

IN THE PLANNING AND ENVIRONMENT P&E No. 27 of 1993
COURT

HELD AT BRISBANE

QUEENSLAND

Before QUIRK DCJ

[COUNCIL OF THE SHIRE OF MAROOCHY v D'AMORE]

COUNCIL OF THE SHIRE OF MAROOCHY Application

AND

SUSAN ROSANDA D'AMORE Respondent

REASONS FOR JUDGMENT - QUIRK DCJ

Judgment delivered: 10.11.93

Catchwords:

Counsel: C. Hughes - Applicant
A. Vasta QC - Respondent
Solicitors: J.D. Hall Shire Solicitor - Applicant
Messrs Cranston McEachern & Co -
Respondent
Hearing 3, 4.11.93
Date(s):

IN THE PLANNING AND P & E Application No. 27
ENVIRONMENT COURT of 1993

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

COUNCIL OF THE SHIRE OF MAROOCHY Applicant
SUSAN ROSANDA D'AMORE Respondent

REASONS FOR JUDGMENT - QUIRK DCJ

Delivered the day of November 1993

In this matter the applicant Local Authority has sought a declaration that the use being made by the respondent, Mrs D'Amore, of her land on the Blackall Range Road;

"for the purpose of religious gatherings constitutes use of the subject land as a 'place of public worship' within the definition of that term where it appears in the Town Planning Scheme for the Shire of Maroochy"

and that such use is an unlawful use of the land.

A consequential restraining order was also sought against the respondent.

While most of those whose affidavits were put before the Court as evidence in the matter were cross-examined, in the end there did not appear to be any seriously disputed matters of fact in the case.

Mrs D'Amore acquired her land, which occupies a little over three hectares in June of 1991. Of herself she said in her affidavit;

"I have been a devout Catholic for the whole of my life and I am particularly devoted to Our Blessed Mother, the Mother of Christ".

The attributes which she saw this land as having and her decision to purchase it were explained in her evidence and her reasons were associated with her religious beliefs. I say at once that the substance of those beliefs, the conviction with which and the manner in which she has chosen to practice those beliefs are areas into which I do not propose to intrude. The task which the Court faces is to decide, on the evidence given, whether the use that has been made of the subject land is contrary to the provisions of the Town Planning Scheme.

The subject land is included in the Rural B Zone in the Scheme. In that zone the defined purpose "place of public worship" is a discretionary use. The applicant Local Authority's case is that what has been occurring on that land is within that definition and, as no

appropriate Town Planning consent has been obtained, such use is unlawful.

The respondent who resides at Richlands (where she and her husband conduct a poultry farm) told me that she intends to construct a residence on the subject land and although the necessary building application has been submitted, no construction work has yet commenced. From time to time she retires to the property to meditate and pray and has occasionally, stayed overnight in makeshift accommodation. She has also invited her friends and those with religious inclinations similar to hers to accompany her. The evidence indicates that, over a period of more than a year, from time to time groups of people in varying numbers have visited the site and, in one way or another, join in activities in furtherance of their Marian devotion (I use the term "Marian" only in its ordinarily understood sense i.e. 'of or pertaining to the Virgin Mary' (Macquarie Dictionary, page 1070)).

The larger of these gatherings (which occur monthly on average), have attracted as many as 150 persons but the evidence suggests that these numbers have settled to of in the order of about 100 persons. The origin of these gatherings was explained by the respondent. They are timed to coincide with days of religious significance which she chooses. Those interested are either contacted by or contact her. Transport pick up points were arranged and the group set out on what they regard as a form of pilgrimage to the site. On the site they pray and sometimes a Mass (according to the Catholic rite) is celebrated by a retired priest. On other occasions, individuals or smaller numbers of person resort to the site for their own purposes. Mrs D'Amore's evidence was that all who attend upon the subject land do so at her invitation or at the invitation of other persons to whom she has given authority to extend such an invitation.

Evidence was given of these occurrence and their manifestations by a Planning Officer and by the Shire Solicitor. Evidence from two neighbours, a Mr Newton and Mr Wheeler was also put before the Court. This evidence was given sensibly and with restraint but it is clear

that, quite understandably, adjoining owners do not welcome the intrusion upon their privacy and the detriment to their amenity which are consequences of the arrival upon the land of a considerable number of persons and the vehicles which bring them there.

However, it must be emphasised that the extent to which the amenity of adjoining residents is impaired is not relevant to the determination of the application before the Court except in so far as it might relate to whether or not (once a legal basis for the relief sought has been demonstrated) the discretion to grant that relief should be exercised. The matter which is fundamental to the determination of the application is whether the respondent's use of her land is in breach of the Town Planning Scheme and, as the applicant's case has been presented, it comes down to whether or not the land is being used as a "place of public worship". The definition of "place of public worship" is;

"Any premises used or intended for use primarily for the public religious activities of a religious organisation, community or association. The term does not include an education establishment or an institution as herein defined".

The word "public" which appears both in the term and its definition is obviously of importance. I was referred to a number of dictionary entries regarding "public". The sense in which that word is used here is obviously the converse to "private". In that context most dictionaries put it that the word means eg.;

"That which is open to may be used by or may or must be shared by all members of the community". (Shorter Oxford English Dictionary).

"Open or accessible to all" (Collins Dictionary).

"Open to all the people" (Macquarie Dictionary).

Counsel for the applicant submitted that it would be very difficult to regard these activities sensibly as not being public and pointed to a number of their features which he said were relevant in that regard. He argued that;

1. The scale of what occurred on site indicated that it had gone beyond the bounds of private activity;
2. The publicity that had attended the activities on the land were not suggestive of private activity;
3. The lack of evidence of any person's having been excluded from the site was indicative of public rather than private activity.

I cannot accept that whether an activity is public or private is a function of the number of those who attend to participate in or to observe it. As Counsel for the respondent pointed out, proceedings in open court are undeniably public but rarely "draw a crowd". On the other hand an expansive and generous host could, at a social gathering to which his invitation is given, be responsible for a very large gathering that could, in no sense, be properly regarded as public.

Publicity directed at attracting involvement in particular activity may well point to its being of a public rather than a private nature. The evidence must however be looked at carefully. There is no suggestion whatever in this case that the reports of activity on the land which have occurred on television or in the press were initiated by Mrs D'Amore. The fact that she has been responsive when approached for interviews and ready to put forward her point of view does not alter that. There is no evidence that forthcoming activities of a religious nature on site have ever been advertised in any way that could be fairly said to have been aimed at the community generally.

As to the lack of evidence of exclusion, on what I have heard and seen in the case, I would accept that Mrs D'Amore, by reason of her nature would tend against being exclusive towards any person who evidenced genuine interest in the matters with which she and her friends have concerned themselves on the land. It is however, another thing entirely to say that the activities on site are "open to all members of the community".

On that question one must inevitably return to an examination of the basis upon which persons are admitted to this land which is in private ownership. As already noted, the evidence of Mrs D'Amore is that all who attend on the land do so at her express invitation which is given either directly or by others with her authority. On that point, there is no compelling evidence to the contrary and I am not prepared to disbelieve her. Accordingly, I see no basis for any finding that, while activities on the subject land are clearly of a religious kind, they are "public religious activity" within the meaning of the definition found in the Town Planning Scheme.

I might add that I doubt whether the activity that has taken place is that "of a religious organisation, community or association" within the meaning of the definition. It is true that the majority of those who attend appear to be of the Catholic faith but there is no evidence that the Catholic Church is (in any organisational sense) formally or in any meaningful way, involved. There is no evidence that those who attend have made any tangible effort to be "associated" in any way other than in that they share an interest in the Marian ideal has apparently brought them to the site. In my view the concept of a "religious organisation, community or association" would probably require something more than that.

I do not feel it necessary to go into the matter of the "standard of proof" that is required for any finding that would justify the granting of relief of the kind here sought. As mentioned, matters of fact were not seriously in dispute and I am not persuaded, even on the balance of probabilities, that the activities on the subject land fall within the definition "place of public worship".

I appreciate that the result will not be satisfying to neighbours who have been concerned, perhaps with some justification, at the level of activity that has, at times, taken place in this otherwise rural setting. I repeat however that the matter has been brought before

the Court on the limited basis of a specific allegation of a breach of the Town Planning Scheme. Questions of impact on amenity or whether Mrs D'Amore is, in any general sense, "doing the right thing by her neighbours" simply do not arise.

For these reasons the application is REFUSED.