

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Body Corporate for Pine Trees CTS 43235 v Brisbane City Council & Ors*
[2018] QPEC 060

PARTIES: **BODY CORPORATE FOR PINE TREES CTS 43235**

(Appellant)

v

BRISBANE CITY COUNCIL

(Respondent)

And

**CHIEF EXECUTIVE, DEPARTMENT OF STATE DEVELOPMENT,
MANUFACTURING, INFRASTRUCTURE AND PLANNING**

(Co-Respondent by Election)

FILE NO/S: 4795 of 2017

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 12 November 2018 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 12 November 2018

JUDGE: Everson DCJ

ORDER: **1. The application is dismissed.**
2. The appeal be stayed until further order of the court.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION IN PENDING
PROCEEDING – APPLICATION FOR JOINDER – where the appellant
seeks to extinguish an easement through the appeal proceeding – where the
easement benefits the applicant for joinder – where the applicant for joinder
applies to be joined to the appeal proceeding – where the applicant for
joinder has other remedies available under the Planning Act and these
remedies could not be obtained event if it becomes a party to the appeal –
whether the applicant for joinder being added as a party to the current
proceedings would be desirable, just and convenient

LEGISLATION: *Sustainable Planning Act 2009* (Qld) s 369

Uniform Civil Procedure Rules 1999 (Qld) r 69

CASES: *Leda Holdings Pty Ltd v Caboolture Shire Council* [2007] 1 Qd R 467
Novadeck v Brisbane City Council [2016] QPELR 951

COUNSEL: J Hastie for the appellant
D Fahl for the applicant for joinder

SOLICITORS: HWL Ebsworth for the appellant
Brisbane City Legal Practice for the respondent
Herbert Smith Freehills for the co-respondent by election
Clinton Mohr Lawyers for the applicant for joinder

- [1] This is an application in pending proceeding by which Hastone Australia Pty Ltd seeks an order that it be joined as a party to the appeal.
- [2] The appeal is an appeal against the decision of the respondent to refuse a permissible change application, pursuant to section 369 of the Sustainable Planning Act 2009 ("SPA") in respect of a development permit for a material change of use (multi-unit dwelling) and preliminary approval for building works, approved by the respondent on 19 February 2009, relating to land located at 2180 Logan Road and 9A Marada Street, Upper Mount Gravatt ("the land").
- [3] It is uncontentionous that the appeal is to be heard and determined under the Planning Act 2016 ("PA"). It is equally uncontentionous that pursuant to the PA Hastone Australia Pty Ltd has no right to be heard in the appeal.
- [4] The applicant relies upon rule 69 of the Uniform Civil Procedure Rules 1999 ("UCPR"), on the basis that its presence before the court would be desirable, just and convenient to enable the court to adjudicate effectively and completely on all matters in dispute connected with the proceeding.
- [5] The appeal itself seeks the deletion of condition 26 of the development permit which required the developer of the land, to grant a 10-metre wide volumetric easement, 4.5 metres high, for access purposes over land which is now under the control of the appellant, in favour of the adjoining land now owned by Hastone Australia Pty Ltd.

- [6] It is uncontentional that this condition of approval, despite running with the land and being binding on successors in title has not been complied with. It is clear to me that the deletion of this condition would be detrimental to Hastone Australia Pty Ltd.
- [7] In the submissions in support of its application Hastone Australia Pty Ltd emphasises the need for considerations of natural justice to prevail, in circumstances where it apprehends that the appeal is about to be compromised to its detriment.
- [8] The utility of rule 69 of the UCPR, in the context of a proceeding concerning a planning dispute was considered by Keane JA in *Leda Holdings Pty Ltd v Caboolture Shire Council* [2007] 1 Qd R 467. He observed at 470:-

“The discretion conferred by r 69 should be approached as intended to facilitate the determination of proceedings in accordance with the rules of natural justice. It should not be approached as if it were intended to restrict the availability of the common law right of a person likely to be affected by a decision to be heard in relation to that decision.”

- [9] However, as I observed in *Novadeck v Brisbane City Council* [2016] QPELR 951 at 957:-

“The applicability of the rules of natural justice is subject to the relevant statutory law that applies. Pursuant to SPA, Beriley does not have a right to be heard in the determination of the application brought by Novadeck. This is uncontentional. 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 court proceeding. An obvious example is a code assessable development application. The exercise which must be undertaken by the court pursuant to Novadeck's application is prescribed by s 367. It is a confined inquiry which is informed by the subsequent provisions of SPA noted above. Significant constraints are placed upon the circumstances in which a change to a development approval can occur in s 361(1).”

- [10] The same considerations apply to the application before me today. The same legislative considerations apply pursuant to the PA as applied pursuant to SPA. It is an unattractive course where a party seeks to take the benefit of the conditions of a development approval without acknowledging and complying with the conditions of the development approval which confer the burdens. It is uncontentional that the development approval benefiting the appellant carries with it the obligation to grant an easement over part of the land in favour of the adjacent land now owned by Hastone Australia Pty Ltd.

- [11] In considering and determining an application for a minor change which seeks to delete such a condition it is the intention of the legislature to place significant obligations upon the responsible entity, which in this case is the Brisbane City Council. I am alarmed to learn in the course of the hearing of this application that the council was contemplating compromising the appeal in circumstances where the condition intended to confer an easement to the benefit of the land owned by Hastone Australia Pty Ltd would be deleted, with obvious detriment to the interests of this company.
- [12] However, these circumstances of themselves do not mean that the presence of Hastone Australia Pty Ltd before the court in this appeal would necessarily be desirable, just and convenient. It is significant that the legislature does not intend Hastone Australia Pty Ltd to have a right of appearance in such a proceeding. It is also significant that Hastone Australia Pty Ltd has other remedies available to it pursuant to the PA and that these remedies could not be obtained even if it became a party to the appeal.
- [13] In order to obtain the benefit of the easement contemplated by the condition of the development approval the subject of the appeal it is necessary for Hastone Australia Pty Ltd to institute a proceeding which compels compliance with the relevant condition. The appropriate way for achieving this is to commence a proceeding for an enforcement order requiring compliance with the relevant condition.
- [14] For reasons which are unclear to me, Hastone Australia Pty Ltd has not taken this course. It therefore cannot be said that by simply being joined in this proceeding its interests will be adequately addressed. I am therefore of the view that there is no real utility in allowing the application, but rather that a combination of an interim enforcement order and ultimately an enforcement order would secure compliance with the condition the subject of this appeal from the perspective of Hastone Australia Pty Ltd.
- [15] It follows therefore that I am not satisfied that the presence of Hastone Australia Pty Ltd before the court would be desirable, just and convenient to enable the court to adjudicate effectively and completely on all matters in dispute connected with the appeal, in circumstances where the respondent is obliged to act in a way which takes into account the interests of the applicant, and further, that these interests can only be satisfactorily addressed in a separate proceeding. I therefore dismiss the application.

- [16] Upon the delivery of my reasons for judgment Mr Fahl, who appears on behalf of Hastone Australia Pty Ltd, has sought a stay of the appeal to enable his client to file an application for an interim enforcement order. This course is opposed by Mr Hastie, who appears on behalf of the appellant. Mr Hastie, however, has offered an undertaking that his client will take no steps in the appeal for seven days.
- [17] In the course of legal argument Mr Hastie stated that it was his client's intention to progress the appeal, such that by the time any application for an enforcement order came before the court the appeal had been successfully resolved. In these circumstances the more attractive course is to stay the appeal.
- [18] I do not intend the stay to be open-ended however and I therefore order that the appeal be stayed until further order of the court.