PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:

PARTIES:

GREY BOULEVARD PTY LTD (ACN 082 781 431) (Appellant)

MAROOCHY SHIRE COUNCIL (Respondent)

FILE NO/S: 1779/99

DIVISION:

PROCEEDING:

ORIGINATING COURT:

DELIVERED ON: 20 December 1999

DELIVERED AT: BRISBANE

HEARING DATE: 21 October 1999

JUDGE: QUIRK D.C.J.

ORDER:

CATCHWORDS:

COUNSEL:

SOLICITORS:

[1] This was an appeal against a condition of approval attached to a development permit for an aged and disabled person's home on land at Sippy Downs. Because of the nature of the appeal it is unnecessary to go into a detailed description of the land and the proposed development. These matters are sufficiently dealt with in the material placed before the Court (see Exhibit 1 particularly tab 2).

[2] The disputed condition provided:

> "Water Supply and Sewerage Headworks Requirements Contribute current cost/EP towards Water Supply and Sewerage Headworks in accordance with Council's Local Planning Policy "Developer Contributions Towards Water Supply and Sewerage Infrastructure" at the time of payment ie. 1.8 EP's per bed based on the proposal submitted (100 beds equals 180 equivalent persons). The contribution will be payable in accordance with Council's Local Planning Policy ie. within 14 days after the date of the granting of the approval under the Building Act 1975 as amended".

[3] The Notice of Appeal claimed that:

> "The condition is neither reasonably required in respect of the development or relevant to the development. It is also an unreasonably imposition on the development."

[4] The relevant application was made at a time when the *Integrated Planning Act* was in force. However, the relevant planning scheme was a "transitional planning scheme" as provided for in Part 1 of Chapter 6 of the Act. Furthermore it was accepted by the parties to the appeal that the matter is one governed by s.6.1.31(2)(c) that it was open to the planning authority to impose a condition requiring a contribution towards the cost of supplying infrastructure as if the repealed *Local Government (Planning and Environment) Act* had not been repealed.

[5] The wide definition of "infrastructure" in Schedule 10 includes water supply and sewerage works and, in the repealed Act (in s.6.2), there was specific and comprehensive provision in respect of contributions towards such matters.

[6] The section sets out the manner in which such contributions are to be assessed and paid. Section 6.2(3) provides that in a case of this kind the planning authority may, as a condition of granting approval, require the applicant to pay a contribution towards the costs of appropriate water supply headworks and sewerage headworks. Section 6.2(6) provides that the amount of any contribution required to be paid is (in such a case) to be determined under a local planning policy. Section

6.2(6)(b) governs the content of the policy. Section 6.2(7) identifies the matters to be taken into account in formulating and adopting the relevant policy. Such a policy was adopted by Council on the 26th of March 1998 and was before the Court as part of Exhibit 1 (Tab 15).

[7] That the policy provided appropriate support for the disputed condition was originally questioned on two grounds namely:

1. The selection of a level of demand of 1.8 equivalent persons per bed and

2. The "cost per equivalent person" current at the time of the appeal.

[8] The second of those grounds has ceased to be contentious in that, since the appeal, there has been an amendment to the policy whereby the "costs per equivalent person" has been reduced to a level now acceptable to the appellant.

[9] The issue whether a level of demand of 1.8 EP/bed is an appropriate one for this proposal remains to be considered. The origins of the figure of 1.8 is found in Table B3 of the policy support document which is picked up by reference in Table 2 of the Policy itself. In Table B3 certain forms of development are identified one of them being "convalescent home" to which the rate of 1.8 per bid is attributed. It was on this figure that the Council relied.

[10] The evidence in the appeal came from two experienced engineers, Mr Tate who gave evidence for the appellant and Dr Johnson (a member of a firm of consultants to the Council) who was called by the respondent.

[11] In a planning report which accompanied the application the proposed development was described in this way:

> "It is proposed to locate an aged and disabled persons' home on the subject site. The home will provide for approximately 100 beds which may be staged

> depending on bed allocations. The proposal will provide 24 hour care for aged and disabled persons and including living, dining and visiting rooms as well as staffing quarters. Our client has approval in principal for a bed allocation from the Commonwealth Government for the subject site.
>
> ...
>
> The proposal has been designed to function as an efficient and secure aged care facility. This necessitates controlled access for the complex hence the need for the car parking and servicing at the front of the site. Generous landscaping is proposed throughout the site, particularly at the front boundary. ...”

[12] In the Town Planning Scheme the following definition of “aged and disabled persons' home” appears:

> “A home for the accommodation of aged and disabled persons established under the *Aged and Disabled Persons' Home Act*. The term does not include an accommodation unit or a retirement village as herein defined.”

[13] There is no definition of “convalescent home” in the Town Planning Scheme although “hospital” is defined as:

> “Any premises used or intended for use as a hospital, sanatorium, nursing home, or home for the infirm, incurable or convalescent persons. The term includes buildings and other structures associated with such uses, but does not include an aged and disabled persons' home or institution as herein defined.”

It is noted however that Table B3 deals separately with “hospitals” attributing a greater EP/unit to such facilities.

[14] The appellant's case was that the level of demand of 1.8 EP/unit was, for the development proposed in this case, high to a demonstrable and unreasonable extent. It was suggested that the intended level of care was less than in many facilities that could be described as “convalescent homes”. And that consequently the use of the figure of 1.8 found in Table B3 for both water supply

and sewerage was an overestimate. Fundamental to the approach of Mr Tate was an attempt to ascertain the projected demand upon the existing water supply and sewerage system of this proposal. He examined data from a number of facilities which, in his opinion, involved activity (and a level of care) more comparable to that intended in this development (Table 2 Exhibit 2). He pointed out that these figures indicate an average level of consumption of water considerably lower than that identified for convalescent homes in Table B3.

[15] Mr Tate also questioned the factor of 20% employed by the Council's consultants in taking into account leakage within the water system. For reasons which he explained he believed that a figure in the order of 13% would have been more appropriate. He concluded that, for the purposes of establishing appropriate contributions, figures of 0.7 EP per bed for water supply and 1.0 EP per bed for sewerage would be appropriate in the circumstances.

[16] Dr Johnson, in his evidence, explained and supported the planning authority's approach which is reflected in the policy. To do so he put before the court a wide range of data in respect of water consumption by facilities which were involved in providing comparable services. For reasons that he explained he believed the better approach was to analyse the data in a statistical way.

[17] In so doing, after discarding data which he regarded as aberrant, he derived, for the relevant local authority areas, a figure indicative of the average consumption (in litres/bed/day) and the standard deviation of that average figure from the overall mean. The results can be seen in Table 2 of Exhibit 5.

[18] Included in the data analysed by Dr Johnson were the facilities relied upon by Mr Tate. While acknowledging that the average consumption rates for facilities within the Maroochy Shire was at the higher end of the spectrum, he pointed out that those relied upon by Mfr Tate were at the opposite end and added:

> "It is also apparent on the basis of mean consumption calculated for each data set that the Rod Tate data is the least representative of the overall data set."

The contents of Table 2 appear to bear out this assertion.

[19] In explaining the policy's mode of operation, Dr Johnson emphasised that Australian communities have considerably higher expectations in relation to the performance and reliability of a water supply system. Accordingly planning authorities must adopt a conservative approach (involving a high level of safety). This is explained in detail in part 4 of his report which became Exhibit 5.

[20] As to the performance of a water supply system being effected by "unaccounted for water losses" he referred to a number of respected published authorities which lend support to the selection of a figure of 20% as being appropriate for planning purposes.

[21] In Part 6 of his report (Exhibit 5) Dr Johnson demonstrated the derivation of an EP multiplier of 1.8 as one which afforded an appropriately high probability of non-exceedance of demand over supply.

[22] Dr Johnson made the further point that, whatever might be the intentions of a particular applicant at the time of approval, the planning authority is obliged to approach the matter by reference to the rights which the approval gives and the projected level of water consumption of facilities that might operate within the ambit of such an approval. Against this background he was confident that the policy's approach was a reasonable and appropriate one.

[23] The issue in the case is whether the requirement for these contributions is an appropriate exercise of the power to impose conditions upon approval of this kind. As stated the fixing of such contributions is specifically governed by s.6.2 of the *Local Government (Planning and Environment) Act*. The Policy which formed the basis for fixing the contributions must be seen to

meet the requirements of s.6.2(6)(b) and s.6.2(7) of the Act. Having considered the evidence given I am satisfied that the relevant policy meets those requirements. As was pointed out in Grant v Pine Rivers Shire Council & Anor [1991] QPELR 160 such a policy is necessarily of broad application and there is some impracticality in expecting it to be able to fix contributions to reflect the specific demands of each development according to the developer's intentions at the time of the application. The desirability of a level of conservativeness in these matters was also recognised in this decision.

[24] With respect to the description of the proposal as an "aged and disabled persons' home" and the fact that Table B3 was applied on the basis of its being fairly comparable to a "convalescent home" I am satisfied on the evidence that, in a planning context, the comparison was a reasonable one in the circumstances.

[25] Attention was drawn to a discretion which arises (by reason of s.6.7.6) in the policy and is expressed in this way:

> "Where equivalent population for a particular development application can not be determined from (Table B3) of the Policy support document, the increase in equivalent population shall be determined by counsel. The determination shall be made having regard to Table 2 and (Table B3) to the extent that these are relevant to the proposed development."

[26] However, in the circumstances of this appeal I am satisfied that a departure from Table B3 as it relates to a "convalescent home" is not warranted. On the whole of the evidence I am satisfied that the condition imposed by the Council is an appropriate one. The appeal must accordingly be dismissed.