[2002] QCA 68

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
PHILIPPIDES J

Appeal No 1150 of 2001

HIEI PTY LTD (ACN 068 548 345) — Applicant

and

DOUGLAS SHIRE COUNCIL — Respondent

BRISBANE

..DATE 12/03/2002

JUDGMENT

McPHERSON JA: This is an application for leave to appeal from a decision of the Planning and Environment Court dismissing an appeal from the council refusing to approve a material change of use of land so as to permit the establishment of 12 motel units accommodating 24 persons on specified land at or near Cape Tribulation Road in the north.

The Council of the Shire of Douglas has adopted a policy of restricting the establishment of new tourist accommodation in some of the rainforest areas of the Daintree part of Queensland. The purpose is evidently to ensure that the natural beauty of the area is not impaired by the introduction of too many buildings providing for accommodation of this kind.

Consequently, if the approval of the material change would result in an increase in the total overnight visitor capacity, the development control plan in the area provides that the Council shall not approve any application for rezoning or consent use or, as it now is, a material change in the use of the land. At least that is so where, to express it in the words of that provision of the DCP3, namely s.4.4.2.2, the implementation of the approval would result in an increase in the total overnight visitor capacity.

In the present instance, the proposal seeking approval for the 12 motel units having a total OVC of 24 would obviously

increase the total overnight visitor capacity in the particular precinct concerned. It would do so by a figure of 24.

The applicant argues, however, that it was entitled to bring into the equation in reduction of that increase another approved accommodation proposal which it, or persons with whom it has a contract, would be prepared to surrender or revoke in certain circumstances. That proposal involves a total overnight visitor capacity of 16 and, if brought into account, would reduce the amount of increase involved in the applicant's proposal from 24 to eight.

Whether that method of proceeding is legitimate, or a legitimate way of reducing the OVC of the primary proposal made by the applicant, is a matter which might need to be argued on an appeal in this case if it were allowed to proceed. However, even if it is a legitimate course to adopt, it would still mean that the applicant's proposal involved an increase in OVC of at least eight in this case.

To meet that problem, the applicant might perhaps have altered its application from one for 24 extra visitor capacity units to one for only 16. That would have meant that if bringing into account this other application or proposal was well founded, the two would set each other off. There would be an overall reduction, in other words, to nil in the additional visitor capacity involved in implementation of this

application or proposal of the applicant.

It is said that the Judge fell into error in not considering that matter in his reasons, and we were referred to passages in the transcript where it was said that the applicant had, by its counsel, effectively foreshadowed, or even perhaps made, an application, as an alternative, for the reduction of its application for approval from 24 to 16 unit accommodation.

Having looked at the transcript and having been taken to what was said at the end of the addresses of both counsel, I remain quite unpersuaded that the Judge was ever asked to consider the matter in that way. No formal application was made to reduce the application for approval from 24 to 16, either generally or in the alternative.

It does not, therefore, seem to me possible for it to be said that the Judge made a mistake of law in not considering that aspect of the matter. Once one reaches that conclusion, it follows, in my opinion, that there is nothing in respect of which this Court could now grant leave on the basis of an error of law. There may be other errors of law that would have to be established and considered if the first point was got over; but, in my opinion, there is no way in which that threshold point can be resolved in favour of the applicant.

I would therefore refuse the application for leave to appeal in this case.

WILLIAMS JA: This is an application for leave to appeal from a decision of the Planning and Environment Court of Queensland. Pursuant to section 4.1.56 of the Integrated Planning Act 1997, the applicant must show an error or mistake of law on the part of the Court in order to obtain leave to appeal.

The applicant's initial application to the respondent local authority was for permission to use premises for the construction of 12 motel units and other incidental activities. The material in support of the application indicated that, relevantly, 12 quality lodges were to be constructed having a capacity of providing overnight accommodation for 24 people. The application was refused by the respondent and there was then an appeal to the Planning and Environment Court.

In my view, section 4.4.2.2 of the development control plan of the respondent is of critical importance in determining this issue. Relevantly, it provides that,

> "The council shall not approve any application for rezoning or consent where the implementation of the approval would result in an increase in the total overnight visitor capacity and to the extent that implementation of an approval would result in that capacity being increased the application shall be refused."

Once the matter gets into the Planning and Environment Court

then, by virtue of certain provisions of the Integrated Planning Act to which it is not necessary to refer to specifically, the Court has all the powers and functions of the local authority. In other words, one can substitute Court for council in the extract from section 4.4.2.2 that I have just quoted.

It is clear that, on an application governed thereby, in appropriate circumstances the order of the Court would be that to the extent that the implementation of the approval would result in the overnight visitor capacity being increased, the application should be refused.

Here, as I have said, the application would prima facie have increased the overnight visitor capacity by 24 units, but evidence was placed before the Court that the applicant had entered into an arrangement with the holder of some 16 overnight visitor capacity units for those units to be surrendered. If it was legitimate to take that surrender into account then the overall capacity would only have been increased by eight if this particular application was allowed. In other words, if the application was limited to 16 units then there would have been no increase in the total overnight visitor capacity.

The question that has to be considered is whether or not the Planning and Environment Court was asked to grant approval for that reduced number. It does seem that the case principally

advanced by the applicant in the Planning and Environment Court was for 24 units, though there were some statements made in the course of opening and final submissions that indicated that, in certain circumstances, the applicant may have considered accepting a lesser number, for example 16. It is not clear in my view that the Court was specifically asked to adjudicate upon an application for 16 units.

I have some concern as to the extent to which the Court had to be formally asked to do that given the wording of section 4.4.2.2 which I have quoted above; but, at the end of the day, I have come to the conclusion that the matter was left in such a vague state that it could not be said that there was such an error or mistake in law on the part of the Court as would warrant this Court granting leave to appeal. I would therefore refuse the application.

PHILIPPIDES J: I agree that leave should be refused for the reasons given by Justice McPherson.

McPHERSON JA: The order is that the application is dismissed.
MR HINSON: I would ask for costs.

MR KEANE: Nothing to say about that, your Honour.

McPHERSON JA: With costs.
