
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : DEEPBLUE ENTERPRISES PTY LTD and TOWN
OF PORT HEDLAND [2003] WATPAT 32

CORAM : MR P MCGOWAN
MR L GRAHAM
MS M CONNOR

HEARD : 20 JUNE 2003

DELIVERED : 14 JULY 2003

FILE NO/S : APP 185 of 2002

BETWEEN : DEEPBLUE ENTERPRISES PTY LTD
Appellant

AND

TOWN OF PORT HEDLAND
Defendant

Catchwords:

Town planning - Preliminary issue - Whether Use Class classificulation is discretionary power

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr B McMurdo
Defendant	:	Mr D McLeod

Solicitors:

Appellant	:	Phillips Fox
Defendant	:	McLeods

Case(s) referred to in decision(s):

Buttfield v City of Albany [2000 27 SR (WA) 121]

Canning v Minister for Planning; ex parte City of Canning (1998) 101 LGERA
284

City of Cockburn v McNiece Industrial Systems (unreported; WA Supreme
Court; Full Court; 24/9/84; Lib No 5523A).

Erceg v MRPA (unreported; Appeal 28/83 decided 29 October 1984)

MR P MCGOWAN, MR L GRAHAM, MS M CONNOR:

1 On 13 June 2002, an application was made (apparently on behalf of the Appellant) to the Respondent for planning approval to establish an engineering fabrication business at what is described as the site of the old Red Bank Power Station in Port Hedland.

2 The matter was dealt with by the Respondent on 25 September 2002. It determined as follows:

“that

- (i) The proposed use for Fabrication Engineering be defined as General Industry under TPS 5; and
- (ii) The application for planning consent be refused for the following reasons:-
 - (a) General Industry is a use not permitted in a Mixed Business zone under TPS 5;
 - (b) The proposed use is not compatible with adjoining land uses;
 - (c) The proposed use is not compatible with the adjoining zone of Rural Residential;
 - (d) The proposed use may have a detrimental effect on the amenity of the locality; and
 - (e) The proposed use may adversely affect adjoining properties by way of emission of noise.”

3 This appeal is brought from that decision.

4 The Respondent challenged whether there was a legitimate basis to appeal from the Respondent’s decision. That challenge was the subject of a Preliminary Hearing designed to answer the question posed by the Respondent.

Clarification of Issue

5 At the commencement of argument we sought clarification from Counsel for the Appellant as to the extent to which he thought it was necessary for

any forensic investigation or fact finding to be undertaken as a precursor to the determination of the issue.

6 He initially seemed to be of the view that this issue was premature in the sense it would be necessary for all factual material to be received and assessed by the Tribunal before the jurisdictional point would arise. At that point, he then contended, one could then address any jurisdictional issue.

7 Counsel for the Respondent clarified his position as follows:

1. The classification of a use class is not a decision which involves the exercise of any discretionary power;
2. The fact in this case that a use class has been allocated meant, in light of that determination;
3. That discretionary power (that is whether to approve or not) did not arise;
4. That is an issue properly to be determined now;
5. It did not admit of evidence to be received in order to address the issue.

8 Upon further clarification with Counsel for the Appellant, Mr McMurdo effectively conceded that either the jurisdictional point when taken was good or it was not. If it was good, the point is to be taken now. If the issue is determined against the Respondent, the matter will proceed and the evidence will be received in the usual way.

9 There really is not a set of circumstances we could contemplate whereby the jurisdictional point was effectively deferred until receipt of all relevant factual and other evidence.

10 In short, we are satisfied that it is proper to entertain the Respondent's application now and to make this determination as a preliminary issue.

Subject Property:

11 The property is Lot 6039 Red Bank Road, Port Hedland (“**subject property**”). The subject property is zoned Mixed Business under the Respondent's Town Planning Scheme No 5 (“**TPS 5**”). As is common, TPS 5 contains a number of use classes. The particular classes with which we are concerned here are Industry – Light and Industry – General.

Definitions:

12 In TPS 5 definitions appear as follows:

“Light Industry is

An industry;

- (i) In which the process carried on, the machinery used and the goods and commodities carried to and from the premises, will not cause any injury to, or not adversely affect the amenity of the locality by reason of the emission of light, noise, electrical interference, vibration, smells, fumes, smoke, vapour, steam, soot, ash, dust, waste water or other waste products; and
- (ii) The establishment of which will not or the conduct of which does not, impose an undue load on existing or proposed service for the supply or provision of water, gas, electricity, sewerage facilities or any other like services.

Industry – General is defined as

An industry other than a cottage, extractive, light, noxious, rural or service industry.”

13 As can be seen, the two appear to exclude each other. However, under TPS 5 the Use Class Table indicates that light industry is permissible but Industry – General is not a permitted use in the Mixed Business zone.

14 There was considerable argument before us as to the true nature and classification of the exercise being undertaken by a local authority where it determines the appropriate use class.

15 The matter was directly addressed by Burt C J in *City of Cockburn v McNiece Industrial Systems* (unreported; WA Supreme Court; Full Court; 24/9/84; Lib No 5523A).

“The appellant’s case is essentially simple. By the Scheme the use of the land sought to be developed for the establishment thereon of a “noxious industry” is not permitted. The industry proposed to be established was a “noxious industry” and the appellant Shire had no power to give its consent to the

application. Hence its refusal to consent to not involve the exercise of a discretionary power and the Minister had no authority to entertain an appeal from that refusal. In my opinion, that is correct.”

- 16 It was suggested by Counsel for the Appellant that such views were obiter in the context of the particular decision. Whilst in a narrow sense that may be so that is not to say that the views are not to be accorded appropriate weight. More so when it appears that neither Justice Wallace nor Justice Brinsden who sat with the then Chief Justice expressed any contrary view.
- 17 Nor do those views appear to have been the subject of any critical comment in any of the more recent decisions of the Full Court.
- 18 In particular this Tribunal has previously and directly applied the views so expressed in *Buttfield v City of Albany* [2000 27 SR (WA) 121].
- 19 As the issue was raised before the Respondent so it is raised before us. If in fact the initial determination is not one which involves the exercise of a discretionary power, nor is it in relation to the exercise of a discretionary power, then no right of appeal exists either under clause 9.6 of TPS 5 nor, in our view, for the reasons which we develop later under section 8 of the *Town Planning and Development Act 1928* (“**Act**”).
- 20 The Appellant, as we understood the argument, sought to contend that in order to arrive at a determination of the appropriate use class the Respondent would necessarily have to have addressed the question of amenity. In addressing the question of amenity that would involve consideration of a value judgment. Insofar as it involves consideration of a value judgment (for which in essence there was no right or wrong answer) there was necessarily in that an exercise of discretion so that the determination of a use class would, in that way, be a decision which was in respect of the exercise of a discretionary power.
- 21 The reason that the Appellant’s argument is so driven and the reason why in our view it appears to have limitations is that it imports the notion that there are discretionary considerations to which necessarily it can be said the Respondent must have regard in order to arrive at the determination of the use class. In particular, these involve a consideration as to whether, by reference to the definition of Light Industry, what is contemplated will or will not adversely affect the amenity of the locality. That, however, is to entice this Tribunal to be drawn into a consideration of the underlying factual merits of the case rather than a consideration of whether in its

allocation of a use class, where there is no other express criterion contained within the Scheme as to the approach to be adopted, this involves the exercise of a discretionary power.

- 22 It has previously been pointed out by this Tribunal that the determination of use class is a question of fact or law or a combination of the two. The acceptance of that approach necessarily, in our view, rejects the notion that there is a discretionary element at play. As a consequence the Tribunal rejected the notion that there was a right of appeal arising from such a determination. *Erceg v MRPA* (unreported; Appeal 28/83 decided 29 October 1984).
- 23 Although the express issue with which we are concerned was not raised directly with the Full Court it was nevertheless adverted to in *City of Canning v Minister for Planning; ex parte City of Canning* (1998) 101 LGERA 284 at 287 and 296. Acceptance in that case that the determination as to whether the use of the premises as a pharmacy was incidental to the primary use as a medical centre was considered to be a question of fact. The nature of the decision with which the local authority was there concerned is akin, in our view, in many respects to the decision with which this Respondent is concerned.
- 24 By analogy the logic is equally applicable.
- 25 Counsel for the Appellant sought to contend that section 8A(1)(a) of the Act in effect gave some different or other right to the Appellant than would otherwise have been the case under either clause 9.6 TPS 5 or section 47(1) of the Act.
- 26 We agree with the analysis offered by Counsel for the Respondent in response. The argument advanced by the Appellant seems in many respects to assume the matter with which we are concerned is the exercise of a discretionary power or even the exercise of a discretion. The short point is that once Council has made a classification of use and that use is not permitted then there is no discretion to be addressed. To get the discretion part of the role played by the Respondent it would be necessary to set aside the Respondent's decision about the characterisation of use. That is not a means by which section 8A(1)(a) aids the Appellant nor is it a means by which directly or indirectly this Tribunal's jurisdiction would be enlarged.
- 27 As has been pointed out if one seeks to set aside a decision on characterisation of use that is effectively to be undertaken by application to the Supreme Court for a writ of mandamus.

“If, on the other hand, the appellant’s Shire’s misunderstood the meaning of the expression “noxious industry” so that upon the proper instruction of that expression the application did not contemplate the use of the land for industry so described and with the result that the application was one which ought to have been dealt with by the Shire in the exercise of discretion given to it by the scheme, then the Shire has declined to exercise its discretion and the proper remedy would be mandamus compelling it to reconsider the application and to exercise discretion controlled by relevant criteria with reference to it.”

City of Cockburn v McNiece Industrial Systems Pty Ltd at per Burt C J.

- 28 For those reasons we are of the view that the exercise with which the Respondent was concerned, namely the classification of the appropriate use class, was not a matter which involved the exercise of a discretionary power nor was it a decision in respect of the exercise of discretionary power nor is it otherwise covered by section 8A(1)(a) of the Act.
- 29 For those reasons we are of the view that the point taken by the Respondent is well made. The appeal, therefore, has no jurisdictional basis for its institution. It should as a result be dismissed which is the order we propose to make.