

SUPREME COURT OF SOUTH AUSTRALIA

(Land and Valuation Division)

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NORTHCAPE PROPERTIES PTY LTD v DISTRICT COUNCIL OF YORKE PENINSULA

[2008] SASC 57

Judgment of The Honourable Justice DeBelle

4 March 2008

ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS

Application for development consent – division of large parcel of coastal land into allotments, roads and reserves – expert evidence as to future shoreline erosion – whether Commissioner misunderstood or misstated the evidence of experts as to extent of future coastal erosion – whether proposal had sufficient regard to estimated future shoreline erosion and requirement for erosion buffer – whether proposal offends provisions of the Development Plan relating to coastal reserves and planning of development near coast – appeal dismissed.

On Appeal from ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA (COMMISSIONER MOSEL) [2007] SAERDC 50

Appellant: NORTHCAPE PROPERTIES PTY LTD Counsel: MR M RODER - Solicitor: BOTTEN LEVINSON

Respondent: DISTRICT COUNCIL OF YORKE PENINSULA Counsel: MR J HILDITCH - Solicitor: GRIFFIN HILDITCH LAWYERS

Hearing Date/s: 18/02/2008

File No/s: SCCIV-07-1340

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**NORTHCAPE PROPERTIES PTY LTD v DISTRICT COUNCIL OF
YORKE PENINSULA
[2008] SASC 57**

Land and Valuation Division

1 **DEBELLE J:** This is an appeal against a decision of a Commissioner of the Environment, Resources and Development Court (“the Environment Court”).

2 The appellant, Northcape Properties Pty Ltd (“Northcape”), applied for development consent to divide a large parcel of land into 80 allotments. The land is on the northern outskirts of Marion Bay on Yorke Peninsula. The land is within the area of the District Council of Yorke Peninsula (“the Council”) and is subject to the Council’s Development Plan.

3 The land lies between Stenhouse Bay Road and the coast. The land has an area of almost eight hectares and has a frontage to Stenhouse Bay Road. It has a noticeable fall in level from the level of Stenhouse Bay Road towards the coast. Broadly speaking, the land is cleared and gently undulating. Its south eastern boundary is contiguous with a strip of Crown land (Section 110). This parcel separates the land from the water’s edge and is mainly made up of vegetated sand dunes.

4 On 27 June 2006, the Council resolved to refuse to grant development consent. Northcape appealed to the Environment Court. The appeal was heard by a Commissioner who, on 9 September 2007, dismissed the appeal. Northcape has appealed to this court against the Commissioner’s decision.

Two Issues

5 There were two main questions before the Commissioner and those two questions have been re-agitated on this appeal. The first was whether the proposal so offends the provisions of the Development Plan relating to coastal reserves and planning of development near the coast that development consent should be refused. The Commissioner decided that that was one ground on which the Council was correct in refusing development consent.

6 The second issue concerned the fact that the proposal depended upon the construction of an effluent disposal scheme on land on the other side of Stenhouse Bay Road which did not form part of the development application. As the Commissioner properly found, the provision of an effluent treatment scheme was a fundamental requirement for the residential use of the subject land. The Commissioner held that the Council was correct in refusing development consent on the ground that proper provision for the disposal of effluent had not been made. After this appeal had been lodged, Northcape applied to the Development Assessment Commission for development consent for a proposed effluent

treatment scheme. The Commission will be considering the application in the relatively near future. In that sense, events have overtaken this appeal. The most convenient course, therefore, is for the court to determine the first issue. If that is decided against Northcape, it will be unnecessary to consider the second issue concerning effluent disposal. If the first issue is decided in favour of Northcape, consideration of the second issue will depend on whether the Development Assessment Commission grants development consent for the effluent treatment scheme. I, therefore, put the second issue to one side for the moment.

- 7 I turn to consider the first question, namely, whether the Commissioner erred in concluding that the proposal so offended the provisions of the Development Plan relating to coastal reserves and planning of development near the coast that development consent should be refused. It is first necessary to consider the proposal and the relevant provisions of the Development Plan.

The Proposal

- 8 The development proposal involves the division of the whole of the subject land into allotments. Northcape seeks to divide the land into 78 residential allotments. The other two allotments are reserves. One reserve is in the north east sector of the land. It has an area of some 3173 square metres and has the dual purpose of being a drainage reserve and a recreation reserve.

- 9 The other reserve (which is lot 80) lies between the allotments on the southern side of the subject land and Section 110. It is a long narrow strip between those allotments and Section 110. It is a linear reserve. It can fairly be described as a coastal reserve and I will refer to it in that way. Section 110 is a wide strip of Crown land separating the subject land from the water's edge and largely consists of vegetated sand dunes. The greater part of Section 110 is in the Coastal Zone. The primary objective for the Coastal Zone is the retention in a natural state of coastal dunes, cliffs, geological features and associated native vegetation within the zone: see Objective 1 for the Coastal Zone. The natural features of the Coastal Zone which are relevant in this appeal are the coastal dunes and the native vegetation associated with them. To the west and south of the land is the remainder of Section 110 and the whole of Section 109, which, together, are within a Conservation Zone. The subject land is within a Holiday Settlement Zone.

The Development Plan

- 10 The Commissioner identified the relevant provisions of the Development Plan and had due regard to them. The land is within that part of the Holiday Settlement Zone which is just to the north of the township of Marion Bay. It adjoins the Coastal Zone on its southern boundary.

- 11 The provisions for the Holiday Settlement Zone contain only one relevant provision. It is Objective 1 which states:

A zone primarily accommodating detached dwellings on individual allotments which semi-detached and residential flat buildings where individual site conditions are appropriate.

It is necessary to consider also some of the provisions in the Development Plan which apply throughout the Council area (“the council-wide provisions”) as well as some important provisions grouped under the heading “Coastal Development”.

- 12 The Commissioner referred to two council-wide provisions under the heading “Land Division”. These provisions prescribe desired objectives to be realised in applications for land division. Objective 1 provides:

Land in appropriate localities divided into allotments in an orderly and economic manner.

An explanatory text follows this Objective. Among other things, it says:

The division of land should make provision for the through connection of roads to provide for the efficient and economic connection of services, and make provision for public open space and the on site detention and disposal of storm water separate to public open space.

The other provision under the heading of “Land Division” is Principle of Development Control 5(j) which provides that, when land is divided and the land borders the sea, a reserve should be provided along the sea frontage. The Commissioner noted that the objectives and principles under the heading “Open Space” in the council-wide provisions are consistent with the provisions just quoted.

- 13 More particularly relevant are those provisions in the Development Plan under the heading “Coastal Development”. These provisions relate to the protection of coastal areas on Yorke Peninsula. Objective 1 in the section headed “Coastal Development” is expressed in these terms:

To retain, protect or enhance the natural coastal environment of South Australia.

That Objective is then explained in some detail. The relevant parts read:

The coastal areas of Yorke Peninsula are important for their onshore and marine environmental and landscape values, as well as for developed uses such as towns and holiday settlements, tourism, marinas, commercial farming, aquaculture and recreation.

Development a considerable distance from the coast (mainland or island) can affect all these areas if it influences the environment, general character and amenity of the coastal area or interferes with coastal processes such as erosion, tide and storm flooding or sand drift, for these reasons the following objectives are for the control of any development which could affect coastal areas, or could itself be affected by coastal processes, and, as such, may be applicable beyond, as well as within, the boundaries of any designated coastal zone.

Much of the coast is subjected to the forces of waves, tides and sea-currents, particularly during storms. 'Soft' coasts develop a balance between the sea and the land which changes with the seasons, a so called dynamic equilibrium. For example, beach and sand dunes built-up during months of relative calm will be eroded during stormy seasons, only to be built-up again after the storms have passed. As well, wave action and currents are continually moving sand along the shore, often resulting in a net drift of material in one direction.

Development can either directly or indirectly, interfere with these processes for example by changing surface and groundwater flows, and result in permanent loss of beach and dunes.

Not only may the shore environment be degraded and the amenity and recreation use of the beach be lost, but the development which caused the problem may become at risk.

Objectives 2, 5, 7, 9, 10 and 11 are also relevant. They are in these terms:

Objective 2: To promote development which recognises and allows for hazards to coastal development such as inundation by storm tides or combined storm tides and stormwater, coastal erosion and sand drift; including an allowance for changes in sea level due to natural subsidence and predicted climate change during the first 100 years of the development.

Objective 5: To manage development in coastal areas to sustain or enhance the natural coastal environment.

Objective 7: To encourage development which does not interfere with environmentally important features of coastal areas, including mangroves, wetlands, dune areas, native vegetation, wildlife habitats, estuarine areas exposed cliffs, headlands, islands and hill tops, and areas which form an attractive background to urban and tourist developments.

Objective 9: To promote development which maintains or enhances public access to coastal areas in keeping with objectives for protection of the environment, heritage and amenity by provision of:

- (a) planned, appropriate easy to use public access to and along beaches;
- (b) coastal reserves and lookouts;
- (c) convenient and safe public boating facilities at selected locations;
- (d) convenient vehicular access to points near beaches and selected points of interest; and
- (e) adequate car parking.

Objective 10: To ensure that development is only undertaken on land which is not subject to, or which can be appropriately protected from, coastal hazards such as:

- (a) inundation by storm tides or combined storm tides and stormwater;
- (b) coastal erosion; or
- (c) sand drift.

Objective 11: To encourage development that is located and designed to allow for changes in sea level due to natural subsidence and probable climate change during the first 100 years of the development. This change to be based on the historic and currently observed rate of sea level rise for South Australia with an allowance for the nationally agreed most-likely predicted additional rise due to global climate change.

These Objectives are re-enforced by a number of the Principles of Development Control applying to coastal development. The Commissioner referred to the following principles which are relevant to the issue of the proximity of the proposed development to the coast.

- 18** Development adjacent to the coast should not be undertaken unless it has or incorporates the provision of a public reserve, not including a road or erosion buffer provided in accordance with principle of development control numbered 31, of at least 50 metres width between such development and the toe of the primary dune or the top edge of the escarpment, unless the development relates to small-scale infill development in a predominately urban zone or to development associated with the operation of ports.
- 19** Development which abuts or includes a coastal reserve for scenic, conservation or recreational purposes should be located and designed in such a way as to have regard to the purpose, management and amenity of the reserve and to prevent illegal incorporation of reserve land into private land.
- 21** Access to beaches and reserves should be, by means of walkways and roads suitably designed and constructed to meet the environmental objectives and principles of development control for coastal areas.
- 30** Development which requires protection measures against coastal erosion, sea or stormwater flooding, sand drift or the management of other coastal processes at the time of development, or which may require protection or management measures in the future, should only be undertaken if:
 - (a) the measures themselves will not have an adverse effect on coastal ecology, processes, conservation, public access and amenity;
 - (b) the measures do not now, or in the future require community resources, including land;
 - (c) the risk of failure of measures such as sand management, levee banks, flood gates, valves or stormwater pumping, is appropriate to the degree of the potential impact of a failure; and
 - (d) adequate financial guarantees are in place to cover future construction, operation, maintenance and management of the protection measures.

- 31** Development should be set-back a sufficient distance from the coast to provide an erosion buffer which will allow for at least 100 years of coastal retreat for single buildings or small-scale developments, or 200 years of retreat for large-scale developments such as new towns, unless:
- (a) the development incorporates private coastal works to protect the development and public reserve from the anticipated erosion, and the private coastal works comply with principle of development control numbered 30; or
 - (b) the council is committed to protecting the public reserve and development from the anticipated coastal erosion.
- 32** Where a coastal reserve exists, or is to be provided in accordance with principle of development control 19, it should be increased in width by the amount of buffer required.
- 33** The width of an erosion buffer should be based on:
- (a) the susceptibility of the coast to erosion;
 - (b) local coastal processes;
 - (c) the effect of severe storm events;
 - (d) the effect of a 0.3 metres sea level [rise] over the next 50 years on coastal processes and storms; and
 - (e) the availability of practical measures to protect the development from erosion caused by a further sea level rise of 0.7 metres per 50 years thereafter.

The Commissioner might also have referred to Principle 2 which provides:

Development should not be located in delicate or environmentally sensitive coastal features such as sand dunes, wetlands or remnant native vegetation.

The failure to do so is of no consequence as the intent of Principle 2 is expressed in the Objectives and Principles of Development Control already mentioned.

14 The Commissioner concluded that the proposal is neither a “small scale” development nor a “small scale infill” development to which the exception in Principle 18 refers. In his view, the proposal is “more in the nature of a ‘broad-acre’ development of a scale which would, if implemented, significantly increase the size of the Marion Bay township”. There is no appeal against that conclusion. In my view, that is a fair and accurate assessment of the proposal.

15 This review of the relevant provisions of the Development Plan demonstrates that the Plan expresses a clear intention that land division and other forms of development closely bordering the coast should preserve native vegetation and, make due allowance, where appropriate, for coastal erosion and for the provision of both an erosion buffer and a coastal reserve. It is manifest

that the intent is not only to allow for future coastal erosion but, at the same time, seek to preserve the existing natural features in an erosion buffer area which should be additional to a coastal reserve. The manifest intent of the coastal reserve is to assist in the preservation of natural features: see especially Objectives 1, 2, 7 and 9 and Principles of Development Control 1, 18, 19, 31, 32 and 33.

- 16 The Commissioner correctly interpreted the Development Plan in this way. He said at [40]:

40 When read as a whole the coastal provisions recognize the importance of preserving the foreshore as well as dunes, native vegetation and other components in the coastal environment. The Plan urges that new development, including coastal reserves, be provided in addition to the erosion buffer. The test following Objective 1 expressly states that the provisions may be applicable *beyond the Coastal Zone*.

He developed that reasoning further in paragraph [43] to which I will later refer. There is no challenge to the Commissioner's understanding of the meaning and effect of the Development Plan. There can be no doubt that the Commissioner has correctly understood the intent of the Plan.

The Extent of Future Coastal Erosion

- 17 Each party called a witness on the question whether the coastline was subject to erosion. Northcape called Mr Patterson who, the Commissioner found, was a well-qualified and experienced civil engineer with undergraduate and postgraduate engineering science degrees. At the time he gave his evidence, he was undertaking research for a Doctorate of Philosophy into geological and coastal evolution. The Council called Mr Magryn, who has undergraduate and postgraduate degrees in engineering and coastal science. The Commissioner found that Mr Magryn's experience on coastal processes did not appear to be as extensive as that of Mr Patterson. He continued:

That said the opinions of both experts have their shortcomings. Mr Patterson's statement of evidence was prepared from the "desktop". Mr Magryn, on the other hand, prepared his statement after visiting the land and experiencing, first hand, the relevant conditions and circumstances but failed to utilise the array of data considered by Mr Patterson.

The Commissioner relied on the evidence of Mr Patterson and concluded that over the next 100 years the coastline will shift inland by 35-40 metres. He expressed his conclusion in these terms:

38 When all of the evidence is examined it is reasonable to conclude that the coastline is in a receding phase. It is probably oscillating but the evidence about erosion and sea level rise suggests that it is in a long term phase of moving inland. Mr Patterson's evidence about the extent to which it is receding and, as a consequence, the erosion and sea level rise buffer that should be provided is the most reliable. I accept that over the next 100 years the coastline (when measured from the high water mark) will shift inland by 35-40 metres.

- 39 If the terms of the Plan were to be read such that it is necessary only to keep the high-water mark clear of the proposed allotments, an erosion buffer of that depth might be sufficient. The high water mark would intrude near to or within part of the reserve (Lot 80) if it recedes a distance of 40 metres. However, to position new development in relation to the likely future high water mark would be to ignore other provisions of the Plan.

The Commissioner then referred to the provisions in the Development Plan concerning preservation of the foreshore and the provisions in the Plan seeking both a coastal reserve and an erosion buffer. Reference has already been made to those provisions.

- 18 Northcape had also called Dr Anderson, who is a consultant and environmental scientist employed by Kinhill Pty Ltd, a firm of consulting engineers now called Kellogg Brown and Root Pty Ltd. He holds a Bachelor of Science degree with honours obtained in 1976 and a Doctorate of Philosophy gained in 1982. He has had 20 years experience in ecological surveying and other aspects of ecology. Dr Anderson had inspected the dune system and noted the vegetation on and behind (that is to say, on the leeward side) of the dune. His evidence was that this area was some 20 metres to 50 metres. He believed that the variety of native species was high for the region and typical of a relatively undisturbed area of coastal dune vegetation in this region. That conclusion is entirely justified by the evidence. He expressed the view that the strip of coastal vegetation on and behind the sand dune is extremely important to the ecology of the coastline in the area of the proposed development. He said:

Removal of the native vegetation, whether directly by physical removal or indirectly through the introduction of other factors, such as uncontrolled access by people, will result in disruption of the stability of the vegetation, removal of the vegetation and the dune surface. Without considerable mitigation, accelerated erosion will then occur, the condition of areas of native vegetation will be adversely impacted and the composition of the intact stratum of native vegetation will change, for example, through additional weed infestations. In order to avoid adverse impacts, the best management action is not to disturb the dune and the vegetation community.

The Commissioner understood Dr Anderson's evidence to be that a corridor of vegetation with a minimum width of 20 metres should be retained to sustain the ecology of the dune system, a goal consistent with Objective 7. That finding is consistent with the evidence of Dr Anderson. It was not challenged on this appeal.

- 19 The Commissioner then noted that, with the coastline receding up to 35-40 metres, the high water mark would intrude on to part of lot 80, the proposed linear reserve intended to serve as a coastal reserve. That would also mean that the greater part of Section 110 would be below the high water mark. That would mean that the retention of a corridor of vegetation with a minimum width of 20 metres would mean that most of the proposed coastal reserve would be required as the erosion buffer and to enable what the Commissioner called "landward migration of the shoreline, dunes and native vegetation that maintains that

stability". That, in turn, would result in the loss of the coastal reserve, a result, as the Commissioner noted contrary to the intent of the Objectives and Principles of Development Control especially those for the Coastal Zone mentioned above. The Commissioner said at [43]:

43 ...The text under Objective 2 and Principles 18 and 31 expressly urges a reserve (such as in Lot 80) be provided in addition to the erosion buffer. In the case of Principle 18, a public reserve "not including a road or erosion buffer, provided in accordance with principle of development control numbered 31", of 50 metres in width is advised. The Plan clearly expresses, by reference to the many objectives and principles under the heading "Coastal Development", the planning purpose behind the provisions that require a coastal reserve in addition to the erosion buffer. It is to provide access for all to the coastal environment to use. The Plan speaks quite expressly against alienating coastal development by restricting public access. This is one circumstance where the dual use of an area within a development (i.e. Lot 80) for conservation and public access is incompatible. To do otherwise over the long term would be to regard proposed Lot 80, in the words of the Plan, "as [an] expendable erosion protection area".

The expression "as expendable erosion protection area" is found in Objective 9.

20 Shortly stated, the effect of the Commissioner's reasoning was that in the next 100 years the coastline would recede 35-40 metres and so cause the removal of much of Section 110 which currently serves as an erosion buffer. A new erosion buffer would then be necessary on what is now the coastal reserve with a consequential loss of that reserve. That was a result entirely inconsistent with the Objectives of the Development Plan and so required the Commissioner to uphold the Council's decision refusing development consent.

21 Mr Roder, who appeared for Northcape, did not challenge the Commissioner's conclusions as to the meaning and effect of the Development Plan. Instead, Mr Roder particularly attacked the finding that the coastline would shift inland by 35-40 metres. He contended that the Commissioner had misunderstood and misstated the evidence of Mr Patterson and that, in turn, had affected his conclusions about the consequences for the erosion buffer and coastal reserve.

22 In his report, Mr Patterson had estimated the effect of three potential causes of erosion. They are:

- (a) short-term shoreline fluctuations, including effects of storm erosion;
- (b) progressive shoreline change as a continuation of any existing long-term trend; and
- (c) shoreline retreat due to climate change and in particular rise in the sea level.

Having noted their combined effect Mr Patterson concluded in his written report:

Based on the above, a reasonable provision for potential for future shoreline recession for planning purposes is considered to be 35-40m. A highly conservative provision would be up to 45m. The available plan of the proposed development indicates that the property boundary would be in excess of 45-50m from the dune toe. As such, it is highly likely that the properties would be impacted directly by coastal erosion over the next 100 years.

That was the passage on which the Commissioner had relied when making his finding. In that passage, Mr Patterson unequivocally speaks of an allowance for "future shoreline recession". When read with the whole of his report, it is apparent that he is speaking of an inland movement of the coastline.

23 There is other evidence which demonstrates that the Commissioner correctly understood the conclusion reached by Mr Patterson. Before the hearing of the appeal had begun, Mr Patterson and Mr Magryn had conferred. After that conference, they had prepared a memorandum which each had signed. For present purposes it is sufficient to note paragraphs 3 and 4 of that memorandum.

3. Patterson and Magryn have both estimated the expected amount of shoreline regression due to anticipated sea level rise over the next 100 years. These estimates reasonably agree.
4. Patterson estimated the total shoreline erosion over the next 100 years to be 35 to 40m. Magryn estimated the total shoreline erosion over the next 200 years to be 76m, or 46m over the next 100 years.

Mr Patterson has unequivocally stated that the shoreline erosion over the next 100 years would be between 35-40 metres. There is no foundation at all for Mr Roder's attack upon the Commissioner's reasoning.

24 It might be noted also that there was not a great deal of difference between the opinions of Mr Patterson and of Mr Magryn as to the extent of inland recession of the coast over the next 100 years. Mr Patterson's estimate was 35-40 metres. Mr Magryn's evidence was 46 metres. When estimates of this kind are made in respect of a period as long as 100 years, a difference of some 15 per cent represents no more than a reasonable difference of opinion. In that respect, it is relevant to note also that Mr Patterson's conservative estimate was 45 metres. On that footing the difference was only some 2.2 per cent. Questions as to the proper allowance to be made for an erosion buffer or a coastal reserve will not be decided on amounts as small as six metres when making estimates in respect of a period of 100 years.

25 Mr Roder contended that the effect of Mr Patterson's evidence was that the long term movement of the shoreline inward was 25-30 metres. He contended that the short term oscillations and fluctuations of the shoreline as a consequence of tidal changes, storm surges and the like must not be considered when determining the long term movement of the shoreline. Mr Roder's contention is essentially that the distance of 35-40 metres is not the distance between the current high water mark and the estimated high water mark in 100 years time but, instead, is the distance between the current average shoreline position (10

metres seaward of the high water mark) and the high water mark in 100 years time. Mr Roder's contention is not borne out by the terms in which Mr Patterson expressed his conclusion in his report nor by the terms of the memorandum he and Mr Magryn signed. Furthermore, even if that were one interpretation of Mr Patterson's report, Mr Patterson made it clear in cross-examination that the 35-40 metre distance was the "shift in the profile generally". The relevant question and answer were in these terms:

- Q. Moving on to that next paragraph, you say 'A reasonable provision for potential future shore-line recession for planning purposes is considered to be about 35-40 m'. Just to be clear, that is 35-40 m; is it from the current shore-line or is it from the toe of the dune, or where are you taking it from.
- A. Given that the profile shape tends to maintain its same shape as it shifts, it really doesn't matter. It is the shift in the profile generally, maintaining a shift, so depending on what part in that profile is of concern to the regulatory authority is the point which you would adopt.

Finally, Mr Roder's argument depends on one interpretation of Mr Patterson's report. That interpretation was not put to Mr Patterson when he gave his evidence. As Mr Roder's contention is a gloss on the evidence of Mr Patterson, it should not be advanced in the absence of evidence from Mr Patterson assenting to that interpretation. In other words, the effect of Mr Roder's contention should have been put to Mr Patterson if it is now to be relied on.

26 In any event, even if Mr Roder's contention was correct, the 20 metre erosion buffer will move inland occupying a significant portion of what is now to be coastal reserve and thereby impacting upon that reserve. It will result in an unsatisfactory provision for an erosion buffer of the kind contemplated in the Development Plan.

27 The Commissioner was, therefore, correct in concluding that in the next 100 years the high water mark would recede inland by 35-40 metres. He was also correct in his assessment of the consequential effect upon the erosion buffer and coastal reserve.

28 For the reasons already given, the Commissioner's interpretation of the Development Plan is correct. This proposal offends so many of the goals and objectives of the Development Plan that development consent must be refused. The proposal is on any view an attempt to develop the land to the greatest extent possible without due regard to the ecological sensitivity of the area and the need to preserve natural features.

29 For these reasons, the Commissioner was correct in upholding the Council's decision refusing development consent. Given that conclusion is not necessary to consider the issues as to effluent disposal. The appeal must be dismissed.