PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Copley v Logan City Council & Anor* [2012] QPEC 39
PARTIES:	**MARIE AGNES DOYLE, CECILIA BRIDGET DOYLE, AND PETER DANIEL DOYLE** (Applicants/Co-Respondents) **AND** **LOGAN CITY COUNCIL** (Respondent) **AND** **GREGORY CHARLES COPLEY** (Respondent/Appellant)
FILE NO/S:	1788/11
PROCEEDING:	Hearing of an application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	30 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2012
JUDGE:	RS Jones DCJ
ORDER:	**1. All of the appellant's grounds of appeal, save for Ground 1 – "flooding" are struck out.** **2. The issues in the hearing of the substantive appeal are to be limited to only the flooding issues raised by the appellant in his amended notice of appeal.** **3. I will hear from the parties (if required) as to the costs of the application.**
CATCHWORDS:	APPLICATION TO STRIKE OUT APPELLANT'S NOTICE OF APPEAL PURSUANT TO RULE 171 OF THE UNIFORM CIVIL PROCEDURE RULES 1999 (UCPR) – or, in the alternative, orders pursuant to r 293 of the UCPR that summary judgment be given for the co-respondent against the appellant in respect of all or part of the appellant's notice of appeal – tests to be applied – whether appellant's grounds of appeal disclose no reasonable cause or are otherwise frivolous or vexatious *Local Government (Planning and Environment) Act 1990*

(Qld), s 4.4(3)
Sustainable Planning Act 2009 (Qld), s 457
Uniform Civil Procedure Rules 1990 (Qld), rr 171, 293

Australand Holdings Ltd v Gold City Council & Anor [2007] QPELR 48; (2006) QPEC 88, approved
Daikyo (North Qld) Pty Ltd v Cairns City Council & Ors (2003) QPELR 606, cited
Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors (1990) QPLR 209, cited
Hamill & Anor v Brisbane City Council (2004) QPEC 30, approved
Holts Hill Quarries Pty Ltd v Gold Coast City Council & Ors [2001] QPELR 5; [2000] QCA 268, cited
Hughes & Anor v Westpac Banking Corporation & Ors [2010] QSC 274, approved
Newmann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd [2010] QCA 119, approved

APPEARANCES: Mr M. Connor, solicitor, of O'Meara Solicitors for the applicants/co-respondents

Mr J. Dillon of counsel, instructed by Corrs Chambers Westgarth for the respondent council

Mr G. Copley, the respondent/appellant, appeared in person

[1] This proceeding is concerned with an application to strike out (in whole or in part) an appeal to the Planning and Environment Court of Queensland or, in the alternative, that judgment be given (in whole or in part) for the co-respondent in respect of the respondent/appellant's notice of appeal as amended. For the reasons set out below, the orders of the court are:

1. All of the appellant's grounds of appeal, save for Ground 1 – "Flooding" are struck out.

2. The issues in the hearing of the substantive appeal are to be limited to only the flooding issues raised by the appellant in his amended notice of appeal.

3. I will hear from the parties (if required) as to the costs of the application.

Background

[2] On or about 29 February 2008, the applicants lodged a development application under a superseded planning scheme, in respect of the subject land with the former Beaudesert Shire Council for a development permit for:

(i) a material change of use of premises; and

(ii) a reconfiguration of a lot.

[3] The Beaudesert Shire Council no longer exists and its local government area is now the responsibility of the respondent, the Logan City Council.

[4] Essentially, the development application involved an application for a material change of use namely an increase in density, and the reconfiguration of one lot into 25 lots. The development, if completed, will be a fairly typical rural residential subdivision located on the southern side of the Logan River at Stockleigh.

[5] By Negotiated Decision Notice 19 October 2011, the respondent approved the development application subject to conditions. On 21 December 2011, the appellant filed an amended notice of appeal in this court. Accordingly, the substantive proceeding is a submitter appeal commenced by Mr Copley against the respondent Council's decision to approve the applicants/co-respondents' development application.

[6] On 2 February 2012, Judge Rackemann ordered that the issues in dispute in the appeal were those identified in paragraphs 1-4 (inclusive) in the amended notice of appeal, together with any particulars given in respect of those grounds.

[7] Unfortunately, there are two separate sets of paragraphs numbered 1-4 in the amended notice of appeal. When this proceeding was argued before me, the only person who had also been present in court when those orders were made was Mr Copley. According to Mr Copley, when his Honour Judge Rackemann made those orders, he was referring to both sets of paragraphs.[1]

[8] In these circumstances, I intend to address all of the substantive matters raised in the amended notice of appeal.

The grounds of appeal

[9] The primary relief sought by Mr Copley in the substantive appeal is that the development application be refused in its entirety. The bases for this relief are:

(i) that the respondent's decision notice was invalid because it wrongly included Crown land and wrongly excluded a part of public road, namely Evergreen Road;

(ii) no parkland is provided for;

(iii) no or insufficient regard was given to "koala and wildlife habitat";

(iv) traffic issues; and

(v) the subject land is flood affected.

[10] As an alternative to the appeal being allowed in full, Mr Copley seeks the following alternate relief:[2]

> "In the alternative:

---

1 T1-108 LL 15-35.

2 Notice of Amended Appeal, p 2.

1. As to regular flooding of the Subject Site which consists of Logan River flats and sensitive River environs that no building envelop be permitted under 27.5 metres;

2. (i) 'The three' lots consisting of 15,380 square metres numbered 1, 2 and 3 … be set aside for parks.

(ii) 'The three' lots 13, 14 and 15 consisting of 12.58 hectares together with an area of land fronting the Logan River below 20 metres … and also identified in State Planning Policy (2/10) as SEQ Koala Protection Area, be specifically set aside for koalas, wildlife habitat and Logan River banks and its environs.

3. The amount of $500,000 be paid to Council as a contribution towards the respondent's costs for bitumen sealing of Flynn Road and upgrade works to Flynn and Stockleigh Roads intersection.

4. As to the respondent's granting an extra Lot as shown in its Negotiated Decision Notice dated 18th October 2011 it unnecessarily increases the density and is dangerous to the lives of unsuspecting new residents of this flood development contained on dangerous high flooding River flats."

The court's power to grant the relief sought

[11] The *Planning and Environment Court Rules 2010* do not expressly provide for the striking out of appeals or for the granting of summary judgment. Accordingly, the *Uniform Civil Procedure Rules 1999* ("UCPR") apply. Rule 171 of the UCPR provides of the striking out of pleadings:

"(1) This rule applies if a pleading or part of a pleading—

(a) discloses no reasonable cause of action or defence; or
(b) has a tendency to prejudice or delay the fair trial of the proceeding; or
(c) is unnecessary or scandalous; or
(d) is frivolous or vexatious; or
(e) is otherwise an abuse of process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

[12] Rule 293 of the UCPR deals with summary judgment for the defendant and relevantly provides:

> "(1) A defendant may, at any time after the filing of a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
>
> (2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or part of the plaintiff's claim and may make any other order the court considers appropriate."

[13] Nothing turns on the fact that in this application the applicants are co-respondents (not defendants) in the substantive proceeding and Mr Copley is not a plaintiff but the appellant.

[14] In *Newmann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd*,[3] Muir JA (with Holmes JA agreeing) relevantly said:

> "The utilisation of rules such as r 292 is to be encouraged, but their application must conform with '… the general principle … that issues raised in the proceedings are to be determined in a summary way only in the clearest of cases.'
>
> In *Rich v CGU Insurance Ltd*, Gleeson CJ, McHugh and Gummow JJ cited with approval the following passage from the reasons of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*:
>
> > 'Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'" (footnotes deleted)

[15] In *Hughes & Anor v Westpac Banking Corporation & Ors*,[4] P Lyons J, after referring to *Newman* and a number of other cases, said:

> "In … *Salcedo* it was held that rr 292 and 293 'brought about significant changes in the law and procedure relating to summary judgment.' More recently, the approach to be taken to an application for summary judgment under the UCPR was considered by the Court

---

3 [2010] QCA 119 at paras [80]-[81].
4 [2010] QSC 274 at para [38].

> of Appeal in *Newmann* … ." Although reference was made to *Salcedo*, the court nevertheless applied principles derived from *Dey v Victorian Railways Commissioners* and *General Steel Industries Inc v Commissioner for Railways (NSW)*. Those principles are that issues raised in proceedings are to be determined in a summary way in only the clearest of cases; and that summary judgment is to be granted only when a high degree of certainty is achieved about the ultimate outcome of the proceeding, if it were allowed to go to trial in the ordinary way."

[16] In *Hamill & Anor v Brisbane City Council*,[5] Wilson SC DCJ (as he then was) considered that r 171 could be relied on to strike out appeals to this court that "*disclose no proper cause of action and are unarguable and manifestly hopeless*." His Honour also observed that he could see no reason why r 293 of the UCPR could not also apply in respect of appeals to this court.

[17] For the reasons set out below, I have concluded that there are a number of the matters raised by Mr Copley in his notice of appeal which are unarguable and would be doomed to fail at the hearing of the substantive appeal. However, in respect of the issues of flooding, I am unable to reach that conclusion. A consequence of that is that if the substantive appeal is not otherwise resolved, then it will be dealt with in the usual way. In such circumstances, I do not consider it would be appropriate to give judgment in favour of the applicants/co-respondents in respect of part only of the appeal.

The grounds of appeal

The Crown land issue

[18] The current registered survey plan for the subject land shows that its northern and western boundaries is the southern bank of the Logan River. There is nothing which suggests that any Crown land lies between the boundary of the subject land and the Logan River. Mr Copley was unable to point to anything which would indicate that some Crown land did exist in the area he contends. Rather, he considered the matter *"open to argument"* and that it would be an issue that he would have a surveyor report on and address at the court-ordered mediation.[6]

The Evergreen Road issue

[19] Evergreen Road (Drive) is a road to be constructed by the applicants/co-respondents to provide access for the proposed lots. As I understand Mr Copley's argument on this issue, it is his contention that when the respondent approved the subdivision and, in particular, the various proposed lot sizes, it did not bring into its calculations or consideration the 10,000 m^2 or so of land which would be required to be dedicated as road.[7]

[20] The survey data to which I was referred during the course of argument makes it sufficiently clear that the respondent Council has not made any material

---

5 (2004) QPEC 30 at paras [16]-[20].

6 T1-78 LL 1-30.

7 T1-78 LL 30-60 and T1-79 LL 1-10. See also T1-76 LL 45-60.

miscalculation concerning the area of land to be subdivided. The survey data was not seriously challenged in any way by Mr Copley.

[21] In my view these grounds are manifestly unarguable and disclose no reasonable cause of action.

Parkland

[22] No dedicated parkland is intended in the proposed development. In this context, it is relevant to bear in mind that the proposed lot sizes range from just under 5,000 m^2 through to 7.1 hectares. The majority of the lots being between about 5,000 and 6,000 m^2.

[23] Under the relevant planning regime, as it then was, the respondent had the discretion to require the payment of a financial contribution rather than imposing a condition requiring the dedication of specific parkland.

[24] As I understand Mr Copley's arguments on this issue, first, he contends that it would not be reasonable to allow this application to proceed without some area being dedicated for parkland when other developments in the locality have been required to do so in the past.[8] Second, a park in the south-western corner of the development would protect the river bank and/or river flats.[9]

[25] That park dedication has been required in respect of other developments is of no real consequence in this case. Each case has to be treated on its own merits. There could be no reasonable basis for concluding that the Council was wrong to accept a financial contribution rather than accepting a designated area of parkland.

[26] As to the second matter, I was not taken to any material which indicated that the river banks and/or river flats (including the vegetation thereon) was in need of protection, let alone how the park area proposed would address the issue.

[27] It is also relevant to this issue that the respondent Council has made it abundantly clear that it has no desire to become an occupier of parkland and assume the maintenance responsibilities that go with it. In cases such as this, I am not aware of any power this court has to impose conditions compelling a local authority to become an occupier of land. In *Australand Holding Ltd v Gold City Council & Anor*,[10] Wilson SC DCJ (as he then was) relevantly said:

> "Nothing in IPA otherwise suggests that this court has power to impose conditions compelling acceptance, by a local authority, of a responsibility involving ongoing expense associated with the control and maintenance of private land, against its will. It is true that in appeal proceedings of this kind the court has power to substitute its own decision for that of the local authority, but that cannot imbue the court with jurisdiction to compel a local authority to become an occupier of land." (footnotes deleted)

I respectfully agree.

---

8 T1-87 – T1-89.

9 Appellant's affidavit, sworn 2 April 2012 at paras 2-9.

10 (2006) QPEC 088 at para 19.

[28] This ground is also manifestly unarguable and discloses no reasonable cause of action.

Koala and wildlife habitat

[29] Mr Copley contends that approximately 12 hectares of land (Lots 13, 14 and 15) located in the northern section of the subject land should be set aside for "*koalas, wildlife habitat and Logan River banks and its environs*". This issue was not raised in any material way during the hearing of this application. However, the general thrust of Mr Copley's concerns in this regard is set out in his affidavit sworn 23 February 2012, where it is asserted:[11]

> "… these three (3) lots are situated on the lower flats of the Logan River and are seriously inundated when the Logan River is in flood. The land is heavily wooded with large gum trees particularly around the river and is the habitat of the local koala population.
>
> While it is unfortunate the identified Koala Habitat in the South East Queensland Map identifies the Subject Site and all of the appellant's land around the Logan River opposite as Low Value Bushland, the Map does show that this Koala Habitat joins Medium Value Bushland. Curiously the Koala Habitat Map grants more weight to the wooded areas away from the heavily wooded gums along the Logan River. While the said mapping is favourable to the present Developments, as such, it fails to protect the existing koala habitat.
>
> As to the state maps of Koala Habitat for the Subject Site it cannot be denied that this area is and always has been the habitat of Koalas in south-east Queensland and the court has the power under s 4.1.28(2)(a) and (b) to recognise and protect this area of the flooded Logan River."

[30] It is not disputed that the State's Logan River koala habitat mapping shows the subject land as being low value habitat.[12] However, Mr Copley's assertions that this area of the subject land did provide habitat for koalas was not challenged.

[31] It might have been open for Mr Copley to agitate this issue in a number of ways. By way of example, by arguing that the applicants prepare an appropriate flora and fauna report and/or conditions on clearing be imposed. The difficulty for him is that he is, in effect, seeking an order from this court requiring the applicants/ co-respondents to dedicate 12 hectares of its land as a wildlife habitat area. The issues of who would occupy and/or otherwise control the land, including maintenance, were not addressed.

[32] As pleaded, Mr Copley could not succeed on this issue. It would be neither a relevant nor a reasonable condition to require the applicants/co-respondents to set aside some 12 hectares of land for koala habitat.

---

11 At paragraphs 24-26.

12 Exhibit 6.

[33] As presently pleaded, this ground is also manifestly unarguable and discloses no reasonable cause of action.

Traffic issues

[34] In respect of traffic, in his notice of appeal Mr Copley asserts:

> "The present and future land buyers of the development are users of Flynn Road and the cost burden of bitumen sealing this road should not be imposed on the community. I refer to roadworks required on other developments within 10 km of the Subject Site.
>
> As to Flynn and Stockleigh Road intersection it will be more impacted on by either the numbers proposed for this development or the suggested reduced density of the subject site.
>
> As to the Rose Farm Lane development off Hots Road, Council required and received a 'separate road charge' contribution."

In the alternative to requiring the applicants/co-respondents' carrying out these roadworks, it seeks an order of the court requiring them to pay $500,000 by way of roadworks contribution.

[35] According to Mr Copley, the roadworks contended for are "*overdue, and necessary for the safety of all residents and their children and are in the public interest …*".[13] Unfortunately, Mr Copley produced no material to substantiate these allegations.

[36] No doubt as a reaction to this issue being raised, the applicants/co-respondents sought the advice of a traffic engineer. On 23 February 2012, a Mr N. Viney provided a short report which relevantly stated:

> "The Development Approval provides access to and from the future lots only by Evergreen Drive and requires, by Condition 13 of the development approval, the design and construction of an extension of Evergreen Drive on the land to service the proposed development. A copy of the approved layout plan for the development is appended (Figure 2) that shows the proposed lot layout and the required extension to Evergreen Drive. The plan notes that Flynn Road along the eastern boundary of the land is not to be constructed.
>
> Traffic generated by the future lots (being an additional 25 lots) will travel via the extended Evergreen Drive to the intersection of Evergreen Drive and Stockleigh Road and thereafter along Stockleigh Road. The additional traffic generated by the development is comfortably within the constructed capacity of Evergreen Drive.

---

[13] Affidavit, sworn 2 April 2012, at para 11.

> None of the traffic generated by the future lots will have any reason to use Flynn Road. Even if Flynn Road were to be upgraded, it would only be possible for, at most, three of the proposed future lots to have any access to Flynn Road, as only three of the lots have any frontage to Flynn Road and those three lots would, in any case, already have access to Evergreen Drive.
>
> Therefore, there is no reason from a traffic engineering perspective to require the upgrading of Flynn Road or the Flynn Road/Stockleigh Road intersection as a result of the development."

[37] Mr Viney's conclusions were not seriously challenged in any way.

[38] Having regard to the nature of the proposed development (including its likely expected population), there could be no justification for imposing conditions of the type contended for by the respondent/appellant. Such conditions would be neither relevant nor reasonable. Accordingly, this ground is also manifestly unarguable and discloses no reasonable cause of action.

The extra lot

[39] The development as originally proposed included only 25 lots. As approved by the respondent, the development is now comprised of 26 lots. It was not made clear as to how the additional lot came into being but the most likely explanation is that it was the result of negotiations between the respondent and the applicants/ co-respondents.

[40] Mr Copley raised two issues in respect of the extra lot. First, he questioned the ability of the proposed Evergreen Drive to provide access to 26 rather than 25 lots. Second, it would unreasonably increase the population density over the site and the drain on infrastructure.[14]

[41] Mr Copley made no attempt to substantiate any of his allegations and there is nothing in the material before me which even remotely gives rise for concern about these issues. The allegations are groundless and unarguable.

Flooding

[42] I consider it fair to say that this matter was the major concern to Mr Copley. In his amended notice of appeal it is asserted:

> "Upon consideration of the impact of flooding on the subject site in 1947, 1974 and 1976, and the more severe impacts from the floods before and including 1887 and the 1893 flood, and after giving weight to new flood levels which are based on climate change sea level rise predictions from the intergovernmental panel on climate change, and as prospective buyers of land at the subject site will be unforgiving if they find out that their inundated homes were built with a full knowledge that flooding was inevitable, therefore the respondent's negotiated decision notice and amended development

[14] T1-98 LL 10-60, T1-99 LL 5-15.

> approval is unacceptable for the subject site situated on sensitive environmental Logan River flat lands and the court is requested that the decision be set aside."

[43] According to Mr Copley, the lives of the future residents of the development would be put at risk if it were allowed to proceed as presently approved. According to Mr Copley, at the very least no residential development ought be permitted below 27.5 m AHD. The respondent's current policy is to require residential development to be above 24.9 m AHD.

[44] To support his case, Mr Copley intends to rely on anecdotal evidence including an eyewitness or eyewitnesses to the 1974 flood.[15] As I understand it, Mr Copley will also be relying on various documents and flood records (some of which are in the possession and/or control of the respondent) including some notes and/or reports of a person identified by Mr Copley as the "Beaudesert Shire Council's surveyor". It is in no way suggested that Mr Copley will limit his evidence to that which I have described; however, on the material before me, that appears to be the main thrust of the evidence he intends to call.

[45] Relevant to this case, involving as it does both a "rezoning" and subdivision of land, the development application had to be assessed against, among other things, s 4.4(3) of the *Local Government (Planning and Environment) Act 1990*. That section relevantly provides:

> "(d) whether the land or any part thereof is so low-lying or so subject to inundation as to be unsuitable for use for all or any of the uses permitted or permissible in the zone in which the land is proposed to be included."

[46] Section 4.6.8(b) of the respondent's transitional planning scheme provided, relevant to the subject land:

> "Some land in the locality of areas shown on Strategic Plan Map 4 on Rural Residential is subject to flooding … rural residential allotments will only be permitted where an area of at least 1,000 square metres is provided, above the defined flood level as determined by Council in each case."

[47] Under the transitional planning scheme, the "defined flood level" was defined to mean the "*flood level which the Council, on the advice of the shire engineer, may from time to time determine*." For this development application the defined flood level was 24.9 m AHD.

[48] It is a condition of the development approval that all building envelopes are to be above the defined flood level for the site, namely 24.9 m AHD. Accordingly, at face value, the development approval complies with the transitional planning scheme insofar as it is relevant to flooding.

[49] The respondent and the applicants/co-respondents contend that in essence Mr Copley is seeking to have this court substitute a new planning policy (namely

---

[15] See Annexure A to the Amended Notice of Appeal.

the introduction of a new flood level height of 27.5 m AHD) in lieu of the existing defined flood level.

[50] The respondent and the applicants/co-respondents contend that to adopt such an approach would be impermissible, as it would involve the court in presuming to act as the planning authority and substituting its own flooding policies for that of the relevant planning authority.[16] I accept that submission as being undoubtedly correct. However, that the court should require no building envelope to be permitted below 27.5 m AHD is only an alternative or fallback position for Mr Copley. His primary position is that the respondent's defined flood level of 24.9 m AHD was unsoundly based and that, given the vulnerability of the subject land to flooding, the development should not have been approved at all. As Mr Connor candidly conceded, that is an entirely different situation than that of the court purporting to assume the role of the responsible local authority.[17]

[51] While I accept that the surveying evidence before me[18] appears to strongly support the decision of the respondent to approve the development, I am not prepared at this stage to determine that Mr Copley has not raised a reasonable cause of action for the purposes of r 171 of the UCPR, or that he has no real prospect of succeeding on this part of his appeal and that accordingly there is no need for a hearing of the appeal.

[52] At the hearing of the appeal it may be revealed that Mr Copley's assertions concerning the flooding are manifestly groundless and otherwise be frivolous and/or vexatious. If that does prove to be the case, that may raise questions as to costs,[19] but that is a matter for another day.

[53] For the reasons given, the application succeeds in part and the orders of the court are:

1. All of the appellant's grounds of appeal, save for Ground 1 – "Flooding" are struck out.

2. The issues in the hearing of the substantive appeal are to be limited to only the flooding issues raised by the appellant in his amended notice of appeal.

3. I will hear from the parties (if required) as to the costs of the application.

---

16 See e.g. *Daikyo (North Qld) Pty Ltd v Cairns City Council & Ors* (2003) QPELR 606 at [22] and *Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors* (1990) QPLR 209 at 211, and *Holts Hill Quarries Pty Ltd v Gold Coast City Council & Ors* [2000] QCA 268 at [46].

17 T1-66 LL 20-30.

18 Affidavit of Stewart John Wall, sworn 9 March 2012, in particular.

19 Section 457 of the *Sustainable Planning Act 2009*.