

IN THE PLANNING AND ENVIRONMENT  
COURT

Appeal No. 100 of  
1994

HELD AT BRISBANE

QUEENSLAND

Before Quirk DCJ

[Burmah Fuels (Qld) P/L v. Redland S.C.]

BETWEEN:

BURMAH FUELS (QUEENSLAND) PTY. LTD.

- and -

REDLAND SHIRE COUNCIL

REASONS FOR JUDGMENT

Judgment delivered: 30/09/1994

Catchwords:

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Appellant

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Hearing 1, 2, 3 August 1994

Date(s):

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BETWEEN:

BURMAH FUELS (QUEENSLAND) PTY. LTD.

Appellant

AND:

REDLAND SHIRE COUNCIL

Respondent

REASONS FOR JUDGMENT - QUIRK D.C.J.

Delivered the day of September, 1994

This appeal is against the respondent's deemed refusal of an application to rezone land at Birkdale from the Rural Non-Urban Zone to the Special Facilities Zone (Service Station, Shop and Car Wash) Zone. The land occupies an area of nearly 5,000 square metres on the corner of Old Cleveland Road East and Bailey Road. It forms part of a larger subdivided allotment.

The proposed rezoning is to enable the development of the land as a service station, shop and car wash which is intended to operate under an "A.M. - P.M." franchise. A description of what is intended was given in evidence by the appellant's state manager, Gregory Tasker and Brian Haratsis (an appropriately qualified consultant who has made an "economic assessment" of the need for a facility of this kind at this location). This evidence explained that the proposal is a relatively new approach to the retailing of convenience goods in conjunction with fuel sales. In the "merchandise mix" of the store emphasis would be placed on ready to eat fresh foods and bakery items, although there would be some non-food convenience items and motor products. Public toilets, telephone and electronic banking (EFTPOS) would also be available. An important feature of the proposal is that it would offer its services on a 24 hour/7 day per week basis and would provide a convenient opportunity to the motoring public to resort to its attractions in a pleasant and secure environment.

I was told that this type of retailing facility (termed "convenience retailing" is distinguishable from the form of service station/shop to which people in this State have traditionally been accustomed. It is only beginning to make its appearance in Queensland, but has proved particularly successful overseas and in southern States where some examples have been introduced. Its popularity has been attributed to changes in social behaviour and spending patterns which were described in detail in the evidence. Mr. Haratsis gave a careful and detailed account of his assessment, his identification of

relevant trade catchments and his conclusions that the proposal would trade successfully and meet a community need which is not presently being satisfied.

The subject land is presently undeveloped. Residential development is found to the south on the opposite side of Bailey Road. All adjoining parcels are included in the Rural Non-Urban Zone. To the north there is an allotment occupying a little over 2 hectares on which stands a roadside stall, a nursery and a ceramic studio. On the western side of Old Cleveland Road there is a large area of land zoned Public Purposes which is virtually undeveloped and which, as I understand it, is the site of a Commonwealth Government radio monitoring station.

The subject land slopes very gently away from Old Cleveland Road. A portion of the parent parcel to the east of the subject land is low-lying and forms part of the local drainage system. This does not however appear to pose any problems for the proposal.

The intended development has been carefully planned. The majority of the activity associated with the service station and shop has been focussed away from residential development on the southern side of Bailey Road. A detailed landscaping plan has been prepared and was put before the court.

On behalf of the appellant, Mr. Eppell, an experienced traffic engineering consultant, has made a study of existing traffic conditions in Old Cleveland Road East and in Bailey Road and has concluded that the proposal would be unlikely to give rise to any traffic difficulties such as would warrant its rejection. He regarded the development as being located appropriately in traffic planning terms and expected it to operate acceptably both in terms of its internal form, its accesses and the junction of Old Cleveland Road East and Bailey Road.

Mr. Kamst, an appropriately qualified consulting engineer, gave evidence that impact upon residential amenity from noise generated by the proposal and its

lighting would be within acceptable limits. Some nearby residents were called to voice objection to the intended development. Although some apprehensions regarding likely detriment to residential amenity were expressed and were understandable, the full appreciation of what was proposed was not always apparent in this evidence. Having regard to all relevant considerations and the expert evidence given, I am satisfied that the application should not be refused on the grounds of impact upon amenity.

The respondent's main opposition to the proposed development was based on a perceived conflict with its expressed planning strategies for the area and in particular with its Strategic Plan and Development Control Plan. Whether the community's interests would be served by the provision of this facility was also disputed.

In the respondent's Town Planning Scheme, the subject land is (as is other adjoining land to the north-east of the intersection) included in the Rural Non-Urban Zone. As the land is clearly not of a high order of utility for agricultural purposes, a reading of the Statement of Intent for that zone would suggest that it has been so zoned because it is land;

“which is expected to be required for urban development following rezoning during the life of the Town Planning Scheme”.

In these circumstances, the zone could fairly be regarded as a “holding zone” and the fact that both “service stations” and “shops” are prohibitions in that zone is not necessarily decisive against an approval in this case.

In the Strategic Plan, the subject land is shown as being within the “Urban Areas” designation. This Preferred Dominant Land Use designation is described in the Plan in this way:

“This designation describes the built-up areas of the Shire. The predominant use within an urban area is residential but may also include facilities

necessarily associated such as small shopping centres, parks, schools, civic facilities and in certain cases may include light industrial uses".

The objectives and implementation criteria relevant to the "Urban Areas" are found in Development Control Plan 1 in which the subject land is designated "Comprehensive Development" on Map Sheet No. 4. The intent of the "Comprehensive Development" designation is given as follows:

"This designation covers land in respect of which there is a special need for the co-ordination and detailed guidance of development. In addition it covers parcels of land whose topographic features, existing uses or other considerations indicate a need for a greater degree of flexibility or control in handling development".

A specific intent for each of the "Comprehensive Development" designations is provided by the Development Control Plan. For the area of which the subject land is a part, it is (in clause (2)(vi)) as follows:

"The area is considered to be most suitable for some low density residential use other than dwelling house on normal residential size allotments or possibly some tourist-orientated or recreational use. In considering such uses or any other use for which consent may be granted, particular attention will be paid to the maintenance of the semi-rural character of Old Cleveland Road and the likely impact on the residential amenity of neighbouring areas. Two storeys is considered an appropriate maximum height for any building".

It should be mentioned that in the Development Control Plan, Division 3, Clause 17(3) provides a "supplementary Table of Zones" which applies to certain areas designated Comprehensive Development on the map sheets. However, the clause is careful to point out that:

"Any area designated as Comprehensive Development on the Development Control Plan Maps and referred to in (the supplementary Table of Zones) but not included in the Comprehensive Development Zone shall be rezoned to that zone prior to the provisions of (the supplementary Table of Zones) having effect".

Where it refers to the area of which the subject land is a part, the Supplementary Table of Zones shows "service stations" and "shops" as prohibitions. This matter assumes some importance. The respondent has placed emphasis on s.4.4(5A) of the Local Government (Planning and Environment) Act which provides:

"The Local Authority must refuse to approve the application if -

- (a) the application conflicts with any relevant Strategic Plan or Development Control Plan; and
- (b) there are not sufficient planning grounds to justify approving the application despite the conflict".

One of the conflicts with the Development Control Plan referred to by Mr. Clarke, the respondent's planning witness, identified this supplementary Table of Zones. It is however now more than six years since the gazettal of the Town Planning Scheme and no move has been made to include the land in the Comprehensive Development Zone. The plan makes it clear that in the absence of such a zoning, the Table has no application to the subject and no conflict such as contemplated by s.4.4(5A) could be said to arise.

Another area of conflict referred to by Mr. Clarke related to the specific intent for this part of Birkdale which has been set out in Clause 17(2)(vi) and which has already been referred to. It might fairly be said that the passage lends no direct support to the rezoning which is here proposed. It begins by identifying some uses which are considered "most suitable" and refers to criteria by reference to which the suitability of a proposed use should be measured. While those criteria must be considered, it seems to me another thing entirely to assert that conflict between the proposal and this part of the Development Control Plan has been demonstrated. To enliven the provisions of s.4.4(5A) conflict (as such) must be plainly identified. It must be added that such conflict alone is insufficient to rule out a particular proposal. The section offers to an applicant the opportunity to show "sufficient planning

grounds to justify approving the application despite the conflict".

With this in mind it seems to me entirely appropriate to enquire as to the town planning justification for the "Comprehensive Development" designation in respect of this land and for any other negative indicators that might, in respect of this proposal, appear in the Town Planning Scheme. Some assistance in this regard is obtained from "Part B" (although not formally part of the Scheme, a "supporting document" within the meaning of s.2.6 of the Act).

Clause 15.19 deals with this area and says:

"An area on the (north-eastern) side of the junction of Old Cleveland and Bailey Roads has been included (in the Comprehensive Development designation) because of the drainage constraints to which it is subject. Because of these constraints, it is considered appropriate that consideration be given to alternative residential forms or recreational uses, possibly tourist-oriented, in this area. Further shopping is considered undesirable because of its arterial road location and unnecessary because of the proximity of the local shopping centre a short distance to the east in Alexandra Hills".

This passage would appear to suggest that the choice of the "most suitable" forms of use in the Development Control Plan was based on the drainage constraints evident in the area. As already noted these constraints pose no problems for the intended development here.

The disinclination to permit further shopping in the area appears to have two bases viz.:

- "1. The arterial road location.
2. The proximity of the local shopping centre in Alexandra Hills".

On the evidence given in this appeal, neither of these two matters would warrant a rejection of this proposal. An arterial road location is not only not undesirable for a facility of this kind, but essential.

The local shopping centre does not provide comparable facilities and, having regard to its location, could not, on the evidence which I heard, provide an appropriate site for them.

Mr. Clarke pointed out that one of the important objectives for the Strategic Plan (Objective 2 of Division 3) is to promote the establishment and orderly growth of a hierarchy of business centres throughout the Shire. The Plan goes on to identify areas suitable for the establishment of major business areas and district level business centres. The importance of preventing commercial ribbon development and adverse effects upon existing retail establishments is stressed. While these are matters which are, in a town planning sense, undeniably important, the nature of the development with which we are dealing in this appeal must be borne in mind.

I accept the opinion of Mr. Ryter (the appellant's town planning consultant) that the concept of strengthening a retail hierarchy, while certainly appropriate when considering ordinary retail development, is not comparably relevant when one is dealing with a service station/shop use. He pointed out that this development would function differently from a "stand alone" general store or local shopping group. Its primary function is to meet the convenience of motorists and to provide a 24 hour facility. Its locational requirements are correspondingly distinguishable. I accept that this proposal is unlikely to lead to a proliferation of access points along the arterial road and would not constitute or be the genesis of commercial ribbon development.

Mr. Ryter accepted that one should have regard to the criteria referred to in Clause 17(2)(vi) of the Development Control Plan. In respect of the "maintenance of the semi-rural character of Old Cleveland Road" he pointed out that the proposed development is to be located on an allotment which is nearly 5,000 square metres in area and provides for a minimal site coverage. It was his opinion that the impact of the development will be softened by appropriate landscaping treatment. He



added that Old Cleveland Road has a substantially "more urbanised character" than it did in 1988 when the Plan was gazetted. Mr. Ryter's opinion was that any impact on existing and likely future residential amenity would be within acceptable limits. I accept his evidence.

In regard to need, existing service station and retailing facilities in the area were identified and examined. It was the respondent's case that the community need for such facilities is being amply met at present. It was further submitted that is here proposed was really not novel and the "convenience-retailing" concept was no more than a guise beneath which one could find nothing that was not already conveniently available in this part of the Shire.

I have given this matter and the evidence relating to it careful consideration and have concluded that I should decline to share such a cynical approach to it. I am prepared to accept the evidence of Mr. Haratsis and Mr. Tasker that what is here intended involves something different in the way of a service station-convenience retailing combination and that not only its commercial success but its attraction and convenience to the public has been shown elsewhere and would probably be repeated here. I accept that community interest would be served by an amendment of the Town Planning Scheme to permit it to occur.

My attention was drawn to a decision of this Court in February of 1987 which dealt with an application to use nearby land for the purposes of a service station, which application was rejected. (See Theodoru v. Redland Shire Council (1987) Q.P.L.R. 11). The decision was given prior to the gazettal but with full knowledge of the contents of the present Town Planning Scheme. A good deal of time has passed since the decision and circumstances have changed. Different factors arose in that appeal and I do not believe that a comparative analysis of the two matters is called for. The decision in this appeal is demonstrative of what is often said in this Court, namely that each case is determined in the light of its own

facts and on the evidence given. Two cases (while at first glance comparable) are rarely identical.

On all of the evidence in this appeal, I am satisfied that the appellant has made out a case for the rezoning of the subject land as proposed. The onus of showing that the application should be approved has been discharged. The appeal is accordingly allowed.