

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Deason & Ors v. Brisbane City Council & Anor* [2000] QPE
083
*Norman Creek Catchment Co-Ordinating
Committee Inc v. Brisbane City Council & Anor*

PARTIES: **CHRISTOPHER MARK DEASON & ORS** Appellant
And
BRISBANE CITY COUNCIL Respondent
And
RAY SWEENEY ARCHITECT Co-Respondent

AND

**NORMAN CREEK CATCHMENT CO-ORDINATING
COMMITTEE INC.** Appellant
And
BRISBANE CITY COUNCIL Respondent
And
RAY SWEENEY ARCHITECT Co-Respondent

FILE NO/S: Appeal No 3961 of 1999
Appeal No 3962 of 1999

DIVISION: Planning and Environment

PROCEEDING:

ORIGINATING COURT: Brisbane

DELIVERED ON: 24 November 2000

DELIVERED AT: Brisbane

HEARING DATE: 30, 31 October; 1 November 2000

JUDGE: Senior Judge Skoien

ORDER: **Appeals dismissed**

CATCHWORDS: *Integrated Planning Act 1997*; planning intent; environmental
issues; stormwater

COUNSEL: Mr S Keliher for the appellants
Mr M Rackemann for the respondent
Mr S Ure for the Co-Respondent

SOLICITORS: Brisbane City Legal Practice for the Respondent
Hopgood Ganim Lawyers for the Co-Respondent

- [1] These two appeals are by objectors to a proposed development of apartment buildings and detached houses on Logan Road, Holland Park, the Council having approved Sweeney's application.
- [2] Although the new City Plan came into force on the first day of the hearing of the appeals before me, s.4.1.52(2) of the *Integrated Planning Act 1997* requires that they be heard and determined based on the superceded 1987 Town Plan, giving appropriate weight to the provisions of the City Plan. Under the 1987 Town Plan the application would have required a rezoning of that part of the land which is zoned Future Urban (an apartment building being a prohibited development in that zone) and a consent application in respect of the balance of it which is zoned Residential B.

The Site

- [3] The site occupies an area of 10,283m² with a 63.89 metre frontage to Logan Road. It also has a frontage of approximately 20 metres to the stub end of Palmer Street. Much of its southern and eastern boundary is formed by Mott Creek, a tributary of Ekibin Creek and ultimately Norman Creek. It is currently vacant land but was formerly occupied by the Amaroo Gardens Caravan Park. Some of the facilities associated with the caravan park use remain on the site. These include an ablutions block and a number of concrete driveways and concrete caravan annex floors. Part of the site which fronts Logan Road is within the Residential B zone with R4 and RX designations and the balance is within the Future Urban zone. The surrounding land is generally in the Residential B zone, R3 or R4. Thus medium density development of the general area was contemplated by the zoning.

- [4] The site contains a number of variations in levels, accommodated by a number of small steps and terraces but generally the site slopes gently in a southerly direction along its long axis away from Logan Road, and also gently in a south-easterly direction towards Mott Creek. The site is generally lower than the adjoining land to the north and especially the land to the east and south across Mott Creek.
- [5] There is a large number of mature trees on the site including gum trees, poincianas, jacarandas, palms and a stand of camphor laurels at the northern end of the boundary formed by Mott Creek. The site is not affected by a Vegetation Protection Order. A flood regulation line affects the southern end of the Mott Creek boundary.
- [6] Existing development in the vicinity of the site generally comprises detached dwellings to the north and west, and a mixture of detached dwellings and townhouses across Mott Creek to the east and south. The northern (Logan Road) end of the site adjoins a service station to the east and a shop to the west. The southern boundary of the site adjoins an area of open space around the waterway. This area is relatively inaccessible, overgrown and steep in parts.
- [7] Logan Road is a busy arterial road on which, about two hundred and fifty metres inbound of the site, is a substantial shopping centre which has a Coles Supermarket as its anchor tenant and thirty-seven specialty shops.

The Proposal

- [8] The proposed development comprises a total of ten buildings including two detached houses (referred to as townhouses on the drawings) providing sixty-five dwelling units. Six of the buildings are proposed to have basement (or lower level) car parks. Two of them are to be two storeys high, and four are to be three storeys high. The three storey buildings are located at the northern or Logan Road end of the site.
- [9] A total of 130 parking spaces will be provided on site (108 in basement or lower level car parks) with access to the site to be obtained only from Palmer Street. The development will be landscaped and recreational facilities to be provided include a swimming pool.

The Issues

- [10] The issues can be summarised under the headings planning documents, environmental considerations and stormwater disposal.

Planning Documents

- [11] Insofar as part of the land was included in the Residential B zone, the proposed form of development is obviously consistent with that zoning and indeed with the two designations namely R4 (within which apartment buildings were a consent use) and RX (which indicates that access to the land should be gained from a road other than the heavily trafficked Logan Road - see s.7.6.10 of the Town Plan). As noted above that access will be via Palmer Street.

[12] Insofar as the land was included in the Future Urban zone, the statement of intent for that zone in s.6.1 of the Town Plan included the following passage:

"Areas close to centres and accessible to higher frequency public transport are the preferred locations for medium density housing ... areas more remote from centres are preferred for lower densities typified by detached housing"

[13] The site is in close proximity to the substantial shopping centre referred to in para[7] above and to public transport along Logan Road. I regard it therefore as falling within the statement of intent, preferring the town planning evidence of Mr Brown and Mr Drew to that of Mr Heywood.

[14] In his report which was tendered, Mr Brown demonstrated how the density of the proposed development in respect of each of the differently zoned land parcels, in consultation with the Council, was calculated conservatively to effect R4 for the Residential B land, but only R3 for the Future Urban land.

[15] The areas zoned Residential B, are now, under the City Plan, included in the low-medium density residential area which are intended to "contain a mix of houses up to two storeys and two and three storey multi-unit dwellings" (see s.5.4.1). Within such areas, "higher densities and three storey buildings occur near multi-purpose centres, near public transport and along arterial roads" (see s.5.4.2).

[16] In those circumstances, the form of development proposed is acceptable. I conclude this despite the fact that s.6.1.2(3) of the *Integrated Planning Act*, at first blush, seems to caution against it in respect of the Future Urban zone. But notionally, a rezoning is being considered here and the matters to which I have referred in paras [6] and [11-15] overwhelmingly argue for the rezoning to be to a

zone (such as Residential B) which permits the proposed development. There is no basis for any suggestion that the land is being over-developed in the town planning sense. Indeed in my opinion, the site, by reason of its size, condition, location and zoning, is one which is ripe for redevelopment in a form such as this proposal.

Environmental Considerations

- [17] Regrettably, Mott Creek where it forms a boundary of the site is in a degraded state. The trees and shrubs along it are mostly undesirable species. All parties seem to accept that the camphor laurel trees, for example, ought to be removed. Across the creek the bank is, at the southern end, high, poorly vegetated and probably unstable in flood times. The bank on the site, at its southern end, has been filled at some time in the past and is therefore poorly vegetated and is unstable. Downstream the creek bed is badly overgrown with rampant exotic species. It is very likely that pollutants are in the water itself from the upstream roads (especially Logan Road), car yards and service stations. When the site was a caravan park it is obvious that it must have contributed substantial run-off pollution.
- [18] The Council, in approving the application, set conditions designed to protect Mott Creek and these are set out in para.88 of the report of Mr McNeilage, Sweeney's consultant environmental expert. He said, and I accept, that he expects, from his experience, that these conditions will be effective. They relate to the landscaping of the site and the re-making of the creek bed to reduce the steepness of the bank on the site side and to widen the bed. The less steep banks are to be reinforced with rock and planted to protect against erosion.

- [19] Planning Policy 6.01 relates to the suitability of land in the Future Urban zone and, relevantly to this issue, picks up Planning Policy 19.22 on Brisbane Waterways.

The extract from that which was referred to by the appellants is:-

"To ensure that physical development is set back from waterways to allow for the preservation and rehabilitation of vegetated riparian zones for physical and ecological processes, the maintenance of species and the establishment of wildlife corridors. For the development of currently undeveloped properties, as a general rule the setback will be thirty (30) metres from the top of the high bank, although up to sixty (60) metres may be required where sites are assessed to be of special ecological significance. The setback can vary on a site-specific basis depending on individual circumstances such as presence of existing vegetation, flooding conditions, size and importance of the waterway and intensity of development proposed."

- [20] In my view, the site is not "currently undeveloped property" within the meaning of that extract. That argument was put by Mr Kelleher who appeared for the appellants and their witnesses. The phrase must mean a property in its natural state, or something like its natural state. This site still contains on-the-ground evidence of its previous development as a caravan park. On the site the banks of the creek have been filled which in itself is a degradation of the creek. So I am unable to find, in this policy, a requirement for even the thirty metre setback from the top of the high bank. After all, the high bank which is there is not natural but constructed. Nor can I sensibly read it as referring to the top of the high bank after reconstruction by the developer for that would permit a developer to adjust the setback simply by adjusting the reconstruction.

- [21] The evidence of Mr McNeilage and Ms Hooper, the Council's environmentalist, broadly agreed. In their view the degraded nature of the creek and its vegetation, the undesirable filling on both sides which has left the banks too steep for vegetation to be properly established (and susceptible to flood instability) render

remedial work very desirable. As Mr McNeilage said, in such a case "More is better" but as usual a balancing process has to occur. Here, the engineering which will widen the creek (but leave the low flow bed undisturbed) provides a sensible hydraulic approach. While there will be removal of vegetation in the short term, in the medium to long term the ecology of the creek will be substantially improved. The Council does look at each site specifically and in this case, while the set back of the nearest building is not thirty metres (and is not required by the policy to be that) it is at over six metres from the new high bank to the nearest building point and about twenty-one metres from the existing low flow bed. More importantly, the reinforcing and the re-vegetation will not only provide a better hydrological situation but will also ultimately create a better ecological environment.

[22] The space available, provided that sensible upkeep of the grounds is maintained, should prevent the run-off of pollutants into the creek. Such run-off which enters the stormwater drainage system of the land itself will undoubtedly be improved not only above the present (and former) situation, but over what happens on most sites. That will be the effect of the Hume-ceptor pollutant trap which will be installed in the stormwater system. I consider that proper conditions should be drafted to require regular maintenance of the Hume-ceptor and proper disposal of the pollutants which it collects. The parties should also settle conditions designed to prevent the run-off of pollutants from the landscaping.

[23] It is apparent that I have preferred the evidence of Mr McNeilage and Ms Hooper to that of Mr Hoobin, the environmental consultant called by the appellants. His evidence was, in my opinion, not soundly based. And while it is obvious that I have not been persuaded by the evidence of the lay witnesses who gave evidence on

behalf of the appellants I would not want it to be thought that I did not consider it carefully, or that I doubted their bona fides. On the contrary they are clearly people who are keenly interested in the welfare of this entire creek catchment and (unlike many) do something practical to protect and enhance it.

Stormwater Disposal

[24] The most serious point in this issue was the ability of the presently designed stormwater system to pick up and contain the additional 13.2 cubic metres/second of flood water in a Q 50 flood event which would not be accommodated in the existing drainage pipe. It was the subject of conflicting technical evidence from Mr Maddison for Sweeney and Mr Rogers for the appellants. Mr Baron, for the Council, was substantially in agreement with Mr Maddison. Much of the debate revolved around the design of the inlet and the loss of head associated with it. But ultimately I do not have to concern myself with the question, (and I tend to think that Mr Maddison's design suffices) because Sweeney is prepared to accept a condition for the development that the stormwater inlet and pipes be such as will accommodate a further flow of 13.2 cubic metres/second (or, put differently, in combination with the existing pipe, a total flow of 23.2 cumecs.) There is no reason to doubt that such a condition can be met by proper design or that the Council engineers can be relied upon to assess the adequacy of the design.

[25] The underground flow of 23.2 cumecs will leave, in a Q 50 flood event, three cumecs to flow overland down an internal road to the creek. I accept that such a flow will (after minor and inconsequential filling) result in a depth to velocity ratio of 0.6 m²/sec which Mr Maddison and Mr Baron regarded as acceptable. Mr

Rogers for the appellants, argued for 0.4 m²/sec but I prefer the evidence of Mr Maddison and Mr Baron. The flow will not be along an access route to or from the development so it will not be necessary for people to come into contact with it. The depth of the flow will be only about 300 mm.

[26] The appellants raised safety issues in relation to the possibility of children, in a Q100 year flood event, being endangered by the proximity of the building development to the flooded creek. To refuse the development for that reason would be akin to refusing it because of the proximity of Logan Road with its heavy traffic, equally dangerous to children. One must assume that the guardian of a child will be reasonably careful of the child's safety.

[27] Finally, while there was some evidence that the works on the site (especially the works at the creek) would produce a very small reduction in flood storage on the site there was no satisfactory evidence of any resulting detriment from that to any downstream property. Indeed the work will reduce flood levels and some velocities to the advantage, particularly, of the buildings across Mott Creek to the south east of the site.

Conclusion

[28] The co-respondent has satisfied the onus cast on it by s.4.1.50(2) of the *Integrated Planning Act*. The two appeals will be dismissed. However before ordering that I want to have the developer and the Council try to agree the conditions I foreshadowed in para. [22] above, so I adjourn the further hearing of the appeals to a date to be fixed.