TRANSCRIPT OF PROCEEDINGS

PLANNING AND ENVIRONMENT COURT — Toowoomba P & E Appeal No 7 of 1992

JUDGE ROW

LARRAINE MARGARET SUTTON — Appellant

and

ROSALIE SHIRE COUNCIL — Respondent

and

ROYCE DENIS JENSEN and DELPHINE ROYALE JENSEN — Respondents by Election

BRISBANE

..DATE 05/10/92

ORDER

HIS HONOUR: As no order is being sought against the respondent Council I grant leave to the solicitors for the respondent Council to withdraw on the hearing of the application.

I refuse the application by the appellant for costs against the respondents by election on the basis that the Court has no jurisdiction to entertain the application to order costs. It cannot be said that in the circumstances of the decision there has been a default in procedural requirements. The Court found that the proposed use was an as of right use in the existing zone and there was no legal obligation on the respondents by election to make the said application.

I make no order for costs.

The power to award costs under s. 7.6(1)(b)(i) applies where the Court considers the appeal or other proceedings to have been frivolous or vexatious. The July 1992 amendments by introduction of the words "other proceedings" clearly envisages that such a power can be exercised in proceedings of the nature which are currently before me, being an application for an order for costs.

I am satisfied that the application by the appellant is a proceeding within the relevant provisions.

Although I have found that the Court has no jurisdiction to make an order for costs against the respondents by election that does not in itself establish that the application was frivolous or vexatious.

The appellant is in person. The point argued related to the application and concerned the interpretation of s. 7.6 of the Planning and Environment Act. The point was one on which there may be some ground for discussion as to the power of the Court in the circumstances to make an order for costs. It was a matter which may fairly have been argued. The application of the appellant was not frivolous or vexatious. If to the contrary in the exercise of discretion no order ought to be made.

I make no order for costs on the application of the respondents by election for costs against the appellant.

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LARRAINE MARGARET SUTTON — Appellant

and

COUNCIL OF THE SHIRE OF ROSALIE Respondent

and

ROYCE DENIS JENSEN AND DELPHINE ROYALE JENSEN Respondents by Election

BRISBANE

..DATE 11/09/92

JUDGMENT

HIS HONOUR: In this appeal, the respondents by election and respondent submit that the application made to the respondent was of no legal consequence in that the use proposed to be made of the land is a use which is for a purpose for which buildings or other structures may be erected or used, or for which land may be used without the consent of the respondent pursuant to Column III of the Table of Zones in the Local Shopping Zone. It was submitted on behalf of the respondents by election and the respondent that the proposed use is for the purposes of a "shop" which is an as of right use in the Local Shopping Zone and consequently the application to the respondent was not lawfully required.

The subject land is zoned local shopping. In that zone shop is a purpose for which buildings or other structures may be erected or used or for which land may be used without consent of the respondent. Shop is defined as:

> "Any land, building or other structure or any part thereof used or intended for use for the purpose of displaying or offering goods for sale to members of the public. The term includes incidental storage of such goods on the same premises but does not include a catering shop, local store, hotel, service station or warehouse as herein defined."

The use proposed by the respondents by election is identified in paragraphs 5 and 6 of the affidavit of the male respondent by election sworn on 9 September 1992.

Inter alia it is proposed by the respondents by election that they buy and store on site for sale to the public products being those enumerated in subclause (a) to (h) thereof. It was further sworn that none of the materials proposed to be sold from the subject land would be extracted from the subject land. Exhibit B to the affidavit identifies to some extent the nature of the activities in that the varying products would be contained in bins or containers from which they would be sold to the public. The financial transaction, I am satisfied, would probably occur away from the bins, and money would be paid in an area which would house a receptacle for the receipt of moneys.

The appellant contends that the proposed use of the land is for heavy industry. It was contended that the proposed use was an industry within the definition of the term industry under the relevant planning scheme as it includes an operation involving the breaking up or dismantling of any goods or any article for trade, sale or gain, or ancillary to any business. It was further contended that once it was established that the proposed purpose was an industry, then the particular form of activity proposed by the respondent by election fell within the definition of heavy industry in that it was an industry which is within Appendix III under the designation “sand, gravel and stone crusher, screening plant and depot”.

I am satisfied that the use of the land will involve the purchasing of material in bulk or large quantities or mass and its sale to the public will be in lesser quantities than that in which it would have been purchased. The nature of the goods which it is proposed to merchandise on the subject land is indicative that the breaking up will only occur in relation to the separation of the larger quantities of goods into smaller quantities for sale. In my view, that operation in the circumstances is not an operation which involves within the definition of the term industry the breaking up or dismantling of any goods or any article for trade, sale or gain, or ancillary to any business. The concept of industry does envisage various types of processes or operations and the

proposed use of the subject land I am satisfied is not within that definition. The proposed activity does not involve the extraction of sand, gravel, turf, soil, rock, stone or similar substances from land within the ambit of clause (a)(iii). Whilst the respondents by election propose to sell such goods, those goods will be imported onto the subject land. Such goods will not be extracted from the subject land. Reference was also made to subclause (b) of the definition of industry, which relates to operations within subclause (a) when carried on land upon which any of the operations therein specified are carrying on. Subclause (i) thereof relates to the storage of goods used in connection with or resulting from any of the above operations. Subclause (iii) refers to the sale of goods resulting from such operations.

The affidavit of the male respondent by election establishes that none of the material proposed to be sold from the subject land will be extracted from the subject land. I am satisfied that the proposed use is not within subclause (ii) of clause (a) of the definition of industry. In those circumstances subclause (b) does not provide any assistance to the appellant in relation to the nature of the proposed use as the operations proposed by the respondents by election are not within subclause (a) of the definition of industry.

If, contrary to what I have found, the proposed use is an industry, the contention that the industry is a heavy industry, in my opinion, fails. The reference in Appendix III as to "sand, gravel and stone crusher, screening plant and depot" is to be construed with the word "crusher" as qualifying the words sand, gravel and stone. The proposed activities in no way entail the crushing of sand, gravel and/or stone. In my view, therefore, the proposed activity, if contrary to what I have held before is an industry, it is not a heavy industry within the provisions of the relevant planning scheme.

The definition of shop is indicative that a shop can entail the use of land as distinct from a building or

other structure. The term shop is to be contrasted with that of local store which is defined in such terms as to indicate that such an activity has a limited gross floor area, and that the goods which are used or intended to be used primarily for sale by retail are a wide range of foodstuffs. Clearly the subject proposal does not involve foodstuffs in the normal meaning of that term.

The definition of shop does not connote any relationship to an area to be served or as to the nature of the goods to be sold thereat. This is perhaps to be contrasted with the definition of local store and the intent of the local shopping zone. The requirement that a proposed use comes within the definition of shop relates to the display or offering of goods for sale to members of the public. As set out in the affidavit by the male respondents by election, the proposed use clearly falls within this prescription. I am satisfied that what is said in para 5 of the affidavit of the male respondent by election as to "products", falls within the normal meaning of the term "goods" as referred to in the definition. There is no reference within the definition of shop to a requirement for such a use to meet the daily needs of residents for commercial and/or shopping facilities. The definition is very broad and is limited only by its own terms in relation to the display or offering of goods for sale to members of the public. It is noted and is particularly relevant in this appeal that the term also includes incidental storage of such goods on the same premises. Exhibit B to the affidavit of the male respondent by election indicates that the goods are proposed to be stored on the same premises and that such storage is incidental to the nature of the proposed use being the display or offering goods as identified in paragraph 5 of the affidavit of the male respondent by election for sale to members of the public.

It was contended by the appellant that the proposed activity is contrary to the intent of the local shopping zone. The subject land is zoned local shopping and to that extent the intent of the zone in relation to this application is of little consequence. Had the application been, for example, to change an existing zone to the

local shopping zone, then the intent of the zone would be significant. However, as I have said, the subject land is so zoned local shopping and what is sought herein relates to a proposed use of land within an existing local shopping zone. Had the proposed use been a discretionary use in the zone the intent of the zone would have been relevant.

Planning policy 6 adopted by the respondent at a meeting held on 18 February 1992 resolved that the respondent define a landscape supplies business as falling within the definition of "light industry" under the Town Planning By-laws.

Whatever may have been intended by the planning policy, the planning policy cannot override the planning scheme and the statutory documents. There is no consequential amendment that has been inserted into the planning scheme and/or statutory documents. The planning policy is inconsistent with the provisions of the planning scheme and statutory planning documents, and therefore it cannot have any weight.

For the reasons above, I am satisfied on the material before me that the application by the respondents by election related to a purpose which is a purpose for which buildings or other structures may be erected or used for which land may be used without: the consent of the respondents pursuant to Column III of the Table of Zones in the Local Shopping Zones.

On the material before me I am satisfied that the application by the respondents by election to the respondent was not required by law. The respondents by election, through their counsel, intend this day to withdraw their application to the respondent.

I dismiss the appeal on the limited ground that the proposed use is an as of right use in the existing zone. Consequently there was no legal requirement to make application to the respondent for the rezoning of the subject land.
