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2007 WL 1726738; [2007] QCA 200; 1 PDQR 79; [2007] ALMD 6647; [2007] ALMD 6645

Charles & Howard Pty Ltd v Redland Shire Council
McMurdo P, Holmes JA and Mackenzie J
5 March, 15 June 2007. Brisbane

Appeals - Applicable law at time of appeal - De novo - Determinations based upon provisions of earlier planning scheme in force when development application made - Relevant provisions of planning scheme in force at time of appeal - "Give weight to any new laws and policies the court considers appropriate" - Primary judge giving determination on partial reliance on planning scheme in force at time of appeal - Integrated Planning Act 1997 (Qld), ss 3.5.30, 4.1.27, 4.1.52, 4.1.56

Development Consent - Condition - Development approval subject to condition requiring fill to be placed in different location on site to that sought in development application - Comparative analysis between relevant merits of competing proposed locations on the same site conducted by primary judge - Erroneous "best sites" test - Integrated Planning Act 1997 (Qld), ss 3.5.30, 4.1.27, 4.1.52, 4.1.56

Development Consent - Condition - Development approval subject to condition requiring fill to be placed in different location on site to that sought in development application - Relevance and reasonableness - Whether disputed condition unreasonable - Effect of significantly altering proposed development - Integrated Planning Act 1997 (Qld), ss 3.5.30, 4.1.27, 4.1.52, 4.1.56

Words and Phrases - "Give weight to any new laws and policies the court considers appropriate" - Primary judge giving determination on partial reliance on planning scheme in force at time of appeal - Integrated Planning Act 1997 (Qld), ss 3.5.30, 4.1.27, 4.1.52, 4.1.56

> Under the respondent Redland Shire Council's 1988 planning scheme (1988 planning scheme), certain land was zoned Residential A but its Preferred Dominant Land Use under the Council's 1998 strategic plan (part of the 1988 planning scheme) was not Urban Residential but rather Special Protection Area.
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> Despite approval by a private certifier for a dwelling in the northwest corner of the land the dwelling could not be built in this position under the 1988 planning scheme without a development approval as the proposed building site needed fill to bring it to the minimum height level required by the council's relevant planning instruments. The council approved the applicant company's development ***350** applica-

tion to place fill on the land subject to seven conditions, only the first of which was controversial, namely: "Approval has not been granted to site the proposed development at the [applicant's preferred] location ... The proposal is to occur within the confines of the building envelope" on the council's preferred house site within the portion of the land proposed to be included in the urban residential zone (condition 1).

It was common ground that the house site preferred by the applicant company was below 2.4 metres Australian Height Datum (AHD) and was subject to inundation once in 100 years (the Q100 flood level). By contrast, the building envelope referred to in condition 1 had an elevation of 2.5 metres AHD and was not subject to inundation by Q100 flood level.

The Planning and Environment Court (PE Court) refused the applicant company's appeal from the Council's conditional approval.

Section 4.1.52(2)(a) of the Integrated Planning Act 1997 (Qld) (the Act) provided:

"(1) An appeal is by way of hearing anew.

(2) However, if the appellant is the applicant or a submitter for a development application, or is a person who has applied for approval of a proposed master plan, the court -

> (a) must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate; ..."

Held: (1) In determining the application, the council was obliged to act under the planning scheme in force at the time of the application, the 1988 planning scheme, a transitional planning scheme under the Act.

(2) On the appeal, the PE Court was obliged to make its decision based on the 1988 planning scheme (which included the 1998 strategic plan) but was also entitled to give weight to any new laws and policies the court considered appropriate pursuant to s 4.1.52(2)(a) of the Act.

(3) The primary judge did not fail to decide the appeal based on the 1988 planning scheme. Whilst his Honour did not directly refer to s 4.1.52(2)(a) of the Act, his approach seemed entirely consistent with that subsection's requirement that the court "must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate".

(4) The primary judge was entitled under s 4.1.52(2)(a) of the Act to consider the 2006 planning scheme in force at the time of the appeal hearing in deciding whether to allow the appeal. The applicant company had not demonstrated any legal error on the primary judge's part in his partial reliance on the 2006 planning scheme.

(5) Condition 1 was not an example of impermissibly imposing a condition with the effect of approving something quite different to that for which the application was made. The approval remained an approval to fill on the land for the purpose of building a residence but it imposed a condition as to where on the subject land that fill was to be placed.

Cases Cited

The following cases are cited in the judgment:

HA Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230.

Queensland Adult Deaf & Dumb Society (Inc) v Brisbane City Council (1972) 26 LGRA 380.

Multi Development Corporation Pty Ltd v Coff's Harbour Shire Council (1976) 33 LGRA 419.

Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349.

Ecovale Pty Ltd v Gold Coast City Council [1999] 2 Qd R 35; (1998) 104 LGERA 341.

Cambridge Credit Corporation Ltd v Parkes Developments Pty Ltd [1974] 2 NSWLR 590; (1974) 33 LGRA 196.

Bennett v Livingstone Shire Council (1985) 19 APA 268.

Barakat Properties Pty Ltd v Pine Rivers Shire Council (1994) 85 LGERA 99.

Grant v Pine Rivers Shire Council [2006] QPELR 112.

Castro v Douglas Shire Council [1992] QPLR 146.

Aborigines and Islanders Alcohol Relief Service Limited v Mareeba Shire Council [1985] QPLR 292.

Charles & Howard Pty Ltd v Redland Shire Council [2006] **QPEC 95**.

Proctor v Brisbane CC (1993) 81 LGERA 398.

Daikyo (North Queensland) Pty Ltd v Cairns City Council [2003] QPELR 606.

Luke v Maroochy Shire Council [2003] QPELR 447.

Grosser v Council of City of Gold Coast (2001) 117 LGERA 153.

Application

***351** These proceedings concerned the applicant company's development application to place fill on its land subject to a condition which stated that approval had not been granted to site a proposed development for a dwelling at the applicant company's preferred location. The facts of the case are set out in the judgment of McMurdo P

GJ Gibson QC and JJ Haydon, for the appellant

MD Hinson SC and SM Ure, for the respondent

Cur adv vult

15 June 2007

McMurdo P

1 Mr Wade Mellish, a director of Harridan Pty Ltd, is hoping to build his family home on 1.697ha of land at 20 Albert Street, Victoria Point. The land has a pleasant outlook over Moreton Bay. Vehicular access to the land is through Albert Street. Its northeast boundary adjoins a narrow reserve directly bordering Moreton Bay. To the west and north the land borders a developed urban-residential subdivision. Much of the central and eastern portion of the land is taken up by a mangrove-lined creek and estuary. Harridan Pty Ltd entered into a conditional contract to purchase the land. The applicant company, Charles & Howard Pty Ltd, has an interest in the land. Under the respondent Redland Shire Council's 1988 planning scheme, the whole of the land was zoned Residential A but, no doubt because of its ecologically sensitive position, its Preferred Dominant Land Use under the Council's 1998 strategic plan (part of the 1988 planning scheme) was not Urban Residential but rather Special Protection Area. Acert Building Certification, a private certifier, had approved plans to build the Mellish house in the northwest corner of the land close to Moreton Bay. It is common ground that, despite that approval, the house could not be built in this position under the 1988 planning scheme without a development approval as the proposed building site needed fill to bring it to the ***352** minimum height level required by the Council's relevant planning instruments. That is why, on 7 November 2005, the ap-

plicant made a development application to the Council for preliminary approval to place fill on the land on the site of the approved proposed footprint for the Mellish home.

2 On 21 November 2005 the Council requested the applicant to "demonstrate why the proposed dwelling cannot be located within the portion of the site proposed to be included in the urban residential zone", a more elevated location in the western corner of the land close to Albert Street, the corner of the land furtherst from Moreton Bay but still with an outlook over the Bay across the road. There were then further communications between the parties that are of no direct relevance to the determination of this application.

3 On 19 January 2006 the Council approved the applicant's development application to place fill on the land subject to seven conditions, only the first of which is controversial in this Court: "Approval has not been granted to site the proposed development at the [applicant's preferred] location ... The proposal is to occur within the confines of the building envelope" on the Council's preferred house site within the portion of the land proposed to be included in the urban residential zone.

4 The Council was not required to and did not give reasons for its decision but it was common ground that the house site preferred by the applicant was below 2.4 metres Australian Height Datum (AHD) and was subject to inundation once in 100 years (the Q100 flood level). By contrast, the building envelope referred to in condition 1 had an elevation of 2.5 metres AHD and was not subject to inundation by Q100 flood level.

5 The applicant appealed from the Council's conditional approval to the Planning and Environment Court under s 4.1.27 Integrated Planning Act 1997 (Qld) (the Act), contending that the condition was not reasonable, did not satisfy the conditions test in s 3.5.30 of the Act and ought to be amended to allow development at the location in the applicant's development application. It is clear from extracts of the transcript of the hearing in the Planning and Environment Court provided during oral submissions in this application that the issue there was whether the building site proposed by the applicant was an appropriate site for filling to occur.(1) The hearing in the Planning and Environment Court took place over three days. The Planning and Environment Court refused the applicant's appeal on 25 August 2006.(2)

6 The applicant applies for leave to appeal from that decision under s 4.1.56 of the Act. To succeed in this case, the applicant must demonstrate an error or mistake of law by the Planning and Environment Court and also obtain the leave of this Court to appeal. The applicant contends that the primary judge erred in law, first by misconstruing the relevant planning instruments; second, by erroneously applying a "best sites" test or "alternative sites" test; third, the condition was not reasonable because it was effectively a refusal of the application; and, fourth, by wrongly construing the planning instruments based on the evidence of potential impacts of climate change on predicted future sea levels. The applicant submits that these questions are of general importance, extending beyond the interest of the present parties, to the administration of town planning in the Redlands Shire and to all Queensland local governments ***353** which need to consider the filling of land near the coastline. The applicant contends that leave to appeal should be granted, the appeal allowed, the order made by the Planning and Environment Court set aside and instead an order allowing the applicant's appeal to the Planning and Environment Court, deleting condition 1 and either substituting a new condition allowing the filling to occur on the applicant's preferred building site or remitting the matter to the Planning and Environment Court for determination according to law.

The primary judge's approach

7 Before turning in more detail to the applicant's contentions, it is helpful to set out the approach taken by the experienced Planning and Environment Court judge. After referring to the background

facts, his Honour referred to s 3.5.30 of the Act which requires that conditions imposed by local governments must be relevant or reasonable.

8 The judge observed that the area proposed to be filled was 24.8 metres long and 13.2 metres wide with eight metres between the edge of that area and the mangroves of Moreton Bay. The purpose of the fill was to raise the level of the land above the Q100 flood level. At its deepest the fill would be about 700 millimetres. One hundred and fifty-nine cubic metres of fill or 32 standard truck loads would be required.

9 His Honour then turned to the Council's planning documents. He first considered the planning scheme in force at the time of the Council's decision. Under the 1988 planning scheme, all houses in low lying areas like this land must have an additional 300 millimetres height above 2.4 metres AHD.(3) Because the land is in the Residential A zone a dwelling house may be erected without the Council's consent but in reality there are constraints relating to filling and drainage. Where land is subject to flooding at a frequency of more than one in 100 years, approval to fill shall not be granted "except where such filling is of a minor nature".(4) The applicant's desired house site and the part of the land covered in mangroves are designated Public Open Space while the part of the land containing the Council's preferred site is designated Residential A.

10 A local planning policy dealing with waterways, wetlands and the coastal zone applied to all of the land and included an objective to:

> "protect residential housing from floodwaters by excluding such development from lands inundated by the Average Recurrence Interval of one in 100 year flood ... to ensure that any works and/or rehabilitation is designed in such a manner 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."

The policy added:

> "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 ... RL 2.4 metres in coastal areas."

11 His Honour found that filling the area proposed by the applicant, which was ***354** below 2.4 metres AHD, would effectively result in no such buffer zone. All of the subject land is in the 1998 strategic plan's 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 pre-condition 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 [to] be retained in its natural state along the coast-

> line 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 ...(5)"

12 His Honour then considered the Council's 2006 planning scheme in force at the time of the appeal hearing. Its Desired Environmental Outcomes(6) include:

> "... 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."

13 All of the subject land, apart from the Council's preferred site for the fill which is Urban Residential, is now in the Open Space Zone. Provisions as 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. (7) A dwelling is an "inconsistent use". The 2006 planning scheme contains a number of "overlays" which express policies for particular areas. The "flood prone, storm tide and drainage constraint land overlay" applies to all of the subject land apart from the Council's preferred site. His Honour noted the relationship between that overlay, the Habitat Protection Overlay and the Waterways, Wetlands and Moreton Bay Overlay to both proposed house sites on the subject land.

14 His Honour next considered and reviewed the competing evidence of the two engineers, Dr Trevor Johnson on behalf of the applicant and Dr Tom Connor on behalf of the Council. His Honour accepted Dr Connor's opinion that from a hydrological point of view the applicant's preferred house site is in a flood plain because there is evidence that tides inundate the site and the southern edge of the building platform is near the edge of the creek bank; flooding from heavy rainfall associated with high tides would inundate the site. 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 minimises the extent of filling in that it would require only five cubic metres. Dr Connor considered "the [applicant's] proposed building pad would be an embankment, up to approximately ***355** 875 millimetres in height at its deepest point adjacent to the creek bank, blocking the entire northern flow path area of the creek at this location" (a comment his Honour noted was made before the applicant restricted the proposed width of the fill). Dr Connor "thought that the amount of fill could not be described as "minor"'.(8) His Honour noted that Dr Connor considered the impacts of climate change should also be taken into account: the State Coastal Management Plan assumes that impacts will include higher frequency and more extensive storm tide flooding. New development should be focussed in areas not vulnerable to the impacts of climate change. The applicant's proposed house pad could possibly be surrounded in time by higher levels of water.

15 His Honour next considered the evidence of ecologists Dr Thorogood and Dr Watson. They each agreed that the Council's preferred building pad would have the advantage over the applicant's site of creating a more effective buffer zone between the building site and existing established houses in the urban subdivision. Whilst Dr Thorogood agreed with Dr Watson that the eight metre buffer zone around the applicant's site would be sufficient at present to allow for the natural growth and spread of the mangrove canopy, it would probably result in an insufficient buffer area to protect the mangroves over the coming years because of feared rise in sea levels progressively diminishing the buffer as the marine vegetation advanced inland. His Honour ef-

fectively preferred Dr Thorogood's view and concluded that ecologically the Council has chosen the better site, one which also reflects the plain intention of the planning documents that there be no development such as that proposed by the applicant.

16 His Honour then reviewed the evidence of the town planners. Mr Forsyth, called on behalf of the applicant, based his conclusions on the expert views of Dr Johnson and Dr Watson. The Council's town planner, Mr Perkins, was influenced by the views of Dr Connor and Dr Thorogood, whose views were also preferred by his Honour. Mr Perkins considered the 1988 planning scheme recognised that much of the subject land was not suitable for urban development. The 1998 planning documents reinforced that planning intent. The extent and location of filling proposed by the applicant was not minor in the context of the planning intent for the site. In the light of the assessment made by Dr Connor and Dr Thorogood, Mr Perkins identified that the applicant's proposal significantly conflicted with engineering and environmental outcomes sought by the 2006 planning scheme. His Honour accepted Mr Perkins' conclusions, considering that they were obviously supported by the town planning documents.

17 His Honour next considered the applicant's submissions that its proposed site was preferable. This contention relied on Dr Johnson's evidence that the fill was to be on only a small portion of the overall land mass and would be incorporated with a much larger area of land to be rehabilitated. The judge decided that the Council, in rejecting the applicant's proposed house site as suitable, volunteered a condition allowing a house to be built at the western end of the land and in doing so made no mistake in principle as the Council was imposing a condition which was relevant and reasonable in the sense discussed in Proctor v Brisbane City Council.(9) His Honour concluded that "it is clear that ***356** the various town planning documents are against the [applicant's] proposal"(10) and that the disputed condition imposed by Council was reasonable and relevant as it better reflected the aims of the relevant town planning provisions.(11)

Did the judge err in construing the planning instruments?

18 The applicant contends that it is unclear from the judge's reasons whether his Honour relied on the 2006 planning scheme to reach a conclusion different to that which should have been reached upon a consideration of the 1998 planning scheme.

19 It is common ground that because the applicant's chosen building site was lower than 2.4m AHD, fill was needed to raise it above that level before construction could proceed. This required the applicant to make a successful development application. In determining the application, the Council was obliged to act under the planning scheme in force at the time of the application, the 1988 planning scheme, a transitional planning scheme under the Act.(12) On the appeal, the Planning and Environment Court was obliged to make its decision based on the 1988 planning scheme (which included the 1998 strategic plan) but was also entitled to give weight to any new laws and policies the court considers appropriate: the Act s 4.1.52(2)(a). His Honour's reasons set out earlier do not suggest that his Honour failed to decide the appeal based on the 1988 planning scheme. His Honour's approach appears to have been to first consider the planning scheme in place at the time of the application and to then also consider relevant portions of the 2006 planning scheme in force at the time of the appeal. Whilst his Honour did not directly refer to s 4.1.52(2)(a), his approach seems entirely consistent with that subsection's requirement that the court "must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate". His Honour was entitled under s 4.1.52(2)(a) of the Act to consider the 2006 planning scheme in deciding whether to allow the appeal. The applicant has not demonstrated any legal error on the primary judge's part in his partial reliance on the 2006 planning scheme.

This contention fails.

20 The applicant next contends that the primary judge could only have concluded that the fill proposed by the applicant was "of a minor nature" under the planning documents. This is arguably a question of fact rather than law and, at best for the applicant, a mixed question of fact and law. It is true that his Honour did not make a specific finding that the applicant's proposal to fill the land was not of a minor nature but that was unquestionably the effect of his Honour's carefully reasoned conclusions after reviewing the competing and relevant evidence. The judge did not unquestioningly accept Dr Connor's conclusion that the amount of fill sought to be deposited by the applicant on the preferred site was not minor. His Honour accepted Dr Connor's reasons supporting that view and formed his own conclusion. Even if Dr Connor's opinion, that the fill was not minor, was strictly inadmissible for swearing a critical issue for the court's determination,(13) the judge came to the same ***357** reasoned conclusion only after giving appropriate consideration to the evidence and the relevant town planning instruments. The applicant has failed to demonstrate any judicial error of law in this respect.

Did the judge erroneously apply a "best sites" test?

21 The applicant contends that the primary judge erred in breaching a well-established principle of town planning construction that it is not a court's function to embark on an investigation to determine whether better sites exist elsewhere for a proposed development in an application or whether the proposed development is the best possible use for a site. The relevant and only issue for judicial determination should have been whether the proposed application was appropriate: Scurr v Brisbane City Council (No 6),(14) Comkey Pty Ltd v Caboolture Shire Council,(15) Bennett v Livingstone Shire Council, (16) Aborigines and Islanders Alcohol Relief Service Ltd v Mareeba Shire Council,(17) Queensland Adult Deaf & Dumb Society (Inc) v Brisbane City Council,(18) Castro v Douglas Shire Council(19) and Luke v Maroochy Shire Council. (20)

22 This submission must be placed in the context of the way the issue in this case was placed before his Honour. Both parties contended that the issue for his Honour was whether condition 1 was relevant or reasonable. The answer to that question required a consideration in the light of the relevant planning documents of where was the more appropriate location for the filling to occur and a residence to be built. The many cases to which the applicant has referred this Court in support of its contention concerned whether another site on different land the subject of the application was a better site than the site proposed for development. They do not deal with allowing a development application to fill land where a condition has been imposed allowing development on the land the subject of the development application but in a different position on the land than that proposed in the application. The point now raised was not argued in the Planning and Environment Court. His Honour cannot be justifiably criticised in the circumstances of this case for undertaking a comparative analysis between the relevant merits of the competing proposed locations on the one site in determining whether the condition imposed by the Council satisfied s 3.5.30(1) of the Act. That is what the parties asked him to do. The applicant's contention, that in the present circumstances this amounted to an error of law, fails.

Was the conditional approval unreasonable because it was in effect an approval for a quite different development application?

23 In an associated contention the applicant argues that the issue for determination by the judge was simply whether the applicant's proposal to Council should have been approved. That proposal identified a particular location. The Council did not approve that application but instead allowed it conditional on the applicant placing fill on the land in a different location. The ***358** applicant contends that this was in fact a refusal of the development application; the condition was not reasonable because the

effect of the approval was not an approval at all; the approval with the disputed condition made the approval a significantly different approval from that to which the development application related.

24 In Mison v Randwick Municipal Council,(21) whilst recognising that each case will turn on its own facts, Priestley JA (Meagher JA agreeing) noted that:

> "... if a condition imposed upon a purported consent to a particular development application has the effect of significantly altering the development in respect of which the application is made, then the purported consent is not a consent to the application."

Similarly, this Court in Barakat Properties Pty Ltd v Pine Rivers Shire Council(22) noted that:

> "... an application, in this case, a combined application for rezoning and subdivisional approval, cannot be approved subject to conditions which would result in a materially different proposal: see, eg, Cambridge Credit Corporation Ltd v Parkes Developments Pty Ltd [1974] 2 NSWLR 590; 33 LGRA 196; Multi Development Corporation Pty Ltd v Coff's Harbour Shire Council (1976) 33 LGRA 419 at 426-428."

See also Grant v Pine Rivers Shire Council.(23)

25 Those cases all related to development applications for use of land where advertising of the application was necessary so that approving without notice a quite different application to that made could well affect the rights and interests of third party objectors. There is no contention that this was the position in the present case. By contrast, the applicant's development application was for approval for filling on vacant land for the purpose of building a detached house. The Council's decision notice granting the development application in condition 1 provided that: "approval has not been granted to site the proposed development at the location indicated [by the applicant]. The proposal is to occur within the confines of the building envelope as indicated" by the Council. This is not an example of impermissibly imposing a condition with the effect of approving something quite different to that for which the application was made. The approval remained an approval to fill on the subject land for the purpose of building a residence but it imposed a condition as to where on the subject land that fill was to be placed. The issue litigated on appeal in the Planning and Environment Court concerned the relevance and reasonableness of that condition in the light of the evidence and the relevant town planning documents. I am not persuaded that his Honour has erred in law in his approach to determining the issues between the parties as raised before him. This contention also fails.

Did the judge err in considering evidence of climate change?

26 The applicant contends that there was no inconsistency between cll 16 and 17 of the 1988 planning scheme (dealing respectively with filling and drainage and minimum development levels) and the reference in the Council's strategic plan 1998, para 4.4.3, that:

> ***359** "At the time urban development is proposed in these adjacent areas [including the land the subject of this application], it will be necessary to establish the appropriate width of land to 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 ..."

27 The applicant submits that the judge erroneously took on the Council's responsibility as planning authority in determining this issue and that this amounted to an error of law: Grosser v Council of the City of Gold Coast, (24) Daikyo (North Queensland) Pty Ltd v Cairns City Council(25) and

Ecovale Pty Ltd v Gold Coast City Council.(26)

28 His Honour's approach in considering whether an approval to place fill on the land under the planning scheme's cl 16 or cl 17 imposed a reasonable condition was orthodox. His Honour was entitled, as he did, to take into account, by way of para 4.4.3 of the 1998 strategic plan, the impact of climate change on sea levels on the area proposed to be filled by the applicant and on the area proposed by the Council in its disputed condition, and to accept Dr Connor's opinion that the applicant's proposed building site may be vulnerable to rising sea levels because of climate change, thereby supporting the reasonableness of the condition imposed on the development approval by the Council. The applicant has not demonstrated that his Honour erred in law in so doing. Nor am I persuaded that in construing the relevant planning documents in this way his Honour has arrogated to the court the responsibility of determining Council planning issues. His Honour rightly considered that these were matters relevant to the determination of the essential issue before him: whether the disputed condition in the approval to place fill on the land was relevant and reasonable under s 3.5.30 of the Act in the sense discussed by this Court in Proctor v Brisbane City Council.(27) This contention is also without substance.

Conclusion

29 The applicant has failed to demonstrate the primary judge erred in law so that it is unnecessary to consider under s 4.1.56 of the Act whether leave to appeal should be granted. The application for leave to appeal must be refused with costs.

ORDER: Application for leave to appeal refused with costs.

Holmes JA

30 I have read the reasons for judgment of the President. I agree with them and with the order proposed.

Mackenzie J

31 I have had the opportunity to consider the President's reasons. I agree with them and wish to add nothing to them. I agree with the order proposed.

So ordered

Solicitors for the applicant: Mullins Lawyers

Solicitors for the respondent: Home Wilkinson Lowry

J VENEZIANO

FN(1) Transcript, 17 August 2006, pp 9 and 13.

FN(2) Charles & Howard Pty Ltd v Redland Shire Council [2006] **QPEC 95** August 2006.

FN(3) The Council's 1988 planning scheme, para 17 as amended 15 November 1990.

FN(4) Above, para 16.

FN(5) The Council's strategic plan 1998, para 4.4.3 (AB96-97).

FN(6) See the Council's 2006 planning scheme, s 3.1.2(1)(b)(ii).

FN(7) See s 4.16.7(2)(e)(i)(B).

FN(8) The applicant contended before his Honour and in this Court that Dr Connor's conclusion that the fill was not "minor" was inadmissible.

FN(9) Proctor v Brisbane City Council (1993) 81 LGERA 398.

FN(10) Proctor v Brisbane City Council (1993) 81 LGERA 398.

FN(11) Proctor v Brisbane City Council (1993) 81 LGERA 398.

FN(12) The Act, s. 6.1.29.

FN(13) HA Bachrach Pty Ltd v Caboolture Shire

Council (1992) 80 LGERA 230.

FN(14) Scurr v Brisbane City Council (No 6) (1975) QPLR 162 at 165-166.

FN(15) Comkey Pty Ltd v Caboolture Shire Council (2006) QPELR 399 at [47].

FN(16) Bennett v Livingstone Shire Council (1985) 19 APA 268.

FN(17) Aborigines and Islanders Alcohol Relief Service Ltd v Mareeba Shire Council [1985] QPLR 292.

FN(18) Queensland Adult Deaf & Dumb Society (Inc) v Brisbane City Council (1972) 26 LGRA 380 .

FN(19) Castro v Douglas Shire Council [1992] QPLR 146

FN(20) Luke v Maroochy Shire Council [2003] QPELR 447.

FN(21) Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349.

FN(22) Barakat Properties Pty Ltd v Pine Rivers Shire Council (1994) 85 LGERA 99.

FN(23) Grant v Pine Rivers Shire Council [2006] QPELR 112.

FN(24) Grosser v Council of City of Gold Coast (2001) 117 LGERA 153.

FN(25) Daikyo (North Queensland) Pty Ltd v Cairns City Council [2003] QPELR 606.

FN(26) Ecovale Pty Ltd v Gold Coast City Council [1999] 2 Qd R 35; (1998) 104 LGERA 341.

FN(27) Proctor v Brisbane City Council (1993) 81 LGERA 398.

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