as it relates to a matter of public safety and is highly credible. I accept Council's submissions in this regard. Mr Collins is a very senior and experienced expert. He is well known to the court and his opinions are entitled to respect. If accepted, his opinions go directly to the question of compliance with key provisions of Council's planning scheme in the assessment of the respondent's development application.

[88] Should leave be granted for Council to lead Mr Collins' evidence?

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30 *Regional Land Corporation No.1 Pty Ltd v Banana Shire Council* [2009] QCA 140, [18].

[89] On balance, I am satisfied there are special grounds to admit Mr Collins' evidence. It would, in my view, be contrary to common sense to exclude the evidence. It has the potential to assist the court in relation to a matter that: (1) involves a need to review and understand a highly technical document in circumstances where there is no admissible opinion evidence presently in the material to aid in this task; and (2) goes directly to an issue of public safety during defined flooding events. Put simply, the evidence is directed at ensuring the court re-exercises the discretion on the proper factual foundation for a matter directly engaging public safety considerations. This is not offset, or overcome, by reason the evidence could have reasonably been led at first instance, but was not.

[90] Whilst leave will be granted for Council to lead fresh evidence, it will be granted in part only. The respondent objected to Mr Collins' evidence on the footing that it impermissibly criticised the Tribunal's decision, and swore the ultimate issue to be determined by this court. These objections are valid in so far as they relate to sections 3.5, 3.6 and 6 of Mr Collins' report. The Council will be given leave to file a new affidavit that exhibits an amended report excluding sections 3.5, 3.6 and 6. These sections of the report are akin to submissions. The submissions are more appropriately advanced by Counsel, or the advocate, appearing on behalf of Council at the rehearing.

Conclusion

[91] In the circumstances, it is ordered that:

1. Council's application filed 21 November 2019 be allowed.

2. Council is granted leave under r 766(1)(c) of the UCPR to lead evidence from Mr Neil Collins in the form of the report exhibited to his affidavit filed on 6 December 2019, exclusive of sections 3.5, 3.6 and 6.

3. By 4pm on 25 March 2020, Council file and serve a further affidavit of Mr Collins exhibiting an updated version of the report exhibited to his affidavit filed on 6 December 2019, excluding sections 3.5, 3.6 and 6.

4. The appeal be reviewed at 9:15am on 27 March 2020 for the purposes of making directions for the further conduct of the rehearing.