Queensland Planning and Environment Court Decisions

Charles & Howard Pty Ltd v. Redland Shire Council [2006] QPEC 95 (25 August 2006)

Last Updated: 13 September 2006

[IMAGE]

PLANNING & ENVIRONMENT COURTOF QUEENSLAND

CITATION:	*Charles & Howard Pty Ltd v Redland Shire Council* [2006] QPEC 95
PARTIES:	**CHARLES & HOWARD PTY LTD** Appellant v **REDLAND SHIRE COUNCIL** Respondent
FILE NO:	BD 391 of 2006
PROCEEDING:	Appeal
DELIVERED ON:	25 August 2006
DELIVERED AT:	Brisbane
HEARING DATES:	7, 8, 9 August 2006
JUDGE:	Judge Brabazon QC

ORDER:	**Appeal dismissed**
CATCHWORDS:	ENVIRONMENT AND PLANNING – APPLICATION TO COUNCIL FOR PRELIMINARY APPROVAL – CONDITION REQUIRED DIFFERENT SITE – VALIDITY - *Integrated Planning Act 1997*, *Sections 3.5.30* *Integrated Planning Act 1997*, *ss 4.1.52(2)*, *4.1.50(1)* *Proctor v Brisbane City Council* 1993, 81 LGERA, 398
COUNSEL:	Mr J Haydon for the Appellant Mr S Ure for the Respondent
SOLICITORS:	Mullins Lawyers for the Appellant Home Wilkinson Lowry Lawyers for the Respondent

The Application

[1] The appellant has an interest in land at 20 Albert Street, Victoria Point. On 7 November 2005 it made an application to the Council for a preliminary approval to place filling on the land. The fill was for the purposes of building a detached house. The development application was accompanied by a letter which is not in evidence here. Apparently, the proposed position of the house was in the eastern corner, nearest to the esplanade. That would put the proposed house beside an existing residence to the north, having a frontage to Lancewood Street.

[2] Then followed an information request from Council, dated 21 November 2005. In particular, it said: "In accordance with the draft Redland Planning Scheme, demonstrate why the proposed dwelling cannot be located within the portion of the site proposed to be included in the Urban Residential Zone." That location would have been at the other end of the land, in the western corner, farthest from the esplanade.

[3] Some further submissions were made by the appellant. A decision notice dated 19 January 2006 was given. The preliminary approval was granted, subject to conditions. The first condition said:

"Approval has not been granted to site the proposed development at the location indicated on the document labelled sheet 1, site plan, prepared by Inscape Design. The proposal is to occur within the confines of the building envelope as indicated on the attached site plan prepared by Redland Shire Council, RSC-1. ..."
[4] This appeal is about the validity of that condition. In substance, the appeal is by Harridan Pty Ltd, a company which has entered into a conditional contract of sale to buy the land. The director of Harridan is Mr Wade Mellish. Mr Mellish says that Harridan wishes to build the house at the eastern end of the land, so that it may be his family home. Council agrees that a house be built, but says that it has to be at the western end of the land.

This Appeal

[5] When the application was made, the 1988 Planning Scheme was in force. It was a transitional planning scheme, under the provisions of the *Integrated Planning Act* 1997. That is, it was continued in effect under that Act until an IPA scheme came into effect. The 2006 Planning Scheme came into effect in March this year.

[6] This Court must decide the appeal based on the laws and policies applying when the application was made. However, it may give weight to any new laws and policies the Court considers appropriate. See s 4.1.52(2) of IPA.

[7] The appeal is "by way of hearing anew". That is to say, this is a fresh hearing on the merits, unaffected by Council's earlier decision. The appellant has the onus of showing that the appeal should be allowed. See s 4.1.50(1).

[8] The duty of this Court is a traditional one. That is, it is obliged to consider the evidence, and reach an independent view of the merits of this application.

[9] It will be appreciated that the Council is the lawful planning authority for the shire. It is the duty of the Court to apply the planning provisions

which Council has adopted, in the context of Queensland's general laws about planning and environmental matters. This Court is not a planning authority. It has no power to impose any views of its own on the Council or other parties. It acts only on the evidence. Sometimes, it has the benefit of additional evidence and expert opinion, compared to that available to Council and its officers.

[10] Should the Council's decision about placing the fill at the western end of the land remain, or should there be a condition that the fill be placed at the eastern end of the land?

The Land

[11] The land has an area of some 1.697 hectares. To the east is an esplanade and the waters of Moreton Bay. To the north and west is a subdivision created in 1972. The subdivision is bounded by Lancewood Street to the north and Morell Street to the west. This land can be accessed from Albert Street at its south-west corner. Across Albert Street, and extending further to the south, there is a large area of parkland. That parkland blends imperceptibly (there is no boundary fence) with the rest of this land. The most notable feature of the site is a mangrove forest which grows on a marine waterway, linked to the bay.

[12] Because the land adjoins an established subdivision to the north and west, its neighbours have made use of the land. Informal access has been obtained from the esplanade. The result is a collection of plants, vegetables, garden beds, trees, rubbish and the neighbours' possessions spread unevenly throughout its length. If it were cleaned up it would be a park-like area of land between the back gardens to the north and the mangroves to the south.

Conditions

[13] Section 3.5.30 of IPA provides:

"**Conditions must be relevant or reasonable**
(1) A condition must –
(a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
(b) be reasonably required in respect of the development or use of premises as a consequence of the development.
(2) Subsection (1) applies despite the laws that are administered by and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency."
[14] The appellant says that the condition, forcing it to place the fill and the house at the western end, is unreasonable. Council's position is the opposite – it is a relevant and reasonable condition imposed on the development as a consequence of the conflict between the proposal and various town planning provisions which affect the land.

The Appellant's Proposal

[15] Until just before the hearing, the appellant proposed to fill a rectangular area, from the northern boundary to the line of the mangroves, to make an elevated pad for a house. Then, conscious no doubt of the need to protect the mangroves, the width of the pad was decreased by six metres. The present proposal can be seen, for example, in the drawings Exhibit 3A. The pad would be 24.8 metres long and 13.2 metres wide. There would be 8 metres between the mangroves and the edge of the pad, which would be contained by a vertical supporting wall. A house design had already been approved by certifiers, but that would have to be changed to fit the narrower foundation.

[16] The purpose of the fill is to raise the level of the land above the one in a hundred flood level. The standard height required by Council to achieve that is 2.4 metres AHD. The result is that fill at the lowest part of the land, parallel to the mangroves, would be about 700 mls deep. As the land rises gently towards the existing house to the north, that fill would taper to

nothing near the boundary. It is agreed that fill to 2.475 AHD would be 159 m^3. That would be about 32 standard truck loads of fill.

The 1988 Planning Scheme

All houses in this low lying area must have another 300 mls additional height above 2.4 metres AHD. The power of the Council to demand that is found in para 17 of the 1988 Scheme, as amended on 15 November 1990 (see pp 7, 9 and 13 of Ex 13, the Planning Scheme extracts):

"... no person shall, without the written approval of the Council, erect a building with a floor level of less than 300 mm above flood level of a frequency of 1 in 100 years, where such building is located on an allotment within or adjacent to a flood place."

[17] Those requirements are reflected in Condition 2 of the present approval – "Maximum lower storey floor level to be RL2.7m to 2.8m – that is 300m above the Q100 storm tide level as given by Council of RL2.4m." It is common ground that, if this application is successful, then the same condition would apply to the appellant's preferred site.

[18] All of the land is in the Residential A zone. That is, a dwelling house may be erected without the consent of Council. That right should not be taken literally, as it is apparent that there are other constraints. One constraint relates to filling and drainage. As this land is subject of flooding at a frequency of more than 1 in 100 years, approval to fill it shall not be granted "except where such filling is of a minor nature". (Para 16, at p7 of Ex 13).

[19] The land is subject to Development Control Plan 1. This land is given two different designations. The appellant's preferred house site, and the mangroves, is in Public Open Space. The Council's preferred site, and the

higher land adjoining the subdivision to the north, is designated Residential A.

[20] The purpose of the DCP is to control development. It designates preferred dominant land uses for the different parts of each district. The designation of Public Open Space covers publicly owned land and land which it is envisaged will come under Council control for parks and recreational purposes. The objective is to make adequate provision for open air sport and recreational use:

"Those areas designated as Public Open Space on the Strategic Plan Maps which are not already owned by or under control of the Council will be progressively acquired as funds become available or in association with the rezoning, subdivision or other development of land." (See p 24 of Ex 13).

[21] (It was common ground that the DCP should not be given too much weight, because of the impact of the later Strategic Plan).

[22] A local planning policy dealing with waterways, wetlands and the coastal zone applies to this land. An objective is to:

"protect residential housing from flood waters by excluding such development from lands inundated by the Average Recurrence Interval of 1 in a 100 flood ... to ensure that any works and/or rehabilitation is designed in such a manner so as to minimise changes in the flow regime of waterways which may adversely impact on flooding, ecological processes, environmental values or natural rates of scouring and erosion".

[23] That policy also introduces the idea of a buffer zone, which assumed considerable importance in this appeal:

"Development should be separated from the coastal zone, wetlands or waterways by a buffer zone of sufficient width to accommodate the maintenance of physical and biological processes, storm surge or flood inundation, public use and access, and visual amenity.

The buffer zone width will vary on a site specific basis ... as a general rule however minimum buffer widths are typically in the order of between 30 and 60 metres from ... RL2.4 metres in coastal areas."

[24] (Because the fill would be on land that is below RL2.4, there would

literally be no buffer zone, as defined.)

[25] The 1998 Strategic Plan applies to all of this land. It is described as a Special Protection Area:

"This designation indicates the location of areas within the main urban parts of the shire which have been identified as possessing natural environmental qualities worthy of conservation. ... the purpose of the inclusion of these lands in this designation is to retain their natural values. This may be achieved while land is in private ownership ... the conservation of the environmental values of land in this designation is an essential precondition to Council's preparedness to consider development within or adjoining this designation. ... this designation also includes most of the coastal areas of the shire which are adjacent to locations where further urban development may be permitted. At the time urban development is proposed in these adjacent areas, it will be necessary to establish the appropriate width of land be retained in its natural state along the coastline so as to comply with the requirements of the Coastal Protection Act and any associated planning documents, to take into consideration sea level changes which may result from changes in climatic conditions ..."

[26] The land is also included within the greenspace and marine system. The appellant's preferred house site, like the mangroves, is in the marine area. See Ex 13, p 66.

The 2006 Planning Scheme

[27] As this scheme is now in force, it is appropriate that considerable attention be paid to its provisions. There are Desired Environmental Outcomes at s 3.1.2(1)(b)(ii):

"... by ensuring development ... maintains the health of the Shire's natural drainage systems, water catchments in Moreton Bay by ... avoiding the placement of fill or other potentially damaging activities within flood plains and areas subject to tidal inundation."

[28] Likewise, the provisions with respect to the Open Space Zone refer to the need to minimise adverse impacts on environmental and scenic values

by minimising the need for excavation and fill. See s 4.16.7(2)(e)(i)B.

[29] A dwelling house is an "inconsistent use" within the Open Space Zone – see p 117 of Ex 13.

[30] It is notable that all of this land, apart from the Council's preferred site for the fill, is in the Open Space Zone. The Council's preferred house site is in an area described in the zoning map as Urban Residential. See p 146 of Ex 13.

[31] The 2006 scheme contains a number of "overlays", which express policies for particular areas. Division 6 contains the "flood prone, storm tide and drainage constrained land overlay". It applies to this land, apart from the Council's preferred site. That is, the appellant's site is in the storm tide area. See p 170. The overall outcomes are, "to provide acceptable levels of flood immunity for people, buildings and other structures, to minimise the risk of damage and property loss due to flooding or storm tide, to protect the hydraulic capacity and ecological functions and values of waterways ... and lands which naturally accommodate the flow of waters during flood or storm tide events, ..." (at p 164). A key outcome is to avoid the risk of flooding by not allowing development on land below the 1 in 100 ARI flood and storm tide level (at p 165).

[32] A second overlay relates to habitat protection. It was common ground here that the mangrove forest must be maintained. See p 177 of the extracts. The area of the Council's preferred site is subject to that overlay, in that it describes that part of the land as a "koala habitat". The rest of the land, including the appellant's preferred site and the mangrove area is described respectively as an "Enhancement Corridor" and a "Marine Habitat". The overall outcome is that development should enhance environmental values of (in this case) the mangrove area. This is described as an "H2" area – see p 172. The outcomes of assessable development include, "explore all alternatives to locate the development outside" the Enhancement Corridor – (see p 182).

[33] Finally, there is an overlay with respect to waterways, wetlands and Moreton Bay. Both house sites are in the Waterways and Wetland buffer. An acceptable solution is that "uses and other development are located

outside the area shown on the overlay map" (at p 193). If that exclusion cannot be achieved, then a buffer area has to be provided, and there has to be a separation by way of distance between the development and the vegetated buffers. The usual buffer requirement is at least 40 metre. See p 197.

The Engineers

[34] Dr Trevor Johnson and Dr Tom Connor gave evidence. Dr Johnson was retained by the Appellant, and Dr Connor by Council. There is no reason to doubt their high level of expertise.

[35] Essentially, Dr Johnson restricted his views to several substantial matters. As he pointed out, filling land at the eastern edge would make no difference to the storm surges which can be expected, from time to time, to carry sea water on to the land. Such an event had been witnessed in 2005. The evidence of both engineers would indicate that it is appropriate to regard the eastern part of the land most likely to be affected by storm surges. That would certainly happen, if the land were not filled. Dr Johnson went on to say that the proposed filling would have a very minor effect on the flow of flood waters. He thought the maximum increase in flood level would be less than one centimetre. Such an increase would not cause inundation of any existing residential property in the area. Water levels upstream of Albert Street would remain entirely unaffected. If that one centimetre increase were not acceptable, then it would be possible to excavate a minor amount of fill, no more than about 5 cubic metres, from elsewhere on the land to compensate for that obstruction. For those reasons, he said that the construction of this building pad "would not interfere in any impactive way with the existing overland flow path which runs across the site".

[36] He went on to say that interference with the land during construction, and by the use of the house itself, could be managed easily enough by appropriate controls.

[37] Dr Connor wrote a much more extensive report, dealing with the link between the proposed works and the various expressions of policy made

by Council. It seems that the only real factual difference between their evidence relates to the description of the land as a "flood plain". Dr Johnson thought that it did not amount to a flood plain. Dr Connor said that it did. As he explained, the location of the southern edge of the building platform is near the edge of the creek bank. There is evidence that tides inundate the site. Flooding from heavy rainfall associated with high tides would inundate the site. He therefore said that it seemed appropriate, from a hydrological point of view, to classify the site as being in a flood plain. That conclusion should be accepted. Dr Connor went on to consider the relevant overlays that apply to this site – those for acid sulphate soils, flood prone storm tide and drainage constraints, habitat protection, and water ways, wetlands and Moreton Bay.

[38] As he pointed out, there are no definite acceptable solutions to an area which is subject to the storm tide overlay. Filling is discouraged by the policy of the overlay. As he observed, filling in the proposed location has the potential to impact on the environment, alter the flood flow characteristics of land below the storm tide level by restricting flow, intensifying and concentrating flows and reducing flood plain storage, and affecting the visual amenity of a hydrological environment. By way of contrast, the approved building envelope does minimise the extent of filling. (Only five cubic metres is proposed for that site).

[39] He suggested that any analysis would show minor affects on flood levels, with a potential for changes in flood behaviour around the site – "the proposed building pad would be an embankment, up to approximately .875 mls in height at its deepest point adjacent to the creek bank, blocking the entire northern flow path area of the creek at this location". (That comment was made before the latest restriction on the proposed width of the fill.) He thought that the amount of fill could not be described as "minor" – see pages 6 and 7 of his report.

[40] From the point of view of any buffer between development and the mangroves, he would prefer Council's present choice, as being further away from the mangroves.

[41] The impacts of climate change had also to be taken into account, in his opinion. The State Coastal Management Plan assumes that there will impacts such as higher frequency and more extensive storm tide flooding.

Therefore, attention should be focussed upon the location of new development in areas not vulnerable to the impacts of climate change. In his view, attention has to be focussed on the possibility that this house pad would be surrounded, as time passes, by higher levels of water.

[42] Dr Connor explained that the site approved by Council was the preferred site, because of the hydrological and ecological considerations discussed in his report. His wider examination of Council's policies means that his opinion should be accepted, and that Council's preferred condition is appropriate.

The Buffer Zone

[43] Both proposals could see the cleaning up of the degraded land adjoining the mangroves. To enhance its effect as a buffer between the mangroves and the established houses of Lancewood Street, two steps would be taken – fencing off all those other properties, and replanting the area with native trees.

[44] It was accepted by both Dr Thorogood and Dr Watson (the ecologists) that the Council's proposal would have the advantage of creating the more effective buffer – the fill and house at the western end would be further from the mangroves. To that may be added the consideration that the Council's proposal avoids the need for an access track winding along the land to its eastern end. That track would pass through a stand of protected casuarinas. It should be accepted, as Dr Thorogood explained, that construction work would mean at least some destruction of these trees by heavy vehicles.

[45] Dr Thorogood had to agree that the eight metre buffer would be sufficient, at the present time, to allow for the natural growth and spread of the mangrove canopy.

[46] Dr Thorogood went on to explain why the buffer proposed by the appellant would not always be sufficient. His drawing Ex 6 (c) shows various scenarios. Essentially, he said that allowance has to be made for the natural growth of a mangrove canopy over the coming years. The proposed pad, and house, shows that there will probably be an insufficient buffer area to protect the mangroves. His views also take into account the

feared rise in sea levels such as those predicted by the CSIRO – see Ex 5 (b). That would result in the marine vegetation encroaching more and more on to the surrounding land. Progressively, the buffer would diminish as the marine vegetation advanced.

[47] The reference to sea level charges is linked to para 4.4.3 of the Strategic Plan – see para [26] above.

[48] On any view, Council has chosen the better site, from an ecological point of view. Even if Dr Watson is right, that a sufficient buffer can be achieved, that is not the end of the matter. The plain intention of the planning documents is that there should be no such development such as this on the eastern end of the land.

The Town Planners

[49] Mr Forsyth, called on behalf of the Appellant, thought that the Appellant's proposal to fill the land could be supported under the provisions of the 1988 and 2006 planning schemes. He was also of the opinion that the Council's imposition of condition 1 was not related to the original proposal, and was therefore not a reasonable or relevant condition. Overall, he was satisfied that the amendments sought by the Appellant were the appropriate town planning resolution to the subject matter.

[50] As his report makes clear, he bases many of his conclusions on the expert views of others. In particular, he relies upon the views of Dr Johnson and Dr Watson.

[51] On the other hand, Mr Perkins was influenced by the views of Dr Connor and Dr Thorogood. He points out that the 1998 planning scheme, while including the whole site in the Residential A zone, recognised that much of the site, including the area proposed to be filled, was not suitable for urban development. The other 1998 planning documents re-enforce that planning intent, as does the strategic plan. He accepted that the extent and location of filling was not minor, in its context.

[52] He gave considerable weight to the existing 2006 planning scheme. Its effect he summarised this way:

(a) “The 2006 planning scheme clearly articulates planning intention that the proposed area of filling is not intended, or considered suitable, for urban development.

(b) The extent and location of proposed filling is not minor in the context of the planning intent for the site.

(c) The 2006 planning scheme makes provision for urban residential development on part of the site not so affected by environmental values or flooding. The Council’s condition would make residential development take place on the appropriately zoned part of the site.

(d) Assessments of the proposal made by Dr Connor and Dr Thorogood identify that the proposal significantly conflicts with engineering and environmental outcome sought by the 2006 planning scheme.
[53] Apart from the views of other experts, it is clear that the various town planning documents are against the appellant’s proposal. In truth, the views of experts such as Dr Connor and Dr Thorogood make clear why that should be so. Mr Forsyth had a hard time in finding sufficient merit in the proposals to justify his conclusions. Mr Perkins conclusions are obviously supported by the town planning documents, and should be accepted here.

Submissions for the Appellant

[54] In substance, it was submitted for the appellant that its proposal, taken in the context of the whole of the land, would be the preferable result. It was pointed out that the area to be filled amounts to about 1.9% of the whole site. That is some 327 square metres. On the other hand, the whole of the proposed area to be rehabilitated is some 2,414 square metres, about 14% of the whole site. If the evidence of Dr Johnson is accepted then there is no compelling reason why the Appellant’s position should not be accepted. Taken overall, it can be seen that the proposal, including the rehabilitation of much of the land, will result in the better outcome.

[55] The two responses can be made to that. Dr Johnson’s evidence is not comprehensive, as these reasons explain. Secondly, there is no reason why the rehabilitation of the land might not be achieved if the Council’s conditions remain in place.

[56] It was said that the Council had made a mistake in principle, by not just deciding if the eastern site is an appropriate place for a house. Rather, it was said, the Council had impermissibly chosen "the best site", by comparing the two.

[57] It is true that the Council did not have to go on to impose a condition about the western site, to be filled. In substance, the Council rejected the eastern end as a suitable site, and volunteered a condition allowing a house to be built at the western end. In doing that, it made no mistake in principle. It was imposing a condition which was relevant and reasonable. In *Proctor v Brisbane City Council* 1993, 81 LGERA, 398, the Court was considering the word 'relevant' in the definition. The court said:

"It may well be that a condition which is in no proper sense of the word 'required' by a subdivision is nevertheless relevant ... as falling within the proper limits of a local authority's functions under the Act, as imposed to maintain proper standards in local development or in some other legitimate sense. For example, a condition relating to the layout of the subdivisional roads may not be able to be supported as "required" – reasonably or otherwise – by the subdivision in question, but may be defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located."

Conclusions

[58] The town planning documents are quite against the appellant's proposal. They give much support to the position adopted by Council. The condition imposed by Council is reasonable and relevant, as it better reflects the aims of the town planning provisions.

[59] The appeal must be dismissed.