

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Bullock & Ors v Maroochy Shire Council & Anor* [2007]
QPEC 089

PARTIES: **BULLOCK & ORS**
Appellants

v

MAROOCHY SHIRE COUNCIL
Respondent

and

ARIA PROPERTY GROUP PTY LTD
(ACN 104 265 652)
Co-Respondent

FILE NO/S: Appeal No. BD 3620 of 2006

DIVISION: Planning & Environment

PROCEEDING: Appeal

ORIGINATING
COURT: Brisbane

DELIVERED ON: 30 October 2007

DELIVERED AT: Brisbane

HEARING DATE:

JUDGE: Griffin SC DCJ

ORDER: **Appeal Allowed**

CATCHWORDS: Planning Schemes – Interpretation; Integrated Development –
meaning of; IPA – sufficient grounds – meaning of.

COUNSEL: Mr S P Fynes-Clinton (Appellants/Applicants)
Mr C L Hughes SC, with Ms S Holland (Respondent)
Mr G J Gibson QC, with Mr Williamson (Co-Respondent)

SOLICITORS: Anderssen Lawyers (Appellants/Applicants)
Shire Solicitor (Respondent)
IPA Law (Co-Respondent)

- [1] The appellants are submitters in this appeal challenging the decision of the respondent Council (the Council) granting conditional approval for a material change of use (multiple dwelling units – 16 one bedroom units and 24 two bedroom units) on land situated at 17-21 Douglas Street, Mooloolaba (the subject land). The onus is upon the co-respondent to support the approval. The development application which was approved was for 40 multiple dwelling units in a building 25 metres high and comprising eight storeys.
- [2] The processes by which the approval was granted, including public notification, are regular and not contentious in this appeal. The approval was granted by the Council on 27 October 2006.

The issues in this appeal

- [3] Central to the appeal is the construction of the Planning Scheme – MP2000 and in particular, to the subject land which is in Precinct 5 (Mooloolaba North multi-storey residential of Planning Area 4 (Mooloolaba)). The ultimate resolution of the appeal therefore depends upon the proper construction of MP2000 and in particular as it applies to Precinct 5 and the co-relative issue as to whether the proposed development is consistent with the reasonable expectations of the community as to the type of development likely to be permitted within this locality, having, of course, regard to the provisions of the relevant planning instruments.
- [4] The development as approved does not conform with a number of aspects of “acceptable solutions” set out in the Planning Scheme and is therefore “impact

assessable". Such impact assessable development while not necessarily having to conform to any particular acceptable solution in the Planning Scheme must nonetheless, in my view, produce a result which is qualitatively similar to that contemplated by a fair reading of the entire Planning Scheme.

The development site

- [5] The subject land consists of three separate lots between 17 and 21 Douglas Street, Mooloolaba with a total area of 1,518m² located on the eastern side of Douglas Street, one street removed from the Mooloolaba Esplanade. The land presently contains three old and dilapidated residential dwellings. In the immediate vicinity to the south of the subject land is a four storey multiple dwelling residential buildings (Admirals Court) and to the north of the subject site are two four storey multiple dwelling residential buildings (Bay View and Harbour View). There is a six storey multiple dwelling residential dwelling to the east behind the subject site (Oxygen). Oxygen itself, whilst approved by Council, was apparently not the subject of scrutiny in this court. Its mere approval (as with the approval of other relatively new developments), whilst relevant as to the fact that these buildings both exist in the environs of the subject site and have been approved, cannot, in my view, form any basis for the promotion of an argument that the subject development was properly authorised in accordance with the relevant planning documents.
- [6] According to the way in which the appeal was argued by all parties, there are a number of evidentiary matters which seem to be largely uncontentious. The building is an attractively designed modern dwelling complex, which is well

articulated in both plan and elevation and will deliver an appropriate level of amenity for those residing in the complex. It takes advantage of its position and is conveniently located. The land use itself is one which is a preferred land use in the relevant planning area and precinct in terms of the type of development. In the immediate vicinity, the Council has approved buildings which are above the height of the 15 metres in circumstances where the development is not integrated.

- [7] Although an issue arose of some importance during evidence in the hearing of this appeal, I am satisfied that the site is on “land south of the Mooloolaba Esplanade”¹. This issue has some fundamental importance in the overall construction of the Planning Scheme and this and other aspects of it will be referred to below.
- [8] I should record also that a site inspection was carried out in the presence of counsel and which included inspection of the subject site and the immediate environs of that site.

The Planning Scheme, its Provisions and Operation

- [9] The planning scheme, Maroochy Plan 2000 is typical of planning schemes in that it commences with general statements of intent and moves to specifics in terms of its operation. Whilst the general statements of intent are helpful in a contextual sense, the real operation and proper construction of the planning instruments as they relate to this appeal are to be found in the more specific

¹ See Maroochy Plan 2000, Exhibit 20, p114.

provisions in relation to Planning Area 4 – Mooloolaba and specifically Precinct 5 – Mooloolaba North in which this development site is situated.

[10] At 3.4.2 in the Vision Statement the intention is that: -

“Mooloolaba will be the pre-eminent coastal tourist destination on the Sunshine Coast both in terms of the natural and built environment. It will be a people orientated place which is focussed on the Esplanade, sea and river and in harmony with its sub-tropical setting. A diverse range of services and activities will be provided to residents, workers and visitors...

(2) This means that: ...

(b) new development will encourage interaction between people and the place and will promote a sense of community which is in harmony with the environment. The evolution of Mooloolaba will be dependant upon attracting development which consolidates the existing trade, service and economic base...

(d) critical to the success of achieving this vision, are the principles of continuity, connectivity, permeability and legibility which collectively form the cornerstone for liveability in Mooloolaba.”

One of the key character elements at 3.4.3 as an ingredient of (2) design intent is that: -

“Mooloolaba, especially the esplanade is to evolve into a people- oriented place, focussed on the sea and in harmony with its sub tropical setting. It will provide a diverse range of services and activities in attractive and responsive settings which fulfil the needs of both the local and regional community. Environmental values and access and movement are stressed in these general provisions.

Under the more specific provisions of Mooloolaba North the intent is described as one which is: -

“The primary purpose of the precinct is to provide for medium-high density residential and tourist accommodation, with a small mix of other (tourist and business) uses with a high level of amenity.”

Of some importance is the provision related to preferred and acceptable uses: -

“Preferred uses within this precinct are those referred to in the Table of Development Assessment (refer vol 1) for the multi-storey residential precinct class where on land south of the Mooloolaba esplanade.”

More specific provisions follow which relate to Preferred Maximum Density and maximum building height. I will return to a consideration of these below.

- [11] The preferred and acceptable “uses” in the precinct therefore appear to be those referred to in the Table of Development in Volume One of the Planning Scheme. That relevant Table of Development refers to a “purpose” and does not make use of the term “use”. Much was made of this by the appellants in submissions. It is clear enough however that the “use” definitions set out in the scheme are described in a way that makes “use” one for a particular “purpose”. So much is clear for example by reference to the definition of “residential use” which means: -

“use for any of the following *purposes* or use of any other premises for dwelling *purposes*.”

One of the purposes which follow the definition for “residential use” includes multiple dwelling units. The preferred and acceptable uses in the precinct therefore are those which appear in the purpose of the Table of Development which relevantly includes multiple dwelling units. There appears to be no contest that a multiple dwelling unit is a preferred and acceptable use for Precinct 5.

- [12] Two further matters are relevant to note. The first is that, according to the scheme, preferred maximum density is a function of its area in square metres

and the preferred maximum height development in the precinct is four storeys and fifteen metres. Central as this aspect is to the appeal it is helpful to set out this “bonus provision” as it has been called, in full: -

“Provided that Council may give favourable consideration to an application for impact assessable development in relation to an integrated development on a site south of the esplanade as follows, where the development has regard to the Precinct intent preferred and acceptable uses and landscape and built form of this precinct and does not exceed the maximum building height density and site cover in table 4.5.”

Table 4.5 provides: -

Maximum Acceptable Building Height	Maximum Acceptable Site Area per dwelling for calculating the DUF	Maximum Acceptable Site Cover
4 storeys (but not more than 15m)	75	27.5%
6 storeys (but not more than 25m)	50	25%

- [13] The development in question is impact assessable. It is therefore not a requirement that the development in all its various aspects be able to be “fitted in” or “pigeon-holed” into a strictly self assessable regime. However I accept the submission that ultimately the development viewed as a whole must demonstrate a qualitatively sympathetic result which conforms with and is not contrary to, the scheme viewed as a whole.

Dealing with the issue of conflict

- [14] Planning schemes should be read broadly and sensibly.² Conflict may well not be demonstrated even though specific or individual provisions apparently

² See *Westfield Management Ltd v Pine Rivers Shire Council* [2004] QPELR 1 at para 18 per Britton SC DCJ.

viewed alone may be contradictory with other provisions of the scheme. The scheme itself must be viewed broadly and cohesively to obtain its true meaning and intent.

[15] To discover whether there is a conflict (which is the argument at the heart of this appeal) it will be necessary to plunge into the murky waters of various planning provisions.

[16] At the outset it is, I accept, largely uncontested that the relevant provisions as to height should be viewed in terms of the height described in terms of metres and not merely by reference to the number of storeys of the particular building.³

[17] The Precinct 5 provisions call up other provisions of the planning scheme dealing with “preferred and acceptable uses” and those provisions themselves in a circular way refer back to the Precinct 5 provisions so that one may determine what those provisions mean specifically in the context of a development in Precinct 5.

[18] A starting point is the Statement of Intent for Precinct 5 which provides: -

“The primary purpose of the precinct is to provide for medium-high density residential and tourist accommodation, with a small mix of other (tourist and business) uses with a high level of amenity.”

“Preferred and acceptable uses” is described in the following way: -

“Preferred uses within this precinct are those referred to in the Table of Development Assessment (refer vol 1) for the multi-storey residential precinct class where on land south of the Mooloolaba esplanade.”

³ See for example the evidence of Jackson T90; van Pelt T155

There is no doubt that the subject land is on “land south of the Mooloolaba esplanade” i.e. the expression “land south of the Mooloolaba esplanade” appears to me to bear the same meaning throughout all Precinct 5 provisions.

[19] The next step is to undertake an identification of the “preferred” uses in Precinct 5. The Table of Development assessment for Multi-storey buildings in the Residential Precinct Class in Volume One of the planning scheme promotes the notion of a “preferred use” for the subject site by reference to a development of units having a maximum building height of fifteen metres but not more than four storeys and containing twelve two bedroom units.

[20] The Table attempts to identify and specify a range of *uses*, the commencement of which will be self assessable or code assessable development and which are “new uses” by reference to those provisions which are identified by Precinct 5 provisions as the “preferred uses” in the precinct. The next step to be taken is to return to Precinct 5 provisions disclosing that a “new use” is one which occurs as a result of development for the purpose of multiple dwelling units: -

“In premises having a height and dwelling factor of not more than the maximum provided for the particular precinct.”⁴

[21] Precinct 5 states the maximum building height as “4 storeys but not more than 15 metres”.

[22] There is no equivalent statement in terms of “maximum dwelling unit factor”. However the preferred maximum density table by calculating site area of 1518

⁴ Emphasis added.

square metres and dividing that by the prescribed figure of 127(which represents square metres of site area per unit development) produces approximately twelve two bedroom units⁵. This therefore sets the parameters for the development in terms of scale and density which is the “preferred” use in Precinct 5.

- [23] One emerges from the depths of the planning provisions with a tolerably clear understanding of the scheme as it relates to this development to the effect: that the parameters described in table 4.5 (above) are the parameters which relate to impact assessable development. “Uses” described in the Table of Development assessment are “uses” and consistent with such uses which flow from the carrying out of self-assessable development.

The bonus provision

- [24] It is worthwhile repeating the phraseology which has been referred to by a number of witnesses as a ‘bonus provision’: -

“Provided that Counsel may give favourable consideration to an application for impact assessable development in relation to an *integrated development* on a site south of the esplanade as follows, where the development has regard to the Precinct intent preferred and acceptable uses and landscape and built form of this precinct and does not exceed the maximum building height density and site cover in table 4.5.”

Subject to what might be described as the outcomes of impact assessment, the Council may give favourable consideration to a development that is not part of the preferred and acceptable land uses if that is a development which is integrated development. Integrated is defined in the scheme as follows: -

⁵ Appellants’ calculation which I accept as correct

“Integrated’ where applied to the development of premises, means premises which combine different uses and/or buildings that are planned, designed and built (either at one time or staged) to incorporate common and/or related sighting, design and/or construction elements;”

- [25] The meaning to my mind is tolerably clear. An increase in height from that fundamentally contemplated as fifteen metres may be considered as an appropriate ingredient in a development if that development is “integrated” as it is defined in the scheme.⁶
- [26] The proposed development is therefore not a development which is a preferred or acceptable use within Precinct 5 nor a development which falls within the proviso of being an integrated development.
- [27] Considerable attention has been directed in submissions to the notion and effect of this “bonus provision” although I note that the Council has distanced itself from that particular expression.
- [28] The effect of the so-called “bonus provision” is that it provides for extra density of residential development up to 27.5% and the height restriction is increased to not more than 25 metres (although according to table 4.5 such height increase is restricted to maximum site cover of 25%). In this case the development with a height of not more than 25 metres would provide 40 units. The proviso however stipulates that these ingredients will come into play only in circumstances where the development is an integrated one. It appears to me that the “reward” for increased density and height is available only in circumstances where the

⁶ MP 2000 Vol 1 p 14.

development is integrated i.e. where there is some community benefit which balances the extra impact of both height and density.

Conclusion as to conflict

[29] Specifically in my view acceptable measure A2 in element 2 (site, size and density) refers to a density which equates to twelve two bedroom units and acceptable measure A1.1 in element 4 (building envelope) refers to a height of fifteen metres (but not more than four storeys). By reference to table 4 the matters set out therein are boundaries which regulate impact assessable development. Furthermore in Acceptable Measure A1.1 in element 4, the phrase “buildings have a height of not more than that stated are *preferred* for the relevant precinct” is used. Although the word ‘preferred’ is used, reading the scheme as a whole, an upper limit of fifteen metres (but not more than four storeys) for a development which is not integrated is stipulated.

[30] The development is in my view in fundamental and substantial conflict with the planning provisions for Precinct 5. It is a development which will not lead to a preferred and acceptable use as contemplated by the plan. Furthermore the development is not an integrated one. The so-called “bonus” provision will be rendered meaningless if emphasis is not given to the stipulation that a height of 25 metres will be possible only if the development is an integrated one. The conflict is substantial. It is illogical to argue that the proposed development would have less impact than an integrated one in its particular situation in Douglas Street and should be approved in its non-integrated form. In fact there is evidence which I accept that there are some limited forms of integrated

development which would be appropriate for the particular development in its situation for example the provision of a small “fitness studio”.⁷

A consideration of the issue of conflict

[31] The principles to be applied to the construction of planning schemes may be summarised as follows: -

- (a) The scheme should be construed broadly rather than pedantically and with a sensible practical approach.
- (b) The scheme should be construed as a whole.
- (c) The scheme should be construed in a way that best achieves the apparent purpose and objects of the scheme. Planning schemes have the force of law but are not constructed with the precision of an Act of Parliament.
- (d) A conflict of itself may not disentitle a particular proposal.

[32] The appellants in this case allege substantial conflict with the planning scheme. If such a conflict exists it must be plainly identified⁸ and further, regard must be had to the nature and extent of any conflict.⁹

[33] The analytical process of determining and considering the question of conflict was discussed in *Stappen v Brisbane City Council*¹⁰: -

“The exercise involves discerning from the verbiage of the scheme the degree of importance it attaches to compliance with particular principles requirements or codes and then, analysis of the particular proposal within that regime.

⁷ See evidence of KL Stephens T193

⁸ See *Fitzgibbons Hotel Pty Ltd v Logan City Council* (1997) QPELR 208 at 212J.

⁹ *Woolworths Limited v Maryborough City Council & Anor* (2005) QCA 262 at para 25.

¹⁰ (2005) QPEC 003 at para 31 per Wilson SC DCJ.

This is another way of expressing the test proposed by Atkinson J in *Weightman* which requires an identification of the nature and extent of any conflict and if it arises an attempt to identify any planning grounds which might be relevant to it and finally whether those planning grounds outweigh the degree of conflict.”

[34] To some extent that statement has been overtaken by an amendment to IPA in March 2006. Section 3.5.14(2) of IPA now provides that: -

“In the circumstances an application must demonstrate sufficient *grounds*.”

“Grounds” in relation to section 3.5.14 is defined in schedule 10 as follows: -

“1. Grounds means matters of public interest;
2. Grounds does not include the personal circumstances of an applicant, owner or interested party.”

[35] In my view the effect of this change has brought about a widening of the notion of what constitutes “grounds” and is no longer limited merely to “planning issues” but now has wider reference to the purpose and objects of IPA.¹¹

[36] Applying those principles to the operation of the scheme as I apprehend it, there is, I find, a conflict which is substantial between the proposed development and the operation of the planning scheme viewed as a whole. This conflict is a conflict in terms of the proposed height of the building (25 metres) and to a lesser extent the building site coverage (30%) although in my view the site cover issue may well, alone, not be regarded as substantial conflict.

[37] The height of the building in my view, viewed independently, demonstrates a substantial conflict with the scheme.

¹¹ See ss 1.2.1, 1.2.2 & 1.2.3 of IPA.

The development

Traffic

- [38] On the evidence before me I do not regard traffic issues relating to the proposed development as having any potential to significantly impact on the amenity of the existing residential community.¹²

Site cover

- [39] Some controversy has attended the issue of site cover, the appellants relying upon the evidence of the witness Jackson and on calculations by reference to the definition of “site cover”:

“Site cover means the proportion of the site covered by buildings, fixed structures or outdoor storage areas but does not include unroofed car parking areas; where the area covered by buildings or other structures is measured to coincide with the outer limits of the building or structure that is above the level of the adjoining land.” [MP 2000¹³]

It is argued by the appellants that a site cover of fifty percent is a more accurate calculation by applying that definition to Jackson’s evidence on the basis that the proportion of the site covered by buildings or fixed structures is substantially greater than the “building footprint” of the proposed tower itself. It is contended that a calculation by reference to the plans¹⁴ reveals that additional site cover is a substantial proportion of the building footprint site cover giving that calculation of fifty percent by taking into account car parking areas that are said to be “above

¹² For example the report of Burgess described potential traffic increase as “infinitesimally small” see exhibit 6 p 7.

¹³ Vol 1 p 18.

¹⁴ At p 39 of exhibit 3.

the level of adjoining ground” and should therefore be regarded as part of the calculation which gives the figure of fifty percent.

[40] This issue may be put to rest immediately. At pre-trial collaborations amongst the experts, it was agreed that the site cover was approximately thirty percent. This is not, as the appellants assert, an error which can later be corrected by reference to later evidence. The parties in the pre-trial procedures contemplated by the Act agreed that the site cover was approximately thirty percent. Such an agreement should be treated in the manner of pleadings and in my view should not be departed from. I therefore regard the evidence as limiting site cover to approximately thirty percent.

[41] There are no other issues apart from those to which I have referred (and including landscaping issues) which can be said to give rise to conflict with the scheme.

Sufficient grounds

[42] Although I have concluded that there is a substantial conflict with the scheme in terms of the height issue, the application may still be approved where it is demonstrated that there are sufficient grounds to justify approval despite that conflict. The co-respondent has identified “planning grounds” upon which it relies by letter dated 8 May 2007.¹⁵ The Council has also identified grounds of reliance by letter dated 11 May 2007.¹⁶

¹⁵ Exhibit 1 p 27-28.

¹⁶ Exhibit 1A.

[43] Accordingly, not only must a conflict be identified but the court is required to consider the character and extent of that conflict.

[44] I will set out in summary form the contentions of both parties for justification.

[45] The co-respondent contends: -

- (i) the proposed development is an attractive modern building which is conveniently located to be public facilities and is designed to provide a high level of amenity for future occupants of the development;
- (ii) the provisions of planning area number four – Mooloolaba precinct five have been overtaken by events to the extent that those provisions of the scheme seek to regulate the high density height density and site cover of multi-storey development in the precinct but have now been overtaken by deliberate planning decisions of the Council to approve development which exceeds expressions of preferred development outcomes with respect to building height, density and site cover in particular the Council has approved the developments known as ‘Oxygen’ and ‘Coco’;
- (iii) The proposed development is consistent with the emerging character of the area which departs from the planning intent of precinct five. The proposed development complies with detailed performance provisions of the planning scheme detailing building height, site cover and density.

The Council relies on the following grounds for justification: -

- (i) The proposal offers an attractive addition to the built form of the locality;
- (ii) The proposal contributes to achieving the planning intent of Mooloolaba being the major tourist node and this precinct providing for medium-high density residential and tourist accommodation;
- (iii) The proposal appropriately takes advantage of but does not exceed the maximum high density residential and tourist accommodation;
- (iv) The proposal appropriately takes advantage of but does not exceed the maximum height limit anticipated for this locality;
- (v) The additional intensity assists to achieve the state's planning intentions for infill developments to avoid urban sprawl;
- (vi) The increased number of storeys and residential density are products of this approach to the building height where the resultant building bulk is the same as if a lesser number of storeys were built to the same building height;
- (vii) Amenity impacts created by the proposal are unlikely to be any different to those of a fully compliant building; and
- (viii) The intended future character of the locality is for the public benefit determined by the planning scheme to include a differentiation and from one end of Douglas Street to the other.

- [46] The notion of “sufficient grounds” must include an assessment both of any relevant planning grounds together with a consideration of matters that confer a benefit on the public generally or at least on a relevant sector of the public.¹⁷ On the other hand benefit or personal advantage to the developer or other interested part must be disregarded. There is no doubt that the building is an attractive, well articulated proposal.
- [47] In relation to the approvals for the buildings ‘Coco’ and ‘Oxygen’ the fact that the Council has made such decisions in the past is evidence only of the fact that such buildings exist and have been approved. Their presence may not be used as support for the proposal or considered as supportable by reference to the scheme as it existed when those decisions were made. There is no evidence to suggest that the approvals for those buildings were subject to the scrutiny of the appellants’ process in this Court.
- [48] The planning scheme is relatively recent, having been made in 2000 and most recently amended in 2006. I am not satisfied that the mere assertion that two buildings ‘Coco’ and ‘Oxygen’ which exist in the precinct are sufficient evidence that the planning scheme has been overtaken by events. The argument in this regard proposed by the co-respondent and Council appears somewhat circular.
- [49] There is however nothing in the scheme to suggest that there must be any “gradation” between precincts.

¹⁷ The encyclopaedic Australian Legal Dictionary defines the term as “a concern common to the public at large or a large proportion of the public which may or may not involve the personal or proprietary rights of individual people.”

[50] A consideration of the arguments advanced by both co-respondent and the Council as to justification leads me to conclude because of the character and extent of the complex, that is the height of the proposed development above 15 metres, there is no basis to approve the proposed development.

[51] Nor do I find in an examination of that nature and extent of the conflict any basis for approval. No “ground” either advanced in argument or apparent on the evidence justifies the approval of this development as proposed.

[52] It therefore follows that I allow the appeal.