[2007] QPEC 084

PLANNING AND ENVIRONMENT COURT

JUDGE BRABAZON QC

P and E Appeal No 681 of 2007
P and E Appeal No 682 of 2007
P and E Appeal No 683 of 2007

BAROOGA PROJECTS (INVESTMENTS) PTY LTD — Appellant

and

REDCLIFFE CITY COUNCIL — Respondent

BRISBANE

..DATE 13/09/2007

JUDGMENT

HIS HONOUR: This hearing deals with three appeals against decisions made by the Redcliffe City Council. The Council decided to refuse three development applications which involve the development of multiple dwellings, I think only because there were three titles, lots 93, 94 and 95. There were three applications and three decisions but, effectively, it is the one project.

After the refusal, negotiations between Barooga Projects and Council have resulted in changes which the Council is now content to accept subject, necessarily, to the Court's decision that the changes are "minor changes". That is the issue here, whether or not they are minor.

I should say that I am grateful for Mr Cochrane's submissions which comprehensively point out the contemporary ways in which this Court has approached questions of this kind. It will be remembered that section 4.1.52(2)(b) of IPA says that in a situation like this where the Council has received an application and refused it:

> "The Court must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change."

Not surprisingly, perhaps, there are now many decisions of this Court dealing with the issue of "minor change". One thing that has influenced the cases from time to time is a definition of "minor change" in a different context, that is, in Schedule 10 of IPA. There, minor change is defined by

reference to three things that would not require any activities such as referral to additional concurrence agencies, or to cause development previously requiring only code assessment to require impact assessment, or where impact assessment is required be likely, in assessment manager's opinion, to cause a person to make a properly made submission objecting to the proposal, if the circumstances allowed.

It is now really apparent that, fundamentally, one must pay attention to the words themselves in this section as this is not literally an occasion on which the application of Schedule 10 is called for.

It must be said that the Judges of this Court have tried to take a functional view of the idea of "minor change", that is to look behind what may superficially seem to be a substantial change to see whether that is, in truth, the case. For example, it needs to be recognised that the power to modify an application is a beneficial one, and that the town planning process itself would be greatly narrowed and made more difficult if appropriate changes could not be made. For example see Judge Rackemann's remarks in Heilbron and Partners -v- Gold Coast City Council [2005] QPELR 386 at 392.

Judge Wilson of this Court in several decisions has recently collected together some of the more important themes in these cases. For example, see the decisions in Studio Tekton Pty Ltd -v- Redland Shire Council [2006] QPEC 107, Grant -v- Pine

Rivers Shire Council [2006] QPELR 112 at 116, and Parcel One Pty Ltd -v- Ipswich City Council [2007] QPEC 033.

One thing he did point out in Studio Tekton, was that the Court in being careful in its consideration of what constitutes a minor change would take into account changes which both attempt to ameliorate impacts and those which are intended to improve a design. In that context, he points out an occasional irony, as he called it - that is, a significant alteration to a proposal to make it more acceptable to submitters but simply because of its scale exposed itself to categorisation as a major rather than minor change.

In the Parcel One decision he emphasised that which is now accepted, that the phrase "only a minor change" is meant to be:

> "...a simple and straightforward one which should be construed principally by reference to matters of scale and degree, broadly and fairly."

He went on to say, and I agree, that:

> "It is attractive to adopt a generous approach to the interpretation of the limits within which an application like this may be changed."

He did go on to say that:

> "The statutory requirement had to be served and that some assistance can be gained from looking at Schedule 10 of IPA."

He also pointed out that:

> "If changes are beneficial or ameliorative, it may be of assistance and that it would also be helpful to see exactly what it was that was changed, that is to say whether it be a salient or incidental feature of the original proposal."

It is also probably necessary in cases of this sort to take into account whether or not there are, or are likely to be, submitters and whether or not those who, as happens in many cases, were opposed to a project become supportive of it once changes are made to their satisfaction. It might be noted in this case there were no submitters.

Having said all that, it is necessary to turn to the changes that have been made here. The three lots, as I say, have been treated separately and one might note the changes which are relatively similar in each case. For example, in lot 93 the number of units, 38, has been reduced to 26. The gross floor area has gone down from around 4000 square metres to around 3000 square metres. The site coverage has been reduced from 35 per cent to some 26 per cent. All that has been achieved largely by removing the third story leaving it a 2-story building. The setbacks are larger. The appearance, at least according to Mr Cochrane's summary, is different. The original proposal, which the Council considered, was rendered masonry with Colorbond roofing whereas now it will be blockwork with Colorbond roofing.

I might say that his note attached to his submissions indicated face brick but as I understand the plans, they say it will be blockwork.

The number of carparks has been reduced from 38 to 26 and with respect to visitors from 15 to 9. The traffic arrangements have been altered somewhat from a one-way entry and one-way exit to a single entry and exit for the lot 93 units.

The changes to lot 94 and 95 are substantially along the same pattern. Overall, it can be seen that each of the structures will be of two storys rather than three. The original proposal for 86 units has become 59. I have mentioned the changes to the outside appearance with regard to the masonry or blockwork.

The traffic changes apply to each of the three lots. Before there was one entrance to the whole project and one exit from the whole project. Now there are four separate entrances or exits over the footpath, that is to say one in/one out and two which combine an in/out arrangement.

A look at the floor plan will show that the layout of the units is quite different. For example, the garages, some of which were located against the rear boundary, have all been moved from that position.

It is necessary to look at the elevations. For example, to take one of the three, elevations to lot 93 can be compared to

the old elevations. It can be seen that the style of the building and the treatment of windows and shape of the roof is different in each case. The north elevations, lot 93, presents as a substantial building which has become about half that width in the new elevation. With regard to the east elevation, before one looked at three substantial buildings fairly close together with relatively flat roofs. They have now become four buildings with steeper roofs.

The west elevation is also different. There are four buildings whereas before one saw three. In fact, the truth of the matter is that anyone looking at these plans would be hard pressed to think that it was the same project.

The fact of the matter is the project has been entirely reworked to what would be, I imagine, a much more satisfactory result to the Council's officers. However, if I may say so, it is outside the range where the Court can agree that it is a minor change.

I also wish to say that in my experience in recent times there have been a number of applications of this kind where it is apparent that the envelope is being pushed to its absolute limit. In this case if the application were acceded to that limit would be exceeded. In my view, it is simply impossible to regard this as a minor change, bearing in mind the sort of differences that I have mentioned - in particular, the appearance of the buildings to anyone who might be interested and think of making an objection to it.

It does seem apparent, and I should say I have heard this suggested in other quarters, that an amendment to the legislation is necessary. There is nothing more I can say about that today.

The application is refused.

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