SUPREME COURT OF QUEENSLAND

CITATION:	*Kettering P/L v Noosa Shire Council* [2002] QCA 229
PARTIES:	**KETTERING PTY LTD** ACN 010 014 150 (appellant/respondent) v **NOOSA SHIRE COUNCIL** (respondent/appellant)
FILE NO/S:	Appeal No 429 of 2001 P&E Appeal No 176 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal - Further Order
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	Judgment delivered 8 February 2002 Further Order delivered 28 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2001
JUDGES:	McPherson and Davies JJA and Ambrose J Further Order of the Court.
FURTHER ORDER:	**Application to amend this Court's order made 8 February 2002 refused**
CATCHWORDS:	PROCEDURE - JUDGMENTS AND ORDERS - AMENDING, VARYING AND SETTING ASIDE - OTHER CASES - where the order of the Court of Appeal precluded an alternative argument of the appellant that had not been argued before the Planning and Environment Court or the Court of Appeal - where the parties submitted the court's order should be amended - whether the reasoning of the court precluded the alternative argument - whether the order of the court should be amended
COUNSEL:	P D McMurdo QC, with T N Trotter, for the appellant D R Gore QC, with M E Rackemann, for the respondent
SOLICITORS:	Wakefield Sykes (in-house solicitor) for the appellant Deacons for the respondent

[1] **THE COURT:** On 8 February 2002 this Court allowed an appeal in this matter from the Planning and Environment Court, set aside the order made by that court and, in lieu, ordered that s 3.5(4)(d) of the *Local Government (Planning and Environment) Act* 1990 (Qld) has the effect that no compensation is payable to the respondent for injurious affection by the coming into force of the Development

Control Plan described in the reasons of the Court. Both parties have sought an order from this Court that that order be amended to read as follows:

> "Subsections 3.5(4) and (5) of the *Local Government (Planning and Environment) Act* 1990 operate to preclude the payment of compensation to the respondent save to the extent that the claim for compensation is based on the first option identified in a letter dated 29 August 2000 from the solicitors for the respondent to the solicitors for the plaintiff."

[2] This Court sought written submissions from the parties as to why the Court's order should be amended in that way. The appellant forwarded those submissions on 2 May 2002; the respondent contented itself with, in effect, agreeing with the appellant's submissions.

[3] The reason why, it seems, the parties sought this amendment is that, as one of the parties put it, the Court's order precludes argument in respect of the first of the options described in the appellant's solicitors' letter to the respondent of 29 August 2000 and the possibility of that option was not put to this Court. In that letter the appellant's solicitors wrote:

> "But for the DCP, the necessary approvals in order to carry out residential development of the land (including the land now in sub-precinct D) could have been obtained in a number of ways including, relevantly for compensation purposes:
>
> (a) by obtaining town planning consent for 'group housing developments'.
>
> Such a consent would have enabled development of both attached and detached dwellings; or
>
> (b) rezoning from the Rural Pursuits Zone to another zone where land could be subdivided into smaller allotments for dwelling houses."

[4] On 31 August 2000, a judge of the Planning and Environment Court made an order in this matter that the question whether s 3.5(4) and s 3.5(5) operated to preclude the payment of compensation "if and to the extent to which the claim for compensation is based on the second option identified in the letter of 29 August 2000 from the solicitors for the appellant to the solicitors for the respondent" be tried and determined separately from and before the other issues in the appeal. When the matter came before another judge of that court, his Honour, in his judgment, delivered on 1 December 2000, identified the application before him as:

> "… to try as a separate and preliminary point whether the provisions of s3.5(4) and s 3.5(5) of the *Local Government (Planning and Environment) Act* 1990 preclude a claim for compensation for injurious affection to land which Kettering has made against the Council."

And his Honour made the following order:

> "Section 3.5(4)(d) of the *Local Government (Planning and Environment) Act* does not preclude the appellant (in the name of Kettering) from claiming compensation."

It was in the appeal against that order that this Court made the order sought now to be amended.

[5] This Court identified the question before it in the same way as the learned primary judge had identified it, that is whether the provisions of s 3.5(4) and s 3.5(5) of the *Local Government (Planning and Environment) Act* 1990 precluded a claim for compensation for injurious affection to land which Kettering had made against the Council. No objection was taken in this Court to the way in which the learned primary judge had identified the question before him. However the notice of appeal to this Court had sought an order that:

> "Sub-sections 3.5(4) and (5) of the *Local Government (Planning and Environment) Act 1990* operate to preclude the payment of compensation to the Respondent if and to the extent to which the claim for compensation is based on the second option identified in a letter dated 29 August 2000 from the solicitors for the Respondent to the solicitors for the Appellant."

[6] One reason why this Court reached a conclusion contrary to that of the learned primary judge is that it held that section 3.5(4)(d), like the other paragraphs of s 3.5(4), excluded a right to compensation where, speaking generally, the coming into force of a provision of a planning scheme has only a remote or indirect, as opposed to a direct and immediate effect on the value of a person's interest in premises; and that the coming into force of a development control plan has only the former effect.

[7] It is true that a claim based upon the first option described in the appellant's letter of 29 August 2000 would require evidence to be heard in order to determine whether, within the meaning of s 3.5(5), the appellant had a legal right referred to in subsection (4)(d). However even if it did have such a right, it was not one which the coming into force of a development control plan prohibited or restricted for the reason that, as this Court explained in its judgment in this appeal, a development control plan affects land only potentially because it merely indicates the intentions for the future development of designated parts or the whole of a planning scheme area.

[8] That reasoning of this Court therefore precludes argument on the so-called first option. We would therefore refuse the application to amend this Court's order. To allow such an application and alter the order made in some such way as the parties seek would, in our opinion, be to encourage pointless further litigation.

Order

Application to amend this Court's order made 8 February 2002 refused.