

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 108 of 1983

BETWEEN:

ROBERT RALPH WALKER, HELEN CLAIRE OVENS, (Appellants)
ANTHONY EDWARD WALKER and LESLIE HECTOR Appellants
BERRY

- and -

COUNCIL OF THE SHIRE OF NOOSA (Respondent) Respondent
Appeal No. 109 of 1984

BETWEEN:

RUSSELL CLARKE and MICHAEL (Appellants) Appellants
STORRER

- and -

COUNCIL OF THE SHIRE OF NOOSA (Respondent) Respondent
Appeal No. 14 of 1984

BETWEEN:

ROBERT RALPH WALKER, HELEN CLAIRE OVENS (Appellants)
ANTHONY EDWARD WALKER and WALTER RHODES Appellants

- and -

COUNCIL OF THE SHIRE OF NOOSA (Respondent) Respondent
Appeal No. 15 of 1984

BETWEEN:

RUSSELL CLARKE, MICHAEL STOREER and (Appellants)
MICHAEL RICHARDSON Appellants

- and -

COUNCIL OF THE SHIRE OF NOOSA (Respondent) Respondent

ANDREWS S.P.J.

McPHERSON J.

SHEPHERDSON J.

JUDGMENT DELIVERED by McPHERSON J. ON THE 6th SEPTEMBER,
1984. ANDREWS S.P.J. AND SHEPHERDSON J. CONCURRING.

"APPEALS NUMBERED 14 AND 15 OF 1984 IN THIS COURT AGAINST
THE DECISION OF THE LOCAL GOVERNMENT COURT IN MATTERS
NUMBERED L.G.A. 300 AND 301 OF 1983 SHOULD BE ALLOWED. IN
EACH OF THOSE CASES THE MATTER SHOULD BE REMITTED TO THE
LOCAL GOVERNMENT COURT FOR HEARING AND DETERMINED ON THE
MERITS. THE RESPONDENTS SHOULD BE ORDERED TO PAY THE
APPELLANTS' COSTS OF THOSE TWO APPEALS.

IN ADDITION, I WOULD ALLOW THE TWO APPEALS IN WHICH LEAVE
HAS BEEN GIVEN TO FILE NOTICES OF APPEAL AGAINST THE
DECISION GIVEN BY THE LOCAL GOVERNMENT COURT ON 9 SEPTEMBER,
1983 AND IN EACH CASE ORDER THAT THE ORDER OF THAT COURT
MADE ON THAT DATE BE VARIED BY DELETING THE WORDS "WITHIN
60 DAYS OF THE DATE HEREOF" WHERE THE SAME APPEAR IN
PARAGRAPH 17 OF THAT ORDER AND SUBSTITUTING THE WORDS "ON
OR BEFORE THE DATE OF DETERMINATION OF LOCAL GOVERNMENT
APPEAL NO. 300 OF 1983" OR AS THE CASE MAY BE 301 OF 1983.
IN RESPECT OF THOSE TWO APPEALS I WOULD NOT MAKE ANY ORDER
AS TO COSTS.

IN RESPECT OF THE REMAINING TWO APPEALS BEING NUMBERED 108
AND 109 OF 1983 IN THIS COURT, I WOULD ORDER THAT THE
APPEALS BE DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 108 of 1983
Appeal No. 109 of 1983

FULL COURT

Mr. Justice

Before the Full Court

Mr. Justice Andrews S.P.J.

Mr. Justice McPherson

Mr. Justice McPherson

Appeal No. 108 of 1983

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BERRY

AND:

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AND:

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JUDGMENT - McPHERSON J.

Delivered the 6th day of september 1984.

CATCHWORDS:

Building control and town planning - Building application
Approval subject to condition - Condition of local
authority approval erect structure on road - Local

authority refusing approval - Appeal to Local Government Court - Whether Court has jurisdiction - Local Government Act, 1936-1983, s. 33(16A)

Counsel: Gore for appellants
Fitzgerald Q.C. & Trotter for respondents
Solicitors: Michael Richardson (Noosa Heads) for appellants by T/A Walker Rhodes
Neilson Stanton & Parkonson for respondent (Gympie) by T/A Nicol Robinson & Kidd
Hearing dates: 31st July and 1st August 1984

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COUNCIL OF THE SHIRE OF NOOSA (Respondent) Respondent

JUDGMENT - McPHERSON J.

Delivered the 6th day of september 1984.

These appeals arise out of attempts by the appellants Walker and the appellants Clarke and Storrer to build dwelling houses on three parcels of land owned by them and situated in a sand dune area at Noosa. The appeals are a sequel to earlier appeals that were considered and allowed

by this Court sub. nom. Walker. v. Noosa Shire Council [1983] 2 Qd.R. 86. It is necessary to say something both about those appeals and about the course of events since the time when they were allowed.

Under the town planning scheme of the Noosa Shire Council, in whose area the land is located, the land is zoned "future Clause 4 of the Order in Council that constitutes that scheme provides so far as material that:-

"(a) The purpose for which any building or other structure may be erected or used or for which land may be used without the consent of the Council in each zone shall be the purposes set forth in Column III of the Table of Zones herein opposite the name of the relevant zone"

In the case of the future urban zone the material purpose so set forth is "dwelling houses - one dwelling house only shall be allowed on each subdivision or parcel of land ..." Because the purpose for which it is proposed to use the land, or the building to be erected or used on each parcel, is that of a dwelling house, no difficulty exists for the appellants in that regard. However, the land is within what is commonly termed a sand dune problem area, and building upon it is therefore regulated by the provisions of the Council's sand dune protection by-law, which is contained in by-law 5, part VI, of chapter 44 of the Council's by-laws. Under those provisions a person may not erect a building on land in that area except with the written permission of the Council and in accordance with any conditions that may be imposed.

Such permission was sought by the appellants in 1982. It was refused by the Council, whereupon the appellants appealed to the Local Government Court against the decisions refusing that permission. Those appeals were unsuccessful: see [1982] Q.P.L.R. 400. Further appeals to this Court were successful in proceedings which are, as I have said, reported in [1983] 2 Qd.R. 86. As appears from the report of that matter, the plans for erection of the

houses envisage in each case the erection also of a vehicular ramp to provide access from Park Road. The ramp is a necessary prerequisite not only to use of the land for a dwelling house but in order to enable the process of construction of the dwelling to take place. In each case (and I will henceforth refer only to the case of Walker as exemplifying all three parcels and appeals) the ramp will terminate at the house on the relevant parcel but its commencing point is to be located on land adjacent to that parcel and forming part of what is conveniently referred to as the road reserve of Park Road.

In the initial proceedings by way of appeal to the Local Government Court, the appeal was refused essentially on the ground that, although acceptable from an engineering point of view, the proposed ramp required the use of the road reserve and permission to erect and use the road for that purpose had not been obtained from the appropriate body or corporation in which that road was vested or which was legally responsible for it. As the result however of the successful appeal to this Court the matter was remitted to the Local Government Court with the direction that the appeals be allowed subject to the condition that "all consents from any person or authority whose consent or permission is required for the building of the proposed erections upon any part of the Park Road reserve be obtained before commencement of the works" and subject also to such other conditions as that Court might consider appropriate: see [1983] 2 Qd.R. 86, 90.

The matter then returned to the Local Government Court where, on 9th September 1983, the appeal was allowed on terms which, so far as relevant were that the appellants were granted permission "to erect a building on the subject land" generally in accordance with certain specified conditions. It is of importance to note that the "building" referred to in this part of the order allowing the appeal was the dwelling house itself. Conditions 3 and 4 of the conditions forming part of that order were as follows:-

- "3. Construction of the vehicular ramp is to be by augered piers using a portable drilling rig, hydraulically operated with the provision of tie beams to give the structure rigidity. The ramp is to be of a timber decking.
4. No work is to be commenced on the dwelling house before the vehicular access ramp is completed to the reasonable satisfaction of the Shire engineer."

The order concluded with the following further conditions numbered 17 and 18:-

- "17. All consents or permissions from any person or authority whose consent or permission is required for the building of the dwelling house or any of the proposed erections upon any part of the Park Road reserve shall be obtained within 60 days of the date hereof.
18. If all or any of the consents referred to in paragraph 17 hereof have not been obtained by the Appellants within 60 days of the date hereof, the permission granted hereby shall forthwith lapse and be of no legal effect whatsoever."

The later history of the Walker appeal, which is in substance duplicated in the appeal by Clarke and Storrer, is as follows. On the assumption (which seems to me to be correct: see Concord Municipal District v. Coles (1906) 3 C.L.R. 96) that the subsoil of Park Road vested in the Crown, the appellants sought from the Lands Administration Commission permission pursuant to ss. 371A and 372 of the Land Act 1962-1983, to construct the ramp on the Park Road reserve. That permission was granted on 17th October 1983, or, more accurately, by a letter of that date the appellants were informed that the Commission had no objection to construction of the ramp provided that the approval of the local authority was obtained. By the terms of by-law 4 of chapter VIII of the Council's Roads and Regulation of Traffic By-law (Government Gazette, 18th June

1941, p. 2262), it is provided that no person "without a permit ... shall (a) erect a structure upon a road or reserve so as to encroach thereon." Permission was sought pursuant to this by-law, but by letter dated 1st November 1983 the Council conveyed to the appellants its resolution to refuse that permission.

On 10th November 1983 appeals (numbered LGA 300 and 301 of 1983) against the Council's refusal of that permission were lodged in the Local Government Court. The period of 60 days allowed by conditions 17 and 18 of the order of that Court made on 9th September 1983 expired shortly after the date on which the Council communicated its refusal of permission. Accordingly on 8th November 1983 the appellants applied to the Local Government Court to vary that order by extending the period of 60 days within which that permission was to be obtained. That application was on 6th December 1983 refused essentially on the ground that there was no power, whether under the provision for liberty to apply or otherwise, to vary the order in the manner sought by the appellants. From those decisions appeals numbered 108 and 109 of 1983 were brought to this Court by Walker and by Clarke and Storrer. However, Mr Gore of counsel, who appeared for the appellants on the appeals, announced at the outset of the hearing that those two appeals would not be proceeded with. Instead he was given leave to file further notices of appeal against so much of the order of the Local Government Court given on 9th September 1983 as limited to 60 days the time within which conditions 17 and 18 of that order were to be satisfied.

The appeals (LGA 300 and 301 of 1983) from the Council's refusal to grant permission under its Roads and Regulation of traffic By-law ("the 1941 by-law") were dismissed by the Local Government Court on 29th February 1984. Appeals numbered 14 and 15 of 1983 were brought to this Court against that decision. In that decision the Local Government Court has held that it had no jurisdiction under s. 33(16A) of the Local Government Act, 1936-1983 ("the Act"), to hear those appeals. That was the question

principally argued before us and, for an understanding of it, it is necessary to set out s. 33(16A) and the subsections immediately preceding it:-

" (15) Appeals in respect of applications to use land or to erect or use buildings or other structures. Subject to this section any applicant for approval, consent or permission to use any land or to erect or use any building or other structure for a purpose permitted by a town planning scheme may appeal to the Court against the decision of the Local Authority.

(15A) (a) Subject to this section, any applicant for approval to have a use of any land, building or other structure registered in the Register of Existing Non-Conforming Uses as prescribed by a town planning scheme may appeal to the Court against the determination of the Local Authority.

(b) Subject to this section, the owner or occupier of any land, building or other structure (other than an applicant referred to in paragraph (a)) the use whereof the Local Authority has determined should be registered in the Register of Existing Non-Conforming Uses as prescribed by a town planning scheme may appeal to the Court in respect of such determination.

(16) **Appeals in respect of requirements and decisions of Local Authority under by-laws.** Subject to this section any person who is dissatisfied with any decision of the Local Authority under any by-law made pursuant to this section or under a by-law made prior to the passing of The Local Government Acts Amendment Act of 1966 for controlling the use and development of land pending the coming into force of a town planning scheme, may appeal to the Court against such decision.

(16A) **Other appeals in respect of the erection of buildings or other structures.** Subject to this section, an applicant who is dissatisfied with a decision, requisition or other act of authority with respect to the erection of any building or other structure for a purpose permitted by a town planning scheme made or done or purporting to be made or done by the Local Authority or any officer of the Local Authority by virtue of the provisions of any by-law or the scheme may appeal to the

Court against such decision, requisition or other act of authority.

This subsection does not apply to a decision, requisition or other act of authority in respect of which a right of objection is conferred by the Building Act 1975."

The ground on which in the Local Government Court jurisdiction to hear the appeal was denied was that the ramp, with respect to which the decision appealed from was made, was a building or structure on the road; that there was nothing in the Council's town planning scheme that permitted a structure to be erected on a road; and that therefore the decision was not one with respect to the erection of that structure for a purpose permitted by the town planning scheme. In so far as conditions 17 and 18 of the order of 9th September 1983 imposed a need to obtain the permission to erect the ramp of the Council under its 1941 by-law relating to structures on roads, they required, or so it was submitted by Mr Fitzgerald Q.C. for the Council, "a quite separate decision to erect a quite separate structure for a quite separate purpose on quite separate land". The application to erect the ramp was not, it was further submitted, an application to use the ramp as a dwelling house but to use it as a vehicular ramp.

In order to attract the appellate jurisdiction conferred by s. 33(16A), it is necessary to identify what in the context of this matter is the "decision" sought to be appealed against, the "structure" to be erected, the "purpose" permitted by the town planning scheme, and the "by-law" or the scheme referred to in that subsection. The decision in question was clearly enough the Council's decision conveyed by its letter dated 1st November 1983. That decision refused permission to construct the ramp or the relevant portion of it on the road. It did so not under the town planning scheme but pursuant to the provisions of cl. 4(a) of the 1941 by-law, which was the by-law "by virtue of the provisions of" which the Council's decision was made.

A comparison of the various subsections of s. 33 set out above shows that, although there may be a degree of overlapping or common ground among them, subs. (15) is primarily directed to appeals against decisions on applications for approval, consent or permission to use land, or to erect or use a building or structure for a purpose permitted by a town planning scheme; that is, for town planning appeals in the conventional sense. Subsection (16) may be thought to be directed primarily to decisions made under pre-town planning scheme by-laws. Subsection (16A) does not extend to decisions concerning the use of land or a building but is confined to decisions with respect to the erection of a building or structure. It requires that the purpose of the erection be a town planning purpose; but in order to attract jurisdiction under the subsection the decision with respect to such erection need not be one made by the local authority under the town planning scheme as such, but may be one made under any by-law. That a range of decisions is contemplated, which may be wider than those made directly under the town planning scheme as such, is shown by the express exclusion from s. 33(16A) of decisions in respect of which a right of objection is conferred by the Building Act 1975. That implies that, subject to satisfaction of the other requirements of subs. (16A), a decision concerning the erection of a building in respect of which a right of objection is not conferred by that Act may be the subject of an appeal under that provision.

The analysis so far undertaken tends to confirm the submission of the appellants that, in order to be appellable, it is not the application the subject of the decision appealed against but the decision itself that must be "with respect to" the erection of a structure for a purpose permitted by a town planning scheme. The expression "for a purpose permitted by a town planning scheme" describes or qualifies the words "erection of any building or other structure". The decision must be "with respect to" the erection of that building or structure for a town planning purpose. The expression "with respect to" does not

seem to me to be distinguishable in its substance or effect from the cognate phrase "in respect of" which has repeatedly been held to "have the widest possible meaning of any expression intended to convey some connexion or relation between two subject-matters to which the words refer": see McDowell v. Baker (1979) 53 A.L.J.R. 671, 673, and authorities cited there. Here there can be no doubt of the connexion or relation between the Councils decision under the 1941 by-law and the erection of the building or structure. That is so whether in the present context the building or structure is taken to be the ramp itself (for the erection of which permission was sought under the by-law) or the proposed dwelling house. The connexion or relation between the Council's decision and the erection of the dwelling house is established both in physical fact and by the terms of the order of the Local Government Court of 9th September 1983. Paragraph 4 of that order, which is set out above, makes the completion of the vehicular ramp a condition precedent to commencement of work on the dwelling house; and paragraphs 17 and 18 of that order are what render it necessary to obtain within 60 days the consent or approval of any person or authority required for the building of the dwelling house or any proposed erection on the road, failing which the permission granted by the order lapses. The permission granted by that order is, as its terms disclose, a permission to erect the dwelling house on the land. Without that permission there can be no ramp. Without the ramp there can be no dwelling house.

The decision of the Council therefore has the quality of a decision with respect to the erection of a building or structure. The final question is whether the erection of that building or structure is "for a purpose permitted by a town planning scheme". It is clear that the purpose involved here is that of a dwelling house. That is the only material purpose for which any of the three parcels of land in question may lawfully be used, or for which any building or structure may be erected or used, in the relevant zone under the town planning scheme. It is true, or at least it may be assumed, that the road area in which it is proposed

to erect the commencing portion of the ramp is not located in any land zoned under the scheme. But s. 33 (16A) does not in terms require that it should be. What it requires is that the erection of the proposed building or structure should be for a purpose permitted by the town planning scheme. Even if one approaches the matter on the footing that it is the ramp alone, considered as a structure apart from the house, that is the relevant structure, it is clear that, contrary to the submission made on behalf of the respondent Council, it is not necessary that the ramp should be used "as" a dwelling house in order to make the decision sought to be appealed against a decision with respect to the erection of a structure for the purpose of a dwelling house. It is not possible to regard the ramp as having as a separate and severable purpose the function of providing vehicular access which, it was accurately submitted, is not a purpose under the town planning scheme. The dominant if not the sole purpose of the ramp is to serve the dwelling house, and that purpose is therefore determinative of the purpose of the ramp: see Warringah Shire Council v. Raffles [1979] 2 N.S.W.L.R. 299, 301-303, and authorities referred to there, particularly Gold Star Bakeries Pty. Ltd. v. Waverley Municipal Council (1964) 10 L.G.R.A. 396, 399. From this it follows in my opinion that the ramp is a structure erected for a purpose permitted by the town planning scheme, and that the Council's decision with respect to it, which was made under the 1941 by-law, is a decision that may be the subject of an appeal under s. 33(16A) of the Act.

For these reasons there was under s. 33 (16A) of the Act jurisdiction in the Local Government Court to entertain appeals numbered LGA 300 and 301 of 1983. It follows that the appeals numbered 14 and 15 of 1984 in this Court against that decision should be allowed and that in each case the matter should be remitted to the Local Government Court for hearing and determination on the merits. The respondent should be ordered to pay the appellants' costs of these two appeals. In addition, I would allow the two appeals, in which leave has been given to file notices of

appeal, against the decisions given by the Local Government Court on 9th September 1983 and in each case order that the order of that Court made on that date be varied by deleting the words "within 60 days of the date hereof" where the same appear in paragraph 17 of that order and substituting the words "on or before the date of determination of Local Government Appeal No. 300 of 1983" or (as the case may be) "301 of 1983". In respect of those two appeals I would not make any order as to costs. In respect of the remaining two appeals (being nos. 108 and 109 of 1983 to this court) I would order that the appeals be dismissed with costs.