

TRANSCRIPT OF PROCEEDINGS

(Copyright in this transcript is vested in the Crown.
Copies thereof must not be made or sold without the
written authority of the Director, State Reporting
Bureau.)

PLANNING AND ENVIRONMENT P & E Appeal No 421 of
COURT 1994

JUDGE O'SULLIVAN

LEN DUNNE Appellant

and

BRISBANE CITY COUNCIL Respondent

and

ALEX ENBORISOFF & ASSOCIATES PTY Respondent by
LTD Election

BRISBANE

.. DATE 17/10/95

JUDGMENT

HER HONOUR: This is the matter of Dunne and Brisbane
City Council. I publish my reasons.

The formal order will be that I allow the appeal.

IN THE PLANNING AND ENVIRONMENT P & E Appeal No. 421 of
COURT 1994

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

LEN DUNNE Appellant

AND:

BRISBANE CITY COUNCIL

Respondent

AND:

ALEX ENBORISOFF & ASSOCIATES PTY.
LTD.

Respondent by
Election

REASONS FOR JUDGMENT - O'SULLIVAN D.C.J.

Delivered the 17th day of October, 1995

This is an Objector appeal against the proposed approval of an Application by Alex Enborisoff & Associates Pty Ltd ("the Applicant") for an attached housing development comprising 29 duplex and attached houses ("the proposal") on 1.052 hectares of land described as Lot 2 on RP 161408, Parish of Indooroopilly, situated at Carinya Street and Russell Terrace, Indooroopilly ("the land"). The land is currently vacant except for a derelict dwelling.

The Appellant is the owner of nearby land which abuts the south west boundary of the land.

The proposal is for 29 units, 7 duplexes and the remainder in attached housing. The proposal is in 2 parts, separated by the creek area which is to be landscaped for recreation. Two buildings comprising 3 dwelling units each are proposed to have access via a 55 metre frontage to Russell Terrace. Ten buildings containing 23 units, in 3 rows, are proposed to have access via a 20 metre frontage to Carinya Street. The units are to be constructed in two different styles.

The land is included in the Residential "A" Zone.

Attached houses and duplex houses complying with the requirements of Residential Development Area R1 are a permissible use in the Residential "A" Zone.

Section 24.2.5:

Section 24.2.5 of the Town Plan of the Respondent requires certain matters to be taken into account in determining an application for consent.

Section 24.2.5(c) requires the following to be taken into account:

"the character of the proposed development in relation to the character of the development on any adjoining land and in the locality".

It was agreed that the character of the area is predominantly that of low density detached housing. The houses exhibit many different materials and styles.

Approval has been given for 24 townhouses on 9283m² at 82 Russell Terrace, which is approximately opposite the Russell Terrace frontage of the proposal.

It emerged from the evidence at the hearing of the Appeal that whether this proposal is out of character with the locality largely hinges on the question of trees and landscaping.

Mr Mulcahy, the Town Planner who gave evidence on behalf of the Applicant, opined:

"The retention of trees on site where possible, and the further planting of trees and shrubs will ensure that the development when completed and established, will maintain the existing character of the area, that is, of small scale buildings in a hilly and treed environment".

Evidence about landscaping and trees was given by Mr Kearney, a Landscape Architect who gave evidence on behalf of the Applicant, and Mr King, a Landscape Architect who gave evidence on behalf of the Appellant. I found Mr Kearney's assessment to be superficial compared to Mr King's.

The land currently has a number of large and attractive trees. It would of course be desirable if these could all be retained. However, the reality is that the land is in the Residential "A" Zone, has no Vegetation Protection Order over it, is privately owned,

and could accommodate 17 conventional lots for owners who could remove every tree as of right.

Mr Booth, the Town Planner who gave evidence on behalf of the Appellant, contended that trees were less likely to be cut down if the land were kept for conventional subdivision. Mr King agreed and said: "a significant amount of tree cover would be retained", and he referred to an "educated public". He pointed to the existing retention of trees in this particular area. I consider that he over-stated the likely extent of retention of trees following development. Moreover, his assessment was based on the district very proximate to the land, rather than on the area as a whole. I accept the evidence of Mr Mulcahy that it is inevitable that in a conventional subdivision these trees would be cut down, either at subdivision stage or by subsequent owners. This is especially likely because the predominant trees on the land are eucalypts which are not compatible with residential development.

I consider that for any proposed development on the land the existing trees are unlikely to be retained, because of their incompatibility with residential development or because they will not survive the development process, or both.

Mr Kearney agreed that the major problem for the retention of eucalypts is the earthworks. He agreed that it would only be possible to keep about six, maybe seven, of the existing trees. This is at odds with his Plan (Exhibit 14) which includes the notation: "retain existing and reinforce with species from 'Building Zone' list".

Mr Kearney considered that if his recommendations are put in place and followed, the erosion of the area's natural woodland character would be "reduced as far as possible under the development proposal". The issue is of course whether the degree of impact is acceptable or not.

Mr King considered that only nine valuable trees would be retained, and there is no potential for replanting trees. He prepared a detailed Plan titled

"Indication of areas where tree planting can occur" (Exhibit 38). Mr Kearney admitted that he did not yet have access to a soils report and thus could not comment on whether a comparatively small root system only would be possible. He considered that that should be addressed at the construction stage or during the design development stage. I accept that details are frequently provided at the development stage, as in proposed Condition A(h), however, some degree of detail is required for this proposal at this stage, in order to enable an assessment of whether the proposal is out of character with the character of the locality and whether the proposal adversely impacts on the visual amenity of the area to an unacceptable degree. The detail with which I am presently provided leads me to the view that the proposal has not sufficiently addressed the issue of trees and landscaping and in its present form I consider the proposal will have an unacceptable impact on the character of the locality.

Proposed Condition A(h) of the current proposed Conditions of Approval provides, inter alia,

"...prior to the commencement of any site works and or lodging the building application a landscape plan is to be submitted and approved. Such plan is to detail:

- "(i) all trees nominated as bring retained in accordance with Plan No. DA01C, received on 10 October 1994, noting steps taken for the retention and protection of these trees;
- (ii) that as many trees as possible are retained on the site and details noting steps taken for the retention and protection of these during construction or reasons for their removal".

Plan DA01C would seem to have been superseded. Indeed in the light of the totality of the evidence given by Mr Kearney and Mr King at the hearing of the Appeal, it is possible that the Condition is entirely inappropriate.

Mr Booth was very concerned that the proposal had been designed in ignorance of the constraints of the land. Mr Mulcahy disagreed, and contended that the site

plan responds to the topography with individual buildings spread around the site and sited along the contour line.

Mr King considered that the contours on the approved plan are inaccurate, and he prepared an overlay (Exhibit 35) to illustrate this. He agreed that the Dee survey is reliable, and he used the spot levels shown on Exhibit 19. Using these levels, he calculated the amount of cut and fill required, which he illustrated on a large Han (Exhibit 34). He considered that there is a need to know the accurate levels and the amount of cut to decide if there is the possibility of "decent trees for screening". I accept this evidence.

Overall, I found Mr King's approach to be thorough and in stark contrast to the vagueness of the proposal.

Another matter of concern to the Appellant was that cut would be such that 2,000 truckloads of soil would need to be taken away from the land. Mr Mulcahy agreed that: "subdivision could not be built without a massive interference with the natural existing surface of the land because of steepness". However, he also said:

"It's not unusual in development of residential estates and attached housing developments to have to modify the land fairly substantially, but often in time with landscaping development that is something that's not visible and apparent...".

Mr Mulcahy considered, and I accept, that any proposed development of the land would involve earthworks:

"I think the major consideration is what is the end result, what is the impact of the development that will be erected on the site when it is finished. I don't think that, in fact, whether it is two metres or three metres of cut or fill in any particular location on the site has any direct bearing on the outcome of the development".

I accept this evidence. I consider that apart from its relevance to screening, the amount of cut is not an issue which warrants refusal of the proposal.

Visual amenity:

The proposal provides for twelve buildings each containing two or three units, two storeys in height.

In assessing the proposal, it is relevant that the intensity of the proposal conforms with the provisions of Section 7.6.3 of the Town Plan of the Respondent (Special Requirements for Residential Buildings where the site is in RDA R1).

The Appellant contended that the proposal would lead to over-development of the land and will result in a significant deterioration of the visual amenity of the area. The Appellant contended that the proposed buildings and units would have an appearance of rows of roof lines.

Based on his Plans and calculations Mr King concluded that there will be "a dominance of urban form": driveways, roofs, walls.

Mr Mulcahy considered the effect would be of "broken up" development, on varying levels, with space between buildings and interspersed vegetation; the roof forms are at different angles stepping down the slope; each roof is different in scale and angled. Mr Simmons, the Town Planner who gave evidence on behalf of the Respondent, referred to the dwellings being at different levels relative to the slope and relative to each other, substantial variation in facade line, mixture of construction materials, and different setbacks from access ways.

I accept this evidence of Mr Mulcahy (subject to vagueness about the extent of "interspersed vegetation") and of Mr Simmons.

However, I consider, that the question of visual amenity depends not only on these matters raised by them but also on the extent of trees and landscaping. I find that in its present form the proposal does not provide sufficient detail to enable me to be satisfied that it will not have an unacceptable impact on the visual amenity of the area.

The Appellant was also concerned about the impact of the proposal on visual amenity, considered from outside the land.

I accept that views of the site from the Western Freeway are to some extent limited by the proposed acoustic fence, existing vegetation within the freeway reserve, the angle of view and the speed of vehicles on the freeway.

However, existing vegetation on the freeway reserve may not continue, for example the species may die, or vegetation may not be maintained, or changes to the freeway may be undertaken.

Mr Kearney agreed that on his current Plan the dominant amount of vegetation screening which exists in relation to the eastern side of the proposed development is in the road reserve area. He agreed that buffering and screening should be capable of being managed on site, rather than using somebody else's land.

I consider that landscaping and buffering should be provided on the land itself, as well as on the road reserve of the freeway and that the proposal does not sufficiently provide for this, and relies too heavily on the vegetation in the road reserve area.

I accept that views of the site from Russell Terrace are limited by the alignment of the road, the freeway overbridge, topography and proposed landscaping. I am satisfied that the impact on visual amenity, assessed from the Russell Terrace perspective, is not such as to warrant refusal of the proposal.

Section 7.6.2:

The proposal complies with Section 7.6.2 of the Town Han of the Respondent which sets out the Special Requirements of Residential Buildings, except for distance from a road alignment, and provision for a common clothes drying area (as required by Condition E(ao) of the current proposed Conditions of Approval).

Proposed Units 15, 16 and 29 are within six metres of a road alignment. As there is a distance of 20 metres from the alignment to the road, there is a proposed acoustic barrier along the Western Freeway, and there would be no adverse impact on any adjoining property, I consider that a relaxation from six metres to three metres should be granted.

Proposed Units 1-7 are within six metres of a road alignment, namely, five metres. I consider that a relaxation is acceptable.

Proposed Unit 8 is within six metres of the western boundary, namely three metres, and substantial screening and buffering will need to be provided. I consider that this ought to be provided in detail in the proposal and Mr Mulcahy's proposed latticework on the Units themselves is not sufficient.

Proposed Unit 23 is within six metres of the western boundary, the boundary with the Appellant's land. The proposal does not provide sufficient detail of the nature and extent of the landscaping to be provided.

In the light of the evidence given at the hearing, it would seem that some of the Units may require the use of fill or piers, which may mean they may be above the proposed screen fencing on the western boundary. The extent of this ought to be clarified. While total screening from residential development is not reasonable, significant overlooking is not acceptable.

The exact location of the cul de sac bulb of Carinya Street is unclear.

Planning Policy 7.27:

Design of Attached House Development within Residential "A" Zone:

The Applicant contended that the proposal complies with the requirements of the Respondent's Planning Policy 7.27, with the exception mentioned by Mr Mulcahy, namely,

privacy for the two existing dwellings to the west of the land, which I have already discussed.

The Appellant was concerned that the Application and accompanying documents and Plans did not provide the detail required by this Policy. While I accept that it may have been preferable for more detail to have been provided, I consider there has been compliance with Planning Policy 7.27.

Planning Policy 18.01:

Landscaping Provisions for sites abutting heavily trafficked roads:

Mr Mulcahy said that the erection of the acoustic barrier along the Western freeway, the retention of existing vegetation within the freeway reserve, the vegetation to be retained on site, the additional vegetation to be planted on site and the "broken up" location of buildings on the site will all combine to ensure that the standard of visual amenity from the freeway is not adversely affected. I consider that the proposal does not provide sufficient detail concerning "the vegetation to be retained on site" and "the additional vegetation to be planted on site", without which it is not possible to say whether there has been compliance with Planning Policy 18.01.

Refuse :

Planning Policy 7.11 of the Respondent provides for the storage of garbage bins on the site of a multi-unit residential building.

The approved Plan does not provide for this.

Condition A(f) of the proposed Conditions of Approval does not seem appropriate in view of the proposal for refuse collection which emerged at the hearing of the Appeal.

I do not consider that the proposed refuse collection arrangement nominated at the hearing is

satisfactory, and in this respect I prefer the evidence of Mr Booth to that of Mr Simmons.

Bikeway:

The proposed bikeway/footpath does not comply with the relevant Australian Standards.

Proposed recreation area:

Mr Booth and Mr King considered that the location of a BBQ in the middle of the creek corridor is not acceptable. I accept this evidence.

The need for benching, or other measures to improve access became dear during the hearing.

Planning Policy 7.09 of the Respondent states that where any condition of development requires the provision of landscape and recreation areas and that land is constrained in any way by steep topography those areas will be provided from that part of the site not affected by the constraint.

Where a site is constrained, specific Landscape Plans are to be submitted which show various things listed in the Polity. I am not persuaded that such detail has been provided.

Public transport and access to facilities:

I consider that the location of the proposal is such that it will require people to use cars. This does not warrant refusal of the proposal.

I consider that the proposal has access to facilities, as required by the Town Plan.

Noise:

Mr Moore, the Noise Engineer who gave evidence on behalf of the Applicant, prepared a supplementary report which showed an acoustic barrier ranging from 2 - 2.45 metres, vertical and horizontal to the Western Freeway. It was agreed that with that construction, subject to

confirmation concerning levels, and the necessity to ensure the fence continues down to the ground, the proposed dwellings on the land will attain the standard required by the Respondent.

The Applicant tendered a letter from Queensland Transport dated 18 July 1995 advising of approval in principle to:

- "1. Erect a paling fence along the road reserve bounding the site.
2. Perform landscaping treatments within the road reserve.
3. Provide a paved footpath or bikeway linking Carinya Street with Russell Terrace".

The advice is valid for two years from the date of the letter.

Traffic:

All the traffic engineers who gave evidence accepted that Russell Terrace currently carries at least 5,000 vehicles a day in the vicinity of the land, and is likely to carry more in the future.

The proposal would lead to an increase of approximately 1.5 per cent in the volume of traffic using Russell Terrace. In Carinya Street the proposal would lead to an increase of approximately 5 per cent.

I consider that the increases in volume of traffic in Russell Terrace and Carinya Street will have only a minor impact, and are not such as to warrant refusal of the proposal.

Safety:

The proposal provides for six units to have frontage to Russell Terrace, with one access point. In a normal frontage arrangement, 3 driveways would be usual.

Mr Holdsworth the Traffic Engineer who gave evidence on behalf of the Applicant, and Mr Brameld, the Traffic Engineer who gave evidence on behalf of the Appellant, used different methods to measure the speed environment of Russell Terrace, and thus arrived at different speeds, varying from 65 kilometres per hour to 77 kilometres per hour for the 85th percentile.

Mr Holdsworth considered that the proposal complies with AUSTRROADS (basic catastrophe standard), Brisbane City Council Policy 18.06, NSW Traffic Authority Standards, and the Off-street Australian Standard 2890.1 (even using Mr Brameld's measured speed).

Mr Holdsworth considered that the Respondent's Policy 18.06 Table 3.2 provides for a minimum requirement for sight distance (comfortable stopping distance) of approximately 60-65 metres and a maximum requirement of 120 metres. If measured in the manner described in the Policy, the proposal has 110 metres. He considered that the gradient factor is already built into the figures.

Mr Brameld considered that, allowing for grade, the appropriate sight distance under Policy 18.06 should be 135-140 metres.

In applying Policy 18.06 I prefer the approach of Mr Holdsworth to that of Mr Brameld. I am satisfied that using either Mr Holdsworth's measured speed or Mr Brameld's calculated speed, the proposal complies with the minimum standard to which the Respondent may relax.

Mr Brameld considered that because of the high speed environment, the long steep downhill grade, proximity to a school, available sight distances, traffic accidents, and skid resistance of the surface relaxation should not be granted.

I accept that there have been traffic accidents but I am not satisfied that these have been such as to warrant refusal of the proposal on the ground of traffic safety.

Mr Holdsworth acknowledged that something needs to be done to correct the existing problem with skidding under the bridge, but considered that there was no relationship between the need to take the corrective action and the proposal. I accept this evidence.

Mr Brameld was concerned about problems with sunlight in the driver's eyes. I accept the evidence of Mr Holdsworth that the onus is on the driver exiting the land, not the driving coming up the hill who may temporarily be blinded.

Mr Brameld was concerned that Russell Terrace is carrying higher amounts of traffic than it should be, so there is no point in increasing the density to exacerbate an existing unsatisfactory situation. I do not accept the validity of this approach, and I prefer the approach of Mr Holdsworth and of Mr Eppell, the Traffic Engineer who gave evidence on behalf of the Respondent, namely, that Policy 18.06 calls for a range to allow for compromise within a range of acceptable standards.

I consider that the proposal complies with Policy 18.06, subject to the relaxation provided by that Policy, which I consider ought to be given.

I find that the traffic grounds of Appeal do not warrant refusal of the proposal.

Summary:

The proposal conforms with the provisions of Section 7.6.3 of the Town Plan of the Respondent.

Further details of screening and buffering ought to be provided for proposed Units 8 and 23 in order for the proposal to comply with the provisions of Section 7.6.2 of the Town Plan of the Respondent.

The proposal may lead to unacceptable overlooking.

The exact location of the cul de sac bulb of Carinya Street is unclear.

There has been compliance with Planning Policy 7.27 of the Respondent.

In its present form the proposal does not comply with Planning Policy 18.01.

There has not been compliance with Planning Policy 7.11.

The proposed bikeway does not comply with the relevant Australian Standards.

The proposal does not comply with Policy 7.09 of the Respondent.

The proposal has access to facilities as required by the Town Plan of the Respondent.

Subject to the formulation of appropriate Conditions of Approval reflecting Mr Moore's supplementary report, the noise impact of the proposal is not such as to warrant refusal of the proposal.

Subject to relaxation as provided by the Policy (which ought to be given) the proposal complies with Planning Policy 18.06 of the Respondent.

The traffic grounds of the Appeal do not warrant refusal of the proposal.

The proposal will have an unacceptable impact on the character of the locality.

The proposal will have an unacceptable impact on the visual amenity of the area.

In view of the various matters I have nominated I consider that the Applicant has not discharged its onus of proving that the proposal ought to be approved.

I allow the Appeal.