[2005] QPEC 040

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Transcript of Proceedings

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Date: 27 April, 2005

PLANNING AND ENVIRONMENT COURT

JUDGE WHITE

P & E No 500 of 2004

GEORGE PAGE	Appellant
and	
DOUGLAS SHIRE COUNCIL	Respondent
and	
THE BEACH CLUB PORT DOUGLAS PTY LTD ACN 106 632 384	First Co-Respondent
and	
THE STATE OF QUEENSLAND	Second Co-Respondent

CAIRNS

..DATE 05/04/2005

REASONS

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

MS R ALLISON (of Miller Harris, Lawyers) for the appellant

MS T FANTIN (of Morrow Petersen) present

HIS HONOUR: On the 18th of February 2005 I made orders disposing of the appeal. My reasons follow.

The land, the subject of this appeal, consists of five allotments located at 22 Davidson Street, Port Douglas. They have a total area of 6,728 square metres. Pursuant to the respondent's transitional planning scheme:

(a) part of the land is within the Residential B Zone and part within the Residential Business Zone in the Table of Zones;

(b) it is designated Urban in the Strategic Plan:

(c) it is designated a Tourist Accommodation Area - high density pursuant to Development Control Plan 2 - Port Douglas.

On the 30th of October 2004 the respondent approved an application by the co-respondent for a development permit for a material change of use to 50 multiple dwellings (tourist), 50 accommodation premises and subsidiary ancillaries subject to conditions. The appellant was a submitter in respect of the original application. He appealed against the approval.

By the time the appeal came on for hearing on the 18th of February 2005 only one live issue remained in the appeal, namely the proposed development represents overdevelopment by reason of an excessive plot ratio. The permitted plot ratio for the proposed development on the subject land is .8. Plot ratio is the ratio of gross floor area of the buildings involved in the development to the total area of the subject land. Given the area of land is 6,728 square metres, the maximum permissible gross floor area is 5,382 square metres.

When the hearing of the appeal started on the 18th of February 2005 it was apparent that the appellant, respondent and co-respondent each took different views as to the gross floor area of the development, plans for which were lodged with the application. Each had engaged architects to examine the plans, apply their view of the definition of gross floor area in the respondent's transitional planning scheme and calculate the gross floor area. Each of the three architects had come up with different answers. Although the three parties had come to the hearing with their architects prepared to give evidence and be cross-examined, counsel for the co-respondent submitted that it was not necessary or appropriate to embark on any examination of evidence. Attention was directed to the approval under appeal which relevantly required that the carrying out of any works on the subject land associated with the proposed development were to be generally in accordance with the nominated plan development, except where modified by the terms of the approval of the development application or any subsequent operational works development permit.

Condition 4.2 was as follows:

"The plan of development must incorporate the following elements, as depicted on the revised/additional plans, must be amended as follows:

(a) the gross floor area of the development must not exceed 5,382 square metres plus an allowance of 15 percentum equivalent to 807.3 square metres or patio areas above the 5,382 square metres in accordance with the definition of gross floor area in the planning scheme;

(b) plans detailing the gross floor area and balcony area and associated calculations must be submitted to council prior to the issue of a development permit for building work or construction of the proposed development."

It was and is common ground that this condition intended that the 807.3 square metres allowed for balcony or patio areas was included in the 5,382 square metres rather than additional. It was to this point that, by consent, I amended condition 4.2 on the 18th of February 2005.

The submission for the co-respondent was that the approval allowed no more than the permissible gross floor area. If it happened to be the fact that the plans lodged with the application provided for more than 5,382 square metres upon a

proper application of definition of gross floor area, then new plans would have to be lodged with the application for the development permit for building works. If there was a dispute between the co-respondent and the council at that time, it would have to be resolved at that time. It was submitted that the conditions of approval effectively prevented any excess of plot ratio and therefore there was no dispute over the only remaining ground of appeal and the appeal should be dismissed.

I am inclined to agree. However, the parties had brought witnesses and were prepared to argue a factual question. It seemed to me at the time prudent to hear the evidence and make the necessary findings of fact. For that reason I allowed the evidence to continue. Before long, Mr Lyons QC for the appellant was asking questions of Mr Ratcliffe, the co-respondent's architect, to which objection was being taken. Mr Lyons was pursuing an issue of whether or not the co-respondent could modify the plans to meet condition 4.2 set out above. Mr Savage submitted that this was not an issue in the appeal. I eventually upheld the submission for the co-respondent and the cross-examination ended. I will briefly state my reasons.

An appeal to the Planning and Environment Court from a decision of a council upon an impact assessable application for a material change of use may be an appeal de novo and it may always place the burden of proof upon the original applicant. But the appeal to the Court is still a legal proceeding. It is to be commenced by a notice of appeal,

which is to state grounds. The practice of the Court requires issues to be identified by a form of pleadings not dissimilar in principle to that which applies in civil proceedings. Just because the developer has the burden of proof does not give a submitter/appellant some right to generally put the developer to proof. It is not a proceeding in which the developer has brought an unwilling submitter to Court in the way that the prosecution does in a criminal proceeding or even in the way in which a plaintiff does to a defendant in a civil proceeding. The right of a submitter to appeal to the Court does not, in my view, extend to a right to generally put an applicant to proof. The appeal provisions of the Integrated Planning Act and the practices of the Court require the issues to be identified with reasonable precision so as to ensure that all parties to the appeal have the benefit of procedural fairness and are not taken by surprise. In my view, if the appellant wanted to advance a case that the conditions of approval could not be complied with at all for any reason, it needed to expressly say so in a ground of appeal so as to enable the co-respondent to meet that challenge. In my view, the points sought to be pursued in cross-examination of Mr Ratcliffe did not arise out of any issue in the appeal. In my view, therefore, the point made by the co-respondent was a good one, there was no "live" issue in the appeal. For that reason, on the 18th of February 2005 I ordered that the appeal be dismissed other than for an amendment to condition 4.2 about which all parties were agreed.

Although it is not strictly necessary to the determination of the appeal, since the parties have made detailed submissions on the point I will express some views about the construction of the definition of gross floor area in relation to the proposed development.

Section 13.2 of the scheme contains the following relevant definitions:

Gross floor area:

> With respect to a building or buildings the sum of the floor areas (inclusive of all walls, columns, verandas and balconies, whether roofed or not) of all stories in the building or buildings excluding:
>
> (a) the area (inclusive of all walls and columns) of any motor rooms, or air-conditioning or other mechanical or electrical plant and equipment room;
>
> (b) the area of that part of any unenclosed private veranda or balcony, whether roofed or not, directly accessible only from one dwelling unit which is within three metres of the back wall of that veranda or balcony to the extent the sum of all such areas does not exceed 15 percentum of what would be the gross floor area;

(c) the area of any lobby and/or porte cochere, at ground story level and/or any covered walkway:

(d) the areas (inclusive of all walls and columns) at any ground story of all rooms associated with landscaped and recreation areas in relation to development for some residential purpose to the extent that the sum of all such areas does not exceed 10 percentum of the landscaped and recreation areas provided within the site;

(e) the areas (inclusive of all walls and columns) of all space used or intended for use for the parking of motor vehicles where that parking of motor vehicles is incidental to and necessarily associated with the use of some premises.

Building: Any fixed structure which is wholly or partly enclosed by walls and which is roofed. The term includes any part of a building.

Story: That space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, including any level used for car parking; that part of the ceiling which is not more than one metre above ground level shall not be included as a story."

Part 8 of the scheme deals with development requirements generally. Section 8.13 is headed residential density. It deals with plot ratio which is, as I have indicated, the ratio of gross floor area. I therefore have no difficulty in accepting the submission of the co-respondent that the purpose of the definition of gross floor area is to identify residential areas for a building, but that does not justify a substantial rewriting of the definition of gross floor area which, with respect, the co-respondent respectfully submits that I should do.

In my view, the proper application of the definition of gross floor area to the plans submitted with the application result in a gross floor area which significantly exceed that allowed for in condition 4.2. In order to obtain an approval to carry out the building works the co-respondent will have to submit revised plans. The form of those revised plans will be for the co-respondent to decide. It is for the co-respondent to decide how it will go about altering the plans to bring the gross floor area back below the maximum permitted. It will then be for the respondent to assess whether or not the gross floor area is within the limits set by condition 4.2. If there is a dispute about calculation it can be brought before the Planning and Environment Court, if necessary. I therefore do not consider it appropriate to embark upon a detailed analysis of the current plans, but it may be of assistance to the parties if I expressed a preliminary view. It must, of necessity, be a preliminary view because no final view can be

formed except in relation to plans which are the subject of an application for a development permit for building works.

In my view, the opening words of the definition of gross floor area require the inclusion of the area of the horizontal plane of all walls, including all external walls and common walls of each story. It must include the whole of the area of the balconies and verandas, including any area covered by a balustrade or railing and any area beyond that. Exclusion (a) is imprecisely expressed. I construe it as follows:

(a) the area inclusive of all walls and columns of -

(i) any lift or motor room;

(ii) any air-conditioning plant and equipment room;

(iii) any other mechanical plant and equipment room;

(iv) any other electrical plant and equipment room.

As to exclusion (b), if there is an area of any unenclosed private area or balcony which is not excluded, then the area to the outer edge of the balcony or veranda cannot be deducted because it must be included by reason of the opening words of the definition.

As to exclusion (c), the ground story level, in my view, is the level at which access to the building is gained from

outside the building. Only a lobby and/or porte cochere at that level would be excluded. In my view, any covered walkway would probably include internal public hallways, stairways, et cetera, at any level, although I could not finally decide this issue without looking at specific plans.

Exclusion (b) is difficult to construe in the abstract, "landscaped and recreation area" as given meaning to the term at 17.7 of the definition of planning scheme, in my view an internal games room would normally not benefit from the exclusion. However, looking at the definition of landscaped and recreation area, in my view a swimming pool constructed on a balcony or veranda probably would benefit from the exclusion.

It should be obvious that no deduction may be made pursuant to exclusions (a), (b), (c), (d) or (e) unless they were included in the primary calculation of gross floor area in the first place. Further, any part of the building listed in any of the exclusions must be included in the initial calculation of gross floor area. That must be the intention of the definition.
