

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Cleveland Power P/L v Redland Shire Council* [2013] QPEC

PARTIES: **CLEVELAND POWER P/L ACN 101932272**  
**(Appellant)**  
**V**  
**REDLAND SHIRE COUNCIL**  
**(Respondent)**

FILE NO/S: 5192 of 2011

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Brisbane

DELIVERED ON: 20 March 2013

DELIVERED AT: Brisbane

HEARING DATE: 8 March 2013  
Written submissions 20 March 2013

JUDGE: Andrews SC DCJ

ORDER: **Judgment allowing the appeal and extending the relevant period of the development approval as per initialled draft.**

CATCHWORDS: **PLANNING AND ENVIRONMENT – where Council refused a request to extend the period of a development approval – where developer appealed Council’s refusal – where Council no longer opposes an order extending the period of approval – whether the court should have regard to the matters in s 388(1) of the Sustainable Planning Act 2009**  
**PLANNING AND ENVIRONMENT – where Council refused developer’s request to extend period of a development approval – where the approval is consistent with current laws and policies – where high level of community awareness of the development approval – where if the request were refused further rights to make a submission would be available for a further development application and would be exercised by members of the public – whether to extend the relevant period of the development approval**

COUNSEL: M Williamson for the appellant  
M Johnston for the respondent

SOLICITORS: Connor O'Meara for the appellant  
Norton Rose for the respondent

### Issues

- [1] Where Council has refused a developer's request to extend the period of a development approval and the developer appeals against Council's refusal this court determines the appeal. Council having withdrawn its opposition to the appeal the first issue is whether the court deciding the appeal should have regard to s 388(1) of the *Sustainable Planning Act 2009* ("SPA"). The second issue is whether the court should have regard to the fact that Council does not oppose the appeal. The third issue is whether it is appropriate to allow the appeal and extend the period of the development approval notwithstanding that further rights to make a submission would be available for a further development application and would be exercised by members of the public.

### Background

- [2] This is an appeal against Council's decision to refuse a developer's request to extend the relevant period of a development approval. The developer seeks final orders from the court allowing the appeal and extending the period of the development approval for two years from the date of judgment. The order is not opposed by Council.
- [3] The developer proposes to develop land at Mount Cotton with a bio-mass power plant. The land has the benefit of a development approval for a material change of use and a related environmental approval for Environmentally Relevant Activity No. 17.
- [4] The development application was impact assessable. More than 300 submissions were made by members of the community opposing the development. The development application was approved by the Council.
- [5] A submitter appeal was commenced in relation to the Council's decision to grant the development approval. The appeal was resolved between the parties and the court made final orders in the submitter appeal on 7 November 2007. That order of 7 November 2007 is the development approval which is the subject of the developer's request to extend the relevant period. The period was four years from 7 November 2007.
- [6] On 7 November 2011 the developer lodged a request with the Council under s 383 of SPA to extend the relevant period of the development approval. The Council refused. This is an appeal against that refusal.

- [7] In preparation for the appeal, experts in the fields of town planning, air quality and noise impacts prepared joint reports.
- [8] The development approval is consistent with Council's current planning scheme and with the South East Queensland Regional Plan as at the time the approval was granted.
- [9] The noise and air quality experts recommended changes to the development approval to update the conditions imposed by the then Environmental Protection Agency to achieve greater certainty that the approval would be consistent with current laws and policies with respect to air quality emissions.
- [10] The Department of Environment and Heritage Protection includes the former Environmental Protection Agency. That Department agreed that the extension to the development period was appropriate.
- [11] The developer accepts that members of the public have maintained a "rage" against the proposal and that if the request were refused, further rights to make a submission would be available for a further development application and that members of the public would exercise those rights.

#### **Statutory framework**

- [12] Section 383 of *SPA* provides that a person may apply to the assessment manager to extend a relevant period. In deciding the request, the assessment manager must have regard to s 388 of *SPA*.
- [13] Section 388(1) of *SPA* provides:  
 "388 Deciding request  
 (1) In deciding a request under section 383, the assessment manager must only have regard to—  
 ..  
 (a) the consistency of the approval, including its conditions, with the current laws and policies applying to the development, including, for example, the amount and type of infrastructure contributions, or infrastructure charges payable under an infrastructure charges schedule; and  
 (b) the community's current awareness of the development approval; and  
 (c) whether, if the request were refused—  
 (i) further rights to make a submission may be available for a further development application; and  
 (ii) the likely extent to which those rights may be exercised; and

(d) the views of any concurrence agency for the approval given under section 385."

**Issue 1: whether the court needs to consider s 388(1) of SPA**

- [14] Solicitors for developer appeared on a review day with a draft order with a provision for allowing the appeal and extending the period of the development approval. Counsel for the Council announced that the Council did not oppose the order but brought to the court's attention some facts relevant to the matters set out in s 388(1) of SPA.
- [15] It was submitted by the solicitor for the developer that the matters in s 388(1) need not be established for the purpose of determining that the court has jurisdiction to make the order, that jurisdiction was not in issue, that because Council did not oppose the orders the court need not be concerned with s 388(1) of SPA and that the facts drawn to the attention of the court by counsel for the Council unnecessarily complicated a simple matter.
- [16] I accept that the factual matters set out in s 388(1) of SPA do not need to be satisfied in order for the court to have jurisdiction to hear the appeal. That feature is of no assistance in determining whether the court should consider s 388(1). I otherwise reject the two other submissions of the solicitor for the developer.
- [17] As I expressed concern in the face of the developer's submissions the matter down to allow the developer to add to its submissions. Some hours later, Mr Williamson of counsel appeared on very short notice to supplement the submissions for the developer. He orally distinguished the concern courts must have with jurisdictional matters from the concern which the court should have with the matters in s 388(1). He echoed the submission of the solicitor for the developer that it was relevant that the Council did not oppose the application and added that the Council's decision not to oppose the appeal should be given more weight as the Council acts to protect public rights. Perceiving that more assistance would be appreciated, Mr Williamson offered to supplement the oral submissions with written ones. They arrived today.

**Issue 2: The relevance of council not opposing**

- [18] While it seems sensible that a court should have regard to the fact that Council has changed its mind, I am unsure whether that is a matter which the court may consider. I note that according to the wording of s 388(1), an assessment manager deciding a request under s 383 of SPA "must only have regard to" the four matters set out in s 388(1). The court can have regard to the "views of any concurrence agency for the approval given under s 385". There was no submission made that the Council was such a concurrence agency. Even if a failure to oppose an application could be regarded as the "views" of Council, I am not persuaded that it is a matter to which I may have regard. Fortunately, it does not affect the outcome as I propose for the reasons following, to allow the appeal. If I could take into account the non-opposition of council on the hypothesis that it is "a concurrence agency for the

approval given under section 385" it would have reinforced the other bases for my decision.

**Issue 3: Should the appeal be allowed where it is likely that numerous persons would make submissions to a fresh development application?**

- [19] The position taken by the Council in drawing to the court's attention matters referred to in s 388(1)(c) of SPA was appropriate. The complication it introduced was appropriately introduced. The choice of its counsel to raise the complicating facts was performance of his duty performance to the court. Section 388(1)(c) makes relevant to the court's function as assessment manager the likely extent to which rights to make a submission may be exercised. That part of the sub-section makes relevant the interests of potential submitters. They are not represented at the appeal. In an appeal where the facts show a likelihood that there would be numerous submitters in the event of a further development application the court should expect that this complication would be raised, at least by an officer of the court acting for Council.
  
- [20] The developer's supplementary written submissions have been helpful.
  
- [21] I accept that the provision in s 388(1) of SPA does not contemplate that any one of the four considerations is intended to prevail and it does not contemplate that a failure to comply with one of the criteria mandates refusal.
  
- [22] I regard it as particularly significant that the development approval is consistent with current laws and policies. Because the public notification process for the development application attracted more than 300 submissions I accept the submission that any submission made in response to the development application, if remade, is unlikely to raise any new issue not already raised by submissions in the original application process.
  
- [23] I accept the submission that any new resident in the area having arrived after the public notice should have an expectation that development could proceed in the area in accordance with the planning scheme. The consistency of the development approval with the planning documents is important because there must therefore be a reasonable expectation on the part of the public that development of the kind approved may occur in the area.
  
- [24] I accept that the opposition to the proposal maintained by some members of the public is likely to be related to the acceptability of the "use" in the area and not based upon its consistency or otherwise with current laws and policies. I balance that against the fact that the approval, including its conditions, is consistent with current laws and policies.
  
- [25] I accept there would be little utility in forcing the developer to undergo an extensive impact assessment process for the purpose of obtaining a development approval that would be, for all intents and purposes, consistent with the existing development

approval and which would be unlikely to provoke a public submission that would raise any new issue for consideration.

- (26) It is appropriate that the appeal be allowed and that the relevant period of the development approval be extended for two years from the date of judgment.