Supreme Court of Queensland – Court of Appeal

WAW Developments Pty Ltd v. Brisbane City Council [2011] QCA 47 (18 March 2011)

Last Updated: 18 March 2011

SUPREME COURT OF QUEENSLAND

CITATION:	*WAW Developments Pty Ltd v Brisbane City Council* [2011] QCA 47
PARTIES:	**WAW DEVELOPMENTS PTY LTD** ACN 084 429 827 (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 9979 of 2010 P & E Appeal No 3586 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	18 March 2011
DELIVERED AT:	Brisbane

HEARING DATE:	10 March 2011
JUDGES:	Muir and Chesterman JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **The application for leave to appeal is granted;** 2. **The appeal is allowed;** 3. **The order of the Planning and Environment Court is set aside;** 4. **The respondent is to pay the costs of the application and appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – FORM AND CONTENTS OF APPLICATION – VALIDITY OF APPLICATION GENERALLY – where the applicant built a raised deck over the footpath outside its premises and sought development approval for the use of the structure for outdoor dining – where there was no question in the proceedings about the legality of the structure itself – where the application for "evidence of resource entitlement" was acknowledged by the departmental administration officer – where the departmental administration officer indicated that the Department did not require tenure over the subject area and that the activity of outdoor dining was covered by local laws – where the applicant claimed that the relevant State representative was satisfied with the development and thus could proceed according to s 3.2.1(5)(c) of the *Integrated Planning Act* 1997 (Qld) – whether the departmental administration officer's letter amounted to an indication that the Chief Executive was satisfied that the development might proceed – whether the application was a 'properly made' one *Integrated Planning Act* 1997 (Qld), s 3.2.1(5)(c) (repealed) *Integrated Planning Regulation* 1998 (Qld), s 12, schedule 10 (item 8) (repealed) *Stockland Property Management Pty Ltd v Cairns City Council* (2009) 171 LGERA 1; [2009] QCA 311, considered

COUNSEL: C L Hughes SC, with D M Favell, for the applicant
M D Hinson SC for the respondent
SOLICITORS: Colwell Wright Solicitors for the applicant
Brisbane City Legal Practice for the respondent

[1] MUIR JA: I agree with the orders proposed by Chesterman JA for the reasons given by his Honour.

[2] CHESTERMAN JA: The applicant appealed to the Planning and Environment Court ("P & E Court") against the respondent's refusal of its development application:

"To extend the existing approved Restaurant Use ... over the footway immediately adjoining the existing activity by way of construction of a steel and concrete deck (the structure), and doorway leading to the structure, for use by the Restaurant for Outdoor Dining ... ."

[3] The respondent applied to the P & E Court for an order summarily dismissing the appeal to that court on the ground that the application was not a "properly made" one.

[4] On 6 August 2010 the P & E Court struck out the appeal. The applicant seeks leave to appeal against the summary dismissal of its appeal.

[5] The applicant conducts, or has approval to conduct, a restaurant from premises fronting Wyandra Street in Newstead near its intersection with Commercial Road. The footpath, part of the Wyandra Street road reserve, slopes quite steeply. The applicant built a raised deck over the footpath, level with it at the Commercial Road end but elevated above it at the other. At that end access to the deck to and from the footpath is by stairs. The deck is attached to the restaurant premises and is intended by the applicant to be the site of outdoor dining.

[6] There is no question in these proceedings about the legality of the structure. The respondent required the applicant to apply for development approval for the use of the structure for outdoor dining. The application was made and rejected. It was the appeal against the rejection of the application which was summarily dismissed.

[7] Section 3.2.1 of the Integrated Planning Act 1997 ("IP Act") (which

remains the relevant legislation for this application) has as its subject matter applications for development approval. Section 3.2.1(5) provides:

"To the extent the development involves a State resource prescribed under a regulation, the regulation may require the application to be supported by 1 or more of the following ...

(c) evidence the chief executive of the department administering the resource is satisfied the development application may proceed in the absence of an allocation of, or an entitlement to, the resource."

[8] Section 12 of the Integrated Planning Regulation 1998 provides that:

"For section 3.2.1(5) of the Act, schedule 10 prescribes State resources and the evidence required to support an application that involves taking or interfering with a resource."

[9] The relevant item in Schedule 10 is number 8,

"Land that is a road (other than a State-controlled road) ... ."

Wyandra Street is a road other than a State controlled road. The department with the responsibility for the administration of the road was at the relevant time the Department of Environment and Resource Management. The evidence necessary to satisfy s 3.2.1(5) was evidence that the Chief Executive of the department was satisfied:

"(b) The development application may proceed in the absence of an allocation of, or an entitlement to, the resource."

[10] The resource in question was the road reserve. The application involved the resource because the deck was built on and over part of the footpath and thereby provided an alternative means of pedestrian access along the footpath. That is, one could walk along the natural slope or walk along the deck and stairs. If used for dining footway access to that part of the footpath would be restricted.

[11] The applicant applied to the department for "evidence of resource entitlement". The application identified a road other than a State controlled road as the subject of the application and sought "tenure for existing

outdoor dining and footpath unlimited access to the public."

[12] The application was acknowledged by the departmental administration officer who noted that the application was:

"... for resource entitlement to construct an elevated deck on road reserve in Wyandra Street Newstead adjoining freehold property described as Lot 154 RP97694 Parish of North Brisbane County of Stanley at 68 Commercial Road Newstead. The purpose of the deck is to provide an outdoor dining area to an adjoining café.

This application had been assigned to Theresa Dunn...for processing... ."

[13] A few days later Ms Dunn wrote to the applicant:

"I refer to your letter ... in which you request resource entitlement for the construction of an elevated deck to facilitate footpath dining ... .

The Department ... advises that it will not require tenure over the subject area for the construction of the elevated deck.

It has been determined from the information provided and further investigation by this Department that the activity of outdoor dining is covered by local laws administered by the Brisbane City Council. The General Authority – evidence of resource entitlement for roads issued by this Department lists the activity of outdoor dining, as traditionally consistent with the use of a road.

Enclosed for lodgement with your application is a copy of the General Authority."

[14] The attached Authority was headed "Evidence of resource entitlement for roads." It read relevantly:

"This general authority relates only to development applications (other than for vegetation clearing) under (*IP Act*) WHERE the road is under the control of local government; AND

- for uses2 –
  - ...

◦ consistent with a road ...
AND satisfies the requirement of section 3.2.1(5) of (IP Act) and s 12 and Item 8 of Schedule 10 ... that a development application ... is supported by evidence that the chief executive ... is satisfied that the development application may proceed in the absence of an allocation of, or an entitlement to, the resource."

[15] Footnote 2 gives examples of uses that are traditionally associated with the use of a road. They include:

"outdoor dining to which the public has unrestricted access, with no fixed improvements UNLESS part of the streetscape, and tables and chairs, etc. are removed each day after trading".

[16] The statutory purpose of s 3.2.1(5) was explained by Keane JA in Stockland Property Management Pty Ltd v Cairns City Council [2009] QCA 311; (2009) 171 LGERA 1 at

11-12. His Honour said:

"But the language of s 3.2.1(5)(b), which speaks of the consistency of the development application "with an allocation of, or an entitlement to, the resource", is a more reliable indication that the legislature's intention is that the occasion for the engagement of the requirements in s 3.2.1(5)(b) is indeed a clash with, or a hampering or hindering of, the State's enjoyment of ownership or stewardship of the State resource ... .

Such a view of the scope of (the section) and s 12 of the (Regulation) is consistent with an underlying intention that, where the public interest in the enjoyment of resources held for the community by the State may be adversely affected by a proposed development, the representatives of the State should have the opportunity to veto the development. Where the proposed development is consistent with the implementation of the State's own purposes, the concern which informs the legislation does not arise."

[17] If the State is not concerned that the particular development application will adversely affect the State resource it may say so, and evidence that the relevant State representative is satisfied that the development may proceed in the absence of an allocation of or entitlement

to the resource to the applicant, will satisfy s 3.2.1(5)(c).

[18] The applicant submits that Ms Dunn's letter was evidence to that effect. The primary judge disagreed. His Honour said:

"[10] Unfortunately the accompanying "General authority – Evidence of resource entitlement for roads" ("the General Authority") relevantly only authorises development applications "for road purposes" or "consistent with a road" which are specified as including "outdoor dining to which the public has unrestricted access, with no fixed improvements UNLESS part of the streetscape, and tables and chairs, etc are removed each day after trading."

...

[15] Turning to whether the response of DERM in the letter dated 27 July 2009 constituted compliance with s 3.2.1(5) of IPA. The appellant concedes that there is no question of there being an "allocation or entitlement" to the footpath and it therefore submits that there has been compliance with subsection 3.2.1(5)(c) on the basis that this letter constitutes evidence that the chief executive of DERM is satisfied that the development application may proceed in the absence of such an allocation or entitlement.

[16] This is an incorrect interpretation of what is stated in the letter. The letter merely refers the appellant to the General Authority. The terms of the General Authority make it clear that it only includes outdoor dining to which the public has unrestricted access where there are no fixed improvements "UNLESS" they form "part of the streetscape".

[17] In *Gelling & Ors v Cairns City Council & Anor* [2008] QPEC 38 at [30] Dodds DCJ defined the term "streetscape" to mean, "the presentation offered by a street in its context by which I mean the buildings, other development, open space, vegetation, etc which may reasonably be considered as framing it."

[18] On the facts before me and in particular having regard to the photographs of the structure put in evidence, I do not consider that the structure is part of the streetscape. It does not frame the street. It intrudes

into the street.

[19] It follows that the appellant failed to comply with s 3.2.1(5) of IPA."

[19] With respect to the primary judge it is impossible to read Ms Dunn's letter as indicating anything other than the Chief Executive's satisfaction that the development might proceed, and that the development did not adversely affect the State resource. The letter noted expressly that the department did not require the applicant to obtain tenure over that part of the footpath covered by the deck. The clear inference is that the department did not regard the structure and its intended use as effecting a closure of part of the road reserve, so the applicant was not required to obtain title to that part of the reserve.

[20] It is equally clear from the reference to the General Authority and the provision of a copy of it that the department regarded the use of the deck for outdoor dining as an acceptable use of the footpath. The primary judge came to a different view by concentrating upon the example given in footnote 2 which refers to outdoor dining. His Honour seemed to think that approval had been given only for outdoor dining that fell within the description in footnote 2. This approach misses the point. Ms Dunn's letter did not say that the Chief Executive would be satisfied that the development might proceed in the absence of an allocation of or entitlement to the resource only if the application fell within one of the examples described in the General Authority. The clear tenor of her letter was that the department did not require the applicant to obtain an entitlement to the resource, and was content for the application to proceed without such an entitlement.

[21] Ms Dunn clearly thought that the General Authority covered the subject matter of the application. Whether or not she was right on that point her letter clearly expressed the satisfaction required by s 3.2.1(5)(c).

[22] The General Authority was enclosed, as I read the letter, as an explanation for the expressed conclusion that the intended use of the deck was consistent with the use of the State resource as a footpath.

[23] Even if one were to construe the letter as signifying the Chief Executive's satisfaction that the development may proceed in the absence

of the requisite allocation or entitlement only in the circumstance that the proposed use was outdoor dining to which the public had unrestricted access, with no fixed improvements unless part of the streetscape, with tables and chairs removed each day after trading, the P & E Court was not justified in summarily dismissing the appeal. On that construction of the letter and authority whether s 3.2.1(5) had been complied with depended on a question of fact, whether the application for the development approval was for outdoor dining involving no fixed improvement unless part of the streetscape. On that construction of the letter the Chief Executive expressed satisfaction conditionally. Whether the condition had been fulfilled would require an investigation of fact, whether the deck was part of the streetscape. That question could not be answered on an application to strike out the appeal summarily on a point of law.

[24] On any view of Ms Dunn's letter the appeal to the P & E Court should not have been peremptorily dismissed. The question whether the deck forms part of the streetscape does not arise in this application and it is unnecessary to essay any criticism of the primary judge's opinion that it did not.

[25] However, lest it be thought that an understanding of what constitutes a streetscape is limited to those who practise in the P & E Court it is worth noting that the term is a common one and appears, for example, in Chambers Dictionary which defines it as:

"A scene or view of the street: the specific characteristic of or improvements made to a street."

[26] Streetscape must then, surely, include street furniture. That is, according to the Oxford Dictionary of Architecture:

"anything erected on pavements or streets, including bollards, railings, lampposts, pissoirs, post boxes, street signs, telephone kiosks, and entrances to subways or underground railways, often of cast iron."

[27] Whatever one thinks of the aesthetics of the applicant's structure it is an improvement at least as substantial as a pissoir or a parking meter.

[28] The P & E Court erred on a question of law by wrongly concluding

that Ms Dunn's letter did not provide the evidence required by s 3.2.1(5) of the IP Act, and s 12 of the Regulation. The dismissal of the applicant's appeal in consequence of that error has done it an injustice.

[29] I would give the applicant leave to appeal, allow the appeal and set aside the order made by the P & E Court. The respondent should pay the costs of the application and appeal.

[30] ANN LYONS J: I agree with the reasons of Chesterman JA and with the orders proposed.