

# SUPREME COURT OF QUEENSLAND

CITATION: *Peter des Forges v BCC & Principal Properties P/L; Kangaroo Point Residents Association & Ors v Brisbane City Council & Principal Properties P/L* [2002] QCA 90

PARTIES: **PETER DES FORGES**  
(appellant/first respondent)  
v  
**BRISBANE CITY COUNCIL**  
(respondent/second respondent)  
**PRINCIPAL PROPERTIES PTY LTD** ACN 072 279 675  
(respondent/applicant)

**KANGAROO POINT RESIDENTS ASSOCIATION, KENNETH FLETCHER, PAVEL FORMAN, JURINA FORMAN, GAEL PHILLIPS, JAMES SIMMERS, NERIDA SIMMERS, UNA CRAIG, BARRY MARANTA, FLORENCE DYER, DOUGLAS FORBES, VALENTINA ARISTON, NICHOLAS LAWS, EDNA JOHNSON, JOHN MOWBRAY, SANDRA DALY, DENIELLE DALY, SEAN DALY, RAYMOND RIDDELL, BRADLEY HOLMES AND VANESSA HOLMES**  
(appellants/first respondents)  
v  
**BRISBANE CITY COUNCIL**  
(respondent/second respondent)  
**PRINCIPAL PROPERTIES PTY LTD** ACN 072 279 675  
(respondent/applicant)

FILE NO/S: Appeal No 9759 of 2001  
Appeal No 9760 of 2001  
P&E Court No 4297 of 2000  
P&E Court No 4310 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for Leave Integrated Planning Act

ORIGINATING COURT: Planning and Environment Court at Brisbane

DELIVERED ON: 21 March 2002

DELIVERED AT: Brisbane

HEARING DATE: 21 February 2002

JUDGES: McMurdo P, Thomas JA, Byrne J  
Judgment of the Court

ORDER: **Application for leave to appeal granted.  
Appeal dismissed.  
Parties have until 12 noon, 22 March, 2002 to file and serve any submissions as to costs and in the absence of any submissions within that time order that in each application and appeal the applicant/appellant pay the respondents' costs to be assessed.**

CATCHWORDS: ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION BY CONSENT AUTHORITY – CONSIDERATION OF DEVELOPMENT STANDARDS – PARTICULAR DEVELOPMENT STANDARDS - where proposed three tower unit development at Kangaroo Point – where development classified as ‘high intensity’ - where development regulated by Kangaroo Point Peninsula Development Control Plan ('DCP') and Development Code ('Code') – where development has to comply with DCP - where Code set out 20 design elements, each with varying design objectives to be considered in any proposed development – where DCP aims to achieve 'best balance' between development and surrounding environment

ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – PLANNING TERMINOLOGY – FLOOR SPACE AND FLOOR RATIO – where under **Intensity of Development** element the maximum permitted gross floor area ('GFA') was 12, 135 sq metres – where definition of GFA in the relevant Town Plan excluded 'balconies' from calculation – where proposed development had large outdoor spaces – whether trial judge erred in law in not excluding the outdoor spaces in development from the definition of GFA as 'balconies' under the Town Plan – meaning of 'balconies' - trial judge erred in failing to treat outdoor spaces as balconies

ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – PLANNING TERMINOLOGY – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – GENERALLY – MATTERS TO BE CONSIDERED - whether demonstrated error in law could materially affect the decision of the learned primary judge – where concerns regarding proposed development's bulk and associated oppressiveness – where other design objectives of the DCP not met – where best balance between development and surrounding environment not achieved

*Integrated Planning Act 1997 (Qld)*, s 4.1.52, s 4.1.56(1)(a), s 6.1.2, s 6.1.3, s 6.1.25, s 6.1.28, s 6.1.30

*Local Government (Planning & Environment) Act 1990 (Qld)* (repealed), s 2.1, s 3.4(1), s 4.13(5), s 4.13(5A)

*Town Plan for the City of Brisbane 1987* s 7.3.1, s 30.3

*H A Bachrach P/L v Caboolture SC* (1992) 80 LGERA 230, considered

*Holts Hill Quarries P/L v Gold Coast City Council & Ors* [2000] QCA 268; Appeal No 7006 of 1998, 14 July 2000, considered

*Z W P/L v Peter R Hughes & Partners Pty Ltd* [1992] 1 QdR 352, considered

*Robert Cruse Nominees Pty Ltd v Noosa Shire Council & Ors* [1981] QPLR 122, considered

COUNSEL: P J Lyons QC, with M E Rackemann, for the applicant  
J E Gallagher QC, with T N Trotter, for the first respondents in Appeal No 9759 of 2001 and Appeal No 9760 of 2001  
M D Hinson, with E J Morzone, for the second respondents

SOLICITORS: Nicol Robinson Halletts for the applicant  
Minter Ellison for the first respondents in Appeal No 9759 of 2001 and Appeal No 9760 of 2001  
Brisbane City Legal Practice for the second respondent

- [1] **THE COURT:** The applicant in both these applications, Principal Properties Pty Ltd ("the developer"), applied on 4 August 1999 to the Brisbane City Council ("the Council" and second respondent in these applications) for a Material Change of Use of land and for development approval for 70 residential units in three towers at Kangaroo Point under the 1987 Town Plan for the City of Brisbane ("the Town Plan"). The Council, which supports the developer in these applications, approved the development application on 22 September 2000, subject to conditions. The Kangaroo Point Residents Association and individuals ("the respondents" to these applications) filed appeals against the Council's approval on 25 October 2000, five days before the current planning scheme, City Plan 2000, came into force.
- [2] Appeals from the Council's decision approving the application are brought under the provisions of the Town Plan with the court giving appropriate weight to the provisions of City Plan 2000: see *Integrated Planning Act 1997* (Qld) ("the IPA"), s 6.1.25; *Local Government (Planning & Environment) Act 1990* (Qld) ("the LGPEA"), s 3.4(1).
- [3] The appeals were heard in the Planning & Environment Court over 16 days and on 21 September 2001 the court allowed the appeals and set aside the development approval. The developer seeks leave to appeal from that decision under the IPA<sup>1</sup> because of an error or errors of law.
- [4] As the question of leave to appeal is here so entwined with the proposed grounds of appeal, the Court considered both the applications for leave and the arguments on the appeals together.
- [5] Development at Kangaroo Point is regulated by the Kangaroo Point Peninsula Development Control Plan ("the DCP").<sup>2</sup> Section 4.13(5A) LGPEA provides:

<sup>1</sup> s 4.1.56(1)(a).

<sup>2</sup> Although the IPA came into operation on 30 March 1998, transitional planning schemes which include the Town Plan continued in effect: ss 6.1.2, 6.1.3. The DCP is part of a planning scheme:

- "(5A) The local government must refuse to approve the application if –
- (a) the application conflicts with any relevant strategic plan or development control plan; and
  - (b) there are not sufficient planning grounds to justify approving the application despite the conflict."

- [6] The developer claims the learned primary judge erred in his interpretation and application of the DCP in finding the term "balcony" in the definition of "gross floor area" in the Town Plan<sup>3</sup> did not include the outdoor spaces of Tower 1 of the proposed development. The developer also contends the judge erred in interpreting and applying the provisions of the DCP dealing with Intensity of Development and Boundary Clearances, Separation and Privacy and that any of these errors or a combination of them could have materially affected his decision so that the appeals should be allowed and the matter remitted to the Planning & Environment Court for determination according to law.<sup>4</sup>

### **Background**

- [7] The land the subject of these applications is at 39-44 Castlebar Street and 108-110 Lambert Street, Kangaroo Point. It comprises five separate allotments totalling 8,090 sq metres with a combined frontage of approximately 85 metres to the Brisbane River. It is of irregular configuration with a 14 metre frontage to Castlebar Street and a 10.52 frontage to Lambert Street. Access to the site from these two frontages is steep. The land forms an amphitheatre rising away from the river. The constraints of the irregular shape and easements limit the land available for multi-unit development. The proposal is for three residential towers and a fourth low building containing gymnasium, visitors' car park and a tennis court on its flat roof. The towers are to be set back 20 metres from the high water mark to allow a landscaped riparian zone with a public walkway along the edge of the river and public access through the development. The upstream apartment block when viewed from the river, Tower 1, comprises 12 apartments of one apartment to a floor over 13 floors. The downstream apartment block, Tower 3, comprises 25 apartments over 13 floors. Tower 2 is in the middle and comprises 33 apartments over 13 floors.
- [8] The aims of the DCP include fostering sustainable residential development to a maximum intensity of R6<sup>5</sup> by attracting people to live in the area and encouraging the use of ferries rather than cars.<sup>6</sup> The DCP also aims to foster development achieving the best balance in its response to its site, adjoining development, the area of the Town Plan and the city and environment as a whole by application of the Development Code.<sup>7</sup> The Development Code is contained within the DCP.<sup>8</sup>
- [9] The Town Plan describes the nature of R6 development:

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LGPEA, s 2.1. The development application was made and processed under the IPA (s 6.1.28) but the Council must determine the application under the IPA's predecessor, the LGPEA: see s 4.13(5) and IPA, s 6.1.30.

<sup>3</sup> s 30.3.

<sup>4</sup> See *HA Bachrach P/L v Caboolture SC* (1992) 80 LGERA 230-237-238; *Holts Hill Quarries P/L v Gold Coast City Council & Ors* [2000] QCA 268; Appeal No 7006 of 1998, 14 July 2000, [9].

<sup>5</sup> DCP, 1.1; described further in [9] below.

<sup>6</sup> DCP, 1.3(e) and (j).

<sup>7</sup> DCP, 1.3(n), 1.5

<sup>8</sup> DCP, 8.3.

"... The Residential Development area R6 is intended to facilitate and encourage the development of high-rise apartment buildings. It is intended to consolidate high-rise development areas in appropriate locations. This will avoid the undesirable effects of a dispersion of high-rise apartments amongst lower scale forms of development. ...

...

Due to the impact which high-rise residential buildings have on the surrounding area, there is generally an expectation that high-rise residential buildings will not be erected in areas intended for low-rise development.

There is, however, an expectation that in higher density areas, high-rise apartment buildings will predominate ... No height limit has been placed on residential buildings in an RDA R6. Particular attention will, however, need to be given to environmental and amenity matters such as sun penetration, shadowing, air circulation, views, aspects and traffic generation for the benefit of existing and future residents."<sup>9</sup>

- [10] The Development Code identifies 20 elements to be considered in the development of the Kangaroo Point Peninsula; establishes design objectives for those elements; recognises that the satisfaction of one design objective may conflict with another; aims to achieve the optimum balance in the way the various design objectives are achieved; indicates the design objectives likely to be most important and the balances and compromises which may be appropriate; recognises that the relative importance of the design objectives also depends on the circumstances of a site which must be considered on a case by case basis and acknowledges that design objectives can often be achieved in alternative ways. The DCP also recognises that:

"In certain circumstances, the achievement of the design objectives of the Development Code may preclude the development of a site to the maximum allowable gross floor area."<sup>10</sup>

- [11] Under the Development Code<sup>11</sup> an element may have mandatory requirements which will not be varied unless specifically provided; requirements which will be varied only where the circumstances warrant or the Council is satisfied that the relevant design objectives of that element are achieved suitably in an alternative manner; desirable solutions which should be achieved unless the Council agrees that the necessary measures would conflict with those needed to satisfy objectives of greater importance or the relevant design objective can be suitably satisfied in an alternative manner; and considerations which provide further information on the priority to be given to certain design objectives in certain circumstances and which indicate where variations may be appropriate, suggest alternative ways design objectives may be met and propose possibilities which are desirable but not required by the Development Code.<sup>12</sup>

### **The approach taken by the primary judge**

- [12] In order to consider the proposed development, its relationship with the DCP and the developer's contentions, it is useful to examine the careful approach taken by the

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<sup>9</sup> Town Plan, s 7.3.1.

<sup>10</sup> DCP, s 1.5.

<sup>11</sup> DCP, s 3.

<sup>12</sup> DCP, s 3.1.

primary judge to the appeals. His Honour considered each of the elements in the Development Code relevant to the proposal.

- [13] As to **Site Area and Frontage**<sup>13</sup> his Honour noted the site area well exceeded the requirements<sup>14</sup> and the road frontage to Castlebar Street also complied.<sup>15</sup> As the frontage to Castlebar Street would largely face a wall beside the tennis court it was "hardly an impressive frontage. However, this is a minor consideration, overall. It is really a consequence of the constraints of the site."<sup>16</sup>
- [14] His Honour noted and it was common ground that as to the **Site Cover and Site Features** requirement,<sup>17</sup> the site cover of the proposed buildings did not exceed 40 per cent of the site.<sup>18</sup> His Honour observed, however, that because of the constraints of the irregular site, only a portion of it is suitable for high rise building.<sup>19</sup>
- [15] In considering **Intensity of Development**,<sup>20</sup> his Honour noted the development provided public pedestrian access to the river walk and so the maximum permissible proposed gross floor area was 1.5 sq metres for every 1 sq metre of site area.<sup>21</sup> As the site area is 8,090 sq metres, the maximum permitted gross floor area was 12,135 sq metres. Here, the gross floor area within the weatherproof walls of these towers was precisely 12,135 sq metres. The further 360 sq metres of recreational buildings such as the changing room and gym exceeded the maximum permissible gross floor area, infringing the mandatory requirements<sup>22</sup> but the developer agreed to remove these buildings from the development proposal.
- [16] The developer did not include in the calculation of the 12,135 sq metres of gross floor area the very extensive "balcony" areas<sup>23</sup> of the three towers because the definition of "gross floor area" in the Town Plan<sup>24</sup> excluded "balconies".
- [17] His Honour found that the very large "balconies" of Tower 1, which totalled about 2,000 sq metres and enveloped the single unit on each floor, exceeded the internal areas of each unit and were not balconies within that definition. His Honour described them as wraparound verandahs, not projections from the side of the building and noted:
- "Even if that conclusion is not correct, then it should still be found that the developer has attempted to take an unreasonable advantage of the exclusion of balconies from the GFA calculation by designing a building whose impact is greatly increased by its dominant outdoor spaces. That conclusion is reinforced by the architects' assumption

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<sup>13</sup> DCP, 3.2.

<sup>14</sup> DCP, 3.2.2(a)

<sup>15</sup> DCP, 3.2.2.(b).

<sup>16</sup> Reasons for Judgment, [67].

<sup>17</sup> DCP, 3.3.

<sup>18</sup> DCP, 3.3.2(a).

<sup>19</sup> Reasons for Judgment, [72].

<sup>20</sup> DCP, 3.4.

<sup>21</sup> DCP, 3.4.2(b) and (d).

<sup>22</sup> DCP, 3.4.2 and see Reasons for Judgment [87], [89] and [101].

<sup>23</sup> The meaning of the term "balcony" is contentious (see [32] to [42] below), but it is a shorthand term at this point.

<sup>24</sup> Town Plan, s.30.3.

that the site cover (despite the exclusions in 3.3.2(a)) included the whole footprint of the towers."<sup>25</sup>

- [18] His Honour considered that the "balconies" of Towers 2 and 3 might be recognised as balconies but were "still generous". Overall the "balconies" make the three towers very much bulkier than is reflected in the calculations made by the developer's architect of the gross floor area.
- [19] The element of **Height and Views from Public Places**<sup>26</sup> permits buildings of more than 12 storeys or 33 metres as long as the design objectives<sup>27</sup> are met. His Honour observed that the amphitheatre effect of the site assists in reducing the relative height of each of the towers.<sup>28</sup> Most of level 1 of Tower 1 is below ground so that it appears as less than 12 storeys from the street and as 13 storeys from the river. It is 250 mm above the height limit of 33 metres. Towers 2 and 3 are built on reasonably flat ground and each is 13 storeys. The current City Plan 2000 places a limit of 10 storeys. His Honour found that whilst the three towers narrowly exceed the height requirements of the DCP, they do not obviously exceed the skyline envelope and maintain an appropriate residential scale. His Honour considered that "[b]y itself it is not a large excess".<sup>29</sup>
- [20] His Honour noted Tower 3 exceeded by 4.5 metres a 30 metre length requirement<sup>30</sup> in the element of **Streetscape and Security**<sup>31</sup> but this would not offend neighbours or the public and was "not a significant issue".<sup>32</sup>
- [21] As to **Architectural Treatment**,<sup>33</sup> his Honour found that the buildings did not produce a wall of development when viewed from the river because of the orientation of Tower 1 at an angle, Tower 2's longest side facing the river and Tower 3's shorter side facing the river; the use of verandahs, balconies<sup>34</sup> louvres and other screening devices,<sup>35</sup> steps and recesses, balconies of different proportions and variation of louvres and screening devices;<sup>36</sup> the use of columns and the top treatment of the towers. His Honour commented: "Overall, the towers would be seen by many as quite handsome buildings containing many traditional elements."<sup>37</sup>
- [22] The elements of **Compatibility with Heritage Buildings**,<sup>38</sup> **Climatic Response**,<sup>39</sup> **Outdoor Living and Recreation Space**,<sup>40</sup> **Landscaping**,<sup>41</sup> **Required External Works**,<sup>42</sup> **Access for the Disabled**,<sup>43</sup> **Riverside Public Access and Park**,<sup>44</sup> **Other**

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<sup>25</sup> Judgment, [100].

<sup>26</sup> DCP, 3.5.

<sup>27</sup> Set out in DCP 3.1. and 3.5.1.

<sup>28</sup> Reasons for Judgment, [105].

<sup>29</sup> Reasons for Judgment, [118].

<sup>30</sup> DCP, 3.3.2(c).

<sup>31</sup> DCP, 3.6.

<sup>32</sup> Reasons for Judgment, [122].

<sup>33</sup> DCP, 3.7.

<sup>34</sup> DCP, 3.7.2(i).

<sup>35</sup> DCP, 3.7.2.(v).

<sup>36</sup> DCP, 3.7.2.(iv).

<sup>37</sup> Reasons for Judgment, [125].

<sup>38</sup> DCP, 3.8.

<sup>39</sup> DCP, 3.9.

<sup>40</sup> DCP, 3.14.

<sup>41</sup> DCP, 3.15.

<sup>42</sup> DCP, 3.16.

**Pedestrian Access Ways,**<sup>45</sup> **Parking and Vehicular Access,**<sup>46</sup> **Vehicular Access to Main Street**<sup>47</sup> and **Noise,**<sup>48</sup> were either not in issue or were adequately met<sup>49</sup> by the development or the agreed changes to it.

- [23] Unlike the design objectives of other elements, the element of **Views for Residents**<sup>50</sup> is "subject to the need to satisfy other design objectives" and is to provide opportunities for development to maximise views for residents. His Honour noted the DCP's encouragement of intense river front development would inevitably substantially impact upon the views of those more remote from the river; the DCP does not protect those views, but aims rather to provide view corridors<sup>51</sup> "as far as reasonably possible";<sup>52</sup> this does not mean the absolute best possible result for residents whose views are affected by the development. His Honour recognised that the scope for providing view corridors will be affected by the location, form and orientation of existing buildings and the constraints of the site. If the other criteria of the DCP are satisfied, then the question of neighbours' views is a secondary consideration.<sup>53</sup> His Honour found that views of residents at 24 Castlebar Street, 40 Castlebar Street, 112 Lambert Street, 102A-106 Lambert Street, "Beau Rivage" and "The Figs" will be substantially detrimentally affected by the development. The views from "Dolphin Court" will be devastated.
- [24] His Honour considered the element **Boundary Clearances, Separation and Privacy**<sup>54</sup> was central to the appeals.<sup>55</sup>
- [25] The setback of the "balconies" of Tower 1 from the Owen Cox building at 44 O'Connell Street does not comply with the 10 metre setback requirement<sup>56</sup> and varies from 6.1 to 8.5 metres. His Honour found that the orientation and the fitted and fixed shutters on levels 1-6 of Tower 1 on that side provide some privacy; there is no particular impact on 44 O'Connell Street. The benefit of this reduced setback is greater separation and a wider view corridor between Towers 1 and 2, but this reflected the difficulty of fitting these three towers on to the site. As the Owen Cox building may be redeveloped in the future and a relaxation of the 10 metre requirement requested, non-compliance with this setback requirement was "not insignificant".<sup>57</sup>
- [26] Nor does Tower 2 meet this requirement; it is only 6.45 metres from the common boundary with the Daly residences. Because of the Daly residences' driveway and the boundary set back of the Daly houses, separation between Tower 2 and the actual Daly residences is substantial, varying from 17.5 to 21 metres. Whilst this separation is within that contemplated by the DCP for high rise buildings without

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43 DCP, 3.17.  
 44 DCP, 3.18.  
 45 DCP, 3.19.  
 46 DCP, 3.20.  
 47 DCP, 3.21.  
 48 DCP, 3.10.  
 49 Reasons for Judgment, [132].  
 50 DCP, 3.11.  
 51 Reasons for Judgment, [146].  
 52 DCP, 3.11.2.  
 53 Reasons for Judgment, [150].  
 54 DCP, 3.12.  
 55 Reasons for Judgment, [168].  
 56 DCP, 3.12.2.  
 57 Reasons for Judgment, [174].

any particular privacy measures, there remained the prospect that the Daly properties could be redeveloped in the future because they were three houses on valuable land.<sup>58</sup> The proposed fixed screens to the first six levels of Tower 2 will prevent direct privacy problems from those levels but those living on higher levels will be able to open their shutters and look down onto the Daly residences as a consequence of the failure to meet the setback requirements.

- [27] Tower 3 also fails to meet the setback requirement as its south-eastern "balconies" are only 6 metres from the Mowbray boundary; the public access way encouraged by the DCP incorporates 3 of those 6 metres. The first Mowbray residence has been designed with a side wall, a few small windows and a glass brick section to ensure privacy. The developer proposes fixing shutters to the first three levels of Tower 3 to provide privacy; the upper levels have moveable shutters which overlook rather than look into the lower rise Mowbray residences. Occupants on the upper levels of Tower 3 could nevertheless look into the front areas and pools of the three Mowbray houses. His Honour noted that there was some force in the submission that the development with its 20 metre river front setback and its proposed privacy measures on the lower levels will give more privacy to the Mowbray houses than a tower built to the requirement. Town planner, Mr Buckley, noted the general oppressiveness of the scale of the building. Architect, Mr Robinson, noted that the full 10 metre setback would provide an opportunity for more substantial and effective landscaping; although landscaping was not required by the DCP, as the developer's plans included landscaping it is likely that landscaping would be retained in any development proposal which met the 10 metre setback requirement. His Honour concluded:

"The design objectives in s. 3.12.1 are concerned with buildings being "unduly close and oppressive". They are concerned with oppressiveness "in the way they block neighbour's daylight and exposure to the sky" and with the provisions of privacy. While efforts have been made to use louvres to achieve privacy, they are limited in their application. A significant relaxation is sought by the developer."<sup>59</sup>

- [28] Although the element has no requirements as to facing buildings, it is a desirable solution that units directly facing each other face either face a blank wall<sup>60</sup> or are separated by at least 20 metres; or if the units are no higher than 9 metres that they be separated by 12 metres and landscaping.<sup>61</sup> Towers 2 and 3 are higher than 9 metres, face each other and are separated by 12 not 20 metres. The proposed development provides moveable louvres so that concerned residents can avoid overlooking. This does not meet that desirable solution. His Honour also noted that the acoustic amenity of occupants of Towers 2 and 3 will be affected and they will receive more noise than their neighbours.<sup>62</sup>

- [29] The element of **Over-Shadowing**<sup>63</sup> has the design objective to have winter sunshine reach the outdoor living areas and living room windows of all building units.<sup>64</sup> The

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<sup>58</sup> Reasons for Judgment, [175].

<sup>59</sup> Reasons for Judgment, [182].

<sup>60</sup> Under DCP, 3.12.4(a)(ii), "blank wall" includes a wall with windows fitted with louvres to protect privacy.

<sup>61</sup> DCP, 3.12.3(b).

<sup>62</sup> Reasons for Judgment, [185].

<sup>63</sup> DCP, 3.13.

requirement is that buildings should not over-shadow living rooms windows on a nearby site for more than one hour between 10 am and 2 pm on 22 June.<sup>65</sup> The proposed development does not meet that requirement for 40 Castlebar Street which would be over-shadowed by most forms of high rise development on the site, although the design of Tower 2 with its longest sides parallel to the river does reduce that impact. The over-shadowing of 40 Castlebar Street is overall "a minor complaint".<sup>66</sup>

- [30] His Honour noted that there were 369 submissions objecting to the application in its original form. Twelve residents gave evidence of their concerns. The greatest concern related to the bulk and associated oppressiveness of the towers. For example, Mr Mowbray was greatly concerned about the limited boundary set back of Tower 3 from his residence and Ms Danielle Daly was greatly concerned about the lack of privacy because of the closeness of Tower 2 which combines with Tower 3 to form a solid barrier across the development site to the south-east. The occupants on this boundary will undoubtedly feel hemmed-in by the towers.<sup>67</sup> Whilst many residents were deeply concerned about their loss of views, which may be kept in mind, under the DCP the most significant complaints relate to the bulk and associated oppressiveness of the buildings, reduced separations and loss of privacy.<sup>68</sup>
- [31] His Honour then considered in an overview whether the development provided the outcome required by the DCP. The development was usually successful in achieving the aims of the DCP but his Honour had considerable concerns about the Intensity of Development, the Boundary Clearances, Separation and Privacy. The very large "balconies on Tower 1 effectively make the GFA larger than the DCP expects";<sup>69</sup> the extensive use of shutters and the dominance of vertical columns in the outdoor spaces make the buildings seem wider and more solid in appearance; they are relatively bulky compared to the internal living areas and are hardly transparent between the "balconies". Despite the clever use of shutters and some of the benefits from the positioning of the towers, the setbacks in several significant respects are less than those expected by the DCP.<sup>70</sup> These concerns are compounded by the excessive height of the towers.<sup>71</sup> Although a secondary consideration, the loss of neighbours' views<sup>72</sup> is a further difficulty flowing from the size and closeness of the towers. Whilst recognising that the issues were finely balanced, his Honour preferred the views of Messrs Robinson and Buckley and found that the design objectives of the DCP were not met because there had been insufficient regard to the actual Intensity of the Development, Boundary Clearances, Separation and Privacy and consequential effects on Views so that the "best balance" was not achieved and the legitimate expectations of other residents not sufficiently respected. The proposal, his Honour considered, "pushes the envelope too far".<sup>73</sup>

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<sup>64</sup> DCP, 3.13.1(e).

<sup>65</sup> DCP, 3.13.2(a).

<sup>66</sup> Reasons for Judgment, [191].

<sup>67</sup> Reasons for Judgment, [203]-[204].

<sup>68</sup> Reasons for Judgment, [206].

<sup>69</sup> Reasons for Judgment, [208].

<sup>70</sup> Reasons for Judgment, [209].

<sup>71</sup> Reasons for Judgment, [210].

<sup>72</sup> Reasons for Judgment, [212].

<sup>73</sup> Reasons for Judgment, [213].

**Should the outdoor areas of Tower 1 be included in the calculation of the "gross floor area" of the development?**

- [32] The developer's primary contention is that his Honour erred in law in not excluding the outdoor spaces of Tower 1 from the definition of "gross floor area" as "balconies" under the Town Plan.<sup>74</sup> If this submission is correct, the proposed development precisely meets the maximum gross floor area under the mandatory requirement,<sup>75</sup> once the recreational buildings, which the developer has agreed to delete from the proposal, are excluded.
- [33] His Honour's reasoning turned on his findings that the outdoor spaces of Tower 1 did not project from the building and were within the building frame; each unit of Tower 1 occupies an entire floor with the outdoor space exceeding that of the internal space, virtually encircling each floor; the outdoor spaces were verandahs rather than balconies.
- [34] The relevant definition of "gross floor area" in the Town Plan<sup>76</sup> is:  
*"with respect to a building,*<sup>77</sup> *planning unit or development for some purpose means the sum of plan areas of all floor levels (inclusive of the plan area of all walls, windows, columns, elevator shafts, and the plan area of all internal and external stairs, landings, ramps, escalators, or other means of access between levels, at or between each level) in the building, in all buildings contained in the planning unit or all buildings to which that development relates, as the case may be, excluding –*  
 (a) the area (inclusive of the plan area of all walls and columns) of any lift motor room or airconditioning or other mechanical or electrical plant and equipment room;  
 (b) *the area of any private balcony, whether roofed or not;*  
 (c) the area of any roof deck;  
 ...  
 For the purpose of this definition an outdoor space which is situated *in or on a building and which is –*  
 A. *in the nature of a projection from the side of a building, whether or not such projection is cantilevered or supported partially by posts, braces or columns, shall be deemed to constitute a balcony;*  
 ... ." (*my emphasis*)
- [35] It is not contentious that Tower 1 was a building and its "balconies" were private and situated in or on Tower 1.
- [36] It is useful to look at the dictionary definitions of some words not otherwise defined in the DCP or the Town Plan. The phrase "in the nature of" means "having the qualities of".<sup>78</sup> "Projection" means "1. A projecting or protruding part. 2. The state

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<sup>74</sup> See these Reasons, [15].

<sup>75</sup> DCP, 3.4.2(b) and (d).

<sup>76</sup> s 30.3.

<sup>77</sup> Under Town Plan s 30.3, "building" is defined as "any fixed structure that is wholly or in part enclosed by walls and is roofed and where the context indicates or requires, includes any part of a building".

<sup>78</sup> Macquarie Dictionary, 3rd ed, University of New South Wales, 1997.

or fact of jutting out or protruding. 3. A causing to jut out or protrude."<sup>79</sup> "Balcony" means "a balustraded or raised and railed platform projecting from the wall of a building".<sup>80</sup> The term "verandah", whilst colloquial for "beer gut", has the primary meaning of "an open or partly open portion of a house or other building, outside but abutting one or more of its principal rooms, covered either by a separate skillion roof or by the roof of the main structure".<sup>81</sup>

- [37] The only other outdoor space referred to in the definition of "gross floor area" is "roof deck" which does not include the outdoor spaces of Tower 1; the term "verandah" is not used in the definition although it is used, but not defined, in the DCP.<sup>82</sup> The DCP also refers to other outdoor spaces.<sup>83</sup> The element Outdoor Living and Recreation Space<sup>84</sup> is concerned that such areas meet minimum requirements, not with limiting their size. That element refers to the term "court"<sup>85</sup> which is not defined in the DCP but means "1. an open space wholly or partly enclosed by a wall, buildings, etc".<sup>86</sup> It is not suggested the "balconies" of Tower 1 come within that concept.
- [38] The tendered computer generated drawings<sup>87</sup> demonstrate the differences between the large wraparound outdoor spaces of Tower 1 and those of Towers 2 and 3 which are smaller with several discrete areas on each floor correlating with the multiple units on each floor. The "balconies" of all three towers appear to be at least partially supported by the external columns of the tower but the definition of gross floor area states that "balcony" includes "an outdoor space which is situated in or on a building and which is ...supported partially by ... columns".
- [39] The uncontested evidence of architect Mr Matovic was that each floor was to be constructed with a single cast concrete plate attached to the columns on the outside of the building. In some ways, this supports his Honour's conclusion that the "balconies" of Tower 1 were not projections, but no distinction can be made on this basis between the "balconies" of the three towers which were all to be constructed using this unexceptional modern building technique. On the other hand, the computer generated drawings<sup>88</sup> demonstrate that the "balconies" of Tower 1 do seem to have the qualities of a projection, at least when viewed from the roof level.
- [40] The developer's contention receives some further support from the legislative history of the definition. The Town Plan's previous definition of "gross floor area" limited the exclusion of private balconies to 15 per cent of the gross floor area of the dwelling unit.<sup>89</sup> This suggests that the amendments to that definition were intended to exclude from the gross floor area the outdoor spaces to which it refers regardless of size. It seems surprising, however, that some upward limit was not imposed. We are told that the definition relevant to this case is continued in City Plan 2000.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> See, for example, DCP, 3.6.3(a), 3.7.2(a)(i).

<sup>83</sup> See, for example, DCP, 3.6.3(a), 3.7.2(a)(i), 3.12.4(e).

<sup>84</sup> DCP, 3.14.

<sup>85</sup> DCP, 3.14.2(a)(ii).

<sup>86</sup> See fn 78.

<sup>87</sup> Exs 3 and 42A.

<sup>88</sup> Exs 3 and 42A.

<sup>89</sup> See Queensland Government Gazette No 57, 13 June 1987, 30-169.

- [41] It is not an altogether easy task to give meaning to this definition of "gross floor area". Town planning documents often present such difficulties. They should be read in a practical common sense way<sup>90</sup> determining ambiguities or inconsistencies in context and according to the intent of the planning document. Whilst we understand his Honour's concern about the peculiarly large size of the "balconies" of Tower 1, it seems the planning intent of both the Town Plan and the DCP is to encourage the provision of large "balconies" in new developments with no limitation as to size, apart from the controls otherwise provided by the DCP or other relevant planning documents. The outdoor spaces excluded from the calculation of gross floor area are not just those within the dictionary definition of "balcony"; nor are those spaces within the dictionary definition of "verandah" necessarily excluded from this extended statutory definition of "balcony".<sup>91</sup> The "balconies" of Tower 1 were private outdoor spaces "situated in or on a building ... in the nature of a projection from the side of a building, ... supported partially by ... columns" and so are "deemed to constitute a balcony".<sup>92</sup>
- [42] In our view, his Honour erred in failing to treat the outdoor spaces of Tower 1 as balconies for the purpose of the Town Plan's definition of "gross floor area". The outdoor spaces of Tower 1 did not form part of the gross floor area of this development.

#### **Other alleged errors of law?**

- [43] Mr Lyons QC, who appears with Mr Rackemann for the developer, submits that the learned primary judge made additional errors of law, first in taking into account the potential redevelopment of neighbouring sites when considering whether the 10 metre boundary separation should have been relaxed.<sup>93</sup> Mr Lyons emphasises that the DCP makes express provision for potential development of adjoining sites;<sup>94</sup> it is silent on this issue when discussing the element, Boundary Clearances, Separation and Privacy;<sup>95</sup> therefore future development of neighbouring sites is irrelevant to this element.
- [44] We are far from persuaded that the reference to future development in some portions of the DCP and the absence of such a reference elsewhere demonstrates that the DCP's intention was to limit the relevance of future development to the elements which specifically refer to it. The DCP is a town planning document, not a carefully crafted piece of legislation: ambiguities must be determined in a practical common sense way according to the planning intent. The overall objective of the DCP is to promote in a stated way the development of the area for R6 intensity housing.<sup>96</sup> This means that with increased land values and rates, R6 development can be expected to steadily replace low rise residential housing. The definition of "R6 development" in the Town Plan adverts to the need to consider "environmental and amenity matters ... for the benefit of ... future residents".<sup>97</sup> Under City Plan 2000, the Kangaroo Point Peninsula is a high density residential area, the most intense residential area designation, maintaining the likelihood of

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<sup>90</sup> *Z W P/L v Peter R Hughes & Partners P/L* [1992] 1 QdR 352, 360.

<sup>91</sup> cf DCP, 3.6.3.

<sup>92</sup> Town Plan, 30.3, definition of "gross floor area", exclusion (b).

<sup>93</sup> See these Reasons [25] and [26].

<sup>94</sup> DCP, 3.11.2, 3.12.2(c) and 3.12.4(f).

<sup>95</sup> DCP, 3.12.

<sup>96</sup> DCP 1.3; as to R6 development, see these Reasons at [9].

<sup>97</sup> See these Reasons [9].

future development of neighbouring properties. There is nothing in the DCP to suggest that it intends to allow earlier development the benefit of relaxation of standard requirements for Boundary Clearances, Separation and Privacy without any consideration of the rights of future developers of neighbouring land. This seems to have been an issue before the primary court: the developer's director Mr McFarlane in his tendered statement<sup>98</sup> addressed in general terms the effect of the proposal on the future development of neighbouring properties. His Honour was right to consider the impact of the relaxation sought by the developer on the prospective development of neighbouring properties.

[45] Mr Lyons next contends that the learned primary judge erred in law in failing to consider whether the design objectives of the element of Boundary Clearances, Separation and Privacy<sup>99</sup> were achieved by the development plans before rejecting the proposed variation of the requirements.<sup>100</sup> Mr Lyons rightly submits that the question was whether the design objectives were met as satisfactorily in the proposed development as they would have been had the development met the requirements of that element.<sup>101</sup> Mr Robinson was of the opinion that if the development were set back an additional 4 or 5 metres from its boundary with the Mowbray residences, there would be less impact on the privacy of the external living spaces of those residences. Although his Honour did not specifically refer to this part of Mr Robinson's evidence, he accepted his evidence generally. The proposed solution to this non-compliance involved the extensive use of shutters attached to the lower level of Tower 3's balconies which compounded his Honour's concerns with the first of the design objectives of the element of Intensity of Development.<sup>102</sup> His Honour also noted the shutter solution would not stop residents of the upper levels of Tower 3 looking into the Mowbray living spaces; the 10 metre setback would provide an opportunity for more effective landscaping. His Honour's careful reasons demonstrate his awareness of the need to consider whether the proposed development's variation to the requirement met the design objectives.<sup>103</sup> His Honour was ultimately satisfied that it did not.<sup>104</sup> We are not persuaded his Honour erred in his thoughtful consideration of these matters.

[46] Mr Lyons further contends that his Honour erred in finding that the residents on the higher levels of Tower 2 could open their shutters and look down onto the Daly properties when the relevant design objective of Boundary Clearances, Separation and Privacy is to provide "privacy for the internal and external living spaces of dwelling units".<sup>105</sup> Mr Robinson stated that between 10 and 20 of the apartments in Tower 2 would overlook the private open recreation spaces of neighbouring properties. Although his Honour has expressed himself in general terms, it seems clear enough that his Honour was referring to the external living spaces of the Daly properties and correctly addressed the design objective. There is no error of law here.

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<sup>98</sup> Ex 42, pp 4-5.

<sup>99</sup> DCP, 3.1.

<sup>100</sup> DCP, 3.12.2.

<sup>101</sup> DCP, 3.1.

<sup>102</sup> DCP, 3.4.1(a).

<sup>103</sup> Reasons for Judgment, [173], [179] and [182] and see these Reasons [27].

<sup>104</sup> Reasons for Judgment, [213].

<sup>105</sup> DCP, 3.12.1(b).

[47] Mr Lyons next contends that his Honour erred in considering acoustic privacy<sup>106</sup> when the design objective of Boundary Clearances, Separation and Privacy referred only to "privacy";<sup>107</sup> the element of "Noise" was dealt with separately under the DCP.<sup>108</sup> The element of "Noise" covers excessive noise, particularly traffic, and is plainly distinguishable from the concept of privacy. The noise issues considered by the acoustic expert witnesses, Mr Kamst and Mr Rumble, considered only noise in the nature of plant noise, traffic noise, noise from the tennis courts and the like, not acoustic privacy issues. Privacy is not defined in the DCP or the Town Plan. Its dictionary definition is "**1.** The state of being private; retirement or seclusion. **2.** Secrecy. **3.** *Rare* a private place."<sup>109</sup> Eavesdroppers or telephone tappers are considered invaders of privacy. There is no suggestion in that definition, in the DCP<sup>110</sup> or the Town Plan that "privacy" should be limited to visual privacy, excluding acoustic privacy; if the DCP intended privacy to be so limited it can be expected to clearly state that limitation; it did not. His Honour was right to consider acoustic privacy as well as visual privacy when considering the relevant design objective of this element.<sup>111</sup>

**Was the primary judge entitled to set aside the development approval because of non-compliance with the DCP?**

[48] The next question for determination is whether the demonstrated error of law which led his Honour to include the outdoor spaces of Tower 1 in the gross floor area of the development could have materially affected his Honour's decision to set aside the Council's approval of the development. If so, then the appeals should be remitted to the Planning & Environment Court for determination according to law.<sup>112</sup>

[49] Ordinarily, such an error would be considered to be one that could have materially affected the decision. But his Honour clearly stated that even if he were wrong on that point, the developer was nevertheless attempting to take an unreasonable advantage of that exclusion by designing a building with greatly increased impact because of its dominant outdoor spaces. It is true that his Honour noted that conclusion was reinforced by the architect's assumption that the site cover included the whole footprint of the towers. This assumption was wrong, for the requirement in the DCP, that site cover is not to exceed 40 per cent of the area of a site<sup>113</sup> excludes balconies, contrary to the definition of "site cover" in the Town Plan<sup>114</sup> which includes structures like balconies; this is probably why the architects engaged by all parties mistakenly calculated the site cover of this development including the area of the outdoor spaces; the architects' view is irrelevant if it is not the effect of the DCP. But this misconception does not detract from the obvious correctness of his Honour's conclusion that Tower 1 was a building with a greatly increased volume, actual floor area and impact because of its dominant balconies, a conclusion supported by the opinions of Mr Robinson<sup>115</sup> and Mr Buckley.<sup>116</sup>

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<sup>106</sup> See these Reasons [27].

<sup>107</sup> DCP, 3.12.1(b).

<sup>108</sup> DCP, 3.10.

<sup>109</sup> See fn [78].

<sup>110</sup> DCP 3.6.1 refers to "visual and acoustic privacy".

<sup>111</sup> DCP, 3.12.1.

<sup>112</sup> See fn 4.

<sup>113</sup> DCP, 3.3.2(a).

<sup>114</sup> Town Plan, s 30.3.

<sup>115</sup> See ex 31, p 19.

<sup>116</sup> Ex 33, 9-10.

- [50] His Honour's observation that the "very large balconies on Tower 1 effectively make the GFA larger than the DCP expects"<sup>117</sup> must be read taking notice of the word "effectively" and subject to his earlier qualifying statement that "even if that conclusion is not correct, then it should still be found that the developer has attempted to take an unreasonable advantage of the exclusion of balconies from the GFA calculation by designing a building whose impact is greatly increased by its dominant outdoor spaces".<sup>118</sup> This latter view was open to his Honour, and it is unaffected by the error that has been identified above.
- [51] The hearing before the primary judge was an appeal by way of hearing anew;<sup>119</sup> the primary court's task was to make a fresh decision on the merits of the case.
- [52] The discretionary exercise in determining whether a proposed development meets the requirements of the DCP is not to simply record whether the design objectives of the majority of the elements set out in the Development Code are met by the application for development. It is to consider the proposed application in the light of all those elements and to then determine whether the proposed development meets the mandatory requirements, whether the requirements not met by the proposed development should be varied,<sup>120</sup> whether the design objectives are met and whether the proposed development achieves an acceptable balance of any competing design objectives and interests under the DCP, taking into account the site and adjoining development.<sup>121</sup>
- [53] His Honour recognised that it was unnecessary for a developer to achieve perfection or the best alternative in order to satisfy the DCP but rather to ensure the proposed development is an appropriate planning outcome in accordance with the Development Code.<sup>122</sup> His Honour acknowledged the positive aspects of the proposed development.
- [54] Here, the exclusion of the outdoor spaces of Tower 1 from the gross floor area of the proposed development had the effect that the development precisely met the maximum allowable gross floor area under the DCP, at least once the developer agreed to exclude the recreational buildings. One of the design objectives of the element of Intensity of Development<sup>123</sup> is "(a) to achieve the aims of the Plan in a way which results in a quality residential environment."<sup>124</sup> The DCP recognises that sometimes the achievements of the design objectives set out in the Development Code<sup>125</sup> may preclude the development of a site to the maximum allowable gross floor area so that the design objective is not necessarily met simply because the proposed development does not exceed the maximum allowable gross floor area. The outdoor spaces of Tower 1, like those of the other towers, were within the solid vertical external elements of the building and the first seven floors on the north-

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<sup>117</sup> Reasons for Judgment, [208].

<sup>118</sup> See these Reasons [17]; Reasons for Judgment [100].

<sup>119</sup> IPA, 4.1.52.

<sup>120</sup> DCP, 3.1, 3.22(a).

<sup>121</sup> DCP, 1.3(n), 1.5 and 3.22.

<sup>122</sup> Judgment, [57]-[59]. Cf comments of Else-Mitchell J in his article "Council's Discretionary Powers – Their Use and Abuse in Health, Building and Planning Matters", *Shire and Municipal Record*, 15 January 1969, 835, 840 referred to with approval by Carter DCJ (as he then was) in *Robert Cruse Nominees P/L v Noosa Shire Council & Ors* [1981] QPLR 122, 125-126.

<sup>123</sup> DCP, 3.4.1.

<sup>124</sup> See also DCP, 3.6.11(e).

<sup>125</sup> See DCP s 3.

western side were screened, adding to the apparent bulk of the building. His Honour formed the view that regardless of whether the outdoor spaces of Tower 1 were excluded from the calculation of gross floor area, the outdoor spaces of the three towers and their use of shutters and columns made the buildings of excessive bulk so that this design objective was not met. That conclusion was supported by the opinions of architect Mr Robinson and the town planner Mr Buckley.<sup>126</sup>

[55] These shortcomings were compounded by other departures from the Development Code: the design objectives of the element of Boundary Clearances, Separation and Privacy were not met.<sup>127</sup> The excessive height of the development and the secondary consideration of the proposed development's effect on neighbours' views were additional concerns. His Honour was conscious of the limitations of the topography of the site which meant that development which would ordinarily be spread over a larger area was confined to a portion of the site with the result that the design objectives of the Development Code relating to Intensity of Development, Boundary Clearances, Separation and Privacy and Views were not met and adequate balance was not achieved.<sup>128</sup>

[56] The demonstrated error of law is his Honour's inclusion of the outdoor spaces of Tower 1 in the calculation of gross floor area under the Town Plan. As his Honour was careful to point out,<sup>129</sup> his conclusion that the design objectives of the Development Code have not been sufficiently met in this development stood independently of that conclusion. That error could not have materially affected his decision.

[57] It follows that any appeals would fail.

**Should the application for leave to appeal be granted?**

[58] As demonstrated, the applications raise a question of law as to the meaning of the definition of "gross floor area" in the Town Plan. That issue is not only of importance to parties in this matter, which concerns a substantial development proposal on a significant piece of waterfront inner-city land, but is also likely to affect future litigants because, we are told, there is a similar provision in the current City Plan 2000. The case is a suitable one in which to grant the applications for leave to appeal.

[59] We would grant the applications for leave to appeal, but, for the reasons we have given, dismiss the appeals. We would give the parties until 12 noon, 22 March 2002 to file and serve any submissions as to costs and in the absence of any submissions within that time order that in each application and appeal the applicant/appellant pay the respondents' costs to be assessed.

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<sup>126</sup> See Mr Robinson's report ex 31, p 19 and Mr Buckley's report, ex 33, pp 9-10.

<sup>127</sup> See these Reasons [45].

<sup>128</sup> Other minor complaints mentioned in his Honour's reasons, but not in the final overview, were that the road frontage of the development was "hardly impressive" (see these Reasons [12]); the length of Tower 3 exceeded the 30 metre requirement by 4.5 metres (see these Reasons [20]) and 40 Castlebar Street was over-shadowed by the development.

<sup>129</sup> See these Reasons [17]; Reasons for Judgment [100].