

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Dickson Properties Pty Ltd v Brisbane City Council & others*
[2019] QPEC 29

PARTIES: **DICKSON PROPERTIES PTY LTD**
(Appellant)

v

BRISBANE CITY COUNCIL
(Respondent)

and

ANTHONY LEIGHTON
(first co-respondent by election)

and

BRUCE LOCKWOOD
(second co-respondent by election)

and

JOHN LESLIE BRISTOW
(third co-respondent by election)

and

**RURAL ENVIRONMENTAL PLANNING
ASSOCIATION INC**
(fourth co-respondent by election)

and

GEORGE PALLOT
(fifth co-respondent by election)

and

MAX GODFREY GRINDON-EKINS
(sixth co-respondent by election)

FILE NO: 4072/12

DIVISION: Planning and Environment Court

PROCEEDING: Minor Change Application

ORIGINATING
COURT: Planning and Environment Court of Queensland, Brisbane

DELIVERED ON: 11 June 2019 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 11 June 2019
 JUDGE: RS Jones DCJ
 ORDER: It is declared that:

1. The changes from Preliminary ROL Concept, Sheet no. ERS01_SK06, Revision 1 dated 10 May 2012 which was publicly notified by the Appellant to Reconfiguration Plan, drawing no. B3980P_DA1 R2 C dated 23 May 2019, are minor for the purposes of section 4.1.52(2)(b) of the now repealed *Integrated Planning Act 1997* having regard to sections 350, 819 and 821(2)(b) of the now repealed *Sustainable Planning Act 2009* and section 311 of the *Planning Act 2016*.

LEGISLATION: *Sustainable Planning Act 2009* (Qld)
Planning Act 2016 (Qld)

COUNSEL: JG Lyons for the appellant
 No counsel for the respondent
 First co-respondent self-represented
 MA Williamson for the fourth co-respondent and as proxy for the third and fifth co-respondents
 BD Lockwood for the 2nd co-respondent and as proxy for the sixth co-respondent

SOLICITORS: King & Co Solicitors for the appellant
 R Yuen from City Legal for the respondent

- [1] This proceeding is concerned with an application brought by the developer for what is in effect a decision by the court that certain intended changes to the proposed development be declared minor changes for the purposes of the *Sustainable Planning Act 2009* (Qld). The proposal has, as Mr Lyons pointed out, two essential elements; the reconfiguration of a lot and preliminary approval, both designed to facilitate a residential-style development on the subject land. The application is supported by the Brisbane City Council, and it is not opposed by the second to sixth respondents. Indeed, the second co-respondent and Mrs Williams, on behalf of the third to fifth co-respondents, contended that the proposed changes were minor. Mr Leighton, the first co-respondent, however, contended that the changes were not minor for the purposes of the *Sustainable Planning Act*.
- [2] Section 350 of that Act deals with the meaning of a minor change. Subsection 1 identifies that a minor change in relation to an application is any one of a number of changes to the application. Of particular relevance here is whether the change is one that would not result in a substantially different development and would not require

the application to be referred to additional referral agencies and did not change the type of development approval sought, nor require an impact assessment, where the original application would not have involved that level of assessment. Relevantly here, the only live issue, in reality, is whether or not the proposed change would result in a substantially different development.

- [3] I will return to Mr Leighton’s position in more detail in a moment, but it is convenient to point out at this stage that in his affidavit, filed by leave today, in paragraphs 5 and 6 he says:

“The original plan of development, ERS01SK06, revision 1, dated 10/5/2012, attachment 1, provides a council-owned flood emergency access facility for three existing Allard Close residences as part of the council-owned road reserve, circled in red in attachment 1 for the convenience of the court. Using a council-owned road reserve is, in my opinion, a suitable mechanism for providing a safe emergency escape facility to the top of Weekes Road for the existing Allard Close residents during future river floods, which is where my family had to escape in the 2011 flood.

The court acceptance of the changed plan of development, attachment 2, as a minor change, would remove that council-owned flood emergency escape facility for the existing Allard Close residences, circled in red in attachment 2 for the convenience of the court, and create an additional approximately 400 metres of group title/private land between these existing Allard Close residences and the top of the council-owned Weekes Road, where existing residences escaped to, up and across an open rural paddock in 2011.”

- [4] I would pause there to note that the three Allard Close residents include Mr Leighton and also Mr Lockwood, who was present in court when this matter was being argued, and as I indicated, it was his view that the proposed changes were minor. The other matter that I would note at this stage is that the open rural paddock to which I referred is in fact the subject land which is privately owned.

- [5] In paragraph 20 and 21 of Mr Leighton’s affidavit, he goes on to identify matters that he considered to be of particular importance by reference to section 68 of the *Planning Act 2016*. The reference to the *Planning Act* does not detract from his submissions in my view. What he articulates in paragraphs 20 and 21 really go to the heart of his submissions before me. I do not intend to read those paragraphs out in full, other than to identify that particular emphasis is placed on matters such as changing the ability of the proposed development to operate as originally intended, removing from the development a component that was integral to the operation of the development, the

introduction of new impacts or increasing severity of known impacts, or removing various components which might prove to be offset components or components that balance other negative impacts.

- [6] In support of the application, the developer relies on the evidence of Mr Ovenden, a town planner; Mr Williams, a traffic engineer; and, perhaps most importantly in the context of this proceeding, Mr Rhodes, an engineer with more than 25 years in water resource engineering and floodplain modelling and management.
- [7] To dispose of this proceeding, it is not necessary to deal with the evidence of the traffic engineer. Mr Ovenden, in his affidavit, compares what is now proposed to what was originally proposed. After setting out a table of those changes in paragraph 7, in paragraphs 8 and 9, Mr Ovenden states the following:

“The relevant differences between the original plan of development and the changed plan of development can be summarised as follows:

- (a) Reduction in the total number of lots, from 49 to 23 lots, plus new road to be held in common property and access easement to provide access to lots 20, 30, and 31 on SP121727
- (b) Change from a mix of conventional and large low-density lots
- (c) Change from conventional freehold subdivision titling arrangement to community title lots under standard format plan. The common property area includes the internal access road, the flood gauge and flood siren and gauge boards
- (d) Inclusion of building envelopes to delineate the developable area of each lot
- (e) Removal of the detention basin, with stormwater management to be contained within each lot
- (f) Consolidation of the two access points to each road into one access point and the dedication of a three-metre wide road reserve along the Weekes Road frontage of the site
- (g) Addition of an access easement over the internal road to facilitate alternative access to adjoining lots 29,30, and 31 on SP121727. The alternative access will provide pedestrian and vehicle access with a higher level of flood immunity than currently available to lots 29, 30 and 31
- (h) The inclusion of a sewage pump station within the community property adjacent to the internal road. Both the original plan of development and the changed plan of development include upgrading of the culvert on Weekes Road to 11.5 metres and to achieve vehicle access during a Q50 flood event. In addition to this, the changed plan of development includes installation of a flood gauge in the community title lot inside balance lot 17 and the siren and gauge boards located within common property adjacent to Weekes Road to alert future residence of the impending closure of Weekes Road during Brisbane flooding.”

- [8] I accept those descriptions of the differences between what was originally proposed and what is now proposed. I would also observe at this stage that the reference to lot 29, 30 and 31 is a reference to those three properties also referred to by Mr Leighton

in his affidavit. Before proceeding further, it is also appropriate to refer to plans that were tendered during proceedings before Her Honour Judge Kefford, if for no other reason than because it is by reference to those plans that I consider I can best try and summarise what lies at the heart of Mr Leighton's concerns.

- [9] I should note that there can be no doubt that the subject land is flood prone, and indeed, flood prone to such an extent that it required the careful analysis of a number of experts who were solely concerned with that issue. I also accept that Mr Leighton's concerns were concerns genuinely held by him and were in no small part generated by the impact of, in particular, the most recent flood event on him and his family.
- [10] Essentially, as I understood Mr Leighton's arguments against the application, they were: first, that it would be, to use his words, irresponsible to require the three owners of the three lots to which I have referred, which lie to the immediate west of the subject land, to enter into arrangements for an easement that would provide access from those three lots onto and over the subject land. In respect of this part of Mr Leighton's concerns, I consider them to be, while genuine, unrealistic or at least unpersuasive. Owners can be expected to act rationally, particularly when it involves formalising and securing an access route which previously did not exist, at least in a legal sense, and which would be more likely to ensure an alternate access route during times of major flood events.
- [11] Also, in this context, I would note that the easement or that part of the easement servicing those three lots, 29, 30, and 31, has existed in all three proposals, that is, the original proposal, the proposal before Judge Kefford, and that now before me. Indeed, it was through the involvement, in no small part, of Mr Lockwood that that part of the easement access has been improved to provide for a truck turnaround area.
- [12] In respect of that part of the proposed easement, I have little doubt that it could quite properly be described as a minor change insofar as it has altered what was originally proposed. That then brings me to what I consider to be really at the heart of Mr Leighton's concerns, namely, that what will now occur would be, if approved, access arrangements through common property, albeit a road, whereas originally the access easement from the west would have connected with and onto a public road under the control of the Brisbane City Council. As I understand it, Mr Leighton seemed to express the view that if today we were concerned with access arrangements of the

type that were before Judge Kefford, that is, access onto and joining with a council road, his concerns would be if not entirely satisfied then satisfied to a significant degree.

[13] Again, as best as I could understand his concerns about the access arrangements over the common property, being the road, they were that that access or escape route could be jeopardised by a number of matters, including a failure to properly maintain the road and the road being rendered inaccessible in various ways including somehow being closed off to anyone other than those who were internal residents. He was also concerned that the easement for the benefit of himself, Mr Lockwood, and the other landowner to the west, might be surrendered or otherwise placed in jeopardy. Before proceeding further, I would observe that a number of Mr Leighton's concerns were, to an extent, based on a lack of understanding of how easements operate and the laws governing easement rights and obligations. Also in my view, there was a failure to give proper recognition that it is in the interests of the owners and occupiers of the proposed group title lots intended for development to keep the road in good and trafficable repair. I will come back to that topic in a moment. That said, though, it does not necessarily follow that Mr Leighton's concerns do not require further consideration of the reasons as to why the proposed development has changed from a single lot residential development with access to a public road to a group title regime.

[14] As I have already indicated, flooding over the subject land is a matter of grave concern, and by necessity then, ensuring that residents on the subject land have appropriate flood mitigation and flood management regimes in place. Indeed, in respect of this particular aspect of the proceeding, no less than three joint expert reports were prepared, dealing with matters of stormwater and flooding. In the first of those reports, they were attended by Mr Greg Roads, the engineer to whom I have already referred; a Mr Warren Bridson, who was a consultant who specialised in emergency management planning among other things; a Mr Martin Giles, also an engineer with extensive experience in water engineering and specialised knowledge in hydraulic modelling and flood risk management; a Mr Ken Granger, a professional geographer with almost 50 years' experience, with particular emphasis in fields of strategic intelligence and disaster risk management, and a Mr Steve Clark, also a

registered professional engineer with more than 25 years' experience in water resource engineering and flood plain management experience.

- [15] Not surprisingly, in paragraph 9 of the first joint expert report, a point of agreement was to this effect:

“We agree that the key risk of the development is the consequences of flooding for events that overtop Weekes Road, which is proposed to be raised to the Brisbane River, two per cent AEP flood level. Evacuation will be cut for vehicles when the Weekes Road access becomes inundated. The level of Weekes Road is critical to the timing of evacuation.”

- [16] In paragraph 19, areas of disagreement between the experts are identified. In this context, Mr Ken Granger, Mr Steve Clark, and Mr Martin Giles, recommended that the development should be managed under a body corporate structure to provide ongoing management and the application of, in particular, mechanisms to provide for broader understanding for the residents of flood risks, and also to provide for an improvement in the management of the site. Thereafter, there was a second expert report which would appear to have been prepared at a later time, and at which only Mr Rhodes, Mr Giles, and Mr Clark were present. I do not consider it necessary to dwell on that report in any particular detail because a third report was prepared. Signatories to that report were Mr Rhodes, Mr Bridson, Mr Giles, Mr Granger, and Mr Clark. In paragraph 8, it identifies a number of the features of what is now proposed and, in particular, that what is now proposed is a community title subdivision, with internal roads being held as common property. It also identifies and refers to the escape access easement for the benefit of the three lots to the immediate west, two of which are owned by Mr Leighton and his family, and Mr Lockwood.

- [17] In paragraph 14 of that report, it takes up the matter raised in paragraph 19 of the first expert report that I have already referred to, that is, the matters that were identified by Mr Giles, Mr Granger, and Mr Clark, who were those who initially argued in favour of a community title development. It is necessary to deal with some of the matters raised in this joint expert report where, in paragraphs 14 through to 16, under the heading Flood Emergency Management Plan, the experts agreed that:

“The site is subject to inundation under severe and extreme flood events beyond a one per cent AEP event. A flood emergency management plan shall be prepared and then implemented and maintained under the community management statement for the site operated by the body

corporate. The plan shall be based on the flood risk assessment prepared by W.R.M, and the household emergency action plan version 3, May 2019 and include the following:

- (a) Flood levels and warning times based on Brisbane River Catchment flood study
- (b) Evacuation routes and procedures
- (c) The predicted Moggill Road gauge levels that would cause Weekes Road to be inundated and associated actions
- (d) The predicted Moggill gauge levels that would cause Allard Close to be inundated and isolate the residents of lots 29, 30 and 31
- (e) Incorporation of a site flood height gauge, located wholly within the site with the gauge located in Bellbowrie Creek, gauge board showing the level in the Brisbane River and the depth over the low point in Weekes Road at the southwestern corner of the site, and a siren within the internal road system, the location of the components of the gauge to be verified with the agreement of council.
- (f) Nomination of trigger for siren activation
- (g) Evacuation triggers that are not relied on BOM warnings for when the power and/or telephone coverage is cut
- (h) Inclusion of requirements and responsibility for maintenance of the gauge
- (i) Graphical correlation between flood levels predicted or recorded at the Moggill gauge with the flood level at the gauge board site, consistent with the results of the Brisbane River Catchment flood study to allow the interpretation of levels nominated by the Moggill gauge
- (j) Highlight the risk associated with a shelter in place for large flood events, events greater than the defined flood event, particularly given the significant increase in the depth of inundation for events greater than the design event flood
- (k) Body corporate responsibilities include the ongoing education of residents, maintenance and implementation of the plan, the provision of a designated person to act as the flood response manager, and an alternate to act as the manager in the event of the manager being unavailable
- (l) Inclusion of HEAP in the plan
- (m) Requirement for the periodic revision of plan to account for changes in best practice technology to take advantage of experience gained as a result of implementing the plan during major flood events
- (n) Inclusion and requirement for maintenance of appropriate signage alerting residents and visitors to the risk associated with flooding.”

[18] I will end the quote there. Reference is also made to the preparation and certification of a flood emergency plan and the implementation and maintenance of a certified flood emergency plan. Then, under the heading Household Emergency Action Plan, it is said with agreement:

“We agree that the HEAP¹ given in attachment 1 is appropriate and provides sufficient information for residents to evacuate. It is noted that a revision of the HEAP may be necessary depending on the final arrangement of the onsite gauge and siren.

We agree that the maintenance and update of the HEAP will be the responsibility of the body corporate and outline in the FEMP.”

¹ Household Emergency Action Plan.

- [19] It seems tolerably clear to me that by reference to the input of those experts, that contrary to Mr Leighton's concerns, it was the opinion of those well qualified and experienced experts that a group title development would provide the safest outcome for the residents of that development. Of course, it does not necessarily follow that the change is still not a significant one insofar as Mr Leighton is concerned. However, on balance, I am satisfied that the proposed access arrangement via an easement through the common property including the road amounts to a minor change when looked at objectively. As I have already noted, many of Mr Leighton's concerns failed to bring into account the law associated with the creation of easements and the protection of easement user rights. Further, it seems to me that but for his concerns about flood events, his arguments about the road being common property would be untenable. That is, if this were not a flood-affected lot, Mr Leighton would have no argument with the access being via the common road or common title road. Bringing into account the evidence of the experts concerned with flooding and flood risk management, as I have already said, it seems tolerably clear to me that the current proposal would result in a safer outcome, and that the changes proposed are minor for the purposes of the *Sustainable Planning Act*.
- [20] It strikes me that when reference is made to the evidence of the experts, that many of the concerns expressed by Mr Leighton, while no doubt genuinely held, are unrealistic worst-case scenarios. On balance, for the reasons give, I am satisfied that the proposed changes are minor for the purposes of the *Sustainable Planning Act* in that they do not result in a substantially different development, nor do they offend any of the other elements of section 350.
- [21] Finally, before making orders, I would note that this conclusion does not mean that this development will now automatically go ahead. There may well be further opportunities for Mr Leighton to agitate a number, if not all of his concerns, at a later stage, if he still considers it necessary. As I said, these are my reasons and I reserve the right to tidy them up before they are published.
- [22] For the reasons given, it is declared that:
1. The changes from Preliminary ROL Concept, Sheet no. ERS01_SK06, Revision 1 dated 10 May 2012 which was publicly notified by the Appellant to Reconfiguration Plan, drawing no. B3980P_DA1 R2 C dated 23 May 2019, are minor for the purposes of section 4.1.52(2)(b) of the now repealed

Integrated Planning Act 1997 having regard to sections 350, 819 and 821(2)(b) of the now repealed *Sustainable Planning Act 2009* and section 311 of the *Planning Act 2016*.