PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Forde v Toowoomba Regional Council* [2008] QPEC 114
PARTIES:	**GRANT LINDSAY FORDE** (Appellant) v **TOOWOOMBA REGIONAL COUNCIL** (Respondent)
FILE NO:	BD 4 OF 2007
PROCEEDING:	Appeal
DELIVERED ON:	12 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	27 and 28 November 2008
JUDGE:	Judge Brabazon QC
ORDER:	**Appeal dismissed**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – CONFLICT WITH PLANNING SCHEMES – where proposal is in conflict with planning scheme – lot reconfiguration – establishment of commercial stables in conjunction with houses
LEGISLATION CITED:	*Integrated Planning Act 1997* (Qld)
CASES CITED:	*Legal & General Life of Australia Ltd v North Sydney Municipal Council* (1990) 69 LGRA 201 *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189
COUNSEL:	Mr S P Fynes-Clinton for the Appellant Mr S M Ure for the Respondent
SOLICITORS:	Hede Byrne & Hall Solicitors for the Appellant Deacons for the Respondent

1 The Issues

[1] The address, 31 Glenvale Road, Toowoomba, actually covers two adjoining pieces of land. They are lots 19 and 20. They are long rectangular pieces of land, of roughly similar area. The combined area is 2,458 m^2.

[2] The front part of lot 19 is vacant land, while the front part of lot 20 contains a house, with a garage behind it. Towards the back of each lot there are horse stables and associated sheds and equipment. There are stalls for 12 horses. The two blocks of land have been used together for around 40 years as horse stables. The aerial photo at p 5 of Ms Roughan's report shows the two lots at the present time.

[3] A change is now proposed. Mr Forde's wish is that the existing house and garage on lot 20 should become a separate lot of 537 m^2. Behind the garage, the boundary between lots 19 and 20 would be removed, so creating a hatchet or L-shaped block on the one title. The proposal can be seen at p 2 of Ms Roughan's report. The new lot 19 would have an area of 1,924 m^2.

[4] The Council has refused to approve that change. Mr Forde has appealed to this court. Should the change be allowed, or not?

[5] The appeal means that there has been a fresh hearing before this court. That is, the court has a duty to consider the merits of the appeal based on the evidence, independently of any view which Council took. Mr Forde is the appellant, and he has the burden of proving that the appeal should be allowed.

[6] It must be understood that this court is in no sense a planning authority. That is the duty of the Toowoomba City Council. The court acts on all the evidence, including, in particular, the town planning provisions adopted by Council.

[7] In this case, some established principles are important. If the proposal is in conflict with provisions of the planning scheme, that conflict should be identified. The application might be allowed, if there are sufficient planning grounds to do so, despite the conflict. Secondly, planning schemes are all about the well-being of the whole city, rather than the particular wishes of individual citizens or land owners. The definition of "grounds" in IPA confirms that approach. They do not include the personal circumstances of an applicant or owner.

2 The Contentions

[8] The Council refused the application on two grounds which are significant here:

(a) The proposal does not meet the performance criteria of element 12 or Ch 9.11 of the Toowoomba Planning Scheme – Reconfiguration Code.

(b) The proposal compromises the intent of the stables precinct of the neighbourhood residential zone.

[9] Mr Forde's grounds of appeal are these:

1. The proposed development merely gives effect to the existing use of the land.

2. The existing lot configuration is impractical given that stables currently constructed on one of the existing lots have no means of practical access other than via the adjoining lot. The proposed development will rectify that problem and provide practical access to the stables.

3. The proposed development will have no impact on the amenity of the area given that the current land uses are existing lawful uses.

4. …"

5. The proposed development is not inconsistent with the intent of the stables precinct of the neighbourhood residential zone and ought to have been approved."

3 The Town Planning Scheme

[10] The current Toowoomba City Council planning scheme was adopted in 2003. There are special provisions for land surrounding the Clifford Park Racecourse. They make allowance for stables. At the present time, there are about 160 horses in stables on the north western corner of the racecourse, and another 400 or so in the stables scattered around the suburban areas outside the racecourse.

[11] Under the previous city plan, this land was in the Residential B Zone. The intent of that Zone was this:

> "This Zone is intended to provide for residential areas where commercial stables are permitted in the vicinity of the racecourse".

That intention meant that there was no connection between stables and houses. The present planning scheme is quite different.

[12] These stables are in the Neighbourhood Residential Zone. The intent of the zone is to have development primarily of detached housing, with the dominant use being houses on lots greater than 500 m^2, except in the Stables Precinct. These stables are in such a precinct. The intent of the precinct is "to provide for the establishment of commercial stables in conjunction with houses in a manner which minimises the potential impact on the amenity of nearby residential premises."

[13] That statement of intent speaks about two things which were controversial here.

[14] Are these stables, "commercial stables?" It was suggested that stables couldn't be called commercial until they held 20 or more horses.

[15] These stables are presently occupied by Mr Goodwin, whose occupation is that of horse trainer. At the moment, he is training nine horses, with two more expected to arrive soon.

[16] As a matter of comparison, the records here show that there are about 50 stables in use at the present time. The majority have less than 10 horses. Eight involve between 11 and 20 horses, one involves 20 horses and there are only three which involve more than 20 horses.

[17] No doubt it is true, that keeping a small set of stables with a few horses may mean that they are not commercial stables. They may be kept for a hobby, or for family reasons. In this case, the facts show that the stables are in the commercial category. They have been there for many years. Mr Goodwin does not live in the house on lot 20. There was no evidence, connecting the use of the stables with the occupation of that house.

[18] Secondly, it is important to decide what is meant by the expression "… the establishment of commercial stables in conjunction with houses …".

[19] For the Council, it was submitted that the expression means a dwelling house forming part of that stable complex, that could be occupied by a manager or caretaker of the stable complex.

[20] On the other hand, Mr Fynes-Clinton for Mr Forde submitted that the expression should be understood as meaning, established together with or alongside in a physical sense and not established for use in association with the use of a dwelling house as such. That is, there is no need for any integration between the use of the residential dwelling and the stables.

[21] It is helpful to see similar expressions being used in other cases. For example, in a New South Wales case, *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189 (18 November 1993), the planning scheme required that: "the Council may consent to the carrying out of development (other than sub-division) for the purpose of providing accommodation for tourists, where the Council is satisfied that any accommodation is provided in conjunction with the use of the land for the purpose of agriculture."

[22] The judgment records this conclusion:-

> "In my opinion, the phrase "in conjunction with" denotes a connection or relationship or association, a quality which it is convenient to refer to as a "nexus".
>
> ... the phrase requires a nexus between, on the one hand, the tourist accommodation to be provided, and on the other hand, the use for agriculture. In the context of the clause in question, that nexus is not demonstrated by mere physical location or by the fact that they are both "economic activities". The clause requires the nexus to be between two uses. It is a question of function and accordingly, it is a functional nexus which is required."

[23] On the other hand, Mr Fynes-Clinton relied upon the decision in *Legal & General Life of Australia Ltd v North Sydney Municipal Council* (1990) 69 LGRA 201. There, a council had a discretion to allow development for the purpose of residential flat buildings "constructed in conjunction with commercial premises". The Court of Appeal held that those words "constructed in conjunction with" were best understood as having the general effect of "constructed together with", that is, physically, and not as contended by the appellant, "constructed for use in association with the use of commercial premises as such". Accordingly, it was not necessary to show that the residential flat building would subserve or be used as ancillary to that commercial use.

[24] In that case, the word "constructed" was significant, in determining the final meaning of the expression. Here, it is the "establishment" of commercial stables which might be in conjunction with houses.

[25] The use of the word "establishment" points to the relationship between the commercial stables and the houses. If the establishment of stables in conjunction with houses is to minimise the potential impact on the amenity of nearby residential premises, then it can be seen that there must be a functional connection, as in the *Sweeny Pastoral Company* case. That is the appropriate interpretation here. The submissions for the Council should be accepted.

[26] It is common ground that this development has to be assessed against the Lot Reconfiguration Code. That Code provides for minimum lot areas. Schedule 2 of the Code deals with the Stables Precinct in the Neighbourhood Residential Area. Lots are to have dimensions and _____ areas that, "are consistent with the intent of the relevant zone and precinct". That is part of the performance criteria. There is then an "acceptable measure", to achieve that. In this case according to Schedule 2 of the Code, that is an area of 1,200 m^2.

[27] Mr Fynes-Clinton submits, correctly, that compliance with an acceptable solution is just one way of meeting a performance criterion. It is not necessarily the only way. In some cases, a radically different solution may be proposed, on the basis that it does meet the performance criteria. The reference, therefore, is to "the intent of the relevant zone and precinct." That is set out, above, in para 9.

[28] The Animal Keeping and Intensive Animal Husbandry Code also applies. Performance Criterion P1 for stables says, "the stables do not have an adverse impact on the residents of the site or on adjoining premises in noise or odour."

There are two acceptable measures:

> "**A1.1** The site area is at least:
>
> - 1,200 m^2 where in the Stables Precinct of the Neighbour Residential Zone. …
>
> - No house is stabled closer to a residential building than:
>
> - 15 m where the site is in the Stables Precinct of the Neighbour Residential Zone …"

[29] Therefore, to achieve the performance criteria, it is difficult to see that it can be done if the standard of 1,200 m^2 is much reduced.

4 Proposed Scheme Amendments

[30] It is appropriate to take into account amendments to the planning scheme, that have been prepared and notified to the public. That is, in principle, they should be given appropriate weight, when considered together with the present scheme provisions.

The intention is that the maintenance of larger lot sizes in the Stables Precinct should be reinforced. Any proposed reconfiguration to create lots less than 1, 200 m^2 is to be impact assessable and "not preferred". This change is likely to be in force early in 2009. It would be wrong to cut across Council's intentions, by allowing this proposal to proceed.

5 Other Considerations

[31] The reference to houses is important in this case, because of the house on lot 20. If this appeal were allowed, the reconfiguration of the land would mean that the house could be sold to anybody. That is a result which would be in conflict with the provision of the planning scheme.

[32] It can be accepted that a proposed development would continue to give effect to the existing use of the land for stables. However, it would make a different with regard to the house. It is quite possible, or even probable, that the resulting small lot would be sold to someone unrelated to the stables' operation.

[33] It is true, that adjustment of the boundary behind the house is necessary, if it is sold, to allow access to lot 20, over lot 19. There is no effective access at the present time to the rear of lot 20, other than from lot 19. That is, the house is constructed so close to the boundary, that it would not safely allow the passage of a medium rigid vehicle. The space available is below the Australian standard. Secondly, the garage behind the house physically stands in the way of access to the rear. It was pointed out that without undue expense or trouble, the garage could be moved. That is so, but the position of the house would seem to be the real obstacle.

[34] However, the existing arrangement has worked for 40 years, and there is no suggestion that there is any reason to split the operation on the two blocks of land – at least in relation to the operation of the stables, behind the house. The existence of the two titles does not itself undermine the viability or security of the stable's operation.

[35] Given that the two lots are in common ownership, and used conjointly, the current access arrangement is both lawful and practical. There is evidence that this is not an uncommon arrangement for stables in the precinct. Some other joined lots are used in the same way.

[36] There could be an impact, if the house were sold separately. The town planners agreed that amenity impacts and complaints about them were common in situations where stables and houses were established close to each other. For example, stables often mean very early noise and some odours and health concerns. For example, manure has to be disposed of in a certain way and any breakdown in that system could cause a health concern. Adverse amenity impacts need to be minimised or avoided. One way to do that is to have on-site supervision by a manager or caretaker, so that an eye can be kept on problems which might emerge.

[37] If the house was sold to someone with no connection with horse training, then those conflicts are likely to be increased.

6 The Planners

[38] Of the planners, Ms Roughan gave more appropriate weight to the planning scheme, and the amenity impacts. Her conclusion, which is reflected in these reasons, should be accepted. As she puts it:

> "**6.0 Conclusion**
>
> In my view, the proposed development is in conflict with the intent for the Stables Precinct in the Neighbourhood Residential Zone and is in conflict with P1 of Element 12 Site Planning in the Lot Reconfiguration Code.
>
> There is nothing unique about the subject land that points to the need for the reconfiguration and which would, in my view, justify its approval despite the conflict.
>
> The stables and residence complex has been operational on the site under the current lot reconfiguration for over four decades. There are no apparent external circumstances that give rise to the need to excise the small lot and there are no clear community benefits that flow from the reconfiguration. The site has practical access that is similar to many operations within the precinct.
>
> Instead, the proposed reconfiguration creates a number of potentially undesirable or less desirable outcomes, by:
>
> - Creating a circumstance in which amenity and land use conflicts are more likely to arise by the creation and likely on-selling of a small residential lot;
>
> - separating the stables from the house, and thereby removing the immediate ability for on-site supervision and management of potential impacts; and
>
> - reducing the potential for expansion or upgrading of stables facilities should a new house be established on the new lot 19."

7 Conclusions

[39] Mr Fynes-Clinton, in his comprehensive and helpful submissions, mentioned everything in favour of the application. He urged the adoption of Mr Buller's conclusion that there is sufficient planning merit in the proposal to warrant its adoption despite any conflict as to the scheme.

[40] However, once it is seen that the scheme provisions (particularly because of the issues about "commercial stables" and "established in conjunction with stables") have been more accurately applied by Ms Roughan, it is clear that her opinion should prevail.

[41] The Council's decision was correct. There are conflicts between the proposal and the scheme provisions. There are no planning grounds sufficient to justify this proposal, despite the conflicts. The appeal must be dismissed.