SUPREME COURT OF QUEENSLAND

CITATION:	*MC Property Investments P/L v Sunshine Coast Regional Council* [2010] QCA 163
PARTIES:	**MC PROPERTY INVESTMENTS PTY LTD** ACN 076 608 243 (appellant/applicant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 12663 of 2009 P & E Appeal No 284 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	25 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2010
JUDGES:	Holmes and Chesterman JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL – PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where respondent refused applicant's impact assessable material change of use application for 38 multiple dwelling units – where refusal upheld by the Planning and Environment Court – where site subject of application approximately 650 metres from the nearest bus stop – where statement of intent for the relevant planning precinct specified that "medium-density housing development should be located close to the public transport" – where primary judge construed the statement of intent as indicating a reference to transport facilities in existence at the time of the application's assessment – where judge considered the question of proximity as the "critical issue" – where applicant argued that this amounted to the elevation of proximity to the level of prescriptive criterion, the failure to meet which would justify the dismissal of the appeal – whether primary judge erred by construing the statement of intent as relating to

existing transport infrastructure – whether primary judge erred by considering proximity as the "critical issue"

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where primary judge found that there was a conflict between the applicant's impact assessable material change of use application and the relevant planning scheme – where primary judge made express reference to the approach espoused in *Weightman* in determining whether there were sufficient planning grounds to approve the application despite a conflict with the planning scheme – whether primary judge failed to apply the *Weightman* approach

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where applicant argued that, if the statement of intent did refer to existing transport infrastructure, the application should be allowed with a condition that the applicant seek approval from TransLink for the provision of a new bus stop – where expert evidence that the proposed bus stop would be on the "cusp of being within an acceptable walking distance" of the site – where primary judge made a finding of fact that this would not satisfy the preference in the statement of intent that "medium-density housing development should be located close to the public transport" – where primary judge said that there was no evidence of the attitude of TransLink to bus stop planning and design – where applicant argued that the primary judge made an implicit finding that the consent of TransLink was required – whether primary judge erred in dismissing the applicant's alternative application for conditional approval

Integrated Planning Act 1997 (Qld), s 3.5.14(2), s 4.1.56(1)(a)

Hofer v Maroochy Shire Council & Anor [2009] QPELR 278; [2008] QPEC 90, considered
MEPC Australia Ltd v Westfield Ltd (1998) 100 LGERA 204; [1998] QCA 345, considered
Walker v Noosa Shire Council [1983] 2 Qd R 86, distinguished
Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, considered

COUNSEL: G Allan for the applicant
C Hughes, with S Holland, for the respondent

SOLICITORS: P&E Law for the applicant
Sunshine Coast Regional Council Legal for the respondent

[1] **HOLMES JA**: The applicant seeks leave to appeal, pursuant to s 4.1.56(1)(a) of the *Integrated Planning Act* 1997 (Qld), against a decision of the Planning and Environment Court to dismiss its appeal against a decision of the respondent Sunshine Coast Regional Council. An appeal to this court may be brought with leave only on the ground of "error or mistake in law on the part of the [Planning and Environment Court]".[1]

The Planning and Environment Court judgment

[2] The decision of the Council appealed against in the Planning and Environment Court was to refuse an impact assessable material change of use application for 38 multiple dwelling units in the Sippy Downs planning area. The relevant planning scheme is the Maroochy Plan 2000. Pursuant to the planning scheme, the Maroochy Shire is divided into 30 planning areas, which are then further divided into 300 precincts. The site in question here fell within Precinct 5 (Stringybark Road West) of Planning Area 3, Sippy Downs. Some of the grounds on which the Council had refused the application were abandoned in the Planning and Environment Court; the learned judge dealt with and dismissed others. What remained was the question of access to public transport.

[3] The statement of intent for precinct 5 contains the following:

> "Small lot housing should be allowed at suitably accessible locations and medium-density housing development should be located close to the public transport facilities."

The learned primary judge described as the "critical issue or the 'touchstone'" whether the development was located "close to the public transport facilities". In considering what that phrase meant, he adopted what Rackemann DCJ had said in *Hofer v Maroochy Shire Council and Anor*[2] (which involved a development application for a nearby site in Precinct 5):

> "The planning scheme does not, in terms, define what distance is said to be 'close' to the public transport facilities, for the purposes of that part of the intent for Precinct 5. The word 'close' is a relative and imprecise term relating to the distance or interval between one thing and another. The determination of what is 'close' involves issues of fact and degree, in the relevant context. The subject provision is concerned with closeness to public transport facilities. The public transport facilities of relevance for present purposes are the bus facilities in Stringybark Road. Whether the proposed development is 'close' to those facilities should be judged by reference to the distance between the development and the closest bus stops, being the point where the bus facilities are accessed."[3]

[4] The site the subject of the application in the present case was about 650 metres from the nearest bus stop. The learned judge took the view that the use of the words "close to the public transport facilities" in the statement of intent indicated a reference to public transport facilities existing when the assessment was made. He considered that had the authors of the planning scheme intended that regard should be had to anticipated future public transport facilities, they would have said

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1 Section 4.1.56(1)(a) *Integrated Planning Act* 1997.

2 [2009] QPELR 278.

3 At 284.

so. His Honour concluded that the site was not "close to the public transport facilities", so that the proposal conflicted to a significant degree with the intent for the precinct.

[5] The applicant had submitted, however, that if the learned judge took the view that the statement of intent referred to the existing facilities, the appeal could, nevertheless, be allowed with a condition that the applicant provide a new bus stop. Considering that proposition, his Honour noted indications in the planning scheme that bus stops were to be placed at 400 metre intervals along Stringybark Road, the major road through the planning area. Construction of a new bus stop, he said, might require the relocation of an existing bus stop with probable adverse planning implications; none of the traffic experts had recommended its relocation. The judge went on to mention an argument made in *Hofer* that future provision of transport facilities could be expected on the strength of the expressed intent of installing bus stops at 400 metre intervals. However, despite the age of the planning scheme and the constructions of developments, his Honour remarked, there was no evidence of Council planning to give effect to that intent, and there was no evidence of the attitude of TransLink (the statutory authority whose duties include planning and managing public transport infrastructure), which would have to be involved in planning and design.

[6] In a joint experts' report, the traffic engineers had agreed that the site was

> "… located on the cusp of being within an acceptable walking distance of public transport subject to the provision of a new bus stop in the vicinity of the Stringybark Road/Toral Drive intersection."

Being "on the cusp of being within an acceptable walking distance of public transport" did not, his Honour considered, qualify as being "close" to public transport.

[7] The learned judge then considered, as s 3.5.14(2) of the *Integrated Planning Act* required, whether there were sufficient grounds to justify the identified conflict with the planning scheme. In doing so, his Honour said, he followed the approach identified in *Weightman v Gold Coast City Council*.[4] The applicant in its submissions had referred to the evidence of its town planner to the effect that the proposal would provide for additional multiple dwelling units, which, it was said, would both offer a wider range of housing choice and meet a public need as a result of expected population growth. The learned judge accepted that the proposal would provide additional multiple dwelling units, but observed that there was

> "… no hard evidence of any particular need despite projected population growth in the Planning Area".

There were other developments under way which would satisfy the planning intent to provide greater housing variety and choice. Accordingly, his Honour concluded that the grounds identified by the applicant were not sufficient to justify approval.

The application for leave to appeal

Construction of the statement of intent

[8] Unfortunately, his Honour's admirably clear and concise judgment is riddled, on the applicant's submission, with 14 errors of law, many with subcategories. The first

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4 [2003] 2 Qd R 441.

set of errors was said to concern his construction of the statement of intent for Precinct 5. It was said that he had construed it to the exclusion of other relevant parts of the Maroochy Plan 2000. The statement of desired character for the planning area contained, by way of a "Visions Statement" for the development in that area, the following:

> "In order to maximise the potential of the proposed town centre, the level of interactions with and benefit from the university and viability of the transportation strategy, the township would best be characterised by:
>
> ...
> • high levels of accessibility for pedestrians, cyclists and public transport, and less reliance on private cars ..."

and:

> "The communities will be served by well designed, interconnected movement networks, increasing connections between local streets and higher order roads in order to improve access to and movement of, in particular, public transport, pedestrians and cyclists."

The general statement of intent for master planned communities said:

> "It is intended that all new dwellings have good access to transport, open space, schools, shops and community facilities. These support facilities should be provided as early as possible and should, as far as practicable, be co-located in and around centres.
>
> While predominantly low density residential development is intended, sites close to centres and accessible to public transport are the preferred locations for medium-density housing ... A master planned community should provide high levels of accessibility and mobility through the effective relative location of key facilities supported by an efficient and safe vehicular, cycle and pedestrian network."

Other references in the planning scheme, including Desired Environmental Outcomes for the Shire, also pointed to an emphasis on development focussed around public transport services.

[9] The applicant submitted that those parts of the scheme actively encouraged approval of the proposed development, taking into account the absence of any actual master planning by the Council. Had the primary judge taken a purposive approach to the statement of intent construed in the context of the planning scheme as a whole, he would not have treated the reference to public transport as being to existing facilities, and he would have concluded that the proposed development by providing a new bus stop would enhance transport facilities, in accordance with the emphasis in the scheme on access to public transport.

[10] It was also suggested that the learned judge's construction created an inconsistency between the passage in the statement of intent for Precinct 5 referring to proximity to the public transport facilities and an earlier part of the statement of intent which says:

> "Due to the proximity of the southern part of this Precinct to the town centre and university, and the anticipated future provision of good bus services ... it is intended that further new housing and infill development should be allowed in the future to achieve a wider range of residential dwelling types and densities."

The applicant said that this passage showed that the purpose underlying the statement of intent was to facilitate change in the precinct from its previous usage to multi-purpose dwellings, of a kind which could be achieved by imposing conditions of the sort which the appellant proposed. And, it was said, the learned judge's emphasis on the definite article "the" in the expression "the public transport facilities" and his allusion to the fact that the drafters of the planning scheme could, if they had wished, have referred to anticipated facilities, showed that he had wrongly construed the statement of intent as if it were drawn with the precision of an Act of Parliament.

[11] For my part, I cannot see that the planning scheme passages referred to indicate anything but the desirability of access to public transport encapsulated in the statement of intent for the precinct. They do not militate against construction of the phrase "close to the public transport facilities" as referring to existing facilities. Nor do I think there is any necessary inconsistency between his Honour's construction and the earlier part of the statement of intent relied on by the applicant. The reference in the earlier part of the statement, to allowing further housing "in the future" does not suggest an intent that it be permitted in the present, before the bus services come into being. It is entirely consistent with the proposition that development and public transport facilities are to go hand in hand.

[12] The learned judge's observation that the authors of the planning scheme could have referred instead to anticipated facilities was unexceptionable; it does not indicate some fundamentally wrong approach to his construction of the statement of intent. His reference to the use of the definite article in the expression ("close to <u>the</u> public transport facilities") was a rational approach to the reading of the statement of intent, and produced a construction consistent with the emphasis in the planning scheme on access to public transport. In any event, even if his Honour erred in his construction of the statement of intent by regarding it as referring to existing facilities, that will not avail the applicant unless legal error can also be shown in his conclusion that the site was not close to the proposed future bus stop, an issue dealt with subsequently in these reasons.

[13] It was said that the learned judge's reference to the question of proximity as the "critical issue" showed that he had wrongly elevated the reference in the statement of intent to the level of a prescriptive criterion, the failure to meet which would justify the dismissal of the appeal. Reliance was placed on what was said by McMurdo P in *MEPC Australia Ltd v Westfield Ltd*:[5]

> "A statement of intent is a statement of intention providing useful guidelines in determining whether an application should be approved … Although it is only a guide, it remains a relevant factor when construing the planning scheme and in determining the merits of an application and also, it seems to us, in determining whether an application is a valid application."

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5 (1998) 100 LGERA 204 at 211.

[14] While it is not to be doubted that the statement of intent serves as a guide, not as a set of mandates, context may be relevant in ascertaining the significance of what it contains. The statement of intent in *MEPC Australia Ltd* related to zones established by a planning scheme under the *Local Government (Planning and Environment) Act* 1990 (Qld). In contrast, the planning scheme here involved 30 planning areas, 300 precincts and 18 precinct classes, a rather more intensive form of planning. As the Maroochy Plan explains, the precincts are designed to,

> "… establish each locality's context and role within the Planning Area, and the desired future local character." [6]

While local planning provisions are intended to reflect the general principles in the Strategic Plan, it is the planning area provisions (including the statements of intent and desired character for planning areas and precincts) which, according to the planning scheme, represent "Council's specific planning intent for the relevant localities". The primary function of a statement of intent for a precinct is to provide,

> "assessment criteria ... for the preparation and assessment of applications for impact assessable development (to determine if the proposed development and/or use is compatible with the desired character of the locality)."[7]

[15] Consequently, although an absence of the desired proximity of public transport could not dictate the rejection of the development application, it was plainly a highly significant factor; properly described by the learned judge as giving rise to the "critical issue". But the learned judge did not treat it as conclusive. Having made the necessary findings of fact, he proceeded to consider it (as s 3.5.14(2) of the *Integrated Planning Act* required him to do) in the context of whether a decision in favour of the application would conflict with the preference expressed in the statement of intent as part of the planning scheme.

The identification of conflict and planning grounds and the balancing of the two

[16] The applicant complained that despite the learned judge's reference to following the *Weightman* approach, his reasons did not disclose whether he in fact did follow that approach. The judgment of Atkinson J in *Weightman* (with which McMurdo P agreed) set out the proper approach to determination of whether there were sufficient planning grounds to approve the application despite a conflict with the planning scheme. The judge should:

> "1. examine the nature and extent of the conflict;
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> 2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
>
> 3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict."[8]

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6 Maroochy Plan 2000 Volume 1 Administration and Assessment Requirements 2.2: Explanation of the Way the Shire is Divided for the Purposes of this Planning Scheme.

7 Maroochy Plan 2000 Volume 3 Planning Areas, Precincts and Precinct Classes: Introduction.

8 At 453.

The complaint seems to be that the learned judge, while stating that he was applying *Weightman*, did not set out the three steps articulated above. But it is perfectly plain from his reasons that the learned judge did indeed identify the conflict, did examine the planning grounds put forward by the applicant and did determine, on balance, that they were not sufficient to justify approving the application.

[17] The learned judge was said to have committed errors of law in determining that a significant conflict existed. That argument was based, in part, on what was said to be his error in construing the statement of intent (an issue already dealt with) and on other errors in connection with the proposed new bus stop. He was said to have acted without evidence in drawing the conclusion that the relocation of the bus stop resulting from the addition of a new bus stop by the applicant would "probably have adverse planning implications". But that was an inference drawn from the evidence: none of the experts had recommended the removal of the existing bus stop, but rather had said that its location was appropriate.

[18] A further "error" was the learned judge's conclusion that being on the cusp of an acceptable walking distance of 400 metres from the proposed bus stop was not "close to the public transport facilities", when, according to the applicant, only the contrary factual conclusion was open on the evidence. But the experts did not clarify what they meant by using the expression "on the cusp" or how great a latitude the expression was intended to convey. His Honour's conclusion that a site "on the cusp of being within an acceptable walking distance of public transport" was not a site "close to the public transport facilities" was one of fact open on the limited evidence before him. It involved no error of law.

[19] It was also said that the learned judge erred by making an "implicit finding" that approval for the proposed additional bus stop was required from TransLink. In fact, the applicant said, while TransLink played "an important consultative role" in determining the proper location for bus stops, it did not have any statutory function of approving them. It was suggested that the facts were aligned with those in *Walker v Noosa Shire Council*.[9] In that case, it was held that a judge of the Local Government Court had erred in refusing an appeal which he would otherwise have allowed, solely on the basis that no permission to erect associated structures had been given, when he could have allowed the appeal conditional on the obtaining of the necessary consents.

[20] It is debateable whether in referring to TransLink his Honour was considering its prospective involvement in the location of the bus stop or was speaking of its role more generally in the location of bus stops along Stringybark Road, in the far from imminent implementation of the planning intent. Assuming the former, the observation that TransLink's attitude was unknown was a simple statement of the obvious; its views as to the appropriateness of the proposed bus stop location would have been relevant given the consultative role which the applicant conceded it had. But in any event, the comment was far from an assertion that its approval was required. The circumstances of this case, accordingly, bear no resemblance to the situation in *Walker*, which actually did involve a conclusion that an approval was needed.

[21] It was also suggested that the learned judge had failed to give adequate reasons as to the process by which he determined that the grounds were not sufficient to justify approval and that the failure to give reasons constituted an error of law.

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9 [1983] 2 Qd R 86.

His Honour identified his finding as a matter of fact that the evidence of the town planner did not establish a need for the development. His reasoning could not have been clearer. His finding that two sets of development currently under way would address any issue of housing need, variety and choice was one of fact made on evidence and constituted no error of law.

[22] The applicant went so far as to assert that his Honour in saying that there was "no hard evidence" of need had applied an incorrect standard of proof; the applicant had only to establish need on the balance of probabilities, not on "hard evidence". This proposed ground of appeal is absurd and smacks of the desperate. Finally, the learned primary judge was said to have acted without evidence in drawing the conclusion that developments already under way in the area would address the question of need. His conclusion, however, was clearly based on the evidence as to the number of units they entailed and was a proper and open inference.

Conclusion

[23] Despite an exhaustive process of challenging almost every line in the relevant part of his Honour's judgment, no error of law has been identified. I would refuse the application for leave to appeal with costs.

[24] **CHESTERMAN JA:** I agree with the order proposed by Holmes JA for the reasons given by her Honour.

[25] **ATKINSON J:** I agree with the order proposed by Holmes JA and with her Honour's reasons.