

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Beach Club Port Douglas P/L v Douglas Shire Council*

PARTIES: **BEACH CLUB PORT DOUGLAS PTY LTD**
(Applicant)
v
DOUGLAS SHIRE COUNCIL
(Respondent)

FILE NO/S: 116 of 2005

DIVISION:

PROCEEDING: Originating Application

ORIGINATING
COURT: Planning and Environment Court, Cairns

DELIVERED ON:

DELIVERED AT:

HEARING DATE: 16, 17 May 2005

JUDGE: White DCJ

ORDER:

CATCHWORDS:

COUNSEL: Mr D H Denton SC for the applicant
Mr M Hinson SC for the respondent

SOLICITORS: MacDonnells for the applicant
Williams Graham & Carman for the respondent

- [1] This is an application for certain declarations. In order to properly explain how the application comes before the Court it is necessary to set out something of the history of an appeal formally disposed of by me in this Court on 18 February 2005. The applicant in this proceeding applied to the respondent for a development permit for a material change of use in respect of five allotments of land located at 22 Davidson Street, Port Douglas. The total area of the land is 6,728 square metres. The application was to develop 50 multiple dwellings (tourist), 50 accommodation premises and subsidiary ancillaries subject to conditions. That application required public notification and impact assessment. On 30 October 2004 the respondent approved the application for a development permit for a material change of use subject to conditions. The appellant in Appeal No. 500 of 2004, Mr Page, was a submitter and exercised his right of appeal pursuant to the relevant provisions of the *Integrated Planning Act*. That appeal came on for hearing before me on 18 February 2005. On that date I ordered that the appeal be dismissed for reasons

which I delivered later on 5 April 2005. One of the conditions of the approval granted by the respondent was as follows:-

“The plan of development must incorporate the following elements as depicted on the revised/additional plans, and must be amended as follows:-

- (a) The gross floor area of the development must not exceed 5,382 square metres plus an allowance of 15% equivalent to 807.3 square metres for balcony patio areas over and above the 5,382 square metres, in accordance with the definition of gross floor area in the Planning Scheme.
- (b) Plans detailing the gross floor area in the balcony area and associated calculations must be submitted to Council prior to the issue of a development permit for building works for construction of the proposed development.”

[2] In the view which I took at the hearing of Appeal 500 of 2004 it was not necessary to make a detailed calculation of the gross floor area of the plans submitted in support of the application which was the subject of that appeal. However, the parties had prepared and produced evidence in relation to the gross floor area in accordance with those plans, and submissions were made to me. Gross floor area is defined in the Planning Scheme of the respondent Council and I will set that out shortly. However, in my reasons in appeal 500 of 2004 I expressed the view that the gross floor area calculated in accordance with the plans lodged with the development application would exceed that permitted by condition 4.2. In the course of doing so I expressed some preliminary views about the proper construction of the definition of gross floor area in the Planning Scheme.

[3] It is of considerable significance that at the time I disposed of Appeal No. 500 of 2004 the parties consented to an amendment to Condition 4.2 of the approval so that it read as follows:-

“The plan of development must incorporate the following elements depicted on the revised/additional plans and must be amended as follows:-

- (a) The gross floor area of the development must not exceed 5,382 square metres calculated in accordance with the definition of gross floor area in the Planning Scheme inclusive of any balcony area in excess of 807.3 square metres or more than 3 metres from the back wall of the balcony.
- (b) Plans detailing the gross floor area and the balcony area and associated calculations must be submitted to Council prior to the issue of a development permit for building work for construction of the proposed development.”

[4] Shortly after Appeal No. 500 of 2004 was disposed of, on 8 April 2005, the applicant lodged an application for development permit for building work consequent upon the prior approval of the material change of use. In purported compliance with Condition 4.2 it lodged comprehensive architectural plans which in the applicant's view demonstrated that the calculation of gross floor area in accordance with the definition of that term in the Planning Scheme complied with Condition 4.2.

[5] It is common ground that in dealings between the representatives of the applicant and representatives of the respondent Council following the lodgement of this application, the Council displayed an intention to apply the contents of a memorandum dated 17 October 2000 and which is document No. 4 in ex 1. The applicant took the view that, in some respects at least, the matters contained in ex 1 /4 were inconsistent, and inconsistent to the applicant's detriment, with the proper construction of the definition of gross floor area in the Planning Scheme.

[6] As a consequence the applicant made this originating application for the following declarations pursuant to s 4.1.21(1)(b) of the *Integrated Planning Act* 1997 as follows:-

“(a) That the respondent consider the building application applying the terms of the transitional scheme without reference to the October 2000 document.

(b) As to the proper construction of the term gross floor area in the transitional scheme with reference to the building application.

(c) The building application complies with Condition 4.2 of the development approval granted by the Court on 18 February 2005.”

[7] The parties have put into evidence the relevant plans. There is in evidence details of the calculation of gross floor area by architects engaged by both parties. Counsel for both parties have made detailed submissions on the proper construction of the definition of gross floor area. There are calculations of the square meterage of those areas which are in dispute. I am therefore in a position to determine, on the basis of the proper construction of the definition of gross floor area, whether or not the plans submitted by the applicant for the building permit comply with that definition. It is accepted that depending upon my view in that regard I will be able to form a view as to whether or not ex 1 /4 is consistent with the definition of gross floor area. It is therefore accepted that, depending upon my view of the construction of the definition of gross floor area, I am able to determine with precision whether or not the plans lodged in support of the building permit comply with the definition of gross floor area and may deal with all of the declarations sought.

[8] It is useful to set out briefly the general approach of the respondent's transitional planning scheme as it affects this development and the issues to be determined on this application. The respondent's Planning Scheme is a transitional planning scheme pursuant to the provisions of the *IPA*. Uses are primarily governed by a Table of Zones. There is also a Development Control Plan 2 – Port Douglas applying to the township of Port Douglas and therefore to the subject land. That Development Control Plan addresses a variety of issues, but of particular relevance to this proposed development, it is concerned with the form and appearance of buildings. In particular it provides what may be conveniently described as development bonuses for buildings which conform to the desirable features of appearance and form provided for in the Development Control Plan. One of these desirable features is that buildings be designed in what is described as “the tropical Queensland of vernacular building style”. In part, s 3.5.1.1 of the DCP 2 provides as follows:-

“Development which incorporates desirable design features consistent with the preferred forms of development in the DCP area may be granted density bonuses as provided for in this section up to a maximum total bonus additional to the basic plot ratio.”

- [9] Plot ratio is the relationship between gross floor area and the area of the land the subject of the development. On the original application it was accepted that this applicant was entitled to the benefit of bonuses to the extent that a plot ratio of .8 was permitted. For that reason the gross floor area of 5,382 square metres was provided for in Condition 4.2, that being .8 of the total area of the subject land.
- [10] The Development Control Plan does not deal with all development requirements in the Development Control Plan area. Section 3.1.3.1 provides as follows:-
 "In general only those requirements which apply exclusively to development within the DCP 2 area are included in this plan. Those development requirements which apply throughout the Planning Scheme area or to more than one DCP area are included in Parts 8.0 to 11.0 of the Planning Scheme and also apply in the DCP-2 area in addition to the requirements specified in s 3.5. Reference should also be made to those Parts to identify all of the requirements which relevant to development in the DCP area."
- [11] The subject of gross floor area arises in Part 8.0 of the Scheme entitled Development Requirements – General.
- [12] Section 8.13 is entitled RESIDENTIAL DENSITY. It contains details concerning plot ratios and plot ratio bonuses which do not need to be set out in detail. It is clear however that the Scheme intended such things as plot ratio, plot ratio bonuses, and gross floor area to regulate residential density. In my view, such matters bear only marginal relevance to aspects of development such as the size and bulk of buildings. These matters are regulated by other express provisions concerning such things as building height, building set back, building foot print and dimensions of buildings.
- [13] The following relevant or potentially relevant definitions appear in Part 13.0 of the respondent's transitional Planning Scheme:-
"Gross floor area – with respect to a building, or buildings, the sum of the floor areas (inclusive of all walls, columns, verandahs and balconies whether roofed or not) of all stories in the building or buildings, excluding –
 (a) The area (inclusive of all walls and columns) of any lift motor room or air-conditioning or other mechanical or electrical plant and equipment room;
 (b) The area of that part of any unenclosed private verandah or balcony, whether roofed or not, directly accessible only from one dwelling unit which is within 3 metres of the back wall of that verandah or balcony to the extent that the sum of all such areas does not exceed 15 per centum of what would be the gross floor area but for this paragraph;
 (c) The area of any lobby and/or porte cochere at ground storey level, and/or any covered walkway;
 (d) The areas (inclusive of all walls and columns) at any ground storey of all rooms associated with landscape and recreation area in relation to development for some residential purpose, to the extent that the sum of all such areas does not exceed 10 per centum of the landscape and recreation area provided within the site;
 (e) The areas (inclusive of all walls and columns) of all space used or intended for use for the parking of motor vehicles where that parking

of motor vehicles is incidental to and necessarily associated with the use of some premises.

Ground Level –

- (a) Where land has been excavated to facilitate development, the likely ground level had that excavation not been carried out.

Building – any fixed structure which is wholly or partly enclosed by walls and which is roofed. The term includes any part of a building.

Storey – That space within a building which is situated between one floor level and the floor level next above, or, if there is no above, the ceiling or roof above, including any level used for car parking. That part of the ceiling which is not more than one metre above ground level shall not be included as a storey.

Caretaker's Residence – any premises used or intended for use for self-contained accommodation for the exclusive use of a caretaker and his family in connection with a particular purpose on the same parcel of land.

- [14] It is convenient to firstly consider in detail the issue of whether the gross floor area calculated by reference to the plans lodged with the application for a building permit complies with the Condition 4.2 of the development approval. The result of that exercise will then indicate the appropriate determination of the other issues.
- [15] I have been greatly assisted in that the parties have identified those particular parts of the buildings and the areas of such parts expressed in square metres, which are in dispute. However, I raised with Counsel during the course of the hearing a preliminary view that there were some parts of the building which the parties had agreed should be excluded from the calculation of gross floor area and about which I had doubts that such agreement properly applied the definition of gross floor area. I indicated to Counsel that I was not prepared to exclude such parts from the calculation of gross floor area if I determined that on the proper construction of the definition they should be included. However, I identified those parts about which I was concerned to Counsel and gave them the opportunity to make relevant submissions. I give due weight of course to the agreement of Counsel and will refer specifically to those parts during my reasons which follow.
- [16] The definition of gross floor area is set out in such a way that it requires an initial calculation of gross floor area from which certain identified areas are to be excluded. In my view none of the areas which are permitted to be excluded can be deducted unless such areas are also included in the initial calculation. In the evidence, and during the course of the hearing, the initial calculation pursuant to the definition was referred to as primary GFA and I will for convenience continue to use that term.
- [17] The appellant submits that the area of the horizontal plane beneath the external walls and columns at each floor level should be excluded from the calculation of primary GFA. Mr Denton SC looks to the dictionary definitions of the words "area", "floor", "room", and "space". He also relies on the Scheme definition of "storey". I feel bound to say that looking at those definitions, there is some support for the view that in calculating GFA, only the areas of physical horizontal surfaces

with empty space above would be taken into account. If that were so I see no reason why it would not also exclude the horizontal plane of internal walls as well. However, in my view the words in brackets mitigate against such a construction. In my view the horizontal plane of all external walls and columns at each storey level are required to be included in the primary GFA determination.

- [18] The applicant also submits that what is described as "balcony fenestration" is to be excluded from the calculation of primary GFA. What is referred to here is the design treatment of the outer edges of balconies. They are illustrated in a sketch attached to the written submissions made on behalf of the applicant. For convenience I will mark that sketch "ex 5". As the illustration shows there is a floor area upon which people may walk. Towards the outer edge of the balcony is a hob or step-up. Immediately on top of hob is the balcony railing. It is obviously not intended that people will actually step up onto that hob and walk beyond the railing. It is the surface area of the hob which the applicant submits should be excluded from the primary GFA calculation. It is agreed that the total area of such hobs is 176.1 square metres.
- [19] I cannot accept the submission. In my view the ordinary meaning of the words contained in the introduction to the definition of gross floor area require their inclusion. They are part of the building and they are part of the balconies. Of course, some of the area of such balcony fenestrations may be later excluded pursuant to exclusion paragraph (b).
- [20] During the course of the hearing I expressed some concern about whether or not the floor area of the lower level of what is referred to in the plans as building A should be included in the primary GFA calculation. It was common ground between the parties that it should not. It is not included in the primary GFA calculation of 7,881.28 square metres. Upon further consideration of the definition of gross floor area I have come to the conclusion that it should not be included and since the parties are agreed thereon there is no need to give any further consideration to that issue.
- [21] The parties dispute the area which is to be excluded pursuant to paragraph (c). Mr Hinson submits that in order to benefit from that exclusion the area of any lobby, portcochere, and covered walkway must be at ground storey level. In other words, he submits that the exclusion should be read as follows:-
 "the area of any lobby at ground storey level and/or porte cochere at ground storey level, and/or any covered walkway at ground storey level."

The simple answer to the submission is that the words used in the exclusion do not say that. Further, there is nothing in the purpose of the definition of gross floor area, namely as part of the regulation of residential density, which requires such a construction, particularly as it applies to this sort of building. In the case of a multiple dwelling building it is the occupation of the dwellings themselves which primarily contribute to residential density. In a multiple dwelling building with a number of stories there is likely to be present (as in this case) a main entrance area which might well consist of a porte cochere and lobby. It is also likely that there will be internal stairways and passageways which residents and their visitors will use to gain access to the individual residential units. These areas also in my view do not contribute to residential density. They may contribute to the size and bulk of the

building but their area will be contained by other development control provisions regulating the number of storeys, height of building, site coverage, etc. In my view exclusion (c) encompasses all covered walkways at any level or more particularly, on any storey, not just the ground storey. It includes all stairways. This fits more comfortably with the purpose of the definition and certainly does not require a re-arrangement of the express words of the exclusion to arrive at what in my view would be an arbitrary result confining the exclusion for covered walkways to the ground storey level.

[22] I accept the respondent's submission that only a lobby at ground storey level may be excluded but I do not accept that only one lobby at ground storey level may be excluded. In my view the singular includes the plural. This is consistent with s 32C of the *Acts Interpretation Act* 1954 applying to the meaning of Acts.

[23] There are some areas of the proposed plans which require special consideration. They may be illustrated by reference to page 15 of ex 3. It may be observed that the unit numbers are noted twice, once in large print and once in small print. This is because they are intended to be capable of what is described as "twin key occupancy". Using Unit 28 as an example, access is gained by means of the staircase numbered stair 7. One then enters through a doorway identified as DG 28-01. In order to enter the larger portion of Unit 28, one then goes through the door identified as DG 28-02. If one wishes to enter the smaller part of Unit 28 one enters through the door marked DG 28-03. For a group of persons wanting to occupy all of Unit 28, that is both the larger and smaller areas, they will be provided with keys to all three doors. If an occupant or a small group of occupants only wishes to occupy the larger portion of Unit 28 that group will be provided with keys to doors DG 28-01 and DG 28-02 for access. Under those circumstances another occupant or small group of occupants may occupy the smaller part of Unit 28. The occupants of the smaller portion of Unit 28 will be provided only with keys to doors DG 28-01 and DG 28-03.

[24] The appellant submits that the small square area bounded by those three doors and the wall between Unit 28 and the similar area in Unit 29 are either lobbies (at ground storey level) or covered walkways at other storey levels. In my view the submission is correct. Such a view is also consistent with the primary purpose of the calculation of gross floor area, namely to regulate residential density. These little areas at the entrance to the units contribute nothing at all to residential density. I am fortified in this view by the judgment of Skoien SJDC in *Garrad v Brisbane City Council* 2004 QPEC 037 at p 8. In my view therefore the area of such entrance lobbies or walkways on all stories should be excluded from the calculation of gross floor area by reason of exclusion (c) of the definition. However I am having difficulty ascertaining what the resulting total deduction by reason of exclusion (c) would be in light of this conclusion. I will need some further assistance from the parties.

[25] Exclusion (d) reads as follows:-

"The area (inclusive of all walls and columns) at any ground storey of all rooms associated with landscape and recreation area in relation to development for some residential purpose, to the extent that the sum of all such areas does not exceed 10 per centum of the landscape and recreation area provided within the site."

As I understand the position, the parties were agreed between themselves as to the square metre area to be excluded pursuant to paragraph (d). The only issue arose out of my concern that the areas of the lower or basement level of building A might need to be included. As I understand the position, none of those areas were included in the primary gross floor area calculation. Since I have come to the conclusion that that is an appropriate approach, it seems therefore that the amount to be allowed by reason of exclusion (d) is not in dispute. I am having difficulty ascertaining the quantum of that area. I will need further assistance from the parties in that regard.

- [26] I now turn to exclusion (b). As I understand the issue in dispute it is the figure to which the 15 per centum calculation should be applied. The submission on behalf of the respondent is that the amount to be allowed by reason of exclusion (b) is 15 per centum of the maximum gross floor area permitted. It is agreed that on that basis the allowance for balconies would be 807.3 square metres, the amount specified in Condition 4.2 of the development approval. The respondent submits that the figure to which 15% is to be applied is the primary gross floor area less exclusions allowed in paragraphs (a), (c), (d) and (e). In my view the respondent's submission is correct. That is the logical construction which would be required by the words "of what would be the gross floor area but for this paragraph" in the words of exclusion (b). Until I am able to finally ascertain the amounts to be excluded pursuant to paragraphs (a), (c) and (d) I am unable to arrive at the appropriate figure for exclusion under paragraph (b).
- [27] I should say however that at the moment I consider the parties bound by the consent order fixing 807.3 square metres as the area to be excluded under paragraph (b).
- [28] Finally, I turn to the 100 square metres provided for in the caretaker's residence. It is common ground between the parties that the area of the caretaker's residence was not included in the calculation of primary gross floor area. In my view it should have been included. It contributes directly to the residential density arising out of the proposed development. It is a building or part of a building. Further, there is no rational basis for excluding the area of a caretaker's residence pursuant to any of the express exclusions permitted in the definition of gross floor area.
- [29] By now it will be readily apparent that in my view the document ex 1 /4 is inconsistent with the proper construction of the definition of gross floor area in the respondent's transitional Planning Scheme. In my view the respondent was in error in insisting that gross floor area should be calculated in accordance with that document. I propose therefore to make the first declaration sought. It will be necessary for me to have further assistance from the parties before making a final determination of the quantum of the gross floor area of the proposed development.
- [30] I am hoping that the parties will be able to give me an agreed figure (expressed in square metres) –
- (i) For the primary gross floor area
 - (ii) For exclusions (a), (c), and (d).
 - (iii) For exclusion (e), if any such area was included in the primary GFA.

If I have those figures I will be quickly able to arrive at a final figure for gross floor area.