SUPREME COURT OF QUEENSLAND

CITATION:	*Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2010] QCA 237
PARTIES:	**TAMBORINE MOUNTAIN PROGRESS ASSOCIATION INCORPORATED** (applicant/applicant) **v** **SCENIC RIM REGIONAL COUNCIL** (first respondent/first respondent) **HYACINTH DEVELOPMENTS PTY LTD** ACN 100 627 709 (second respondent/second respondent)
FILE NO/S:	Appeal No 13493 of 2009 SC No 3122 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	3 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2010
JUDGES:	McMurdo P, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – DISTINCTION BETWEEN QUESTION OF LAW AND QUESTION OF FACT – where the applicant sought leave to appeal against the decision of the Planning and Environment Court refusing its application for declarations – where the applicant sought declarations that the two decisions of the Council were unlawful – where the first decision was the approval of an application for the reconfiguration of three lots into 52 lots – where the second decision was the approval of an application to reduce the 52 lots to 45 – where the applicant argued that the primary judge made errors of law in determining whether the Council considered the whole of the transitional planning scheme in accordance with s 6.1.29(3)(b) *Integrated Planning Act* 1997 (Qld) in assessing the approvals – where

the applicant argued that the primary judge erred in failing to appreciate that the changes to the zoning of the land was not a relevant consideration for the Council in its assessment of the approvals pursuant to s 6.1.29(3)(b) *IPA* – whether the primary judge found as a fact that the Council took the transitional planning scheme into account in accordance with s 6.1.29(3)(b) *IPA* in assessing the approvals – whether the primary judge erred

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACT INVOLVED – GENERALLY – where the applicant argued that there was no evidence for the primary judge's conclusion that the Council considered the 1990 plan in assessing and deciding the subdivision applications – whether there was no evidence for the primary judge's conclusion – whether such an error would constitute an error of fact or law

Sustainable Planning Act 2009 (Qld), s 822
Integrated Planning Act 1997 (Qld) (repealed), s 4.1.56, s 6.1.29(3), s 6.1.30(3)
Local Government (Planning and Environment) Act 1990 (Qld) (repealed), s 5.1(3)

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited
Bruce v Cole (1998) 45 NSWLR 163; [1998] NSWCA 45, cited
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16, cited
Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor [2010] QPELR 195; [2009] QPEC 98, cited
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306; [1996] QCA 226, cited

COUNSEL: S J Keim SC, with M Labone, for the applicant
M Hinson SC, with N Andreatidis, for the first respondent
N B Markham, Director of the second respondent, for the second respondent

SOLICITORS: MacAllan Lawyers for the applicant
Corrs Chambers Westgarth for the first respondent
N B Markham, Director of the second respondent, for the second respondent

[1] **McMURDO P:** The applicant, the Tamborine Progress Association Inc, has not demonstrated any error of law warranting the grant of an application for leave to appeal to this Court under s 4.1.56 *Integrated Planning Act* 1997 (Qld)

(repealed).[1] I agree with Fraser JA's reasons for refusing the application for leave to appeal, with costs.

[2] **MUIR JA:** I agree that the application for leave to appeal should be dismissed for the reasons given by Fraser JA.

[3] **FRASER JA:** The applicant the Tamborine Mountain Progress Association Incorporated seeks leave to appeal against a decision of the Planning and Environment Court refusing the Association's application for declarations that two decisions by the first respondent Scenic Rim Regional Council were unlawful.[2] In the first decision, on 5 June 2007, the Council approved an application by the second respondent developer, Hyacinth Developments Pty Ltd, for the reconfiguration of three lots at Mt Tamborine into 52 lots. In the second decision, made on 25 November 2008, the Council approved the developer's application to reduce the number of lots to 45.

[4] The grounds of an appeal to this Court from a decision of the Planning and Environment Court are limited to error or mistake in law or absence or excess of jurisdiction.[3] The Association contended that the primary judge made errors of law.

[5] The proposed appeal focussed upon the requirement in s 6.1.29(3)(b) of the *Integrated Planning Act* 1997 (Qld) ("IPA") that the Council consider "the transitional planning scheme" when assessing and deciding subdivision applications. Under the Shire of Beaudesert Town Planning Scheme 1985, which was a transitional planning scheme under IPA, the land was zoned "'Special Facility'… '*tourist facility including restaurant, fruit tree and flower farm, crafts, fruit tree produce and flower sales; motel and residential units (maximum of 135 bedrooms); office and manager's residence generally in accordance with plan No. 8891/24 dated 9 August 1990*'."[4]

[6] The following grounds of the Association's proposed appeal were stated in its draft notice of appeal:

> "1. The learned trial Judge failed to appreciate that, as a matter of law, "the transitional planning scheme" in section 6.1.29(3)(b) …included the whole of the Special Facilities zoning of the land the subject of the Subdivision (reconfiguration of a lot) Approvals, including the words "*generally in accordance with plan No. 8891/24 dated 9th of August 1990*".
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> 2. The learned trial Judge failed to appreciate that, as a matter of law, the words "*generally in accordance with plan No. 8891/24 dated 9th of*

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1 The *Integrated Planning Act* 1997 (Qld) (IPA) has been repealed by the *Sustainable Planning Act* 2009 (Qld). Appeals started under IPA before the commencement of the *Sustainable Planning Act* are to continue to be heard and decided under IPA: s 822 *Sustainable Planning Act*.

2 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98.

3 *Integrated Planning Act* 1997 (Qld), s 4.1.56. That Act was repealed by the *Sustainable Planning Act* 2009 (Qld). The parties agreed that under the transitional provision in s 822 of the 2009 Act this application proceeds under the former Act.

4 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [1].

August 1990", being part of the "the transitional planning scheme" for the purpose of section 6.1.29(3)(b) of the IPA, constituted a matter that was required to be taken into account by the First Respondent in assessing and deciding the Subdivision Approvals.

3. The learned trial Judge failed to appreciate that, as a matter of law, by considering the purported changes to the zoning of the land (themselves declared to be invalid) the subject of the Subdivision Approvals, the First Respondent failed to have regard to "the transitional planning scheme" and had regard to a purported transitional planning scheme which excluded the words "*generally in accordance with plan No. 8891/24 dated 9th of August 1990*", and, thereby, took into account a matter which was, pursuant to section 6.1.29(3)(b) of the IPA, a matter which constituted an irrelevant consideration and which could not lawfully be taken into account."

[7] At the hearing of the application the Association advanced an alternative ground that there was no evidence for the primary judge's conclusion that the Council considered the 1993 zoning in deciding the subdivision application. That ground was not articulated in the draft notice of appeal but the Council and the developer did not object to this Court considering it.

Background and the primary judge's reasons

[8] In 1990 the Council approved the rezoning of land at Mt Tamborine from the rural zone to the zone described in paragraph 5 of these reasons. The rezoning was approved by the Governor in Council and notified in the government gazette in 1993. For present purposes the critical part of the zone description is the expression "generally in accordance with Plan No. 8891/24 dated 9th August 1990".

[9] On 16 December 2004 the Council issued a decision notice approving development substantially in accordance with a plan which differed substantially from the 1990 plan. On 12 July 2005 the Council issued a decision notice approving development generally in accordance with a subsequent plan, which also departed substantially from the 1990 plan. On 15 December 2006 the Council issued a decision notice which substituted a condition that development must be generally in accordance with "Drawing No. 1 dated 22 August, 2006 prepared by Bennett Design & Partners and received by Council on 29 August, 2006 and accompanying documentation". The 22 August 2006 Bennett Design & Partners plan was again markedly different from the 1990 plan. There was uncontested opinion evidence by a town planner that none of those subsequent plans was generally in accordance with the 1990 plan.

[10] The primary judge found that each of those three approvals was unlawful and invalid for non-compliance with the applicable legislative requirements and declared that the approvals were of no lawful effect.[5] That is not in issue and it is not necessary here to recapitulate the primary judge's reasoning, which all parties accepted was correct.

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5 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [7]-[13].

[11] On 12 March 2008 the Council wrote to the developer advising that the Council had assessed an amended proposal plan (" 'Plan of Development', Drawing No. 18507 [of extract DA of extract 01], prepared by Bennett Design & Partners and received by Council on 21 February 2008"), that Council officers were satisfied that this amended proposal plan was "generally in accordance with the approved plan of development", and that the amended plan was now taken to be the approved plan of development for the tourist facility. Again there was no challenge to the town planning expert's evidence that this plan was not generally in accordance with the 1990 plan. The primary judge found and declared that the 2008 amended plan of development which the Council had purported to approve was not generally in accordance with the 1990 plan.[6] That is also uncontentious.

[12] Before that last decision, by application dated 23 August 2006 and received by the Council on 24 August 2006 the developer applied for approval of the reconfiguration of three lots into 52 lots, of which 50 were residential lots. Section 6.1.29(3) of IPA identified matters that applied, to the extent that those matters were relevant, for assessing that application. Relevantly, the matters were (under s 6.1.29(3)(b)) the transitional planning scheme and (under s 6.1.29(3)(h)(ii)) the matters stated in s 5.1(3) of the *Local Government (Planning and Environment) Act* 1990 (Qld) ("the Repealed Act"). The matters stated in s 5.1(3) of the Repealed Act relevantly included (s 5.1(3)(a)) the proposed use of each of the proposed allotments and (s 5.1(3)(s)) the provisions of the planning scheme which regulated the subdivision of land.

[13] The effect of s 6.1.30(3) of IPA was that the application fell to be decided under s 5.1(6) and (6A) of the Repealed Act. Section 5.1(6A) applied only where the application conflicted with a relevant strategic plan or development control plan, which was not submitted to be the case. Accordingly the application was decided under s 5.1(6) of the Repealed Act, which provided that in deciding an application made to it pursuant to that section a local government was to approve the application, or approve the application subject to conditions, or refuse to approve the application. On 5 June 2007 the Council approved the application for reconfiguration subject to conditions. The decision identified the approved plans as the proposed plan 11566-9B prepared by Andrews & Hansen Pty Ltd (which showed the reconfiguration, including the creation of 50 residential lots) and proposed landscaping plan 014516/L/01 prepared by Bennett Design & Partners (which depicted landscaping on the 50 residential lots).

[14] The primary judge rejected the Association's argument that the subdivision approvals were invalid on the ground that in assessing and approving the developer's application on 5 June 2007, and when varying that approval on 25 November 2008, the Council wrongly referred to the zoning as it had been purportedly amended by the Council's earlier, invalid approvals. The primary judge accurately quoted the terms of the 1993 rezoning, including the words "generally in accordance with Plan No. 8891 [of extract 24] dated 9 August 1990",[7] and noted that under s 6.1.29(3) of IPA the Council was required to

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6 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [14]-[18].

7 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [1].

assess the developer's application having regard to the transitional planning scheme, amongst other things.[8] The primary judge observed:[9]

"[26] The Association also argues that the reconfiguration approval is unlawful because it is based on a plan of development that had no lawful effect; that Council took into account, irrelevantly, unlawful approvals and failed to pay proper heed to the only relevant consideration, ie the lawful rezoning approval in 1993; and, that the approval is contrary to the zoning.

[27] Certainly, Council was bound to consider the zoning of the land when deciding the subdivision application but, it appears, it did so. The Association submits that the plan of development in the old zone description must inform the decision to approve the subdivision and that the allotments in it have boundaries which do not accord with the old plan. As Council submits, however, the old rezoning approval does not purport to deal with subdivision. The land consisted of only three allotments and nothing, in it, is relevant to subdivision as a process. Once that is appreciated, it will also be understood that the old plan of development did not identify any required or preferred subdivision layout.

[28] Otherwise, the rezoning of the land amended the old Planning Scheme and determined the purposes for which land or buildings could be used. The Scheme expressly provided that the extent of subdivision which could be undertaken would be determined, in each case, on receipt of detailed information.

[29] As Council says, that information was provided with the reconfiguration application. Approval of that application authorises the subdivision into separate lots, with separate titles. The question whether the use of the subdivided lots is lawful depends on the nature of the use and the planning controls relating to it – which is a different question from anything relating to the power, itself, to reconfigure [*Stubberfield v Redland Shire Council* [1995] 1 Qd R 332, at 336-7]. Should further approval be necessary to use the lots produced by the subdivision, the merits of that proposed use will be properly dealt with when the application is made [*Walker v Noosa Shire Council* [1983] 2 Qd R 86; *Young v Gosford City Council* (2001) 120 LGERA 243 at 255]."

Grounds 1 to 3

[15] Under these grounds the Association argued that in the first sentence of paragraph 27 the primary judge referred to the zoning of the land "at a higher level of generality" and that this was not a reference to the correct zone description earlier quoted by the primary judge. The Association also argued

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8 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [24].

9 *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at [26]-[29].

that the primary judge's subsequent reference to the "old zone description" did not comprehend reference to the 1990 plan and that paragraph 27 referred instead to the 1993 zoning as it had been purportedly but invalidly altered by the Council's subsequent approvals of different plans.

[16] That argument requires a departure from the natural meaning of the primary judge's reasons. It also requires the surprising conclusion that the primary judge held that the Council was correct in considering that the zone description included plans which his Honour held had been invalidly substituted for the 1990 plan. The argument should be rejected. In paragraph 26 the primary judge recounted the Association's argument that the Council failed to consider the 1993 rezoning. The primary judge had earlier accurately quoted the full description of the zone and there is no reason to doubt that the reference in paragraph 26 to "lawful rezoning approval in 1993" comprehended reference to the 1990 plan and to no other plan. The primary judge's reference in the first sentence of paragraph 27 to the Council being bound to consider "the zoning of the land when deciding the subdivision application" naturally referred to the "lawful rezoning approval in 1993" described in the immediately preceding sentence. Thus the primary judge both held that the Council was bound to consider the 1993 zoning, including the 1990 plan, and found as a fact that the Council did so.

[17] The Association argued that the primary judge held in paragraphs 27 to 29 that the reference in the 1993 zoning to the 1990 plan was irrelevant and not to be taken into account. Again, I cannot accept that this is a fair reading of the primary judge's reasons. The primary judge held that the 1993 zoning did not purport to deal with subdivision, it was not relevant to subdivision "as a process", and the 1990 plan did not identify any required or preferred subdivision layout. That did not amount to a conclusion that the Council was not obliged to take the 1990 plan into account when assessing and deciding the developer's subdivision applications. Rather, in the assessment of the subdivision applications there were limitations upon the significance of the zoning. The evidence bears that out. Relevantly the zoning identified the purposes for which the land could be used with or without the Council's consent and which uses were prohibited.[10] This planning scheme did not specify minimum lot sizes, frontages or other dimensions for this zone (although it did for other zones[11]). Whilst the 1990 plan formed an element of the zone description which the Council was bound to consider, that plan should not be treated as requiring or preferring a particular configuration of the zoned land. As the primary judge went on to point out, the zoning of the land determined the purposes for which it could be used but the extent of the subdivision which might be undertaken would be determined subsequently upon receipt of the necessary information.

[18] On a fair reading of the primary judge's reasons his Honour correctly held that: the relevant transitional planning scheme comprehended the correct 1993 zone description, including the words "generally in accordance with Plan

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10 Shire of Beaudesert Town Planning Scheme 1985, Part II, Division 1, s 2.

11 Shire of Beaudesert Town Planning Scheme 1985, Chapter XI, By-law No. 16(1), which did not refer to the present zone.

No. 8891/24 dated 9th August 1990"; correctly held that the Council was required by s 6.1.29(3)(b) of IPA to take that into account in assessing and deciding the subdivision applications (although its significance was limited in this particular case); and found as a fact that the Council did take it into account.

No evidence that the Council considered the 1990 plan when assessing and deciding the subdivision applications?

[19] The Association argued that the evidence conclusively demonstrated that the Council wrongly considered the subsequent plans which purported to amend the 1990 plan. This argument was substantially based upon inferences which were said to arise from the Council's active consideration of those subsequent plans before, during and after the Council's consideration of the subdivision applications.

[20] The Association pointed out that when Council received the developer's 23 August 2006 subdivision application on 24 August 2006, the 1990 plan had apparently been superseded by the very different plan which the Council had purported to approve on 12 July 2005. The Association argued that the latter plan reflected what Council would have perceived was the relevant state of approval when the subdivision application was lodged. The subdivision application and its covering letter referred to an "enclosed" Plan of Development prepared by Bennett Design & Partners showing the overall design of the project. That plan was not in fact enclosed but a Bennett Design & Partners plan dated 22 August 2006 was subsequently received by the Council on 29 August 2006 for the developer's 25 August 2006 application for approval of the amendments of the rezoning conditions. The Council purportedly approved the 25 August 2006 application on 15 December 2006, when the subdivision application was still pending. The Association argued that this demonstrated that the Council thereafter considered that the approved plan of development was the Bennett Design & Partners plan dated 22 August 2006.

[21] The Association also emphasised that the approved plans of subdivision (proposed plan 11566-9B prepared by Andrews & Hansen Pty Ltd showing the reconfiguration, including the creation of 50 residential lots, and proposed landscaping plan 014516/L/01 prepared by Bennett Design & Partners, which depicted landscaping on the 50 residential lots) were consistent with the invalidly approved Drawing No.1 dated 22 August 2006 prepared by Bennett Design & Partners. The approved plan of subdivision created 50 lots for residential units and left two balance lots described as "Future Commercial Stage" and a lot described as "Future Manager's Residence". The configuration of the 50 residential lots and the access to them on the approved subdivision plan substantially replicated the same area of the Bennett Design & Partners plan of development dated 22 August 2006, which was the approved development plan in the Council's invalid 15 December 2006 decision. Furthermore, the subdivision application referred the Council to the Bennett Design & Partners plan because the proposed subdivision plan which the Council approved (proposed plan 11566-9B prepared by Andrews & Hansen Pty Ltd) included a note in the "Future Commercial Stage" area, ("See Plan of

Development by Bennett Design and Partner for proposed access ways") and a note on the bottom of the plan omitted reference to the 1990 plan in what was otherwise an accurate description of the zone. The Association argued that in these circumstances the Council, having "abandoned" the 1990 plan, would have perceived that the plan which Council was obliged to consider was not the 1990 plan and that Council officers would have retrieved a copy of the Bennett Design & Partners plan and placed it on the subdivision application file.

[22] The Association referred also to the developer's surveyor's letter dated 17 November 2006 to the Department of Main Roads, sent in response to a referral coordination information request, which stated that it enclosed "copies of the original approval and subsequent amendments along the approved plan of development", and to the Department's letter to the Council dated 23 January 2007 which referred to the surveyor's letter. The Association submitted that it followed that the copies of "the original approval and subsequent amendments" of the approved plan of development "must have been" placed on the Council's subdivision application file.

[23] The Association referred to the marked inconsistency between the plans which Council approved on 5 June 2007 and the 1990 plan approved in the 1993 rezoning. The earlier plan depicted a townhouse development with a motel, restaurant, and other developments whereas the 2007 plans depicted 50 residences in the subdivided lots and associated landscaping, with future commercial development on the remaining two lots. The Court was taken through a detailed comparison of the plans to demonstrate that the differences were significant. In the Association's submission, the approved subdivision lacked utility because it catered for a development which differed very substantially in many respect from that which was permitted by the 1993 zoning with reference to the 1990 plan. The Association's senior counsel acknowledged, however, that it would be open to the developer to seek to remedy that difficulty by a further application after receiving notice of the subdivision approval. The Association then argued that the fact that the Council did not advert to this issue in the course of assessing the subdivision application demonstrated that it must have assessed the application with reference to the subsequent plans. The Association argued that it was not believable that the Council, having purportedly changed the rezoning on three occasions, could have disregarded those changes when it considered the subdivision applications.

[24] The Association advanced similar arguments in relation to the developer's application to vary the subdivision approval, which the Council received on 11 June 2008. In this case, the Council's invalid "Generally in Accordance Determination" made on 12 March 2008 described the Bennett Design & Partners plan, Drawing No. 18507/DA/01, received by the Council on 21 February 2008 as "the approved plan of development for the tourist facility" and the Council repeated that in subsequent communications with the developer. Amongst other material the Association referred to an email request of the developer by someone in the Council enquiring of the justification for the reduction of the lot yield from 52 to 45. The developer responded on 15 October 2008 attaching Drawing No. 18507/DA/01 and the Council's 12 March 2008 letter and stated that the reason was, "so the subdivision approval matches the approved plan of development".

[25] The Council argued that the Council's planning report, which was considered by the Council when it approved the subdivision application, revealed that the Council had considered the correct 1993 zoning of the land, including its reference to the 1990 plan. Because the Council was then for the first time considering an application for subdivision approval it was unsurprising that the Council did not refer to the subsequent plans the subject of the invalid approvals. The Council argued that in so far as the Bennett Design & Partners plan upon which the Association relied showed development of the whole site, that plan was not significant because the subdivision application only sought approval for a subdivision of the site to produce the 50 residential lots in accordance with the Andrews & Hansen Pty Ltd plan 11566-9B. The developer did not seek any approval for subdivision or development of the two remaining lots. The Council argued that the consistency in the layout of the 50 residential lots as between the approved plan of subdivision and the 22 August 2006 Bennett Design & Partners plan was unremarkable. The Council pointed out that the evidence of the town planning expert did not touch upon the subdivision plans. Nor did he express an opinion that the approved subdivision layout of the 50 lots (or the varied layout of the 43 lots) was not "generally in accordance with" what the 1990 plan showed as the layout of the 57 residential units it depicted.

[26] The Council argued that the 1993 zoning did not preclude approval of the subdivision application or the later variation of that approval and there was no basis for treating either approval as being beyond power. The differences between the 1990 plan and the approved subdivision plan would not have set "alarm bells ringing" in light of the limitations upon the relevance of the zoning to the assessment of the subdivision application which the primary judge identified in paragraphs 28 and 29 of the reasons and because any development need only be "generally in accordance with" the 1990 plan.

[27] The developer adopted the Council's arguments.

[28] In considering these competing arguments it is relevant to note that there was no direct evidence that any particular Council member or representative who participated in the decisions upon the subdivision applications had in mind any particular zone description for that purpose. The Association's claim was instead based upon inferences which were said to arise from the documents. However, reference to the directly relevant documents demonstrates that there was apparently persuasive evidence which supported the primary judge's finding. On the first page of the Council's planning report for the first subdivision application the description opposite the word "zoning" accurately quoted the 1993 zone description, including the reference to the 1990 plan. On the fourth page of the report the 1993 zoning description was again accurately stated, under the heading "Zoning", which itself appears under the earlier heading "Statutory Considerations". The seventh page of the report noted that the proposal had been assessed against the Town Planning Scheme. The primary judge would naturally have given substantial weight to the content of the planning report, which was certainly taken into account by the Council in the assessment and decision of the subdivision application. There was no direct evidence that any other document was taken into account.

[29] The only reference to zoning in the 5 June 2007 decision notice approving the subdivision application was in the condition imposed by the Council as the

assessment manager that the approved use and activities should at all times comply with the "Zoning of Special Facilities, and any relevant provisions of Part V respectfully, of the Town Planning Scheme". That is consistent with the view that the Council considered the correct zone description, particularly when it is read in light of the unambiguous references to the lawful 1993 zoning in the Council's planning report. Most importantly, neither the Council's planning report nor the decision notice referred to any of the plans which purported to replace the 1990 plan. In relation to the 25 November 2008 variation of the subdivision approval there was no direct evidence that the material upon which the Association relied for its argument was in fact considered by the Council. As this was a variation of the earlier subdivision approval, the evidence of the Council's planning report again pointed to the Council having considered the lawful 1993 zoning.

[30] The Association argued that the planning report should be discounted because its references to the 1993 zoning should be understood as being merely, as the Association's senior counsel expressed it, "a file reference to the file itself, not to the actual lawful plan which the Council considered". However there was no evidence to that effect. The argument is also difficult to reconcile with the fact that the reference appeared not merely on a file cover but on the first page and again on the fourth page of the Council's planning report under a heading and subheading which suggested that a statute required the Council to consider the 1993 zoning.

[31] The Council certainly considered the invalidly approved plans at other times and for other purposes. Even so, bearing in mind the limitations upon the significance of the zoning in the assessment of the subdivision applications, the documents which directly concerned those applications strongly supported the inference that the Council adverted to and complied with its statutory obligation to take into account the lawful 1993 zoning. If, contrary to my own view, the primary judge found the facts incorrectly, that would constitute an error of fact not law because there was probative evidence,[12] or evidence which reasonably admitted of the primary judge's finding.[13]

[32] This ground of the proposed appeal is also not viable.

Proposed order

[33] I would refuse the application for leave to appeal, with costs.

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12 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 - 357, 367 and 387.

13 See *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7; *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 335; *Bruce v Cole* (1998) 45 NSWLR 163 at 187-190.