[HIGH COURT OF AUSTRALIA.]

DELTA PROPERTIES PROPRIETARY LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

BRISBANE CITY COUNCIL . . . . DEFENDANT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1955.

BRISBANE, *July* 25-27;

SYDNEY, *Sept.* 27.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Local Government (Q.)—Public Health—Drainage of land—Low-lying area—City of Brisbane—Prohibition against erection of dwellings on land in council's opinion not "capable of being drained"—Opinion of council—Formation of opinion—Matters relevant for consideration—Party affected—Right to be heard—The City of Brisbane Acts 1924 *to* 1951, *s.* 33 (2)—*Ordinances, Chap.* XII, *Pt.* IX, *s.* 7.

Section 7 of Pt. IX (drainage of lands and premises other than under *The Metropolitan Water Supply and Sewerage Acts* 1909 *to* 1924) of Chap. XII (Health Ordinance) of the Ordinances made under s. 36 (2) of *The City of Brisbane Acts* 1924 to 1951 (Q.) provides: "It shall not be lawful for any person upon land which is so situated as not, in the opinion of the council, to be capable of being drained to erect any building to be used wholly or in part as a dwelling or to adapt any building to be used wholly or in part as a dwelling".

Held, (1) that the words "capable of being drained" contemplate the practicability, in view of the local topography, and not the physical possibility, of drainage of individual premises, by gravitation through its own pipes and conduit, to council drains (or in relation to draining with other than rainwater, from houses erected on land suitable for sub-surface irrigation) to works of sub-surface irrigation. In considering whether land is so capable the council is not concerned to consider the likelihood or unlikelihood of its being able, having regard to its own financial resources and works programme, to provide

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adequate drainage for the area in which the land is situated by means of roads and council drains. (2) That an opinion of the council must relate specifically to a parcel of land which, before the council comes to consider it, has the character of the potential curtilage of a building to be erected or adapted for use wholly or in part as a dwelling. (3) That the council was not required to wait for the submission of building plans or of an application relating to a proposed building before forming such an opinion. (4) That once expressed by formal resolution the opinion of council would stand, unless revoked, as a permanent obstacle to the erection or adaptation of any building on the land for use as a dwelling. (5) That the validity of the council's opinion must depend upon a full and fair opportunity having been afforded to any person whose property was under consideration of placing before the council his case against such opinion being formed.

In resolving that certain land was, in its opinion, not capable of being drained the Brisbane City Council had considered not the problems facing owners of allotments as to the drainage of those allotments but the engineering and financial difficulties likely to present themselves to the council if housing development were allowed to take place in the area generally. The allotment owners concerned were not afforded an opportunity of objecting to the formation of such opinion by the council and of placing their views before it.

Held, that the opinion so formed by the council was not such as is contemplated by s. 7 above-mentioned and a pre-requisite of the valid formation of such an opinion had not been observed.

Semble, that s. 37 (10) of *The Local Government Acts* 1936 *to* 1949 (Q.), whilst not applicable to the present case must be given a construction similar to that given to s. 7 above-mentioned.

Decision of the Supreme Court of Queensland (Full Court): *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (1955) Q.S.R. 181, reversed.

APPEAL from the Supreme Court of Queensland.

The Brisbane City Council on 25th September 1951 declared by resolution that in its opinion a specified area of land, which included certain land owned by Delta Properties Pty. Ltd., was so situated as not to be capable of being drained.

Delta Properties Pty. Ltd. sued in the Supreme Court of Queensland seeking a declaration that the resolution was void upon the grounds that it was passed, *mala fide*, that the opinion expressed was not the true and honest opinion of the council and that it was passed for ulterior purposes. The action was tried with a jury by *Mansfield* S.P.J., who on the findings of the jury on certain specific questions left to it entered judgment for the council. An appeal brought by Delta Properties Pty. Ltd. to the Full Court of the

Supreme Court of Queensland was dismissed (1), from which decision the company appealed to the High Court.

The material facts and statutory provisions and the history of the trial before *Mansfield* S.P.J. are fully set out in the judgment of the Court hereunder.

A. L. Bennett Q.C. and *O. J. North*, for the appellant.

H. T. Gibbs, for the respondent.

Cur. adv. vult.

Sept. 27.

THE COURT delivered the following written judgment :—

The substantial question in these proceedings is whether the erection of a dwelling house on any part of certain land of the plaintiff within the City of Brisbane is unlawful by reason of the fact that on 25th September 1951 the Brisbane City Council passed a resolution declaring it to be the opinion of the council that a specified tract of land, which includes the plaintiff's land, was so situated as not to be capable of being drained.

The council, in contending for an affirmative answer to this question, relied in the Supreme Court and to some extent in this Court upon sub-s. (10) of s. 37 of *The Local Government Act* 1936 (Q.) as amended, which provides : " It shall not be lawful for any person upon any land which is so situated as not, in the opinion of the local authority, to be capable of being drained to erect any building to be used wholly or in part as a dwelling, or to adapt any building to be used wholly or in part as a dwelling ". The Act, however, contains in s. 3 a definition of " local authority " which restricts its meaning, unless the context otherwise indicates or requires, to a local authority constituted under the Act, and the Brisbane City Council is not constituted under the Act. It owes its constitution to special legislation contained in *The City of Brisbane Acts* 1924 *to* 1954 (Q.). There is nothing in the context of s. 37 (10) to extend the meaning of " local authority " in that provision so as to include the Brisbane City Council. Section 36 (3) of *The City of Brisbane Acts* provides that the council shall be deemed to possess all the powers, rights, privileges and authorities of a local authority under any Act ; but s. 37 (10) of *The Local Government Act* can hardly be regarded as conferring a power, right, privilege or authority. There seems to be no ground for considering that the provision has any application in the present case.

(1) (1955) Q.S.R. 181.

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There is, however, a provision in almost identical terms in s. 7 of Pt. IX of Chap. XII of the Ordinances made under the authority of s. 36 (2) of *The City of Brisbane Acts* 1924 *to* 1951 (Q.). The only difference is that s. 7 says " upon land " instead of " upon any land ". The council's case must rest upon this section.

The land to which the council's resolution of 25th September 1951 referred was described therein as " the land bordered red on Plan No. T. P. 19.1/1 prepared by the Planning and Building Branch, Department of Public Works ". This plan showed a large tract of land at Bald Hills, within the area of the City of Brisbane, including an area bounded by Gympie Road on the west, Telegraph Road on the south, and the North Coast railway line running in a generally north-westerly direction. This area was shown as subdivided into a large number of allotments suitable in size for house sites. The land bordered red comprised some 218 of these allotments, together with certain intersecting streets which, according to the evidence, were indicated on the site by signposts but were unmade.

The first problem in the case is to construe s. 7. What is meant by " so situated as not to be capable of being drained " ? What is the extent of the land which the council may consider as an entirety in forming an opinion under the section ? Does the section mean that if the council forms the opinion referred to, the expression of that opinion is to stand until revoked, or until circumstances change in any other way, so that in the meantime the section will operate as an absolute prohibition ? If so, is it an implied condition of the validity of such an expression of opinion that the council, before forming the opinion, shall have given all persons interested in the land a reasonable opportunity of making representations against the formation of the opinion ? Or is the function of the council limited to forming such an opinion in the course of dealing with an application for some consent or approval with respect to the erection of a dwelling house thereon ? The language of the section itself gives a minimum of assistance on such questions as these, and in order to answer them it is necessary to consider the context in which the section appears.

Chapter XII of the ordinances is headed " Health Ordinances ", and Pt. IX bears the caption " Drainage of lands and premises other than under *The Metropolitan Water Supply and Sewerage Acts* 1909 *to* 1924." The provisions of the Part preserve a careful distinction between a " house-drain " and a " drain ". The former is defined, in s. 2, to mean any pipe or conduit for the drainage of one building only, or of premises within the same curtilage, and made merely for the purpose of communicating therefrom with a

system of sub-surface irrigation or with a drain as defined or other means of disposal of drainage. "Drain" is defined to mean a pipe, conduit or channel of the council for the conveyance of rain-water and waste or foul liquids from lands and premises within the city. Section 3 provides that the council may cause to be made such drains as are necessary for effectually draining the city, and the next four sections are directed to the subject of the drainage of individual premises. Together these four sections cover six classes of cases in which it is found that there are not sufficient means of disposing of surface waters on the premises. In outlining their provisions it will assist to keep clear the distinction made by the definitions if "council drain" is substituted for "drain".

The first section of the group, s. 4, deals with three cases. (i) The first is the case of a house which is without a house-drain sufficient for the effectual disposal of waters other than rain-water. The section empowers the council's engineer in such a case to give the owner a notice requiring him to make a house-drain or house-drains emptying into a council drain which is within the curtilage of the house or is not more than three hundred feet from the curtilage. If no such means of drainage are available, the owner may be required to dispose of such waters by means of suitable works of sub-surface irrigation if, in the opinion of the council's engineer, the extent of the land available and the nature of the soil are suitable for sub-surface irrigation. (ii) The next is the case where a building on any premises is without a house-drain to take rain-water from such building to a council drain and there is a council drain within the curtilage, or within three hundred feet from the curtilage, of such premises. In such a case the engineer is empowered to give the owner a notice requiring him to make a house-drain from the premises so as to communicate with the council drain, and to make such connections with the house-drain as will cause all such rain-water to be taken to the council drain. (iii) The section also covers the case where there is already a house-drain from the premises communicating with a council drain, and the engineer is of opinion that adequate provision has not been made for the disposal of rain-water from the buildings on the premises and that the rain-water could be properly disposed of through such house-drain. The engineer is empowered in that case to require the owner to connect the building with the house-drain or with extensions or improvements thereto, together with such necessary connections from the buildings as will adequately convey all such water to the council drain. (iv) Then s. 5 governs the case where premises have a house-drain connecting with a council drain, but

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the house-drain, though sufficient for the effectual drainage of the premises, is not adapted to the general system of council drains in that locality, or ought in the opinion of the council to be connected to another council drain. In that case the council may, on condition of providing a house-drain or house-drains equally effectual for the drainage of the premises and communicating with such other council drain as it thinks fit, close the first-mentioned house-drain. (v) The fifth case is that of land which is situated within three hundred feet of a council drain and is so low-lying as not to admit of being drained by gravitation into a council drain. Section 6 provides that the council may give notice to the owner to fill up land so that it may be drained, and it goes on to provide for a daily penalty, and for the performance of the work by the council, in the event of the owner neglecting or refusing to comply with the notice. (vi) Finally, there is s. 7 which, as already stated, makes it unlawful to erect a building to be used wholly or in part as a dwelling, or to adapt any building to be used wholly or in part as a dwelling, upon land which is so situated as not, in the opinion of the council, to be capable of being drained.

Plainly the last-mentioned provision refers to the practicability of ridding land of water, and not to the bare possibility of doing so. As Mr. *Gibbs* contended, all land may be said to be capable of being drained, if " capable " refers only to physical possibilities. " Capable of being drained " must therefore be read as subject to some limitation of meaning. If the section were taken out of context, so that draining by any of the methods within the capacity of engineering skill were considered to be in contemplation, the only practical limit to drainability would be that which is set by considerations of cost. But the context throws much light on the construction of the section. The definitions which have been quoted, and the terms of ss. 4, 5 and 6, make it plain that the only kind of drainage to which reference is being made in this group of sections is drainage of individual premises, by gravitation through its own pipes and conduits, to council drains or (in relation to draining water other than rain-water, from houses erected on land which is suitable for sub-surface irrigation) to works of sub-surface irrigation. Whether particular land is " capable " of being drained in this sense must be a question of levels. Section 6 recognizes this by describing the land to which it applies as " so low-lying as not to admit of being drained by gravitation into a (council) drain " ; and similarly s. 7 itself, by its express words, confines the council's attention to the effect of situation on drainability. The meaning of ss. 6 and 7 taken together seems to be

that if a given parcel of land is so situated in relation to the other land in the vicinity that no " house-drain " which might be constructed would dispose of its waste and surface waters, satisfactorily from a health point of view, by gravitation to a council drain (or a work of sub-surface irrigation) which exists or might be provided, the council may require the land to be filled up so that it may be drained, if that is a feasible thing to do ; and, if even that course is not a practicable solution of the problem in the council's opinion, no building for use as a dwelling may lawfully be erected.

It is clear that in considering such a question the council is not concerned at all to take into account the likelihood or unlikelihood of its being able, in view of its own financial resources and works-programme, to provide adequate drainage for the area in which the land is situated by means of roads and council drains. The embargo upon building which s. 7 provides arises only upon the formation by the council of the opinion that, whatever general drainage facilities may be constructed in the locality, the particular piece of land is in such a position that no house-drains with which it may be equipped will be able to drain it properly.

The next point to be observed is that the group of sections is concerned only with drainage by means of house-drains, that is to say drains " for the drainage of one building only or of premises within the same curtilage " as the definition puts it. The council is not set at large to pronounce upon the drainability of any tract of land which it may see fit to select. Five of the six provisions which have been summarized above postulate a parcel of land identified by its connexion with a building or a proposed building. In the first two, as in the definition of " house-drain ", this parcel is actually named as the curtilage ; in the second and third it is referred to as the " premises " " on " which there is a building ; and in the fourth it is called the premises. The sixth, the provision in s. 7 itself, creates a prohibition which will be infringed by the erection or adaptation of a building, to be used wholly or in part as a dwelling, " upon " land as to which the council has the specified opinion ; and the only construction of the word " upon " which will make the section homogeneous with its fellows is that which treats a building as being upon the land within its curtilage and not upon any more extensive area. It seems an inevitable conclusion that an opinion of the council which is to result, by force of s. 7, in a prohibition of the erection of a building for use as a dwelling must relate specifically to a parcel of land which, before the council comes to consider it, has the character of the potential curtilage of a building to be erected or adapted for use wholly or partly as a

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dwelling. There is nothing in the ordinance to restrict the application of s. 7 still further by confining it to land which has acquired the necessary character in any particular manner. The fact that the land consists of one entire building lot in a sub-division is no doubt sufficient, though an opinion formed with respect to such a lot would not apply to any portion of that lot which is afterwards carved out of it so as to form by itself the curtilage of a building.

On this construction of s. 7, there is nothing to require the council to wait for building plans to be submitted or for any application relating to a proposed building to be made. The opinion may be formed as well at one time as at another, and whether the council has been invited to consider the matter or is acting on its own initiative. And it must also be true that an expression of the opinion by a formal resolution of the council will stand, unless revoked, as a permanent obstacle to the erection or adaptation of any building on the land for use as a dwelling.

The situation which the section creates is that a prejudicial effect upon the rights of individuals with respect to property will occur whenever the council, in the exercise of its judgment, decides that land is, by reason of its situation, incapable of being drained, that is to say forms an opinion to that effect and expresses it in the only way in which such a body can, i.e. by means of a resolution. In such a situation the law insists, according to long-established doctrine, that the step which will have that prejudicial effect, namely the formation and expression of the opinion, requires for its efficacy the prior observance of the fundamental principles of natural justice. In particular it is essential that the person whose property is in question must be given a full and fair opportunity of placing before the council his case against the formation of the opinion: *Cooper* v. *Wandsworth District Board of Works* (1); *Sydney Corporation* v. *Harris* (2); *Errington* v. *Minister of Health* (3); *In re Gosling* (4). If the council forms an opinion adverse to that person in disregard of these requirements the resulting ineffectiveness of the resolution expressing it may be established by a declaratory order: cf. *Barnard* v. *National Dock Labour Board* (5).

Section 37 (10) of *The Local Government Acts* has been put aside as inapplicable, but it is desirable to mention, since the council has relied, as will appear, upon that sub-section, that very similar considerations apply to it. Section 37 as a whole bears the general heading " Drainage ", but its terms show that its concern is with

(1) (1863) 14 C.B.N.S. 180 [143 E.R. 414.]
(2) (1912) 14 C.L.R. 1.
(3) (1935) 1 K.B. 249.
(4) (1943) 43 S.R. (N.S.W.) 312, at p. 317; 60 W.N. 204.
(5) (1953) 2 Q.B. 18.

the carrying off of waters other than sewage from premises. Subsection (1) commences by drawing the distinction between such drainage and council drainage, by referring to the completion (*scil.* by the local authority) of any drainage in the area, i.e. the district in which a local authority has jurisdiction (s. 3), and providing that as soon as may be after such completion, the local authority is to require the owner or occupier of premises within three hundred feet of such drainage to provide for the carrying off of waters other than sewage from such premises to such drainage, as the local authority shall direct. It also entitles the owner of any premises in the area to carry off such waters from such premises to the drainage of the local authority, on certain conditions. Subsections (2) to (8) inclusive make further provisions, all relating to the drainage of individual premises by means of their own drains. Then sub-s. (9), like s. 6 of the ordinances, deals with the case of land which is within three hundred feet of any drainage and is so low-lying as not to admit of water other than sewage being carried off by gravitation into such drainage; and it enables the local authority to require the owner to fill up the land. In the context thus provided, sub-s. (10) must be given the same construction as has been stated with respect to s. 7 of the ordinances.

What happened in the present case was as follows: On 20th July 1951 an officer of the council made a report to the deputy building surveyor with respect to approximately three hundred blocks, including the appellant's land. He stated that the major portion of the area was very low and practically flat, that the ground was then damp, after an exceptionally dry spell, and that there was every indication that the land would be unsuitable for domestic buildings in normal weather. He said that roads were not formed through the area and would present a major drainage problem of which he went on to give some particulars. He suggested that, pending a report from the district engineer, building applications should be held in abeyance.

On 31st July 1951 the district engineer made a memorandum, headed generally " Bald Hills Station Estate ", in which he described what he called the area between Palmer Street and the railway as flat and boggy. He said that if building were permitted in the area hatched red (on some plan which is not now identifiable), comprising approximately 196 lots, there would be a demand for road access. Road construction and stormwater drainage, he said, would provide a major problem and, even if it were practicable, the council would be involved in very considerable expense and the locality would always be a liability. It was, he understood, subject

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to considerable flooding. Referring to another thirty-six lots fronting Telegraph Road, he said that here, again, drainage problems would be difficult. His conclusion was that from a highway stormwater drainage point of view the areas referred to were not suitable for building development. The remainder he considered could be dealt with reasonably.

On the same day the officer in charge of planning and building of the Department of Works reported to the divisional engineer that the area in which Telegraph Road, Dickson Street, Miles Street, Palmer Street and Musgrove Street were located—more or less the area to which the council ultimately directed its resolution—had been inspected by a field inspector, who was of opinion that it was very low and practically flat and that there was every indication that the land was unsuitable for the erection of a dwelling house.

On 7th August 1951 the divisional engineer reported to the engineer for maintenance of the Department of Works that he had inspected the area north of Telegraph Road and west of the railway line, and said that because of flat terrain, lack of drainage facilities and the nature of the ground itself the council would be inundated with requests for improved access and drainage if any buildings were permitted, and considerable difficulties would be experienced by any occupiers during and after any wet weather. To overcome any of the access and drainage difficulties, he added, the council would be faced with a very costly programme; and he thought that the difficulty of disposing of household sullage wastes could soon become a health nuisance. He therefore recommended that buildings be not permitted on an area which he marked on a plan but which was not identified at the trial, and that the area be acquired by the council for future development for sporting fields. This, he said, would possibly be more economical than the cost of road and drainage development.

On 17th August 1951 a committee called the Officers' Planning Committee received a report from the officer in charge of planning and building which said that, whilst certain sections of the Station Estate could be developed to advantage for residential purposes, other parts were looked upon as unsatisfactory for residential development "due to the many drainage difficulties with which the council was likely to be confronted to adequately cope not only with surface waters but also household drainage should development proceed." The minutes of the meeting added that the opinion was also expressed that certain sections of the area were incapable of being adequately drained; and the decision reached was that

the chief engineer and manager of the Department of Works should investigate further the drainage problems affecting the area, and that, should he deem it advisable, he should arrange for the taking of suitable steps to have the area declared as not capable of being drained.

The officer referred to inspected the area and agreed with the divisional engineer's report of 7th August 1951. In a memorandum to the town clerk on 12th September 1951, he said that to render the area habitable would involve considerable expenditure by the council, both on drainage and road construction, and that in the interests of owners building on the land should not be permitted. He described it as unfortunate that sales of land of this nature were permitted, and said: "The council can, of course, declare the land as not being readily drainable and therefore unsuitable for the erection of domestic dwellings, and it appears to me that this is the best course to follow . . .". He submitted the matter for consideration, observing that the decision to be made was very largely a matter of policy.

On 13th September 1951 a field inspector reported that Mr. E. H. Smith of Miles Street, Bald Hills, had lived there for forty-two years and verified the officer's opinion that the ground, apparently the lower part of Miles Street near its junction with Telegraph Road, was unsuitable for domestic buildings "by reason of the fact that the ground floods and becomes very swampy."

The question eventually reached the council's Establishment and Co-ordination Committee on 21st September 1951. The town clerk directed the committee's attention, not to s. 7 of the *Health Ordinances*, but to s. 37 (10) of *The Local Government Acts*, and the committee recommended the council to exercise its powers thereunder by expressing the opinion that the land bordered red on Plan No. T.P. 19.1/1, prepared by the Planning and Building Branch of the Department of Works, was so situated as not to be capable of being drained. This recommendation was adopted by the council on 21st September 1951, the resolution being then passed which is the subject of the present proceedings.

From this recital of the events which led up to the passing of the resolution it will be seen that what was under consideration at every stage was, not the problem which would face owners of individual home-sites in regard to the draining of their respective allotments, but the problem which would face the council if housing development took place in the area generally. The engineering, and particularly the financial, difficulties in the way of constructing adequate council drains and roadways was the constant, and quite

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natural, pre-occupation of the officers who considered the matter; and it is altogether plain that the council, not seeing its way to undertake the early solution of these problems, and realizing the unfortunate plight in which purchasers of building lots would be placed if they were to erect homes and then find themselves without the benefit of adequate road and drainage facilities, took the course of proclaiming an opinion which it thought would form a bar to the erection of dwellings in the area.

This, however, was to misconstrue the provision. As already stated, it is concerned only with the practicability, in view of local topography, of constructing effective private drainage for individual curtilages. Not being alive to this, the council and its officers naturally did not think at any stage of ascertaining what the appellant, as owner of a number of building lots, might wish to say. The result was that the opinion which the council formed was not such an opinion as s. 7 contemplates, and a pre-requisite of the valid formation of such an opinion in relation to the appellant's allotments was not observed.

The appellant, however, sued in the Supreme Court to have the resolution declared void for entirely different reasons. By its statement of claim it accepted the position that, but for the invalidating circumstances which it alleged, the passing of the resolution would have attracted a prohibition of the erection or adaptation on its land, that is to say on any of its allotments, of any building to be used wholly or in part as a dwelling. The allegations upon which it relied for its right to relief were, first, that the resolution was passed in bad faith, the opinion expressed in it not being the true and honest opinion of the council, and, secondly, that the council in fact formed no real opinion in the matter, and in passing the resolution acted for an ulterior purpose, gave no consideration to relevant matters, and was influenced entirely or substantially by irrelevant considerations. After giving particulars of these charges, the statement of claim proceeded to allege that the appellant applied to the council to approve of certain building plans, specifications and particulars for the erection of a dwelling house on one of its building lots, and that the council refused the application by reason of the impugned resolution. The relief claimed was a declaration that the resolution was not passed in good faith and was void and of no effect, an injunction against refusing to approve of the plans, specifications and particulars on the ground that the erection of a dwelling house was unlawful because of the resolution, and mandamus requiring the council to determine the application in good faith and, subject to compliance with the ordinances, to

approve the erection by the appellant of a dwelling house on the land.

The action was tried with a jury. The learned trial judge (*Mansfield* S.P.J.) put to the jury thirteen questions, based largely upon the particulars which the appellant had given of its main allegations. The more important facts found by the answers to these questions were as follows. First, it was found that the council, in passing the resolution of 20th September 1951, pursued the deliberate policy of using s. 37 (10) of *The Local Government Acts* as a device to prevent erection of dwelling houses on the appellant's land when it (the council) was of the opinion that the expense to it of road construction and drainage would be considerable. This may well mean no more than that the purpose of the council was, by precluding the building of houses in the area, to save itself from the embarrassment of a growing demand for the construction of expensive roads and council drains. Secondly, the jury found that the appellant's land, which was being considered as a whole, was in fact capable of being drained, although the council could have formed the opinion honestly that it was not capable of being drained. Counsel for the appellant framed three more questions which he desired to have answered, but his opponent objected to them and they were not put to the jury. They were (1) whether the resolution was passed by the council in bad faith; (2) whether the opinion expressed in the resolution was the true and honest opinion of the council; and (3) whether the council, in passing the resolution acted for an ulterior purpose and was influenced by extraneous considerations. No general verdict was taken.

In this situation the learned judge gave judgment for the council. He pointed out that the whole basis of the appellant's case had been that the council could not properly, and in accordance with s. 37 (10) of the *Local Government Acts*, have been of the opinion that the land was incapable of being drained, because in addition to considering the bare question whether or not the land was in fact capable of being drained it had considered the cost of drainage and the cost of the construction of roads in the immediate area. His Honour took the view that road construction and drainage were matters inevitably connected with each other, and that an opinion on drainage and its cost could not be formed, so as to have any true relation to practical matters, unless some consideration was also given to the cost of road construction. He held that the council had not taken into consideration matters which were not germane to the question of the capability of drainage of the land, and, declining to hold that the jury's findings as to the use of s.

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37 (10) as a "device" established any improper use of the section by the council, he concluded that the appellant's claim must fail. An appeal to the Full Court was unsuccessful, and from the Full Court's order the present appeal is brought to this Court.

It is clear that the litigation has been conducted throughout on the footing that the land to be considered was the appellant's land taken as a whole. The appellant did not seek in the Supreme Court a decision that an opinion of the council could not be relevant to s. 7 of the ordinance or s. 37 (10) of the Act unless it was directed to a specific building allotment; and the point was never raised that the council had any duty to allow the appellant an opportunity of stating its case. It is pointless to consider whether the judgments below would be correct if s. 7 of the ordinance were to be construed in a sense different from that which has been explained. The unfortunate fact is that the action was contested on a completely wrong basis. On the one hand, the appellant could have obtained a declaration that the council's resolution had no effect under s. 7 of the ordinance without raising any of the issues which were fought. On the other hand, insofar as it obtained favourable answers to the questions which were left to the jury, those answers gave it no title to more extensive relief. Nor could those answers stand insofar as they are based on an erroneous direction as to the meaning of s. 7 of the ordinance. In any event the appellant could not obtain the injunction or either of the orders for mandamus which were sought in the statement of claim, for they related to the appellant's application for approval of the plans specifications and particulars for the erection of a dwelling, and under Chap. 23 of the ordinances, dealing with buildings, the approval which is made necessary is an approval to be given by the city architect, who was not a party to the action.

The question remains as to what order should be made on this appeal. The resolution was open to attack, but the appellant was not entitled to the substantial relief claimed in the action. If the land on which any particular dwelling is proposed to be erected is in fact so situated as not to admit of being efficiently drained at all times by gravitation into an existing stormwater sewer or channel, the erection or adaptation of a building to be used as a dwelling house is forbidden by s. 34 of Chap. 23 (the building chapter) of the ordinances. For this reason it may or may not be of much use to the appellant to have even the declaration which has been mentioned. On the whole, however, it seems a proper course to pronounce such an order as will make it clear that the resolution is (though not for the reasons advanced) not one which

stands in the way of any application by the appellant for approval of building plans.

There should be an order allowing the appeal, discharging the order of the Full Court of the Supreme Court, and substituting therefor an order allowing the appeal from *Mansfield* S.P.J., setting aside his order and judgment, and ordering that in lieu thereof there be judgment in the action declaring that the resolution of the defendant council of 25th September 1951 mentioned in the statement of claim does not express any such opinion as is referred to in s. 37 (10) of *The Local Government Acts* 1936 *to* 1949 or in s. 7 of Pt. IX of Chap. XII of the ordinances made in pursuance of the provisions of *The City of Brisbane Acts* 1924 *to* 1945.

In all the circumstances it seems right to make no order as to costs, either in this Court or in the Supreme Court.

Appeal allowed. Order of the Full Court of the Supreme Court of Queensland discharged. In lieu thereof, order that the appeal to the Full Court be allowed, that the order and judgment of Mansfield S.P.J. be set aside and that in lieu thereof there be judgment in the action declaring that the resolution of the defendant council of 25th September 1951 *mentioned in the statement of claim does not express any such opinion as is referred to in s.* 37 (10) *of The Local Government Acts* 1936 *to* 1949 *or in s.* 7 *of Pt. IX of Chap. XII of the Ordinances made in pursuance of the provisions of The City of Brisbane Acts* 1924 *to* 1951.

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Solicitor for the respondent, *G. L. Byth*, City Solicitor.

R. A. H.