

(tho94014)

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT ALICE SPRINGS

SCC N° 36 of 1994

BETWEEN:

ASIT INVESTMENTS  
Appellant

AND:

NT PLANNING AUTHORITY  
Respondent

**CORAM: THOMAS J**

REASONS FOR DECISION

(Delivered 28 July 1994)

This ruling deals with a preliminary issue which arose prior to the hearing of an appeal against a decision of the Northern Territory Planning Appeals Committee.

The essential question for decision, on the preliminary issue, is whether the appeal should proceed under the provisions of the present *Planning Act* No. 85 of 1993 assented to on 31 December 1993 which came into effect on 18 April 1994, or the previous now repealed *Planning Act*.

The background to this appeal is set out in the affidavit of John Samuel Royle sworn 31 May 1994.

The appellant seeks consent to develop part of its property at Lot 8131 Palm Place, Alice Springs for the purpose of flats or cluster dwellings.

The appellants property is situated just south of Heavitree Gap on the eastern side of the Todd River. It is a large triangular shaped property of some 34,000 square metres and presently contains

a motel, a caravan park, a large restaurant/night club complex, a manager's residence, administration block and swimming pool.

The appellant's consent application is to change the use of the subject land before converting the existing motel on the subject land to flats and adapting it for that purpose by the addition of kitchens to the existing units, fencing and landscaping.

The subject land is zoned B3 in the Alice Springs Town Plan 1992 ("the town plan") which is a tourist business zone in which the flats are a consent use.

On 14 September 1993, the Northern Territory Planning Authority rejected the appellant's application. The appellant appealed against that decision to the Planning Appeals Committee pursuant to section 114 of the *Planning Act* 1993.

This appeal to the Planning Appeals Committee ("the Committee") was heard on 15 and 16 March 1994. The Planning Appeals Committee dismissed the appeal. Reasons for its decision are dated 29 April 1994. However, it is common ground between the parties that the decision was actually delivered on 11 May 1994. Copy of these Reasons for Decision are annexure "JSR2" to the affidavit of John Samuel Royle sworn 31 May 1994. Between the date of hearing of the appeal in March 1994 and the delivery of the judgment in May 1994, the new *Planning Act* came into force and the previous *Planning Act* was repealed.

The appellant has filed a Notice of Appeal and application for Leave to Appeal from the judgment of the Planning Appeals Committee seeking the following orders.

1. That the appeal be allowed and the decision of the Committee confirming the decision of the respondent be set aside.
2. That the decision of the respondent be revised and that the matter be remitted to the Committee for it to consider whether

any conditions should be imposed on granting consent to the development.

3. Costs.

Mr Stirk, for the respondent, submits that the appeal to the Supreme Court should proceed under the new *Planning Act* which came into force on 18 April 1994.

Mr Stirk referred to the following provisions of the present *Planning Act*:

"147. APPLICATIONS TO APPEALS COMMITTEE UNDER FORMER ACT

(1) Where a notice of appeal within the meaning of the former Act was lodged with the former Appeals Committee and a hearing (other than a preliminary hearing) in respect of the matter was held before the commencement date -

- (a) the former Appeals Committee; and
- (b) the former consent authority whose determination is the subject of the notice of appeal,

shall continue in existence for the purpose of determining the matter and Part VII of the former Act shall apply as if the Act had not been repealed by this Act."

"148. SAVING OF DETERMINATIONS OF FORMER APPEAL COMMITTEE

Without affecting the limitation period to which a claim is subject under the *Limitation Act*, a determination of the former Appeals Committee under section 147 of the former Act continues in existence as if it was made under section 103 of this Act."

"149. APPEALS TO SUPREME COURT UNDER FORMER ACT

A person who was eligible under the former Act to appeal to the Supreme Court on a question of law may do so as if the former Act had not been repealed."

It is Mr Stirk's argument that s103 of the present *Planning Act* makes the decision of the former Planning Appeals Committee under the old Act a decision of what is now titled the Planning Appeals

Tribunal by virtue of the deeming provisions contained in s148. The respondent's argument is that what flows from this is that any rights of appeal are therefore regulated by the new Act because the decision is deemed to be a decision of the Planning Appeals Tribunal and as a consequence s115 of the present *Planning Act* is the statutory basis for any appeal to the Supreme Court.

Section 115 provides as follows:

"115. APPEALS TO SUPREME COURT

(1) A person may appeal against a determination of the Tribunal to the Supreme Court only on a question of law.

(2) An appeal under subsection (1) shall be made within 28 days after the date of service by the Tribunal of the statement of reasons for the determination."

Mr Stirk argues that the appellant does not fall within s149 of the *Planning Act* because at the time the new Act came into effect on 18 April 1994, the Appeals Committee had not delivered its determination and the appellant was not eligible to appeal to the Supreme Court until the determination of the Appeals Committee had been made.

Mr Preston, appearing for the appellant, submits that the appellant should proceed to seek leave to appeal in accordance with s150 of the now repealed *Planning Act*.

Section 150 states:

"150. APPEAL TO SUPREME COURT

(1) Subject to this section, any party to an appeal may appeal to the Supreme Court against any decision of the Appeals Committee on a question of law.

(2) An appeal under subsection (1) shall not be made unless -

(a) the leave of the Supreme Court is obtained; or

(b) the question of law was raised at the appeal.

(3) An appeal under subsection (1) shall be made within 21 days of the date of issue of the instrument of determination."

It is the argument on behalf of the appellant that s147 of the new *Planning Act* sets up a code to deal with appeals under the former Act. It is submitted by the appellant that the appellant's case fits squarely within s147(1) of the new Act. This provision is set out earlier in these reasons for ruling. Counsel for the appellant contrasts provisions of s147(1) with the provisions of s147(2) which states:

"(2) Where a notice of appeal within the meaning of the former Act was lodged with the former Appeals Committee and a hearing (other than a preliminary hearing) in respect of the matter was not held before the commencement date -

- (a) the former consent authority in respect of the land to which the instrument relates shall be the consent authority for the purposes of the appeal; and
- (b) this Act applies as if the application for appeal had been lodged with the Appeals Tribunal under this Act."

Counsel for the appellant asserts that if the Appeals Committee had heard the matter prior to the commencement of the new Act (which is the case here) then the now repealed *Planning Act* would apply. In particular, Part VII of the former Act (which includes provisions for appeal to the Supreme Court) still applies. Contrasted with the position under s147(2) where a notice of appeal has been lodged and a hearing of the appeal has not taken place, the new *Planning Act* applies.

My reading of s147(1) of the current Act, is that the former Act applies to enable the former Appeals Committee to conclude its determination when it heard a matter prior to the commencement of the new Act.

In addition s147(1) of the current Act provides that "Part VII of the former Act shall apply as if the Act had not been repealed by this Act" which means that in this situation an appeal to the Supreme Court is governed by the former Act.

I agree with the submission of Mr Preston that s148 of the new *Planning Act* merely preserves the determination of the former Appeals Committee so that it will remain in force after the commencement of the new *Planning Act*.

Counsel for the appellant and the respondent, both appear to be in agreement that the appellant does not come within the provisions of s149 of the new *Planning Act*, because no determination having been given by the former Appeal Committee at the time the former Act was repealed, the appellant was not a person who was eligible under the former Act to appeal to the Supreme Court.

Essentially, the appellant argues the question of which Act covers the appeal to the Supreme Court is contained in s147(1) of the new *Planning Act* and the correct interpretation of this is that it proceeds under the now repealed *Planning Act*. The respondent argues the provisions of s148 mean the appeal proceeds under the new *Planning Act*.

Neither party are contending that it will ultimately make any difference or affect the substantive rights of the parties, as under the provisions of both Acts either party has a right to appeal to the Supreme Court on a question of law. The respondent has indicated it will not be taking any point against the appellant in respect of the time limits for lodging an appeal under either Act. Both parties have indicated that the point of seeking a ruling is to clarify under which Act the appeal to the Supreme Court should proceed.

On balance I do not accept the submission of Mr Stirk for the respondent that s148 can be interpreted in the way he suggests.

I agree with the submission of counsel for the appellant that the appeal to the Supreme Court should proceed under the *Planning Act* which was repealed on 18 April 1994.

Accordingly, I rule that this appeal should proceed in accordance with the provisions of the now repealed *Planning Act* which Act was repealed on 18 April 1994.