PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Curtain v Eacham Shire council*
PARTIES:	**DAVID CURTAIN and SUSAN CURTAIN** (Appellants) v **EACHAM SHIRE COUNCIL** (Respondent)
FILE NO/S:	164 of 2005
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	
DELIVERED ON:	April 2006
DELIVERED AT:	Cairns
HEARING DATE:	
JUDGE:	White DCJ
ORDER:	**Uphold the appeal.**
CATCHWORDS:	
COUNSEL:	Mr D Denton SC for the appellants Mr S Ure for the respondent
SOLICITORS:	MacDonnells for the appellants Lilley Grose & Long for the respondent

[1] The appellants are registered proprietors of a parcel of land described as Lot 3 on RP 715928 Parish of Malanda, County of Nares. It is 59.41 hectares in area. The land is roughly rectangular in shape but with an irregular boundary at its western end. It has two relatively small frontages to the Malanda/Lake Barrine Road on its western end. Its major road frontage is to Moore Road on its southern boundary. Approximately one third along the Moore road frontage from the Malanda/Lake Barrine Road is a cluster of buildings comprising –

(a) A shed
(b) A building containing self-contained residential accommodation
(c) A manager's residence
(d) A restaurant
(e) Two buildings, each containing four accommodation units

[2] The appellants applied to the respondent Council for approval to reconfigure the lot by subdividing an area of 1.95 hectares (the subject land) whereon the above

buildings are located, from the larger allotment. This is an appeal against the respondent's refusal of such application.

[3] The respondent's planning scheme applicable at the time the application was made, came into force on 15 April 1989 and was therefore a Transitional Planning Scheme pursuant to the provisions of the *Integrated Planning Act* 1997 as amended (IPA). The result is that the application fell to be decided by the respondent and by the court pursuant to the provisions of s 6.1.30 of IPA, that is by reference to subsections 5.1(6) and (6A) of the now repealed *Local Government (Planning and Environment) Act* 1990 as amended. In particular, subsection 5.1(6A) provides as follows:-

> "The local government must refuse to approve the application if –
> (a) The application conflicts with any relevant strategic plan or development control plan; and
> (b) There are not sufficient planning grounds to justify approving the application despite the conflict."

The respondent argues that there is a conflict between the appellants' proposed subdivision and the Strategic Plan under the Transitional Planning Scheme and that therefore the application must be refused. The primary position taken on behalf of the appellants is that there is no such conflict but that if there is, there are sufficient planning grounds to justify approving the application despite the conflict. It is therefore appropriate to deal with this issue first.

[4] Given the way that the respondent has approached the application, it is appropriate to set out some relevant town planning history in relation to the proposed subdivided allotment. Historical documents contained in ex 8 disclose that a person by the name of Deede, in July 1977, made an application for consent to the respondent Council to use part of the land for what was described in the application form as "Dude Ranch – holiday resort". The letter accompanying the application form included the following:-

> "We propose to conduct a dude ranch which will entail the erection of accommodation units for 16 guests and a ranch house consisting of dining room, lounge room, kitchen, storeroom, recreation room and amenities. Our intention is to cater for guest meals and entertainment.
>
> Outside activities will include horse riding in a rural setting. We intend to conduct the dude ranch along with our usual farming activities of cattle grazing, maize growing, also oats which we bail and chaff for horse feed."

The application was approved at a meeting of the Council on 29 August 1977. The minutes of the meeting suggest that conditions might have been imposed but no conditions have been produced by the respondent.

[5] The evidence also does not disclose any precise detailed history of ownership of the subject land. Ex 6 is a statement by Robert Russell Fry. Mr Fry has lived in the Russell Road area since he was about 7 years of age (1952). He is very familiar with the subject property. He says that he recalls the Deedes who owned the property in the 1970s and that the units were constructed by Mr Deede. He says that there was an airstrip established on the property in the late 1970s. He recalls

that a Mr Ozarko took over the property at some time but does not say when. Apparently Mr Ozarko attempted to introduce the use of ultra light aircraft to the area at some stage. The appellants purchased the land in August 2004 but it is unclear whether they purchased the land from Mr Ozarko or some subsequent owner.

[6] The respondent keeps a register of lawful non-conforming uses. On 25 October 1988 there was entered in the register in respect of the subject land the following lawful non-conforming use –

"Eight (8) motel units"

At that time the owners were recorded as W E & M J Ozarko and J P and K D Burrett.

[7] Susan Dorris Curtain gave evidence by means of a statement ex 4 and oral evidence with cross-examination. The appellants are both veterinarians, although Mrs Curtain is not presently practising in her profession. She says that when the appellants took possession of the land it was run-down and in a neglected condition. The land was poorly fenced, the soil in poor condition. The land was covered in weeds such as lantana, tobacco weed, purple top and sensitive week. The buildings were also in a neglected state. The restaurant was very run-down with the kitchen in a putrid state. Paint and wallpaper was peeling off the walls and the interior of the buildings was generally dark and dingy. Since taking over the property the appellants have considerably improved the farmland by planting approximately 4,500 rainforest timber trees. They have improved the fencing and attended to substantial weed eradication. They are, at the time of the hearing, running 31 head of cattle and it is expected that the land will be capable of running more cattle in the future. The appellants have also commenced significant refurbishment of the relevant buildings.

[8] The appellants are interested in using the subject land for farming purposes. They are not interested and do not consider that they have appropriate skills to run a motel. They wish to subdivide the land by having the motel buildings on a separate title so that they can sell it. Their personal wishes are of no relevance to the issues before the court and I give them no weight in arriving at my ultimate conclusion. However, their personal situation does provide a practical example of a situation referred to by Mr Peter Robinson, the Town Planner, who gave evidence for the appellants, namely that competent farmers might not have the necessary time and skills to competently manage a motel operation and that persons having the time and skills to competently manage a motel operation may not be able to manage a farming operation nearly as well. I accept Mr Robinson's evidence in this regard and I consider that to be of some relevance to the planning issues arising in this case.

[9] I also want to make it clear that there are two aspects of the way in which the case for the respondent has been presented and argued which I reject. Firstly, I reject the characterisation of the existing and historical use of the subject land as "farm stay". Whilst I accept from the evidence of Mr Fry that the accommodation buildings were used as the base for a "dude ranch" type of operation, there is no evidence that it was used exclusively for that purpose and that only persons engaging in the "dude ranch" type of activities were accepted as guests of the premises. More importantly,

the registered non-conforming use is that of a motel. Motel is defined in the Transitional Planning Scheme as follows:-

> "Any premises used or intended for use for temporary accommodation of travellers and the vehicles used by them, whether or not the premises or any part thereof is also used or intended for use in the provision of meals to such travellers or the general public."

The appellants did not apply for a material change of use. I reject any suggestions on the respondent's behalf that the appellants' application should be evaluated or assessed as if it were.

[10] I will set out the provisions of the Strategic Plan in the Transitional Planning Scheme upon which the respondent relies to advance the proposition that the proposed subdivision is in conflict with the Strategic Plan. The Strategic Plan is based around a schedule of Preferred Dominant Land Uses. The preferred dominant land use applying to the whole of the lot is "General Farming". The explanation for this designation is as follows:-

> "The designation covers most of the Shire's freehold areas in recognition of the economic base provided by dairy farming and grazing. Other rural pursuits are envisaged, although to a lesser extent and subsidiary to dairying and grazing."

It is also of some relevance to note that there are areas designated as "Special Farming" as the preferred dominant land use in the Strategic Plan. The explanatory outline for areas designated Special Farming is as follows:-

> "The designation covers areas suitable for more intensive farming where climate, soils and terrain as well as proximity to the markets enable development of smaller farms for producing crops such as tropical fruits."

[11] Section 3.0 of the Strategic Plan contains a statement of Aims, Objectives and Implementation. Section 3.1 expressly deals with land designated as General Farming and Special Farming. The respondent expressly relies on these provisions and I will set them out in full:-

> **Aim** – to protect and encourage primary industry in the Shire, to conserve and protect the natural resources of the Shire, and to provide for the needs of people supported by primary industry.
>
> (1) **Objective**
>
> To protect valuable dairy and grazing areas from pressure for non-agricultural uses.
>
> **Implementation**
>
> (a) The Shire's valuable rural land has been identified in Part B of the Strategic Plan and all such areas are shown as General Farming or Special Farming on the Strategic Plan map, unless there are other overriding considerations.
>
> (b) The scheme maps include most of the valuable agricultural land in the Rural (General Farming) or Rural (Special Farming) Zones. Council does not favour re-zoning of any part of this land to zones that would allow for the establishment of non-agricultural uses which would have a detrimental effect on the agricultural uses of the land in

the General Farming and Special Farming Preferred Dominant Land Use areas unless there are strong overriding circumstances.

(c) In administering the Town Planning Scheme in relation to the consent powers in the Rural (General Farming) and Rural (Special Farming) Zones Council will have regard to the aims and objectives of the Strategic Plan by minimising conflicts of consent uses with "as of right" uses in these zones.

(d) To minimise the need for non-agricultural uses on valuable agricultural land, Part B of the Strategic Plan evaluates the demand for various uses including Rural Residential and Urban development.

Appropriate locations for such uses are identified on the Strategic Plan map in areas which will have the minimum possible adverse effects on dairying and agriculture. Council does not favour rezoning applications for locations other than those identified in the Strategic Plan and subject to any other relevant criteria.

(2) **Objective**
to prevent fragmentation of farming land into uneconomic allotment sizes.

Implementation

(a) Council does not favour rezoning of land zoned Rural (General Farming) or Rural (Special Farming) to a zone to which a lower minimum allotment area defined in chapter 38 subdivision of land by-law applies other than in accordance with the Strategic Plan.

(b) Council will consider applications to subdivide land in the Rural (General Farming) into allotments lesser in area than 50 hectares and land in a Rural (Special Farming) zone into allotments lesser in area than 16 hectares under Part 9 Subdivision of Land only in the case of the following circumstances –

(i) Subdivision of allotment for the purpose of increasing the area of an adjoining allotment by consolidation."

[12] The conflict with the aim of the General Farming Predominant Land Use designation, objective (1) and its implementation asserted by the respondent appears in paragraph 17 of Mr Ure's written submissions as follows:-

> "There is a constant thread running through these provisions to limit circumstances whereby pressure could be placed on legitimate rural uses as a consequence of non-rural uses being established proximate to them."

Mr Ure then goes on to rely on evidence of Miss Coleman, the respondent's town Planner, dealing with pressures said to arise out of the proposed subdivision. Firstly, in my view, the Strategic Plan must be read in light of the undisputed fact that the subject land has not been used for dairying or grazing purposes for decades. It is not being used for dairying or grazing purposes at present. There is no evidence to suggest that it is likely to be used for dairying or grazing purposes in the foreseeable future. Secondly, the motel use is a lawful non-conforming use protected by Part 4 of IPA. Thirdly, objective (1) is "to protect valuable dairying and grazing areas from pressure for non-agricultural uses". It is NOT to protect valuable dairying and grazing areas from pressure from non-agricultural uses. Further, this application is

not a rezoning application and would not have been a rezoning application under the repealed Act. It is not a consent use application and it would not have been a consent use application under the repealed Act.

[13] I accept that any pressures which might mitigate against the effective and efficient use of the balance of the land for dairying and/or grazing, or some other form of farming for that matter, which might result from the proposed subdivision constitutes a relevant planning issue to be taken into account in deciding whether the application should be granted. However, I reject the submission contained in paragraph 17 of the respondent's written submissions. In my view, objective (1) and its associated implementation provisions have no relevance at all to the appellants' application and there is no conflict with that part of the Strategic Plan.

[14] As to objective (2) and its implementation provisions, the respondent's submission abut the conflict appears in paragraph 4 of its written submission as follows:-

> "Again a consistent principle can be discerned. That is that the only circumstance upon which an allotment of less than 50 hectares will be contemplated in the Rural (General Farming) zone is to increase the area of an adjoining allotment."

If implementation provision (b) is read in isolation then it must be said that the proposed subdivision would be in conflict with it. However, in my view, that paragraph cannot be read in isolation. Paragraph (b) is not in the nature of a by-law which has independent and absolute force. In my view it applies, and only applies, when it is relevant to achieve objective (2) – to prevent fragmentation of farming land into uneconomic allotment size. Once again, the subject land is not farming land, has not been farming land for decades, and is unlikely to be farming land in the foreseeable future. There is no suggestion that the proposed subdivision will in any way influence the economic use of the balance of the land for farming purposes. Indeed, it could not, because the area of the whole parcel of land which has historically been used for farming will not be significantly reduced. In saying this I am mindful of the submission made on behalf of the respondent that the area devoted to farming would be reduced because the proposed subdivision would result in the appellants building a shed and home on the balance land and that the area of land covered by those building footprints would be removed from farming use. Such a submission is not worthy of any serious consideration. The appellants have already constructed a shed upon the balance land which is used for farming purposes in that it contains cattle handling facilities and storage facilities for farm machinery and supplies. They had every right to build the shed where they wished as they have every right to build a home where they wish. The building footprint of a home would be a negligible proportion of the total area of the balance land.

[15] The respondent advances an argument that the proposed subdivision is in conflict with the respondent's draft IPA Planning Scheme. On 31 August 2005 I made the following order:-

> "The grounds of dispute in this appeal be identified as the grounds set out in the Notice of Appeal, the further and Better Particulars provided by the respondent to the solicitors for the appellant on 22 August 2005 and any further issues that may be notified in writing by the parties to the appeal on or before 12 September 2005."

I have examined the Notice of Appeal whereby this appeal was commenced. There is nothing whatsoever in the grounds of appeal either express or implied which suggests that conflict with the draft IPA Planning Scheme is an issue in the appeal. The Further and Better Particulars filed on behalf of the respondent on 22 August 2005 make no reference express or implied to the draft IPA Planning Scheme. So far as I am aware no further issues were notified in writing by the parties to the appeal on or before 12 September 2005. The respondent has not even provided me with a copy of the draft IPA Planning Scheme.

[16] An appeal to the Planning and Environment Court is not a criminal prosecution. The fact that the appellant has the burden of proof does not mean that a respondent can raise any issue at any time, at will. The practice of the Court is to define the issues so that all parties are afforded procedural fairness and, in particular, are not taken by surprise at the hearing of the appeal by new issues being raised against it. It is for that reason that orders such as that which I made on 31 August 2005 are made. I will not deal with the issue of whether or not the proposed subdivision is inconsistent or otherwise with the draft IPA Planning Scheme.

[17] The respondent submits that the proposed subdivision conflicts with State Planning Policy 1/1992 – Development and Conservation of Agricultural Land. The policy is in evidence as attachment 4 to ex 9. I have read it. There is no point in setting out substantial passages of it. The particular provisions which the respondent submits gives rise to the conflict or conflicts are set out in paragraph 46 of the respondent's written submissions. I will deal with those in turn:-

> "1.2 The local authorities, the Planning and Environment Court; and the Government are required to have due regard to this policy when carrying their planning functions."

I will have due regard to the provisions of the policy, however I am not prepared to read anything into the policy which is not supported by the words used in it. The respondent relies expressly on a number of paragraphs (but not all of them) contained in section 4 which is headed "The Role of Planning Schemes". I need to set out the paragraphs relied upon by the respondent as well as some others from that section which might bear upon this particular application.

> 4.1 Local authorities will be expected to include provisions regarding the conservation of good quality agricultural land when preparing, amending or reviewing planning schemes, particularly when framing strategic plans, development control plans or local planning policies. Applications for rezonings, consent uses and subdivision should be considered in the context of such provisions. In the absence of specific agricultural land provisions, or where such provisions are considered inadequate, the government will be guided by the principles set out in this policy when considering applications for the approval of planning schemes, rezonings and other scheme amendments.
>
> 4.2 Strategic Plans are particularly important in establishing an appropriate framework for the conservation of good quality agricultural land. When considering the future distribution of development in strategic plans, settlement patterns that minimise the impact on productive farming areas, both directly and

indirectly, should be evaluated. For example, a strategy of dispersing development to peripheral or 'satellite' settlements on land of low agriculture potential might prove preferable in overall planning terms to the more obvious option of continuing additions to an existing city or town that is surrounded by good quality farm land.

4.3 Certain farming areas have the advantage of proximity to markets, processing plants, or certain industries associated with agriculture; the sugar industry is an obvious example: particular attention therefore needs to be given to the implications of development or subdivision proposals on these areas. Farm size, layout and the type of business vary, but the loss of a holding or a part can have important ramifications for the remainder particularly where severance or fragmentation are involved.

4.4 Although the demand for agricultural products fluctuates, once land is built on or subdivided, its return to agriculture is seldom practicable. Therefore a decline in the market for a particular crop should not justify development on land traditionally used for growing that crop. Markets change and the land could be cultivated for other purposes.

4.5 Similarly, land ownership and the size of farm holdings should not override land quality when determining a site suitable for development. A policy which would allow the development of small sites or holdings, irrespective of land quality, would merely encourage fragmentation of ownership followed by further development pressures. The viability of farm holdings varies with the crops selected and tenure patterns are flexible: an appropriate choice of crop or amalgamation of holdings can overcome the problem of the uneconomic farm unit. Therefore land subdivision policies and controls should not inhibit restructuring and farm amalgamation: in some instances, subdivision will be necessary to enable the assimilation of parcels with adjoining properties.

4.6 Cases will arise where local authorities have to consider development proposals on good quality agricultural land. In such instances a 'key' principle should be whether an overriding need in terms of benefit to the community can be demonstrated for the development at that particular location.

4.7 In this context small scale subdivisions, especially "Rural Residential" merit special mention. In purely agricultural terms such subdivisions lead either to a loss from production or generally less efficient and productive use than commercial agriculture. Yet rural Residential development is flexible in its locational requirements. Accordingly such development is inappropriate on good quality agricultural land while smaller

rural subdivisions generally should be assessed on their agricultural merits.

4.8 The proximity of development, particularly where there is a significant residential component can inhibit farming practice thereby limiting the extent to which the inherent land quality can be exploited: for example crop spraying and cane burning are two operations which cause conflicts with adjoining residential properties. Clearly such conflicts should be avoided if possible but where new developments have to be located on or adjacent to good quality agricultural land measure to ameliorate potential conflicts should be devised wherever practicable.

4.9 There should be no financial compensation implications for local authorities as a result of implementing this policy. The various provisions described above should all be based on the premise that existing commitments stand and that "down zoning" is not being advocated."

[18] At page 6 of the policy document is a section entitled "Policy Principles". The respondent's submissions specifically refer to principles No. 5 and 8. However the text of the policy document is not accurately reproduced in the respondent's written submissions. Correcting obvious typing errors in the policy document, the principles referred to by the respondent are as follows:-

"5. Due consideration should be given to the protection of good quality agricultural land when applications for rezonings, consent or subdivision are being determined (paragraph 4.1).

...

8. Local authority planning provisions should aim to minimise instances of incompatible uses locating adjacent to agricultural operations in a manner that inhibits normal farming practice. Where such instances do arise, measures to ameliorate potential conflicts should be devised wherever possible (paragraph 4.8)."

It is also relevant to include the following which appears after the List of policy principles –

"Note: The policy principles should be read in conjunction with the main text."

[19] Paragraph 4.9 set out above requires a further reminder that this is not a development application to establish a motel use on the subject land. The motel development exists and it is lawful. Policy principle 5 is noted to derive from paragraph 4.1. Having due regard to the note to the list of policy principles, in my view paragraph 4.1 (and therefore principle 5) has no relevance to the present application. I am prepared to accept the evidence of Mr Walker which to some extent is supported by the evidence of Mr Fry that the soil on the subject land is of high quality capable of supporting a variety of grazing, agricultural and horticultural activities. I have grave doubts that the subject land in its present state, with a variety of buildings scattered about upon it, is suitable for practical use for grazing, agricultural or horticultural purposes. There is certainly no evidence to suggest that that is the case. However, even if there is a theoretical possibility that the subject

land could be put to productive use for agricultural purposes in its present state, the subdivision of that land from the larger parcel will not alter the position. In any event, paragraph 4.1 of the policy has nothing to do with how a local authority and this Court should deal with a specific subdivision application. It is to do with the way in which a local authority should make provisions in its planning scheme so as to give effect to the policy. Paragraph 4.2 is to similar effect but deals specifically with Strategic Plans. There are no market implications involved in the proposed subdivision and therefore paragraph 4.3 has no relevance.

[20] In my view paragraph 4.4 has no relevance. The subject land has not been used for any agricultural purpose for decades.

[21] Paragraph 4.5 must be read as a whole. In my view the thrust of the paragraph may be seen in the following sentence –

> "Therefore land subdivision policies and controls should not inhibit restructuring and farm amalgamation: in some instances subdivision will be necessary to enable the assimilation of parcels with adjoining properties."

It is correct to say that the purpose of this subdivision has nothing to do with enabling the assimilation of parcels with adjoining properties. However, it may equally be said that the proposed subdivision will not inhibit restructuring and farm amalgamation in any way.

[22] Paragraph 4.6 has no relevance. This is not a development proposal and even if it is arguable that the subject land may be appropriately described as good quality agricultural land, it is not being used for such purpose.

[23] In my view paragraph 4.7 has no relevance. This is not a small scale subdivision for rural Residential purposes. The subdivision will not lead to a loss from agricultural production at all and will not lead to any less efficient and productive use of the subject land for agricultural purposes, since there is no such use at present.

[24] I accept that any potential pressures against the efficient use for agricultural purposes of the balance land, which might potentially arise out of the proposed subdivision is a relevant planning issue in deciding whether or not the application should be approved. However, I do not consider that such relevance arises out of paragraph 4.8 of the planning policy. Once again, paragraph 4.8 applies in the case of proposed developments and the way in which the planning scheme should deal with them. This is not an application for a proposed development. The development is already there and is lawful.

[25] Finally, if paragraph 4.9 of the policy has any relevance at all it serves to reinforce my view that this State Planning Policy is not intended to apply to existing lawful developments. In summary, I am satisfied that there is no conflict between the proposed subdivision of the subject land and State Planning Policy 1/1992.

[26] I should briefly discuss the zoning of the subject land. It is contained within the Rural (General Farming) Zone. The respondent's written submission refers (in my view rather selectively) to the statement of intent of the zone which is as follows:-

> "The intent of this zone is to provide for and protect the Shire's prime agricultural land for dairy farming and grazing pursuits and to cater for compatible rural activities. Uses in this zone should be

> generally compatible with primary industry activities. The general minimum subdivision area is 50 hectares."

However, it is not without some relevance to this rather general statement of intent to observe that in the Table of Zones the purposes for which buildings or other structures may be erected or used or for which land may be used only with the consent of Council contains some decidedly non-agricultural uses, such as bus depots, caravan parks, children's day-care centres, indoor entertainments, and motels (where ancillary to a caravan park). It is clear therefore that the planning scheme itself accepts that in appropriate circumstances uses other than agricultural uses may be carried on within the zone. It seems to me also to be tolerably clear that where many such consent uses are deemed to be suitable for a particular location, they would be unlikely to be carried on over a parcel of land of 50 hectares or more. Therefore the statement of intent of zone namely "the general minimum subdivision area is 50 hectares" is no more than that. That is, it is a general minimum. In my view there is nothing in the provisions relating to the Rural (General Farming) Zone which gives rise to any necessary conflict between the proposed subdivision and those provisions. However, in the end these matters are not relevant. No issue of the suitability of the motel use arises in this appeal. It is there; it is lawful; it is a lawful use within the Rural (General Farming) zone.

[27] The respondent also raises an asserted conflict with the subdivision of land provisions of the respondent's Planning Scheme. Pursuant to s 6.1.30 of the *Integrated Planning Act*, subsection (3) paragraph (c), this application is to be decided under s 5.1(6) and (6A) of the repealed Act. Subsection 5.1(6) provides as follows:-

> "In deciding an application made to it pursuant to this section, a local government is to –
> (a) Approve the application, or
> (b) Approve the application subject to conditions, or
> (c) Refuse to approve the application."

This section clearly gives the local authority a discretion. I turn now to the particular provisions of the subdivision of land part of the Transitional Planning Scheme. It is in fact Part 9. Section 9.3 is headed "Basic Requirements of Subdivisions". Subsection 9.3.1 deals with minimum areas and frontages of proposed allotments. It provides in respect of land in the Rural (General Farming) Zone, a minimum area of 50 hectares and a minimum frontage of 400 metres. The subject land does not comply with that minimum. Provision 6 of subsection 9.3.1 provides as follows:-

> ".6 Notwithstanding the minimum areas, widths and frontages specified in this subsection the Council may –
> ...
> .3 permit a lesser dimension and/or lesser area than specified where it considers that –
> .1 such variation would allow a more satisfactory standard of development of the land having regard to its physical characteristics; or
> .2 such variation would be in the public interest; or
> .3 such variation would be consistent with the standard of existing development in the area provided that in the opinion

> of council such existing development is of an acceptable standard of development having regard to the characteristics of the area."

[28] The appellants expressly rely on clause 9.3.1.6.3.

[29] In my view this clause cannot be taken too literally. Taken literally it would require a comparison of a lesser dimension and/or lesser area with "existing development in the area". In my view the term "existing development" must not only include existing allotment areas in the area but the nature of the development upon those allotments. In my view, therefore, the term "variation" refers to the area of land which would result from the proposed variation together with any existing or proposed development upon it. Further, the word "consistent" does not require that the proposed variation be the same as existing development. To do so would overstate the meaning of the word consistent. In the context in which the word is used in this clause I form the view that it means "compatible". (See the Macquarie Dictionary, Federation Edition 2001). In my view, also the word "area" in the phrase "with the standard of existing development in the area" is not to be confined to the immediate vicinity or immediately adjacent to the subject land under consideration. It simply refers to the general locality or neighbourhood within which the subject land would sensibly be considered to be part. In my view, it does not extend to the whole of the Shire. The identification of the neighbourhood or locality (area) would not depend upon a particular area in hectares or even square metres being precisely identified. I do not propose to identify the boundaries of the locality, neighbourhood or area within which I consider the subject land to be located. However, using figure 1 at p 4 of ex 9, I consider that it would extend at least to the eastern end of Moore Road, at least to the northern end of Rankins Road where it joins the Malanda/Lake Barrine Road and would include at least some of the small allotments on the western side of the Malanda/Lake Barrine Road opposite the western end of Moore Road. The pattern of subdivision in the area is mixed. There are a number of parcels of land in excess of 50 hectares. There are parcels of land well under 50 hectares and approximately two hectares in area. In my view the proposed subdivision of the subject land is consistent with the standard of existing subdivision in the area.

[30] As to the development, the existing buildings on the subject land are of residential appearance, consistent with the types of buildings on many, if not most, of the parcels of land in the area. There is no suggestion that the buildings on the subject land are other than of a reasonable standard of construction.

[31] As to the proviso, namely –

> "...provided that in the opinion of Council such existing development is of an acceptable standard of development, having regard to the characteristics of the area."

I am satisfied that the existing development in the area is of an acceptable standard having regard to the characteristics of the area. As I have indicated I am satisfied that the standard of development on the subject land is consistent with the overall standard in the area. I am therefore satisfied that it was open to the Council and would be open to the Court to exercise the discretion provided for in s 9.3.1.6.3 provided that, in a planning sense, it is appropriate to do so. The fact that circumstances give rise to the exercise of the discretion does not necessarily mean

that the discretion should be exercised in favour of permitting a lesser dimension and/or lesser area.

[32] A consideration of whether or not the discretion should be exercised in the appellant's favour brings into focus a matter which has, to some extent, dominated the case advance on behalf of the respondent. That is, the potential conflict between the motel use being carried on upon the subject land and the surrounding agricultural uses. The submission is that whilst the motel use and the surrounding agricultural use remains in the same ownership the tendency will be for the management of both uses to take place in such a way that the uses are compatible. It is submitted that if the subdivision is permitted and the appellants proceed with their plan to sell the subject land with the motel use, the potential for conflicts will be substantially greater. The evidence of this is said to come from the evidence of Ms Coleman, the Town Planning Consultant for the respondent, particularly contained in her report, ex 9.

[33] I have no doubt that in some circumstances the operation of a motel on land, completely or substantially surrounded by land upon which some intensive form of agriculture is carried out, can give rise to conflict. But this will not always be the case. I have no doubt that there are travellers who would find a motel located in a rural area an attractive place to stay for a short time. Depending upon the exact nature of the agricultural activity being carried upon adjacent land some travellers might find the agricultural activity to be part of the attraction of the motel. In other words, not all agricultural activities are likely to give rise to complaints and conflict. For instance, I could readily accept that conflict could arise between a motel use and an immediately adjacent sugar cane farm if the cane was being burnt prior to harvesting. I could readily accept that there would be a potential for complaint and conflict between a motel use if immediately adjacent farmland was being used for growing crops which periodically required aerial spraying of chemical herbicides or pesticides. On the other hand, I am not at all persuaded that the grazing of cattle for beef or dairy production would be likely to lead to conflict. I am not persuaded that the cultivation of land and the growing of crops such as maize, oats and sorgum would give rise to any real possibility of complaint and conflict.

[34] The difficulty with the respondent's argument is that there is no evidence of the detailed farming methods associated with the sorts of agricultural production which might possibly be carried out on the neighbouring land in the future, over and above cattle grazing. By way of example, it was raised during the course of evidence that an agricultural aircraft might be used for spreading seed and fertilizer for the purposes of improving pasture production for cattle grazing. I am aware, through my own general knowledge, that aerial seeding for the improvement of pastures sometimes occurs on very large scale cattle operations over thousands of acres. However, I have never heard of such a method being used for seeding and fertilizing comparatively small areas such as exist in this locality. More importantly, there is no evidence at all that an agricultural aircraft has ever been used for such a purpose in this locality. The respondent tendered a statement from Mr Russell Fry (ex 6) who is a lifelong resident of the area. That statement contains no reference at all to any sort of activity associated with farming in the locality of the subject land which suggests the <u>real</u> possibility of a conflict between the motel use and agricultural activities carried on upon the adjacent farmland.

[35] The fact remains that the motel use is a lawful use. The motel is there. It is capable of making some contribution towards the tourist industry within the respondent's Shire. In my view it is desirable in a planning sense that that contribution be maximised. I accept Mr Robinson's evidence that it is not always appropriate and compatible for the same person or persons to be operating a motel and carrying on farming. I also accept Mr Robinson's evidence that the motel is somewhat limited in that, with eight units, it is unlikely to be large enough to provide an independent income to the operators. Although I accept his evidence that the motel operation is most likely to appeal to someone with lifestyle interests, I do not take this to mean the motel is too small to earn any income at all. I am satisfied that the motel operation is more likely to be carried on efficiently in separate ownership. In my view, although this could hardly be described as a compelling planning reason, it is sufficient planning reason to justify the approval of the subdivision in light of the fact that the motel use is an existing lawful use. Further, in my view there is no planning reason, statutory or practical, for refusing the application.

[36] In summary therefore I am satisfied that on balance, the proposed subdivision should be approved and accordingly I propose to uphold the appeal. I will give the parties time to agree any reasonable and relevant conditions which might be consistent with the aforesaid reasons.