

SUPREME COURT OF QUEENSLAND

CITATION: *ALDI Stores (A Limited Partnership) v Redland City Council*
[2009] QCA 346

PARTIES: **REDLAND CITY COUNCIL**
(respondent/applicant)
v
ALDI STORES (A LIMITED PARTNERSHIP)
(appellant/first respondent)
DEBRA NEARY AND NIGEL CUSHING
(first co-respondent/second respondent)
**CHIEF EXECUTIVE, DEPARTMENT OF MAIN
ROADS**
(second co-respondent/third respondent)

FILE NO/S: Appeal No 5863 of 2009
P & E Appeal No 1429 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for Leave Integrated Planning Act

ORIGINATING COURT: Planning and Environment Court at Brisbane

DELIVERED ON: 6 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 29 October 2009

JUDGES: Chief Justice and Holmes and Muir JJA
Separate reasons for judgement of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The application is refused.**
**2. The applicant is to pay the first respondent's costs, to
be assessed, as necessary, on the standard basis.**

CATCHWORDS: ENVIRONMENT AND PLANNING – COURTS AND
TRIBUNALS WITH ENVIRONMENT JURISDICTION –
QUEENSLAND – SUPREME COURT – ERROR OF LAW
– town planning scheme – identification of ‘District Centre’ –
factual issue informed by provisions of scheme – whether
Planning and Environment Court erred in law

H A Bachrach Pty Ltd v Caboolture Shire Council (1992) 80
LGERA 230; [1993] QPLR 33, cited
Handley v Brisbane City Council [2005] QPELR 80; [2004]
QPEC 39, considered
Harburg Investments Pty Ltd v Brisbane City Council [2001]
QPELR 119; [2000] QCA 398, cited
Harrow Trust v Adelaide Hebrew Congregation Inc (2002)
221 LSJS 449; [2002] SASC 308, cited

Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council [2009] QCA 237, cited
Stappen Pty Ltd v Brisbane City Council [2005] QPELR 466; [2005] QPEC 3, cited
Webster v Caboolture City Council [2009] QPELR 455; [2008] QPEC 82, considered
Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, cited
Yu Feng Pty Ltd v Maroochy Shire Council, [2000] 1 Qd R 306; [1996] QCA 226, cited

COUNSEL: G J Gibson QC, with S M Ure, for the applicant
 D R Gore QC, with B D Job, for the respondent

SOLICITORS: DLA Phillips Fox for the applicant
 Hopgood Ganim for the respondent

- [1] **CHIEF JUSTICE:** The first respondent (“Aldi”) successfully appealed to the Planning and Environment Court against the refusal of the present applicant (Redland City Council) of Aldi’s application for a development permit for a material change of use to establish a supermarket on land at Alexandra Hills. The land comprises seven unoccupied lots zoned urban residential, and critically, situated only a short distance from an established comprehensive retail centre. The applicant contends that the Judge comprising the Planning and Environment Court erred in law, and that this court should consequently grant leave to appeal, allow the appeal and set aside the primary judgment.
- [2] The jurisdiction of this court is relevantly confined to error of law. Aldi opposes a grant of leave, denying error of law and submitting that “the Council impermissibly seeks to re-agitate issues of fact and merit”.
- [3] The major challenge to the learned Judge’s reasoning relates to his conclusion that this development would not impair an objective of centrality discernible from the Redlands Planning Scheme. The supermarket will be located 250 metres west of the Alexandra Hills Shopping Centre, which is a large suburban retail outlet. The Council contended that the proposed establishment would impair the Scheme intent that this sort of development be confined to that existing more substantial establishment. On the other hand, Aldi contended that any existing central development, or central development envisaged by the Scheme, was sufficiently broad to embrace the instant site. The Judge accepted that contention.
- [4] Any difficulty for present purposes arises from the fact that the Scheme does not set clear limits on what it presents as any central development. The relevant provision of the Strategic Framework (s 3.2.3(3)(k)) says:

“The Redlands Planning Scheme actively protects the primacy of the Shire’s centres by discouraging out-of centre development and ensuring no existing centre expands to the next level in the centre’s matrix by virtue of size or function.”

As His Honour observed:

“The term ‘out-of-centre’, according to the definition section of the RPS, means ‘a location that is clearly separate from a centre but

within the defined urban area in the planning scheme. Whether the proposal constitutes ‘out-of-centre’ development hinges on the question whether the site is within, or outside, what the RPS shows as the ‘*Alexandra Hills District Centre*’.”

- [5] Determining whether the instant site forms part of or is “clearly separate” from the “Alexandra Hills District Centre” would ordinarily be regarded as a determination of fact.

- [6] The factual nature of the enquiry is also supported by the submissions made to His Honour, as recorded in his reasons:

“ALDI contends that the District Centre includes a wide range of non-residential uses including the Alexandra Hills Shopping Centre, the free-standing 24-hour service stations (adjoining the land to the east), and a nearby retirement village, child care centres, a community hall, a sporting club, a health centre, Keith Surridge Park and its playing fields, and the TAFE campus. The assertion is based in part upon a diagram in the RPS which shows the District Centre extending beyond Finucane Road to the north and Cambridge Drive to the west so as to include these facilities and, of course, the ALDI site.

Council argues that the District Centre consists entirely of, and is strictly limited to, the land occupied by the Alexandra Hills Shopping Centre, and does not extend to the ALDI site. This interpretation is, in part, reliant on the fact the Shopping Centre is shown to be within the *District Centre* zone in some scheme maps.”

- [7] Noting “the absence of a definition of ‘centre’ in the RPS”, the Judge went on to refer to a number of provisions in the Strategic Framework and relevant factual considerations, leading to this conclusion:

“I am satisfied that, properly construed, the ‘Alexandra Hills District Centre’ contemplated by the RPS is larger than the *District Centre* zone and the Alexandra Hills Shopping Centre which lies within it. It is unnecessary to define its exact boundaries, or to do more than observe that on this construction the subject site falls within what the planner called by ALDI referred to as the District Centre ‘node’.”

- [8] The applicant submitted that “references in the RPS to the “Alexandra Hills District Centre” are references to land at Alexandra Hills that is zoned “District Centre” not to other (land)”. But the Scheme does not equate the “Alexandra Hills District Centre” with the “District Centre Zone”.

- [9] The language of the Scheme suggests the words “centres” and “District Centres” carry their ordinary everyday meanings. Section 3.2.3(3), for example, relevantly provides:

“(3) Centres –

- (a) The Redlands Planning Scheme encourages the development of centres in accordance with a functional network, with individual centres of

varying level differentiated from one another on the basis of a centres matrix that distinguishes centre role and function, scale and use composition.

(b) The designated network of centres is illustrated on Diagram 2 – Centres.

(c) In a regional context, centres situated at Carindale, Mount Gravatt and Loganholme, impact significantly on Redland Shire centres by continuing to provide a high order of retail shopping, particularly department stores that will continue to establish a level of leakage of retail spending outside of the Shire.

(d) The South East Queensland Regional Plan recognises both Capalaba and Cleveland as Principal Activity Centres which service catchments of sub regional significance and accommodate key concentrations of employment.

...

(e) Capalaba Major Centre -

(i) Capalaba is the primary retail and commercial centre with a catchment greater than 50,000 that includes –

- a. discount department store/s;
- b. supermarkets;
- c. a full range of speciality stores;
- d. commercial premises;
- e. retail warehousing.

...

(f) Cleveland Major Centre -

(i) Cleveland is developed as one of two secondary retail and commercial major centres...”

[10] The applicant, referring for example to s 4.4.7(2)(a)(i)f and (b)(i)a, would put the subject site into a “district community node”, not the “district centre” which, it was contended, must fall within the District Centre Zone.

[11] That and the points made through paragraphs 13-19 of the applicant’s outline of argument ignore the reality that absent a precise Scheme delineation of the District Centre, it fell to His Honour to determine whether this site fell within its bounds, as best he could determine they were intended, allowing for various indications otherwise drawn from the provisions of the Scheme.

- [12] Allowing for the absence of that precise geographic Scheme delineation of the Alexandra Hills District Centre, it fell to His Honour to determine whether this site should be regarded as falling within the scope of that Centre, or was separate from it. His approach was informed by other provisions of the Scheme, but also factual considerations, such as ‘high accessibility’ (para 32 reasons for judgment); whether in fact the site falls within the “locale incorporated in the RPS in Diagram 2 of Division 2 of Part 3” (para 33), and inconsistency with the District Centre concept, should it be confined to the larger existing shopping centre, because of the circumstance that the only non-retail use in that centre is Australia Post.
- [13] Accordingly, that was not a purely factual exercise, because it involved some construction of the Scheme but neither solely nor extensively so. The exercise was of an evaluative character. I am not in that context satisfied that the applicant has raised any substantial ground for considering that His Honour’s conclusion was not a conclusion open to him. In other words, I am not satisfied that the Judge was by law constrained to come to a different conclusion. That being so, the applicant has not demonstrated any substantially arguable error of law in respect of the primary plank in the Judge’s approach. Compare *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QCA 398 and *Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council* [2009] QCA 237 paras 21, 31.
- [14] Determining the ordinary meaning of a word in everyday use (eg “centre”, “district centre”) is not a matter of law (*H A Bachrach Pty Ltd v Caboolture Shire Council* [1993] QPLR 33, 38; *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306, 335, 342-3; *Harrow Trust v Adelaide Hebrew Congregation Inc* [2002] SASC 308 paras 19,20). This Scheme does not identify the centre. The Judge referred to provisions of the Scheme, and it is true that any misconstruction of the Scheme would have involved error of law (*Weightman v Gold Coast City Council* (2002) 121 LGERA 161, 175). But reference to those provisions did not, and could not, of itself conclude the issue. Hence my conclusion that the process was in the end evaluative, and His Honour’s conclusion being reasonably open, it must be upheld (cf. *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 451; *Regional Land Development Corporation (No 1) Pty Ltd v Banana Shire Council* [2009] QCA 140 para 12 ff).
- [15] The Judge rejected the argument that the proposed development would compromise Desired Environmental Outcome 3 (“Community Health and Wellbeing” – s 3.1.4(1)(f)) – effectively determined in favour of Aldi because of the Judge’s conclusion about the siting of the development within the District Centre; Outcome 4 (“Access and Mobility” – s 3.1.5(1)) – a purely factual consideration about transport movement; and Outcome 6 (“Economic Development” – s 3.1.7(1)(a)b) – again raising the centrality issue. His Honour’s approach to those aspects therefore did not give rise to arguable error of law.
- [16] The applicant sought to draw a point of law from His Honour’s view that compromise would more readily arise were the proposed development to conflict with Outcomes “which operate for more specific purposes, or relate to smaller areas”: because these Outcomes (3, 4 and 6) were broad, city-wide objectives, compromise was less likely. The applicant contrasted *Handley v Brisbane City Council* [2005] QPELR 80, *Stappen Pty Ltd v Brisbane City Council* [2005] QPELR 466, and other cases, with *Webster v Caboolture City Council* [2008] QPEC 82.

[17] His Honour said this:

“[15] In a number of decisions this court has held that, for individual development proposals, compromise might not readily be found in the face of DEOs which operate on a shire-wide, or city-wide, basis. The very general wording of these DEOs means the statements of principle they contain may, sometimes quite easily, be trawled for words supportive of differing conclusions. Other decisions acknowledge, however, that compromise may more easily be identified in the face of DEOs which operate for more specific purposes, or relate to smaller areas.

[16] Here, the broad-scale nature of the DEOs logically attracts an approach of the kind suggested by Skoien SJDC in *Brown v Brisbane City Council* [2005] QPELR 629 in which his Honour said, at [9]:

‘...So for a development proposal to compromise the achievement of a DEO, it must be of such a nature that it will clearly threaten, imperil or endanger the planning outcome that is expressed... to be one for the ‘*planning scheme area*’ rather than for a specific site or locality... or, the planning scheme generally. Further, as a consideration of the existence of sufficient planning grounds is not afforded ... , it is obvious the provision contemplates a threat to the DEO which is so serious that no regard to ameliorating planning grounds can be had.’ (emphasis added)

[18] Notwithstanding what the Judge said in para 15 above, he did not determine the issue of ‘compromise’ by reference to those authorities, but by reference to his conclusion about the siting of the development within the District Centre (Outcomes 3 and 6) and transport movement (Outcome 4). He relied on *Brown*, apparently, to offer synonyms for the word ‘compromise’.

[19] I would however prefer the *Webster* approach. The construction of such schemes should not be governed by notions not expressed, or not necessarily implied, as favoured in *Handley*. But His Honour’s reference to the approach suggested in *Handley* appears not to have governed or influenced his assessment.

[20] As to conflict with the intent of the urban residential zone, His Honour concluded that the level of conflict was “relatively minor” and should not exclude the proposed development. The submission for the Council emphasized that the area of the proposed supermarket is “more than three times greater than the 400 square metres gross floor area threshold”, declared by the scheme to be an “inconsistent use” for a shop in the Urban Residential Zone. But examining paragraphs 32-37 of the applicant’s outline demonstrates the essentially factual nature of its challenge to His Honour’s factual/evaluative conclusion that:

“...the level of conflict with the Urban Residential Zone Code and the Strategic Framework is minor. The proposal resolves the planning problems created by the odd, ‘island’ aspect of the site;

meets (as shown below) an apparent need; sits comfortably within the 'node' envisaged by the RPS; and, complements the nearby District Centre. These are plainly matters fairly capable of being categorised as of 'public interest' and, hence, persuasive planning grounds which propel the application across the low level conflict it has with the planning scheme."

- [21] His Honour's further conclusions, in relation to the aspects of need, traffic and amenity, were quintessentially factual (and were not challenged before us).
- [22] Counsel for the applicant ultimately submitted that the Planning and Environment Court inadvertently substituted its own planning strategy for that evident in the Scheme. That submission fails because of the failure of the applicant's primary submission.
- [23] I would order that the application be refused, and that the applicant pay the first respondent's costs, to be assessed, as necessary, on the standard basis.
- [24] Indemnity costs were sought, but I consider standard costs appropriate. There is no sufficiently special aspect warranting an indemnity assessment.
- [25] **HOLMES JA:** I agree with the reasons of the Chief Justice and Muir JA and with the orders which the Chief Justice proposes.
- [26] **MUIR JA:** I agree with the reasons of the Chief Justice and with the orders he proposes. The applicant's success on the ground that the primary judge erred in concluding that the subject land was part of the area described in the Redlands Planning Scheme ("RPS") as the Alexandra Hills District Centre was substantially, if not entirely, dependent on showing that the Centre was co-extensive with the Alexandra Hills District Centre. In order to sustain this point, it was necessary to show that in the RPS, references to "District Centre" were interchangeable with "District Centre Zone".
- [27] The applicant's argument derives little, if any, support from the statement in s 4.4.7(2)(b)(i)(a) of the RPS under the sub-heading "Built Form and Density" that:
- "(1) The scale of uses and other development achieve a high standard of built form and urban design that –
- a. reinforce the 'sense of place' established **by the centre ...**" (emphasis added)
- [28] Sections 4.4.7(1) and (2) refer to overall outcomes for the District Centre Zone Code.
- [29] To my mind, if the applicant's construction was correct, one would have expected to see in s 4.4.7(2)(b)(i)(a) "by that zone" instead of "by the centre". It is unorthodox drafting to refer to a "centre" if what is meant is a "zone". If the applicant's construction is accepted, the RPS has adopted a somewhat eccentric drafting technique: the random use of two quite different expressions to describe the same concept. It is more likely that the intention, gleaned from the language of the RPS, is that the words "centres" and "District Centres" have their ordinary everyday meanings. The language of s 3.2.3(3) set out in the Chief Justice's reasons strongly supports that conclusion.

- [30] The references to "centres" in s 3.2.3(3)(a), (b), (c) and (d) appear to be descriptive of developments, brick and mortar and enterprises therein, not of zones within which developments of the nature described may take place.
- [31] Diagram 2 referred to in s 3.2.3(3)(b) supports that conclusion. It refers to "centres" and identifies them by location without reference to zones.
- [32] It is useful to set out other extracts from s 3.2.3, 3.2.4, 4.4.7 and 4.4.8 of the RPS:
"3.2.3(3)

...

- (j) All remaining centres in the Shire are local centres. Local centres are generally encourage to develop in locations zoned for such purposes.
- (k) The Redlands Planning Scheme actively protects the primacy of the Shire's centres by discouraging out-of centre development and ensuring no existing centre expands to the next level in the centre's matrix by virtue of size or function.

3.2.4 Local Level Strategies applying to certain parts of the Shire

- (1) Southern Moreton Bay Islands (SMBI)

...

- (b) Residential Development -
(i) The Redlands Planning Scheme provides for a separate Zone for residential development on the Islands.

...

- (c) Centres -
(i) The Redlands Planning Scheme provides for the development of Centres to accommodate a variety of commercial, retail, service trades, community facilities and tourism related activities.

...

- (iii) On the Islands, two levels of centres are envisaged, Island Centre and Local Centre. A separate Zone is provided in the Redlands Planning Scheme for Island Centres that will be the principal or highest order centre.

...

- (iv) An SMBI Centre Zone Code will guide development in these centres, which will provide for a range of complementary activities to service the Island Group as a whole.

....

- (vi) Provision is also made for Local Centres on Macleay, Russell and Lamb Islands. These centres are intended to provide convenience shopping and personnel service activities for surrounding residential areas. The Shire wide Local Centres Zone Code will guide development within these centres.

- (vii) The Redlands Planning Scheme actively protects the primacy of the Island Centres by discouraging out-of-centre non-residential development.
- (viii) The creation of additional lots in the zones is generally inconsistent with the Planning Scheme, except where the reconfiguration improves **the functional layout of the centre.**

...

4.4.7 Overall Outcomes for District Centre Zone Code

- (1) The overall outcomes are the purpose of the District Centre Zone Code.
- (2) The overall outcomes sought for the District Centre Zone Code are described by five key characteristics
 - (a) Uses and Other Development;
 - (b) Built Form and Density;
 - (c) Amenity;
 - (d) Environment;
 - (e) Infrastructure.

Each of these is detailed below.

...

4.4.8 Specific Outcomes and Probable Solutions applicable to Assessable Development

Assessable Development			
Specific Outcomes		Probable Solutions	
	<u>Uses and Other Development –</u>		
S1.1	...	P1.1
S1.2	(1) The zone provides for a range of centre uses that – (a) enhance and protect the role and function of the Shire’s network of centres	P1.2
	...		

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(emphasis added)

[33] Section 3.2.3(3)(j) suggests that a centre may not be entirely situated in a matching zone. So, too, does s 3.2.3(3)(k). The stated objective of the RPS is "discouraging out-of-centre development and ensuring no existing centre expands to the next level ...". It may be inferred that out-of-centre development which falls short of expanding a centre "to the next level" is not considered to be as detrimental to the Scheme's purposes as a development which does expand a centre "to the next level". And, as counsel for the respondent submits, "out-of-centre" is defined as "... a location that is *clearly separate* from a centre but within the defined urban area in the planning scheme." Inferentially, a development may be outside a centre but not be regarded as out-of-centre. It would seem unlikely that "out-of-centre" means merely "out of zone".

- [34] The quoted passages demonstrate that the word "centre" and words describing particular centres are used in ways which are inconsistent with the view that "centre" equates with "zone". The passages also contain provisions in which a clear distinction is made between a "zone" and a "centre".
- [35] No doubt the RPS contemplates that, generally, a centre of a particular description will be in a zone of a particular description. But, as the applicant's own outline acknowledges, s 2.1.23(2) of the IPA prevents planning schemes from prohibiting development on, or the use of, premises. There is thus an obvious possibility that a centre may expand beyond its designated zone.
- [36] The conclusion that the Alexandra Hills District Centre is not confined in area to the District Alexandra Hills Zone shown in the scheme map makes it difficult to sustain the contention that approval of the development application would necessarily compromise the achievement of the relevant Desired Environmental Outcomes.