

TRANSCRIPT OF PROCEEDINGS

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PLANNING AND ENVIRONMENT COURT P & E No 38 Of 1993

JUDGE ROW

PROMINENT INTERNATIONAL HOLDINGS PTY LTD Appellant

and

COUNCIL OF THE SHIRE OF MULGRAVE Respondent

CAIRNS

..DATE 29/11/93

..DAY 1

JUDGMENT

HIS HONOUR: On all of the evidence the appellant has established that the re-zoning application should be approved and that the proposed development of four storeys is acceptable. The appeal is allowed. I publish my reasons.

I adjourn the further hearing to 10 a.m. Monday 10 January 1994, for conditions.

I direct that Exhibit 1, Exhibit 3, Exhibit 4 and Exhibit 5 be returned to the solicitors for the appellant and number 6 be returned to the solicitors for the respondent, upon the usual undertakings.

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IN THE PLANNING AND ENVIRONMENT P & E Appeal No. 38 of  
COURT 1993

HELD AT CAIRNS

QUEENSLAND

Before Row DCJ

[Prominent International Holdings P/L v. Mulgrave Shire Council]

BETWEEN:

PROMINENT INTERNATIONAL HOLDINGS PTY. LTD.

- and -

COUNCIL OF THE SHIRE OF MULGRAVE

REASONS FOR JUDGMENT

Judgment delivered: 29/11/1993

Catchwords:

Counsel: Mr. D. Gore Q.C. with Mr. T. Trotter for  
the Appellant

Mr. J.J. Haydon for the Respondent

Solicitors: Peterson McCullough Robertson for the  
Appellant

MacDonnells for the Respondent

Hearing 23, 24 November 1993

Date(s):

IN THE PLANNING & ENVIRONMENT P & E Appeal No.38 of  
COURT 1993

HELD AT CAIRNS

BETWEEN:

PROMINENT INTERNATIONAL HOLDINGS PTY. LTD. Appellant

AND:

THE COUNCIL OF THE SHIRE OF MULGRAVE Respondent

23rd, 24th NOVEMBER, 1993

REASONS FOR JUDGMENT - ROW D.C.J.

29TH NOVEMBER 1993

Prominent International Holdings Pty. Ltd., ("the appellant") appeals herein consequent upon a decision of the respondent made on the 19th July 1993 whereby the respondent approved, subject to conditions, an application made for and on behalf of the appellant for the rezoning of land situated at 129-135 Oleander Street, Holloways Beach and described as Lot 1 on R.P. 726593, Lot 16 on R.P. 735037 and Lot 17 on R.P. 735039 by excluding the subject land from the Tourist Facilities and Residential B zone and including the land so excluded in a nominated Special Facilities Zone which would permit the development of 48 x 2 bedroom Multiple Dwellings Class B units. The rezoning application was received by the respondent on 11th May 1993. Consequent upon rezoning of the subject land the appellant proposes to develop it for a multiple dwelling residential development consisting of three separate buildings of identical configuration and unit numbers with each being of 4 storeys and 16 units being 4 per floor. The three buildings are proposed to be centrally located within the site with large setbacks from both the northern and southern alignments.

The respondent purported to approve the application but in so doing approved the application for the rezoning of the subject land to Special Facilities (Multiple Dwellings Class B, maximum three storeys in height generally in accordance with plans of development No. 847-012847-010) zone.

The Notice of Appeal sought variations to and deletion of a number of conditions. As a result of discussions between the parties the issues on the hearing of the appeal were substantially reduced to condition 1, 12, 14, 25 (b) in addition to the proper description of the zone. It was submitted on behalf of the appellant that the Special Facilities zone should be described as:-

"Special Facilities (48 x 2 bedroom Multiple Dwellings Class B generally in accordance with plans of development 84701 to 847010) zone."

The effect of such zonal description was to delete the limitation within the zonal description as approved

by the respondent whereby the development zone was limited to three storeys. The Plans of Development would govern the height, namely four storeys.

The subject land is one which has some degree of prominence being located opposite the beach at Holloways Beach and having frontages to Oleander Street, Guava Street, Matthew Street and Mark Close. It has a total area of 7,465 square metres of which 6,459 square metres is within the existing Tourist Facilities zone. The subject land is presently developed with an 18 unit motel (with a restaurant) but is otherwise vacant. The motel and restaurant are currently not operating.

The substantive issue before the court was whether the proposed development should be of 3 or 4 storeys in height. The current zoning in the vicinity of the site is a mixture of Residential B and Residential C. Generally the Residential B zone is located to the North of the subject land whereas the Residential C is located to the South. The Residential B zone is predominantly characterised by detached dwellings with duplex dwellings being permitted one in seven allotments with consent. The Residential C zone allows Multiple Dwellings Class A and B (duplexes and units) by right. The area zoned Residential C is of a mix between units and detached dwellings.

The surrounding land use is characterised by a mix of detached, semi-detached and attached housing being a mix of single and two-storey buildings. A three storey building is located in Bougainvillea Street within that area zoned Residential C to the South of the subject land. The subject land has a number of tall coconut palms existing thereon which it is proposed will be relocated for the purposes of the proposed development and will be utilised in the proposed landscaping of the development. Access to the proposed development is proposed off Guava Street only.

The area in the vicinity of the subject land is considered to be the general focus of activity of the Holloways Beach area in view of its proximity to the beach and public swimming areas, its relationship to a

restaurant opposite the subject land and to shops located to the South. Holloways Beach is predominantly a permanent residential area containing no significant tourist resorts. It is proposed that the development be for permanent residential occupation which is generally consistent with the existing character of residential development at Holloways Beach.

The existing planning scheme contains no intent of zones. Permitted or as of right development under the Table of Zones within the Tourist Facilities zone includes accommodation units which, by definition, includes motels. The proposed use of the subject land for multiple dwellings Class B is permissible with consent of the respondent. In the Residential B zone Multiple Dwellings Class A and Class B are prohibited.

The existing planning scheme contains no strategic plan. There is not in existence any development control plan which affects the subject land.

The respondent has prepared a major review of its Town Planning Scheme. The proposal was initially advertised for public comment at the end of 1990. The proposed scheme introduces a strategic plan and a number of development control plans. The proposed planning scheme as amended in about March 1993 was forwarded to the Minister for gazettal. The gazettal, it was stated, is imminent. The subject land is included partly within the Tourist Facilities zone and that part which was previously zoned Residential B is proposed to be included in the Medium Density Residential zone. The Tourist Facilities zone is intended to accommodate tourist attractions. It is intended that the Tourist Facilities zone will be located away from residential neighbourhoods. Multiple dwelling is permissible development within the zone. The Medium Density Residential zone is intended to provide areas for development both in the form of attached housing and multi storey self contained unit buildings. Because medium density housing can be used for both tourist and permanent accommodation, different standards are perceived as applicable to different areas and different

types of accommodation. Multiple dwelling is permitted development subject to conditions in the zone.

Under the proposed strategic plan the subject land is included within a preferred dominant future land use classification as "Urban (Mixed)". Those areas shown with a preferred dominant land use of Urban (Mixed) indicate areas presently dominated by existing urban uses as well as a number of large tourist developments. This designation recognises the inherent physical attraction and desirability for tourist orientated uses within these areas and therefore provides for the continued expansion of the tourism sector in association with the expansion of permanent residential uses and other urban uses. Development Control Plan 4.2-Tourism Development-Division 4 is to be used for detailed guidance in consideration of any application for development within this preferred dominant land use designation. In general the provisions that relate to the Urban designation also apply to the Urban (Mixed) dominant land use.

The Urban (Mixed) designation is the principal designation which applies to the Northern Beaches area of Mulgrave Shire. It places significant weight on the provisions of Development Control Plan 4.2-Tourism Development-Division 4 for the guidance of any application in relation to land within the designation.

The subject land is within the area subject to D.C.P. 4.2. The intent of D.C.P. 4.2 is to ensure the continued attraction of the division 4 area for the permanent and tourist population. D.C.P. 4.2 principally guides the preferred location of tourist development as opposed to development for permanent residential uses. Within the D.C.P. the subject land is designated as a "discreet residential" area. Land so designated has been identified as an existing or future residential area in which the development of tourist facilities would be inappropriate. Such land is used or will be used for permanent residential purposes and may include areas of medium density accommodation used for permanent occupation where they are appropriately located in accordance with good town planning principles and need.

The Tourist Facilities zone under the proposed planning scheme indicates an as of right density of 18 rooms. The proposal is less than the indicated as of right density as set out on the proposed zoning map. The proposed zoning of the substantial part of the subject land as Tourist Facilities is inconsistent with the Discreet Residential Area designation as set out in D.C.P. 4.2. In addition D.C.P. 4.2 envisages densities of 200 persons per hectare whereas the draft planning scheme for tourist uses envisages a density of 120 persons per hectare. The proposal has a density below that envisaged within the D.C.P. but above that envisaged within the draft scheme for tourist uses.

The proposed planning scheme proposes the introduction of obligatory maps addressing, in part, height of building issues. Under s.5.1.5 provision is made for the declaration of Medium Rise Development areas. Under s.5.1.5.1 sub-clause (b) buildings in a Medium Rise Development area may exceed two storeys in height but not exceed 11 metres in height measured to the underside of the ceiling of the uppermost level from a point on the natural surface of the land vertically below. The draft planning scheme indicates Medium Rise Development areas are proposed in all beach suburbs. The obligatory map as it applies to the Holloways Beach area establishes that the subject land is not part of a Medium Rise Development area. The area so indicated and designated includes existing buildings of no more than two storeys in height and is an area substantially developed with multiple units. The intention of the designation of Medium Rise Development areas indicates that four storey developments are contemplated in that area so shown at Holloways Beach.

The proposed new Town Planning Scheme has been forwarded to the Minister for gazettal and is anticipated it will be gazetted in the near future.

When considering the appeal the court is obliged to consider the rezoning application having regard to the provisions of the existing planning scheme and give such weight as it thinks fit to the provisions of the proposed

planning scheme. Having regard to the fact that the proposed planning scheme has proceeded significantly along its legislative path, in general, considerable weight should be given to those provisions.

Part VII of the existing scheme sets out performance criteria in relation to buildings. Under s.25 (d) the respondent may modify the requirements of this part where it is of opinion that such modification is required because of (i) the unusual topography of the site (ii) difficulties associated with foundation and conditions on part of the site, (iii) other special or unusual circumstances related to the physical aspects of the site which impose unusual constraint on the development or construction of buildings on the land provided that in all cases the respondent is of the opinion that such modification would not adversely affect the amenity of the locality... Height of buildings is prescribed under s.28 which provides that no building shall be erected other than in accordance with the following provisions. Under subclause (a) thereof the height of the building measured at any point within the proposed plan area of the building from the existing natural ground level before building work commenced to the highest point of the underside of the ceiling of any habitable room in the uppermost storey of the building shall be a maximum of 11 metres.

The drawings that accompanied the application showed that that measurement was of 11.60 metres. The proposed buildings are Class II. In those circumstances a modification may be sought under s.25 (d) of Part VII. Prior to lodging the application with the respondent inquiries were made to the Deputy Manager - Engineering Services in relation to building height requirements having regard to the policy provisions of the respondent for flood immunity/greenhouse affects. Advice was received from the Deputy Manager that for flood immunity it would be necessary to raise the height of floor level to R.L. 4.00. The plans were prepared on this basis. Those plans adopting a measurement of R.L. 4.00 indicate a level of R.L. 15 to the underside of the ceiling of the uppermost floor. Accordingly the proposed building would

have a height of 11 metres as referred to in s.28(a) of the Planning Scheme. As all land in the vicinity is required to be constructed so as to provide for the flood immunity/greenhouse affects I am satisfied that this is such a special and usual circumstances whereby modification could and ought to be granted in relation to the requirement under s.28(a). In those circumstances the building subject to the modification does not infringe the height of buildings as prescribed under the existing planning scheme.

When considering the modification the respondent and on appeal the court is obliged to have regard to whether such modification will adversely affect the amenity of the locality or is otherwise within the provisions of s.25(d)(iii) in relation to the requirements for buildings. The proposed buildings are to be located on the subject land so that there are significant set backs from the various streets. Substantial landscaping is proposed which would exceed the building height of each of the proposed three buildings. In addition to the proposed landscaping on the common boundary with abutting land to the West and North West, which remain zoned Residential B and Residential C, a solid wall with significant landscaping is proposed. Such structure and landscaping would further minimise any adverse affects that the proposed development may have on such residential allotments. The buildings themselves will be situated a significant distance from any adjoining residential development. Whilst visitor car parking is proposed within a distance of 1.5 metres from the boundaries affecting those properties to the West such set back complies with the relevant policy of the respondent. As such car parking areas are restricted to visitor car parking it is unlikely that there will be any significant adverse affects on amenity caused by the utilisation of those areas for visitor car parking. On all of the evidence I am satisfied that the amenity of the area in the vicinity will not be adversely affected to such an extent as would warrant refusal of the modification of the building height. Because of the separation distance between the proposed buildings and the residential development to the West I am satisfied

that the modification will not cause nuisance or annoyance to or restrict the unsuitability or enjoyment of adjoining land for residential purposes.

Adopting the ground level as indicated by Deputy Manager - Engineering Services, the height of the building does not exceed 11 metres to the underside of the ceiling of any habitable room in the uppermost storey of the building.

S.7.7 of the proposed Planning Scheme details performance criteria including height of building provisions. The section as contained in the advertised draft planning scheme indicated maximum height of buildings as set out in Table 7.7.3. It had no cross reference to the Medium Rise Development areas but indicated that for all multiple dwellings and accommodation buildings (Class II) the maximum overall height eleven (14) metres and the maximum height to the underside of the uppermost ceiling was 11 metres. That provision in relation to the 11 metres was consistent with the existing Town Planning Scheme provision. After consideration of objections the proposed planning scheme as originally forwarded to the Department was in that form and did not contain any amendment thereto in relation to the height of building provisions. On the 1st November 1993 the respondent resolved that the Chairman be delegated authority to decide on minor or routine amendments to the Town Planning Scheme that might flow out of the review process with the changes decided by the Chairman to be reported to the Council at the earliest practical meeting. Subsequent to the response by the Department to the proposed scheme the Chairman, purporting to act within the terms of the resolution, further amended the draft by including a new provision limiting multiple dwellings and accommodation buildings and motels, not included in the Medium Rise Development areas, to 8 metres overall height and a 6 metre maximum height to the underside of the uppermost ceiling. The amendments were completed on 12th November 1993 (Exhibit 8) and the anomaly in column 2 in respect of the Medium Rise Development Area was corrected to eleven (11) metres. The change is of major significance having regard

to the height of buildings provision as exhibited and as originally forwarded to the Department for gazettal of the proposed planning scheme. The amendment is not of a minor or routine nature and is consequently not within the provision of the resolution of the respondent of the 1st November 1993 which authorised and gave delegated authority to the Chairman to decide on minor or routine amendments. In those circumstances little weight should be given to the amendment relative to the building height for all multiple dwellings not included in the Medium Rise Development Areas.

On considering the subject application it is significant that the respondent has approved a 3 storey development and the manner in which it conducted the appeal. Such approval is not consistent with the amendment to the height of buildings provisions which were passed on or about 12th November 1993 and is indicative that as the case was conducted by the respondent on the basis that a 3 storey development was reasonable that the respondent itself has acted inconsistently with the provisions of the amended height of building provisions. The approach by the respondent in the presentation of the appeal confirms that little weight should be given to the November 1993 amendment of the height of buildings provisions.

The proposed development complies with the performance standards under the existing planning scheme. It has a site coverage of approximately 22 %, a population density of less than 200 persons per hectare and a plot ratio within the permissible limit. The building has substantial set backs from both the Northern and Southern alignments. On site parking meets the requirements of the planning scheme. With a low site coverage significant areas are proposed to be landscaped which will assist in minimising any adverse effect on amenity that may be occasioned by the proposed development. Under the proposed planning scheme the proposed rezoning and subsequent development is consistent with the intent of the Urban (Mixed) designation within the strategic plan. The proposed development is further consistent with the designation of

Discreet Residential area as identified in the proposed development control plan. The proposed use is for permanent residential purposes. The proposal provides for extensive landscaping which will ensure that the built form is subservient to the general landscape. Having regard to the height of the existing coconut palms and other trees which are proposed to be retained or relocated on the subject land I am satisfied that the proposed development will be substantially masked from view from the beach front by that vegetation. The existence of the pitched roof on building B which will protrude above the flat roofs of building A and building C will create a break in the building lines and will add to the variety in the viewscape that the development will present. The extended height of the roof height of building B, I am satisfied, will not prejudicially affect the amenity of the locality to such an extent as would warrant refusal of the application. Whilst part of the pitched roof may be above the existing height of vegetation on the site or that which is proposed to be relocated to appropriate positions only a proportion of the building roof may be visible from the beach front and immediate surrounding locality. The division of the development into 3 separate buildings will assist in breaking up what may otherwise have been a continuous line of the building and will enhance the visual amenity whereby breaks between the buildings with significant landscaping will minimise any adverse aspect that may have arisen had there been one continuous building. The extent and nature of the landscaping proposed, I am satisfied, will ensure that the built form is subservient to the general landscape. Provision of a solid wall to the West of the site with landscaping along the perimeter of the site will add to the buffering or screening effect of the development for those areas to the West.

S.4.2.3 of the Development Control Plan sets out particular development requirements which apply. Whilst there is reference in the D.C.P. to a "designated landscape theme area" no such areas are designated on the D.C.P. maps. The maps accompanying the D.C.P. identify landscape theme routes. The subject land has frontage to Oleander Street which is designated as a landscape theme

route wherein the respondent may require a greater width of landscaping than the 3 metres as stated. The extensive set back generally in the north eastern sector of the subject land is clearly consistent with this intent. The height of the proposed buildings is such that it will not extend above the surrounding tree canopy or be clearly visible when viewed from any part of Holloways Beach. Between the beach and the subject land significant mature tree cover presently exists. The proposed development does not exceed the site coverage permitted under s.4.2.3.4(a) nor does the carpark exceed the limitations provided under s.4.2.3.4(b). Further the proposal meets the various built form criteria which are prescribed under s.4.2.3.7. Plot ratio is of the order of 0.9 and the density does not exceed 200 persons per hectare.

Consequent upon giving public notice of the application forty four individual objections and a petition, which does not provide any grounds of objection, comprising 103 signatures were lodged with the respondent. Of all of the objections the height of the proposal was the most common ground for objection. Other matters raised in the objections included - the proposed 4 storeys and roof is out of character with the area; it is against the expectations of local residences; loss of privacy and the proposal would dominate the area.

On the hearing of appeal oral evidence was given by two objectors, each being a resident of Guava Street in close proximity to the proposed development. Mr. Knowles, who resides immediately adjacent to that part of the subject land which has frontage to Guava Street, gave evidence adopting the matters referred to in his objection and expanding upon aspects thereof. The main concern related to the height of the proposed development and its non-acceptance with what he described as the style of locality referring to the residential nature of Holloways Beach dominated by buildings of a low height. In his view the development was out of keeping with its surroundings and would look out of place. Mr. Page, who lives on the other side of Guava Street a short distance from the site, was similarly concerned with the height of the building and its being out of character with the

existing development in the locality. Whilst I have no doubt that each witness honestly and sincerely held the beliefs and concerns that each expressed the concerns have to be assessed having regard to the reasonable expectation of residents in the locality bearing in mind the existing planning scheme and the proposed planning scheme of the respondent. Subject to a modification of height restriction which may be given by the respondent the development as of right of a 4 storey motel building on land currently zoned Tourist Facilities is a relevant consideration. The fact that the opportunity has existed over a number of years but has not been taken up is a fact to be considered as relevant to those reasonable expectations. Under the provisions of the proposed planning scheme the potential further exists for the provision for 4 storey structures in that part of Holloways Beach which is designated as being within a Medium Rise Development area. In addition if the November 1993 amendments are to be given little or no weight that potential exists for areas within the Discreet Residential area of Holloways Beach. In those circumstances the reasonable expectation of residents in the area of the existing and proposed planning scheme ought to envisage the potential for the subject land to be developed for a multiple dwelling or motel of 4 storeys in height.

The existing amenity of the area is determined significantly by the existing built form and development that has occurred. Such development is primarily of a mixed nature being of detached or attached housing and varying from 1 to 2 storeys in height with only 1 three storey building existing in Bougainvillea Street. The proposed development will be residential in character and nature and will be occupied by permanent residents as distinct from tourists. Holloways Beach area is predominantly developed for permanent residents and does not cater for the accommodation of tourists. The existing amenity is one of a residential nature but is of mixed quality. The existing amenity having regard to the proposed development being for permanent residents, I am satisfied, would not be so significantly affected as would warrant refusal of the application. The likely

future amenity of the area will undoubtedly continue to be residential being constituted basically by development which is occupied by permanent residents. The provisions of the proposed planning scheme will allow for further multiple dwelling development up to 4 storeys in height and will probably result in a further mix being weighted in favour of multiple dwelling development in the locality, particularly in that area which is within the Medium Rise Development area. As the proposed development will be residential in character and will not exceed 4 storeys in height I am satisfied that the proposed development will not, to any significant extent, interfere with the likely future amenity of the area.

Evidence relative to the visual amenity of the locality establishes that existing development is of such a nature comprising basically 1 and 2 storey developments that any building of 4 storeys normally might be visually obtrusive. Holloways Beach is generally a relatively flat area whereby variations in building height could undoubtedly be obtrusive unless steps are taken to minimise the obtrusiveness of the development. The proposed development shows that extensive areas are to be landscaped with existing vegetation which rises to a height well in excess of the building height of the flat storey buildings, namely building A and building C, whereby such buildings would be significantly masked from view. The view that one may obtain in relation to building B will be a part of a pitched roof above a tree canopy. The proposed landscaping, I am satisfied, will significantly mask all buildings and will not, to any significant extent, adversely affect the visual amenity of the locality. Similarly the proposed landscaping will minimise the effect of the bulk and scale of the proposed development. Such bulk and scale will be effectively constrained by the landscaping around the perimeter of the site and the extensive landscaping within the curtilage of the site. The provisions of the development control plan to a significant extent nominate qualitative and quantitative criteria against which development proposals ought to be judged. In general, the proposal meets such criteria which is indicative that its effect

on amenity and visual amenity will not be of an adverse nature.

As the respondent has approved 3 storey development and as the case on behalf of the respondent was conducted on the basis that 3 storey development was appropriate, the significant issue raised before the court was whether the provision of a 4 storey development was an inappropriate form of development. Considerable weight should be given to the actions of the respondent on the hearing of the appeal when on its case the maximum number of storeys permitted in accordance with the November 1993 amendments was 2. The conduct of the respondent on the appeal is indicative that in those circumstances little weight should be given to the November 1993 amendment which had the effect of reducing the height of a multiple dwelling in areas outside the Medium Rise Developments areas to 2 storeys. In the proposed planning scheme the planning documents promote a substantial change to the existing character of Holloways Beach particularly in that area which is within Medium Rise Development designated area where 4 storey multiple dwelling developments will be permitted. In considering the height of buildings provisions the fact that to meet flood immunity/greenhouse affects, fill levels will be required to R.L. 4.0 A.H.D. is indicative that for the purposes of determining height the fill level is a most significant factor. (Exhibit 5 page 188.).

Policy 4.01 of the respondent relates to Class II buildings. In common areas landscaping requirements are prescribed whereby a 1.5 metre strip along all other boundaries, other than the frontage of the site except where the driveway is along the boundary is set. Having regard to the intent of the policy the proposed setbacks for landscaping along Guava Street are adequate. Part of that area serves as an access road to building C. The provision of a screen fence along the property boundaries traversed by the access road to building A and the visitor car parking area will provide shielding to adjoining sites. The width of landscaping proposed will provide an adequate area for landscaping to provide additional shielding. In all the circumstances I am

satisfied that the various setbacks as proposed are adequate for landscaping and other purposes.

The proposal, I am satisfied, complies with the proposed planning scheme, as exhibited and as originally forwarded to the Department. As no weight should be given to the amendment of the 12th November, 1993 and significant weight to the proposed planning scheme, because of its progress, approval should be granted.

On all of the evidence the appellant has established that the rezoning application should be approved and that the proposed development of 4 storeys is acceptable.

The appeal is allowed.

I adjourn the further hearing to 10.00 a.m. Monday, 10th January 1994 for conditions.