IN THE COURT OF APPEAL

[1993] QCA 347

SUPREME COURT OF QUEENSLAND

Appeal No. 19 of 1993

Before The President
Mr Justice Pincus
Mr Justice Moynihan

[Noosa Shire Council v. Resort Management]

BETWEEN:

RESORT MANAGEMENT SERVICES LIMITED
(Applicant) Respondent

- and -

COUNCIL OF THE SHIRE OF NOOSA
(Respondent) Appellant

Appeal No. 95 of 1993

RESORT MANAGEMENT SERVICES LIMITED
(Applicant) Respondent

- and -

COUNCIL OF THE SHIRE OF NOOSA
(Respondent) Appellant

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 17/09/93

These are appeals from orders made on 22 January and 20 May 1993 in the Trial Division in a proceeding by the respondent, Resort Management Services Ltd., for a statutory order of review under the Judicial Review Act 1991 (the "Review Act"). The application for review, which was made on 27 November 1992, relates to a resolution of the appellant Council of 15 October 1992. The order made on 22 January 1993, which was made under section 29 of the Review Act, stayed any proceeding pursuant to the resolution pending the determination

of these proceedings. The order made on 20 May 1993 dismissed the Council's application, pursuant to section 48 of the Review Act, to dismiss the respondent's application for review. The issue on each appeal is whether the appellant's resolution of 15 October, 1992 is a decision which is reviewable under the Review Act. If leave to appeal against the second decision is necessary (Review Act, subsection 48(5)), it is granted; the issue is one which can and in the circumstances should be decided at this point in the proceedings.

Section 2.1 of the Local Government (Planning and Environment) Act 1990 (the "Planning Act") provides that a "planning scheme" consists of-

> "(a) planning scheme provisions for the regulation, implementation and administration of the planning scheme;
> (b) zoning maps and any regulatory maps;
> (c) a strategic plan;
> (d) a development control plan (if any);
> (e) any amendment approved by the Governor-in-Council in respect of the planning scheme."

By section 1.4 of the Planning Act, unless the contrary intention appears -

> "'amend' in relation to a planning scheme, includes to add to, to omit, to alter or to modify;
>
> ...
>
> ...
>
> 'approval' means -
> (a) in respect of the Minister's approval - the Minister's approval in writing;
> (b) in respect of the Local Authority's approval - approval, with or without conditions, in writing;
>
> 'area' means the district in which a Local Authority has jurisdiction;
>
> ...
>
> 'development control plan' means a plan for the orderly growth, development or conservation of an area, that conforms with section 2.5 and is approved by the Governor-in-Council;

...

'planning scheme' means a scheme for town planning which conforms with section 2.1 and is approved by the Governor-in-Council;

...

'strategic plan' means a plan that specifies in general terms the future preferred dominant land uses for the planning scheme area for the progressive development of lands within that area, that conforms with section 2.4 and is approved by the Governor-in-Council;

...

'town planning' includes all matters necessary or expedient for securing the improvement, orderly development, healthfulness, amenity, embellishment, convenience, conservation or commercial advancement of an Area or a part of an Area

...

'zone' means one of the divisions into which a planning scheme area may be divided by the planning scheme for the purposes thereof."

Sections 2.4 and 2.5 of the Planning Act respectively provide:

"**2.4 Strategic plan.** A strategic plan is to include -

(a) a map or series of maps depicting preferred dominant land uses for the area;
(b) a statement of objectives in respect of each of the preferred dominant land uses together with other criteria for determining the type, scale or distribution of other uses required as an integral component to service each preferred dominant land use;
(c) criteria for the implementation for the plan.

**2.5 Development control plan.** A development control plan is to include -

(a) a map or series of maps that indicate the intentions for the future development of designated parts or the whole of a planning scheme area;
(b) statements of the intent of the development control plan;
(c) criteria for the implementation of the plan."

A Local Authority may prepare a planning scheme for its Area or a part of its Area pursuant to section 2.10 and is required by section 2.14 to give public notice of its intention to make application for approval of a planning scheme by the Governor-in-Council. Provision is made for approval of a planning scheme by the Governor-in-Council by section 2.15, pursuant to which a planning scheme "becomes the planning scheme for the area concerned, and has the force of law, on notification in the Gazette of the making of the order in council."

By section 2.16 of the Planning Act, the Local Authority is "to implement, administer and enforce every planning scheme approved for its Area or part of its Area". By sub-section 2.16(1) the Local Authority is bound by the planning scheme for its area.

Section 2.18 of the Planning Act provides for amendment of a planning scheme on the proposal of the Minister (sub-section 2.18(1)) or the Local Authority (sub-section 2.18(2)).

Sub-section 2.18(2)(b) of the Planning Act provides that a Local Authority may propose to amend a planning scheme "by ... amending an existing strategic plan ... ." Provision is made in section 2.18 for the Local Authority to give public notice of its proposal, to keep the proposal open for inspection and to receive submissions. By section 2.19 every submission must be considered and, by sub-section 2.19(3), after considering any submissions and assessing the relevant matters, the Local Authority must decide by resolution, if the proposal, the subject of the public notice -

"(a) should be proceeded with (with or without conditions);

(b) with certain modifications resulting from submissions made, should be proceeded with;

or

(c) should not be proceeded with and where such a

decision is made the proposal thereupon ceases to be a proposal."

Section 2.20 of the Planning Act deals with the process whereby a Local Authority's proposal to amend a planning scheme is submitted for consideration by the Governor-in-Council.

Sub-section 2.20(1) sets a time limit for a local authority to make "application ... as proponent for the approval of the Governor-in-Council of a proposal to amend a planning scheme ...". Sub-sections (6), (9), (11), (12) and (13) of section 2.20 provide:

"(6) The Governor in Council ... may either -
(a) approve the amendment of the planning scheme, in whole or in part;
or
(b) refuse to approve the amendment of the planning scheme.
...

(9) The approval of an amendment of a planning scheme is to be given by order in council.
(10) The order in council is to identify each amendment that is approved.
(11) The planning scheme as amended becomes the planning scheme for the area concerned, and has the force of law, on notification in the Gazette of the making of the order in council.
(12) Any conditions imposed under section 2.19(3) (as subsequently amended under this Act) attach to the land and are binding on successors in title.
(13) Orders in Council under this section are declared to be -
(a) subordinate legislation; and
(b) exempt instruments for the purposes of the Legislative Standards Act 1992."

(Too late for present purposes, the Local Government Legislation Amendment Act (No.2) 1993, which was assented to on 2 June 1993, repealed sub-section 2.20(13) and inserted section 1.5 into the Planning Act. The effect of section 1.5 is that, despite section 10(b) of the Statutory Instruments Act 1992, an order in council under section 2.20 of the Planning Act is not subordinate legislation although it must be notified in the Gazette).

The planning scheme for the Noosa Shire includes a

strategic plan. There is also a draft development control plan. The respondent is the owner of the land within the Noosa Shire which is in an area known as Noosa North shore. The current strategic plan and the draft development control plan are in conflict with respect to the respondent's land. The appellant has sought to remove that conflict by an amendment to the strategic plan which the respondent considers disadvantageous.

On 22 July 1992, the appellant resolved that:

> "(B) Council undertake an amendment of the Strategic Plan Map by the deletion of the existing tourist facility growth area symbol on Noosa North Shore and an addition of a new symbol overlaying the area defined in the Noosa North Shore Development Control Plan as the Lake Cooroibah Visitor Area."

Subsequently, the appellant gave public notice of the proposed amendments to the strategic plan and kept its proposal to amend open for inspection as required under the Planning Act.

In response to the notice given, the appellant received a number of submissions including one from Leisure Mark Australia Pay. Ltd., which is associated with the respondent. The various submissions were considered by the appellant and, on 15 October 1992, it passed the resolution which is the subject of the application for review. That resolution is recorded as:

> "(A) With respect to a proposal to amend the Strategic Plan by the deletion of the existing tourist facility growth area symbol on Noosa's North Shore and the addition of a new symbol overlaying the area defined in the Noosa North Shore Development Control Plan as the Lake Cooroibah Visitor Area Council resolved to proceed with the amendment.
>
> (B) Council advises the authors of submissions received in response to the advertising of the proposed amendments of the above resolution."

By sub-section 20(1) of the Review Act, a person who is aggrieved by a decision to which that Act applies may apply to the Court for a statutory order of review in relation to the decision. Section 7 contains provisions concerning who is "a person aggrieved by a decision". The appellant did not dispute

that, for the purpose of these appeals, the respondent is such a person if the appellant's resolution is a decision to which the Review Act applies. Whether or not the resolution is such a decision falls to be determined by sub-section 4(a) which provides:

> **"Meaning of 'decision to which Act applies'**
> In this Act - **'decision to which this Act applies'** means –
>
> (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion);
>
> ... ."

Section 5 of the Review Act expands upon the meanings of "making a decision" and 'failure to make a decision" and section 6 provides:

> **"Making of report or recommendation is making of decision**
>
> 6. If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

(It was not argued that the Council's resolution or its application to the Governor-in-Council was "a report or recommendation" within the meaning of section 6.)

It is unnecessary for present purposes to set out other provisions of the Review Act, such as the definitions in section 3 or section 8, which is concerned with "Conduct engaged in for making decisions-preparatory acts". Nor is it necessary to set out section 29 of the Review Act under which the stay was ordered: the appellant does not now dispute that the order for a stay was properly made if the appellant fails in its attempt to dismiss the respondent's application for statutory review pursuant to section 48. On the other hand, the respondent does not dispute that its application for statutory review should be dismissed if the appellant's resolution is not a decision which is reviewable under the Review Act. As stated earlier, that is

the issue on these appeals. The appellant accepts that a decision made by it under an enactment may be within the scope of the Review Act but contends that the resolution is not of an administrative but of a legislative or policy or perhaps political character and that, in any event, it is not sufficiently final and operative to be a "decision" within the meaning of the Review Act.

"of an administrative character":

It is not easy to comprehend the reasoning associated with the appellant's submission that its resolution is not of an administrative character because (i) it involves the determination, implementation or application of policy or (ii) is (or might be) influenced by political considerations. These are not features which distinguish legislative from administrative decisions. On the contrary, such features are commonly associated with decisions by executive government which are quintessentially administrative in character.

While difficulty in attributing some other description to a decision does not automatically mean that it is of an administrative character, cases upon analogous legislation in other jurisdictions maintain the orthodox trichotomy between legislative, executive (or administrative) and judicial acts and decisions and generally seek to avoid giving the requirement that a reviewable decision must be of an administrative character a narrow or technical construction: see, for example, Hamblin v. Duffy (1981) 34 ALR 333; Evans v. Friemann (1981) 35 ALR 428.

As was submitted on its behalf, the appellant is an elected body with a multiplicity of functions, some of which might well be characterised as legislative; for example, it has power to make by-laws. However, that is of marginal assistance, since it also plainly has other, non-legislative functions; for example a local authority has duties under section 2.16 of the Planning Act to "implement, administer and enforce" and periodically "review" the planning scheme for its area. See

also Parts 4 and 5 of the Planning Act, which deal with the roles of a local authority in relation to rezoning, land use and subdivisional applications.

While its argument sought to rely upon the circumstances that the appellant is elected, is or may be involved in policy or political considerations and has functions which include legislative functions, its main thrust was that the material decision under section 2.19 of the Planning Act drew its character from the subsequent decision required of the Governor-in-Council under section 2.20. This is an especially elusive argument. Even if it is correct to start from the premise that at least some of the decisions which may be made by the Governor-in-Council under section 2.20 of the Planning Act might be legislative, for example, a decision pursuant to sub-section 2.20(6)(a) to approve an amendment of a planning scheme and perhaps even a decision not to approve under sub-section 2.20(6)(b), this does not lead to a conclusion that the appellant's decision to proceed with an application for amendment of the planning scheme is also legislative in nature. It is difficult to identify any principle or logic to support such a contention, which also seems to overlook that a decision of a local authority under section 2.19 may be a decision not to proceed (sub-section 2.19(3)(c)), not a decision to proceed; sub-sections 2.19 (3)(a) and (b).

More generally, it is extremely difficult to attribute any legislative characteristic to the appellant's material decision. The entire statutory process with respect to planning schemes, with its dependence upon approval by the Governor-in-Council and publication in the Gazette before a scheme or an amendment to a scheme becomes binding, seems inconsistent with the notion that steps in that process, such as decisions by a local authority, are themselves legislative in character. On the contrary, the power under section 2.18 of the Planning Act to propose amendments to the planning scheme for its area seems entirely consistent with, and even perhaps an element of, the appellant's

duty, under section 2.16, to administer the scheme.

"decision"

The appellant's other submission was that the resolution is not a decision within the meaning of the Review Act because it is not an "ultimate or operative determination".

That assertion is incorrect. The resolution was the final decision required of the appellant in the process of amendment of the strategic plan for its area and is a decision which was specifically required to be made by the Planning Act. That is sufficient: Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321, 338, 375-376.

In the circumstances, it has been unnecessary to refer to Part 5 of the Review Act which was not relied on in argument but may nonetheless assist the respondent: see R. v. Brisbane City Council ex parte Read (1986) 2 Qd R. 22; ex parte Helena Valley/Boya Association (Inc.) (1989) 2 WAR 422; Minister for Primary Industries and Energy v.Austral Fisheries Pty. Ltd. (1993) 112 ALR 211, 215(40), 228(15).

There being no other argument advanced by the appellant the appeals fail and must be dismissed with costs to be taxed.

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The President
Mr Justice Pincus
Mr Justice Moynihan

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Judgment delivered 17/09/93

Judgment of the Court

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**APPEALS DISMISSED WITH COSTS TO BE TAXED.**

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CATCHWORDS: ADMINISTRATIVE LAW - Judicial Review - Resolution by Local Authority to amend Strategic Plan - Whether "decision of an administrative character"

LOCAL GOVERNMENT - Town Planning - Resolution by Local Authority to amend Strategic Plan - Whether capable of judicial review pursuant to Judicial Review Act 1991 - Whether "decision of an administrative character."

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| Counsel: | Mr. C. Hampson Q.C. with him Mr. C. Carrigan for the appellant<br>Mr. G. Gibson Q.C. with him Mr. K. Wilson for the respondent |
| Solicitors: | Messrs. Wakefield Sykes for the appellant<br>Messrs. Bayliss Rodgers for the respondent |
| Hearing Date: | 28/07/93 |