HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

KETTERING PTY LTD APPELLANT

AND

NOOSA SHIRE COUNCIL RESPONDENT

Kettering Pty Ltd v Noosa Shire Council
[2004] HCA 33
23 June 2004
B52/2003 and B53/2003

ORDER

Matter No B52/2003

1. Appeal allowed with costs;

2. The order of the Court of Appeal of Queensland dated 8 February 2002 is set aside, and in place thereof the appeal to that Court is dismissed with costs.

Matter No B53/2003

1. Appeal allowed with costs;

2. The order of the Court of Appeal of Queensland dated 28 June 2002 is set aside;

3. Respondent to pay the costs of the appellant of the application to amend made to that Court.

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with D R Gore QC and R S Litster for the appellant (instructed by Hopgood Ganim Lawyers)

P J Lyons QC with T N Trotter for the respondent (instructed by Wakefield Sykes)

CATCHWORDS

Kettering Pty Ltd v Noosa Shire Council

Planning law – Compensation for alleged diminution in value of land – Appellant owned land in Noosa – Town planning scheme amended by a Development Control Plan ("DCP") – DCP constrained development potential of appellant's land thereby diminishing its market value – Appellant sought compensation from respondent pursuant to *Local Government (Planning and Environment) Act* 1990 (Q) ("the Act"), s 3.5(1) – Compensation not payable where land affected by a planning scheme which had the effect of prohibiting or restricting "use of land or erection or use of building or other structure thereon for a particular purpose" – Whether the Act precluded appellant's claim for compensation.

Courts – Jurisdiction – Trial of one of several separate issues – Issue reserved for later determination – Appeal to Court of Appeal with respect to issue decided – Whether Court of Appeal erred in determining issue reserved for later determination.

Local Government (Planning and Environment) Act 1990 (Q), ss 3.4, 3.5.

1 McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. These appeals raise questions as to the proper construction of the *Local Government (Planning and Environment) Act* 1990 (Q)[1] ("the Act"), and instruments made under it giving rise to injurious affection, and, in consequence an owner's entitlement to compensation.

Facts

2 The appellant is the owner of 19.8 hectares of land on Noosa Hill in the Noosa Shire in Queensland. The land is zoned "Rural Pursuits". In that zone a dwelling house is a permitted use but land may only be subdivided as of right into lots of no less than 40 hectares.

3 On 21 September 1991 the "Noosa Hill Development Control Plan" ("the DCP") was gazetted. The Act defines a "planning scheme" as meaning "a scheme for town planning which conforms with section 2.1 and is approved by the Governor in Council". A "planning scheme" is to consist of the various elements listed in s 2.1, including a strategic plan, zoning maps and "a development control plan (if any)". The Act defines a "development control plan" as meaning:

> "... a plan for the orderly growth, development or conservation of an area, that conforms with section 2.5 and is approved by the Governor in Council."

Section 2.5 sets out what the DCP was required to include:

> "...
>
> (a) a map or series of maps that indicate the intentions for the future development of designated parts or the whole of a planning scheme area;
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> (b) statements of the intent of the development control plan;
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> (c) criteria for the implementation of the plan."

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1 In force at the time.

4 As Davies JA pointed out in the Court of Appeal[2] a DCP merely indicates the intentions for the future development of the area covered by a planning scheme. It is a statement of intention, not a declaration or prescription of uses, or prohibitions or restrictions upon them.

5 In Queensland, local authorities, of which the respondent is one, are planning authorities although they are subject to interventions, approval and directions of the responsible Minister and the Governor in Council (s 2.10 to 2.15). Section 2.16 of the Act provides for local authorities to administer planning schemes.

6 Section 2.18 makes provision for the amendment of a Planning Scheme by the Governor in Council on the recommendation of the Minister. Section 2.18(2)(c) is the provision pursuant to which the process for the inclusion of the DCP in the scheme was undertaken by the respondent.

7 Section 4 of the DCP divided an area of land of which the appellant's land formed part, into precincts, and located most of it within sub-precinct D of precinct 2. Application of the principles and intentions stated in the DCP to the appellant's land would significantly reduce its potential for more intensive use.

8 After gazettal of the DCP the appellant claimed compensation in the sum of $9,300,000.00. The claim was as follows:

> "Kettering Pty Ltd's interest in the said premises has been injuriously affected by:
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> 1. the coming into force of a provision contained in the planning scheme for the Shire of Noosa; and/or
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> 2. a prohibition or restriction imposed by or under the planning scheme for the Shire of Noosa."

9 Particulars of the claim were stated in this way:

> "Prior to the gazettal on 21 September 1991 of Development Control Plan No 1 – Noosa Hill, which is part of the Planning Scheme for the Shire of Noosa, Lot 1 on Registered Plan 136508 could reasonably have been expected to be rezoned and subdivided so as to yield 73 house lots and

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2 *Kettering Pty Ltd v Noosa Shire Council* (2002) 120 LGERA 33 at 41 [28].

132 building units or group title units. Because of the gazettal of the Development Control Plan, the yield is reduced to 24 house sites and 75 units."

The Planning and Environment Court

10 The claim was rejected by the respondent. The appellant appealed against that rejection to the Planning and Environment Court ("the PEC") pursuant to s 7.1 of the Act. By then the appellant had formulated alternative bases for its claim as follows:

"But for the DCP, necessary approvals in order to carry out residential development of the land (including the land now in sub-precinct D) could have been obtained in a number of ways including, relevantly for compensation purposes:

(a) by obtaining town planning consent for 'group housing developments'. Such a consent would have enabled development of both attached and detached dwellings; or

(b) rezoning from the Rural Pursuits Zone to another zone where land could be subdivided into smaller allotments for dwelling houses."

11 A judge of the PEC made an order for the trial of separate issues:

"That the question whether s 3.5(4) and (5) of the *Local Government (Planning and Environment) Act* operates to preclude the payment of compensation to the Appellant if and to the extent to which the claim for compensation is based upon the 'second option' (as above)."

12 The questions were tried by the PEC (Senior Judge Skoien) and answered in favour of the appellant. His Honour held that ss 3.5(4)(d) and 3.5(5) of the Act upon which the respondent relied did not foreclose "option (b)" of the appellant's claim because the DCP did not have the effect, *by its operation*, of relevantly prohibiting or restricting the use of the land.

The Appeal to the Court of Appeal

13 The appellant sought, and was granted leave to appeal to the Court of Appeal of Queensland[3]. The appeal was upheld by a Court consisting of McPherson and Davies JJA and Ambrose J[4].

14 McPherson JA regarded himself as bound by an earlier decision of the Court of Appeal, *Sparke v Noosa Shire Council*[5], which does not appear to have been relied upon by the respondent in that Court and was not at the forefront of its submissions in this Court. McPherson JA said[6]:

> "The state of affairs that prevails here is not to my mind legally distinguishable from that considered in *Sparke v Noosa Shire Council*[7]. The respondent here is within the ambit of the exception imposed by s 3.5(4)(d) upon the right to compensation conferred by s 3.5(1) and it is not taken out of that exception by the limitation added to s 3.5(4)(d) that begins with the word 'unless …'. It remains within the exception because the respondent had to surmount not only the obstacle presented by the discretionary power of the council as the local government under s 4.5(1), but also that presented by the discretionary power of the Governor-in-Council under s 4.5(6). Because of the existence of that discretionary power of the Governor-in-Council, it is not possible, in terms of s 3.5(5), to say that before 21 September 1991 it was 'by reason *only* that the applicant's right depended upon the exercise of discretion by the local government in the applicant's favour' that the respondent in this case had no 'legal right' in terms of s 3.5(4)(d). The discretion of the Governor-in-Council under s 4(6) to refuse the application was another reason for saying that the respondent had no such legal right.
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> …

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3 The application for leave appears to have been made and granted under s 4.1.56 of the *Integrated Planning Act* 1997 (Q) which repealed the Act.

4 *Kettering Pty Ltd v Noosa Shire Council* (2002) 120 LGERA 33.

5 [2001] 1 Qd R 344.

6 *Kettering Pty Ltd v Noosa Shire Council* (2002) 120 LGERA 33 at 36 [8], [10].

7 [2001] 1 Qd R 344.

The respondent's submission would treat s 3.5(4)(d) as creating a right to compensation that is different from and in some respects wider than the right under s 3.5(1)(a) from which it is intended to detract. That would have the extraordinary result that, as the reasons of Davies JA demonstrate, the less direct or more remote the connection between the planning scheme provision and the injurious affection suffered by the owner, the stronger his prospect of recovering compensation would become. That is to ascribe an irrational outcome to the legislation. The foundation for the respondent's claim to compensation is s 3.5(1) and the exception imposed upon it by s 3.5(4)(d) cannot create a right to compensation that rises above its source. Exceptions are by their nature limitations on and not extensions of the rules on which they operate."

15 Davies JA was of the opinion that the structure of s 3.5(4)(d) required that a distinction be drawn between a direct and an indirect operation of a planning scheme upon the usage of land to which it applied, and that a very broad meaning should be given to the word "restricts". His Honour's reasoning appears from these passages[8]:

"It can be seen from the paragraphs of s 3.5(4) that injurious affection which may give rise to compensation is thereby limited to affection of an interest in premises which is direct and immediate. Nowhere is this clearer than in what I have described as the exceptions to par (d): for example, one of the ways in which a planning scheme might most directly and immediately operate to prohibit or restrict the use of land would be where, before it came into force, there was a right to use the land for a particular purpose which the provision prohibited or restricted. To construe par (d), as the learned primary judge held and the respondent contends, so as to *exclude* payment of compensation only where a planning scheme, by its direct operation, restricts the use of land would be inconsistent with the scheme of these paragraphs in general and with the exceptions in particular. The correct construction is to the contrary.

So construed par (d) applies in this case to preclude payment of compensation. The reason why the respondent's interest is affected by the coming into force of the development control plan is that that plan, by its operation, restricts the use of land. But it does not do so immediately and

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8 *Kettering Pty Ltd v Noosa Shire Council* (2002) 120 LGERA 33 at 41 [27]-[28] (original emphasis).

> directly; it does so only potentially thereby reducing its value. That is because a development control plan merely indicates the intentions for the future development of designated parts or the whole of a planning scheme area. ... That this development control plan is no more than a statement of intent for the future can be seen from an examination of the plan."

16 Ambrose J agreed with the reasoning and conclusions of both McPherson JA and Davies JA[9]. It is this decision which is the subject of the first appeal to this Court.

17 Unfortunately however their Honours also made orders which would preclude the appellant from pursuing the alternative basis for its claim, option (a) which had not been the subject of any order by the PEC for its determination, and was not covered by any ground of appeal to, or argued in the Court of Appeal. The respondent agreed that this was so and joined the appellant in seeking the correction of the all-embracing order made by the Court of Appeal.

18 The Court of Appeal declined to correct its orders. Their Honours said this[10]:

> "This Court identified the question before it in the same way as the learned primary judge had identified it, that is whether the provisions of s 3.5(4) and s 3.5(5) of the *Local Government (Planning and Environment) Act* 1990 precluded a claim for compensation for injurious affection to land which Kettering had made against the Council. No objection was taken in this Court to the way in which the learned primary judge had identified the question before him. However the notice of appeal to this Court had sought an order that:
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> > 'Sub-sections 3.5(4) and (5) of the *Local Government (Planning and Environment) Act 1990* operate to preclude the payment of compensation to the Respondent if and to the extent to which the claim for compensation is based on the second option identified in a letter dated 29 August 2000 from the solicitors for the Respondent to the solicitors for the Appellant.'

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9 *Kettering Pty Ltd v Noosa Shire Council* (2002) 120 LGERA 33 at 42 [31]-[32].

10 *Kettering Pty Ltd v Noosa Shire Council* [2002] QCA 229 at [5]-[8].

One reason why this Court reached a conclusion contrary to that of the learned primary judge is that it held that s 3.5(4)(d), like the other paragraphs of s 3.5(4), excluded a right to compensation where, speaking generally, the coming into force of a provision of a planning scheme has only a remote or indirect, as opposed to a direct and immediate effect on the value of a person's interest in premises; and that the coming into force of a development control plan has only the former effect.

It is true that a claim based upon the first option described in the appellant's letter of 29 August 2000 would require evidence to be heard in order to determine whether, within the meaning of s 3.5(5), the appellant had a legal right referred to in sub-s (4)(d). However even if it did have such a right, it was not one which the coming into force of a development control plan prohibited or restricted for the reason that, as this Court explained in its judgment in this appeal, a development control plan affects land only potentially because it merely indicates the intentions for the future development of designated parts or the whole of a planning scheme area.

That reasoning of this Court therefore precludes argument on the so-called first option. We would therefore refuse the application to amend this Court's order. To allow such an application and alter the order made in some such way as the parties seek would, in our opinion, be to encourage pointless further litigation."

It is this decision which is the subject of the second appeal to this Court.

The Appeals to this Court

19 It is necessary to set out some further relevant provisions of the Act:

"**3.4 Effect of new planning scheme on pre-existing applications and approvals**

(1) Where a Local Authority has not decided an application prior to the date (in this section called 'the prescribed date') of the coming into force of a planning scheme or an amendment thereof (in this section called the 'new planning scheme') the Local Authority, in deciding the application in accordance with the planning scheme in force at the time the application was lodged, is to give such weight as it considers appropriate to the new planning scheme."

20 The point to be made about this section is that it contemplates, in the case of a pending application made before an amendment to a planning scheme came into operation, that the amendment may be taken into account in deciding the application to which the amendment would otherwise not apply, by the according of weight to it.

21 The topic of compensation is the subject of s 3.5.

> **"3.5 Compensation**
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> (1) Where a person –
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> (a) has an interest in premises within a planning scheme area and the interest is injuriously affected –
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> (i) *by the coming into force* of any provision contained in a planning scheme;
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> or
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> (ii) by any prohibition or restriction *imposed by the planning scheme*;
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> ...
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> (4) Compensation is not payable –
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> (a) in respect of any building or other structure erected or work done upon, or contract made, or other act or thing done in respect of land in a planning scheme area, unless, where required by law, the erection of the building or other structure, or the doing of the work or the making of the contract, or the doing of such other act or thing was approved by the Local Authority;
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> (b) where an interest in premises is injuriously affected by reason of any provision contained in the planning scheme, if and in so far as the same provision or a provision of the same effect was, at the date when the provision included in the planning scheme *came into operation*, already in force by virtue of this or some other Act or by-law of the Local Authority;

(c) where an interest in premises is affected by a planning scheme which *by its operation* prescribes the space about buildings or other structures or limits the size of allotments or the number of buildings or other structures to be erected or prescribes the height, floor space, density, design, external appearance or character of buildings or other structures, but nothing contained in this paragraph is to limit the liability of the Local Authority to pay compensation in respect of the acquisition by it of land pursuant to its power under section 35(9) of the Local Government Act;

(d) subject to subsection (2), where an interest in premises is affected by a planning scheme which *by its operation* prohibits or restricts the use of land or the erection or use of a building or other structure thereon for a particular purpose, unless the applicant establishes that the applicant had a legal right immediately before the provision in question of the planning scheme came into force to use the land or erect or use a building or other structure thereon for the particular purpose which is so prohibited or restricted;

(e) in respect of anything done in contravention of a planning scheme;

(f) in respect of anything done in contravention of any interim development control provisions in force in the proposed planning scheme area or approval given under those interim development control provisions, or in contravention of any building approval granted by the Local Authority, or, as the case may be, in contravention of any decision in an appeal under such an interim development control provision or under Part 5;

(g) in respect of any affection of an interest in premises by or pursuant to a planning scheme or a by-law made by a Local Authority whereunder the subdivision of the land is prohibited or restricted.

(5) For the purposes of subsection (4)(d), it is not to be taken that an applicant did not have the legal right referred to in that subsection by reason only that the applicant's right depended upon an exercise of discretion by the Local Authority in the applicant's favour if the applicant shows that it is reasonable to expect that the exercise of discretion would have been in the applicant's favour had it been sought immediately before the relevant provision of the planning scheme came into force.

(6) The onus of proving that compensation is not payable in any case by virtue of subsection (4) is upon the Local Authority.

…

(8) Subject to subsections (2)(b) and (9), the following provisions are to have effect in assessing compensation in respect of a claim made under this section:-

(a) the amount of compensation is (subject to paragraphs (b), (c) and (d)) to be an amount equal to the difference between the market value of the interest immediately after the time of the *coming into operation* of the provision of the planning scheme by virtue of the operation whereof the claim for compensation arose and what would have been the market value of that interest if the provision had not come into operation;

(b) any modification of the injurious affection that may be effected in consonance with the planning scheme is to be taken into account;

(c) any benefit which may accrue to any land adjacent to the land in respect of which compensation is claimed in which the claimant has an interest –

(i) by reason of the *coming into operation* of the relevant provision or any other provision of the planning scheme; or

(ii) by reason of the construction or improvement by the Local Authority at any time after the

> planning scheme *comes into force* upon the adjacent land of any work or service in pursuance of the planning scheme,
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> is to be taken into account;
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> ...
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> (13) The claimant may appeal to the Court pursuant to section 7.1 against the decision of the Local Authority." (emphasis added)

22 In the Court of Appeal McPherson JA applied an earlier decision of that Court[11] holding that the application for compensation there failed as the appellant could not satisfy s 3.5(5) of the Act. This was so because it needed more than the consent of the Local Authority to exercise any rights of exploitation of the land that it might otherwise have but for the planning change. The respondent here relied, at most, only faintly upon that earlier decision and McPherson JA's application of it. The introductory words of s 3.5(5), "[f]or the purposes of s 3.5(4)(d) ..." make it clear that s 3.5(5) is intended to, and can only apply to cases which are otherwise within the exception for which s 3.5(4)(d) provides, and, as will appear this is not one of them. Accordingly his Honour's construction of the Act cannot be accepted.

23 It can be seen that s 3.5.1 is expressed in expansive language. If an interest in land is injuriously *affected* "by any prohibition or restriction imposed by [a] planning scheme" (s 3.5.1(a)(ii)) then equally it is not easy to see how it would not be injuriously affected by the coming into force of a provision contained in a planning scheme (s 3.5.1(a)(i)). It may be that s 3.5.1(a)(ii) was enacted out of an excess of caution to ensure that injurious effects of any kind unless clearly excepted were to attract compensation. "Injuriously affected [or affecting]" is itself an expression of wide import originally used in ss 63 and 68 of the *Land Clauses Consolidation Act* 1845 (UK)[12] and thereafter in other enactments providing for compensation for many kinds of deleterious effects on

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11 *Sparke v Noosa Shire Council* [2001] 1 Qd R 344.

12 8 & 9 Vict c 18.

the value of land left in a dispossessed owner's hands and arising out of the compulsory acquisition and use of other parts of it[13].

24 The provisions here for compensation arising out of planning changes appear to have been broadly based upon s 342AC which was added in 1945[14] to the *Local Government Act* 1919 (NSW). However, as Sugerman J emphasised in *Bingham v Cumberland County Council*[15], the phrase "injuriously affected" had its origin in English legislation[16] dealing with physical injury or disturbance of enjoyment caused by the construction of works on resumed land. His Honour noted[17] that the New South Wales legislation, whilst in turn based upon more recent English legislation, the *Town and Country Planning Act* 1932 (UK), did not adopt the narrow terminology of its s 18. This allowed compensation only where "property is injuriously affected by the coming into operation of any provisions contained in a scheme ... being a provision ... which infringes or curtails [the claimant's] legal rights in respect of that property." Section 18 also used the expression "by its operation". The respondent submits, adopting the reasoning of the Court of Appeal, that this expression requires that the focus be upon the substantial or "direct" effect of a planning scheme, rather than its "indirect" effect.

25 It can also be seen that s 3.5 uses different expressions to cover what would appear to be the same event: the gazettal in, and therefore the occasion for the commencement of the legal enforceability of a planning scheme, or an amendment to it. Those expressions are: "by the coming into force …" (s 3.5.1(a)(i)); "… imposed by the planning scheme" (s 3.5.1(a)(ii)); "came into operation" (s 3.5.4(b)); "by its operation" (ss 3.5.4(c) and 3.5.4(d)); "coming into operation" (ss 3.5.8(a) and 3.5.8(c)(i)); and "comes into force" (s 3.5.8(c)(ii)). It is not possible to attach any particular significance to the use of the different

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13 For example: *Land Acquisition Act* 1989 (Cth); *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW); *Acquisition of Land Act* 1967 (Q).

14 By s 3 of the *Local Government (Town and Country Planning) Amendment Act* 1945 (NSW).

15 (1954) 20 LGR 1 at 8.

16 *Land Clauses Consolidation Act* 1845 (UK); considered in *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243.

17 (1954) 20 LGR 1 at 9.

expressions. They appear to be the result of inattention to the desirability of consistency of use to cover the same or similar concepts. In each case, however the expression has a temporal connotation and appears to be intended to identify a time or event, and not to point to a distinction between an indirect or direct effect of a change in a planning scheme.

26 The DCP had no prohibitory effect upon the appellant's use of the land. Its effect, although no doubt significantly so, was no more than influential. The respondent submits however that this means that its effect was at least restrictive, and therefore that it falls within the alternative limb of the exception contained in s 3.5.4(d), as a provision of a planning scheme which, by its operation, restricts the use of land.

27 In our opinion "restricts" should not be read in this way in s 3.5(4)(d). To give the word "restricts" such a meaning as, "restricted by influencing" or "by having a strong bearing upon" would be to give it a strained and artificial meaning, and one not compelled, either by the context of its use as held by the Court of Appeal[18], or by any extraordinary consequences otherwise.

28 Section 3.5(4) does not expressly or by implication confine compensation to affection which is direct and immediate. The meaning of s 3.5(1)(a)(i) is not to be construed as the Court of Appeal did, by reference almost exclusively, to the exceptions to it. The appropriate approach is to identify the extent to which the very expansive right to compensation which it confers, is reduced by the subsequent exceptions for which s 3.5(4) provides. Section 3.5(4)(a) is concerned with buildings, structures, contracts, and other acts done in respect of land which may only be done with the approval of the Local Authority when such an approval has not been obtained. Section 3.5(4)(b) is designed to ensure that compensation is available only if there has truly been a relevant change in the law affecting the use of the land. Section 3.5(4)(c) is applicable to planning schemes affecting the size of allotments and features peculiar to buildings, so-called "good neighbour" provisions[19]. Section 3.5(4)(e), not surprisingly, excludes compensation in respect of contravening uses. Section 3.5(4)(g) denies compensation in the case of an affection, again by way of a prohibition or

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18 See also *TM Burke Estates Pty Ltd v Noosa Shire Council* [1998] 2 Qd R 448 at 451 where the same approach was adopted by the Court of Appeal (Davies JA, Shepherdson and White JJ).

19 See Fogg, *Land Development Law in Queensland*, (1987) at 713.

restriction. It can be seen that each exception is quite specific, and not, as the Court of Appeal held, confined to instances of remote or indirect effects on value, expressions nowhere used in the Act.

29 The Court of Appeal was of the opinion that acceptance of the construction urged by the appellant would produce an anomalous, indeed extraordinary result that an injurious affection by way of a prohibition or restriction upon use would not attract compensation, whereas such an affection by way of an indirect and only influential change would. But this is to overlook the particularity and limited nature of the subject matter with which s 3.5(4)(d) is concerned: the prohibition on the use of land, or the restriction on use of buildings or other structures, *for particular purposes*. The effect of the DCP here is upon the potential of the land for subdivision, and greater intensity of use, and not of use for a *particular purpose.* It should be pointed out that this is a different construction of s 3.5(4) from the one placed upon it by the Court of Appeal in *TM Burke Estates Pty Ltd v Noosa Shire Council*[20] in which it was unnecessary to construe the section for the purposes of the decision.

30 There is nothing in the language of s 3.5 which requires that a distinction be drawn between direct and indirect effects. To do so is to introduce concepts themselves imprecise and removed from the words actually used.

31 Injurious affection by the taking and use of part of a landholding, and injurious affection occasioned by a planning change have in common the impairment or displacement of a private interest by a public one. This feature has led, in cases of the former, to judicial pronouncements favouring dispossessed landowners, of which the following, by Gaudron J[21], is a recent example:

> "The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to

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20 [1998] 2 Qd R 448 at 451.

21 *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623 [38].

> limitations or qualifications which are not found in the terms of the statute."

32 To resolve this appeal it is not necessary to resort to pronouncements of that kind[22], nor to the fact that the Act, by s 3.5(8)(c) imports another concept from the law relating to compulsory acquisitions of land, of a reduction in compensation on account of any enhancement in value of the remaining portions by reason of the use to which the acquired land is to be put. Nor is it necessary to have regard to cases in which it has been held that exceptions in statutes are generally to be strictly construed[23] or to the principles relating to exceptions in deeds of which this was said as early as 1790 by Lord Kenyon in *Bowring v Elmslie*[24]:

> "... To let the exception control the instrument as far as the words of it extend, and no further, and then upon the case being taken out of the letter of the exception, the body of the instrument operates in full force."

That the Act by s 3.5 imposes the onus upon the respondent of demonstrating that the case falls within an exception is not however irrelevant. It provides an indication at least, that in a case of doubt an approach similar to that adopted by Gaudron J in *Marshall v Director General, Department of Transport*[25] is to be preferred. The respondent has not satisfied the onus that lies upon it here.

33 It may well be that the language of s 3.5 does not, except perhaps for the "good neighbour" provisions, which may give rise to reciprocity of benefit and obligation, disclose the policy underlying the legislative selection of the cases for

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22 See also: *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373 per Dixon J; *Gregory v Federal Commissioner of Taxation* (1971) 123 CLR 547 at 565 per Gibbs J; *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230 at 234 per Wild CJ, Mr Cooke and Mr Maclachlan; *Robinson & Co v Collector of Land Revenue, Singapore* [1980] 1 WLR 1614 at 1621 per the House of Lords.

23 As to the principles relating to exceptions in deeds, see: *Verdouw v City of Unley* (2000) 111 LGERA 357 at 362 [19] per Bleby J; *McBaron v Roads & Traffic Authority of New South Wales* (1995) 87 LGERA 238 at 244-245 per Talbot J.

24 As quoted in *Burnett v Kensington* (1797) 7 TR 210 at 214n [101 ER 937 at 939].

25 (2001) 205 CLR 603 at 623 [38]; and see 634 [67] per Hayne J.

the exclusion of compensation. There is no doubt that a restructuring and rewording of the relevant provisions to ensure consistency of expression when consistency of application is intended would be useful.

34 The respondent argued that a purposive construction produced the result for which it contended. This is not so. It can provide no explanation why some, but not other, instances of affection should be regarded by the legislature as suitable for exclusion from the otherwise very broad entitlement to compensation which s 3.5(1) contemplates.

35 The appellant's first appeal must be upheld. For the same reasons the second appeal should also succeed. It is therefore unnecessary to consider the implications of the decision of the Court of Appeal to dispose of the whole of the appellant's claim although part of it had not been in issue at first instance or on appeal. As to costs, the respondent may have rights under the *Appeal Costs Fund Act* 1973 (Q), but that is not a matter for this Court to decide. The orders of the Court should be:

1. The appeal in *Kettering v Noosa Shire Council* (Matter No B52/2003) is allowed with costs. The order of the Court of Appeal dated 8 February 2002 is set aside, and in place thereof the appeal to the Court of Appeal is dismissed with costs.

2. The appeal in *Kettering v Noosa Shire Council* (Matter No B53/2003) is allowed with costs. The order of the Court of Appeal dated 28 June 2002 is set aside and the respondent in this Court is to pay the costs of the appellant of the application to amend made to the Court of Appeal. The allowing of the first appeal to that Court and the substitution made for the order of the Court of Appeal dated 8 February 2002 make it unnecessary to make any further consequential orders in the second appeal respecting the application to amend.