IN THE PLANNING AND ENVIRONMENT COURT | P & E Appeal No. 306 of 1995

HELD AT BRISBANE

QUEENSLAND

BETWEEN:

AMPOL PETROLEUM (O'LAND) PTY. LTD. — Applicant

AND:

BELYANDO SHIRE COUNCIL — Respondent

AND:

BRIAN PETER LINCEZ AND ROBYN ESDAYLE LINCEZ — Respondents by Election

REASONS FOR JUDGMENT - QUIRK D.C.J.

Delivered the 15th day of September, 1995

This appeal by an objector is against a decision of the respondent to approve a rezoning application in respect of land near Moranbah to enable it to be developed as a service station with a shop and restaurant included. The applicants, Mr. and Mrs. Lincez, are the owners of a rural property "Grosvenor Downs" which is approximately 15 kilometres from Moranbah. Part of the land is at the junction of the Peak Downs Highway and the Moranbah turnoff and it was here that the applicants intended to locate their development.

On 27th February 1995, the wrote to the respondent Council seeking approval in principle for the construction of a service station with a restaurant and shop included. Drawings accompanying the letter made it perfectly clear what was intended. The Council responded favourably to their enquiry and by letter dated 20th March, advised that it agreed in principle to the proposal to construct a service station is indicated "subject to strict compliance with the Department of Transport's requirements and the relevant Council local

laws and Acts applicable to the development of this facility".

In April 1995 a formal application for the rezoning of land was submitted. It sought a rezoning to the "Commercial" Zone and the nature of the proposed use was described as "Service Station". The application was combined with an application to subdivide from the grazing property the area to be zoned and used as the service station site. On 15th June 1995 the respondent resolved to approve the combined application conditionally.

On 24th July, the appellant, who had objected to the proposal, appealed against the rezoning approval. When the applicants sought legal advice it was recognised that this was a matter caught by s.8.4 of the Local Government (Planning and Environment) Act which provides that premises may not be used as a service station in conjunction with a shop unless the premises are zoned "For the exclusive use" thereof.

The applicants (the respondents by election in the appeal) have sought to amend their application to reseek a rezoning to the "Special Facilities (Service Station, Shop and Restaurant)" Zone. The appellant has opposed the application on two grounds;

1. That the application was a nullity in that it sought a zoning upon which the proposed use of the land was contrary to law;

2. In the light of the proposed amendment and the inadequate description of the proposed use in the application, the intended changes in the application would need to be readvertised.

For reasons which I explained in Burasbridge Pty. Ltd. v. Noosa Shire Council (unreported Dec. 1994), I am of the opinion that where an application seeks something which conflicts with a Town Planning Scheme or some other legal provision, it is not thereby a nullity and there is no basis for refusing to decide the application although its conflict with the law is, of course, a very good

reason for refusing it. If the appellants' argument was correct, many matters which have been determined by this court ought, for want of jurisdiction, never have been before it.

As to the second point raised by the appellant, it is noted that there is no real change in what the appellants have always proposed for this land and, importantly, what they have always made clear to be their intended proposal. It is true that the application for rezoning referred only to "service station", but it is also evident from material put before the court that the Council agreed to receive the plans submitted with the application for approval in principle as part of the formal rezoning application and these were available for public inspection at the relevant time and place. As mentioned, these plans make it perfectly clear that a restaurant and shop have always been part of the proposal.

The zoning now sought is more restrictive than the "Commercial" Zone which was approved by the Council and this can be seen by reference to the Table of Zones particularly in Column 3 which deals with purposes for which land may be used without the Council's consent. The court has been prepared to amend the description of a zone in comparable circumstances in other case (e.g. Salmon v. Gladstone City Council (1987) Q.P.L.R. 1; Roy Sommerville Surveys Pty. Ltd. v. Brisbane City Council (1992) Q.P.L.R. 114).

As to the matter of public notification and advertisement, the fact that the documents available for public inspection gave an informative description of the proposal has already been referred to. Counsel for the respondents by election pointed out that the prescribed form for public notification of a rezoning application makes no specific reference to the proposed use (although it is pointed out that particulars of the proposed amendment to the Town Planning Scheme are available for public inspection.

In any matter where relief from non-compliance with the Act is sought, the matter of fundamental importance is whether:

> "The non-compliance has not adversely affected the awareness of the public of the existence and nature of the application nor restricted the opportunity of the public to exercise the rights conferred by the relevant provisions" (S7.1A(3D)).

In this matter I am satisfied that any non-compliance that has occurred has not affected adversely the interests of the public as there described. I rule that the proposed amendment to the application should be allowed.