IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

BEFORE:

Mr. Justice Matthews

Mr. Justice Carter

Mr. Justice Ambrose

BRISBANE, 12 AUGUST 1988

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiffs

-and-

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT

MR. JUSTICE MATTHEWS: For the reasons which I now publish I think that the first question submitted to the Court should be answered “Yes”, the second one should be answered “No” and that the plaintiffs should pay the costs of the case. I am authorised by Mr. Justice Carter to say that for the reasons which I now publish on his behalf the first question should be answered “No”, the second question “Yes” and that the costs of the appeal should be paid by the defendant.

MR. JUSTICE AMBROSE: I would answer the first question "Yes", the second question "No" and I would answer the third question that the costs ought to be paid by the plaintiffs and I publish my reasons.

MR. JUSTICE MATTHEWS: The order of the Court therefore will be that the questions submitted in the case stated will be answered (1) "Yes", (2) "No" and (3) "by the plaintiffs". That is the order which will be made.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 1891 of 1988

FULL COURT

BETWEEN:

RUSSELL CLARKE and **MICHAEL STORRER** (Plaintiffs)

AND:

THE COUNCIL OF THE SHIRE OF NOOSA (Defendant)

MATTHEWS J.

CARTER J.

AMBROSE J.

Reasons for Judgment delivered on the 12th August, 1988 by Matthews J., Carter J. and Ambrose J.

Matthews J. and Ambrose J. concurring.

Carter J. dissenting.

"QUESTIONS SUBMITTED IN THE CASE STATED ANSWERED:

QUESTION 1. 'YES'

QUESTION 2. 'NO'

QUESTION 3. 'BY THE PLAINTIFFS'."

IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

Before the Full Court

Mr Justice Matthews

Mr Justice Carter

Mr Justice Ambrose

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiffs

AND:

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT : MATTHEWS J.

Delivered the Twelfth day of August, 1988.

CATCHWORDS:

Section 33 Local Government Act 1936-1985 - Application to rezone - "Proposal" by local authority to grant application - Whether authority has right or power to reconsider "proposal"

Counsel: C.E.K. Hampson Q.C. with him J.J.D. Haydon for Plaintiffs

	N.M. Cooke Q.C. with him T. Trotter for Defendant
Solicitors:	Cartwright Richardson & Co. by t/a Goss, Downey Carne for Plaintiffs
	W. Sykes by t/a Nicol, Robinson & Kidd for Defendant
Hearing date:	1st August, 1988

IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiffs

AND:

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT - MATTHEWS J.

Delivered the Twelfth day of August, 1988.

I have had the advantage of reading the reasons of Ambrose J. for the answers which he thinks should be given to the questions asked in this stated case. I agree generally with those reasons and also with the answers which His Honour thinks should be given to the questions but wish to explain shortly why I do this. However, because Ambrose J. has set out the facts of the case, I see no occasion for again doing that but go immediately to the issues which ultimately depend upon the proper construction to be given to relevant parts of the maze of legislation which appears as s. 33 of the Local Government Act 1936-1985 (“the Act”).

The general issue may be stated in the following form. If an application for rezoning is made to a local authority (s. 33(6A) of the Act) and the local authority receives objection to the rezoning which is sought, does a resolution of the local authority to the effect that it

proposes to grant the application, notice of which is to be given to all objectors (s. 33(18)J(i) of the Act), preclude further discretionary consideration of the local authority of the application? Parts of s. 33 itself and persuasive authority point to the correctness of the answers which Ambrose J. gives.

At the outset, I think it important to note that a local authority, having resolved on a proposal to grant the application, is not required by the Act to notify the applicant of this unless appeal is subsequently lodged by an objector and also to note that a proposal to grant an application as distinct from a decision to grant it is only appropriate as a consequence of there having been objection to the granting of it. In a case where there has been due objection, s. 33(18)(n) of the Act expressly forbids any decision on the application until the time for institution of appeal has expired or the appeal has been determined. In the face of such prohibition it is difficult to conclude that by its "proposal" the local authority has made an effective decision in respect of the application or that it has decided to grant the proposal subject to a condition. In Kern Bros. Limited v. Thuringowa Shire Council (1968) Qd. R. 526, Douglas J. considered an approval to subdivide and decided that such approval was, in the circumstances, final and binding, but the relevant legislation (s. 34 of the Act) does not contain a prohibition such as the one to which I have referred.

It is only pursuant to s. 33(18)(p) of the Act that the local authority is to notify the applicant of its decision and to state the grounds of it, after, of course, the lapse of seven days from determination of appeal or expiration of the time allowed for an objector to appeal.

Section 33(6)A(d) enables the local authority, in respect of an application, to approve of it or refuse to approve it or to approve it subject to reasonable and relevant conditions but this particular subsection does not operate to allow of an approval of it unless and until the

steps required by s. 33(18) of the Act (if applicable) have been taken. Differing rights and obligations depend upon the attitude taken by a local authority to an application which it receives; this is made plain, for example, by referring to the differing consequences of an appeal by an applicant or an appeal by an objector, particularly by reference to the powers of either the Local Government Court or the local authority (cf. s. 33(7) and s. 33(18)(n); and see Zieta (No. 59) Pty. Ltd. v. The Gold Coast City Council (1987) 2 Qd. R. 116 per Connolly J. at p. 119.

Finally, it seems apparent that the remarks of Stephen J. in Scurr v. Brisbane City Council (1973) 133 C.L.R. 245 at pp. 256-257, when His Honour, in considering a comparable section of the City of Brisbane Town Planning Act 1964-1971, said, “The Council, once objections are received, cannot pending the expiration of time for institution of an objector's appeal, proceed any further than the proposed stage”, support what I have been saying and the reasons given by Ambrose J. In that case appeal had been lodged but the “proposed stage” must also remain such until the time allowed for appeal has expired.

IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiffs

AND:

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT - CARTER J.

Delivered the 12th day of August 1988.

The facts of the special case are set out fully in the judgment of Ambrose J. which I have had the advantage of reading. I need only summarise them.

The plaintiffs applied to rezone their land which was within the area under the control of the defendant local authority. The local authority advertised notice of their applications, as required by the Local Government Act, and objections to the applications were lodged. The defendant at its meeting on 1st March, 1988 thereupon resolved that it proposed to approve the plaintiffs' applications subject to conditions. None of the objectors, after having been given notice of the decision of the defendant, exercised their right of appeal to the Local Government Court. At a later meeting of the defendant one member thereof gave notice of his intention to move that the earlier resolution of the Council be rescinded and that the applications be refused.

The questions for the Court are:—

(a) Can the defendant lawfully rescind the resolution carried at its ordinary meeting on 1st March, 1988?

(b) Can the defendant be compelled by law to approve of the said rezoning applications?

(c) By whom should the costs of this special case be paid? Section 33 of the Local Government Act codifies the statutory law relating to town planning for local authorities in the State of Queensland, with the exception of the Brisbane City Council. This action relates to applications made by the plaintiffs to the defendant local authority to exclude land from one zone and to include it in another. This land is subject to the provisions of the town planning scheme for the Shire of Noosa. Its rezoning therefore involves an amendment to the town plan.

This rezoning process is initiated by an application to the local authority (subs. 6A(a)). The application once received must be referred by the Shire Clerk to the local authority (subs. 6A(c)). Before “deciding” the application the local authority is required to give public notice of the application (subs. 18(a)(iv)) by posting a notice on the land, by serving notice of it on adjoining owners (subs. 18(a)(v)) and by advertising the notice in a newspaper (subs. 18(a)(vi)). Sub-section 18 contains extensive requirements for the notices and the advertisement, which are plainly intended to inform members of the public precisely as to what the applicants propose for their land. In the case of an application for rezoning the notice on the land must remain there for 30 days (subs. 18(b)(1)); the advertisement in the newspaper shall be published at the same time as or within seven days of posting the notice on the land. The notice to be served on adjoining owners is subject to a similar time constraint. Furthermore, the local authority is required to keep open for inspection at its office not only the application but also all of the accompanying documents. This elaborate scheme is obviously designed to ensure that members of the public are fully informed concerning the proposal and invites objections to the application by a certain date. For the purpose of “deciding an application” the local authority is then required to forthwith consider every objection thereto subs. 18(i)). Therefore, s. 33 imposes upon the local authority not only the statutory obligation to decide the application but also to consider every objection to it, before deciding. It can be inferred from the facts of the special case that the defendant performed its statutory duty.

Thereupon in deciding the application the local authority is empowered to approve it or to refuse it or to approve it subject to conditions (subs. 18(d)). In my view that is precisely what the defendant local authority did on 1st March, 1988. Having duly considered the application and the objections to it, the defendant council as the planning authority for the area, resolved upon its attitude to the

application and the objections. It decided to “approve” the applications of the plaintiffs subject to conditions which it thought to be reasonable and relevant conditions. One has only to read the full text of the resolution of the defendant dated 1st March, 1988 to conclude that proper consideration had obviously been given to all of the detailed town planning requirements and considerations (subs. 6A(e)), which were seen to be relevant in corning to its decision. Furthermore it resolved upon the reasons to support its decision as appears from the notification of its decision given by the defendant to the applicants dated 2nd March, 1988. This notification is set out in para. 10 of the special case. The notification was a statutory requirement and was apparently given in order to comply with subs. 18(p). This notification is an important fact in the special case because of the defendant's argument which seeks to emphasise the statutory difference between a “proposal” to approve and a “decision” to approve. The notification set out in para. 10 of the special case cannot be understood as being anything other than the notification of “the ground of the decision” required to be given by the defendant by subs. 18(p).

It is apparent from the terms of the resolution of 1st March, 1988 that it contains the expression “proposes to approve”. The form of the resolution is readily explained however by reference to the terms of subs. 18(j) I have already pointed out that for “the purpose of deciding an application” the local authority must “consider every objection thereto” (subs. 18(i)) and it did that. Having done so, subs. 18(j) goes on to address what must next occur. The subsection says “... where the Local Authority proposes to grant an application the clerk is required to give notice to the unsuccessful objectors whose objections failed to find favour with the local authority. There is, in my view, no difference in substance between the local authority “deciding the application” in terms of subs. 18(i) and notifying others that it “proposes to grant” the application in terms of subs. 18(j). The change in form or in terminology, which is reflected in the terms of the

resolution, is required only because the statute envisages that an unsuccessful objector may wish to exercise his statutory right of appeal to the Local Government Court. Were such an appeal lodged, what is it, against which the objector appeals? He appeals against “the proposal of the Local Authority to grant the application” (subs. 18(k)). He appeals against the considered decision of the local authority that the applicant's application be approved, in this case subject to conditions, and that his objections are without substance or are not of such weight as to lead the local authority to decide to refuse the application. In my view the change in terminology in the Statute appears only because of the possibility of an objector's appeal, but in my view it is not the legislative intention to thereby dilute the quality or the very essence of its decision which has been made. The local authority has made its decision and for the purpose of complying with the requirement to notify the unsuccessful objectors, the Statute uses the expression “proposes to grant”. It is a convenient use of language but in essence the notification advises the objector that the local authority is “in favour of” the application. The mind of the local authority in relation to the application has been decided. It thereupon leaves the matter in the hands of the objector to appeal if he so wishes. Therefore it is in my view to pursue a somewhat semantic argument to assert that a resolution that a local authority approves an application has a different legal consequence if the resolution asserts that the local authority proposes to approve an application. A consideration of the entire statutory scheme leads me to the view that whatever the form of the resolution the Council has in fact “decided” the fate of the application having regard both to the intrinsic merits of the application itself and the substance of the objections. I derive some small comfort for this view from the fact that that is exactly what the defendant thought it had done, that is, that it had “decided” the application, that it had made “its decision” and that it then on the next day notified its decision and “the grounds of the decision” as required by subs. 18(p).

Sub-section 18(p) provides that the local authority shall make its decision and notify the applicant thereof within seven days after the time for an objector's appeal has expired. Sub-section 18(n) provides that where objections are lodged the application shall not be decided until the time for instituting an appeal has expired. These sub-sections read in the context of the other provisions referred to above mean only that the final decision is made after the time for an objector's appeal has expired. The decision in this case made on 1st March, 1988 and notified on 2nd March, 1988 was the decision of the defendant to approve the application subject to conditions. The finality of that decision depended only upon the contingency that an objector might appeal and have the decision of the defendant upset by the Local Government Court. If that event happened the decision of Court would bind the local authority subs. 18(o). However in the event that no appeals were lodged the clear intent, in my view, of the statutory scheme was that the earlier published decision of the local authority was to become final by the formal decision of the local authority.

In summary therefore the plaintiffs' applications had been received; they were then advertised; objections were received; the local authority considered the applications and the objections; it decided to approve the applications subject to conditions; it notified the applicants of its decision and the reasons for the decision as the Statute required it to do. All that remained to be seen was whether an objector might appeal; no objector appealed. The local authority was therefore required to formally confirm its decision that the application be allowed subject to the conditions which it had previously resolved upon and of which it had advised the applicants. In those circumstances there was in my view no power in the local authority to rescind its decision in the terms notified by it to the person who had applied for its approval.

The submissions to this Court on behalf of the defendant are in substance inconsistent with the mind of

the defendant as reflected in its resolution of 1st March, 1988. That result is said to be justifiable because of the language of subs. 18 and in particular, because a resolution that it “proposes to approve” an application is a decision of the local authority different in substance from one in which the local authority decides to approve an application. In my view the statement that it “proposes to approve” an application in the context of the Act means that it has “decided” to approve the application and in the event that the Local Government Court does not arrive at a different result via an objector's appeal, the decision notified to the applicant is its decision on the application. That decision is confirmed by the effluxion of the time which is allowed to permit an objector to appeal should he wish to do so.

The general power in a local authority to revoke a resolution as provided for in subs. 14(7) has, in my view, to be read with the statutory scheme which relates to town planning and which is detailed in the extensive provisions of s. 33 of the Act.

There is ample authority for the proposition that if a local authority arrives at its decision in relation to a town planning application and notifies the applicant of its decision, it cannot later resile from that decision. Ex parte Forsberg (1927) 27 S.R.N.S.W. 200 is an example. In the context of the present statutory scheme relating to applications for rezoning under the Local Government Act, the power to alter the decision of the local authority, in the circumstances of this case, is vested only in the Local Government Court, in the event of an objector's appeal. This contingency did not eventuate. I do not regard the well known dicta of Stephen J. in Scurr v. Brisbane City Council (1973) 133 C.L.R. 242 at 256-7 as decisive, in this case. The nature of the application, the legislative scheme and the facts of that case though analogous to the facts in the special case are materially different.

I would therefore answer the questions as follows:—

(a) No.

(b) Yes.

(c) By the defendant.

IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

Before the Full Court

Mr Justice Matthews

Mr Justice Carter

Mr Justice Ambrose

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiff

AND:

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT - AMBROSE J.

Delivered the 12th day of August, 1988.

CATCHWORDS:

Local Government and Town Planning Law - Section 33 sub. 18 Local Government Act 1936 - 1985 - "proposal to approve application" discussed - question whether approval can be withdrawn once given.

Counsel:	Mr. C.E.K. Hampson Q.C. and	Mr. J.J.G. Haydon for Plaintiff
	Mr. N.M. Cooke Q.C. and	Mr. T.N. Trotter for Defendant

Solicitors: Goss Downey Canne as town agents for Cartwright Richardson & Co., Noosa Heads for Plaintiff
Nicol Robinson & Kidd as town agents for W.R. Sykes, Tewantin for Defendant

Hearing dates: 1st August, 1988

IN THE SUPREME COURT OF QUEENSLAND No. 1891 of 1988

FULL COURT

BETWEEN:

RUSSELL CLARKE and MICHAEL STORRER Plaintiff

AND:

THE COUNCIL OF THE SHIRE OF NOOSA Defendant

JUDGMENT - AMBROSE J.

Delivered the 12th day of August, 1988.

The plaintiffs have stated a special case in which they seek an answer to the following questions -

(1) can the defendant lawfully rescind resolutions carried at its ordinary meeting on 1st March, 1988 proposing to approve applications by the plaintiffs for a rezoning of land within the defendant's shire; and

(2) can the defendant be compelled by law to approve those rezoning applications made on 16th October, 1987.

The relevant facts stated are as follows:—

(a) by separate applications each dated 16th October, 1987 the plaintiffs made application to the defendant for the rezoning of parcels of land which

each owned in the defendant's shire from the non-urban zone to the residential low density zone under the Town Planning Scheme that operated within that shire;

(b) the plaintiffs duly advertised the applications pursuant to s. 33(18) of the Local Government Act and the defendant received objections to each of the applications made by the plaintiffs;

(c) at its ordinary meeting on 1st March, 1988 the defendant resolved that it proposed to approve each of the applications made by the plaintiffs for the rezoning of their land subject to conditions contained in the Shire Planners Report dated 1st March, 1988;

(d) the defendant notified each of the objectors to the plaintiffs' applications that it proposed to approve those applications pursuant to the provisions of s. 33(18)(j)(i) of the Local Government Act by letters dated 2nd March, 1988;

(e) by letters dated 2nd March, 1988 (with enclosures) the defendant notified each of the plaintiffs to the following effect:—

"I wish to advise that Council at its meeting held on 1st March, 1988 resolved to propose to approve the application subject to the following conditions --"

(a number of conditions were then enumerated).

The defendant then stated various reasons to support its decision upon the applications and also provided each of the applicants with a list of names and addresses of objectors to the application and copies of the relevant parts of the Local Government Act outlining appeal rights with respect to the defendant's decision. At the end of the letter

advising of the defendant's proposal was the following paragraph:—

"You will be further advised following the expiry of the thirty (30) day appeal period mentioned in s. 33(18)(i) of the Local Government Act."

(f) No objector to the plaintiffs' applications filed any notice of appeal in the Local Government Court and the time for lodging any such appeal by any objector expired in or about 1st April, 1988.

(g) At an ordinary meeting of the defendant held on 26th April, 1988 a motion to rescind the previous resolution of the defendant passed on 1st March, 1988 proposing to approve the rezoning applications was defeated and a motion was passed that the defendant direct the Shire solicitor to arrange legal and town planning advice on the defendant's prospects of successfully defending a decision to refuse the plaintiff' s applications.

At its ordinary meeting on 19th May, 1988 consideration was given to advice received and on that day seven members of the defendant gave notice of their intention to move a resolution for the rescission of the resolution carried by the defendant on 1st March, 1988 and notice was given of a further proposed motion that the rezoning application made by each plaintiff be refused on various grounds specified.

(h) On 9th June, 1988 the plaintiffs upon learning of the proposal to put such a motion instituted proceedings in this court in which the procedure of arguing the matters in issue upon a special case was adopted as a convenient method of determining the real issue between the parties.

The answer to the questions posed depends upon consideration of various statutory provisions scattered

through s. 33 of the Local Government Act. Because it is so difficult to collect those parts of s. 33 which are relevant to the determination of the questions in issue I propose not merely to refer to them by reference to the number of the sub-sections and paragraphs and sub-paragraphs by which they may be found only with the greatest of difficulty by perusing the pamphlet copy of the Act but indeed to set out herein the substance of those statutory provisions.

Section 33(6A)(a) provides:—

(a)“ Application may be made to the local authority to exclude land from any zone and to include the land so excluded in another zone.”

Section 33(6A)(b) makes provision with respect to the content of the application and information which must accompany it.

Section 33(6A)(c) provides:—

“(c) Every application made pursuant to this sub-section shall if it complies with this sub-section be referred by the clerk to the Local Authority and the Local Authority shall decide the application.”

Section 33(6A)(d) then provides:—

“(d) Upon an application being referred to the Local Authority pursuant to para. (c) the Local Authority may -

(i) approve it;

(ii) refuse to approve it; or

(iii) approve it subject to reasonable and relevant conditions.”

Section 33(6A)(e) then provides:—

"(e) In respect of an application made pursuant to this section the Local Authority shall, amongst other things, take into consideration -

(a variety of matters including the creation of traffic problems or detrimental effect on the amenity of the neighbourhood or the need for increased facilities if development of the land proposed subsequent to the rezoning is to take place and other specified matters which are not relevant for the purpose of answering the relevant questions.)"

Section 33(18) provides inter alia:—

"(a) where -

(i) an application is made to the Local Authority to exclude land from a zone and to include the land so excluded in another zone — the Local Authority before deciding such application shall -

(iv) give or cause to be given public notice of the application by posting a notice-(in certain specified positions -)

(v) serve or cause to be serve notice of the application -

(on certain persons in the vicinity of the land)

(vi) give or cause to be given public notice of the application by advertisement in a newspaper.

Under s. 33(18)(b) requirements are specified for the size etc. of the notice and the place where it is to be posted.

Under s. 33(18)(c) requirements are specified for the content of the public notice to be inserted by advertisement in a newspaper.

The section contains provisions applying to notices to be posted on the land and notices to be given to nearby occupiers and the notice to be published by advertisement in a newspaper which brings to the attention of people interested “the last day for the receipt of objections”.

Under s. 33(18)(h) it is provided inter alia:—

“(i) a person may on or before the last day for the receipt of objections make and lodge an objection to an application where the making thereof has been notified under this sub-section;

(ii) then specifies the details which must be contained in the objections made and lodged pursuant to sub-para. (i). Under sub-para (ii) the objection must be lodged with the clerk of the shire.

Under s. 33(18)(i) it is provided:-

“(i) For the purpose of deciding an application to which para. (a) applies the Local Authority shall forthwith consider every objection thereto made and lodged in accordance with para. (h).”

Section 33(18)(j) provides:—

“(j)(i) Subject to sub-para. (ii) where the Local Authority proposes to grant an application to which para. (a) applies the clerk shall give notice accordingly to every person who has made and lodged as prescribed by para. (h) an objection to the granting of the application.”

There is nothing relevant in the content of s. 33(18)(j)(ii) to the questions to be answered on this case.

Section 33(18)(k) provides:—

“(k) Subject to this act a person who has duly objected to the granting of an application where a notice has been given pursuant to this sub-section may appeal to the court against the proposal of the Local Authority to grant the application --”

Section 33(18)(1) provides:—

“(l) An appeal under this sub-section shall be instituted within 30 days after the giving pursuant to paragraph (j) of the notification to the person who institutes the appeal but not later.”

Pursuant to s. 33(18)(m) an applicant for rezoning has the right to elect to become a respondent to an objector's appeal.

Under s. 33(18)(n) it is provided:—

“(n) Where a person has duly objected, the application shall not be decided -

(i) until the time for institution of an appeal has expired; or

(ii) if an appeal is duly instituted until the appeal is determined.”

Section 33(18)(o) provides:—

“(o) In the case of an appeal in making its decision the Local Authority shall be bound by the determination of the appeal.”

Section 33(18)(p) provides:—

“(p) The Local Authority shall make its decision and the clerk shall notify the applicant thereof within seven days after the time for institution of an appeal has expired or if the appeal has been duly instituted after the determination thereof. The

notification shall state the grounds of the decision."

Upon my examination of s. 33 of the Act and having regard to the submissions made before us the provisions which I have set out appear to be the only parts of s. 33 relevant for consideration. I make this observation because that section containing numerous sub-sections and paragraphs and sub-paragraphs stretches through more than 70 pages of the pamphlet copy of the Local Government Act.

The power of the defendant to revoke or alter resolutions generally is to be found in s. 14(7) of the Local Government Act which provides:—

> "A resolution of the Local Authority shall not be revoked or altered unless notice of the intention to propose such revocation or alteration is given to each of the members seven days at the least before holding the meeting at which the revocation or alteration is to be proposed.
>
> If the number of members present at that meeting is not greater than the number present when the resolution was adopted the resolution shall not be revoked or altered unless the revocation or alteration is determined by an absolute majority of all the members."

On behalf of the plaintiffs it was contended that once the defendant had resolved that it proposed to approve the plaintiffs' application subject to specified conditions it had irrevocably committed itself to approving that application - subject only to being relieved of that obligation should any objector appeal successfully to the Local Government Court. It was contended that once the defendant commenced to act or do anything pursuant to its resolved proposal to grant the application it so fettered its discretion that it might not afterwards change its mind. Alternatively it was contended that the defendant would not be acting in good faith should it attempt to rescind the resolution that it had passed proposing to grant the application. Put another way it was contended on behalf of the plaintiffs that the proposal to grant the

application ought be viewed as a provisional approval which might be overturned only by a successful objector appeal launched pursuant to s. 33(18)(k). It followed so it was said that should no objector appeal against the defendant's proposal to grant the application then the proposal to grant the application which was notified to the applicant was then "by the effluxion of time confirmed as the approval pursuant to the statute." It was pointed out that a period of only seven days from the date of determination of an objector appeal or from the date of the expiration of time limited for such appeal was specified by s. 33(18)(p) of the Local Government Act within which the "formal" resolution or decision of the Council must be made and indeed notified to the plaintiffs.

It was contended in the alternative that the defendant could not be acting in good faith should it attempt "to change its mind midway through the statutory procedures".

Although it was contended that once the defendant had embarked upon a procedure appropriate only when it proposed to approve an application for rezoning and it could not "midway through that procedure reverse its decision", it was not submitted that there was any estoppel operating against the defendant. It is unnecessary therefore to review the authorities relating to whether a Local Authority could be estopped in circumstances of the sort raised upon this special case. Suffice it to say that reference was made to a number of authorities where courts both in Queensland and in other jurisdictions have considered whether a Local Authority having granted approval to a town planning application and having so notified the applicant, has power later to rescind that approval, I refer only to ex parte Wright re: Concorde Municipal Council (1925) 7 L.G.R. (N.S.W.) 79, ex parte Forssberg in re: Council of Shire of Warringa (1927) 27 S.R.N.S.W. 200 and to Kern Brothers Ltd. v. Thuringowie Shire Council (1968) Qd.R. 526.

All those cases considered an approval to a town planning application actually given by a Local Authority and communicated to, the applicant. Stated briefly those cases are authority for the proposition that if a Local Authority lawfully gives approval to a town planning application and notifies that approval to the applicant it may not subsequently rescind that approval merely because it overlooked some relevant consideration at the time it resolved to grant the application.

For such authorities to support the plaintiff in the present case a resolution by the defendant that it “proposed to approve the application” such as the one the defendant passed on 1st March, 1988, of which it notified the plaintiffs, would have to be treated in the same way as a resolution that it did approve the application of which the plaintiffs were notified.

It is clear then that this argument of the plaintiffs' is really quite similar in substance to what seems to me to be their other principal argument that the resolution to propose to grant the application was in essence a conditional approval - conditional upon there being no successful objector appeal against the defendant's proposal. The essence of the second approach is that as between the plaintiffs and the defendant the defendant was bound to arrive at a decision in accordance with that which it proposed by its resolution of 1st March, 1988 subject only to or conditional only upon no objector succeeding upon appeal to the Local Government Court against that proposal.

For the defendant it is contended that a resolution proposing to approve - even if one construes such a proposal as being conditional upon there being no successful objector appeal - cannot according to the plain and ordinary meaning of the English language mean the same thing as a decision to approve. It is contended on behalf of the defendant that the authorities to which I have referred relating to the inability of Local Authorities to

rescind a town planning approval notified to an applicant cannot be extended so as to prevent a Local Authority from changing its mind prior to making the formal decision required of it by s. 33(6A)(d) and thus departing from what it had previously proposed to do.

To my mind there are four legislative provisions which must be considered in determining the questions posed. Those are ss. 33(6A)(d), 33(6A)(e), 33(18)(o) and (33)(18)(p).

On behalf of the defendant reference was made to some observations of Stephen J. in Scurr & Ors. v. Brisbane City Council (1973) 133 C.L.R. 242. His Honour was there considering legislative provisions similar in some respects to those in question here, contained in s. 22 of the City of Brisbane Town Planning Act 1964-1971. At p. 256 he observed:—

> "Because of the terms of subs. (4) the Council once objections are received cannot, pending the expiration of time for institution of an objector's appeal proceed any further than the proposal stage."

The defendant relies upon this observation in the present case.

In my view it could not be contended that the defendant notified the plaintiffs that it was giving approval to their applications. What it did notify them was that it proposed to give approval to their applications - subject impliedly to its proposal not being set at naught by a successful objector's appeal.

I can find nothing in any of the authorities to which I have been referred to support the proposition that the defendant was at law prevented from changing its mind before the time was reached for it to make a decision of the sort envisaged by s. 33(6A)(d) of the Local Government Act. In my view when making that decision the Local Authority was required under s. 33(6A)(e) "amongst other

things” to take into account the fact that it had notified the plaintiffs on 1st March, 1988 that it proposed to approve their application for rezoning. However it was not until the time for the institution of an objector's appeal had expired that the defendant was permitted pursuant to the combined effect of the provisions of s. 33(18)(n) and s. 33(6A)(d) to make a decision either approving or refusing to approve or approving the plaintiffs' application subject to reasonable and relevant conditions.

To my mind it is not arguable that the defendant in any way fettered its discretion when the time came to make a decision of the sort contemplated by s. 33(6A)(d) by reason only of its having decided to approve the plaintiff's application upon an initial consideration of the objections received upon advertisement of it.

In Zleta No. 59 Pty. Ltd. v. Gold Coast City Council (1987) 2 Qd.R. 116 it was held that under s. 33(18) of the Local Government Act the Local Government Court has no power to impose conditions when determining an objector appeal in respect, of the rezoning of land to which that act applies. On my reading of the judgments in that case the practice in the Local Government Court of intimating to a Local Authority upon such an appeal that it would be right for it to impose additional conditions which in the view of the Local Government Court ought be imposed if the application for rezoning were to be made to the Minister was at least tacitly approved. Observations made in that case assume that the Local Authority subsequent to an objector appeal when making its decision has power to impose conditions upon the approval which it had not determined to impose at the time it proposed to grant the approval. In this respect I refer to the judgment of Connolly J. p. 119 lines 10-22, McPherson J. at p. 125 lines 30-35 and Derrington J. at p. 129-130.

It is clear from those observations in my view that the “recommendation” made by the Local Government Court in such a case for the imposition of conditions was not part

of its “decision” and it seems clear that after the determination of an objector appeal, pursuant to the powers given to it under s. 33(6A)(d), constrained no doubt as those powers are by provisions of s. 33(18)(o), the Local Authority although not formally “bound” by the recommendation made by the Local Government Court as to the imposition of additional conditions is empowered to impose such conditions. It is not hard to envisage additional conditions the cost of complying with which might make the grant of approval of rezoning far less valuable to an applicant than would be the grant of an approval without the imposition of those additional conditions.

Having regard to what was said in Zeita No. 59 Pty. Ltd. the inescapable conclusion is that the only decision which the Local Authority can make pursuant to s. 33(6A)(c) is one which is authorised by s. 33(6A)(d) and that decision cannot be made prior to the expiration of the time within which an objector appeal may be instituted. If one is instituted the decision cannot be made until the determination of that appeal pursuant to s. 33(18)(n). I have come to the conclusion that the defendant is entitled to change its mind before it makes a decision pursuant to ss. 33(6A)(c) and (d) and is entitled when exercising the power given and indeed meeting the obligation imposed upon it by those sub-sections to refuse the plaintiffs' application.

Of course if it does refuse that application the plaintiffs will have a right of appeal under the provisions of the Act to the Local Government Court and no doubt should they exercise that right of appeal the relevant planning considerations will be adequately ventilated and the Local Government Court will be able to give the weight which ought appropriately be given to the defendant's proposal to approve the application resolved on 1st March, 1988 (or at least the grounds if any upon which that proposal was based) when viewed in the context of the whole of the relevant planning considerations.

No authority was cited which in my view could support the proposition that merely by proceeding to change its mind and reverse its proposal to approve the application the defendant exhibited bad faith. Indeed contained in the proposed motion to reverse its decision of 1st March, 1988 and to refuse the application there are a number of town planning grounds referred to in support of that course being taken. An application of the sort before us upon which no evidence whatever has been called is not in my view an appropriate method for determining whether there be bad faith.

I would answer the first question: yes.

I would answer the second question: no.

The third question which reads “by whom should the costs of this special case be paid?” I would answer: By the plaintiffs.