

SUPREME COURT OF QUEENSLAND

CITATION: *A B & R Sultana P/L & Ors v Johnstone Shire Council & Anor* [2004] QCA 251

PARTIES: **A B & R SULTANA PTY LTD ACN 059 081 819 AS TRUSTEE FOR THE SULTANA INVESTMENT TRUST AND UNIT TRUST**
(first appellant)
A B & R SULTANA PTY LTD ACN 059 081 819 AS TRUSTEE FOR THE SULTANA INVESTMENT TRUST
(second appellant)
ALLAN SULTANA CONSTRUCTIONS PTY LIMITED
ACN 010 900 160
(third appellant)
v
JOHNSTONE SHIRE COUNCIL
(first respondent)
WINCAM DEVELOPMENT NO 8 PTY LTD ACN 080 253 907
(second respondent)

FILE NO/S: Appeal No 4512 of 2004
P & E No 403 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Leave Integrated Planning Act

ORIGINATING COURT: Planning and Environment Court at Cairns

DELIVERED EX TEMPORE ON: 26 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 26 July 2004

JUDGES: McPherson JA, Williams JA and Mackenzie J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal dismissed with costs**

CATCHWORDS: ENVIRONMENT AND PLANNING – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – CONSIDERATION OF PLANNING SCHEMES – whether local council entitled to depart from car parking requirements in town plan

COUNSEL: M E Pope for the applicant
M A Jonsson for the first respondent
A Philp SC for the second respondent

SOLICITORS: Bruce Gillian for the applicant
MacDonnells Solicitors for the first respondent
Miller Harris Lawyers for the second respondent

McPHERSON JA: This is an application for leave to appeal from a decision of the Planning and Environment Court constituted by Judge White sitting in Cairns. The applicants, who are the objectors in the Court below, are two related family companies incorporating the name Sultana, who are the individuals who own The Warehouse forming part of the subject area, which is in or close to the centre of Innisfail. The respondents are the Johnstone Shire Council which is the local planning authority, and the applicant developer Wincam Development No 8 Pty Ltd.

The proceedings in the Planning Court arose out of Wincam's application to the Council for approval to develop the site, which is bounded by Ernest, Clare and Gladys Streets, as a building to house a discount department K-Mart store and three smaller retail tenancies fronting Ernest Street. A substantial part of the new structure is to be used to provide on-site car-parking accommodation. The Council approved the proposal, which involves a material change of use of the land, subject in paragraphs 20 and 21 to conditions that the development provide for 110 car-parking spaces on the site and 65 off-site, together with a monetary contribution to the

Council of \$100,000 towards car-parking elsewhere in the locality.

Item 2 of the relevant provision of the Council's town planning scheme, Table 15 in section 4.8.3 of Part D, specifies "performance criteria" that are to be satisfied, which in this instance would call for the provision of 251 on-site car-parking spaces. But the Council has power to vary or depart from these criteria in the light of various stated factors, and it may also forego car-parking space requirements in return for a cash payment to allow the Council itself to provide alternative off-street car-parking.

It was this provision under which the Council acted in the present case in reducing the number of on-site car-parking spaces to be provided from 251 in total to 110 with 65 off-site. Its doing so was and is in accordance with what are described as the "philosophy" expressed in item 1.4 of Part D of the planning scheme. It is not suggested that the Council acted with any improper motive in exercising its discretion so as to relax the performance criteria as it did. What was submitted by Mr Pope of counsel for Sultana, and is maintained before us here, is that, in dismissing the appeal before him and so upholding the Council approval, his Honour acted without evidence of car-parking needs in the future.

It may be accepted that the stipulated performance criteria in section 4.8.3 of Table 15 in the planning scheme looked to future parking as well as present parking needs likely to be generated by the development. Those criteria speak of

sufficient provision of car-parking spaces being "available for the duration of that use" of the premises.

However, on the evidence his Honour found as a fact that the discretionary relaxation of the performance criteria in this instance took account of that factor. He was, he said in his reasons, satisfied that the number of car-parks to be provided will "adequately cater for the parking needs of the proposed development for the present and foreseeable future." He reached this conclusion on the basis of reports and evidence of a Mr Viney, who is an expert traffic engineer who was called in support of the present respondents' case and was cross-examined at the hearing by counsel for Sultana.

What his Honour said on that subject is, of course, a finding of fact which, on its face, is not open to Sultana to challenge in this Court on an appeal confined as this would be to a question of law for which leave is sought here; but Mr Pope submits that a question of law is involved because there is nothing from Mr Viney either in his evidence or report capable of supporting a finding about the foreseeable future.

To my mind, the primary difficulty with the submission is that it confuses an explicit requirement of the stipulated performance criteria with the circumstances in which the Council is authorised to vary or relax those requirements. Those requirements are set out at page 168 of the respondents' version of the record and I will not repeat them here. Those circumstances do not make it mandatory for the Council to consider future parking demands, although no doubt it is a

matter that the Council would properly and ordinarily bear in mind in exercising its discretion to relax the performance criteria. There would plainly be no logic in insisting that the requirements of the performance criteria be fulfilled as a condition precedent to relaxing them as a matter of discretion, nor in empowering the Council to dispense with them only if they were in fact satisfied.

The case is, therefore, one in which the applicant is asserting the absence of evidence to support a finding of fact that it was not strictly necessary for his Honour to make in dismissing the appeal. That being so, even if there were a mistake of law in the finding complained of, it is not one that vitiated or materially affected the decision below.

In those circumstances, there would be no point in giving leave to pursue an appeal that is bound to fail. That is probably all that need be said on the subject; but, in any event, I am far from persuaded that the point raised is not covered by Mr Viney's report and his oral evidence at the hearing. In the course of his report, he says that there is clearly no existing parking problem with the site and that it is unlikely that parking demand from the site will create problems for others. He also says that any additional demand would spread across to other streets which he identifies. In this, he can hardly be supposed to have been restricting his opinion to the first day of the proposed use of the site.

Mr Viney's report then proceeds to consider Sultana's traffic objections to the proposal. Sultana was requested to give and gave detailed written particulars of each of its objections, which were dealt with one by one in Mr Viney's report. The suggestion that foreseeable future parking needs would not be catered for is not among the specific matters so particularised, nor is it raised with Mr Viney in any way in the course of cross-examination at the hearing.

In my opinion, if Sultana intended to rely on it, then in ordinary principles, it should have been specifically raised with him in cross-examination so as to give him an opportunity to deal with it in his evidence. See Precision Plastics Pty Ltd v. Demir (1975) 132 CLR 362, 370-371, which is referred to in the respondents' written outline. That not having been done, Sultana ought not now be permitted to raise it for the first time on appeal.

There was another point advanced as a basis for allowing the appeal to go ahead in this case. It concerned his Honour's order as to costs and an objection to the material, which included Exhibit 15, on which he based that conclusion. That point was, however, abandoned at the beginning of Mr Pope's submissions before us and I therefore have no need to deal with it.

Overall, it is my opinion that the application for leave to appeal has no prospect of success and that it should be dismissed with costs.

WILLIAMS JA: I agree.

MACKENZIE J: I agree.

McPHERSON JA: The order will be as I have stated it.
