PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*JPJ Developments Pty Ltd v Brisbane City Council* [2019] QPEC 13
PARTIES:	**JPJ DEVELOPMENT PTY LTD** (Appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	4317 of 2018
DIVISION:	Planning and Environment Court, Brisbane
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	25 March 2019, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2019
JUDGE:	Everson DCJ
ORDER:	**The application is dismissed**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – application for joinder on an application to extend the currency period for an existing development approval – where applicant has no statutory right to be a party of the originating application
LEGISLATION:	*Planning Act* 2016 (Qld) *Planning and Environment Court Act* 2016 (Qld) *Sustainable Planning Act* 2009 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld)
CASES:	*Novadeck Pty Ltd v Brisbane City Council* [2016] QPEC 53
COUNSEL:	D P O'Brien QC and J Hastie for the applicant J G Evans for the respondent A E Lyons is the applicant for joinder
SOLICITORS:	HWL Ebsworth for the applicant Brisbane City Legal Practice for the respondent

[1] This is an application brought by Mr Lyons who seeks an order pursuant to rule 69(1)(b) of the *Uniform Civil Procedure Rules* ("UCPR") that he be joined as a party in this proceeding.

[2] This proceeding, brought by JPJ Development Pty Ltd, is an originating application seeking orders pursuant to section 37 of the *Planning Environment Court Act* 2016 ("PECA") that the currency period for an existing development approval over land adjoining that owned by Mr Lyons be extended to 18 July 2020.

[3] The development approval, the subject of the originating application ("the development approval") was obtained on 22 October 2009 by the decision of Wilson SC DCJ (as he then was). The currency period, with respect to the development approval, has been extended on previous occasions. At the time the development approval was obtained, Mr Lyons did not own the land adjacent to the land in question, and a previous owner owned the land in question. Relevantly, on 4 April 2014 and on 18 July 2016, the respondent purported to extend the relevant period (as the currency period was then called) of the development approval pursuant to section 383 of the *Sustainable Planning Act 2009* ("SPA"). Furthermore, the court approved permissible changes to the development approval on 16 December 2016 and 27 July 2017. Various approvals for operational works have also been granted by the respondent. It is significant that a third party, such as Mr Lyons, had no right to be heard in respect of any of the approvals sought following the development approval.

[4] Materially, in respect of the permissible change applications, which were heard and determined pursuant to section 367 of SPA, it was necessary that the change not be likely, in the court's opinion, "to cause a person to make a properly made submission objecting to the change if the circumstances allowed".

[5] Mr Lyons submits that pursuant to rule 69 of the UCPR, it is desirable, just and convenient that he be heard in respect of the reviving of the now lapsed approval. He asserts that he would have made a properly made submission, objecting to the changes to the development approval, had he been aware of them. In this regard, he asserts, primarily, that he would have sought emergency access over the land, the subject of the development approval, to the benefit of his own land adjoining it, which would

have enabled him to develop his own land. He also asserts that certain earthworks undertaken as a consequence of changing the access point pursuant to a permissible change application are such that that there has been a detrimental impact on his own land. His property is completely separate from the areas the subject of the changes which were approved by the court. Moreover, in another proceeding, which is currently on foot to further subdivide the land in question, he is advancing the argument that he should be granted emergency access over this land. He also has secured similar emergency access pursuant to the development approval granted over property on the other (western) side of his land, should this land ultimately be developed in accordance with the development approval.

[6] There are a number of difficulties with the application which has been brought by Mr Lyons. Firstly, Mr Lyons has no statutory right to be a party to the originating application. He also never had a right to be heard in respect of any of the permissible change applications which were determined by the court and in respect of applications concerning operational works, determined by the respondent. It was for the court to decide, in determining an application seeking a permissible change pursuant to section 367 of SPA, whether the change would cause a person to make a properly made submission objecting to the proposed change. It is important that the court makes these decisions in an informed way and that the discretion exercised in making such a decision is appropriately invoked. There is nothing before me which suggests that this did not happen. The fact that Mr Lyons now asserts that he would have made such a submission, and that despite his obvious self-interest, that such a submission would have been a properly made submission, is not to the point. It is important that decisions concerning development rights are respected and important discretionary considerations apply in this regard. Effectively, the decision of the court in each instance is now res judicata and the applicant has acted pursuant to them.

[7] Mr Lyons also takes issue with alleged breaches of conditions of approval on the part of the applicant developer. However, in circumstances where there is no locus standi requirement, such concerns are much better addressed by way of a proceeding for an enforcement order or an interim enforcement order, pursuant to section 180 of the *Planning Act* 2016 ("PA"). Again there are sound discretionary reasons for confining the relevant considerations in this application to the question of whether or not it is appropriate that the lapsed development application be revived, rather than

investigating a litany of alleged non-compliances. The proper exercise of the jurisdiction to grant the relief sought by Mr Lyons requires a balancing of the rules of natural justice with the statutory intention evident in the relevant legislative regimes. I commented upon this in *Novadeck Pty Ltd v Brisbane City Council* where I said, inter alia at [18]:

> *The applicability of the rules of the natural justice is subject to the relevant statutory law that applies. ... It is not the intention of SPA that those wishing to make a submission in respect of a development application necessarily have a right to be heard in a subsequent proceeding. An obvious example is a code assessable development application. ... There is nothing before me which suggests that the court cannot undertake the task mandated by the legislative framework when comparing the further changes the subject of the Novadeck application to Modified Approval without including Beriley as a party to the proceeding pursuant to r69 of the UCPR. Conversely, there is a prospect that the parties to the Novadeck application would incur additional unnecessary costs should Berily be included as a party*.[1]

[8] Mr Lyons submits that because the originating application seeks relief pursuant to section 37 of PECA the broad jurisdiction of the court pursuant to this provision, when compared with the narrower inquiry in the context of a permissible change application, which was under consideration in *Novadeck*, warrants a less restrictive approach. In my view, this submission is without merit. The legislature made it clear that none of the approvals following the original development approval were to be subject to third party rights. Any consideration of the interest of third parties pursuant to the legislative framework was, the legislature determined, a matter for the court in exercising its discretion, and not a matter for submission by third parties.

[9] Furthermore, the voluminous affidavit material produced in support of this application makes it clear that the applicant, which has brought the originating application, would clearly be subject to considerable additional costs, should I grant the relief sought by Mr Lyons.

[10] Finally, in the exercise of my discretion, I note a very strong basis for declining the relief sought by Mr Lyons, and that is that the emergency access which he so craves, has already been obtained as a consequence of a condition of the development approval concerning land to the west of his land, and, moreover, is still the subject of

[1] [2016] QPEC 53, [18].

another proceeding before this court, concerning part of the land the subject of the proceeding before me. When I combine the desirable necessity of certainty of decisions of this court, affecting the rights of parties involved in developing land, and others, with the fact that Mr Lyons already has other means at his disposal in advancing his arguments including that for emergency access, I would not exercise my discretion to include him as a party to this proceeding.

[11] The application is therefore dismissed.