

PLANNING AND ENVIRONMENT COURT

JUDGE ROBIN QC

P & E Appeal No 176 of 1995

KETTERING PTY LTD (ACN 010 014 150)           Appellant

and

NOOSA SHIRE COUNCIL                               Respondent

BRISBANE

..DATE 18/8/2006

JUDGMENT

CATCHWORDS: Application for order for particulars of points of claim delivered in relation to court-ordered preliminary determination in a claim for compensation for injurious affection - court asked to reconsider view expressed in published reasons that value was relevant to determining highest and best use - formal orders had not been made.

HIS HONOUR: The parties are back before the Court after the failure of the appellant to satisfy the Council that its efforts, subsequent to the publication of reasons to the parties on the 23rd of March this year, are an adequate provision of the particulars which those reasons suggested ought to be provided.

In some respects, Mr Hughes, for the Council, appears to accept that the exercise of seeking particulars has borne fruit: for example, in paragraph 8(f) of the "appellant's response to respondent's request for further and better particulars and points of claim" of 6 April 2006, which mentions "the absence of any site-specific restrictions on the density or location of development on the land under the planning scheme" in relation to a request for material facts alleged to support the allegation that the highest and best use is the one pleaded in the points of claim.

A mystery adverted to in the reasons as to whether a statement in an affidavit of a Council officer, Mr Weychardt, is relied on as an admission by the Council has been cleared up in the affirmative.

The appellant remains resistant to giving any particulars of value in dollar amounts - understandably, I suppose, wanting to preserve an advantage perceived in Judge Wilson's having been persuaded, against the Council's urging, to order a preliminary hearing.

Central to the reasons published on the 23rd of March this year is my view, which may or may not be heretical, that value is, in principle, relevant in determining both the "highest and best use" of land. This, as Mr Hughes reminds us today, is a concept not found in relevant legislation providing for compensation where the value of land is adversely affected by changes in planning arrangements, which is supposed to have happened here by the adoption of Development Control Plan Number 1, Noosa Hill, in September 1991.

Mr Hinson invites the Court to reconsider, and in particular on the basis of much fuller reference to the decision of Jacobs J in *Adelaide Clinic Holdings Pty Ltd -v- Minister for Water Resources* (1988) 65 LGRA 410. On 17th of March, reference had not gone beyond the passage at page 415 set out in the reasons at paragraph [5]. An injustice might have been done to the learned Judge by ascribing to him a view that commercial uses could be taken as fetching a higher price for unit area than residential uses.

What his Honour was doing at that part of his reasons was disapproving the approach of the Minister's valuer of advancing an alternative valuation approach in a resumption case, in which the Judge was required to assess value and not simply identify highest and best use, of comparing notional value for a commercial use and/or residential use. The land was available only for residential uses, relevantly.

However, an interesting feature of the case was that the applicant for compensation had proposed not residential

development but a development for medical purposes including a psychiatric hospital - being a use which was undoubtedly lawful because the Full Court of South Australia had so determined in relation to the specific site.

The notion that highest and best use may be something separate and apart from value, so that value cannot even require consideration in determining the use question, may gain some support from what appears at the top of page 131 in paragraph 3.17 of the book "Land Acquisition" by Brown, 5th Edition.

Even there, the author brings in concepts of value in stating, "In determining the highest and best use of resumed land, the first task is to identify its market value for current use. Where it is claimed that the land has a greater value for a different use from its existing use, the claimant needs to establish" - there followed a list of things to be established, including lawfulness of uses and the likelihood of their being implemented within "a reasonably short time".

Also I am referred to Halsbury's Laws of Australia at 355-7105.

In Adelaide Clinic Holdings itself, it seems to me that my notion of value being a relevant factor in determining highest and best use can be found in the passage quoted by me previously in the reference to "higher price per unit of area". And, indeed, in the closing sentence: "It is not appropriate to determine the highest and best use by reference only to value."

The appearance of "only" is important and brings in factors such as feasibility, as happened in *Garbler v. Redlands Shire Council* [2001] QPELR 442, of which I am reminded today. In *Adelaide Clinic Holdings*, there is, at page 412 in the Judge's discussion of the approach of the preferred valuer:

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"Mr Taylor did not overlook the use which the claimants seek to make of the subject land - that is, as a psychiatric hospital and consulting rooms - which he thought was a sound, economic, commercial use of the subject land but would probably support almost as high a value as may be ascribed to residential development."

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And a further reference at 417: "Another useful test, however, is afforded by Mr Taylor's own valuation of the land acquired on a commercial basis, which he thought was not the highest and best use but was not much different from the highest and best use in terms of value."

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No order having been taken out or, indeed, pronounced, it is no doubt open to me to revisit my conclusions. On the basis of the additional material put before the Court today, I would not be disposed to change them. In those circumstances, Mr Hughes seeks a formal order which, the parties will know, is made against the background of the response of the 6th of April this year and, perhaps, supplementary information provided in correspondence exhibited to Mr Nicholls' affidavit filed yesterday.

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The making of the order today in those circumstances carries with it the implication that the particulars provided to date, although useful to a point, are inadequate.

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The appellant foreshadows amending its points of claim with the consequence, and no doubt the intended consequence, of being spared having to give particulars of allegations deleted. I agree with Mr Hughes that if that were to happen the Council ought to have the opportunity by a further request for particulars of remaining pleaded allegations to seek the particulars which may be denied it by amendment of points of claim to withdraw allegations.

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I do not propose to make any orders in relation to amending the points of claim. It would appear to me that the appellant is completely free to make amendments, if so advised, in circumstances of no points in response having yet been provided.

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The order ought to be that the appellant provide further and better particulars as requested by the respondent's solicitors on 30th of January 2006 of paragraphs 1, 4, 5, 6, 7 and 8, satisfactory responses having been made, in the interim, to paragraphs 2 and 3.

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It seems to be common ground that the directions made by Judge Wilson on the 9th of December 2005 in relation to conduct of the preliminary hearing that he ordered should be vacated with a view to a new timetable being set.

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HIS HONOUR: I will make my order subject to leave to the appellant to deliver amended points of claim and to the Council to request proper particulars of it.

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HIS HONOUR: And leave to the council to request proper particulars thereof within a further two weeks.

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