

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Shannen Jane Bielby v Moreton Bay Regional Council* [2018] QPEC 50

PARTIES: **SHANNEN JANE BIELBY**
(applicant)
v
MORETON BAY REGIONAL COUNCIL
(respondent)

FILE NO/S: D 141/2018

DIVISION: Planning

PROCEEDING: Application

ORIGINATING COURT: Maroochydore

DELIVERED ON: Orders made on 19 October 2018, reasons delivered 22 October 2018

DELIVERED AT: Maroochydore

HEARING DATE: 19 October 2018

JUDGE: Long SC DCJ

ORDERS:

- 1. The non-compliance be excused.**
- 2. The development approval be revived.**
- 3. The currency period of the development approval be extended to 21 December 2018 to enable the applicant to make an extension application to the respondent pursuant to section 86 of the *Planning Act 2016*.**
- 4. Each party bear their own costs.**

LEGISLATION: *Sustainable Planning Act 2009* ss 284, 341, 440
Planning Act 2016 ss 37, 85, 86, 299

CASES: *Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Anor and; Sunshine Coast Regional Council v Beerwah Land Pty Ltd* (2016) QPEC 55
Devy & Anor v Logan City Council (2010) QPEC 96
Maryborough Investments Pty Ltd v Fraser Coast Regional Council (2010) QPEC 113
Telstra Corporation Ltd v Brisbane City Council & Ors (2016) QPEC 37

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – LAPSE OF CONSENT – where the respondent granted the applicant a development approval (for material change of use) on 14 September 2011 – where the currency period for that approval was later extended to 15 November 2017 and permitted to be changed on 1 June 2016 – where the changed development approval lapsed on 15 November 2017 and therefore after the commencement of the *Planning Act 2016* – where there has been non-compliance with s 86 of the *Planning Act 2016* in the failure to seek extension of the currency period prior to expiry of the development approval – where this application is for excusal of the non-compliance and revival and limited extension of the approval, pursuant to s 37 of the *Planning Act 2016*, in order to allow an application to the respondent for further extension in conjunction with the further pursuit of the proposed development – where the parties agree that the application should be granted

COUNSEL: C N Wirz (sol.) for the applicant
A J Davey (sol) for the respondent

SOLICITORS: Gantt Legal for the applicant
Moreton Bay Regional Council for the respondent

Introduction

[1] These are the reasons for the orders made in this matter and without opposition, on 19 October 2018. Those orders were made upon the originating application filed on 3 October 2018, seeking:

- “1. If it is contested, a declaration under section 11(1) of the *Planning and Environment Court Act 2016* that the development permit for a material change of use (impact assessable) for multiple dwelling units (10 units) (as amended by decision notice dated 1 June 2016) in relation to land situated at 102 Prince Edward Parade, Redcliffe in the State of Queensland and more properly described as Lot 97 on RP30443 and bearing the respondent’s reference DA/24642/2010/VCHG/1 (**Development Approval**), lapsed within the meaning of section 341 of the *Sustainable Planning Act 2009* on 15 November 2017.
2. An order under section 37(1) of the *Planning and Environment Court Act 2016* that:
 - (a) the Development Approval be revived; and

- (b) the currency period of the Development Approval be extended for a period of 6 months to 19 April 2019, unless further extended according to law.
3. Such further or other orders as this Honourable Court may require.”

[2] As may be noted and for the reasons to follow, the orders made on 19 October 2018 do not entirely reflect the terms of that application. However, they did reflect the agreed position of the parties in resolution of that application.

Background

- [3] By correspondence dated 14 September 2011, the respondent gave a decision notice approving a development application for a development permit for a material change of use (impact assessment) for multiple dwelling units (11 units) in relation to land located at 102 Prince Edward Parade, Redcliffe, in the State of Queensland and more properly described as Lot 97 on RP30443 and bearing the respondent’s reference DA/24642/2010/DA (“development approval”).¹
- [4] On 6 October 2015, the applicant, who is the owner of the subject land,² lodged a request with the respondent to extend the relevant period of the development approval for a further 2 years.³ By correspondence dated 12 November 2015, the respondent gave a decision notice approving the applicant’s request to extend the relevant period of the development approval for a period of two years until 15 November 2017.⁴
- [5] On 28 January 2016, the applicant lodged a request with the respondent to make a permissible change to the development approval. By correspondence dated 1 June 2016, the respondent gave a decision notice approving the applicant’s request to change the development approval (“changed development approval”).⁵
- [6] Each of the development approval given on 14 September 2011, the decision to extend the relevant period of the development approval made on 12 November

¹ Affidavit of Drew Westbrook, filed on 15 October 2018, at [7] and DW-1 at p 41.

² Affidavit of Drew Westbrook at [10].

³ Affidavit of Drew Westbrook at [16] and DW-1 at pp 117–127.

⁴ Affidavit of Drew Westbrook at [18] and DW-1 at pp 128–139.

⁵ Affidavit of Drew Westbrook at [24] and DW-1 at pp 227–273.

2015 and the changed development approval given on 1 June 2016, was given or made pursuant to the *Sustainable Planning Act 2009* (“SPA”).

- [7] Subsequently to the commencement of the *Planning Act 2016* (“PA”), on 3 July 2017,⁶ and on 28 August 2017, Inertia Engineering lodged with the respondent a development application for a related approval to the changed development approval, namely a development application for a development permit for operational works (stormwater).⁷ And on 22 December 2017, Inertia Engineering lodged with the respondent, a further development application for a related approval to the changed development approval, namely a development application for a development permit for operational works (stormwater).⁸
- [8] In about mid-January 2018, the applicant was informed by the applicant’s development consultant that the respondent was unable to assess the development application for operational works because the material change of use development approval had lapsed on 15 November 2017.⁹ Until then the applicant had overlooked the need to attend to the prospect of the lapsing to the changed development approval on 15 November 2017, as explained in the evidence, due to reliance on her husband and his ill health and the death of the applicant’s architect who had been undertaking the project management role for the applicant.¹⁰
- [9] It is the impediment of the lapsing of the development approval on 15 November 2017, which is the primary subject of the relief sought in this Court.

Relevant Statutory Considerations

- [10] Upon the commencement of the *PA*, the changed development approval (with the extended currency period) was to be taken to be a development approval under the *PA* and as remaining effective according to its terms.¹¹ Accordingly, s 86 of the *PA* may have been engaged by the applicant in order to seek a further extension of the development approval, before it lapsed. That is so

⁶ And therefore the repeal of the *SPA* by s 284 of the *PA*.

⁷ Affidavit of Drew Westbrook at [25] and DW-1 at pp 274–298.

⁸ Affidavit of Drew Westbrook at [28] and DW-1 pp 303–377.

⁹ Affidavit of Damion Bielby, filed on 15 October 2018, at [36].

¹⁰ Ibid at [37].

¹¹ See *PA* s 286.

notwithstanding the effect of s 299 of the *PA*, in excluding the operation of s 85 of the *PA* to a development approval given under the *SPA*. It may be noted that the effect of s 299(2) is to instead preserve the operation of s 341 of the *SPA* and so as to determine the relevant currency period of such an approval. In this instance, the effect of the history of the current development approval was that the currency period was determined to expire on 15 November 2017, in accordance with s 341(1)(b).

[11] It is therefore appropriate to accept the applicant's submission that s 37 of the *Planning and Environment Court Act 2016* ("*PECA*") can be utilised in the circumstances of this case to excuse the non-compliance with s 86 of the *PA*, in the sense of the failure to make a request of the respondent, to extend the currency period of the development approval before it lapsed. And to revive the development approval, so that such a request may now be made.

[12] As noted for the applicant, relevantly, s 37 of the *PA* is in comparable terms to s 440 of the *SPA* and in respect of which, this Court had recognised, as providing a broad¹² and untrammelled¹³ discretionary power to excuse non-compliances and to deal with the matter in a way the Court considers appropriate.¹⁴

Discretionary Considerations

[13] There are a number of considerations which favour granting relief pursuant to s 37 of the *PECA*, in the circumstances of this case:

- (a) The non-compliance may be accepted to be the product of a combination of:
 - (i) the applicant experiencing delays with the original architect in preparing architectural plans of the proposed development to a standard that would be sufficient to obtain a development permit for building works and which necessitated the engagement of an alternative architect;

¹² *Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Anor and; Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 055 at [38].

¹³ *Maryborough Investments Pty Ltd v Fraser Coast Regional Council* [2010] QPEC 113 at [30].

¹⁴ *Devy & Anor v Logan City Council* [2010] QPEC 096 at p 3; *Telstra Corporation Ltd v Brisbane City Council & Ors* [2016] QPEC 037 at [16].

- (ii) the applicant also experiencing significant delays with engineering consultants in designing the structural engineering works and preparing and lodging the development application for operational works for stormwater;¹⁵ and
 - (iii) the unexpected death of applicant's architect on 6 July 2017 who had been undertaking the project management role for the applicant and the applicant's husband's ill health,¹⁶ which resulted in the applicant's husband and who had primary responsibility for this matter, being distracted and overlooking the prospective lapsing of the development approval and a request to extend the currency period of the development approval prior to 15 November 2017;¹⁷
- (b) The applicant has otherwise demonstrated a desire and willingness to pursue the development and has incurred considerable expense, estimated to be approximately \$200,000 in that pursuit.¹⁸ And the applicant would be prejudiced, to at least some of that extent, if forced to make a new development application; and
- (c) The application is supported by uncontested evidence from a town planner, expressing views that the current zoning of the land is consistent with the intent of the zone applying to the land at the time of granting the development approval on 14 September 2011, the development approval is consistent with the current planning intent and outcomes for the land expressed through the current planning scheme, the development remains impact assessable, the building height of the development approval is consistent with the relevant provisions in the current planning scheme, the development approval remains

¹⁵ Affidavit of Damion Bielby [16]–[18].

¹⁶ Ibid at [25] and [37].

¹⁷ Ibid at [19]–[25].

¹⁸ Ibid at [47]–[48].

compatible with the current key relevant planning considerations applying to the land, if a new development application were made there would be no referral agencies triggered, and there is no town planning or other reason why the request to revive and extend the development approval ought not to be approved;¹⁹ and

- (d) Significantly, the respondent supported the making of the orders.²⁰ And it is to be noted that the anticipated effect is only the provision of the entitlement of the applicant to seek a further extension of the currency period of the approval, particularly because of an anticipated accompanying further application for change of the development approval.

Conclusion

- [14] Accordingly and where there are circumstances explicable of the oversight sought to be excused and the outcome sought is no more than to now put the applicant in the position that may have been availed, absent that oversight, the appropriate conclusion was a favourable exercise of the Court's discretion pursuant to s 37 of the *PECA*, to excuse the oversight and revive the development approval and extend the currency period of the development approval to 21 December 2018, to enable the applicant to make an extension application to the respondent pursuant to s 86 of the *PA*.

¹⁹ Affidavit of Drew Westbrook at [35]–[38], particularly [37] (g)–(l) and DW–1 at p 430–446.

²⁰ Affidavit of Drew Westbrook at [31] and [33] and DW–1 at pp 382, 385–429.