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IN THE PLANNING AND ENVIRONMENT P & E Appeal No 1986 of
COURT 1996

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

DENAID PTY LTD

Appellant

AND:

CROWS NEST SHIRE COUNCIL

Respondent

REASONS FOR JUDGMENT - QUIRK D.C.J.

Delivered the 6TH day of December 1996

This appeal is against the respondent's deemed refusal of a combined application to rezone and subdivide land at Highfields. The land occupies an area of about 16 hectares on the southern side of the New England Highway to which it has frontage of about 700 metres. It also has frontage to Reis and Borghardt Roads. It is conveniently close to the centre of the Highfields residential area.

The land is relatively level and carries an attractive woodland cover, a good deal of which will be able to be preserved when the land is subdivided. It is intended to include the land to be subdivided (which is presently in the rural A zone) in the residential B zone. The town planning scheme indicates that this zone is intended for low density residential uses on "larger than normal residential allotments adjacent to established urban areas". The minimum lot size is 2,500 square metres (with an average of 3,000 square metres). The zone is intended to be provided with urban services but not sewerage. The proposal complies with this in all respects.

As was explained in the evidence of Mr Walker, an agricultural scientist, the land is not physically suitable (having regard to the freely draining soils and an absence of adequate water supply) for cropping on a commercial scale. Its proximity to the existing Highfields residential area would also make it less than suitable for intensive rural use.

In the respondent's strategic plan the land is designated as "rural residential" (which is an area suitable for residential living close to urban areas but on larger than normal allotments). In a Development Control Plan being prepared for this area, the land is designated as "Low Density Residential" which is intended to provide residential uses on allotments larger than normally provided in urban areas with a minimum of 2,500 square metres and an average of 3,000 square metres. The proposal recognises and complies with these matters.

In short, the land appears to be eminently suitable for the form of development proposed which is consistent with the existing and draft schemes. There was evidence of a demonstrated community demand for residential blocks of the type and quality this development would produce. There was really only one matter which was raised in opposition to the proposal and that was identified as a disputed issue in these terms;

"The appellant has not demonstrated to the satisfaction of council the potential odour impact that the near by piggery will have on the surrounding amenity".

On the opposite side of Reis Road, set back about 100 metres or so from the road alignment, there is a piggery licensed to have up to 2,000 pigs which has been in place since before residential development came to the Highfields area. Recognising the existence of this undertaking the appellant, prior to submitting the application, engaged the services of Mr Winders (a consulting engineer with extensive experience in environmental matters) to examine the proposal and the impact that the piggery might have upon it.

The assessment which Mr Winders made was explained in his written report and oral evidence. Among the matters which he took into account were the nature of the piggery operation, the relative position of it and the proposed development, the topography and climatic influences in the locality. Armed with this information and drawing on his extensive experience in this field, he carried out a prediction of odour impact by way of a form of computer modelling known as "Ausplume" which has been found to be acceptable by the Department of Environment.

Dealing, as one is, with a human reaction of a qualitative kind, precise measurement is not possible as it is with such concepts as dimension, or mass which can be measured quantitatively. I am satisfied however that it is an area into which has gone considerable scientific effort to produce results which are worthwhile and that these results are more than guess work. The evidence of Mr Winders was not challenged by any evidence of comparable expertise.

His work led Mr Winders to recommend that a substantial area along Reis Road be excluded from the land to be rezoned and provide a vegetated environmental buffer between the piggery and the proposed development. This area comprised about 6 hectares, extended for about 475 metres along Reis Road and was about 150 metres deep where it faced the piggery. An environmental management plan is intended to maintain the buffer in an effective condition. These measures would, in the view of Mr Winders, lead to an acceptable result in terms of odour prevention for residents of the proposed development. Mr Winders' recommendations were adopted by the appellant and are reflected in the design of the proposed development.

The only evidence adduced by the respondent to challenge the proposition that the proposal involved an adequate response to likely piggery odours came from a number of residents of the area who related that they have, from time to time, been troubled by unpleasant smells attributable to the piggery and that they were

concerned that the proposal would be unable to provide an acceptable level of amenity for its residents.

There does appear to have been some orchestration of opposition to this proposed development motivated, in no small way, by a desire to see the subject land remain undeveloped and continue to provide an attractively vegetated preserve that adds considerably to the area's attraction. This would, of course, ignore the private ownership of the land and the express provisions of the planning instruments regarding its likely future development. I am not, however, prepared to dismiss this evidence on the basis that it was not given in good faith. I am prepared to accept that these residents have given an honest account of their experiences in the area.

It has to be accepted that the Highfields residential area (and the piggery) have been in place for some considerable time. There are now believed to be in the order of 1,500 people living in it. The evidence shows that, over the years, the level of complaint about the piggery has been relatively low. Few, if any, people have left the area and there has been no real pressure to bring about the piggery's closure.

As Mr Winders explained, topography and climatic conditions have a good deal to do with the movement of odour bearing air and those residents who have experienced difficulties seem to be in the drainage path of this air. The subject land which is higher than the piggery is not. Having considering this evidence I find nothing in it that would justify my not accepting the views expressed by Mr Winders.

Mr Poole, an experienced town planner and the respondent's consultant, gave evidence in opposition to the proposal. He drew attention to provisions in the Draft Development Control Plan which, he said, should lead to its rejection. In particular, he pointed to clause 5.5 which deals with areas designated "low density D Residential". It provides:-

"The DCP 1 map shows areas identified for the purpose of low density residential uses. The Town Planning

Scheme shows the same area zoned Rural, except where rezonings have already been gazetted. Rezoning land from rural A to rural residential B (as defined in the planning scheme) will be supported subject to the application's confirming with the following requirements:

There follows a number of requirements, all of which are met with the exception of .5 which provides:-

"Rezoning or subdivision of land for residential purposes will not be permitted within the separation distances from intensive animal husbandry use as shown in s. 6 of the Town Planning Scheme."

Accordingly, a careful examination of s.6 (as it is here relevant) of the Town Planning Scheme is called for. Separation distances for piggeries are dealt with in 6.12.2. Attention was drawn to the fact that the distances therein referred to are intended to provide for new piggeries or the expansion of existing piggeries but it would seem that clause 5.5.5 is concerned with the separation distance between new residential development and any existing piggery.

S.6.12.2 provides:

"Subject to provision 6.12.1.2, a new piggery or an expanding existing piggery shall not be located at lesser distances than the separation requirements set out in appendix 28".

An important point is that appendix 28 sets out what appeared to be very conservative separation distances (it might be noted that the entire Highfields residential area would appear to be within the four kilometre separation distance which it envisages) and is not absolute. Provision is made for relaxation in 6.12.2.1:

"A person with council's consent may be permitted to establish or expand an existing piggery at a lesser distance than that set out in appendix 28 if, in the opinion of council, following consideration of any or all of the matters contained in this provision, special circumstances exist which warrant such modification.

- 2 - Topography of the area;
- 3 - Numbers of pigs to be kept;
- 4 - Soil condition of the land;
- 5 - Waste disposal methods;
- 6 - Any other matters relevant to the proposal.

.2 - Any application for a lesser distance will be accompanied by a comprehensive report and prepared by a person or organisation recognised as an authority in this field and acceptable to the council."

Accordingly, it is open to the planning authority to review and reduce the prescribed separation distances where that would be supported by advice from an appropriately qualified expert who has taken into account the matters set out in 6.12.2.1.

While we are here dealing with a reverse situation, Mr Winders has done just that and I am satisfied that, on the basis of his opinion, I am entitled to find that the separation distances here proposed are acceptable. Even though the manner in which the piggery is conducted is in the hands of the operator, one can take into account the statutory environmental controls now in place and the proximity of the Highfields residential area. Mr. Winders proceeded on the basis that the piggery will continue to operate in a responsible way and I do not regard that as unreasonable.

If one accepts his view that separation distances for this proposal are reasonable, no real conflict between the proposals and the draft Development Control Plan arises. If some conflict existed, I am satisfied, on the basis of Mr Winders evidence, that there are sufficient grounds to justify proving this application despite any such conflict.

I was referred to some other decisions of this court which dealt with the relative decisions of piggeries and residential development. I do not regard these decisions as establishing any principle of law which I should

follow in this appeal. Every case must be decided in the light of its own facts.

On the whole of the evidence I find that the onus of showing that this application should be approved has been discharged. The appeal is accordingly allowed.