SUPREME COURT OF QUEENSLAND

CITATION:	*Reservilt P/L v Maroochy SC & Anor* [2002] QCA 367
PARTIES:	**RESERVILT PTY LTD** ACN 058 252 476 (appellant/applicant) v **MAROOCHY SHIRE COUNCIL** (respondent/first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 3739 of 2002 P&E Appeal No 17 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	20 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2002
JUDGES:	Davies and Jerrard JJA and Mackenzie J Separate reasons for judgment of each member of the Court; Davies JA and Mackenzie J concurring as to the orders made, Jerrard JA dissenting
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. Remit this matter to the Planning and Environment Court to proceed according to law.** **4. The respondent Council pay the applicant's costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - REFUSAL AND REASONS FOR REFUSAL - where the applicant appealed a decision of the respondent Council refusing an application for a material change of use - where the learned Planning and Environment Court judge reverted to the statutory provisions with respect to onus of proof - whether the respondent Council had to allow the application unless it was satisfied that compliance with the Code could not be achieved by imposing conditions - whether the learned Planning and Environment Court judge wrongly construed the combined effect of s 3.5.13(4) and s 4.1.50(1) of the *Integrated Planning Act* 1997 (Qld)

ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL - CONTROL OF PARTICULAR MATTERS - COMMERCIAL USES - BREEDING AND KEEPING ANIMALS - whether the respondent Council should have approved an application for a material change of use for animal keeping (boarding kennels) on land in the respondent Council's local authority area

ENVIRONMENT AND PLANNING - COURTS AND TRIBUNALS WITH ENVIRONMENTAL JURISDICTION - QUEENSLAND - PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS - EVIDENCE - whether the adversarial way in which expert evidence is adduced should be changed

EVIDENCE - ADMISSIBILITY AND RELEVANCE - OPINION EVIDENCE - EXPERT EVIDENCE - IN GENERAL - whether the adversarial way in which expert evidence is adduced should be changed

Integrated Planning Act 1997 (Qld), s 3.5.13(4), s 4.1.50(1)

COUNSEL: S J Keim, with P Howorth, for the applicant
C L Hughes SC for the first respondent
G B Wilshier (*sol*) for the second respondent

SOLICITORS: Lestar Manning (Maroochydore) for the applicant
Maroochy Shire Council on its own behalf
C Lohe, Crown Solicitor, for the second respondent

[1] **DAVIES JA:** This is an application for leave to appeal against a decision of the Planning and Environment Court given on 12 March 2002 dismissing an appeal by the applicant developer against a decision of the respondent Council refusing an application by the applicant for a material change of use for animal keeping (boarding kennels) on land at Peregian in the respondent's local authority area. The State of Queensland is the second respondent to this application only because, if the application and consequent appeal are allowed and the original application approved, the conditions of approval would include concurrence of the Environmental Protection Authority, a State government body. The State has no interest in this application or the substantive issues in the appeal and has not taken any part in argument before this Court.

[2] The learned Planning and Environment Court judge dismissed the appeal of the applicant on the ground that, because in the appeal before him it was for the applicant to establish that the appeal should be upheld,[1] the applicant was required to satisfy the court, in the circumstances of this case, that its "proposal could be properly conditioned to satisfy the Code requirements" in respect of it;[2] and,

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1 *Integrated Planning Act* 1997 (Qld) s 4.1.50(1).

2 *Integrated Planning Act* s 3.5.13(4).

because of the uncertainty of scientific evidence about noise, that onus was not discharged. For reasons which I shall now explain, the correctness of the major premiss of that sentence is the central question in this application.

[3] An appeal lies to this Court only, relevantly, on the ground of error or mistake of law on the part of the Planning and Environment Court and, even if that is shown, leave of the Court or of a judge of appeal must be obtained.[3] The only error of law contended for by the applicant is that the learned Planning and Environment Court judge wrongly construed the combined effect of s 3.5.13(4) and s 4.1.50(1) of the *Integrated Planning Act* 1997 (Qld) ("the Act").

[4] Section 3.5.13 provides:

> "(1) This section applies to any part of the application requiring code assessment.
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> (2) The assessment manager's decision may conflict with an applicable code if there are sufficient grounds to justify the decision, having regard to the purpose of the code.
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> (3) However—
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> (a) if the application is for building work—the assessment manager's decision must not conflict with the *Building Act 1975*; and
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> (b) for assessment against a code in a planning scheme—the assessment manager's decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area.
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> (4) The assessment manager may refuse the application only if the assessment manager is satisfied—
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> (a) the development does not comply with the applicable code; and
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> (b) compliance with the code can not be achieved by imposing conditions.
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> (5) Subsection (3)(b) applies only to the extent the decision is consistent with any State planning policies not identified in the planning scheme as being appropriately reflected in the planning scheme."

Section 4.1.50(1) provides:

> "In an appeal by the applicant for a development application, it is for the appellant to establish that the appeal should be upheld."

[5] It was common ground in the Planning and Environment Court and remains common ground here that the applicant's proposal required Code assessment within the meaning of Ch 3 of the Act, the relevant Code being described as "Code for Development and Use of Intensive Animal Industries and Aquaculture". It was also and remains common ground that the proposal did not provide an acceptable measure for compliance with the performance criteria specified in element (2) "Site Layout and Management" in the Code because a dwelling on neighbouring land was substantially less than 200 metres from the proposed development.

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[3] *Integrated Planning Act* s 4.1.56.

[6] Under the Code, acceptable measures were ways, but not the only ways, in which the performance criteria in the Code could be complied with.[4] The relevant performance criteria here were stated as follows:

> "Buildings, pens, and other structures and waste disposal areas must be sited, constructed and managed such that the maximum number of animals intended to be kept or processed on the land can be accommodated without having any significant adverse impacts on the amenity of the locality."

[7] His Honour said of compliance with these criteria:

> "The Younie residence is only 127 m from the closest point of the proposed development. The appellant can only succeed on the noise issue if it satisfies the Court upon all of the evidence that the proposal could be properly conditioned to satisfy the Code requirements."

By those statements I would construe his Honour as concluding that the applicant not only failed to provide an acceptable measure under element (2) but also failed to comply with the performance criteria for that element. This seems to follow from his earlier recitation of the respondent's submissions in that respect. He therefore concluded, it seems, that the development did not comply with the applicable Code within the meaning of s 3.5.13(4)(a).[5]

[8] His Honour then turned to the requirement of s 3.5.13(4)(b). On matters relating to the resolution of that question, as was also the case with respect to the matters relevant to s 3.5.13(4)(a), the opinion evidence of the noise expert called by the applicant, Mr McNeilage, and of the competing expert called by the respondent, Mr Chessells, conflicted. The learned Planning and Environment Court judge described the manner in which this evidence was given, on both sides, as follows:

> "The evidence on this issue (as with other issues) often assumed a combative flavour, with both witnesses arguing strongly (and at times at great length) for their particular point of view."

His Honour then went on to describe in more detail how each of these witnesses criticized the evidence of the other. In the end his Honour said that he was not in a position to reject the evidence of one of them or to confidently prefer one to the other. The unfortunate consequence was that, because of his Honour's uncertainty as to which of these competing opinions was correct, he was obliged to revert to the statutory provisions with respect to onus of proof to which I have referred in order to resolve the question arising under s 3.5.13(4)(b). And in seeking to apply those his Honour concluded that the applicant had failed to satisfy the onus upon it to prove that compliance with the Code could be achieved by imposing conditions.

[9] That his Honour was unable to reach any confident view as to which opinion was correct, and consequently had to seek to resolve the matter by applying onus of proof provisions in the Act is not a criticism of his Honour but rather of the adversarial way in which expert evidence continues to be adduced in the Planning and Environment Court. It is inevitable that an applicant, in a system as adversarial

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4 Maroochy Shire Planning Scheme par 1.2(4), (5), par 2.2.

5 Another possible view is that his Honour mistakenly thought that a non-compliance with the accepted measures under element (2) was, without more, a failure to comply with the Code. See, however, fn 4. However, for reasons given later, I do not think it matters which of those is correct.

as this, will call as an expert only a person whose evidence generally supports the applicant's case; and conversely that a respondent will call as an expert witness only a person whose evidence generally supports the respondent's case. Such a system encourages such a witness to express opinions on the question on which he or she is called which are biased in favour of his or her client and to defend those opinions strongly in court thereby decreasing the possibility of the judge arriving at an objectively correct judgment on the question. That is apparently what has happened here with unfortunate consequences, not only to cost to the parties but also to the unsatisfactory way in which his Honour felt compelled to decide the appeal. Especially in the Planning and Environment Court this practice of adversarial experts should not be permitted to continue.

[10] In the end, in my opinion, the learned Planning and Environment Court judge misconstrued the combined effect of s 3.5.13(4)(b) and s 4.1.50(1). The former of these, in its application to the present case, may be more simply paraphrased as follows. The assessment manager (the respondent Council) must allow ("may refuse") the application unless ("only if") it is satisfied that compliance with the Code cannot be achieved by imposing conditions.[6] And because an appeal to the Planning and Environment Court is by way of hearing anew[7] and, where the decision of the Planning and Environment Court changes or sets aside and replaces the decision of the assessment manager, it is to be taken to be the decision of the assessment manager,[8] the court must also allow the application unless it is satisfied that compliance with the Code cannot be achieved by imposing conditions.

[11] Mr Hughes SC for the respondent was unable to advance any satisfactory argument that the plain English meaning of s 3.5.13(4) was not as I have construed it. Rather he submitted that that did not lead to a desirable result. But his submissions did not go so far as to assert that this construction would lead to any ambiguity or absurdity or show that, for any reason, it did not achieve the purpose of the Act. In my opinion there is no reason to think that the legislature did not mean what it said.[9]

[12] It is true that, pursuant to s 4.1.50(1), it was for the applicant, as the appellant in the Planning and Environment Court, to establish that the appeal to that court should be upheld. But in order to establish that, all it had to do, relevantly, was to cause that court to fail to be satisfied that compliance with the Code cannot be achieved by imposing conditions. In the court's state of satisfaction about the competing evidence of two experts it seems likely that, in this case, that onus was satisfied although, for reasons which I shall mention later, I do not think it necessary to resolve that question. But it follows from the construction of s 3.5.13(4) which I favour that in saying that the applicant could only succeed in its appeal to the Planning and Environment Court if it satisfied that court upon all the evidence that the proposal could be properly conditioned to satisfy the Code requirements, his

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6 It is self evident that this construction of the opening words of s 3.5.13(4) affects equally the meaning of par (a) and par (b).

7 *Integrated Planning Act* s 4.1.52(1).

8 *Integrated Planning Act* s 4.1.54(2) and (3).

9 The provisions of s 3.5.13 (Decision if application requires code assessment) may be contrasted in this respect from those of s 3.5.14 (Decision if application requires impact assessment).

Honour stated the test wrongly and in a way which was too onerous for the applicant.

[13] The learned Planning and Environment Court judge's error in this respect was, in my opinion, one of law.[10] The applicant submitted that, if it succeeded in showing such an error of law, as in my opinion it has, then this Court should itself impose conditions aimed at achieving compliance with the Code, and the applicant suggested what those conditions ought to be. I do not think that this Court ought to embark upon any such exercise. There are no doubt a number of reasons for this but it is sufficient to say merely that that is a matter peculiarly within the expertize of the Planning and Environment Court and, at least where the question of what those conditions should be is not a matter of agreement, as it is not here, it is not an appropriate function for this Court to decide that in the circumstances of this case.

[14] This matter came before this Court only as an application for leave to appeal but, as the respondent should know, in such applications this Court endeavours, wherever practicable, to proceed to determine the appeal. Moreover in this case Mr Hughes SC readily acknowledged that the question of construction of s 3.5.13 and s 4.1.50 was one of law, did not suggest that he was not in a position to argue it and argued it in his usual capable way. I mention this only because the respondent had earlier objected to this Court, if it granted leave, proceeding to determine this appeal and Mr Hughes SC remained bound by instructions to that effect. In the circumstances I think it would be unjust not to finally determine that question of construction.

[15] I would accordingly grant the application, allow the appeal and remit the matter to the Planning and Environment Court to proceed according to law. The respondent Council should pay the applicant's costs of this application and appeal. I would consider an application by the respondent Council for an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

Orders

1. Application for leave to appeal granted;
2. appeal allowed;
3. remit this matter to the Planning and Environment Court to proceed according to law;
4. the respondent Council pay the applicant's costs.

[16] **JERRARD JA:** I have read the reasons for judgment of Davies JA. I agree with his construction of s 3.5.13(4) of the *Integrated Planning Act* 1997 (Qld). I also agree it necessarily follows that when applying s 4.1.50(1) of that Act, it is sufficient for an appellant to succeed in the Planning and Environment Court for the appellant to establish that the court has failed to be satisfied that compliance with the code cannot be achieved by imposing a condition.

[17] I do not think it follows that the result reached by the learned judge in the instant case should have been different. One can state three findings and the results which follow from the construction of those sections established by this judgment. These are:-

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[10] *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 451.

- I am satisfied that compliance with the code cannot be achieved by imposing conditions.

Appeal Dismissed

- I am not satisfied that compliance with the code cannot be achieved by imposing conditions.

Appeal Upheld

- I am satisfied compliance with the code can be achieved by imposing conditions.

Appeal Upheld

[18] I consider the accurate way of stating the result reached by the learned judge of the Planning and Environment Court in this case is:

- I am unable to determine on this evidence whether compliance with the code can or cannot be achieved by imposing conditions.

[19] I consider that result has the consequence that the appellant has **not** established that the judge has the requisite non satisfaction; the learned judge simply did not reach that conclusion having said that he could not conclude that issue one way or another.

[20] I would accordingly hold that the correct conclusion for the learned judge below was that the appeal to that court should be dismissed, and likewise dismiss the appeal to this court.

[21] **MACKENZIE J:** Save for reserving my views on the matters discussed in para [9] of the reasons of Davies JA, I agree with his reasons and the orders he proposes.

[22] Those matters raise fundamental issues concerning the role of expert witnesses in litigation. Resolution of the kind of problems referred to by Davies JA will involve devising an appropriate balance between the current perception that a litigant has the right to conduct the case on the basis of evidence favourable to the litigant's case and the public interest in minimising the potential for experts who hold views towards the extremities of the range of possible opinions to unduly dominate, protract and over-complicate litigation. In the absence of cultural change, which is an unlikely possibility in practical terms while the situation remains unregulated, an imposed regime incorporating the principles decided on after the debate has concluded would appear to be the only practical solution.