PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Vanriet Development Pty Ltd v Brisbane City Council* [2021] QPEC 17
PARTIES:	**VANRIET DEVELOPMENT PTY LTD** **(ACN 613 508 802)** (appellant/respondent) **v** **BRISBANE CITY COUNCIL** (respondent/applicant)
FILE NO:	1767 of 2020
DIVISION:	Planning and Environment
PROCEEDING:	Hearing of an application
ORIGINATING COURT:	Planning and Environment Court of Queensland at Brisbane
DELIVERED ON:	29 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2021
JUDGE:	RS Jones DCJ
ORDER:	1. **It is the finding of the court that it does not have the jurisdiction to hear the appeal.** 2. **I will hear further from the parties as to any consequential orders, including the final form of the orders disposing of the notice of appeal.**
CATCHWORDS:	PLANNING AND ENVIRONMENT COURT – JURISDICTION – whether the Planning and Environment Court has the jurisdiction to hear and determine on the merits an appeal against an amended infrastructure charge notice issued by the respondent counsel
LEGISLATION:	*Planning Act 2016* (Qld) s 137, 229 & Schedule 1 *Planning and Environment Court Act* 2016 s 6
CASES:	*Associated Provincial Picture House Ltd v Wednesbury Corporation* (1948) 1KB 223
COUNSEL:	Mr R Yuen for the respondent/applicant
SOLICITORS:	Mr A Storie, solicitor of Connor O'Meara Solicitors for the appellant/respondent Brisbane City Legal Practice for the respondent/applicant

Introduction

[1] This proceeding is concerned with an application brought by the Brisbane City Council (the Council) challenging the jurisdiction of this court to hear an appeal filed on behalf of Vanriet Development Pty Ltd (the respondent). For the reasons set out below, the conclusions of the court are as follows:

1. It is the finding of the court that it does not have the jurisdiction to hear the appeal.

2. I will hear further from the parties as to any consequential orders, including the final form of the orders disposing of the notice of appeal.

Background

[2] The respondent purchased land situated at 115 Rudd Street, Inala. That land is included within the Industry (General Industry) Zone pursuant to the Council's City Plan 2014. In the furtherance of its intention to develop the land, the respondent lodged a development application seeking approval for a development permit for a material change of use of premises and building works for high impact industry and warehouse development. By a negotiated decision notice dated 27 May 2019, the Council approved the development subject to conditions. Of relevance to this proceeding is that the development approval included a condition requiring the provision of trunk infrastructure, namely the dedication of part of the land along the Boundary Road and Rudd Street frontages for the transport network. The amount area of land required to be dedicated was 1,423m^2.

[3] On 27 May 2019, an original infrastructure charge notice was issued by the Council which relevantly included an offset pursuant to Chapter 4, Part 2 of the *Planning Act* 2016. The value of the offset for the establishment cost of the trunk infrastructure was originally assessed in the sum of $153,696. Not satisfied with that assessment, the respondent lodged a request seeking a re-calculation of the offset on 19 February 2020. That application was accompanied by a valuation report prepared for and on behalf of the respondent which valued the land taken in the sum of $400,000. In response to that request, the Council referred the respondent's assessment to an in-house registered valuer for assessment. Following that assessment, the Council then notified the respondent that it was not prepared to accept its valuation but that the offset was now assessed in the sum of $250,000.

Again, not satisfied with that valuation by the Council, on 9 April 2020 the respondent requested that the matter be referred to an independent registered valuer. On 20 April 2020, the Council referred the matter to an independent registered vauler, one Mr Kamitsis for assessment. On 6 May 2020, Mr Kamitsis advised the Council that:

> "The applicable market land rate for the usable portion of the subject site at the relevant date (is) $169/m^2$ and, accordingly the difference between the before and after assessment of the subject land was $235,000. The amended infrastructure charge notice including the re-calculated value of the offset in the sum of $235,000 was advised to the respondent on 22 May 2020. The respondent lodged its notice of appeal on 19 June 2020."

The notice of appeal

[4] Section 137 of the *Planning Act* 2016 deals with the process for the calculation of appropriate offsets or refunds in circumstances such as exist here. Pursuant to s 137(5), the amened infrastructure charges notice "*must adopt the method to work out the establishment cost*." It is uncontroversial that the relevant method for working out the establishment cost for the purposes of this proceeding is the adoption of the before and after method of valuation. Before going on to deal further with the grounds of appeal and the respective submissions made on behalf of the parties, Schedule 1, Item 4 of the *Planning Act* relevantly provides that an appeal to this court may be made against an infrastructure charge notice on one or more of the grounds set out in Item 4 of Schedule 1. In this instance, the respondent relies on two grounds namely:

(a) The notice involved an error relating to;

...

(iii) an offset or refund; or

….

(d) For an appeal to the Planning & Environment Court – the amount of the charge is so unreasonable that no reasonable relevant local government could have imposed the amount.[1]

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[1] Unreasonableness of the type contemplated in *Associated Provincial Picture House Ltd v Wednesbury Corporation* (1948) 1KB 223.

[5] The relief sought in the notice of appeal is:

(a) The appeal be allowed;

(b) The amended infrastructure charge notice:

(i) Be amended to state an offset amount of $400,000; or

(ii) In the alternative, be set aside and replaced with a new infrastructure charge notice stating an offset amount of $400,000; and

(c) Such further or other orders as the court deems appropriate.

[6] In paragraph 11 of the notice of appeal, it is said that the respondent appeals against the amended infrastructure charge notice on the following grounds:

(a) That it involves an error relating to an offset, namely the calculation of the establishment cost of the Land Dedication; and

(b) Further or in the alternative, that it results in the imposition of a charge of an amount that is so unreasonable that no reasonable local government could have imposed it.

[7] In paras 12 and 13, it is then pleaded:

> "The establishment cost of the Land Dedication is to be calculated using the current market value for the Land Dedication, determined using the before and after method of valuation prescribed in s 25 of the Infrastructure Charge Resolution, in accordance with s 27 of the Infrastructure Charger Resolution (the before and after method).
>
> Pursuant to the Before and After Method, the establishment cost of the Land Dedication, and therefore the value of the offset, is $400,000."

[8] The first assertion, namely that the appropriate method for determining the offset is the before and after method, is uncontroversial. What is in controversy is the value of that offset.

[9] On behalf of the Council, it is submitted that this court does not have the jurisdiction to hear and determine this appeal as a consequence of the operation of the s 229(6)(b) of the *Planning Act*. That section, after identifying a number of matters that may be appealed to this court and after dealing with a number of other procedural matters, then provides in subsection (6):

> "To remove any doubt, it is declared that an appeal against an infrastructure charge notice must not be about –
>
> (a) …
>
> (b) for a decision about an offset or refund –
>
> (i) ….
>
> (ii) the cost of infrastructure decided using the method included in the local government charges resolution."

[10] At the heart of the appeal is that, according to the respondent, the valuation relied on by the Council was not the result of a proper before and after valuation. According to Mr Storie, who appeared on behalf of the respondent, any misuse or misapplication of the methodology would mean that in truth, the valuation is not a proper before and after valuation. In this regard, in the respondent's written submissions it is asserted:[2]

> "The appellant's allegation in the appeal are to the effect that, when the before and after method prescribed by s 25 of the Charges Resolution is applied, the value arrived at for the establishment cost of the Trunk Land Dedication is $400,000 and that as a consequence the Amended ICN… involves an error relating to an offset or refund and results in the imposition of a charge of an amount that is so unreasonable that no reasonable relevant government authority could have imposed it.
>
> The necessary corollary of that allegation is that any other value (such as the $230,000 the subject of the Kamitsis' valuation report and the Amended ICN) is not a value decided using the before and after method prescribed by s 25 of the Charges Resolution, because if that method is used (as alleged by the appellant), a different value results (being $400,000).
>
> Consequently, the Appellant's appeal is not about the cost of infrastructure decided using a method included in the local government's charge resolution, rather it is about the cost of infrastructure that the Appellants allege has been decided other than in accordance with that method and therefore, the appeal does not offend s 229(6)(b)(ii) of the *Planning Act*".

[11] What was being submitted on behalf of the respondent, and Mr Storie did not shy away from this,[3] is that the valuation relied on by the Council could not properly be described as a before and after methodology as required, because it must involve

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2 Respondent's Outline of Written Submissions at paras 21 – 23.
3 T1 – 14.

either a misuse or misapplication of that methodology because, if carried out properly, it would also have arrived at a figure of $400,000. With all due respect, that submission could only be described as a "*bootstrap*" approach and cannot be accepted.

[12] The difference between the two valuations arises because the valuer for the respondent and the valuer relied on by the Council, after carrying out their respective investigations of the market, arrived at vastly different values for the land required for dedication. On behalf of the respondent, the valuer adopted the rate of $281/m² whereas the valuer relied on by the Council adopted a rate of $169/m². As far as I have been able to ascertain, the primary difference between those rates per m² came about as a consequence of the valuation on behalf of the Council including in its market assessment, the price paid by the respondent for the subject land. Whereas, the valuation relied on by the respondent did not bring that transaction into account.

[13] That the respective valuers adopted different rates per m² in their valuations does not of itself reveal an error relating to an offset or refund. I was not taken to any material upon which the respondent said revealed or, at least, was indicative of an error or misapplication of the before and after valuation. Instead, in truth, it was simply said that the valuation relied on by the Council must be wrong because it doesn't accord with the valuation prepared on behalf of the respondent. The same observation can be made in respect of the allegation that the valuation relied on on behalf of the Council was so unreasonable (i.e. manifestly inadequate) that it must be indicative of a misapplication or otherwise an abuse of the before and after methodology.

[14] In circumstances where I was not taken to any evidence, other than the existence of the valuation relied on by the respondent itself, there can be no basis for concluding that the valuation relied on on behalf of the Council was so unreasonable that the only inference open was that the before and after valuation methodology was either not adopted or, if it was, it was so grossly misused that it could not be properly said to be such a method of valuation. What the court has before it is simply a difference of opinion about the valuation of the land based on the adoption of different dollar rates m^2.

[15] To put it another way, for the purposes of s 229(6)(b)(ii) there is nothing which would indicate that the before and after methodology was not used by Mr Kamitsis in assessing the market value of the offset or refund. Accordingly, this court does not have the jurisdiction to hear the appeal as it involves, clearly in my respectful opinion, an appeal against an infrastructure charge notice involving a decision about an offset or refund where the appropriate method prescribed in the local government charges resolution, namely the before and after valuation method, was adopted and applied.

[16] At one stage Mr Storie seemed to be suggesting that if an appeal in circumstances such as this was beyond jurisdiction because of the operation of s 229(6) of the *Planning Act*, that would deny land owners an appropriate remedy to ensure adequate relief. Item 4 of Schedule 1 of the *Planning Act* clearly contemplates this court having the jurisdiction to determine appeals against an infrastructure charge notice where, by way of examples, the notice involves an error relating to an offset or refund or where the charge is so unreasonable that no reasonable relevant and local government could have imposed the amount.

[17] Further, even in circumstances where this court is denied the jurisdiction to determine the matter by way of hearing a merits based appeal, it seems to me, without expressing a final view on the matter, that other avenues of challenge might exist. For example, s 11 of the *Planning and Environment Court Act* 2016 gives this court the power to make declarations and consequential orders. Further, in the event that the valuation methodology adopted involved an error which resulted in a figure so unreasonable that no reasonable local authority could adopt it, then relief of the type contemplated by way of judicial review may be available.

[18] As already addressed, s 137 of the *Planning Act* sets out a process for working out the cost for any required offset or refund associated with an infrastructure charge. Section 137(2) gives to the recipient of the infrastructure charge notice, the option of having the relevant local government authority recalculate the establishment cost. Once that notice is given, the local government must amend the infrastructure charge notice adopting the prescribed method for calculating the establishment

cost.[4] That is what has occurred here and, as such, s 229(6)(b) denies this court the jurisdiction to hear and determine the appeal.

[19] In any event, for the reasons given the findings of the court are:

1. It is the finding of the court that it does not have the jurisdiction to hear the appeal.

2. I will hear further from the parties as to any consequential orders, including the final form of the orders disposing of the notice of appeal.

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4 Section 137(4) and (5) of the *Planning Act 2016* (Qld).