SUPREME COURT OF QUEENSLAND

CITATION:	*Seymour CBDB P/L v Noosa S C* [2002] QCA 446
PARTIES:	**SEYMOUR CBD PTY LTD** ACN 010 302 860 (applicant) v **NOOSA SHIRE COUNCIL** (respondent)
FILE NO/S:	Appeal No 5251 of 2002 P & E Appeal No 4178 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	25 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2002
JUDGES:	McPherson JA, Cullinane and Holmes JJ Separate reasons for judgment for each member of the Court each concurring as to the order made
ORDER:	**Application dismissed with costs**
CATCHWORDS:	LOCAL GOVERNMENT – TOWN PLANNING – MISCELLANEOUS MATTERS – APPEALS – where development permit from Council was refused – whether argument asserted by the applicant that the respondent is estopped from asserting the illegality of the earlier approval is a basis for the grant of leave – whether respondent is estopped from contending that any non-compliance with scheme in relation to the matters of gross floor area, site cover and landscaping would be an unreasonable or irrelevant consideration at the time the respondent granted the approvals – whether court erred in applying definition of gross floor area as contained in scheme – whether court misconstrued the provision dealing with landscaping or did so in an unreasonable way – where factual basis of the estoppel cannot be shown to exist – where "gross floor area" definition is one for the purposes of the *Local Government (Planning and Environment) Act* 1990 only – whether area above street level comes within the definition of "landscaped open space"

Integrated Planning Act 1997 (Qld), s 4.1.56, s 3.5.22, s 3.5.33
Local Government Act 1936 (Qld), s 33 (16C)
Local Government (Planning and Environment) Act 1990 (Qld), s 1.4

Minister for Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 192, followed
Roy Summerville Surveys Pty Ltd v Logan City Council [1994] 1 Qd R 440, considered
Vynotas v Brisbane City Council [2002] 1 Qd R. 108, considered

COUNSEL: M Daubney S C and J Haydon for the applicant
P D McMurdo QC and R Listser for the respondent

SOLICITORS:
Stubbs Barbeler Grant for the applicant
Wakefield Sykes for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Cullinane J. The application should be refused with costs.

[2] **CULLINANE J:** The applicant seeks leave to appeal pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 as amended against a decision of the Planning and Environment Court (the Court) refusing an extension of a development permit.

[3] The application to extend the time was made under s 3.5.22 of the Act and an application to alter the relevant condition limiting the duration of the permit was made under s 3.5.33.

[4] The land concerned was developed in the 1980's. In November 1997 the applicant sought approval from the respondent for redevelopment of the site. In May 1998 after an initial refusal and the submission of amended plans, an approval was granted subject to certain conditions. The appellant appealed against these conditions and in July 1999 a compromise was reached and the appeal was withdrawn. At about the same time an application was made for modification of the conditions and in September 1999 the council granted a development permit subject to conditions.

[5] One of these was a condition that the permit would lapse if the use or erection of a building or other structure associated with the use was not commenced by June 2002.

[6] As the expiration period date approached the applicant applied for an extension of this period but this was refused in a letter dated 21 August 2001 on the following grounds:

> "1. The proposed development is not in keeping with the character now sought for the Hastings Street precinct.
> 2. The additional gross floor area and site coverage adds significantly to the visual bulk and scale of the building and is

likely to adversely impact on the amenity of the streetscape and locality. The lack of landscaped open space further accentuates the appearance of bulk and contributes to a loss of amenity on site.

3. The development is contrary to non-discretionary provisions of the Schedule to the Planning Scheme, relating to gross floor area, site coverage and minimum landscaped open space.
4. The development has not been publicly notified since November 1997 and the community has not been allowed the opportunity to comment about the proposal since that time. The public may raise valid planning issues that should be considered particularly since the proposal's non-compliance with the current Scheme requirements are substantial and are not minor."

[7] From this refusal the applicant appealed to the court. In October 2001 the court heard and determined some preliminary issues and in April 2002 the court determined the appeal by dismissing it.

[8] Leave is sought to appeal against both of these decisions.

[9] The third of the grounds set out in the letter of the respondent of 21 August 2001 would in itself have been sufficient to dispose of the application as an approval which was not lawfully granted could not be extended.

[10] The court in considering the preliminary issues did not address the issue of the alleged illegality but rather considered the question whether the respondent was estopped from asserting the illegality of the earlier approval. The court concluded that it was not.

[11] Before us the applicant claimed that the estoppel which the court considered was not an issue and that the court failed to address an estoppel based upon an argument actually advanced. I will return to this shortly.

[12] It is plain from the judgment of the court in April 2002 that there was a general acceptance of the arguments advanced by the respondent upon the issue of illegality.

[13] Here before us the applicant contended that there were two bases upon which the court erred in accepting this argument. The first is based upon the judgment of the Court of Appeal in *Roy Summerville Surveys Pty Ltd v Logan City Council* [1994] 1 Qd R 440. This judgment was concerned with the provisions of s 33(16C) of the *Local Government Act* 1936. The corresponding provisions in the *Local Government (Planning and Environment) Act* 1990 and the *Integrated Planning Act* 1997 depart in significant ways from the legislation under consideration in *Roy Summerville.* The second basis upon which it was contended that the court erred on the issue of invalidity arises from the judgment of this Court in *Vynotas v Brisbane City Council* [2002] 1 Qd R108. It is said that in applying the principles of that judgment the relevant Town Planning Scheme (the Scheme) was to be regarded as a transitional planning scheme only the provisions of which gave rise to matters to be considered upon an application but were not legally binding.

[14] In my view it is unnecessary to consider these two arguments because the court in its decision of April 2002 did not dispose of the appeal on this basis.

[15] That this is so is clear from what the court said at paragraphs [48] and [49] of the April judgment]:

> "[48] … My view is that it was not within the Council's powers to grant the de facto relaxations regarding GSA, site cover and landscaped open space which it did (and perhaps without full realisation of what it was doing) in 1998 and 1999. The appellant has pointed to arguments fairly open that the Council did have such power. Assuming these arguments to be valid, what the Council approved would stand in the absence of any successful challenge from any quarter. Revisiting the matter in August 2001, upon the appellant's later application, the Council was entitled to take a different view, not being estopped in any relevant way.
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> [49] In the result the appellant, which carries the onus under the IPA s 4.1.50(4), has not persuaded this Court that its latest application ought to be successful. In summary, the court does not dissent from the assessments quoted in paragraph [11] above from the Council's letter of 21 August 2001."

[16] Earlier after dealing with the *Vynotas* issue, the court said:

> "… If the appellant's proposal is to be assessed only in terms of the planning scheme, it must be rejected, not approved as extended. If the Court of Appeal authorities are applicable, this court ought to assess the proposal on the basis that the Scheme's effect is persuasive only, albeit of considerable weight and the approval and Development Permit may not be regarded as invalid. Taking this approach, in the end the appeal still fails."

[17] Neither of these arguments then constitutes a basis for the grant of leave.

[18] The court disposed of the application on its merits, something which necessarily required the court to consider the application and assess it by reference to the provisions of the scheme.

[19] Once the arguments as to invalidity are put to one side it can be said that the applicant relies in support of its application for leave upon the following:-

(a) The estoppel, which it is said the court failed to appreciate, and because of this, to consider. Ultimately this was said by Senior Counsel on behalf of the applicant, if I understood him correctly, to be that the respondent is estopped from contending that any non-compliance with the scheme in relation to matters of gross floor area, site cover and landscaping would at the time the respondent granted the approvals have been anything other than an unreasonable or irrelevant consideration.

(b) The court, it was said, erred in applying the definition of gross floor area contained in the scheme. According to the applicant the definition contained in the *Local Government (Planning and Environment) Act* 1990 ought to have been applied.

(c) The court misconstrued the provision in the scheme dealing with landscaping or construed it in an unreasonable way.

[20] So far as the first of these matters is concerned it was conceded, as it had to be, that the respondent was entitled on the application for an extension of time to take into account non-compliance with the scheme in the respects that I have referred to.

[21] There is in my view nothing in the judgment which suggests that the court, which disposed of the matter upon the assumption that the approval and permit had been validly granted, took a view of the conditions to which these were subjected in so far as they related to gross floor area, site coverage or landscaping which was in any way inconsistent with the state of affairs it is said the respondent was estopped from denying. That is, the factual basis of the estoppel relied upon cannot be shown to exist.

[22] An estoppel which compels a local authority (or a court exercising its powers on appeal) to reach the same conclusion on an application to renew a permit as it had reached at the time of the grant as to the relevance of non-compliance with provisions of a town planning scheme would be contrary to principle. The discretion has to be exercised in the light of the circumstances existing at the time of the application. (See the judgment of the Full Court of the Federal Court of Australia in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 192 and particularly the judgment of Gummow J in which he examines the authorities on this subject generally). The applicant does not suggest otherwise and it is not possible to see how, short of an estoppel having this effect, the estoppel relied upon can assist the applicant even if the necessary factual basis existed.

[23] So far as the gross floor area argument is concerned, it is in my view clear from the terms of s 1.4 of the *Local Government (Planning and Environment) Act* 1990 that the definition of gross floor area which appears in that Act is one which is for the purposes of that Act only. I agree with the court's conclusion that a definition in a scheme of gross floor area (except in those respects in which the provisions of the Act deal specifically with the subject) is not intended to be generally overridden by this definition in the Act.

[24] So far as landscape is concerned, the court took the view that it was not permissible to take into account an area above street level referred to as a podium level and which was not visible from outside of the development as meeting the definition of "landscaped open space". The relevant definition refers to the treatment of land "for the purposes of enhancing or protecting the amenities of the site and the locality in which it situated". The court considered the matter was one of "impression" and concluded ultimately that the area could not be regarded as land treated in the way contemplated by the Scheme because it did not meet the description contained in the definition.

[25] I agree with Senior Counsel for the respondent that this does not involve a question of law. However, even if this were not so the issue is quite marginal to the Court's decision to refuse the extension.

[26] The application should be dismissed with costs.

[27] **HOLMES J:** I agree with the reasons of Cullinane J and with the order he proposes.