

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Insight Projects (Qld) Pty Ltd v Hervey Bay City Council*
[2007] QPEC 109

PARTIES: **INSIGHT PROJECTS (QLD) PTY LTD**
Appellant
V
HERVEY BAY CITY COUNCIL
Respondent

FILE NO/S: 1217/2007

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court of Queensland at Brisbane

DELIVERED ON: 7 December 2007

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2007; further written submissions received 29 November and 4 December, 2007

JUDGE: **Alan Wilson SC, DCJ**

ORDER: **1 Appeal allowed**
2 Declare that the change (appearing in the plan which is Figure 4 in exhibit 1) to the application on which the decision being appealed is made is only a minor change
3 Adjourn the matter for further review at 9:15am on 17 January 2008

CATCHWORDS: PLANNING – PLANNING LAW – PLANNING SCHEMES – VEHICULAR AND PEDESTRIAN ACCESS – whether proposed road design and pedestrian access in appellant’s subdivisional proposal offend respondent’s transitional or *IPA* planning schemes
EVIDENCE – EXPERT EVIDENCE – whether town planner employed by a party may give evidence as an ‘expert’ – weight to be given to evidence – rules of court
Local Government Act 1990, ss 5.1(3), (6) and (6A)
Integrated Planning Act 1997, ss 4.1.52(2)(b)
Uniform Civil Procedure Rules, rr 425, 426 and 428

Planning and Environment Court Rules 1999, r 23(5)
Planning and Environment Court Practice Direction 1 of 2006

Cases considered:

Aitchison v Leichhardt Municipal Council [2002] NSWLEC 226

Collins Thomson v Clayton [2002] NSWSA 366

Field v Leeds City Council [1999] All ER (D) 1406

Grant v Pine Rivers Shire Council (no 2) [2006] QPELR 112

Smith v Maroochy Shire Council [2004] QPELR 358

Wruck v Redland Shire Council [2007] QPEC 096

COUNSEL: M Williamson for appellant
M Connor, solicitor, for respondent

SOLICITORS: IPA Law for appellant
Connor O'Meara for respondent

- [1] Council has refused the appellant's application to subdivide a property at 9-19 Corfield Street, Point Vernon into thirteen residential allotments. The application was code assessable. The principal reason for Council's refusal, and the central issue in this appeal, concerns the way the application addresses pedestrian and traffic movement in the area. Council's position is that the proposal does not do enough to respect the clear provisions of the planning scheme where it addresses these matters (either in its form at the time of the application, or now) and does not accord with accepted town planning practice.
- [2] The subdivisional plan propounded by the appellant at the hearing was different from that which accompanied its original application. The changes can be summarised as ones which involve the dedication of land for the purpose of a future road reserve adjoining a street to the west, Jay Street, and on a small section adjoining Corfield Street, in the east. As a preliminary matter the appellant contended these changes were 'minor' for the purposes of s 4.1.52(2)(b) of the *Integrated Planning Act 1997* (IPA). Council did not oppose an order to that effect.
- [3] The changes are internal to the subdivision and do not materially affect the surrounding land owners or properties. If in the future land owners to the south apply to subdivide, the dedications of small pieces of the appellant's land would facilitate an access road between Jay and Corfield Streets across their properties. On any view, these alterations are relatively insignificant in terms of scale and degree. They affect no marked change to what remains a small residential subdivision. I am satisfied they reasonably qualify as minor, as that word is used in the section¹.
- [4] The only evidence in the case was from town planners: Mr Ryter for the appellant, and Mr MacNee for the respondent Council. Mr MacNee prepared a report (tendered as Exhibit 4) in the form and style of an independent town planner retained by a party to a proceeding in this Court but he is, in truth, the Manager,

¹ See, generally, *Grant v Pine Rivers Shire Council (no 2)* [2006] QPELR 112

Planning Services for Council and was its delegate for the purpose of assessing and deciding the appellant's development application.

- [5] I do not think his report can, in the circumstances, be given the weight which would ordinarily attach to evidence from an independent town planner retained in the ordinary course by a party to an appeal. An independent expert witness' primary duty is to the Court, and the expert is subject to the particular strictures and requirements of the *UCPR*, and the rules of this Court and its Practice Directions². The conclusion that less weight should attach to Mr MacNee's 'report' is not a reflection upon his experience or competence as a planner; rather, it is the logical product of the observation that his acknowledged position as Council's decision maker is not consonant with the independence expected of an expert who qualifies in that guise under the Rules.
- [6] To be fair, the appellant did not object to his evidence, and I did not understand Council to advance his report on the basis he is 'independent' of the proceeding. Instead, Mr MacNee's views are, I accept, those of an experienced planner showing why he decided to refuse the application. Exhibit 4 provides, in effect, the particulars and an explanation and justification for that conclusion.
- [7] In any event even if that were not the case and his report received the same weight as Mr Ryter's I would, for reasons which follow, prefer the views of the latter (at least, in respect of the question whether the appellant's new proposal accords with accepted town planning principles).
- [8] The parcel the subject of the appeal contains 1.047 hectares. It runs between Corfield, and Jay Streets at Point Vernon, at the northern end of the conurbation comprising the city of Hervey Bay. Jay Street ends in a cul-de-sac, as do a number of other streets in the immediate vicinity. Two relevant parcels lie to the south of the subject land: lot 1, to the south east, has access to Corfield Street; and, lot 20, to the south west, which has access to Jay Street and has recently been developed with the construction of a very large house located centrally upon the allotment. The town planners agree that neither Lot 1 nor Lot 20 can, presently, be reconfigured for conventional subdivision³ because neither has sufficient road frontage to provide a dedicated road.
- [9] The appellant's amended proposal involves vehicle access to the thirteen allotments by a single road running west from Corfield Street with a 'T' shaped cul-de-sac at the western end. An 'L' shaped pedestrian pathway at that end is also proposed to enable pedestrian movement from the cul-de-sac through to Jay Street, and to the west.
- [10] The amended plan also shows small parcels dedicated for road purposes on parts of the subject site. These would allow road access on lots 1, and 20. Indeed, the proposed plan goes so far as to show the actual outline of a new road on those lots,. It indicates where a road might be located, in a way which would provide vehicle,

² See *Planning and Environment Court Rules* 1999, r 23(5); *Uniform Civil Procedure Rules*, rr 425, 426 and 428; *Planning and Environment Court Practice Direction 1 of 2006*, paras 15 – 17; *Field v Leeds City Council* [1999] All ER (D) 1406; *Aitchison v Leichhardt Municipal Council* [2002] NSWLEC 226; and, *Collins Thomson v Clayton* [2002] NSWSA 366

³ In accordance with Table 4.4.1 of the superseded Scheme

pedestrian and bicycle access between Corfield and Jay Streets, across lots 1 and 20, if proposals for their reconfiguration ever arise.

- [11] Ultimately, two questions came to predominate: first, whether the road within the proposed subdivision should be continued through into the cul-de-sac at the end of Jay Street; and, secondly if a road is not required, whether the pedestrian access is appropriate.
- [12] The planners agree that, as general town planning principles, the greater the degree of permeability provided by a road and pedestrian network in a particular locality, the better; and, that each development should contribute to an acceptable road/pedestrian network and an acceptable subdivisional pattern within its locale. This Court has recognised that connections – ‘connectivity’ – between like developments are a desirable incidence of good town planning⁴.
- [13] For reasons discussed earlier I am inclined, in respect of the question of general planning principles, to attach more weight to the opinions of Mr Ryter as an independent expert than those of the planner employed by the respondent Council. A further reason is that Mr Ryter’s views have the more persuasive internal logic. It is plainly relevant that, as he observed, the proposed development constitutes ‘infill’ in a well established residential area, and the issue is not being considered in the context of a future or emerging community areas where planning for connectivity would ordinarily take on a greater degree of significance.
- [14] I am also satisfied that, as Mr Ryter concluded, the proposed reconfiguration does make appropriate provision for connectivity to the surrounding areas. It provides a pedestrian link through the subject land and, also, land which could be used for road purposes which might, later, facilitate the development of lots 1 and 20 to the south. I did not understand Mr MacNee to demur from the benefit of providing a pedestrian link but, rather, to express dissatisfaction with its form, which he thought was unsafe.
- [15] Certain parts of the transitional planning scheme are also relevant to these issues. The scheme focuses upon the design and construction of new development in a manner which encourages the logical co-ordination of traffic flows, pedestrian spaces and open space systems with adjoining and surrounding streets, and properties⁵. It sought, also, to ensure the operation and use of transport facilities and designs which are economically efficient in the sense that they minimise the ongoing costs of road maintenance, and the like.
- [16] The development itself does not require the provision of a through road to facilitate the subdivision. Council has not alleged there are any traffic engineering reasons (in terms of access, connectivity or safety) which tell against approval in the proposed form. Although it is not determinative, the uncontested evidence of residents of Jay Street, opposing a road connection, is persuasive. Plainly they enjoy the peace and quiet and other advantages of their present cul-de-sac. Obviously they do not anticipate any disadvantage if they remain without a direct road connection to the east.

⁴ *Smith v Maroochy Shire Council* [2004] QPELR 358; *Wruck v Redland Shire Council* [2007] QPEC 096

⁵ Strategic Plan, Objective 1.2.16.8

- [17] Nor, it seems to me, will the proposal prejudice development of Lots 1 and 20. The dedication of land for a road which might ultimately be used by owners who wish to subdivide those allotments is, in fact, eminently sensible and accords with the desires expressed in the planning scheme. It is also relevant that the likelihood of some reconfiguration of Lot 20, in particular, in the foreseeable future is highly remote. The new dwelling on that property is, I accept, very large and expensive and is unlikely to be demolished in the short term.
- [18] Despite Mr MacNee's evidence about pedestrian movement I was not persuaded that the subject parcel is a vital or important piece in terms of connectivity in Point Vernon. There is, certainly, a bus route nearby but it is readily accessible in both directions from the proposed subdivision. The Strategic Plan, which forms part of the now superseded transitional planning scheme, looks to a logical flow of pedestrian movement between existing, and future development. The proposal, it seems to me, meets that requirement as well.
- [19] The current and former planning schemes have to be considered in light of a number of realities. Firstly, this particular parcel is not an important piece in the puzzle in terms of connectivity for the wider area. Secondly, the proposal meets the relevant requirements of the *IPA* scheme – the proposal does nothing to inhibit orderly and efficient future development; does not prejudice the development of adjoining land; achieves internal and external accessibility; and, allows for the safe and efficient movement of pedestrians and cyclists⁶.
- [20] In respect of the latter proposition Mr MacNee referred to the model *Community Protection Through Environmental Design Code* (CPTED)⁷ which emphasises the importance of '*highly connected pedestrian routes enabling safe access*' and the avoidance of '*... laneways that pass between the side fences of residential allotments at the ends of culs-de-sac as these form movement predictors that are difficult to make safe*'. The particular pedestrian access proposed here is, however, quite wide, and will be overlooked by three nearby properties. There is simply no reason to think it will constitute, or create, a danger. Any possible risk can be reduced by conditions requiring, for example, the installation of a mirror at the right angle within the pedestrian walkway.
- [21] The evidence is also persuasive that there is no traffic engineering imperative that would dictate that a through road is necessary for the proposed development. The possible provision of an additional traffic route between Corfield and Jay Streets through and across Lots 1 and 20 to the south is a not inappropriate way of 'unlocking' those properties for further subdivision, should that be desired at some later time. Such a future road would provide vehicular access for allotments within those subdivisions to both the east and the west.
- [22] Mr MacNee had some concerns about the desirability of this possible future road. In particular, he was concerned about the risk of unnecessary duplication. The evidence showed, I am satisfied, that those concerns were not compelling, insurmountable or major and any minor disadvantages could largely, or sufficiently,

⁶ Reconfiguration of Lot Code, PCs 4, 9 and 12; Structure Plan Code, PC 1; Works, Services and Infrastructure Code PC 7

⁷ Exhibit 6

be overcome by appropriate design measures if and when it comes to be constructed.

[23] These conclusions dictate that the appeal should be allowed.