SUPREME COURT OF QUEENSLAND

CITATION:	*Gold Coast City Council v K Page Main Beach Pty Ltd* [2011] QCA 332
PARTIES:	**GOLD COAST CITY COUNCIL** (applicant) **v** **K PAGE MAIN BEACH PTY LTD** ACN 125 178 985 (respondent)
FILE NO/S:	Appeal No 5401 of 2011 DC No 996 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	22 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2011
JUDGES:	Chief Justice, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicant to pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicant Council had refused a development application for a multi-storey apartment building – where the respondent developer's appeal against that refusal had been allowed – where the Overlay Map relevant to the subject site designated a "maximum building height" of three storeys – where the proposed building amounted to a ten storey building – where the primary judge had concluded that the proposed development met the applicable performance criteria – whether the primary judge misconstrued the Planning Scheme and thereby erred in law by approving a development with such height disparity – whether there is a sufficiently arguable error of law – whether leave to appeal should be granted *Integrated Planning Act* 1997 (Qld), s 3.5.5, s 3.5.14, s 4.1.56 *Sustainable Planning Act* 2009 (Qld), s 498, s 822

Cass v Gold Coast City Council [2008] QPELR 556; [2008] QPEC 32, cited
K Page Main Beach Pty Ltd v Gold Coast City Council & Ors (2011) 180 LGERA 126; [2011] QPEC 1, approved
Main Beach Progress Association Inc v Gold Coast City Council (2008) 164 LGERA 233; [2008] QPEC 37, cited
WBQH Developments Pty Ltd v Gold Coast City Council [2010] QCA 126, applied

COUNSEL: C L Hughes SC, with J G Lyons, for the applicant
D R Gore QC, with B D Job, for the respondent

SOLICITORS: McDonald Balanda & Associates for the applicant
Mallesons Stephen Jacques for the respondent

CHIEF JUSTICE:

Introduction

[1] The applicant, Gold Coast City Council, refused an application for approval to develop a multi-storey apartment building on beachfront land at Main Beach Parade, Main Beach. Under the then applicable legislation, the *Integrated Planning Act* 1997, the developer, K Page Main Beach Pty Ltd appealed against that refusal to the Planning and Environment Court. On 3 June 2011 that court allowed the appeal and approved the development application subject to conditions to be developed. The applicant Council now seeks leave to appeal against the orders made in the Planning and Environment Court, on the ground that the Judge constituting that court erred in law. Leave will only be granted if there is a sufficiently arguable case of error which could materially have affected the decision (s 4.1.56(1)(a), (2) *Integrated Planning Act*; s 498 *Sustainable Planning Act* 2009). As the *Integrated Planning Act* 1997 was the legislation in force at the time the appeal to the Planning and Environment Court was commenced, this appeal may be determined under that same now repealed legislation (s 822 *Sustainable Planning Act* 2009).

The judgment of the Planning and Environment Court

[2] A large number of submitters objected to the development application, although they have not appeared on the hearing of the instant application. Their concern rested in the height, bulk and scale of the proposed development and consequent detriment to the amenity of the area. The application proposed a seven storey building with a partial eighth storey. Because of floor to ceiling heights, it amounted to a ten storey building for the purposes of the relevant Planning Scheme, the *Gold Coast Planning Scheme* 2003.

[3] The site falls within the Residential Choice Domain, and this development would be consistent with the intent for that Domain. As to height, the learned Judge referred to the relevant Overlay Map 6-3, which designates a "maximum building height".

[4] It was common ground that the overlay map's reference to a "maximum" height was not however prescriptive. It could not be because of other Scheme provisions which contemplate developments which may exceed the specified height. See also *Cass*

v Gold Coast City Council [2008] QPEC 32, para 32, *Main Beach Progress Association Inc v Gold Coast City Council* [2008] QPEC 37, para 89, and *WBQH Developments Pty Ltd v Gold Coast City Council* [2010] QCA 126, para 35.

[5] While this map shows the land to the immediate west of Main Beach Parade as within a 25 storey designation, the land to the immediate east, which includes the subject site, falls within a three storey designation. The Judge held that was not determinative of the fate of this application in relation to a ten storey building, because of other planning provisions.

[6] In particular, the Table of Development for the Residential Choice Domain contemplated that the height of a proposed development may exceed the maximum number of storeys provided for on the overlay map. In that situation, the development application would become "impact assessable" rather than "code assessable". Accordingly, as the Judge observed, "the maximum height, as shown on the overlay map…is the maximum beyond which an impact assessable development application is required". Section 3.5.5(2) of the *Integrated Planning Act* required in that situation that the proposal be assessed against the entire scheme.

[7] His Honour referred to the "Development Requirements" section of the Residential Choice Place Code, which provided that "buildings must be of a height which is in keeping with the predominant residential character of the surrounding area". He acknowledged that the proposed development of a ten storey building, in the context of the three storey designation in the overlay map, "would ordinarily attract somewhat closer scrutiny than one which exceeded the designation to only a minor extent", but noted that the ultimate question was whether the proposal met the applicable "performance criteri[a]", namely, whether a building of this height would be in keeping with the predominant residential character of the surrounding area, and whether the height would result in a significant loss of visual amenity. He characterized those as "matters of fact, degree and judgment".

[8] The learned Judge then examined the expert and other evidence relating to those issues, and expressed these conclusions:

1. A building of this proposed height would be in keeping with the residential character of the surrounding area. The building would not be as tall as developments to the west, and marginally lower than the shortest of the tall buildings to the east. (The construction of those buildings was approved prior to the introduction of height controls for this precinct in 1982, yet formed part of the established residential area, and therefore fell to be taken into account when addressing the performance criteria.)
2. The likely loss of visual amenity would not "as a matter of fact and degree" be significant.

[9] His Honour went on to consider detailed town planning considerations, such as density, site coverage, building setback, appearance, landscaping, amenity, plot ratio, shadowing, minimum site area, and concluded that any conflict with performance criteria was "not great and would be overwhelmed by the proposal's compliance with the purpose of the Code and by the merit of the proposal otherwise". That reflected s 3.5.14(2)(b) of the *Integrated Planning Act*, which provided that a decision on the application should not contemplate conflict with the Scheme "unless there are sufficient grounds to justify the decision despite the conflict".

The applicant's contentions

[10] The applicant contended that the learned Judge erred in law in his construction of the Planning Scheme, in that he failed to recognize its strategy to aggregate buildings of similar height in discrete areas. It was submitted that reading the Overlay Map OM-6 with other parts of the Scheme discloses a planning strategy that new development on the eastern side of Main Beach Parade be low-rise (three storeys or below), with new high-rise buildings to be located to the west. The applicant referred to *WBQH Developments Pty Ltd v Gold Coast City Council*, *supra*, among other cases.

[11] The applicant's outline of argument expresses the suggested error of law as follows:

> "The learned Primary Judge erred in law in failing to construe the Scheme as a whole and in particular in failing to construe the Scheme as involving the clear planning policies or strategies for this very locality of:
>
> (a) actively **discouraging** (to the extent available under the *Integrated Planning Act*) high rise buildings…from the relevant beach side Strip; and
>
> (b) actively **encouraging** high rise buildings to the west of the beach side Strip (ie west of Main Beach Parade);
>
> in circumstances where such policies or strategies were unarguably a legitimate exercise of the Council's policy or strategy making power."

[12] Mr Hughes SC, who appeared with Mr Lyons for the applicant, submitted that the learned Judge, in failing to address that strategy, focused wholly on the performance criteria, thereby ignoring the "higher order" conflict with the overlay map. Reference was made to the statement of "planning intent" in relation to Overlay Map 6, which says that the specified "**OM6 – Maximum Building Height** will be used to clearly articulate the desired outcome of density and built form for the various parts of the coastal strip". (That passage occurs in the Residential/Tourism Pacific Coast Land Use Theme, whereas this site is within the Residential Choice Domain, but the passage indicates in a more general way the significance of the designation on the overlay map.)

[13] Counsel for the applicant submitted that His Honour failed to give proper weight to these particular features: that OM-6 was "a specific and unambiguous tool to guide building heights"; that while those specified heights were only "acceptable solutions" in the Residential Choice Place Code, the Scheme promoted compliance with acceptable solutions as "desirable"; and that rendering the proposal impact assessable did not mean that approval should be regarded as a favoured outcome.

[14] Mr Hughes fairly, and properly, did not seek to suggest that the Judge fell into error in his construction of any particular provision of the Scheme, but advanced the applicant's case more broadly: the height strategy is of such evident importance that in approving this proposal, the Judge must be taken to have ignored it. As will emerge, my view is that the argument fails, because looking at the Scheme as a whole, that overweening importance is not evident.

Analysis

[15] The learned Judge did refer in his reasons for judgment to each of the features mentioned in the second last paragraph, and he was alive to the guide as to height

provided by the overlay map. As already noted, because the height of this development would exceed the height designated on that map, the proposal was impact assessable, requiring His Honour to address the issues whether the development would be in keeping with the residential character of the surrounding area and whether it would lead to a significant reduction in visual amenity.

[16] Those were essentially factual issues. It was not suggested that His Honour misconstrued any particular provision of the Scheme when dealing with them.

[17] It is the substantial disparity between the height of this proposal, and the height specified in the overlay map, which founds the applicant's challenge: the specified height being a "clear articulate[ion] [of] the desired outcome", has His Honour misconstrued the Scheme, and thereby erred in law, by approving a development reflecting disparity of this order?

[18] Mr Gore QC, who appeared with Mr Job for the respondent, submitted there was nothing in the Scheme to warrant a conclusion that the height specified in the overlay map, while still relevant, should be accorded any particular weight in the process of impact assessment, let alone the substantial weight upon which the applicant's approach would appear to depend. The Scheme could have provided, but does not, that in that process the designated height should be given substantial weight.

[19] The Judge did not ignore the extent of the disparity when going through that process. Reference has already been made, for example, to his reference to "closer scrutiny" because of that level of disparity. Addressing the performance criteria, the Judge is to be taken to have concluded that other amenity considerations overtook or overwhelmed the height issue.

[20] The approach taken by the applicant verges on presenting the designated height in the overlay map as a controlling constraint rather than as a guide, although the applicant would disclaim such a position. The Scheme could have mandated that position, but has not, and has chosen to leave undefined the extent to which height should feature in the process of impact assessment.

[21] Alternatively, the applicant comes close to contending that because of the suggested importance of that height designation, the court could not, acting reasonably, have countenanced approving a proposal for a building of this substantial height. His Honour's apparently careful, comprehensive and rational reasons for judgment would exclude such a contention.

[22] The decision is not vulnerable on the ground advanced. The Judge acknowledged the intended height distribution east and west of Main Beach Parade but concluded for the reasons he expressed, which were valid and available reasons, that approval was warranted. Rather than excluding that result, the various provisions to which His Honour referred allowed for it.

[23] The main difficulty confronting the applicant is that far from ignoring the strategy underlying the Scheme, the Judge did in fact acknowledge it, but then quite permissibly, reflecting his conclusion as to the overall desirability of this development, worked through provisions of the Scheme which gave the court the flexibility to approve the development notwithstanding its height. There is ample

support for the view that for a town planning scheme to advance the public interest, it should allow for that sort of flexibility.

[24] As to the significance of the intent as to height to be drawn from the overlay map, it is useful to refer to the summation of Fryberg J in *WBQH Developments Pty Ltd v Gold Coast City Council*, *supra*, para 37 (in which the other members of the court concurred):

> "Of course the existence of such an intent does not conclude the question whether there is conflict between the proposal and the Planning Scheme. That necessarily follows from the fact that compliance with performance criteria will satisfy the provisions of the code notwithstanding non-compliance with a corresponding acceptable solution. The existence or otherwise of such a conflict must be determined on all of the evidence and on the proper construction of the Planning Scheme as a whole…It is the task of the judge to evaluate all relevant matters in the exercise of the judgment of a specialist court."

[25] His Honour thereby encapsulated the ultimately factual character of the exercise through which the Planning and Environment Court passes in a case like this. That passage aptly describes the approach taken here. It was an evaluative, factually based process, informed of course by the provisions of the Scheme; but it is not suggested His Honour erred in construing them. The applicant's challenge amounts to an alleged error of fact not law, in essence that the Judge attributed insufficient weight to the height designation on the map. Any such failure could not enliven this court's statutorily limited jurisdiction to intervene in the process of the specialist court to which Fryberg J referred, a specialization with which this court is not equipped, hence unsurprisingly the statutory limitation on this court's jurisdiction.

Conclusion

[26] No sufficiently arguable error of law has been established. The application should be refused.

Orders

[27] I would order that the application be refused, and that the applicant pay the respondent's costs of and incidental to the application, to be assessed on the standard basis**.**

[28] **MUIR JA**: I agree that the application should be refused with costs for the reasons given by the Chief Justice.

[29] **CHESTERMAN JA**: Leave to appeal from a decision of the Planning and Environment Court ("P&E Court") may only be granted where an error made by that Court in giving judgment is one of law, or the Court lacked jurisdiction. Errors of fact which affect a decision of the P&E Court, even if clearly demonstrated, will not constitute a basis for the grant of leave to appeal. The legislative circumscription of the Court of Appeal's power to correct error in P&E Court judgments must be respected.

[30] The decision from which leave to appeal is sought approved the development of a 10 storey high residential building in a locality in which a planning map indicating

height restrictions set that limit at three storeys. The applicant argues that the result is so unreasonable as of itself to indicate an error in the adjudicative process that led to the approval. The presence of error, or inferred error, in a decision of the P&E Court is not sufficient for a grant of leave. The decision must indicate not just error but error of law.

[31] The applicant's difficulty in this regard appears from the manner in which it was obliged to cast its submissions. Essentially, the applicant's argument was that the primary judge misconstrued the relevant Planning Scheme and failed to appreciate that it actively discouraged buildings of four storeys and more from the relevant area to the east of Main Beach Parade while actively encouraging such building to the west of that roadway.

[32] The error in construction was said to result from a failure to *properly* to take into account:

- The inclusion of overlay map OM-6 as a specific and unambiguous planning tool to guide building heights;
- The Planning Scheme's clear indication that height maps were to guide desirable built form in designated areas;
- The Planning Scheme described compliance with acceptable solutions as "desirable" and the acceptable solution for the Residential Choice Place Code was a building of less than four storeys;
- The Scheme made development which did not comply with the height maps impact assessable which should have indicated to the primary judge that the proposed development should be viewed unfavourably.

[33] The primary judge did not overlook any of these points. His Honour dealt with each of them by reference to the evidence adduced, and the arguments addressed, to the P&E Court. The applicant's complaint is that had the planning considerations summarised been addressed "properly" the primary judge should have rejected the appeal against the applicant's refusal of the development application.

[34] The argument, however, remains circular. Before leave to appeal can be granted an error of law and not of fact must be identified. The error identified is not that the primary judge ignored the relevant law, the Planning Scheme, or misstated its provisions, but that he misapplied it. This is not enough to establish legal error.

[35] The reasons for judgment of the primary judge show his Honour did advert to all the provisions of the Planning Scheme which the applicant identifies as relevant. Even if it be established that the primary judge gave insufficient weight to the Planning Scheme's indications that buildings in the particular locality should not exceed three storeys, or overemphasised evidence supporting a departure from the height restrictions in the overlay map, the error will be one of fact and not of law.

[36] The Planning Scheme does allow flexibility in the application of its provisions. Part 7, Division 1, Chapter 2 of the Planning Scheme is entitled "Using Codes". Section 4 contains this paragraph:

> "It is desirable that impact assessable development comply with the Acceptable Solutions to ensure that each Performance Criterion is

> met. However, impact assessable development may comply with an alternative solution, provided that the alternative solution can be demonstrated to meet the relevant Performance Criterion…"

[37] Relevantly the height restriction set out in Overlay Map 6-3 could be overcome if the height of the proposed development was "in keeping with the predominant residential character of the surrounding area". The applicant conceded before the P&E Court that the surrounding area included land to the west of Main Beach Parade in which buildings up to 25 storeys are permitted or desirable development. The area to the west of Main Beach Parade is dominated by such highrise buildings. The concession allowed, and indeed obliged, the P&E Court to assess the height of the proposed development by reference to "the predominant residential character" of the area including the very many highrise buildings west of Main Beach Parade. A 10 storey building is not obviously out of keeping with such a context. Even if it were, a finding to the contrary would be one of fact.

[38] Another consequence of the concession may well be that the height restrictions imposed in Overlay Map 6-3 of the area east of Main Beach Parade will be of little practical value in maintaining the area as one of low rise development. In that regard the primary judge's remark that the instant decision will not be regarded as a precedent for other highrise apartment buildings in the vicinity may turn out to be unduly optimistic.

[39] The possibility of such consequences, significant though they may be for town planning in the area of the Gold Coast City Council, does not confer jurisdiction on this Court. Its role is limited to correcting identifiable, and identified, errors of law.

[40] I agree with the Chief Justice that the applicant has not demonstrated any such error in the primary judge's reasons for judgment. I agree with the orders proposed by his Honour.