IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

No: 10535/86

Coram: Cripps J

20 April 1988

JUDGMENT

GLENBIN PTY. LIMITED

v.

LISMORE CITY COUNCIL

His Honour: On 5 February 1986, Rick McKiernan, on behalf of Glenbin Pty. Limited, made application to the Lismore City Council for development consent for a multiple occupancy development on Lot 5 DP625836 Stangers Road, Stony Chute.

On 3 October 1986, the Council granted its consent for "a multiple occupancy community development to accommodate a maximum of fifty five (55) persons to be housed in eleven (11) living units" subject to a number of conditions the relevant ones being as follows:

> "4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

> 8. Buildings may be erected at sites 1 - 10 on the amended plan subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling".
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> 14. Section 94 contribution of $2000 per dwelling unit. The whole contribution applicable to this application shall be paid before the first building approval is released".
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> 15. An additional contribution for the upgrading of the intersection of Stangers Road with the main road 141A at fixed cost of $15,000. This amount is payable before the first building approval of this application is released. The intersection design is subject to Department of Main Roads approval to ensure their standard is maintained".
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> 16. All access to the land for the purpose of access to the dwellings shall be by means of the unnamed public road off Stangers Road, north of Lot 2 DP625836. In this respect, the company shall not object if the right of way over Lot 1 is proposed to be removed by its owner".
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> 18. In addition to the access banks shown on the plan, an access track generally along the contour shall be constructed from the road near the "cottage" in Hamlet 3, westward to connect with the track shown on the northern boundary of Hamlet 2".

On 29 November 1986, Glenbin appealed to the Land and Environment Court nominating the following ground of appeal:

> "Conditions 4, 14, 15, 16 and 18 attached to Notice of Determination of a development application (No: 86/167) issued by the Respondent on 3 October 1986".

Notwithstanding that the Developer intended appealing against certain conditions only, the effect of lodging the appeal is that the consent granted by the Council, which became effective and operated from the date endorsed upon the Notice,

ceased as from 29 October to be effective (s.93(2) of the Environmental Planning and Assessment Act). On appeal, the Court has all the functions and discretions of the Council. The appeal is de novo and it is open to the Court to grant consent conditionally or unconditionally or to refuse consent. The appeal is to be determined by reference to the circumstances, including the law, as it exists at the time of the appeal.

After the grant of development consent, the Minister made the North Coast Regional Environmental Plan, 1988, (18 December 1987) and State Environmental Planning Policy No.15 - Multiple Occupancy of Rural Land (20 February 1988). The North Coast Regional Environmental Plan (which applies to Lismore) defines "multiple occupancy" to mean:

> "the erection of two or more detached dwellings on an unsubdivided allotment of land where the allotment of land comprises the principle place of residence for the occupants who occupy the land on a communal basis".

The objectives of the REP, with respect to rural housing, are to ensure opportunities for rural housing and to provide for multiple occupancy "in some circumstances". Councils affected are obliged in the preparation of local environmental plans to prepare a "rural land release strategy" for the whole of its area. The local environmental plan is to be consistent with strategies identified, one of which is:

> "ensure that development for rural housing meets the full cost of all necessary services and that development takes place in accordance with the programme for the provision of services".

SEPP No. 15 does not define multiple occupancy. The aim of the Policy is:

> "(a) to encourage a community based and environmentally sensitive approach to rural settlement;
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> (b) to enable -
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> (i) people to collectively own a single allotment and use it as their principal place of residence;
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> (ii) the erection of multiple dwellings on the allotment and the sharing of facilities and resources to collectively manage the allotment; and
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> (iii) the pooling of resources, particularly where low incomes are involved, to economically develop a wide range of communal rural living opportunities, including the construction of low cost buildings ... ".

A major objective of the Policy is to facilitate multiple occupancy development "preferably in a clustered style, in a manner which protects the environment". It provides that when processing development applications for multiple occupancies, the council must consider 18 specified matters (over and above the 20 heads of consideration in s.90 of the Environmental Planning and Assessment Act). In particular, it provides that a council shall not consent to an application unless it has taken into consideration among other matters:

History of the Application

The Court was informed that the present application was of significance to the Council of the City of Lismore, not merely because of the particular development the subject of the appeal, but because, so it was said, the outcome of the litigation would be of significance for the Lismore Council in the administration of its planning powers and, in particular, in the application of SEPP No.15. In recognition of the claimed importance of the proceedings to the Council the Court determined to hear part of the evidence in the Lismore area and the balance in Sydney. Three days before the matter was due to commence at Byron Bay, the Court was informed that the Developer would no longer be represented by lawyers and that the Council, pursuant to a policy of "matching" Developers' representation, would also not be represented at the hearing.

Mr. Lambert, a resident of Tuntable Falls (another multiple occupancy development at Nimbin) sought and obtained leave to represent Glenbin and the Council's Planner, Mr. Reynders, was granted leave to represent the Council. I viewed with some surprise the conduct of the Council in asserting that, on the one hand, it wished to explore in detail the planning and legal implications inherent in the administration of SEPP No.15 and, on the other, its resolution to "match" what it apparently believed to be the legally unskilled representation of the Developer. As events turned out, Mr. Lambert and his team

demonstrated considerable legal ability both in the art of advocacy and in their understanding of environmental law and practice.

The Council was represented by Mr. Reynders. Mr. Reynders is the Chief Planner of the Lismore Council. He had prepared a Report which was intended to be tendered in the proceedings. He is a qualified planner and he informed me he proposed calling himself as an expert witness. In cases of complexity it is generally unsatisfactory that expert witnesses and advocates be one and the same. But in the present case, the self-evident problems of that arrangement were exacerbated by the circumstance that Mr. Reynders' expert views did not coincide with the submissions of the Council and I was continually required to make inquiries of Mr. Reynders whether views he was advancing from the 'Bar table were submissions on behalf of the Council or whether they were views which he held as an expert witness. By way of illustration, although I repeatedly asked for information on the subject, I never received a satisfactory answer to the question of what was the attitude of the Council upon the assumption that some of the conditions sought by the Council would or could not be imposed by the Court. It was clear the Council was prepared to grant development consent subject to a number of conditions. But I never found out what its attitude was in the event that I considered it inappropriate to impose one or other disputed conditions.

"(a) The means proposed for establishing land ownership, dwelling occupancy rights, environmental and community management will ensure the aims and objectives of this Policy are met.

(b) The area or areas proposed for erection of buildings including any proposals for the clustering of buildings.

(c) The area or areas proposed for community use (other than areas for residential accommodation and home improvement areas).

(d) The need for any proposed development for community use that is ancillary to the use of the land.

(e) The availability and standard of public road access to the land ... ".

Home improvement area is defined to mean an area of land not exceeding 5,000 m^2 around a dwelling. The Policy provides that except in limited circumstances, the land the subject of a multiple occupancy development may not be subdivided.

The consent granted by the Council was for the construction and use of 10 home sites located throughout the subject land. A map (Exhibit C), identifying these sites was forwarded to the Council prior to the grant of development consent after an earlier plan submitted by the Developer and disclosing 11 sites was rejected. It was a condition of the development consent that the buildings be erected on the sites nominated in the map, Exhibit C (see Condition 8).

The subject land is on Stangers Road, Stony Chute, and is approximately 55ha. It slopes from north to south and

commands impressive views of the surrounding area. The lower part of the land is timbered and the upper parts have been cleared for grazing.

Upon the matter coming on for hearing, Council submitted amended conditions. It now seeks, in lieu of the old condition 8, the following condition:

"(8) All dwellings are to be erected in a cluster or in clusters and are to have a home improvement area not exceeding 5000m^2 around each dwelling. The Chief Health Surveyor is to be satisfied that the precise location of each dwelling is stable and suitable for the location of a dwelling. Action is to be taken to divert surface drainage including road drainage to the satisfaction of the Chief Health Surveyor and Soil Conservation Service of New South Wales".

It submits that Conditions 14, 15 and 16 should remain as originally imposed. If, however, the new Condition 8 is imposed, it no longer presses Condition 18. If the dwellings are clustered in accordance with the requirements of the new Condition 8 and access is from the western end of the subject land, the Council concedes there is no need for the access track referred to in Condition 18. If, however, houses are not required to be clustered, the Council submits I ought impose Condition 18 for access to houses on the eastern side of the property.

In making the above comments, I do not wish to denigrate the efforts of Mr. Reynders to satisfy the Court's requirements to the best of his ability. Indeed, bearing in mind the dual nature of his appearance in the Court, he acquitted himself well. But he is not a lawyer and I would have thought, with respect, that in complicated cases the advocate should not be the expert witness even if (unlike the present case) the opinion of the expert witness and the submissions of the Council coincide. As I have said, where they do not, the problems are exacerbated.

For reasons which I will mention later, I am of the opinion the development consent should be granted subject to conditions. I do not propose to impose the conditions suggested by Council. It therefore is unnecessary for me to consider, for example, what I would have done had I determined, for example, that it was inappropriate to allow access over adjoining land but that I was powerless to prevent it. I have taken into consideration all of the matters referred to in cl.9 of SEPP No.15 and those matters of relevance to the development set out in s.90 of the Environmental Planning and Assessment Act. I have taken into account the lack of "the clustering of buildings". I mention this matter specifically because it appeared to be a matter of considerable importance to Mr. Reynders who, I assume, was making a submission on behalf of the Council. The Council believes, apparently, that unless such a requirement is imposed, it may be overly susceptible to pressure in the future to rezone the land so as to permit subdivision. It is not clear to me why

the Council is now concerned about its diminished ability to resist what I must assume to be a future inappropriate application for rezoning for subdivision. Seventeen months ago, the Council granted development consent and made it a condition of the consent that the dwellings be located where they are now proposed to be. The only assumption I am prepared to make about Council's future attitude is that if an application for rezoning to permit subdivision is made, the Council will consider it on its merits and determine the application in accordance with its statutory obligations. I note that SEPP No.15 does not require clustering; it merely expresses clustering as a "preference" and requires a council or the Court to take into account "any proposals for the clustering of buildings".

I have taken into account the means proposed for the establishment of land ownership, dwelling occupancy rights, environmental and community management of the development. The land will be owned by Glenbin. It is not a large multiple occupancy development. Each shareholder (10 in all) will be entitled to build a house on the area nominated in plan, Exhibit C. Shareholders will have the right to occupy the dwellings they erect and will be entitled, subject to approval by Glenbin, to sell their shares. However, in this regard, the price payable for their shares will not include any "land increase" component and the shares may not be assigned without Glenbin's approval.

Before turning to the disputed conditions, I note that Condition 4 is now no longer in dispute. The condition requires the land to be upgraded and made safe in accordance with recommendations of the Soil Conservation Service of New South Wales and the condition will therefore be attached to the consent.

Disputed Condition

Condition 8

As I have said, development consent was granted by the Council after the Developer, at the Council's request, withdrew its earlier plan and substituted an amended plan nominating the 10 sites proposed for the erection of houses. After development consent was granted but before the hearing of this appeal, certain building work was undertaken on the sites nominated. Although it is true that a hearing before this Court is de novo and that the Court must take into account the circumstances and the law as they are at the date of the appeal, I am not bound to ignore the events that have taken place between the date of the consent and the date of the hearing of the appeal. It was clear to all parties that Glenbin was appealing against conditions of consent. At the time it lodged its appeal, Condition 8, as imposed by the Council, was not in dispute. Condition 8 was included to give effect to the requirement of the Council that the houses on the land be set out on the map, Exhibit C. The new Condition 8 requires the houses to be "clustered" at one end of the site.

In my opinion, I am entitled to take into account as a "circumstance of the case" within the meaning of s.90 that during the suspension of the operation of the development consent by reason of the appeal being lodged to the Court (s.90(7)) Glenbin reasonably believed that it was doing no more than carrying out the development for which it had consent. As I have said, SEPP No. 15 does not mandate cluster development; it merely urges it as a preference. I have visited the site and have seen where the houses are intended to be located in accordance with Exhibit C. The Council could not point to any environmental damage that would result by reason of the houses being dispersed - at least none that could not adequately be addressed by appropriate conditions. Indeed, its reason for requiring "clustering" was its belief that to cluster the development would be to inhibit what it considered to be possible or probable future pressure for subdivision of the land. However, as I have said, SEPP No.15 provides that land the subject of multiple occupancy development shall not be subdivided. Accordingly, the subject land may not be lawfully subdivided unless SEPP No. 15 is amended and the Council prepares a new Local Environmental Plan. The Council relies on the circumstance that recently it has succumbed to representations to make a new local plan to allow the multiple occupancy development at Billen Cliffs to be subdivided and resolved to make a plan to permit subdivision of the land. But I do not regard that circumstances as giving any support to Mr. Reynder's submissions in the present case. I can only conclude that the Council's decision to rezone the land at Billen Cliffs

to allow subdivision proceeded upon a proper exercise of its planning power. I am not prepared to assume that the Council has embarked upon a plan making process dictated by pressure to which it ought not have succumbed. It seems to me, therefore, that I should not change the form of the present development for that reason, particularly, as I have said, it is the form chosen by the Council 16 months ago.

Conditions 14 and 15

On 11 January 1988, the Minister for Environment and Planning published a direction pursuant to the provisions of s.94A of the Environmental Planning and Assessment Act directing, inter alia, the Lismore City Council that, in the case of a condition of development consent referred to in s.94 requiring the payment of monetary contribution in respect of land within its area and being land to which State Environmental Planning Policy No.15 applies, a maximum amount of any such contribution shall be $1950 per dwelling unit. It follows, in my opinion, that however the money is to be spent, it is not open to the Lismore Council to require a contribution with respect to the subject development which exceeds the sum of $1950 per dwelling unit. The two contributions claimed in Council's Conditions 14 and 15 total $35,000 and therefore cannot be imposed. The question is whether any, and if so what, contribution ought be exacted.

Mr. Reynders pointed to what, in his opinion, was an inconsistency between the strategies dictated by the regional plan and the Direction given under s.94A. That is, he was of the opinion that it was not possible to limit s.94 contributions to the sum of $1950 per dwelling unit and, at the same time, ensure that such development "meets the full cost of all necessary services". However, no submission was made that the s.94A Direction was legally tainted by that circumstance.

With respect to Condition 15, it is the Council's claim that the intersection of Main Road 141A and Stangers Road needs to be upgraded to accommodate the additional traffic. With respect to Condition 14, it is the Council's claim that work needs to be undertaken on Stangers Road. In my opinion, it is fanciful to suppose that Stangers Road will be sealed within the next 15 to 20 years. The projection advanced by the Council of 102 dwellings or caravan sites on land abutting Stangers Road is so unlikely an outcome that, for present purposes, it can be dismissed. It is trite law that in order to justify the imposition of a condition (particularly one involving monetary contribution) there must be a proper nexus between the development proposed and the condition sought to be imposed. On present day values, it will cost approximately $220,000 to seal Stangers Road. Council is claiming the sum of $2000 per dwelling in respect of the subject development upon an assumption that contributions from the other 90 dwelling units will be exacted in the future. At the present time, the use of Stangers Road is well below the Department of Main Roads AADT (Annual

Average Daily Traffic) threshold for sealing of roads. In fact, the AADT is only about 150 on Main Road 141A and probably not more than 40 on Stangers Road itself - both figures well short of the 500 required by the Department of Main Roads (or even the 270 suggested by the Council) to justify sealing. It would seem to me that the only reliable material available to determine the extent to which the present development will add traffic both to the intersection at Main Road 141A and along Stangers Road itself is by reference to the survey taken of the Tuntable Falls Community. Upon that basis, it is likely that one car per dwelling will leave the subject land and return to it every second day, that is, the development will probably generate about r10 car movements per day along Stangers Road and through the intersection.

At present, there is, in my opinion, a requirement to upgrade Stangers Road. In this regard, I accept the evidence of Mr. Brimstead and Mr. Andreasson and the Council's Engineer, Mr. Smith. The cost of doing this work is estimated to be approximately $2800. The Council does not seek contribution for the continuing maintenance of the road only an amount sufficient to bring the road up to the appropriate and acceptable standard. Upon completion of the last dwelling on the subject development, the occupants will have added significantly to the present use of Stangers Road. It is always difficult fixing a figure in the absence of precise evidence. However, doing the best I can and taking into account the present users of the road, I impose a contribution in respect of each dwelling in the sum of

$200. Furthermore, I do not think the contribution need be paid prior to the release of the building approval for each dwelling.

So far as the intersection is concerned, it is submitted on behalf of Glenbin firstly, that it will not cost $15,000 to improve the intersection and, secondly, that upon a proper estimate being made, the occupants of Glenbin should not be required to pay the whole amount. With both these submissions I agree. I am persuaded by the evidence of Mr. Fulford that probably it would not cost more than $10,000 to upgrade the intersection. There is already a need to upgrade the intersection and the development at Glenbin will add to that need by approximately 15%. I think that there is a connection between the work to be undertaken at the intersection and the occupancy of the subject land. Accordingly, and upon the adoption of Mr. Fulford's figures, I assess a figure of $1500 to be paid in installments of $150 upon the release of each building approval.

Condition 16

I do not propose to impose Condition 16. Mr. Basso, an accountant, and his wife, a medical practitioner, own the adjoining land. Their land is burdened with a right of way in favour of the subject land. The occupants of the subject land are permitted "from time to time and at all times to pass and repass with or without horses and other animals, carts, wagons,

carriages, tractor engines, motor cars and other vehicles over and along the land 50 links wide shown in the plan annexed to the transfer ... ". The covenant provides that the expense of keeping the land the subject of the right of way in good and sufficient repair is to be borne by both owners in equal shares. Mr. Basso's complaint is that he may be involved in expenditure greater than that anticipated at the time the right of way was created by reason of the now proposed increased density of population on the adjoining land. It must be borne in mind, however, that the right of way is also used by Mr. and Mrs. Basso and one other occupant on their land throughout the greater part of its length. Also, it will not serve all houses on the multiple occupancy. It will serve five only.

On behalf of Glenbin, it is submitted that Condition 16 (or at least so much of it that requires the owner to consent to the removal of the right of way) is ultra vires. It was submitted that the effect would be "to oust the jurisdiction of the Supreme Court which it may exercise under the Conveyancing Act". Because I have come to the conclusion that Condition 16 ought be deleted in the exercise of my discretion, I need not determine whether Glenbin's submission is correct. I have regard to the circumstance that a right of way was created, is legally in existence and provides access for five of the proposed dwellings. It is capable of providing physical access to the subject land. It appeared to be suggested by Council that the use of the right of way (to the five dwellings) would be an "excessive or unreasonable" use and for that reason the condition

ought be imposed. It would seem to me, with respect, that it is not appropriate for this Court to make a condition of the type asked for by the Council. I do not doubt that it is open to the Land and Environment Court to impose a condition that access to any one of the dwellings ought be from a certain road. But I do not think it within the purview of the Land and Environment Court to require the owner of a dominant tenement to consent to an application to the Equity Court by the owner of a servient tenement that a right of way be modified or wholly or partly extinguished. (See Simons v. Willoughby Municipal Council, Bignold J, 21 May 1985, unreported). As I have said, I do not think it reasonable to require traffic to the western side of the land to proceed via the access track referred to in Condition 18. To do so would be to impose an unwarranted financial burden on the applicant and would lead to the result that the applicant would not be able to use that part of the land as proposed by it. I have not overlooked the circumstance that Mr. Basso is justifiably chagrined because some work was undertaken on his land and outside his right of way without his consent. But the action of Glenbin, if unlawful, can be remedied elsewhere. Indeed, there is evidence suggesting that the work, undertaken by mistake, was, in fact, rectified by Glenbin. However that may be, I do not think that circumstance ought deflect me from granting the development consent I think appropriate in all the circumstances.

Accordingly, I grant development consent subject to the following conditions:

1. Any use of the land or of a building, other than for agriculture, forestry or as a residence on an approved site, shall be subject to a specific development consent of the Council.

2. No tree of any species be ringbarked, cut down, lopped, injured or damaged, other than as required for agricultural or forestry purposes, without the prior consent of the Council.

3. An ongoing programme shall be developed, in conjunction with the Far North Coast County Council, for the eradication of noxious weeds on the land.

4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

5. The land shall be owned in its entirety by at least two-thirds of the adult persons residing on the land.

6. The land remain in one lot and unsubdivided under the Local Government Act, Strata Titles Act or any other act.

NOTE: Subdivision refers to the subdividing of land into parts, whether the dealing is:

(a) by sale conveyance, transfer or partition; or

(b) by any agreement, dealing or instrument rendering different parts thereof immediately for separate occupation or disposition.

7. Before development commences, documentary evidence be produced to satisfy the Council that Conditions 5 and 6 are complied with.

8. Buildings may be erected at sites 1 - 10 on the plan identified as Exhibit C in the proceedings before the Court subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling.

9. Notwithstanding approval of sites under Condition 8, the total number of dwellings erected in accordance with this consent shall not exceed the number reasonably assumed to accommodate 55 persons.

10. No building or structure shall be erected or placed on the land and used as a dwelling except at a site referred to in Condition 8.

11. No building or structure shall be erected or commenced to be erected unless a building permit has been obtained from the Council and the Council reserves the right to refuse to

issue a permit if it becomes apparent that the site is not stable or otherwise unsuitable.

12. All dwellings shall be construed in accordance with Ordinance 70 and have external non-reflecting materials or colours that blend with the environment.

13. Effluent of all types from all dwellings shall be disposed of in a matter approved by the Chief Health Surveyor and no absorption trench or other disposal area shall be closer than 50m to any defined natural watercourse or adjacent to land that may be subject to mass movement.

14. A contribution pursuant to the provisions of s.94 of the Act is payable at the rate of $200 per dwelling unit, each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

15. A contribution pursuant to the provisions of the Environmental Planning and Assessment Act for the upgrading of the intersection of Stangers Road with Main Road 141A in the sum of $150 per dwelling. Each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

16. Internal access to each dwelling shall be provided so as to provide a gravelled all weather access to conventional two-wheel drive vehicles. All access shall have grades not

exceeding 16% and be constructed and drained in accordance with recommendations from the Soil Conservation Service of New South Wales so as to minimise cuttings and the possibility of soil erosion.

17. A perimeter fire break be constructed by removal of all flammable material generally along the full length of the western and southern boundaries, avoiding existing forests, but be placed around the edges on a contour and be 20m wide, measured horizontally and maintained with a ground fuel load not exceeding eight tonnes per hectare to the satisfaction of the Council's Fire Control Officer.

18. A primary protection zone shall be maintained for a distance of 20m surrounding each building kept clear of combustible materials with a ground fuel load not exceeding three tones per hectare. In this zone, shrubs and trees no higher than 3m will be permitted provided the canopy cover is less than 20%.

19. A radiation protection zone shall be maintained for a width of 20m surrounding each primary protection zone to be cleared of all rubbish and undergrowth with a ground fuel loading not more than five tonnes per hectare. Trees and shrubs up to 5m high may remain providing the canopy cover is not more than 50%.

20. That all water storage tanks installed as part of the development, be provided with a 38mm male threaded connection with gate valve, in a location accessible to fire fighting vehicles.

21. Each access road that is not a through road shall be provided with a turn around area at its end to allow turning of fire fighting vehicles.

22. The following fire fighting equipment to standards approved by the Bush Fire Council of New South Wales be provided and maintained at all times to the satisfaction of the Council's Fire Control Officer;

(a) a 680 l water tank;
(b) an 8h.p. fire fighting pump;
(c) twelve knapsacks;
(d) six McLeod tools;
(e) 100mm of 20mm fire protection hose;
(f) two "Dial-a-jet" nozzles; and
(g) one drip torch.

23. A suitable fire alarm, capable of being heard from anywhere within the area enclosed by the perimeter fire break, be installed.

24. A suitable person be appointed as Fire Protection Overseer, to be responsible for fire protection maintenance of equipment

equipment and liaison with the Council's Fire Control Officer and the local Bush Fire Brigade.

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 23 PAGES ARE A TRUE AND ACCURATE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR. JUSTICE J.S. CRIPPS.

Jennifer Cox.

Associate

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A major objective of the Policy is to facilitate multiple occupancy development "preferably in a clustered style, in a manner which protects the environment". It provides that when processing development applications for multiple occupancies, the council must consider 18 specified matters (over and above the 20 heads of consideration in s.90 of the Environmental Planning and Assessment Act). In particular, it provides that a council shall not consent to an application unless it has taken into consideration among other matters:

History of the Application

The Court was informed that the present application was of significance to the Council of the City of Lismore, not merely because of the particular development the subject of the appeal, but because, so it was said, the outcome of the litigation would be of significance for the Lismore Council in the administration of its planning powers and, in particular, in the application of SEPP No.15. In recognition of the claimed importance of the proceedings to the Council the Court determined to hear part of the evidence in the Lismore area and the balance in Sydney. Three days before the matter was due to commence at Byron Bay, the Court was informed that the Developer would no longer be represented by lawyers and that the Council, pursuant to a policy of "matching" Developers' representation, would also not be represented at the hearing.

Mr. Lambert, a resident of Tuntable Falls (another multiple occupancy development at Nimbin) sought and obtained leave to represent Glenbin and the Council's Planner, Mr. Reynders, was granted leave to represent the Council. I viewed with some surprise the conduct of the Council in asserting that, on the one hand, it wished to explore in detail the planning and legal implications inherent in the administration of SEPP No.15 and, on the other, its resolution to "match" what it apparently believed to be the legally unskilled representation of the Developer. As events turned out, Mr. Lambert and his team

demonstrated considerable legal ability both in the art of advocacy and in their understanding of environmental law and practice.

The Council was represented by Mr. Reynders. Mr. Reynders is the Chief Planner of the Lismore Council. He had prepared a Report which was intended to be tendered in the proceedings. He is a qualified planner and he informed me he proposed calling himself as an expert witness. In cases of complexity it is generally unsatisfactory that expert witnesses and advocates be one and the same. But in the present case, the self-evident problems of that arrangement were exacerbated by the circumstance that Mr. Reynders' expert views did not coincide with the submissions of the Council and I was continually required to make inquiries of Mr. Reynders whether views he was advancing from the Bar table were submissions on behalf of the Council or whether they were views which he held as an expert witness. By way of illustration, although I repeatedly asked for information on the subject, I never received a satisfactory answer to the question of what was the attitude of the Council upon the assumption that some of the conditions sought by the Council would or could not be imposed by the Court. It was clear the Council was prepared to grant development consent subject to a number of conditions. But I never found out what its attitude was in the event that I considered it inappropriate to impose one or other disputed conditions.

"(a) The means proposed for establishing land ownership, dwelling occupancy rights, environmental and community management will ensure the aims and objectives of this Policy are met.

(b) The area or areas proposed for erection of buildings including any proposals for the clustering of buildings.

(c) The area or areas proposed for community use (other than areas for residential accommodation and home improvement areas).

(d) The need for any proposed development for community use that is ancillary to the use of the land.

(e) The availability and standard of public road access to the land ... ".

Home improvement area is defined to mean an area of land not exceeding 5,000 m^2 around a dwelling. The Policy provides that except in limited circumstances, the land the subject of a multiple occupancy development may not be subdivided.

The consent granted by the Council was for the construction and use of 10 home sites located throughout the subject land. A map (Exhibit C), identifying these sites was forwarded to the Council prior to the grant of development consent after an earlier plan submitted by the Developer and disclosing 11 sites was rejected. It was a condition of the development consent that the buildings be erected on the sites nominated in the map, Exhibit C (see Condition 8).

The subject land is on Stangers Road, Stony Chute, and is approximately 55ha. It slopes from north to south and

commands impressive views of the surrounding area. The lower part of the land is timbered and the upper parts have been cleared for grazing.

Upon the matter coming on for hearing, Council submitted amended conditions. It now seeks, in lieu of the old condition 8, the following condition:

"(8) All dwellings are to be erected in a cluster or in clusters and are to have a home improvement area not exceeding 5000m^2 around each dwelling. The Chief Health Surveyor is to be satisfied that the precise location of each dwelling is stable and suitable for the location of a dwelling. Action is to be taken to divert surface drainage including road drainage to the satisfaction of the Chief Health Surveyor and Soil Conservation Service of New South Wales".

It submits that Conditions 14, 15 and 16 should remain as originally imposed. If, however, the new Condition 8 is imposed, it no longer presses Condition 18. If the dwellings are clustered in accordance with the requirements of the new Condition 8 and access is from the western end of the subject land, the Council concedes there is no need for the access track referred to in Condition 18. If, however, houses are not required to be clustered, the Council submits I ought impose Condition 18 for access to houses on the eastern side of the property.

In making the above comments, I do not wish to denigrate the efforts of Mr. Reynders to satisfy the Court's requirements to the best of his ability. Indeed, bearing in mind the dual nature of his appearance in the Court, he acquitted himself well. But he is not a lawyer and I would have thought, with respect, that in complicated cases the advocate should not be the expert witness even if (unlike the present case) the opinion of the expert witness and the submissions of the Council coincide. As I have said, where they do not, the problems are exacerbated.

For reasons which I will mention later, I am of the opinion the development consent should be granted subject to conditions. I do not propose to impose the conditions suggested by Council. It therefore is unnecessary for me to consider, for example, what I would have done had I determined, for example, that it was inappropriate to allow access over adjoining land but that I was powerless to prevent it. I have taken into consideration all of the matters referred to in cl.9 of SEPP No.15 and those matters of relevance to the development set out in s.90 of the Environmental Planning and Assessment Act. I have taken into account the lack of "the clustering of buildings". I mention this matter specifically because it appeared to be a matter of considerable importance to Mr. Reynders who, I assume, was making a submission on behalf of the Council. The Council believes, apparently, that unless such a requirement is imposed, it may be overly susceptible to pressure in the future to rezone the land so as to permit subdivision. It is not clear to me why

the Council is now concerned about its diminished ability to resist what I must assume to be a future inappropriate application for rezoning for subdivision. Seventeen months ago, the Council granted development consent and made it a condition of the consent that the dwellings be located where they are now proposed to be. The only assumption I am prepared to make about Council's future attitude is that if an application for rezoning to permit subdivision is made, the Council will consider it on its merits and determine the application in accordance with its statutory obligations. I note that SEPP No.15 does not require clustering; it merely expresses clustering as a "preference" and requires a council or the Court to take into account "any proposals for the clustering of buildings".

I have taken into account the means proposed for the establishment of land ownership, dwelling occupancy rights, environmental and community management of the development. The land will be owned by Glenbin. It is not a large multiple occupancy development. Each shareholder (10 in all) will be entitled to build a house on the area nominated in plan, Exhibit C. Shareholders will have the right to occupy the dwellings they erect and will be entitled, subject to approval by Glenbin, to sell their shares. However, in this regard, the price payable for their shares will not include any "land increase" component and the shares may not be assigned without Glenbin's approval.

Before turning to the disputed conditions, I note that Condition 4 is now no longer in dispute. The condition requires the land to be upgraded and made safe in accordance with recommendations of the Soil Conservation Service of New South Wales and the condition will therefore be attached to the consent.

Disputed Condition

Condition 8

As I have said, development consent was granted by the Council after the Developer, at the Council's request, withdrew its earlier plan and substituted an amended plan nominating the 10 sites proposed for the erection of houses. After development consent was granted but before the hearing of this appeal, certain building work was undertaken on the sites nominated. Although it is true that a hearing before this Court is de novo and that the Court must take into account the circumstances and the law as they are at the date of the appeal, I am not bound to ignore the events that have taken place between the date of the consent and the date of the hearing of the appeal. It was clear to all parties that Glenbin was appealing against conditions of consent. At the time it lodged its appeal, Condition 8, as imposed by the Council, was not in dispute. Condition 8 was included to give effect to the requirement of the Council that the houses on the land be set out on the map, Exhibit C. The new Condition 8 requires the houses to be "clustered" at one end of the site.

In my opinion, I am entitled to take into account as a "circumstance of the case" within the meaning of s.90 that during the suspension of the operation of the development consent by reason of the appeal being lodged to the Court (s.90(7)) Glenbin reasonably believed that it was doing no more than carrying out the development for which it had consent. As I have said, SEPP No. 15 does not mandate cluster development; it merely urges it as a preference. I have visited the site and have seen where the houses are intended to be located in accordance with Exhibit C. The Council could not point to any environmental damage that would result by reason of the houses being dispersed - at least none that could not adequately be addressed by appropriate conditions. Indeed, its reason for requiring "clustering" was its belief that to cluster the development would be to inhibit what it considered to be possible or probable future pressure for subdivision of the land. However, as I have said, SEPP No.15 provides that land the subject of multiple occupancy development shall not be subdivided. Accordingly, the subject land may not be lawfully subdivided unless SEPP No. 15 is amended and the Council prepares a new Local Environmental Plan. The Council relies on the circumstance that recently it has succumbed to representations to make a new local plan to allow the multiple occupancy development at Billen Cliffs to be subdivided and resolved to make a plan to permit subdivision of the land. But I do not regard that circumstances as giving any support to Mr. Reynder's submissions in the present case. I can only conclude that the Council's decision to rezone the land at Billen Cliffs

to allow subdivision proceeded upon a proper exercise of its planning power. I am not prepared to assume that the Council has embarked upon a plan making process dictated by pressure to which it ought not have succumbed. It seems to me, therefore, that I should not change the form of the present development for that reason, particularly, as I have said, it is the form chosen by the Council 16 months ago.

Conditions 14 and 15

On 11 January 1988, the Minister for Environment and Planning published a direction pursuant to the provisions of s.94A of the Environmental Planning and Assessment Act directing, inter alia, the Lismore City Council that, in the case of a condition of development consent referred to in s.94 requiring the payment of monetary contribution in respect of land within its area and being land to which State Environmental Planning Policy No.15 applies, a maximum amount of any such contribution shall be $1950 per dwelling unit. It follows, in my opinion, that however the money is to be spent, it is not open to the Lismore Council to require a contribution with respect to the subject development which exceeds the sum of $1950 per dwelling unit. The two contributions claimed in Council's Conditions 14 and 15 total $35,000 and therefore cannot be imposed. The question is whether any, and if so what, contribution ought be exacted.

Mr. Reynders pointed to what, in his opinion, was an inconsistency between the strategies dictated by the regional plan and the Direction given under s.94A. That is, he was of the opinion that it was not possible to limit s.94 contributions to the sum of $1950 per dwelling unit and, at the same time, ensure that such development "meets the full cost of all necessary services". However, no submission was made that the s.94A Direction was legally tainted by that circumstance.

With respect to Condition 15, it is the Council's claim that the intersection of Main Road 141A and Stangers Road needs to be upgraded to accommodate the additional traffic. With respect to Condition 14, it is the Council's claim that work needs to be undertaken on Stangers Road. In my opinion, it is fanciful to suppose that Stangers Road will be sealed within the next 15 to 20 years. The projection advanced by the Council of 102 dwellings or caravan sites on land abutting Stangers Road is so unlikely an outcome that, for present purposes, it can be dismissed. It is trite law that in order to justify the imposition of a condition (particularly one involving monetary contribution) there must be a proper nexus between the development proposed and the condition sought to be imposed. On present day values, it will cost approximately $220,000 to seal Stangers Road. Council is claiming the sum of $2000 per dwelling in respect of the subject development upon an assumption that contributions from the other 90 dwelling units will be exacted in the future. At the present time, the use of Stangers Road is well below the Department of Main Roads AADT (Annual

Average Daily Traffic) threshold for sealing of roads. In fact, the AADT is only about 150 on Main Road 141A and probably not more than 40 on Stangers Road itself - both figures well short of the 500 required by the Department of Main Roads (or even the 270 suggested by the Council) to justify sealing. It would seem to me that the only reliable material available to determine the extent to which the present development will add traffic both to the intersection at Main Road 141A and along Stangers Road itself is by reference to the survey taken of the Tuntable Falls Community. Upon that basis, it is likely that one car per dwelling will leave the subject land and return to it every second day, that is, the development will probably generate about r10 car movements per day along Stangers Road and through the intersection.

At present, there is, in my opinion, a requirement to upgrade Stangers Road. In this regard, I accept the evidence of Mr. Brimstead and Mr. Andreasson and the Council's Engineer, Mr. Smith. The cost of doing this work is estimated to be approximately $2800. The Council does not seek contribution for the continuing maintenance of the road only an amount sufficient to bring the road up to the appropriate and acceptable standard. Upon completion of the last dwelling on the subject development, the occupants will have added significantly to the present use of Stangers Road. It is always difficult fixing a figure in the absence of precise evidence. However, doing the best I can and taking into account the present users of the road, I impose a contribution in respect of each dwelling in the sum of

$200. Furthermore, I do not think the contribution need be paid prior to the release of the building approval for each dwelling.

So far as the intersection is concerned, it is submitted on behalf of Glenbin firstly, that it will not cost $15,000 to improve the intersection and, secondly, that upon a proper estimate being made, the occupants of Glenbin should not be required to pay the whole amount. With both these submissions I agree. I am persuaded by the evidence of Mr. Fulford that probably it would not cost more than $10,000 to upgrade the intersection. There is already a need to upgrade the intersection and the development at Glenbin will add to that need by approximately 15%. I think that there is a connection between the work to be undertaken at the intersection and the occupancy of the subject land. Accordingly, and upon the adoption of Mr. Fulford's figures, I assess a figure of $1500 to be paid in installments of $150 upon the release of each building approval.

Condition 16

I do not propose to impose Condition 16. Mr. Basso, an accountant, and his wife, a medical practitioner, own the adjoining land. Their land is burdened with a right of way in favour of the subject land. The occupants of the subject land are permitted "from time to time and at all times to pass and repass with or without horses and other animals, carts, wagons,

carriages, tractor engines, motor cars and other vehicles over and along the land 50 links wide shown in the plan annexed to the transfer ... ". The covenant provides that the expense of keeping the land the subject of the right of way in good and sufficient repair is to be borne by both owners in equal shares. Mr. Basso's complaint is that he may be involved in expenditure greater than that anticipated at the time the right of way was created by reason of the now proposed increased density of population on the adjoining land. It must be borne in mind, however, that the right of way is also used by Mr. and Mrs. Basso and one other occupant on their land throughout the greater part of its length. Also, it will not serve all houses on the multiple occupancy. It will serve five only.

On behalf of Glenbin, it is submitted that Condition 16 (or at least so much of it that requires the owner to consent to the removal of the right of way) is ultra vires. It was submitted that the effect would be "to oust the jurisdiction of the Supreme Court which it may exercise under the Conveyancing Act". Because I have come to the conclusion that Condition 16 ought be deleted in the exercise of my discretion, I need not determine whether Glenbin's submission is correct. I have regard to the circumstance that a right of way was created, is legally in existence and provides access for five of the proposed dwellings. It is capable of providing physical access to the subject land. It appeared to be suggested by Council that the use of the right of way (to the five dwellings) would be an "excessive or unreasonable" use and for that reason the condition

ought be imposed. It would seem to me, with respect, that it is not appropriate for this Court to make a condition of the type asked for by the Council. I do not doubt that it is open to the Land and Environment Court to impose a condition that access to any one of the dwellings ought be from a certain road. But I do not think it within the purview of the Land and Environment Court to require the owner of a dominant tenement to consent to an application to the Equity Court by the owner of a servient tenement that a right of way be modified or wholly or partly extinguished. (See Simons v. Willoughby Municipal Council, Bignold J, 21 May 1985, unreported). As I have said, I do not think it reasonable to require traffic to the western side of the land to proceed via the access track referred to in Condition 18. To do so would be to impose an unwarranted financial burden on the applicant and would lead to the result that the applicant would not be able to use that part of the land as proposed by it. I have not overlooked the circumstance that Mr. Basso is justifiably chagrined because some work was undertaken on his land and outside his right of way without his consent. But the action of Glenbin, if unlawful, can be remedied elsewhere. Indeed, there is evidence suggesting that the work, undertaken by mistake, was, in fact, rectified by Glenbin. However that may be, I do not think that circumstance ought deflect me from granting the development consent I think appropriate in all the circumstances.

Accordingly, I grant development consent subject to the following conditions:

1. Any use of the land or of a building, other than for agriculture, forestry or as a residence on an approved site, shall be subject to a specific development consent of the Council.

2. No tree of any species be ringbarked, cut down, lopped, injured or damaged, other than as required for agricultural or forestry purposes, without the prior consent of the Council.

3. An ongoing programme shall be developed, in conjunction with the Far North Coast County Council, for the eradication of noxious weeds on the land.

4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

5. The land shall be owned in its entirety by at least two-thirds of the adult persons residing on the land.

6. The land remain in one lot and unsubdivided under the Local Government Act, Strata Titles Act or any other act.

NOTE: Subdivision refers to the subdividing of land into parts, whether the dealing is:

(a) by sale conveyance, transfer or partition; or

(b) by any agreement, dealing or instrument rendering different parts thereof immediately for separate occupation or disposition.

7. Before development commences, documentary evidence be produced to satisfy the Council that Conditions 5 and 6 are complied with.

8. Buildings may be erected at sites 1 - 10 on the plan identified as Exhibit C in the proceedings before the Court subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling.

9. Notwithstanding approval of sites under Condition 8, the total number of dwellings erected in accordance with this consent shall not exceed the number reasonably assumed to accommodate 55 persons.

10. No building or structure shall be erected or placed on the land and used as a dwelling except at a site referred to in Condition 8.

11. No building or structure shall be erected or commenced to be erected unless a building permit has been obtained from the Council and the Council reserves the right to refuse to

issue a permit if it becomes apparent that the site is not stable or otherwise unsuitable.

12. All dwellings shall be construed in accordance with Ordinance 70 and have external non-reflecting materials or colours that blend with the environment.

13. Effluent of all types from all dwellings shall be disposed of in a matter approved by the Chief Health Surveyor and no absorption trench or other disposal area shall be closer than 50m to any defined natural watercourse or adjacent to land that may be subject to mass movement.

14. A contribution pursuant to the provisions of s.94 of the Act is payable at the rate of $200 per dwelling unit, each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

15. A contribution pursuant to the provisions of the Environmental Planning and Assessment Act for the upgrading of the intersection of Stangers Road with Main Road 141A in the sum of $150 per dwelling. Each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

16. Internal access to each dwelling shall be provided so as to provide a gravelled all weather access to conventional two-wheel drive vehicles. All access shall have grades not

exceeding 16% and be constructed and drained in accordance with recommendations from the Soil Conservation Service of New South Wales so as to minimise cuttings and the possibility of soil erosion.

17. A perimeter fire break be constructed by removal of all flammable material generally along the full length of the western and southern boundaries, avoiding existing forests, but be placed around the edges on a contour and be 20m wide, measured horizontally and maintained with a ground fuel load not exceeding eight tonnes per hectare to the satisfaction of the Council's Fire Control Officer.

18. A primary protection zone shall be maintained for a distance of 20m surrounding each building kept clear of combustible materials with a ground fuel load not exceeding three tones per hectare. In this zone, shrubs and trees no higher than 3m will be permitted provided the canopy cover is less than 20%.

19. A radiation protection zone shall be maintained for a width of 20m surrounding each primary protection zone to be cleared of all rubbish and undergrowth with a ground fuel loading not more than five tonnes per hectare. Trees and shrubs up to 5m high may remain providing the canopy cover is not more than 50%.

20. That all water storage tanks installed as part of the development, be provided with a 38mm male threaded connection with gate valve, in a location accessible to fire fighting vehicles.

21. Each access road that is not a through road shall be provided with a turn around area at its end to allow turning of fire fighting vehicles.

22. The following fire fighting equipment to standards approved by the Bush Fire Council of New South Wales be provided and maintained at all times to the satisfaction of the Council's Fire Control Officer;

(a) a 680 l water tank;
(b) an 8h.p. fire fighting pump;
(c) twelve knapsacks;
(d) six McLeod tools;
(e) 100mm of 20mm fire protection hose;
(f) two "Dial-a-jet" nozzles; and
(g) one drip torch.

23. A suitable fire alarm, capable of being heard from anywhere within the area enclosed by the perimeter fire break, be installed.

24. A suitable person be appointed as Fire Protection Overseer, to be responsible for fire protection maintenance of equipment

equipment and liaison with the Council's Fire Control Officer and the local Bush Fire Brigade.

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 23 PAGES ARE A TRUE AND ACCURATE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR. JUSTICE J.S. CRIPPS.

Jennifer Cox.

Associate

Meth - DA PH File

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

10470 of 1987

PALM VIEW HAMLETS
PTY LIMITED

Applicant

THE COUNCIL OF THE
SHIRE OF TWEED

Respondent

Order

LAND AND ENVIRONMENT COURT
14 APR 1988
FILED

THE COURT ORDERS THAT:

1. The Application be upheld.

2. The development application relating to the establishment of a multiple occupancy, comprising 9 homesites at Portion 4, Parish of Burrell, Byrrill Creek Road, Byrrill Creek and in accordance with the conditions contained in Annexure "A" hereto.

3. The exhibits be returned.

ORDERED: 14 April, 1988.

By the Court,

E.C. Irwin
Registrar.
E.E.

SEAL OF THE LAND AND ENVIRONMENT COURT NEW SOUTH WALES

Appended
Spain submission (at request of Assessor) on S.94 re this case and twin case Crystal Vale 10469 of 87 appended

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

APPEAL No:	10470 of 1987	**DECISION DATE:** *	14.4.88
APPLICANT:	Palm View Hamlets Pty Limited		
RESPONDENT:	Tweed Shire Council		
HEARD BY:	Senior Assessor Jensen		
HEARING DATES:	2nd March 1988 (last day)		
REPRESENTATIVES:			
Applicant:	Mr J. Weller, Solicitor with Mr D. Weller, Solicitor.		
Respondent:	Mr D. Connie, Solicitor, of Halliday and Stainlay.		
ACT/SECTION:	Environmental Planning and Assessement Act 1979.		

Appeal No.: 10470 of 1987

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Senior Assessor Jensen
Decision date: * 14 . 4 . 88

PALM VIEW HAMLETS PTY LIMITED

V

TWEED SHIRE COUNCIL

JUDGMENT

THE APPEAL

This matter which involves a subdivision of land and conditions attaching thereto, is generally similar to the matter Crystal Vale Pty Limited (10469/87) which was submitted concurrently to the Court and in part dealt with at the same time. In both matters, the sole question at issue was whether a monetary contribution should be sought under the provisions of s.94 of the Environmental Planning and Assessment Act 1979 and as applied as a condition of approval to a subdivision involving multiple occupancy and previously consented to by the Council.

Shortly, the applicant says that the application of such a contribution, in the circumstance of the Palm View Hamlets subdivision, is contrary to law as established in previous decisions before the Land and Environment Court and is in any case unreasonable through lack of nexus to the subdivision as proposed. The respondent by comparison says that the present matter can be distinguished from the previous matters and that indeed there is a relation between what is sought, by way of a contribution, and works to be done in the surrounding area and sufficient to establish the nexus contemplated as a necessary basis for the application of a s. 94 contribution.

The first witness, a Civil Engineer and Works Engineer for the Council, Mr R.W. Missingham gave evidence and described the location of the subject land and the condition of access roads which it would be necessary to use for access by the future inhabitants of the subdivided land. In particular he referred to the principal road access to the block, being Tyalgum Road. This road has a length of approximately 27 km from its commencement close to Murwillumbah and its termination at the village of Tyalgum. In this regard Mr Missingham noted that approximately 6 km of this access road is not considered to be of an appropriate standard by the Council and will require reconstruction. In this same context Mr Missingham described the works programme of the Council and the manner in which funds are allocated. In addition he noted that a sum of least $120,000 must be assigned to a particular project before Federal funding is made available. He also noted that under the current works programme of the Council, no funding has been allowed for the upgrading of Tyalgam Road. At the present, Mr Missingham says that any patching or remedial work to Tyalgam Road, is carried out with funding from the general revenue of the Council.

Apart from Tyalgum Road, Mr Missingham noted that the Council intended to carry out works in Tyalgum village and in particular the main street would require reconstruction, including kerb and guttering and sealing to full width. The aggregate cost of this work Mr Missingham estimated as between $70,000 and $80,000.

Mr Missingham also referred to works between Tyalgum village and the subject subdivision involving sealing and improvements to Brays Creek Road, with a probable cost of $180,000 and again observed that none of these costs were currently provided for in Council's budget and therefore would have to be sourced from general revenue.

In response to questions Mr Missingham agreed that the applicant had already carried out construction of sections of gravel road to a Council approved standard, amounting to a sum of some $136,000, which had not been required to be expended by the Council. He further agreed that the work undertaken by the applicant formed a part of a ring route, from Murwillumbah via Tyalgum village and back to the main road to Nimbin.

In relation to tourists maps presented to the Court, Mr Missingham also agreed that Tyalgum Road formed a part of the road system advertised as forming a part of Scenic Route No. 10.

In response to questions as to the basis upon which the contribution was sought, Mr Missingham agreed that it was a "standard" condition applied to all rural subdivisions and furthermore, the $2500 sought was a "standard" amount, relating to all rural subdivisions and multiple occupancies. In this context Mr Missingham appeared to be unaware of any plan relating to the manner in which the distribution of funds from these contributions would be made. Further he appeared to be unaware as to whether contributions were held in a "special" fund as opposed to being simply incorporated into the Council's general revenue. Further he was unaware of the precise allocation of funds from contributions to works in proximity of the proposed development.

Asked questions in regard to the five year Council programme of Capital Works, Mr Missingham was unable to point to any particular project to which levy funds would be directed, although he suggested that three bridges would require reconstruction in the future. Later Mr Missingham informed the Court that the probable cost of the bridge works was $170,000 and that he anticipated that this would be funded from Council's loans programme, with repayments met out of general revenue.

The next witness Mr P. Boarder, the Councils Shire Engineer and Chief Town Planner had prepared a statement of evidence from which a number of points are extracted as follows:

* The recently gazetted Tweed Local Environmental Plan 1987 reflects the ongoing demand for rural living in the Shire and makes provisions for a variety of living choices throughout the Shire.

* The plan provides for a "user pays" basis for road upgrading.

* A road hierarchy system is used when determining the priorities for improvement programmes generally based on assessed demands, safety, optimum economical construction, a forward plan programme for ultimate link roads and equitable distribution throughout the Shire.

* To bring the current Shire road system up to an expected satisfactory standard for existing and estimated demand the following forecasts are made:

  Bridges 1986 - 2000: $4 500 000

  Roads 1986 - 2000: $32 400 000

* In developing a policy to provide adequate access roads Council identified a need for all development in rural areas to contribute an equitable base figure and pay for defined improvements as well if necessary.

* In regard to the planning purpose of contributions for roads, upgrading of roads to a safe and acceptable level throughout the Shire is the aim of Council, and is a major factor in the overall planning objective.

* In relation to the development in question being the target of contributions, the Engineers report clearly shows the need for the Byrrill Creek Road to be upgraded and as such will be a benefit to the owners of new dwellings within the subject land.

* In relation to it being a reasonable contribution, increasing population, sharing the overall costs equitably is the basis of applying the contributions.

* Roads in this area have received reasonable allocations of funds during recent years, chiefly because of the lesser road standards, rather than on a traffic count basis.

* These properties will attract a single rating hence for the multiple demands coming from them, there is a great imbalance of annual contribution to road funding generally.

* The Council considered undertaking a Shire wide assessment of potential upgrading costs of roads, in relation to the numbers of lots serviced, but decided that the extent of work was inappropriate.

* Instead an analysis was made of selected areas and from this costs per kilometre of upgrading in relation to lots served pointed to a range of contributions of between $1,500 and $5,400 per lot.

* Since 1982 the Council has applied a road development contribution of $2,500 for each rural subdivisional lot and for each multiple occupancy residential lot, exclusive of the first, for which there is no charge.

* All contributions under s. 94 have been used for roadworks on the basis that the Council considers that, there is a greater need for roads by rural dwellers than for other forms of services, for which s. 94 contributions could be charged.

In response to questions by the applicants representative, Mr Boarder agreed that the $2500 per lot was a constant figure applied across the whole of Shire to new subdivision. While Mr Boarder asserted that contributions obtained in the vicinity of the Palm View Hamlets subdivision would be spent in that same locality and said that the funds were put into

a separate roads development fund, he was unable to describe any document which the Council had prepared to indicate where levied moneys would be spent in proximity to the particular subdivision. Further when asked whether an amount levied from a subdivsion was specifically "ear marked" for use in a particular locality, Mr Boarder said that the Council does not specifically relate funds levied in one particular locality to that same area. Mr Boarder was then asked questions about levies for roads in other parts of the Shire and particular in the urban parts which include Murwillumbah town. He agreed that dwellers in the town paid no urban roads levy despite their use of the road system and further agreed that they made use of the rural road system.

In his final submission the applicant says that on the basis of previous cases before the Land and Environment Court, the application of what is clearly a levy, by way of a condition of consent, can only be considered as an illegal requirement. Mr Weller says that it is quite clear from the evidence that the levy has not been based on a merit assessment of the particular project or the resultant funds tied to any specific project, directly proximate to the subject subdivision. Further he says that while Mr Boarder has said he would recommend to Council that funds acquired from the subdivision be used on specific projects, this could not be relied upon. He says that what the Council is engaged in is an inherently arbitrary exercise in which, ultimately, the money is simply put into the general revenue and distributed across the whole of the Shire. Further in response to a question as to relevance of a recent decision of his honour Mr Justice Stein in the matter of Parramatta City Council v. Peterson he says in summary:

> "Parramatta City Council v. Peterson should be distinguished from the established and settled law invalidating general levies for rural roads, on the grounds that it applies only in the central business district of a City. In rural areas, consent conditions levying contributions for road development generally should continue to be struck down as lacking any reasonable nexus."

Finally in relation to the reasonableness of what is sought in the condition Mr Weller suggests that the Court has been invited by the Council to rely on sheer guess work as to the distribution of funds obtained via this condition. Further he says there is clearly no proper analysis of works proposed or costs involved and certainly no break-up as between tourists, city dwellers and the residents of the new subdivision. In this

context he says that the tourist publications provided by the Shire Council demonstrate an ambition to upgrade the roads for tourists purposes and it is evident that the tourists do not pay the levy. Beyond this he says, that clearly nearly three quarters, of the Shires population also do not pay the rural roads levy.

By comparison the respondent says that the system of contributions applied to this subdivision, spring from "administrative convenience" as admitted by the Shires Engineer Mr Boarder. He says that as compared with the earlier cases cited by the applicant, the Shire has firm proposals for work in the vicinity and he says that it would not be expected the Court would be prepared to support this condition, unless it were satisfied the funds would be properly spent in the locality. Mr Connie says that it is clear enough that each residence in this multiple occupancy subdivision will add users to the road system. Further in relation to the use of Tyalgum village, he says that while Mr Missingham was unable to offer a specific guide as to the public use of the facilities, he had estimated that there would be a component of 20% of public use.

CONCLUSIONS

In reading back through the evidence presented in this matter I conclude that while the Council may have had a conception that users of road facilities should be those who pay for their maintenance and upgrading, in the ultimate the probably difficult task of establishing who those users are, has not been attempted. What has been substituted, by some apparently archane process of sampling, has been to derive a range of typical road costs per new subdivisional allotment ($1500 to $5400) and take something approaching the average, $2500 as being an appropriate levy for all new subdivisions and multiple occupancy lots, throughout the Shire.

In revealing this technique Mr Boarder has pointed to the fundamental unreasonableness of such an approach for clearly there will be allotments where a contribution of $1500 is appropriate. On this basis a generalised tithe of $2500 a lot, is therefore, manifestly unreasonable.

In regard to the application of generalised levies by way of conditions of consent, I was invited by the applicant to consider a number of matters previously before the Court and with one reservation, that I shall come to shortly, I conclude they represent a very clear basis for not accepting the

arrangements that continue to be applied by Tweed Shire Council. My reservation was that perhaps the recently decided matter of Parramatta City Council v. Peterson, before Mr Justice Stein, might have changed the fundamental considerations of extent of the area of a municipality or shire in terms of the acquisition of contributed moneys. In the event I am convinced that this matter is to be firmly distinguished from matters involving locations such as Tweed Shire, where the sheer extent of the land, coupled with the lineal extent of roads system, make the context different to the complexity of a business district, such as Parramatta.

In the ultimate and as has been the case with matters relating to Shire contributions before this Court previously, the "touch stone" remains the tests as advanced in Newbury v. Secretary of State for the Environment. As has been so often quoted, in the decision relating to this matter, the basis upon which a condition associated with a planning consent should be considered to be valid, was proposed as involving the following elements.

1. Must Have a planning purpose.
2. Must Fairly and reasonably relate to the development.
3. Not to be so unreasonable, that no reasonable planning authority could have imposed it.

In the ultimate, while I am satisfied the Council has a generalised policy of upgrading roads and may indeed have identified certain projects in the vicinity of the subject land, as yet there is no consistent or organised means of ensuring the funds provided from contributed amounts relating to particular works will be used in close proximity to the projects from which the contributions derive. On this basis clearly, the condition as proposed by the Council must fail in relation to principle No. 2 as outlined above.

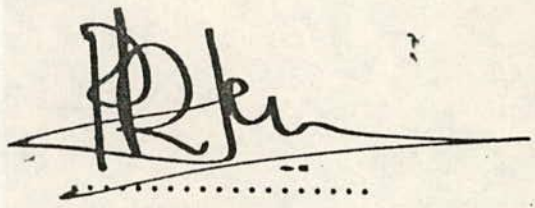
With regard to the first principle, that the condition should be associated with a planning purpose, I am disposed to accept that this is the case, although the evidence appears to point to it being used more as an exercise of funding works for the benefit of the population of the Shire as a whole but also that of tourists. With regard to the third test, I conclude that the approach taken by the Council, in seeking this levy, is not reasonable, particularly having regard to the works undertaken by the subdivider to provide adequate access, not only within the land itself, but also into the adjoining publicly owned roads.

On the basis of the forgoing remarks and with the benefit of a view of the access road system, as far as the proposed subdivision, I conclude that the appeal should be upheld and the condition relating to a financial contribution removed from the conditions of consent. On this basis the following orders are given.

1. The appeal be upheld.

2. That a development application relating to the establishment of a multiple occupancy, comprising 9 homesites at Portion 4, Parish fo Burrell, Byrrill Creek Road, Byrrill Creek and in accordance with the attached conditions, contained as an Annexure and

3. That the exhibits be returned.



Peter R. Jensen,
Senior Assessor

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Crystal Vale v. Tweed Shire Council

In the Land and Environment Court of New South Wales

#104699 of 1987.

OPINION SUBMITTED ON BEHALF OF APPLICANT.

Re: Effect of Parramatta CC v. Peterson.[1]

In the instant appeal, the issue is **whether a monetary contribution, required by the Respondent Council** (under s.94 of the Environmental Planning and Assessment Act) as a condition of its consent approval for a Multiple Occupancy zoning, such contribution being for the purpose of "Rural Road Development", **is void for remoteness from the subject development.**

Consent authorities are empowered by s.94(1) to require payment of a monetary contribution where a development is "likely to require the provision of or increase the demand for public amenities and public services within the area". Under s.94(2)(b) any requisite contribution must be "reasonable" for the augmentation of public amenities and services in the area. The question in this case is whether a contribution, extracted for rural roads anywhere in the shire, is "within the area", and if so, whether it is "reasonable".

A long series of cases establishes that such a levy, for rural roads generally, is of insufficient immediate connection to the proposed development, is not "fairly or reasonably" pertinent and so fails for remoteness.

In Norlyn Investments v. Ballina S.C.[2] and Byrril Creek Hamlet v. Tweed S.C.[3] Assessor Riding rejected such a condition as lacking in a nexus to the proposed development. He cited with approval the judgement of Gibbs C.J. of the High Court in Cardwell S.C. v. King Ranch[4] to the effect that the condition must be reasonably required by the development, and he endorsed Assessor Nott in Pick v. Ballina S.C.[5] wherein it was held that if roads which might benefit from the condition are remote from the subject land then the imposition is unreasonable. In Ramsey & Ilepool v. Richmond River S.C.[6] Stein J. held that such a condition had no necessary relevance to the subject land and failed as too remote. He affirmed that the adoption, by a consent authority, of such a condition as a matter of blanket policy, disabled the authority from exercising its discretion in individual cases and was improper[7].

It appears that if the money is specifically "eartagged" for a rural road in the immediate locality then the necessary nexus can be established. In Hawkins v. Evans S.C.[8] and Coupe v. Mudgee S.C.[9] a condition requiring a monetary contribution to a future upgrading of the immediate access road was upheld. In Mylrea v. Nambucca S.C.[10] a contribution for upgrading of roads "giving access to the development" was upheld. In Young & Guest v. Nambucca S.C.[11] Assessor Andrews upheld a contribution of $3300 required to "benefit the road system on which the building was situated".

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In the instant case, however, it is a "general levy" which has been raised. It is submitted that the Council is now estopped from trying to make out that a local-specific levy was meant, or is now meant. Having formally stated a certain and precise legal position, by way of consent condition, the Respondent council cannot now chop and change its apparent and stated intention so as to try and squeeze it into legitimacy, however appropriate and easy doing so may have been for them at the consent stage.

In the instant case a problem has arisen, and this opinion is sought by the Assessor, following the recent decision of Stein J. in Parramatta CC v. Peterson[1]. In that case a proposed multiple-storey development would generate the need for many more car-parking spaces than it provided internally. The council imposed a s.94 condition that $1.25m be contributed for public car-parking, such funds to go towards a $6m high-rise council carpark 800 metres away. There were council carparks much closer.

Upon challenge that this expenditure was too remote, Stein J. held (inter alia) that the word "area" in s.94(1) means the local government area of the local council and not simply the immediate locality of the development site.

Even if Stein J. is correct in his definition of "area", one must beware of interpreting him as holding that if a development creates or adds to a need anywhere in a [local government] area, then a condition assuaging that need anywhere in the [local government] area is valid. s.94(1) must be read in cnjunction with s.94(2), which requires that any condition imposed by the consent authority pursuant to its s.94(1) study is "reasonable".

Stein J. does not spell this out clearly, however, having made his ruling about the meaning of "area" in s.94(1), he goes on to devote much of his judgement to the concept of "reasonableness" and "nexus". He held that the test of validity did not require an "identifiable nexus" and a "direct connection" to be proven between the proposed development and the public amenity on which the money (the subject of the condition) is to be spent. The condition, however, did have to relate "fairly and reasonably" to the subject development, so as to establish sufficient connection to satisfy the equity argument[12]. He concluded that it was not necessary for the council to prove a direct geographical connection between the subject development and the proposed council carpark, but that it was a fair, reasonable and sufficient that the proposed carpark would serve the Parramatta Central Business District [CBD] as a whole.

The core case on planning nexi is Newbury D.C. v. Secretary of State for the Environment[12] (which, Stein J. in Parramatta formally adopted). This held that for a planning condition to be valid it must: (i) have a planning purpose; (ii) fairly and reasonably [not necessarily directly or exclusively] relate to the development; (iii) not be so unreasonable that no reasonable planning authority could have imposed it.

The Newbury doctrine was somewhat befuddled by Stein J.'s own Chief Judge, Cripps J., in BOMA v. Sydney City Council[7], wherein the requisite "fair and reasonable" relationship appeared to be tightened to require a "direct" connection between the contribution and the development. Stein J. opposed this test as too strict and stated that a lesser test was enough -- it sufficed for the condition "fairly and reasonably" to relate to the development. He advanced, as reasons for distinguishing BOMA, "that Cripps J.

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may have had in mind a wider meaning of "direct" than may be usual"[13]. He supported this opinion by pointing out that Cripps J. had himself applied the wider test in Bullock v. Eurobodalla S.C.[14], wherein he followed St. George v. Manly M.C.[15], which held that a condition must be "capable of meeting the test that it reasonably relates to the development". However, hose it down though he might, Stein J. did not expressly overrule BOMA-- nor was he in a position to do so.

Even assuming that Stein J. in Parramatta was legally correct in narrowing the test laid down by Cripps J. in BOMA, at least a "fair and reasonable" relationship remains required between the condition and the development. Stein J. in Parramatta found a "reasonable" nexus was established where the requisite expenditure occurred 800 metres distant across a major urban CBD. This is, however, a narrow foundation upon which to propose that any development which creates or adds to a general type of need anywhere in its entire local government area, even although such need may, in may or most places in the area, be due to quite unrelated developments, can reasonably be subjected to a monetary consent condition for expenditure upon assuaging that need anywhere in that [local government] area. The required nexus of "reasonableness" could become very stretched under such a doctrine.

It is submitted that Parramatta should be distinguished from the instant appeal on the grounds that the local government area involved was a city, with a total administrative area of only 60 sq. km. and a CBD of about 1 sq. km. In such a tight, urban situation there is a much greater concentration of people and sharing of amenities than in a rural shire. In the Parramatta case, the proposed expenditure was to be a mere 800 metres from the subject development. It was very consciously a major urban CBD which Stein J. dealt with in Parramatta as a whole, unified entity. He expressly, and by way of limitation, said[15] "it is permissible, in the case of a regional or sub-regional centre, to adopt an integrated, cohesive approach".

By way of comparison, the administrative area of Tweed Shire Council is 1307 sq. km. and that of the largest NSW shire, Central Darling, is 51,395.12 sq. km. (Incidentally, the area of NSW is 801,340.88 sq. km.). If the ruling of Stein J. is to be extended to rural areas then expenditure may well be scores, if not hundreds, of kilometres away from a subject development. There is no way that such expenditure can be considered to be proximate enough to the development to provide a "fair and reasonable" (let alone a "direct") connection with or relevance to it.

It is submitted that Parramatta CC. v. Peterson turned upon its own peculiar facts and is clearly distinguishable from the established cases invalidating general levies, especially those for rural roads. Stein J. was only concerned with an inner city area and had no intention to make fresh law applying to extensive or rural areas. Significantly, he did not mention or overrule his own decision in Ramsey & Ilepool v. Richmond River S.C.[6], wherein he personally declared "no real nexus" was evident between a contribution to the "Shire road network generally" and the subject development. Indeed, he did not refer to any of that long series of cases cited above which invalidate general levies for rural roads for lacking the necessary nexus.

Any extension of Parramatta CC v. Peterson, even if it is good law, should not be undertaken lightly. It would make a nonsense of that long string of cases and that established law requiring a reasonable nexus between the

development and the expenditure. This "integrated, cohesive" approach may be fair in an urban CBD, but it is inequitable in a rural, and possibly even a suburban, situation. Such an extension is also entirely unnecessary: if rural councils wish to levy funds for rural road development then all they need to do is to earmark the contribution, at the time of imposing it, to particular, relevant, local access roads.

Furthermore, it should be bourne in mind that the present applicant has already upgraded 4 km. of rural access road, at major expense. Even were general levies for rural roads to now be upheld as reasonable, this particular one should be struck down, in view of the expenditure already bourne, as excessive.

Conclusion.

Parramatta CC v. Peterson should be distinguished from the established and settled law invalidating general levies for rural roads, on the grounds that it applies only in the Central Business District of a city. In rural areas, consent conditions levying contributions for road development generally should continue to be struck down as lacking any reasonable nexus.

NOTES.

1. (1987) 61 LGRA 286.
2. L & E Court NSW #10387 of 1983.
3. #10402 of 1985.
4. 54 LGRA 110.
5. 10058 of 1985.
6. #10350 Land and Environment Court , July 1986.
7. See Cripps J. in Building Owners and Manager's Association of Australia Ltd. v. Sydney CC (1984) 53 LGRA 54.
8. #1687 of 1982.
9. #20465 of 1984.
10. #10052 of 1985.
11. #10579 of 1984.
12. [1981] AC 5787.
13. at pp. 296-297.
14. Land & Environment Court 26 Mar. 1984, unreported).
15. (1981) 3 APA 370.
16. at p.297.

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Solicitor,
16 March 1988.

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Appeal No: 10058 of 1985

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Assessor Nott
Decision date: 24.9.85

CARDWELL v KING RANCH appended.

JOHN LORD PICK

-v-

BALLINA SHIRE COUNCIL

JUDGMENT

The applicant is the owner of lot 5 DP 546091 at Carneys Place, Knockrow, near Ballina. He wishes to excise a 3,000 m^2 lot from the land in order to erect a dwelling house for himself. He is permitted to do this with the consent of the Council under cl. 12(3)(a) of Interim Development Order No. 1 - Shire of Tintenbar.

The applicant's land is in a Non-Urban zone but some of the lots in the locality are small, including the immediately adjoining lots on either side of the proposed 3,000 m^2 lot. It is apparent that the Council's underlying reason for refusing consent for the applicant's subdivision is that the owners of these two adjoining lots objected to the proposed development.

Looking at the whole of applicant's land, it has an area of about 33 ha. There is vehicular access from the east over a rough track from Newrybar Cane Road. The land is rectangular in shape, but it has a "handle" about 900 m long and 20 m wide which leads from the rectangular piece of the subject land to Carneys Place. The proposed 3000 m^2 lot (which I will call "the proposed excised lot") has a frontage on the west to Carneys Place, and has a depth of about 150 m. The balance of the

"handle" which is about 750 m long, between the proposed excised lot and the rectangular part of the subject land, will be added to lot 2 DP 598178 with the consent of the owner of that lot.

Mrs. V. Carney lives in a modern home on a small adjoining lot having an area of 2200 m^2 immediately to the south of the proposed excised lot. Her lot and a much larger adjoining parcel were owned by the Carneys for many years, and Carneys Place was no doubt named in recognition of that family. The present small lot now owned by Mrs. Carney is itself an excised lot created when Mrs. Carney could no longer look after the larger property and had to sell it. Mrs. Carney's house is set back from the boundary of the proposed excised lot by 4.7 m. The main living rooms of Mrs. Carney's house look to the east, and there are extensive views as her house is in an elevated position, looking down over canefields and other agricultural land.

On the evidence it would be possible for a suitably designed split-level house, stepping down the site, to be erected on the proposed excised lot without affecting the views of Mrs. Carney to the east. A house erected on the proposed lot may cause a small reduction in her views to the north-east, but in the circumstances, balancing the interests of the applicant and Mrs. Carney, I do not think that would be unreasonable.

The amenity and views of Mr. Sullivan who lives on the lot immediately to the north of the proposed excised lot are less likely to be affected than Mrs. Carney's. Mr. Sullivan's house is situated approximately 10 m from the northern boundary of the proposed excised lot, and his house is oriented so that the principal views are to the east and north-east, and these views will not be affected by any house erected on the proposed excised lot.

There was no valuation evidence to suggest that the erection of a suitably designed house on the proposed excised lot would affect the market values of the immediately adjoining lots, and from an inspection I made of the properties in the presence of the parties I think that a house for the applicant could be suitably designed so as to have little or no effect on

the values of the adjoining properties.

Although the proposed excised lot is in a rural setting, many of the lots are small. Surrounding the proposed excised lot are nine lots having areas less than 2 ha; ten lots having areas between 2 and 20 ha; and nine lots having areas in excess of 20 ha.

There was some evidence of slippage in the locality, but the modern nearby homes of Mr. Sullivan and Mrs. Carney have apparently shown no signs of slippage, and the Council's officers did not dispute the opinion of the applicant's consulting engineer that properly constructed foundations for a house on the proposed excised lot would be stable.

I do not regard the proposed subdivision as being contrary to the goal of preventing the fragmentation of rural properties. The 900 m long "handle" of the subject land, of which the proposed excised lot forms part, could be put to little agricultural use having regard to its narrowness. As I mentioned earlier, the proposed excised lot is only a small part of the "handle", and the effect of the applicant's subdivision is to incorporate the balance of the "handle" in an adjoining owner's lot which is conterminous with the balance of the "handle". This will result in a better use of the land formerly contained in the "handle".

Once the access handle is removed, the rectangular eastern part of the applicant's land (to be known as lot 7) will have an area of 32.12 ha. Lot 7 has been used for canegrowing, and the proposed subdivision and the erection of a house on the excised lot will not affect that activity. The access to the canefields on lot 7 is a rough track from Newrybar Cane Road. That track would be quite unsatisfactory as a means of access for a house to be erected on lot 7. But the purpose of the present subdivision is not to enable a house to be erected on lot 7, and this subdivision will not make any change to the present use of that lot. Assuming that the relevant environmental planning instrument applying at the time permits it, any dwelling which is sought to be erected on lot 7 could only be erected if proper access for dwelling-house purposes is provided, and, depending on the circumstances, that may entail the applicant in paying for

he full cost of a gravel road to a right-of-way standard: cf. Hawkins v Evans Shire Council (LEC No. 10687/82, 30 August 1985). The proposed excised lot on which a house will be erected has adequate access along Carneys Place.

In the circumstances, I consider that consent for the subdivision should be granted subject to conditions.

One of the conditions that the Council sought to impose was that the applicant make a contribution of $1,620 under s. 94 of the Environmental Planning and Assessment Act, 1979 for the upgrading of rural roads. I do not think that the Council can validly require such a contribution. The Council has a policy of requiring a contribution of $1,620 for every additional rural lot created in the Shire, and the Council has designated certain roads which will be upgraded with the contributions received. Those roads are remote from the subject land and the subject land would not particularly benefit from the road improvements. In this regard it is relevant to note that Carneys Place was originally the route of the Pacfic Highway and in order to get to the present route of the Pacific Highway, the applicant would have to travel only about 350 m along Carneys Place, and the Pacific Highway then leads directly into Ballina. Any benefit the future occupiers of the proposed excised lot will get from the roadworks to be carried out in other parts of the Shire will be no different from the general benefit that the occupier of a subdivided lot in Ballina might get when he or she occasionally uses one of the improved rural roads. Subdividers of urban land in Ballina do not have to pay any contribution for the upgrading of these rural roads. Accordingly, it is not reasonable to require the applicant to pay the contribution of $1,620: s. 94(2)(b) of the Environmental Planning and Assessment Act, 1979; Cardwell Shire Council v King Ranch Australia Pty Ltd (1984) 58 ALJR 386.

The Council also sought a contribution for the upgrading of Carneys Place. That road is bitumen sealed, except for a stretch of about 50 m where it is a two-lane gravel road. The cost of bitumen sealing the gravelled section of Carneys Place is $2,200. It is not apparent that contributions were paid by Mrs. Carney or by other users of Carneys Place.

there are about eight lots having a frontage to Carneys Place whose owners are likely to use that road, I consider that a reasonable contribution to be paid by the applicant towards the cost to the Council of sealing the gravelled section of Carneys Place is $275.

The applicant has also made an application to erect a house on the proposed excised lot, but that application was not the subject of this appeal. The application will have to be assessed by the Council having regard to the amenity of the adjoining neighbours, particularly of Mrs. Carney; and full engineering details of the foundations will be needed.

One of the conditions of consent which will be imposed in relation to the present application contains a restriction as to user under s. 88B of the Conveyancing Act, 1919. The reason for the restriction as to user is not apparent to me. The owner of the adjoining lot into which the balance of the "handle" of the subject land will be incorporated consented to the subdivision only on the basis that such a restriction as to user be imposed.

The orders of the Court are:

1. The appeal be allowed.

2. Development consent be granted for the subdivision of lot 2 DP 598178 and lot 5 DP 546091 in accordance with the plan submitted with Development Application No. 84/186, subject to the following conditions:

   (1) The applicant shall pay a contribution of $275 under s. 94 of the Environmental Planning and Assessment Act, 1979 towards the bitumen sealing of the gravelled section of Carneys Place.

   (2) Submission of written evidence as to the availability of electricity to the site.

   (3) Submission of final plans together with the applicable fee.

   (4) Unless this requirement is waived in

writing by the owner of lot 2 DP 598178, the proposed lot 5 shall be made subject to a restriction as to user under s. 88B of the Conveyancing Act, 1919 upon registration of the subdivision that the said lot 5 is to be retained as a separate parcel of land and is not to be consolidated with the immediately adjoining lot 1 (to the north) or lot 3 (immediately to the south).

3. There be no order as to costs.

4. The exhibits may be returned.

A.J. Nott

A.J. Nott
Assessor.

CARDWELL SHIRE COUNCIL v. KING RANCH AUSTRALIA PTY LTD

Brisbane, June 25, 1984. } Before Gibbs C.J., Mason, Wilson, Brennan and Dawson JJ.

Subdivision of Land (Q.) — Conditions of approval — Test of reasonable requirement — Extension of existing access road — Contribution to cost of replacing bridge over road — Local Government Act 1936 (Q.), as amended, s. 33(16c).

In deciding whether a condition is reasonably required by a proposed subdivision of land within s. 33(16c) of the *Local Government Act* 1936 (Q.), as amended, a local authority is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce, such as the increased use of an existing access road and of the bridge over it, and to impose such conditions as appear to be reasonably required in those circumstances. The test of reasonable requirement of a condition, for example, one relating to road construction, is not that the condition is necessary to provide access or drainage to the land or that the condition should provide a benefit to the subject land which would be enjoyed exclusively by persons connected with the land. So *Held* by the whole Court.

Decision of the Supreme Court of Queensland (Full Court) (which affirmed the decision of the Local Government Court, reported in (1983) 9 A.P.A. 1), reversed.

APPEAL from the Supreme Court of Queensland (Full Court).

I. D. F. Callinan Q.C. and *P. Lyons*, for the appellant.

N. M. Cooke Q.C. and *S. M. Ure*, for the respondent.

GIBBS C.J. This is an appeal from the Full Court of the Supreme Court of Queensland which, by a majority, dismissed an appeal from a decision of the

Local Government Court. The present respondent, King Ranch Australia Pty Ltd, the owner of land in the Shire of Cardwell in North Queensland, applied to the appellant, the Council of the Shire of Cardwell, for permission to subdivide the land into nineteen blocks of various sizes, aggregating about 600 hectares.

The Council approved of the proposed subdivision subject to the four following conditions:

"(a) An amount of $25,000 be contributed towards future costs involved in the Davidson Creek Bridge replacement.

(b) Provide an extension of the existing bitumen-surfaced roadway on the Davidson Road to a point 100 metres past the turnoff to the second road. This road to be equal in width and standard to the standard at the last section of bitumen.

(c) The internal roads to provide a bitumen-surfaced turnout to each extending 25 metres from the Davidson Road centre line and then extend as a gravel paved road of minimum width 4.3 metres pavement, 8 metres shoulder width and minimum gravel depth of 200 mm. Adequate stormwater drainage to be provided.

(d) The Engineering plans of roads to be submitted and approved before acceptance of any guarantee or signing of the Survey Plans."

The respondent appealed to the Local Government Court seeking an order that the council approved of the application for subdivision free from any of the conditions. The Local Government Court, his Honour Judge Given D.C.J., allowed the appeal. He ordered that conditions (a) and (b) should be deleted, that condition (c) should be varied, and that condition (d) should remain, but relettered as condition (b).

Access to the land is given by Davidson Road which leads from the Bruce Highway to and beyond the subject land. At one point the road crosses Davidson Creek by a bridge. Condition (a) required the respondent to contribute $25,000 towards the cost of a new bridge over Davidson Creek. There is evidence that the total cost of a new bridge would range between $300,000 and $450,000. Condition (b) required the respondent to provide a bitumen surface for the road along the south-western boundary of the subject land. At present there is some bitumen on that portion of the road but the condition would require an extension of the bitumenised surface. As to condition (c), his Honour Judge Given said that the present respondent accepted it as reasonable so far as one of the internal roads was concerned because that road comes out onto a sealed portion of Davidson Road not far from the Davidson Creek bridge, but opposes it in relation to the second road which will meet Davidson Road where it is at present unsealed and will remain unsealed unless condition (b) continues to be imposed.

By s. 34(10) of the *Local Government Act* 1936 (Q.), as amended, a local authority to which an application for subdivision is submitted may approve of any such application, or approve subject to conditions, or disapprove. However, a restriction is imposed on the nature of the conditions that may be imposed by s. 33(16c) of the *Local Government Act* which, so far as it is material, provides as follows:

"(a) It shall be unlawful for the Local Authority in the case of an application—

(i) for exclusion of land from a zone and the inclusion of the land so excluded in another zone;

(ii) to open a new road or subdivide land; or

(iii) for approval, consent or permission to use land or use or erect any building or other structure for any purpose,

to subject the approval of that application to a condition that is not prescribed by the scheme or by by-law or reasonably required by the re-zoning of the land, the opening of the new road, the subdivision of the land, the use of the land or the use or erection of the building or other structure in respect of which the application relates."

There is no relevant scheme or bylaw in the present case so that the Council had power to impose the conditions only if they were "reasonably required by ... the subdivision of the land". By s. 28(3) of the *City of Brisbane Town Planning Act* 1964 (Q.), as amended, which is applied by s. 34(15) of the *Local Government Act*, an appeal from a decision of the Local Government Court lies only on the ground of error or mistake of law or want or excess of jurisdiction.

The learned District Court judge made findings of fact in a passage so important that it is necessary to cite it in full. He said:

"Davidson Road, not forgetting that it is in a rural area, carries a considerable volume of traffic. It would seem that the volume of this traffic has increased steadily over the years. The increase is due to a substantial extent to more concentrated use of the land in the area for agricultural rather than other, particularly grazing, purposes. I gather that owners of cultivated blocks largely do not live on the block but live in Tully and travel with staff to their blocks. It is thought this would be the likely pattern on the subject land if this subdivision goes ahead. However, whether that turns out to be the case or not, development of this subdivided land, in my view, can do none other than increase traffic on Davidson Road and wear and tear on the bridge, which is now about thirty years old.

The appellant [that is, the present respondent] argues that increased traffic after development under the subdivision cannot be related to the subdivision because if the appellant itself put the whole area under crops there would still be the same trucks carrying the same fertiliser, etc., to the land and the same trucks carrying produce to market as there would be after subdivision. To put it another way, the land will grow the same number of melons or bunches of bananas if worked as a unit or as up to nineteen separate units. While largely there is substance in these assertions, the argument ignores the point that in fact the appellant not only does not, with the exception of one small area, crop the land; it has no intention of so doing. It wants to subdivide and sell nearly all the blocks. It therefore seems clear to me that the development of the land by way of subdivision will directly create more wear and tear on Davidson Road and the bridge. Indeed, it is hard not to accept the evidence from the shire engineer that traffic generated by the subdivision will significantly shorten the life of the bridge."

Having made those findings, his Honour went on to state the conclusion which he reached in the following words:

"Despite what I have been saying, and however sympathetically one may be disposed to the financial and political problems of the respondent [that is, the appellant shire council] in its shire, I do not think these conditions complained of can be allowed to stand. No attempt is made to justify such conditions on the basis, of being necessary for access to the subdivision or for drainage purposes; nor could it be. The benefit from the imposition and the carrying out of such conditions would not be enjoyed exclusively by persons connected with the subject land: it would be by those persons and generally by other members of the public who use Davidson Road and the bridge. In no relevant sense can it be said that there is some requisite nexus, identification or relationship between the development and the purpose to which the contribution is to be put or the moneys expended on sealing Davidson Road; nor can it be brought within other similar terms used in the cases. It seems to me that the conditions complained of are not within power and cannot stand."

In the Supreme Court the learned judges who constituted the majority of the Full Court concluded that upon analysis of the judgment of his Honour Judge Given it appears that his Honour was applying the test whether the conditions fairly and reasonably related to the subdivision and that he answered that question is favour of the respondent. On the other hand, Matthews J., who dissented, considered that the judge appears to have wrongly thought that the conditions could not be imposed unless they were necessary for access or drainage purposes or unless the benefits arising from their imposition would be used exclusively by persons connected with the subject land.

The statutory test that has to be applied by a local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce — for example, in a case such as the present, the increased use of the road and of the bridge — and to impose such conditions as appear to be reasonably required in those circumstances.

In the present case, the learned District Court judge found, amongst other things, that traffic on the road and wear and tear on the bridge would be increased by the subdivision of the land. It is difficult to reconcile with that finding the statement that there is no requisite nexus, identification or relationship between the development and the purpose to which the contribution is to be put or the moneys expended on sealing Davidson Road. There seems to be an obvious connection between the effect of a subdivision which causes an increased use of roads and bridges and a condition that the subdivider should, by making a reasonable contribution, assist in defraying the costs incurred in meeting the consequences of the extra wear and tear that is expected. Notwithstanding his Honour's earlier reference to the principles laid down in the authorities, and his later citation of cases, his remarks support the view that when he said that the conditions were not within power, he meant exactly what he said. It does appear that he considered that the conditions could be imposed only if they were necessary to provide access or drainage to the land or if they provided a benefit to the land which would be enjoyed exclusively by persons connected with the land. This is a test more stringent than the law allows and in applying it his Honour erred in law.

For those reasons I consider that the appeal should be allowed and that the matter should be referred back to the Local Government Court to decide, in the light of this judgment, whether those or any other conditions are reasonably required by the subdivision.

MASON J. I agree.

WILSON J. I agree.

BRENNAN J. I agree.

DAWSON J. I agree.

Appeal allowed with costs.

Judgment of the Full Court of the Supreme Court set aside and in lieu thereof order that the appeal to that Court be allowed, with costs and that the judgment of the Local Government Court be set aside and that the matter be referred back to the Local Government Court to decide, in the light of the judgment of the High Court, whether the conditions imposed by the appellant Council or any of those conditions are reasonably required by the respondent's subdivision.

Solicitors for the appellant, *Connolly & Co.*

Solicitors for the respondent *Macartney.*

[LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES]

McCALDEN AND ANOTHER v. NEWCASTLE CITY COUNCIL

[J. M. W. FITZ-HENRY (Assessor)]

Aug. 4; Sept. 28, 1983

No. 10618 of 1982

Costs — Planning appeal — Planning authority acting contrary to officer's advice — Planning authority's refusal to consent unsustainable — Costs ordered against planning authority.

The appellants sought planning consent for the building of two townhouses on land in a residential zone. The appeal site is a battleaxe lot a substantial part of which is at the rear of three houses. Access to that rear part is obtainable by a rightofway.

The application was advertised, and local residents objected. The respondent's town planner examined all objections and reported to the respondent that none was of substance. The town planner's recommendation was that consent be granted. The respondent, however, resolved to require a reduction in the height of the roofline. The appellants submitted an amended plan conforming to that requirement. The respondent's town planner reported favourably on the amended application, but the respondent resolved to refuse consent. The applicants appealed.

Held: (1) The respondent's case was at best an attempt to preserve traditional suburban backyards.

(2) The assumption that the backyard of a house should be available for outdoor living without let or hindrance is under challenge in the community.

(3) When redevelopment involves backyard areas careful design is necessary to avoid undue interference with neighbours' privacy, sunshine, and outlook.

(4) That careful design has been achieved by the appellants.

(5) By choosing to ignore the professional advice of its officer and to yield to persuasion with little foundation in fact, the respondent was guilty of dereliction of duty.

(6) Consequently, the respondent did not act in good faith in refusing consent.

(7) Accordingly, the respondent should be ordered to pay the appellants' costs.

PLANNING APPEAL.

Judgment reserved.

Sept. 28.

J. M. W. FITZ-HENRY. This is an appeal under s. 97 of the *Environmental Planning and Assessment Act* 1979, against Newcastle City Council's deemed refusal under s. 96(1) by reason of its neglect and delay to give a decision, within the prescribed period, in respect of a development application for two townhouses on part lot 76 sec. 6 (now registered as lot 761), being premises known as Nos 7 and 9 off Union Street, Cooks Hill, Newcastle.

The powers of the court for the purpose of disposing of the appeal are contained in s. 39 of the *Land and Environment Court Act* 1979. The Chief Judge, pursuant to s. 36(1) of the Act, has directed that the proceedings be heard and disposed of by an assessor.

The relevant environmental planning instrument is *Northumberland Local Environmental Plan No. 1*, gazetted 8th August, 1981. The zoning is residential 2(a). The proposed development is permissible with consent and the applicants are the owners of the property.

Development control plan No. 3, "Code for the control of residential flat development in the City of Newcastle" was adopted by the respondent council on 1st December, 1980, pursuant to the provisions of s. 72 of the *Environmental Planning and Assessment Act* 1979. In the introduction, it is stated:

> "The code is intended to act as a guide to developers indicating the standards that will, in the majority of cases, be required by council. It is not possible to cover every possible development need in a single code, so each case will be determined on its merits and compliance with the code will not lead to automatic approval."

The development control plan was designed to achieve a number of goals which are listed as follows:

"1. To maximise the amenity of residential environments created by multiple dwelling developments.
2. To encourage variety in the size, shape and form of multiple dwellings.
3. To maximise opportunities to increase dwelling density so that existing resources and utilities will be used with greater efficiency.
4. To ensure wherever practicable, that future developments do not intrude upon the existing character of an established area.
5. To minimise conflicts between multiple and detached dwellings adjacent to each other."

The subject land is a battleaxe block which has a total area of 543.5 m.^{2}. It is situated at the rear of three dwellings known as Nos 91-95 Bull Street which lie to the north, and behind Nos 39-45 Union Street which are on the eastern side of the road opposite the Cooks Hill Fire Station. The Commonwealth Hotel occupies the corner block between No. 39 Union Street and No. 95 Bull Street. A rightofway 7.79 m. wide adjacent to the southern boundary of No. 45 Union Street comprises part of the subject land. This, together with an adjacent and parallel rightofway of the same width to the south, provides laneway access 3.58 m. wide to Union Street. Nos 3 and 5 "off" Union Street on a similarly shaped battleaxe block adjacent to the south also depend on this laneway for access. The dimensions of the subject land excluding the access handle are approximately 20.4 m. from south to north and 23.6 m. from east to west. It was occupied for many years by two semidetached single-storey cottages, facing west towards the backyards of Nos 39-45 Union Street. These were demolished by the respondent council in 1975 after falling into disrepair. The land is presently vacant, and, being level and unobstructed, is treated as wasteland and used for car parking and rubbish dumping. The access lane does not appear ever to have been sealed, but is traffickable. Nos 3 and 5 off Union Street are old weatherboard semidetached dwellings of one storey, which face north towards the subject land, and back onto the northern side boundary of No. 53 Union Street, which is owned by Mr J. Fairlie, who appeared as witness for the res-

pondent council, as did Mr A. Anderson of No. 91 Bull Street to the north of the subject land, Mr R. G. Kimber of No. 34 Corlette Street, to the east, whose northwestern rear corner abuts on the southeastern corner of the subject land, and Mrs Pamela Casey, the owner of No. 49 Union Street two doors south of the laneway access to the subject land.

Union Street is one of the main roads leading south out of the Newcastle City Centre which is within easy walking distance. This area has long been developed for residential purposes with a mix of one and two-storey dwellings, in the form of terrace houses, semidetached dwellings, and detached housing. Much restoration and renovation has taken place over recent years, with the recognition of the inherent worth of these inner city properties. It is not surprising that owner-residents, like others in similar circumstances elsewhere, are anxious to maintain the standard they themselves have set and the investments they have made in this area.

Application for approval was originally made by development application No. 462/81 lodged 20th October, 1981, for development described as two, three-bedroom townhouses of two-storeys, with studio attic above. This was depicted on a plan prepared by Tudor Planning Studios dated 1981. The roof appears to have been designed to have a pitch of 35 degrees and, scaling from the plan, a maximum height above ground level of 10 m. The two dwellings were depicted as identical in mirror reverse, facing south. The setback from the southern boundary was proposed to be 3.79 m. and the building was positioned on the rectangular site in such a way as to be equidistant from the side boundaries. Fenestration on eastern and western sides was minimal, while that on southern and northern elevations was no more than one would expect in terrace house design, with the exception of the attic window facing towards the north. The proposal was designed to complement the style of buildings of merit in the vicinity and with awareness of council's development control plan adopted ten months before. The two dwellings proposed in the application comprise "large" dwellings, as defined in the development control plan, having a floor area exceeding 80 m.^{2} exclusive of all external wall thicknesses. Each has a site area of more than 190 m.^{2} as required by the plan and is within the maximum site coverage of 40 per cent. It was common ground between the parties that the development proposed was in accordance with the precepts of the development control plan.

In accordance with council's adopted policy in respect of applications to carry out development of this nature, the owners and occupiers of nearby premises were informed by letter of the proposal and invited to inspect the plans and make any representations they wished within twentyone days from 4th November, 1981. Objections were made by or on behalf of the owners and/or tenants of premises Nos 45, 47, 49, 51 and 53 Union Street, No. 91 Bull Street and Nos 34, 36 and "4 off 38" Corlette Street. In his report to the respondent council, the town planner summarised the objections as relating to overcrowding, loss of privacy, excessive height, exacerbation of existing parking problems, narrowness of access driveway, use of access-way for provision of water supply,

additional noise, creation of a precedent in respect of existing "back-yard" lots, and extension of the development unfavourably regarded on the corner of Bull and Corlette Streets, (being recently completed town-houses approved to density and open space standards applying under the former flat code). The town planner carefully examined all objections lodged and found none to be of substance. Approval was recommended, subject to certain conditions, including an increase in the setback of the proposed dwellings on the southern side boundary from 3.79 m. to a minimum of 5 m. (measured from the verandahs of Nos 3 and 5 Union Street) to ensure that an adequate turning area would be available for vehicles. Subsequently, however, following an inspection of the site and conference with some of the objectors, the respondent council dealt with the application on 15th December, 1981, by resolving:

> "The report be received, the application be not approved in its present form but the applicant be advised that favourable consideration would be given to an amended plan which provided for the height of the roofline to be reduced so that any space above the ceiling could be used for storage purposes only."

An amended plan, again prepared by Tudor Planning Studios, dated 7th February, 1982, was then submitted. This shows reduction in the pitch of the roof to an angle of approximately 30 degrees; the deletion of the attic windows; the lowering of the building to a maximum of 9 m. above groundlevel, and a setback of 5 m. from the southern boundary.

By letter dated 4th November, 1981, the respondent council had previously sought the views of the Hunter District Water Board regarding the adequacy of water and sewerage facilities in the area to accommodate the increased demand likely to be generated by the proposed development subject of this appeal as some objectors had raised this as a potential difficulty. By letter dated 14th December, 1981, however, the board had replied that it had no objection to the proposed development as water and sewerage facilities were available for connection. The board did state, however, that a contribution towards the cost of upgrading the water supply and sewerage systems would be required from the developer, and it requested that development approval by the council:

> "Should be provisional that no development on the land shall be carried out unless and until arrangements satisfactory to the Hunter District Water Board had been made for the provision of adequate water and sewerage services to such land".

Upon receipt of the amended plan the respondent council once again sought the advice of the board by letter dated 7th May, 1982, and the response dated 14th May, 1982, from the board stated that

> "The board has no objection to the proposed development. Water and sewerage facilities are available for connection. There are no requirements as the development of two townhouses on the above site are taking the place of two cottages which were demolished a few years ago."

The objectors to the original proposal had been advised by the respondent council by letter dated 7th January, 1982, that favourable consideration would be given to an amended plan which provided for the height of the roofline to be reduced so that any space above the ceilings could be used for storage purposes only. Prior to the receipt of the amended plan on 2nd February, 1982, three petitions dated 25th January, 1981, addressed to the Lord Mayor, the town planner, and to the Deputy Lord Mayor were received. These were organised by Mr R. G. Kimber, of No. 34 Corlette Street, one of the principal objectors to the original proposal. The court particularly notes that these petitions were signed prior to the receipt by council of the amended plans and, as brought forward by evidence in crossexamination, few of the signatories had in fact viewed the plans but had merely acted on hearsay. Mr Kimber described himself in writing on the documents as the "convenor", and is responsible for the derogatory comment in the headnote which the petitioners duly signed.

On 5th February, 1983, a further letter of objection and a petition was sent to the town clerk by Mr Kimber that took no cognizanse of the fact that the applicant had acted entirely in accordance with council's resolution as conveyed in its letter to him of 7th January, 1982. Despite the number of two-storey houses in the vicinity it seems that the objectors would now only agree to single-storey development on the site; but considered even that to be unnecessary because "there is no shortage of accommodation in this area." For reasons unexplained it was also stated that "this congested type of development is only rating the genuine house owner out of the area".

What exactly happened in the ensuing months was not made clear to the court. One can only presume that Mr Kimber and certain of the other objectors were not inactive behind the scenes. The matter was dealt with inconclusively by council on 8th June, 1982, and referred back for further consideration. It was not until 20th July, 1982, that the town planner once again reported to council on the matter, dealing at some length with the objections as lodged. Notwithstanding his recommendation for approval, subject to conditions, (which are acceptable to the applicant), the respondent council at its meeting held 20th July, 1982, resolved:

> "The report be received and as the council is aware of the impact on the area of further development in the immediate vicinity of existing dwellings and any further intrusion of multi-storey buildings would seriously affect the amenity of the neighbourhood, the development be restricted to a single-storey."

This advice, which is at odds with that given previously, was conveyed to the applicants by letter dated 3rd August, 1982. This appeal was then lodged on 5th November, 1982.

[The assessor referred to aspects not calling for report, and continued:]

The best that can be said about the opposition to this proposal is that it amounts to a spirited defence of traditional suburban backyards, where it is not difficult, with goodwill, to maintain an acceptable level of privacy

between houses. Generations of Australians have taken for granted that the backyard should be available for outdoor living as they choose, without let or hindrance. This assumption is now under challenge. There is greater pressure than ever before for urban consolidation, particularly in conveniently situated inner city residential areas, involving both restoration and redevelopment. Where redevelopment involves backyard areas in the building process, or in this case what is perceived by some of the objectors as wholly backyard area, careful design is necessary to avoid undue interference with neighbours' privacy, sunshine, and outlook. The court is satisfied that here, this has been achieved. Therefore, the court concludes that the applicant's proposal is reasonable, and that the appeal should be upheld. The court has not been persuaded that the objections are such that the proposal should be refused.

At the conclusion of the hearing, Mr P. McClellan made application for costs on behalf of the applicants. He claimed that his clients had experienced extraordinary delay in their attempts to obtain approval for this modest development. The development application had been lodged as long ago as October, 1981. They had readily accepted the advice provided by the respondent council by letter dated 7th January, 1982, and had submitted the amended application promptly on 2nd February, 1982. Notwithstanding the favourable recommendations of its officers the respondent council had taken until 3rd August, 1982, to advise his clients that the development should now be restricted to single-storey. As this was not, in their opinion, a practical proposition, an appeal to this court was necessitated. For the respondent council, Mr Dunn claimed that council had acted responsibly in this matter, that it was not bound by the recommendations of its officers, nor obliged to approve developments that conformed with the development control plan. In his submission, he stated that, as a public body, the council must consider the interests of those most concerned, and in this he was referring to the objectors and not to the applicants.

The court is of the opinion that there has been a dereliction of duty by council in that it chose to ignore the professional advice of its officers and yield to persuasion based on premises which the evidence has shown had little foundation in fact; and consequently that it did not act in good faith in exercising its discretion to withhold consent to this application. (See *Kremer & Associates v. North Sydney Municipal Council* (1982) 47 L.G.R.A. 209). With the concurrence of the Chief Judge under s. 69(8) of the *Land and Environment Court Act* 1979, the court will order that the respondent pay the applicants' costs of and incidental to the proceedings, and that in default of any agreement, the costs be taxed by the registrar.

Appeal allowed.

P. McClellan (instructed by *Braye Cragg Cohen & Co.*) for the appellant applicants.

T. Dunn, solicitor (of *Harris Wheeler Williams & McKenzie*) for the respondent local planning authority.

K.H.G.

PH. S. 94

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

APPEAL NUMBER	10093 of 1985	DECISION DATE	24th September, 1985
APPLICANT	Block Concrete Industries Pty Ltd		
v			
RESPONDENT	Nambucca Shire Council		
HEARD BY	Assessor O'Neil		
HEARING DATE	26 August 1985		

REPRESENTATIVES

Applicant: Mr W.R. Davison, Barrister, instructed by Mr E.C. Abernethy, Solicitor.

Respondent: Mr J. Hannaford, Solicitor of Sly & Russell.

ACT/SECTION Environmental Planning and Assessment Act, 1979; s.97.

Appeal No: 10093/85

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Assessor O'Neil
Decision date: 24.9.85

BLOCK CONCRETE INDUSTRIES PTY LTD

v

NAMBUCCA SHIRE COUNCIL

JUDGMENT

This matter came to the Court by way of an appeal under s.97 of the Environmental Planning and Assessment Act, 1979, against the deemed refusal by the respondent Council of a development application for consent to the use of land at Lot 141 DP 700891, Old Coast Road, Newee Creek for the preparation and sale of ready mixed concrete.

The land is the subject of development approval for the purposes of a concrete products factory, the approval being originally granted on 16 November 1981 and modified on 18 May 1982.

The Court was told that the concrete products factory has been established on the land and the applicant company is in process of building up its business of manufacturing and selling concrete building products.

In the meantime it sees a market for the sale of ready mixed concrete and can use part of its land and facilities to meet this market.

Initially the company disputed the need for a development application for the ready mixed concrete use claiming that the development approval for

a concrete products factory was wide enough to cover the preparation and sale of ready mixed concrete.

A development application was lodged on 20 December 1984 and in the absence of determination of the application by the Council an appeal was lodged with the Court on 1 March 1985.

In the event the Council determined the application on 25 March 1985 by granting consent to the preparation and sale of ready mixed concrete subject to twelve conditions.

At the commencement of the hearing which was held at Coffs Harbour Court House on 26 August 1985 the parties advised the Court that the dispute was limited to three of the twelve conditions attached to the Council's approval.

The disputed conditions are those numbered 4, 6 and 11. The Court will deal with than seriatim.

Condition No. 4 is as follows:-

> "4. The provision, by the applicant, at his expense, prior to occupation of the development, of the following works and services in accordance with Council's engineering standards, to the satisfaction of the Shire Engineer.
>
> Roof and stormwater drainage shall be trapped within the property and piped to the nearest satisfactory watercourse. No stormwater or seepage water shall flow into or across public roads, public reserves or adjacent private property. Where seepage is in evidence adequate subsoil cutoff drains shall be provided and the discharge piped to Council's drainage system."

The applicant's principal contention against this condition is that no such condition was attached to the 1981 approval, as modified in 1982, to the concrete products factory use. It sees the proposed ready mixed concrete activity as an integral part of the concrete products proposal and

thus disputes the need for Condition No. 4 to be attached to the ready mixed concrete approval.

The applicant notes that the earlier approval requires that it obtain the approval of the State Pollution Control Commission and compliance with that body's conditions under the Clean Waters Act. It accepts this requirement and claims that it is working towards obtaining the Commission's approval. It sees this as sufficient.

The applicant may be working towards obtaining the necessary approvals or licences from the State Pollution Control Commission. This however does not obviate the necessity of meeting the respondent Council's requirements as the local government authority regarding disposal of roof and stormwater drainage.

In passing it might be noted that the ready mixed concrete activity would require a greater use of water than the manufacture of concrete building products.

The Court was not persuaded by the evidence that Condition No. 4 should be set aside.

Condition No. 6 is as follows:-

> "6. Pursuant to the provisions of Section 94 of the Environmental Planning and Assessment Act, the applicant shall pay to Council a contribution of $800 per annum for the maintenance and repair of Council's roads for 1985. This amount will be reassessed on 1st January each year of operations and may be varied at Council's discretion, based on the C.P.I. and is to be paid on 1st January of each year."

Most of the argument at the hearing went to this condition.

At the hearing the Court was told by the Shire Engineer who gave evidence for the respondent Council that the amount of $800 mentioned was an out-dated figure based on figures used in an approval granted in 1982

which although increased since then in accordance with C.P.I. variations did not truely reflect current road maintenance and repair costs.

A more realistic figure based on current costs and calculated in accordance with a formulae related to estimated truck movements and distances travelled by the applicant's principal vehicles on Council's roads was said to be $20,365 per annum if calculated on the basis of trucks only or $2078 per annum if calculated on the basis of all vehicles, using the roads.

The Shire Engineer said that whilst he would now recommend $20,365 per annum for the purposes of Condition No. 6, such a figure had not been considered by his Council and he would expect that the Council would be more likely to require the lesser figure of $2078.

It was not suggested that the contribution required under Condition No. 6 would go towards constructing any particular road or bringing any particular road, that may be used by the applicant's trucks, to any particular standard. Rather the contribution was seen as meeting the cost of general wear and tear on Council's roads caused by the company's trucks bringing raw materials to its plant and dispersing the finished ready mixed concrete.

Presumably such contribution would continue to be paid into the indefinite future adjusted each year in accordance with the C.P.I.

Irrespective of the figure adopted, either the $800 originally proposed or the $20,365 which would now be recommended by the Shire Engineer or the $2078 which the latter thinks would now be sought by the Council, the Court does not see a contribution for continuing repair of Council roads as being a legitimate use of the power available under s. 94 of the Environmental Planning and Assessment Act. Rather the Court would expect that the continuing repair of Council's roads would be met, insofar as the Council's responsibility in this area is concerned, from rate revenue.

Consequently the Court will set aside Condition No. 6

Condition No. 11 is as follows:-

"11. Hours of operation being restricted to between the hours of 7.00am to 5.00pm Monday to Friday inclusive."

The applicant pointed out that the approval for the concrete products factory permitted operations from 7am to 7pm Monday to Friday with provision for operation outside these hours with Council's approval on limited occasions to meet certain specified circumstances. The applicant submitted that the ready mixed concrete activity should be permitted to operate under similar conditions as to hours of operation.

No real argument was put to the Court as to why the ready mixed concrete plant should ever operate outside traditional working hours.

On the other hand the hours proposed in Council's condition of 7am to 5pm do seem unduly restrictive particularly during the months of daylight saving and the Court will change this condition to provide that hours of operation be 7am to 7pm Monday to Friday.

There were no submissions as to costs.

Accordingly the Court makes the following orders:-

1. With respect to the conditions attached to the respondent Council's determination dated 25 March 1985 of Development Application No. 975 for the preparation and sale of ready mixed concrete on land known as Lot 141 DP 700891, Parish of Nambucca, Old South Coast Road, Newee Creek.

   a) Condition No. 4 of the said determination is confirmed;

   b) Condition No. 6 of the said determination is set aside; and

c) Condition No. 11 of the said determination is set aside and is replaced by the following condition:-

"Hours of operation being restricted to between 7.00am to 7.00pm Monday to Friday inclusive".

2. No order is made as to costs.

3. Exhibits may be returned.

F.J. O'Neil,
ASSESSOR.

cc.

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

No: 10535/86

Coram: Cripps J

20 April 1988

JUDGMENT

GLENBIN PTY. LIMITED

v.

LISMORE CITY COUNCIL

His Honour: On 5 February 1986, Rick McKiernan, on behalf of Glenbin Pty. Limited, made application to the Lismore City Council for development consent for a multiple occupancy development on Lot 5 DP625836 Stangers Road, Stony Chute.

On 3 October 1986, the Council granted its consent for "a multiple occupancy community development to accommodate a maximum of fifty five (55) persons to be housed in eleven (11) living units" subject to a number of conditions the relevant ones being as follows:

> "4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

> 8. Buildings may be erected at sites 1 - 10 on the amended plan subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling".
>
> 14. Section 94 contribution of $2000 per dwelling unit. The whole contribution applicable to this application shall be paid before the first building approval is released".
>
> 15. An additional contribution for the upgrading of the intersection of Stangers Road with the main road 141A at fixed cost of $15,000. This amount is payable before the first building approval of this application is released. The intersection design is subject to Department of Main Roads approval to ensure their standard is maintained".
>
> 16. All access to the land for the purpose of access to the dwellings shall be by means of the unnamed public road off Stangers Road, north of Lot 2 DP625836. In this respect, the company shall not object if the right of way over Lot 1 is proposed to be removed by its owner".
>
> 18. In addition to the access banks shown on the plan, an access track generally along the contour shall be constructed from the road near the "cottage" in Hamlet 3, westward to connect with the track shown on the northern boundary of Hamlet 2".

On 29 November 1986, Glenbin appealed to the Land and Environment Court nominating the following ground of appeal:

> "Conditions 4, 14, 15, 16 and 18 attached to Notice of Determination of a development application (No: 86/167) issued by the Respondent on 3 October 1986".

Notwithstanding that the Developer intended appealing against certain conditions only, the effect of lodging the appeal is that the consent granted by the Council, which became effective and operated from the date endorsed upon the Notice,

ceased as from 29 October to be effective (s.93(2) of the Environmental Planning and Assessment Act). On appeal, the Court has all the functions and discretions of the Council. The appeal is de novo and it is open to the Court to grant consent conditionally or unconditionally or to refuse consent. The appeal is to be determined by reference to the circumstances, including the law, as it exists at the time of the appeal.

After the grant of development consent, the Minister made the North Coast Regional Environmental Plan, 1988, (18 December 1987) and State Environmental Planning Policy No.15 - Multiple Occupancy of Rural Land (20 February 1988). The North Coast Regional Environmental Plan (which applies to Lismore) defines "multiple occupancy" to mean:

> "the erection of two or more detached dwellings on an unsubdivided allotment of land where the allotment of land comprises the principle place of residence for the occupants who occupy the land on a communal basis".

The objectives of the REP, with respect to rural housing, are to ensure opportunities for rural housing and to provide for multiple occupancy "in some circumstances". Councils affected are obliged in the preparation of local environmental plans to prepare a "rural land release strategy" for the whole of its area. The local environmental plan is to be consistent with strategies identified, one of which is:

> "ensure that development for rural housing meets the full cost of all necessary services and that development takes place in accordance with the programme for the provision of services".

SEPP No. 15 does not define multiple occupancy. The aim of the Policy is:

> "(a) to encourage a community based and environmentally sensitive approach to rural settlement;
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> (b) to enable -
>
> (i) people to collectively own a single allotment and use it as their principal place of residence;
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> (ii) the erection of multiple dwellings on the allotment and the sharing of facilities and resources to collectively manage the allotment; and
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> (iii) the pooling of resources, particularly where low incomes are involved, to economically develop a wide range of communal rural living opportunities, including the construction of low cost buildings ... ".

A major objective of the Policy is to facilitate multiple occupancy development "preferably in a clustered style, in a manner which protects the environment". It provides that when processing development applications for multiple occupancies, the council must consider 18 specified matters (over and above the 20 heads of consideration in s.90 of the Environmental Planning and Assessment Act). In particular, it provides that a council shall not consent to an application unless it has taken into consideration among other matters:

History of the Application

The Court was informed that the present application was of significance to the Council of the City of Lismore, not merely because of the particular development the subject of the appeal, but because, so it was said, the outcome of the litigation would be of significance for the Lismore Council in the administration of its planning powers and, in particular, in the application of SEPP No.15. In recognition of the claimed importance of the proceedings to the Council the Court determined to hear part of the evidence in the Lismore area and the balance in Sydney. Three days before the matter was due to commence at Byron Bay, the Court was informed that the Developer would no longer be represented by lawyers and that the Council, pursuant to a policy of "matching" Developers' representation, would also not be represented at the hearing.

Mr. Lambert, a resident of Tuntable Falls (another multiple occupancy development at Nimbin) sought and obtained leave to represent Glenbin and the Council's Planner, Mr. Reynders, was granted leave to represent the Council. I viewed with some surprise the conduct of the Council in asserting that, on the one hand, it wished to explore in detail the planning and legal implications inherent in the administration of SEPP No.15 and, on the other, its resolution to "match" what it apparently believed to be the legally unskilled representation of the Developer. As events turned out, Mr. Lambert and his team

demonstrated considerable legal ability both in the art of advocacy and in their understanding of environmental law and practice.

The Council was represented by Mr. Reynders. Mr. Reynders is the Chief Planner of the Lismore Council. He had prepared a Report which was intended to be tendered in the proceedings. He is a qualified planner and he informed me he proposed calling himself as an expert witness. In cases of complexity it is generally unsatisfactory that expert witnesses and advocates be one and the same. But in the present case, the self-evident problems of that arrangement were exacerbated by the circumstance that Mr. Reynders' expert views did not coincide with the submissions of the Council and I was continually required to make inquiries of Mr. Reynders whether views he was advancing from the Bar table were submissions on behalf of the Council or whether they were views which he held as an expert witness. By way of illustration, although I repeatedly asked for information on the subject, I never received a satisfactory answer to the question of what was the attitude of the Council upon the assumption that some of the conditions sought by the Council would or could not be imposed by the Court. It was clear the Council was prepared to grant development consent subject to a number of conditions. But I never found out what its attitude was in the event that I considered it inappropriate to impose one or other disputed conditions.

"(a) The means proposed for establishing land ownership, dwelling occupancy rights, environmental and community management will ensure the aims and objectives of this Policy are met.

(b) The area or areas proposed for erection of buildings including any proposals for the clustering of buildings.

(c) The area or areas proposed for community use (other than areas for residential accommodation and home improvement areas).

(d) The need for any proposed development for community use that is ancillary to the use of the land.

(e) The availability and standard of public road access to the land ... ".

Home improvement area is defined to mean an area of land not exceeding 5,000 m^2 around a dwelling. The Policy provides that except in limited circumstances, the land the subject of a multiple occupancy development may not be subdivided.

The consent granted by the Council was for the construction and use of 10 home sites located throughout the subject land. A map (Exhibit C), identifying these sites was forwarded to the Council prior to the grant of development consent after an earlier plan submitted by the Developer and disclosing 11 sites was rejected. It was a condition of the development consent that the buildings be erected on the sites nominated in the map, Exhibit C (see Condition 8).

The subject land is on Stangers Road, Stony Chute, and is approximately 55ha. It slopes from north to south and

commands impressive views of the surrounding area. The lower part of the land is timbered and the upper parts have been cleared for grazing.

Upon the matter coming on for hearing, Council submitted amended conditions. It now seeks, in lieu of the old condition 8, the following condition:

"(8) All dwellings are to be erected in a cluster or in clusters and are to have a home improvement area not exceeding 5000m^2 around each dwelling. The Chief Health Surveyor is to be satisfied that the precise location of each dwelling is stable and suitable for the location of a dwelling. Action is to be taken to divert surface drainage including road drainage to the satisfaction of the Chief Health Surveyor and Soil Conservation Service of New South Wales".

It submits that Conditions 14, 15 and 16 should remain as originally imposed. If, however, the new Condition 8 is imposed, it no longer presses Condition 18. If the dwellings are clustered in accordance with the requirements of the new Condition 8 and access is from the western end of the subject land, the Council concedes there is no need for the access track referred to in Condition 18. If, however, houses are not required to be clustered, the Council submits I ought impose Condition 18 for access to houses on the eastern side of the property.

In making the above comments, I do not wish to denigrate the efforts of Mr. Reynders to satisfy the Court's requirements to the best of his ability. Indeed, bearing in mind the dual nature of his appearance in the Court, he acquitted himself well. But he is not a lawyer and I would have thought, with respect, that in complicated cases the advocate should not be the expert witness even if (unlike the present case) the opinion of the expert witness and the submissions of the Council coincide. As I have said, where they do not, the problems are exacerbated.

For reasons which I will mention later, I am of the opinion the development consent should be granted subject to conditions. I do not propose to impose the conditions suggested by Council. It therefore is unnecessary for me to consider, for example, what I would have done had I determined, for example, that it was inappropriate to allow access over adjoining land but that I was powerless to prevent it. I have taken into consideration all of the matters referred to in cl.9 of SEPP No.15 and those matters of relevance to the development set out in s.90 of the Environmental Planning and Assessment Act. I have taken into account the lack of "the clustering of buildings". I mention this matter specifically because it appeared to be a matter of considerable importance to Mr. Reynders who, I assume, was making a submission on behalf of the Council. The Council believes, apparently, that unless such a requirement is imposed, it may be overly susceptible to pressure in the future to rezone the land so as to permit subdivision. It is not clear to me why

the Council is now concerned about its diminished ability to resist what I must assume to be a future inappropriate application for rezoning for subdivision. Seventeen months ago, the Council granted development consent and made it a condition of the consent that the dwellings be located where they are now proposed to be. The only assumption I am prepared to make about Council's future attitude is that if an application for rezoning to permit subdivision is made, the Council will consider it on its merits and determine the application in accordance with its statutory obligations. I note that SEPP No.15 does not require clustering; it merely expresses clustering as a "preference" and requires a council or the Court to take into account "any proposals for the clustering of buildings".

I have taken into account the means proposed for the establishment of land ownership, dwelling occupancy rights, environmental and community management of the development. The land will be owned by Glenbin. It is not a large multiple occupancy development. Each shareholder (10 in all) will be entitled to build a house on the area nominated in plan, Exhibit C. Shareholders will have the right to occupy the dwellings they erect and will be entitled, subject to approval by Glenbin, to sell their shares. However, in this regard, the price payable for their shares will not include any "land increase" component and the shares may not be assigned without Glenbin's approval.

Before turning to the disputed conditions, I note that Condition 4 is now no longer in dispute. The condition requires the land to be upgraded and made safe in accordance with recommendations of the Soil Conservation Service of New South Wales and the condition will therefore be attached to the consent.

Disputed Condition

Condition 8

As I have said, development consent was granted by the Council after the Developer, at the Council's request, withdrew its earlier plan and substituted an amended plan nominating the 10 sites proposed for the erection of houses. After development consent was granted but before the hearing of this appeal, certain building work was undertaken on the sites nominated. Although it is true that a hearing before this Court is de novo and that the Court must take into account the circumstances and the law as they are at the date of the appeal, I am not bound to ignore the events that have taken place between the date of the consent and the date of the hearing of the appeal. It was clear to all parties that Glenbin was appealing against conditions of consent. At the time it lodged its appeal, Condition 8, as imposed by the Council, was not in dispute. Condition 8 was included to give effect to the requirement of the Council that the houses on the land be set out on the map, Exhibit C. The new Condition 8 requires the houses to be "clustered" at one end of the site.

In my opinion, I am entitled to take into account as a "circumstance of the case" within the meaning of s.90 that during the suspension of the operation of the development consent by reason of the appeal being lodged to the Court (s.90(7)) Glenbin reasonably believed that it was doing no more than carrying out the development for which it had consent. As I have said, SEPP No. 15 does not mandate cluster development; it merely urges it as a preference. I have visited the site and have seen where the houses are intended to be located in accordance with Exhibit C. The Council could not point to any environmental damage that would result by reason of the houses being dispersed - at least none that could not adequately be addressed by appropriate conditions. Indeed, its reason for requiring "clustering" was its belief that to cluster the development would be to inhibit what it considered to be possible or probable future pressure for subdivision of the land. However, as I have said, SEPP No.15 provides that land the subject of multiple occupancy development shall not be subdivided. Accordingly, the subject land may not be lawfully subdivided unless SEPP No. 15 is amended and the Council prepares a new Local Environmental Plan. The Council relies on the circumstance that recently it has succumbed to representations to make a new local plan to allow the multiple occupancy development at Billen Cliffs to be subdivided and resolved to make a plan to permit subdivision of the land. But I do not regard that circumstances as giving any support to Mr. Reynder's submissions in the present case. I can only conclude that the Council's decision to rezone the land at Billen Cliffs

to allow subdivision proceeded upon a proper exercise of its planning power. I am not prepared to assume that the Council has embarked upon a plan making process dictated by pressure to which it ought not have succumbed. It seems to me, therefore, that I should not change the form of the present development for that reason, particularly, as I have said, it is the form chosen by the Council 16 months ago.

Conditions 14 and 15

On 11 January 1988, the Minister for Environment and Planning published a direction pursuant to the provisions of s.94A of the Environmental Planning and Assessment Act directing, inter alia, the Lismore City Council that, in the case of a condition of development consent referred to in s.94 requiring the payment of monetary contribution in respect of land within its area and being land to which State Environmental Planning Policy No.15 applies, a maximum amount of any such contribution shall be $1950 per dwelling unit. It follows, in my opinion, that however the money is to be spent, it is not open to the Lismore Council to require a contribution with respect to the subject development which exceeds the sum of $1950 per dwelling unit. The two contributions claimed in Council's Conditions 14 and 15 total $35,000 and therefore cannot be imposed. The question is whether any, and if so what, contribution ought be exacted.

Mr. Reynders pointed to what, in his opinion, was an inconsistency between the strategies dictated by the regional plan and the Direction given under s.94A. That is, he was of the opinion that it was not possible to limit s.94 contributions to the sum of $1950 per dwelling unit and, at the same time, ensure that such development "meets the full cost of all necessary services". However, no submission was made that the s.94A Direction was legally tainted by that circumstance.

With respect to Condition 15, it is the Council's claim that the intersection of Main Road 141A and Stangers Road needs to be upgraded to accommodate the additional traffic. With respect to Condition 14, it is the Council's claim that work needs to be undertaken on Stangers Road. In my opinion, it is fanciful to suppose that Stangers Road will be sealed within the next 15 to 20 years. The projection advanced by the Council of 102 dwellings or caravan sites on land abutting Stangers Road is so unlikely an outcome that, for present purposes, it can be dismissed. It is trite law that in order to justify the imposition of a condition (particularly one involving monetary contribution) there must be a proper nexus between the development proposed and the condition sought to be imposed. On present day values, it will cost approximately $220,000 to seal Stangers Road. Council is claiming the sum of $2000 per dwelling in respect of the subject development upon an assumption that contributions from the other 90 dwelling units will be exacted in the future. At the present time, the use of Stangers Road is well below the Department of Main Roads AADT (Annual

Average Daily Traffic) threshold for sealing of roads. In fact, the AADT is only about 150 on Main Road 141A and probably not more than 40 on Stangers Road itself - both figures well short of the 500 required by the Department of Main Roads (or even the 270 suggested by the Council) to justify sealing. It would seem to me that the only reliable material available to determine the extent to which the present development will add traffic both to the intersection at Main Road 141A and along Stangers Road itself is by reference to the survey taken of the Tuntable Falls Community. Upon that basis, it is likely that one car per dwelling will leave the subject land and return to it every second day, that is, the development will probably generate about r10 car movements per day along Stangers Road and through the intersection.

At present, there is, in my opinion, a requirement to upgrade Stangers Road. In this regard, I accept the evidence of Mr. Brimstead and Mr. Andreasson and the Council's Engineer, Mr. Smith. The cost of doing this work is estimated to be approximately $2800. The Council does not seek contribution for the continuing maintenance of the road only an amount sufficient to bring the road up to the appropriate and acceptable standard. Upon completion of the last dwelling on the subject development, the occupants will have added significantly to the present use of Stangers Road. It is always difficult fixing a figure in the absence of precise evidence. However, doing the best I can and taking into account the present users of the road, I impose a contribution in respect of each dwelling in the sum of

$200. Furthermore, I do not think the contribution need be paid prior to the release of the building approval for each dwelling.

So far as the intersection is concerned, it is submitted on behalf of Glenbin firstly, that it will not cost $15,000 to improve the intersection and, secondly, that upon a proper estimate being made, the occupants of Glenbin should not be required to pay the whole amount. With both these submissions I agree. I am persuaded by the evidence of Mr. Fulford that probably it would not cost more than $10,000 to upgrade the intersection. There is already a need to upgrade the intersection and the development at Glenbin will add to that need by approximately 15%. I think that there is a connection between the work to be undertaken at the intersection and the occupancy of the subject land. Accordingly, and upon the adoption of Mr. Fulford's figures, I assess a figure of $1500 to be paid in installments of $150 upon the release of each building approval.

Condition 16

I do not propose to impose Condition 16. Mr. Basso, an accountant, and his wife, a medical practitioner, own the adjoining land. Their land is burdened with a right of way in favour of the subject land. The occupants of the subject land are permitted "from time to time and at all times to pass and repass with or without horses and other animals, carts, wagons,

carriages, tractor engines, motor cars and other vehicles over and along the land 50 links wide shown in the plan annexed to the transfer ... ". The covenant provides that the expense of keeping the land the subject of the right of way in good and sufficient repair is to be borne by both owners in equal shares. Mr. Basso's complaint is that he may be involved in expenditure greater than that anticipated at the time the right of way was created by reason of the now proposed increased density of population on the adjoining land. It must be borne in mind, however, that the right of way is also used by Mr. and Mrs. Basso and one other occupant on their land throughout the greater part of its length. Also, it will not serve all houses on the multiple occupancy. It will serve five only.

On behalf of Glenbin, it is submitted that Condition 16 (or at least so much of it that requires the owner to consent to the removal of the right of way) is ultra vires. It was submitted that the effect would be "to oust the jurisdiction of the Supreme Court which it may exercise under the Conveyancing Act". Because I have come to the conclusion that Condition 16 ought be deleted in the exercise of my discretion, I need not determine whether Glenbin's submission is correct. I have regard to the circumstance that a right of way was created, is legally in existence and provides access for five of the proposed dwellings. It is capable of providing physical access to the subject land. It appeared to be suggested by Council that the use of the right of way (to the five dwellings) would be an "excessive or unreasonable" use and for that reason the condition

ought be imposed. It would seem to me, with respect, that it is not appropriate for this Court to make a condition of the type asked for by the Council. I do not doubt that it is open to the Land and Environment Court to impose a condition that access to any one of the dwellings ought be from a certain road. But I do not think it within the purview of the Land and Environment Court to require the owner of a dominant tenement to consent to an application to the Equity Court by the owner of a servient tenement that a right of way be modified or wholly or partly extinguished. (See Simons v. Willoughby Municipal Council, Bignold J, 21 May 1985, unreported). As I have said, I do not think it reasonable to require traffic to the western side of the land to proceed via the access track referred to in Condition 18. To do so would be to impose an unwarranted financial burden on the applicant and would lead to the result that the applicant would not be able to use that part of the land as proposed by it. I have not overlooked the circumstance that Mr. Basso is justifiably chagrined because some work was undertaken on his land and outside his right of way without his consent. But the action of Glenbin, if unlawful, can be remedied elsewhere. Indeed, there is evidence suggesting that the work, undertaken by mistake, was, in fact, rectified by Glenbin. However that may be, I do not think that circumstance ought deflect me from granting the development consent I think appropriate in all the circumstances.

Accordingly, I grant development consent subject to the following conditions:

1. Any use of the land or of a building, other than for agriculture, forestry or as a residence on an approved site, shall be subject to a specific development consent of the Council.

2. No tree of any species be ringbarked, cut down, lopped, injured or damaged, other than as required for agricultural or forestry purposes, without the prior consent of the Council.

3. An ongoing programme shall be developed, in conjunction with the Far North Coast County Council, for the eradication of noxious weeds on the land.

4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

5. The land shall be owned in its entirety by at least two-thirds of the adult persons residing on the land.

6. The land remain in one lot and unsubdivided under the Local Government Act, Strata Titles Act or any other act.

NOTE: Subdivision refers to the subdividing of land into parts, whether the dealing is:

(a) by sale conveyance, transfer or partition; or

(b) by any agreement, dealing or instrument rendering different parts thereof immediately for separate occupation or disposition.

7. Before development commences, documentary evidence be produced to satisfy the Council that Conditions 5 and 6 are complied with.

8. Buildings may be erected at sites 1 - 10 on the plan identified as Exhibit C in the proceedings before the Court subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling.

9. Notwithstanding approval of sites under Condition 8, the total number of dwellings erected in accordance with this consent shall not exceed the number reasonably assumed to accommodate 55 persons.

10. No building or structure shall be erected or placed on the land and used as a dwelling except at a site referred to in Condition 8.

11. No building or structure shall be erected or commenced to be erected unless a building permit has been obtained from the Council and the Council reserves the right to refuse to

issue a permit if it becomes apparent that the site is not stable or otherwise unsuitable.

12. All dwellings shall be construed in accordance with Ordinance 70 and have external non-reflecting materials or colours that blend with the environment.

13. Effluent of all types from all dwellings shall be disposed of in a matter approved by the Chief Health Surveyor and no absorption trench or other disposal area shall be closer than 50m to any defined natural watercourse or adjacent to land that may be subject to mass movement.

14. A contribution pursuant to the provisions of s.94 of the Act is payable at the rate of $200 per dwelling unit, each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

15. A contribution pursuant to the provisions of the Environmental Planning and Assessment Act for the upgrading of the intersection of Stangers Road with Main Road 141A in the sum of $150 per dwelling. Each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

16. Internal access to each dwelling shall be provided so as to provide a gravelled all weather access to conventional two-wheel drive vehicles. All access shall have grades not

exceeding 16% and be constructed and drained in accordance with recommendations from the Soil Conservation Service of New South Wales so as to minimise cuttings and the possibility of soil erosion.

17. A perimeter fire break be constructed by removal of all flammable material generally along the full length of the western and southern boundaries, avoiding existing forests, but be placed around the edges on a contour and be 20m wide, measured horizontally and maintained with a ground fuel load not exceeding eight tonnes per hectare to the satisfaction of the Council's Fire Control Officer.

18. A primary protection zone shall be maintained for a distance of 20m surrounding each building kept clear of combustible materials with a ground fuel load not exceeding three tones per hectare. In this zone, shrubs and trees no higher than 3m will be permitted provided the canopy cover is less than 20%.

19. A radiation protection zone shall be maintained for a width of 20m surrounding each primary protection zone to be cleared of all rubbish and undergrowth with a ground fuel loading not more than five tonnes per hectare. Trees and shrubs up to 5m high may remain providing the canopy cover is not more than 50%.

20. That all water storage tanks installed as part of the development, be provided with a 38mm male threaded connection with gate valve, in a location accessible to fire fighting vehicles.

21. Each access road that is not a through road shall be provided with a turn around area at its end to allow turning of fire fighting vehicles.

22. The following fire fighting equipment to standards approved by the Bush Fire Council of New South Wales be provided and maintained at all times to the satisfaction of the Council's Fire Control Officer;

(a) a 680 l water tank;
(b) an 8h.p. fire fighting pump;
(c) twelve knapsacks;
(d) six McLeod tools;
(e) 100mm of 20mm fire protection hose;
(f) two "Dial-a-jet" nozzles; and
(g) one drip torch.

23. A suitable fire alarm, capable of being heard from anywhere within the area enclosed by the perimeter fire break, be installed.

24. A suitable person be appointed as Fire Protection Overseer, to be responsible for fire protection maintenance of equipment

equipment and liaison with the Council's Fire Control Officer and the local Bush Fire Brigade.

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 23 PAGES ARE A TRUE AND ACCURATE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR. JUSTICE J.S. CRIPPS.

Jennifer Cox.

Associate

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

No: 10535/86

Coram: Cripps J

20 April 1988

JUDGMENT

GLENBIN PTY. LIMITED

v.

LISMORE CITY COUNCIL

His Honour: On 5 February 1986, Rick McKiernan, on behalf of Glenbin Pty. Limited, made application to the Lismore City Council for development consent for a multiple occupancy development on Lot 5 DP625836 Stangers Road, Stony Chute.

On 3 October 1986, the Council granted its consent for "a multiple occupancy community development to accommodate a maximum of fifty five (55) persons to be housed in eleven (11) living units" subject to a number of conditions the relevant ones being as follows:

> "4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

> 8. Buildings may be erected at sites 1 - 10 on the amended plan subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling".
>
> 14. Section 94 contribution of $2000 per dwelling unit. The whole contribution applicable to this application shall be paid before the first building approval is released".
>
> 15. An additional contribution for the upgrading of the intersection of Stangers Road with the main road 141A at fixed cost of $15,000. This amount is payable before the first building approval of this application is released. The intersection design is subject to Department of Main Roads approval to ensure their standard is maintained".
>
> 16. All access to the land for the purpose of access to the dwellings shall be by means of the unnamed public road off Stangers Road, north of Lot 2 DP625836. In this respect, the company shall not object if the right of way over Lot 1 is proposed to be removed by its owner".
>
> 18. In addition to the access banks shown on the plan, an access track generally along the contour shall be constructed from the road near the "cottage" in Hamlet 3, westward to connect with the track shown on the northern boundary of Hamlet 2".

On 29 November 1986, Glenbin appealed to the Land and Environment Court nominating the following ground of appeal:

> "Conditions 4, 14, 15, 16 and 18 attached to Notice of Determination of a development application (No: 86/167) issued by the Respondent on 3 October 1986".

Notwithstanding that the Developer intended appealing against certain conditions only, the effect of lodging the appeal is that the consent granted by the Council, which became effective and operated from the date endorsed upon the Notice,

ceased as from 29 October to be effective (s.93(2) of the Environmental Planning and Assessment Act). On appeal, the Court has all the functions and discretions of the Council. The appeal is de novo and it is open to the Court to grant consent conditionally or unconditionally or to refuse consent. The appeal is to be determined by reference to the circumstances, including the law, as it exists at the time of the appeal.

After the grant of development consent, the Minister made the North Coast Regional Environmental Plan, 1988, (18 December 1987) and State Environmental Planning Policy No.15 - Multiple Occupancy of Rural Land (20 February 1988). The North Coast Regional Environmental Plan (which applies to Lismore) defines "multiple occupancy" to mean:

> "the erection of two or more detached dwellings on an unsubdivided allotment of land where the allotment of land comprises the principle place of residence for the occupants who occupy the land on a communal basis".

The objectives of the REP, with respect to rural housing, are to ensure opportunities for rural housing and to provide for multiple occupancy "in some circumstances". Councils affected are obliged in the preparation of local environmental plans to prepare a "rural land release strategy" for the whole of its area. The local environmental plan is to be consistent with strategies identified, one of which is:

> "ensure that development for rural housing meets the full cost of all necessary services and that development

> takes place in accordance with the programme for the provision of services".

SEPP No. 15 does not define multiple occupancy. The aim of the Policy is:

> "(a) to encourage a community based and environmentally sensitive approach to rural settlement;
>
> (b) to enable -
>
> (i) people to collectively own a single allotment and use it as their principal place of residence;
>
> (ii) the erection of multiple dwellings on the allotment and the sharing of facilities and resources to collectively manage the allotment; and
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> (iii) the pooling of resources, particularly where low incomes are involved, to economically develop a wide range of communal rural living opportunities, including the construction of low cost buildings ... ".

A major objective of the Policy is to facilitate multiple occupancy development "preferably in a clustered style, in a manner which protects the environment". It provides that when processing development applications for multiple occupancies, the council must consider 18 specified matters (over and above the 20 heads of consideration in s.90 of the Environmental Planning and Assessment Act). In particular, it provides that a council shall not consent to an application unless it has taken into consideration among other matters:

"(a) The means proposed for establishing land ownership, dwelling occupancy rights, environmental and community management will ensure the aims and objectives of this Policy are met.

(b) The area or areas proposed for erection of buildings including any proposals for the clustering of buildings.

(c) The area or areas proposed for community use (other than areas for residential accommodation and home improvement areas).

(d) The need for any proposed development for community use that is ancillary to the use of the land.

(e) The availability and standard of public road access to the land ... ".

Home improvement area is defined to mean an area of land not exceeding 5,000 m^2 around a dwelling. The Policy provides that except in limited circumstances, the land the subject of a multiple occupancy development may not be subdivided.

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The subject land is on Stangers Road, Stony Chute, and is approximately 55ha. It slopes from north to south and

commands [redacted] pressive views of the surrounding area. The lower part of the land is timbered and the upper parts have been cleared for grazing.

Upon the matter coming on for hearing, Council submitted amended conditions. It now seeks, in lieu of the old condition 8, the following condition:

"(8) All dwellings are to be erected in a cluster or in clusters and are to have a home improvement area not exceeding 5000m^2 around each dwelling. The Chief Health Surveyor is to be satisfied that the precise location of each dwelling is stable and suitable for the location of a dwelling. Action is to be taken to divert surface drainage including road drainage to the satisfaction of the Chief Health Surveyor and Soil Conservation Service of New South Wales".

It submits that Conditions 14, 15 and 16 should remain as originally imposed. If, however, the new Condition 8 is imposed, it no longer presses Condition 18. If the dwellings are clustered in accordance with the requirements of the new Condition 8 and access is from the western end of the subject land, the Council concedes there is no need for the access track referred to in Condition 18. If, however, houses are not required to be clustered, the Council submits I ought impose Condition 18 for access to houses on the eastern side of the property.

History of the Application

The Court was informed that the present application was of significance to the Council of the City of Lismore, not merely because of the particular development the subject of the appeal, but because, so it was said, the outcome of the litigation would be of significance for the Lismore Council in the administration of its planning powers and, in particular, in the application of SEPP No.15. (In recognition of the claimed importance of the proceedings to the Council the Court determined to hear part of the evidence in the Lismore area and the balance in Sydney.) Three days before the matter was due to commence at Byron Bay, the Court was informed that the Developer would no longer be represented by lawyers and that the Council, pursuant to a policy of "matching" Developers' representation, would also not be represented at the hearing.

Mr. Lambert, a resident of Tuntable Falls (another multiple occupancy development at Nimbin) sought and obtained leave to represent Glenbin and the Council's Planner, Mr. Reynders, was granted leave to represent the Council. I viewed with some surprise the conduct of the Council in asserting that, on the one hand, it wished to explore in detail the planning and legal implications inherent in the administration of SEPP No.15 and, on the other, its resolution to "match" what it apparently believed to be the legally unskilled representation of the Developer. As events turned out, Mr. Lambert and his team

demonstrated considerable legal ability both in the art of advocacy and in their understanding of environmental law and practice.

strata subdivision

The Council was represented by Mr. Reynders. Mr. Reynders is the Chief Planner of the Lismore Council. He had prepared a Report which was intended to be tendered in the proceedings. He is a qualified planner and he informed me he proposed calling himself as an expert witness. In cases of complexity it is generally unsatisfactory that expert witnesses and advocates be one and the same. But in the present case, the self-evident problems of that arrangement were exacerbated by the circumstance that Mr. Reynders' expert views did not coincide with the submissions of the Council and I was continually required to make inquiries of Mr. Reynders whether views he was advancing from the Bar table were submissions on behalf of the Council or whether they were views which he held as an expert witness. By way of illustration, although I repeatedly asked for information on the subject, I never received a satisfactory answer to the question of what was the attitude of the Council upon the assumption that some of the conditions sought by the Council would or could not be imposed by the Court. It was clear the Council was prepared to grant development consent subject to a number of conditions. But I never found out what its attitude was in the event that I considered it inappropriate to impose one or other disputed conditions.

point of law law

In making the above comments, I do not wish to denigrate the efforts of Mr. Reynders to satisfy the Court's requirements to the best of his ability. Indeed, bearing in mind the dual nature of his appearance in the Court, he acquitted himself well. But he is not a lawyer and I would have thought, with respect, that in complicated cases the advocate should not be the expert witness even if (unlike the present case) the opinion of the expert witness and the submissions of the Council coincide. As I have said, where they do not, the problems are exacerbated.

For reasons which I will mention later, I am of the opinion the development consent should be granted subject to conditions. I do not propose to impose the conditions suggested by Council. It therefore is unnecessary for me to consider, for example, what I would have done had I determined, for example, that it was inappropriate to allow access over adjoining land but that I was powerless to prevent it. I have taken into consideration all of the matters referred to in cl.9 of SEPP No.15 and those matters of relevance to the development set out in s.90 of the Environmental Planning and Assessment Act. I have taken into account the lack of "the clustering of buildings". I mention this matter specifically because it appeared to be a matter of considerable importance to Mr. Reynders who, I assume, was making a submission on behalf of the Council. The Council believes, apparently, that unless such a requirement is imposed, it may be overly susceptible to pressure in the future to rezone the land so as to permit subdivision. It is not clear to me why

the Council is now concerned about its diminished ability to resist what I must assume to be a future inappropriate application for rezoning for subdivision. Seventeen months ago, the Council granted development consent and made it a condition of the consent that the dwellings be located where they are now proposed to be. The only assumption I am prepared to make about Council's future attitude is that if an application for rezoning to permit subdivision is made, the Council will consider it on its merits and determine the application in accordance with its statutory obligations. I note that SEPP No.15 does not require clustering; it merely expresses clustering as a "preference" and requires a council or the Court to take into account "any proposals for the clustering of buildings".

I have taken into account the means proposed for the establishment of land ownership, dwelling occupancy rights, environmental and community management of the development. The land will be owned by Glenbin. It is not a large multiple occupancy development. Each shareholder (10 in all) will be entitled to build a house on the area nominated in plan, Exhibit C. Shareholders will have the right to occupy the dwellings they erect and will be entitled, subject to approval by Glenbin, to sell their shares. However, in this regard, the price payable for their shares will not include any "land increase" component and the shares may not be assigned without Glenbin's approval.

Before turning to the disputed conditions, I note that Condition 4 is now no longer in dispute. The condition requires the land to be upgraded and made safe in accordance with recommendations of the Soil Conservation Service of New South Wales and the condition will therefore be attached to the consent.

Disputed Condition

Condition 8

As I have said, development consent was granted by the Council after the Developer, at the Council's request, withdrew its earlier plan and substituted an amended plan nominating the 10 sites proposed for the erection of houses. After development consent was granted but before the hearing of this appeal, certain building work was undertaken on the sites nominated. Although it is true that a hearing before this Court is de novo and that the Court must take into account the circumstances and the law as they are at the date of the appeal, I am not bound to ignore the events that have taken place between the date of the consent and the date of the hearing of the appeal. It was clear to all parties that Glenbin was appealing against conditions of consent. At the time it lodged its appeal, Condition 8, as imposed by the Council, was not in dispute. Condition 8 was included to give effect to the requirement of the Council that the houses on the land be set out on the map, Exhibit C. The new Condition 8 requires the houses to be "clustered" at one end of the site.

In my opinion, I am entitled to take into account as a "circumstance of the case" within the meaning of s.90 that during the suspension of the operation of the development consent by reason of the appeal being lodged to the Court (s.90(7)) Glenbin reasonably believed that it was doing no more than carrying out the development for which it had consent. As I have said, SEPP No. 15 does not mandate cluster development; it merely urges it as a preference. I have visited the site and have seen where the houses are intended to be located in accordance with Exhibit C. The Council could not point to any environmental damage that would result by reason of the houses being dispersed - at least none that could not adequately be addressed by appropriate conditions. Indeed, its reason for requiring "clustering" was its belief that to cluster the development would be to inhibit what it considered to be possible or probable future pressure for subdivision of the land. However, as I have said, SEPP No.15 provides that land the subject of multiple occupancy development shall not be subdivided. Accordingly, the subject land may not be lawfully subdivided unless SEPP No. 15 is amended and the Council prepares a new Local Environmental Plan. The Council relies on the circumstance that recently it has succumbed to representations to make a new local plan to allow the multiple occupancy development at Billen Cliffs to be subdivided and resolved to make a plan to permit subdivision of the land. But I do not regard that circumstances as giving any support to Mr. Reynder's submissions in the present case. I can only conclude that the Council's decision to rezone the land at Billen Cliffs

to allow subdivision proceeded upon a proper exercise of its planning power. I am not prepared to assume that the Council has embarked upon a plan making process dictated by pressure to which it ought not have succumbed. It seems to me, therefore, that I should not change the form of the present development for that reason, particularly, as I have said, it is the form chosen by the Council 16 months ago.

Conditions 14 and 15

On 11 January 1988, the Minister for Environment and Planning published a direction pursuant to the provisions of s.94A of the Environmental Planning and Assessment Act directing, inter alia, the Lismore City Council that, in the case of a condition of development consent referred to in s.94 requiring the payment of monetary contribution in respect of land within its area and being land to which State Environmental Planning Policy No.15 applies, a maximum amount of any such contribution shall be $1950 per dwelling unit. It follows, in my opinion, that however the money is to be spent, it is not open to the Lismore Council to require a contribution with respect to the subject development which exceeds the sum of $1950 per dwelling unit. The two contributions claimed in Council's Conditions 14 and 15 total $35,000 and therefore cannot be imposed. The question is whether any, and if so what, contribution ought be exacted.

Mr. Reynders pointed to what, in his opinion, was an inconsistency between the strategies dictated by the regional plan and the Direction given under s.94A. That is, he was of the opinion that it was not possible to limit s.94 contributions to the sum of $1950 per dwelling unit and, at the same time, ensure that such development "meets the full cost of all necessary services". However, no submission was made that the s.94A Direction was legally tainted by that circumstance.

With respect to Condition 15, it is the Council's claim that the intersection of Main Road 141A and Stangers Road needs to be upgraded to accommodate the additional traffic. With respect to Condition 14, it is the Council's claim that work needs to be undertaken on Stangers Road. In my opinion, it is fanciful to suppose that Stangers Road will be sealed within the next 15 to 20 years. The projection advanced by the Council of 102 dwellings or caravan sites on land abutting Stangers Road is so unlikely an outcome that, for present purposes, it can be dismissed. It is trite law that in order to justify the imposition of a condition (particularly one involving monetary contribution) there must be a proper nexus between the development proposed and the condition sought to be imposed. On present day values, it will cost approximately $220,000 to seal Stangers Road. Council is claiming the sum of $2000 per dwelling in respect of the subject development upon an assumption that contributions from the other 90 dwelling units will be exacted in the future. At the present time, the use of Stangers Road is well below the Department of Main Roads AADT (Annual

Average Daily Traffic) threshold for sealing of roads. In fact, the AADT is only about 150 on Main Road 141A and probably not more than 40 on Stangers Road itself - both figures well short of the 500 required by the Department of Main Roads (or even the 270 suggested by the Council) to justify sealing. It would seem to me that the only reliable material available to determine the extent to which the present development will add traffic both to the intersection at Main Road 141A and along Stangers Road itself is by reference to the survey taken of the Tuntable Falls Community. Upon that basis, it is likely that one car per dwelling will leave the subject land and return to it every second day, that is, the development will probably generate about r10 car movements per day along Stangers Road and through the intersection.

At present, there is, in my opinion, a requirement to upgrade Stangers Road. In this regard, I accept the evidence of Mr. Brimstead and Mr. Andreasson and the Council's Engineer, Mr. Smith. The cost of doing this work is estimated to be approximately $2800. The Council does not seek contribution for the continuing maintenance of the road - only an amount sufficient to bring the road up to the appropriate and acceptable standard. Upon completion of the last dwelling on the subject development, the occupants will have added significantly to the present use of Stangers Road. It is always difficult fixing a figure in the absence of precise evidence. However, doing the best I can and taking into account the present users of the road, I impose a contribution in respect of each dwelling in the sum of

$200. Furthermore, I do not think the contribution need be paid prior to the release of the building approval for each dwelling.

So far as the intersection is concerned, it is submitted on behalf of Glenbin firstly, that it will not cost $15,000 to improve the intersection and, secondly, that upon a proper estimate being made, the occupants of Glenbin should not be required to pay the whole amount. With both these submissions I agree. I am persuaded by the evidence of Mr. Fulford that probably it would not cost more than $10,000 to upgrade the intersection. There is already a need to upgrade the intersection and the development at Glenbin will add to that need by approximately 15%. I think that there is a connection between the work to be undertaken at the intersection and the occupancy of the subject land. Accordingly, and upon the adoption of Mr. Fulford's figures, I assess a figure of $1500 to be paid in installments of $150 upon the release of each building approval.

Condition 16

I do not propose to impose Condition 16. Mr. Bassc, an accountant, and his wife, a medical practitioner, own the adjoining land. Their land is burdened with a right of way in favour of the subject land. The occupants of the subject land are permitted "from time to time and at all times to pass and repass with or without horses and other animals, carts, wagons,

carriages, tractor engines, motor cars and other vehicles over and along the land 50 links wide shown in the plan annexed to the transfer ... ". The covenant provides that the expense of keeping the land the subject of the right of way in good and sufficient repair is to be borne by both owners in equal shares. Mr. Basso's complaint is that he may be involved in expenditure greater than that anticipated at the time the right of way was created by reason of the now proposed increased density of population on the adjoining land. It must be borne in mind, however, that the right of way is also used by Mr. and Mrs. Basso and one other occupant on their land throughout the greater part of its length. Also, it will not serve all houses on the multiple occupancy. It will serve five only.

On behalf of Glenbin, it is submitted that Condition 16 (or at least so much of it that requires the owner to consent to the removal of the right of way) is ultra vires. It was submitted that the effect would be "to oust the jurisdiction of the Supreme Court which it may exercise under the Conveyancing Act". Because I have come to the conclusion that Condition 16 ought be deleted in the exercise of my discretion, I need not determine whether Glenbin's submission is correct. I have regard to the circumstance that a right of way was created, is legally in existence and provides access for five of the proposed dwellings. It is capable of providing physical access to the subject land. It appeared to be suggested by Council that the use of the right of way (to the five dwellings) would be an "excessive or unreasonable" use and for that reason the condition

ought be imposed. It would seem to me, with respect, that it is not appropriate for this Court to make a condition of the type asked for by the Council. I do not doubt that it is open to the Land and Environment Court to impose a condition that access to any one of the dwellings ought be from a certain road. But I do not think it within the purview of the Land and Environment Court to require the owner of a dominant tenement to consent to an application to the Equity Court by the owner of a servient tenement that a right of way be modified or wholly or partly extinguished. (See Simons v. Willoughby Municipal Council, Bignold J, 21 May 1985, unreported). As I have said, I do not think it reasonable to require traffic to the western side of the land to proceed via the access track referred to in Condition 18. To do so would be to impose an unwarranted financial burden on the applicant and would lead to the result that the applicant would not be able to use that part of the land as proposed by it. I have not overlooked the circumstance that Mr. Basso is justifiably chagrined because some work was undertaken on his land, and outside his right of way, without his consent. But the action of Glenbin, if unlawful, can be remedied elsewhere. Indeed, there is evidence suggesting that the work, undertaken by mistake, was, in fact, rectified by Glenbin. However that may be, I do not think that circumstance ought deflect me from granting the development consent I think appropriate in all the circumstances.

Accordingly, I grant development consent subject to the following conditions:

1. Any use of the land or of a building, other than for agriculture, forestry or as a residence on an approved site, shall be subject to a specific development consent of the Council.

2. No tree of any species be ringbarked, cut down, lopped, injured or damaged, other than as required for agricultural or forestry purposes, without the prior consent of the Council.

3. An ongoing programme shall be developed, in conjunction with the Far North Coast County Council, for the eradication of noxious weeds on the land.

4. All dams on the land shall be upgraded within and made safe in accordance with the recommendations of the Soil Conservation Service of New South Wales.

5. The land shall be owned in its entirety by at least two-thirds of the adult persons residing on the land.

6. The land remain in one lot and unsubdivided under the Local Government Act, Strata Titles Act or any other act.

NOTE: Subdivision refers to the subdividing of land into parts, whether the dealing is:

(a) by sale conveyance, transfer or partition; or

(b) by any agreement, dealing or instrument rendering different parts thereof immediately available for separate occupation or disposition.

7. Before development commences, documentary evidence be produced to satisfy the Council that Conditions 5 and 6 are complied with.

8. Buildings may be erected at sites 1 - 10 on the plan identified as Exhibit C in the proceedings before the Court subject to action being taken to divert surface drainage, including road drainage, and the Chief Health Surveyor being satisfied that the precise location of the dwelling is stable and suitable for the location of a dwelling.

9. Notwithstanding approval of sites under Condition 8, the total number of dwellings erected in accordance with this consent shall not exceed the number reasonably assumed to accommodate 55 persons.

10. No building or structure shall be erected or placed on the land and used as a dwelling except at a site referred to in Condition 8.

11. No building or structure shall be erected or commenced to be erected unless a building permit has been obtained from the Council and the Council reserves the right to refuse to

issue a permit if it becomes apparent that the site is not stable or otherwise unsuitable.

12. All dwellings shall be construed in accordance with Ordinance 70 and have external non-reflecting materials or colours that blend with the environment.

13. Effluent of all types from all dwellings shall be disposed of in a matter approved by the Chief Health Surveyor and no absorption trench or other disposal area shall be closer than 50m to any defined natural watercourse or adjacent to land that may be subject to mass movement.

14. A contribution pursuant to the provisions of s.94 of the Act is payable at the rate of $200 per dwelling unit, each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

15. A contribution pursuant to the provisions of the Environmental Planning and Assessment Act for the upgrading of the intersection of Stangers Road with Main Road 141A in the sum of $150 per dwelling. Each contribution to be paid prior to the release of the building approval for the dwelling the subject of the contribution.

16. Internal access to each dwelling shall be provided so as to provide a gravelled all weather access to conventional two-wheel drive vehicles. All access shall have grades not

exceeding 16% and be constructed and drained in accordance with recommendations from the Soil Conservation Service of New South Wales so as to minimise cuttings and the possibility of soil erosion.

17. A perimeter fire break be constructed by removal of all flammable material generally along the full length of the western and southern boundaries, avoiding existing forests, but be placed around the edges on a contour and be 20m wide, measured horizontally and maintained with a ground fuel load not exceeding eight tonnes per hectare to the satisfaction of the Council's Fire Control Officer.

18. A primary protection zone shall be maintained for a distance of 20m surrounding each building kept clear of combustible materials with a ground fuel load not exceeding three tones per hectare. In this zone, shrubs and trees no higher than 3m will be permitted provided the canopy cover is less than 20%.

19. A radiation protection zone shall be maintained for a width of 20m surrounding each primary protection zone to be cleared of all rubbish and undergrowth with a ground fuel loading not more than five tonnes per hectare. Trees and shrubs up to 5m high may remain providing the canopy cover is not more than 50%.

20. That all water storage tanks installed as part of the development, be provided with a 38mm male threaded connection with gate valve, in a location accessible to fire fighting vehicles.

21. Each access road that is not a through road shall be provided with a turn around area at its end to allow turning of fire fighting vehicles.

22. The following fire fighting equipment to standards approved by the Bush Fire Council of New South Wales be provided and maintained at all times to the satisfaction of the Council's Fire Control Officer;

(a) a 680 1 water tank;
(b) an 8h.p. fire fighting pump;
(c) twelve knapsacks;
(d) six McLeod tools;
(e) 100mm of 20mm fire protection hose;
(f) two "Dial-a-jet" nozzles; and
(g) one drip torch.

23. A suitable fire alarm, capable of being heard from anywhere within the area enclosed by the perimeter fire break, be installed.

24. A suitable person be appointed as Fire Protection Overseer, to be responsible for fire protection maintenance of equipment

equipment and liaison with the Council's Fire Control Officer and the local Bush Fire Brigade.

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 23 PAGES ARE A TRUE AND ACCURATE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR. JUSTICE J.S. CRIPPS.

Jennifer Cox.

Associate

Dave not to Rob D. ✓
Dennis F. ✓
Walter (Syd) ✓
Freeglood (Jack) ✓ He will mention to details ✓
N. Star ✓

We to send to Sallemine
✓ Ball
✓ Col James
✓ Hanalley
o/- Rod W.
✓ Corbill

HEARING OF

LAND AND ENVIRONMENT COURT

HELD AT

LISMORE COURT HOUSE, ZADOC STREET, LISMORE

ON WEDNESDAY, 11TH MARCH, 1987

No. 10295 of 1986

MATTER: LITTLE AND ANOTHER

- v -

LISMORE CITY COUNCIL

BEFORE: Mr. A. Nott, Assessor

APPEARANCES

Applicant: Mr P. Starkey, Solicitor of Somerville Laundry Lomax & Co.

Respondent: Mr R. Heap, Deputy Chief Planner of the Council.

(Correct copy of transcript.)

11th March, 1987

DECISION

ASSESSOR NOTT: This appeal concerns a condition which would require the upgrading of a rural road along the frontage of the applicant's land.

The subject land is lot 3 DP.619745, Blade Road, Nimbin. By a Notice of Determination dated 11 October 1985 the council granted development consent for the erection of a dwelling on the subject land and by another Notice of Determination of the same date also granted development consent for the erection of a storage shed and carport on the land.

In each consent a condition was imposed in the following terms : "The applicant or the developer constructs the following road-works with associated stormwater drainage structures to the satisfaction of the city engineer and at no cost to council and also be responsible for the full cost of any maintenance of this work considered necessary by the city engineer for a period of 4 months from the date of approval of the work. A 5.0 metre wide formation with a gravel width of 3.0 metres comprising a minimum of 150 millimetres of compacted gravel for the full frontage of the land being lot 3 in DP 619745."

The reasons given in the Notices of Determination for the imposition of that condition included the preservation of the environment and the existing or likely future amenity of the neighbourhood, to provide adequate protection from bushfire risk and to secure adequate access to and from the development.

In addition there was a note on one of the Notices of Determination to the effect that the council will gravel, pave and maintain the part of Blade Road up to the eastern boundary of the subject land and following the work required by the Notices of Determination to be carried out what was described as "the maintenance limit" would be extended to the western boundary of the subject land. The maintenance limit refers to a gravelled part of Blade Road to the east of the subject land, the gravel terminating depending on what view is taken of the evidence at about 280 metres or 180 metres from the eastern boundary of the subject land.

The land is zoned Rural 1(a2) under Interim Development Order No. 40 - Lismore. Pursuant apparently to the Notices of Determination which had been granted the applicant commenced construction of some of the buildings on the land and it appears that the dwelling house is the only building at the time of the hearing that is not completed. A question arose as to whether the applicant is dissatisfied in accordance with section 97(1) of the Environmental Planning and Assessment Act 1979, and I am satisfied that the applicant is dissatisfied both in the legal and in the factual sense and that therefore is entitled to appeal to the court.

Towards the close of submissions in the case, a question was raised by the council as to whether the consent should have been granted

ASSESSOR: (contd) ...having regard to the question whether the land would be used for agricultural purposes. As that matter had not previously been raised as an issue in the proceedings I rule that unless a special application was made by the council to raise that issue I would not entertain submissions on that point. No application was made by the council in that regard.

The subject land is part of a subdivision for which development consent was granted on 13 March 1981. That subdivision created three lots including the subject land each of which has an area of 6 hectares or less and has a frontage to Blade Road. In addition there was a residue lot left in that subdivision to the south of those three lots.

One of the conditions of the development consent for the subdivision required a road improvements levy of $475 be paid in respect of each of the new lots created, a total of $1,425. It appears that that amount has been paid to the council. The amount of $475 per newly created lot was apparently a standard charge for the council on subdivision applications in rural areas in 1981. In 1982 the council increased the levy to $1,000 or $1,500 and subsequently further increased the levy over the ensuing years.

In order to consider the reasonableness of what is now required to be done by the council, namely, the upgrading of the frontage to the subject land it is necessary to look at the history of the creation not only of the lots in the subject subdivision but of other lots adjoining the subject land. The necessity to do so does not automatically arise as a matter of law but it is a relevant factor to take into account when considering the reasonableness of the council's condition and considering the question of a consistent and equitable policy applied by the council in respect of other owners in the immediate locality.

Immediately to the east of the subject land on the southern side of Blade Road is a lot owned by Hawkins. There is no dwelling house or other building erected on that land. From various documents which were tendered in the proceedings it appears that the subdivision which created the Hawkins lot and also the immediately adjoining lot to the east of the Hawkins' lot was registered after 1983. The exact date of the approval of the subdivision as I indicated is not known but it appears more likely than not that the subdivision was approved in or after 1982. If that is the case it is also more likely than not that a substantially higher contribution for road improvements was required as a condition of subdivision approval for those two lots than was required in respect of the subject land.

In respect of the lot immediately to the east of the Hawkins' lot which is one of the two lots I have just referred to, namely, lot 2 DP 661440, that lot has erected on it a dwelling house for which development consent was granted by Notice of Determination dated 12 April 1983. The application for the dwelling house was made by R. and M. Kurts. Immediately to the east of that lot again on the southern side of Blade Road is a lot known as lot 22 DP 632618 and in respect of that lot a development consent was granted by Notice of Determination dated 15 August, 1986 for the erection of a dwelling house. Immediately to the north on the opposite side of Blade Road to the lastmentioned lot is lot 4 DP 263321 in respect of which G. Williams was granted development consent by Notice of Determination dated 24 December 1982 for the erection of a dwelling house.

ASSESSOR: (contd) The subdivision creating the lot owned by G. Williams and two other lots also having a frontage to Blade Road was approved some time prior to May 1981 when the council's clerk's certificate was given for the subdivision. In respect of those lots that I have mentioned where consent has been granted for the erection of a dwelling house, namely the lots owned by Kurts, Sutcliffe and Williams no condition of development consent was imposed requiring a contribution for road improvements when consent was granted for the erection of the dwelling house in each case.

According to the evidence of the applicants which I have no reason not to accept, Blade Road in 1981 was a gravelled road up to the entrance to the Sutcliffe lot. Since that time the road has further been improved in a westerly direction towards the subject land. As I mentioned at the commencement of this judgment the exact distance between the improved gravel portion of Blade Road and the eastern boundary of the subject land is not clear. However, on the evidence I am inclined to the view that it is in the vicinity of 180 metres.

The entrance to the applicants' property which gives access to the buildings which have commenced to be constructed or completed is 18 metres westward of the easternmost boundary of the subject land. The road continues along the frontage of the subject land in a westerly direction and along the frontage to lots 1 and 2 in an ungraded condition. At the western end of the last lot which was created with the applicant's lot the road apparently deteriorates substantially and it is not clear whether it is passable at all times because of the undergrowth that made have occurred on the road. The road further to the west comes to a dead end and according to the evidence there are no dwelling houses erected west of the subject land. The access to the subject land as is apparent from the description so far given, is from the east along Blade Road.

R. Smith, the council's design engineer prepared a schedule of certain road costs and I have no reason to doubt the accuracy of the amounts stated in that schedule except that because of the conflict of evidence I would prefer to accept 180 metres as being the distance between the eastern boundary of the subject land and the commencement to the east of the subject land of the gravelled portion of Blade Road.

According to Mr. Smith's figures and making a very rough estimate having regard to the reduced distance which I have adopted, it would appear that in order to upgrade the section of Blade Road from the eastern boundary of the subject land to the commencement of the gravelled portion of Blade Road the figure would be in the vicinity of $3,000. There is in addition the small stretch from the eastern boundary of the subject land to the entrance existing at the present time to the subject land, a distance varying from 9 metres to 18 metres.

Mr. Smith's figures also indicate that the cost of upgrading that section of Blade Road outside the subject land along the total width of the frontage of the subject land is $2,880 and I accept that figure.

According to Mr. Smith's evidence it also appears that the upgrading to the east of the subject land of Blade Road was carried out by the use of funds from general rates which were levied. It is not possible according to the council records to say whether any of the moneys which had

ASSESSOR: (contd) ...contributed by the various lot owners immediately to the east of the subject land were expended in the carrying out of the road improvement works.

Mr. Smith indicated that interest was accruing on moneys invested in the road improvements fund and that he thought that a figure in the vicinity of 15 to 18 per cent interest could be accruing. The exact figure is not known but if interest is compounded on an annual basis on the amount of $1,425 which was required to be paid as a contribution when consent was granted for the subdivision of the land from which the subject lot was created it would appear that that sum would now be $3,468. If the amount were compounded on a daily basis it would be, it seems, $4,522. Again, it is not clear whether any of the money which was originally paid has been expended on Blade Road. On the evidence in this case I would have expected that the money should have been expended on Blade Road and not expended elsewhere in the council's area.

Under section 90(1)(i) and (j) of the Environmental Planning and Assessment Act 1979, the council has to consider the means of entrance to the land and the amount of traffic likely to be ~~the capacity~~ generated by the proposed development and the capacity of the road system in the locality to cater for that traffic.

On the evidence I find that the road between the eastern boundary of the subject land and the gravelled portion of Blade Road is in a condition which would not normally be accepted by the council if it were considering a subdivision application and the council would normally be entitled to upgrade the road and on the evidence that would appear to be at least to the standard which is required to be carried out in the present appeal. Nevertheless the road is a cleared and defined road apparently within the road reserve, although it is not gravelled for the distance of 180 metres to the subject land.

It further appears on the evidence that the road is generally passable by ordinary vehicle at all times during the year and I base that finding on the fact that within the last week there have been floods in the Lismore area with quite large downpours of rain preceding the floods and the applicant was, after those rains, able to proceed along the road to the subject land. The road is in an elevated position on a ridge and drains quickly.

Mr. Smith in evidence said that it would be unusual for the council to require a contribution as a condition of consent for a dwelling house following an earlier contribution paid to the council as a requirement of subdivision of the land. Nevertheless, having regard to the Court of Appeal decision in Coup v. Mudgee Shire Council (CA number 28/85 decided on 23 December 1986) it is open to the council in my view to impose a requirement for a contribution at the dwelling house stage notwithstanding an earlier contribution.

The question to be determined is whether it is reasonable to do so in the particular circumstances of this case. Determining such a question often raises difficult questions of fairness and balance as was indicated in my decision of Hawkins v. Evans Shire Council (10687/82 decided on 13 August 1985). I refer to that decision not because it is necessarily applicable or inapplicable to the facts of this case but to illustrate the difficulties that a council and this court faces in determining questions relating to the upgrading of roads.

ASSESSOR: (Investments Pty Ltd) Mr. Starkey in his submissions referred me to Norlyn v. Ballina Shire Council (10387/83, a decision of Assessor Riding on 6 March 1986). That case states a principle which is applicable generally that there must be a real relationship between the roadworks requested and the proposed development. Now insofar as there is a generally substandard road from the entrance to the subject land to the commencement of the gravelled portion of Blade Road it could be said that there is a need for the upgrading of that section of the road. The council however did not seek that the applicants upgrade that section of the road because it indicated that the council itself would carry out the upgrading but instead the council required the upgrading of the road along the full frontage of the subject land.

As I indicated earlier if I were considering a subdivision application, on the evidence of this case I would have no hesitation in requiring the upgrading of the road to at least the standard required by the council. However, other factors have to be considered in the present appeal. One of those factors is that none of those persons in the immediate vicinity of the subject land who have received development consent for a dwelling house have been required to contribute any sum for roadworks. Another factor is that all lots in the locality of the subject land have been required to bear a contribution for road improvements following their creation in subdivisions after 1981 although it appears that in respect of some of those lots the contribution was higher than the amount required at the time of the creation of the subject lot.

Also to be taken into account is the fact that it is not clear whether lot owners in the vicinity have had the road improved by the use of those moneys collected pursuant to rate levies or from the moneys actually contributed at or about the time of the subdivision of the lots in the vicinity.

From the evidence it appears that the moneys contributed in respect of the subdivision of lots immediately to the east of the subject land could quite easily cover the full construction to a three-metre gravelled carriageway on a five metre formed road. If that is the case then there is the sum of money contributed at the time of the creation of the subject land and the other lots in the same subdivision which is available to be expended. That amount if still held in the road improvements fund would have borne interest until the present time.

Notwithstanding the way the council has dealt with the development application I raised with the council whether it would be reasonable for the council to impose a contribution requiring the upgrading of Blade Road not along the frontage of the subject land but from the entrance to the applicants' proposed dwelling easterly towards the commencement of the gravelled section of Blade Road. Had it not been for the contributions already paid and the fact that development consents have been granted for houses on lots east of the subject land it could well have been reasonable to require some contribution towards upgrading of Blade Road by the applicant east of the easternmost boundary of the subject land.

Having regard to section 94(1) of the Environmental Planning and Assessment Act it would appear that the proposed development would increase the demand for public services, namely an improvement to Blade Road. However, having regard to section 94(2)(b) of the Act and the

ASSESSOR: (contd) ...particular circumstances of this case I do not consider that it would be reasonable to require a contribution to be made as I am not satisfied as to the expenditure of previous moneys obtained by the council and there is also the question of consistency between various lot owners to be taken into account.

The state of the road between the entrance to the proposed dwelling house and the commencement of the gravelled portion of Blade Road is not such as would require the refusal of development consent in the particular circumstances of this case.

Accordingly the orders of the court are: 1. The appeal be allowed. 2. Condition 5 of the development consent for application number 85/7100 and condition 6 of the development consent for application number 85/3128 be deleted and the consents otherwise confirmed. 3. There be no order as to costs. 4. The exhibits may be returned.

A J. Nott

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PH FEB
S.94

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

APPEAL NUMBER 10587 of 1984 DECISION DATE 14 October 1985

APPLICANT Paul Fusarelli and Judy Fusarelli

-v-

RESPONDENT Lismore City Council

HEARD BY Assessor A.J. Nott

HEARING DATE 14 October 1985

REPRESENTATIVES

Applicant: Mr A. Pagotto, Solicitor of W.P. Walters & Co.

Respondent: Mr P. Reynders, Town Planner of the Council.

ACT/SECTION Environmental Planning and Assessment Act, 1979; s. 97(1).

Appeal No: 10587 of 1984

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Assessor Nott
Decision date: 14 October 1985

PAUL FUSARELLI AND JUDY FUSARELLI

-v-

LISMORE CITY COUNCIL

JUDGMENT

This is an appeal under s. 97(1) of the Environmental Planning and Assessment Act, 1979 in respect of a condition of development consent relating to a wholesale/retail nursery at lot 6 DP 255203, Blue Hills Avenue, Goonellabah.

The condition in issue between the parties is condition no. 8 contained in Council's notice of determination dated 19 July 1984. That condition states:

> "The developer pay a contribution of $6,030 towards the upgrading of Blue Hills Drive to a 6 m wide bitumen sealed pavement to the City Engineer's satisfaction. This contribution must be paid fully to the satisfaction of Council within three months from the date of this approval or the current use cease until such time as the contribution is paid."

That contribution was required to be paid by the Council under s. 94 of the Environmental Planning and Assessment Act, 1979. When assessing a reasonable contribution under that section, a number of matters are relevant to be considered. In particular and without intending to be

exhaustive, it is necessary to have regard to the present use of the subject land and to the present and likely future use of surrounding land. In this case when considering the present and future use of the subject land and of adjoining land, the Court is concerned with the traffic likely to be generated onto Blue Hills Avenue.

In order to assess the contribution in the subject case it is necessary to describe in some detail the locality. The subject lot is one of nine lots which were approved prior to 1977 when the deposited plan for those lots was registered. The subject land has an area of 10 ha as does lot 7 adjoining it. Lot 8 has an area of 14.77 ha and the other lots are approximately 10 ha in area or less.

Adjoining the subject land to the west is a parcel of about 30 ha owned by the Council. The Council land is the subject of a draft local environmental plan and that plan is likely, on the evidence, to be approved by the Minister. If the Minister does approve it as expected, the Council land will then be zoned 2(g) under Interim Development Order No. 40 - City of Lismore.

The purpose of changing the zoning of the Council land is to enable high density rural-residential development to occur. In particular, the interim development order will permit cluster housing, duplex dwellings and medium-density housing, as well as permitting dwelling houses. In respect of all those developments certain development standards apply, but in general terms it could be said that the interim development order will require not less than 550 m^2 for each dwelling in 2 (g) zone, although for a dwelling house the minimum area is 500 m^2. For a dwelling house in that zone the minimum frontage is 16.5 m and for other permitted residential development the minimum frontage is 18 m.

I mention these development standards because I think it is likely that residential development more or less to the maximum standard permitted by the interim development order is likely to occur, even though that might not be for several years. That being the case, the contribution sought in the present appeal has to be assessed in the light of the traffic which

will be generated in the future by a development of the Council land.

On the evidence it would appear that there could be in the vicinity of 40 lots having either direct or indirect access to Blue Hills Avenue. The indirect access would be via a new road off Blue Hills Avenue, dedicated from the Council land. Of course the Court's decision in no way binds the Council in this matter and it could well be that contrary to what the evidence seems to indicate in this case, no residential development occurs, or alternatively access might be principally to Holland Road. However, a decision has to be made in this matter on the balance of probability, and I find that it is likely that a major proportion of the land to be subdivided by the Council will have access to Blue Hills Avenue.

Since August 1980 when Interim Development Order No. 40 came into effect, it appears that all lots in DP 255203, of which the subject land is one, have been developed. Lot 9 in DP 255203 has a Seventh-Day Adventist school erected on it and the evidence in relation to traffic generation from that development is not clear. It does appear however that there are about 100 students at the school and that at least one double-decker bus comes to the school and leaves the school each day. And I find, because of the location of the school, that it is likely that there would be significant traffic going to the school to deliver pupils there. That traffic could include other buses, and certainly would include cars driving some of the pupils to school. In addition there would be the cars used by the teachers at the school.

All the traffic from the school has to pass along that part of Blue Hills Avenue which the Council seeks to develop using the contribution sought from the applicant in this appeal.

Five other lots of the nine-lot subdivision each has a house erected on it.

Apart from those lots, lot 7 is deserving of particular mention because that lot contains (it seems) a dwelling house and it certainly contains a further development comprising tearooms. The evidence does not

disclose whether a retail nursery business which is also conducted on lot 7 commenced before or after August 1980. In any event the Council has granted development consent for a number of uses including the tearooms and a nursery, and the Council has (as a condition of development consent for lot 7) also required a contribution to be paid. The amount of the contribution is the same as that sought from the applicant in this appeal.

The evidence of the Council was that the total cost of upgrading that part of Blue Hills Avenue from Holland Street to the applicants' gate was $12,060 as at July 1984. The Council's condition of consent required the applicant to pay half that amount and the development consent in respect of lot 7 required the developer of that lot to pay the other half. There is no dispute by the applicants as to the reasonableness of the amount of $12,060 should I find that a contribution of half that amount is required to be paid.

So far I have described the locality and indicated the uses to which the various nine lots have been put. In general, the uses are for a rural-residential dwelling type use, except in respect of lot 7 which has an approval for the tearooms and for a retail nursery, and except in respect of lot 9 which has the Seventh-Day Adventist school erected on it. In addition to a house erected on lot 8, it seems that farm machinery is hired out; however, the evidence does not disclose whether that use is lawful or not.

Looking in more detail at the subject land it is important to consider its past use because, at all relevant times during the ownership of the applicants, the land has been subject to interim development orders. In Vumbaca v Baulkham Hills Shire Council (1979) 141 CLR 614 the High Court held that upon the coming into force of an interim development order any previously existing use whether lawful or not could, after the coming into force of the order, be lawfully continued. This case is of importance in the subject appeal because prior to August 1980 the evidence establishes that the subject land was used for the purpose of a wholesale nursery by the applicants. No development consent was obtained by the applicants for the wholesale nursery use prior to August 1980, but that does not matter

having regard to the High Court decision.

Accordingly I consider it relevant to have regard to the existing traffic that might be generated by a wholesale nursery, as distinct from a wholesale and retail nursery which is what the applicants now apply for. The evidence as to traffic generated by a wholesale nursery is quite sparse and I cannot put a precise figure on it.

In relation to the proposed use for which development consent is sought from the Court, Mr Fusarelli says that no more than about 10 or 12 customers per day will come to the site during springtime and that a lesser number will come during the winter months. The fact that any retail selling of plants from the subject land has been unlawful does not in my decision weigh against the applicants, but it does serve the purpose of showing what might be expected should the applicants continue their present business.

Nevertheless I have to look at the matter on the basis that the present applicants could sell their business to some other nurseryman who might carry on a more intense use of the land. Mr Smith who gave evidence for the Council said that in his opinion there could be up to 20 vehicles coming to the subject land each day. That figure was not based on any studies of other nurseries but I do tend to accept it as an upper limit for the subject land at this location. In accepting that figure I have had regard to the fact that there will be a considerably greater residential population in the locality if the development of the Council land occurs in the near future.

The condition of Blue Hills Avenue I find on the evidence is unsatisfactory for the volume of traffic presently using it. When the Seventh-Day Adventist school was approved it could well have been the case that the Council could have required a contribution for the bitumen sealing of that avenue for its whole length. I do not have to express any final view on that matter. It must be borne in mind that the school use was approved prior to the enactment of s.94 of the Environmental Planning and Assessment Act, 1979. However, I do note the evidence of the Council's

officers that if the school had been the subject of a development application after the coming into force of that Act, a recommendation would have been made for the bitumen sealing of that road at the cost of the school.

Blue Hills Avenue is about 500 m long. It is about 300 m from the junction of Holland Street to the applicants' gate and about 200 m then to the school. For the whole of its length it is a gravel road of approximately 6 m wide. If the development of the Council land takes place, as I find is likely on the evidence presented in this appeal, it is intended that there be a sealed bitumen road for the full frontage of Blue Hills Avenue to the Council land. The bitumen sealing will extend from the kerb on the northern side where the Council land is to the centre of the road, which is a distance of 4.5 m, and if the carriageway prior to the development of the Council land is bitumen sealed, there will be a further 3 m to the south from the centre line of the carriageway. In addition, if the Council land is developed there will be kerbing and guttering and perhaps the construction of footpaths.

Having regard to the terms of s. 94 of the Act, I consider it unreasonable for the applicants to have to bear a contribution of approximately $6,000 towards the upgrading of that part of Blue Hills Avenue from their gate to Holland Street. The contribution in my opinion must be assessed in the light of the existing uses and in the light of likely future uses. No contributions have been sought from any previous developer in the subject locality other than the developer of lot 7. The developer of lot 7 has not paid the contribution which is sought. I am not called upon to express any opinion as to the reasonableness of that contribution.

Weighing all relevant factors and bearing in mind that there is an existing road with existing development already on it, and that this case is different from a case I decided on 30 August 1985, Hawkins v Evans Shire Council (No. 10687/82), I consider that a reasonable contribution for the applicants to pay is in the vicinity of 10 per cent of the present cost of upgrading that part of Blue Hills Avenue from the applicants' gate to

Holland Street.

The orders of the Court are:

1. The appeal be allowed.

2. Development consent be granted in accordance with the notice of determination dated 19 July 1984 [as amended by Court order on 20 June 1985], except that the time for commencement of the development will run from the date of this order, and except that condition 8 shall be deleted and the following condition inserted:

   "The developer shall pay a contribution of $1,300 towards the upgrading of Blue Hills Drive to a 6.0 m wide bitumen sealed pavement, such contribution to be paid on or before 14 December 1985."

3. There be no order as to costs.

A J Nott

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A.J. NOTT
Assessor.

ps.

S.H File S.94

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

APPEAL NUMBER	10579 of 1984	DECISION DATE	22 October 1985
APPLICANT	Steven Young and Jennifer Guest		
v			
RESPONDENT	Nambucca Shire Council		
HEARD BY	Assessor G. Andrews		
HEARING DATE	5 September 1985		

REPRESENTATIVES

Applicant: Mr. S. Loomes, Barrister, instructed by Mr. B.J. Finlayson, Solicitor of B.J. Finlayson and Associates.

Respondent: Mr. J. Hannaford, Solicitor of Sly and Russell, Solicitors.

ACT/SECTION Environmental Planning and Assessment Act, 1979; s. 97(1).

Appeal No: 10579 of 1984

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Assessor G. Andrews
Decision date: 22-10-85

STEVEN YOUNG AND JENNIFER GUEST

v

NAMBUCCA SHIRE COUNCIL

JUDGMENT

This is an appeal to the Court pursuant to s. 97(1) of the Environmental Planning and Assessment Act, 1979 against the respondent Council's decision to grant development consent subject to conditions for the erection of a rural dwelling on Por. 55, Taylors Arm Road, Parish of Medlow, between Upper Taylors Arm and Burrapine, west of Macksville.

Portion 55 is part of an "existing parcel" which also comprises Pors. 20, 60, 62 and 63 Parish of Medlow, being the total area of all adjoining or adjacent land held in the same ownership at the appointed day (16 June 1967) of the deemed environmental planning instrument, Interim Development Order No. 1 - Shire of Nambucca, under which the subject site is zoned Non-Urban 1(a) and pursuant to the provisions of which the erection of a rural dwelling is permissible with consent.

The area of Por. 55 is 22.2 ha and while a dwelling exists on Por. 62 and 63 combined and also on Por. 20, Pors. 55 and 60 are both vacant at this time.

The relevant clauses of the planning instrument are 12(1)(d) and 12(2A), as follows:-

"RURAL DWELLINGS -

12(1) A dwelling house shall not be erected on a parcel of land within Zone No. 1(a) or 1(b) unless the parcel -

(a) has an area of not less than 40 ha;

(b) comprises an allotment created by a subdivision in accordance with cl. 11(3) or (5);

(c) comprises an allotment created by subdivision in accordance with cl. 11(4);

(d) comprises an allotment, lot or portion of land lawfully created prior to the appointed day -

(i) if that allotment, lot or portion has an area of not less than 2 ha but less than 40 ha - only if -

(A) the Council is satisifed with the ratio of depth to frontage of that land;

(B) the Council is satisfied that the land is intended to be developed for the purpose of agriculture; and

(C) if the land has a frontage to a main or arterial road, that frontage is not less than 200 m;

(ii) if the allotment, lot or portion has an area of not less than 1,000 m^2, only if the Council is satisfied that the dwelling house is intended to be used to house the owner, a relative of the owner or a person employed or engaged by the owner in the use of land of the owner, adjoining or adjacent to the allotment, lot or portion, for the purposes of agriculture; or

(e) comprises an allotment created by a subdivision to which the consent of the Council has been given under this Order as in force at any time before the 3 September 1976.

12(2) Not more than one dwelling house shall be erected on a parcel of land referred to in sub-clause (1)(b)(c) or (e).

NUMBER OF RURAL DWELLINGS -

12(2A) The total number of dwelling houses in respect of which the Council may give its consent under sub-clause (1)(d) in respect of any existing parcel shall not exceed -

(a) if the existing parcel has an area of less than 10 ha - nil;

(b) if that existing parcel has an area of not less than 10 ha but less than 20 ha - 1;

(c) if that existing parcel has an area of not less than 20 ha but less than 30 ha - 2; or

(d) if that existing parcel has an area of not less than 30 ha - 3."

The existing parcel as previously described was owned and farmed by the McWilliam family; the farm consisted of five separate certificates of title which were created prior to the appointed day and as a consequence, the respondent Council has no control over their separate sale . However, the Court notes that the respondent Council does require contributions towards roads, public reserves and community facilities for each dwelling erected after the first farm dwelling on the "existing parcel", because the Council considers that the additional population in the area places extra demands on its amenities and services.

Development Application No. 820 of the 18 April 1984 for the erection of a rural dwelling, the subject of this appeal, was granted consent by the respondent Council on 28 May 1984, subject to the following conditions:-

1. A dwelling house is approved on Portion 55 Parish Medlow subject to the provisions of Clause 12(1)(d) of Council's Deemed Environmental Planning Instrument, Interim Development Order No. 1 - Shire of Nambucca.

2. The development being carried out substantially in accordance with plans submitted to Council on 13 April 1984 with the application for development approval.

3. A Building Application being submitted to and approved by Council prior to construction commencing.

4. Any stock loading race proposed to be constructed on the subject property must be located on a site approved by the Shire Engineer prior to construction.

5. The location of the dwelling house being clear of any area likely to be subject to landslip. The applicant should assure himself of this requirement through a suitably qualified person prior to construction commencing.

6. The dwelling house or any ancillary outbuildings, sheds etc. being setback a minimum of 20 metres from the alignment of Taylors Arm Road.

7. Location and construction of vehicular access to the site to the satisfaction and requirements of the Shire Engineer. Attention is

drawn to the need to contact Council's Engineering Department to arrange an inspection.

8. Scrub being cleared from the entrance to the property to ensure adequate site distance.

9. In the use of the dwelling, in accordance with this development consent, the applicant shall take reasonable action to minimise damage to the buildings, goods or equipment or other property stored in the buildings in the event of bush fire risk.

10. Pursuant to the provisions of Section 94 of the Environmental Planning and Assessment Act, the applicant shall pay to Council, on lodgement of the building application a -

    (a) Cash contribution of $3,300 towards the upgrading of access roads and their structures.

    (b) Cash contribution of $850 towards public reserves, amenities, and services. Such contribution shall be used for the establishment and/or improvement of parks, recreation areas and community facilities in the Macksville district.

The respondent Council's reasons for the imposition of the above described conditions in accordance with the requirements of Section 91 of the Environmental Planning and Assessment Act, having regard to the relevant provisions of Section 90 and 94 are as follows:-

"1. To protect the public interest.

2. To ensure siting of the dwelling away from any likely slip prone areas.

3. To comply with the provisions of Part XI of the Local Government Act, 1919 and Ordinance 70.

4. To comply with the provisions of Council's deemed Environmental Planning Instrument.

5. To protect the existing and likely future amenity of the surrounding rural environment.

6. As the development will generate additional traffic to Taylors Arm Road, a contribution, pursuant to Section 94 has been levied to go towards the upgrading of that road.

7. As the development will create a need for additional land for active public reserve purposes, assuming an occupancy rate of 3.1 persons per lot $850 additional lot, based on the formula of 1.2ha, of active open space per 1,000 persons, a contribution pursuant to Section 94 has been levied towards the provision of the active open space."

The subject appeal application was subsequently filed with the Court by the applicant on 9 October 1984, the issue in dispute being the s. 94 contributions referred to in Condition No. 10 described above.

Evidence was given on behalf of the applicant by Ms. J. Guest, being one of the applicants herself, and on behalf of the respondent Council by Mr. J.G. Massey, Chief Town Planner and Mr. D.C. Walker, Shire Engineer. A view of the subject site and its locality was undertaken by the Court prior to the commencement of the hearing.

Mr. Massey presented a comprehensive statement of evidence which represented the nexus between a social study report prepared by D.C.P. McInnes Rigby, Planners Economic and Tourism Consultants in 1983, the adoption of the Social Plan by the respondent Council as policy on 24 January 1984, the proposed expenditures in the Macksville catchment, within which the subject site is located, and Council's condition that there be a cash contribution of $850 per dwelling towards community reserves, amenities and services, such contribution to be used for the establishment and/or improvement of park recreation areas and community facilities in the Macksville district.

Mr. Massey's evidence addressed the necessary test for the application of conditions now well established in the practice of this Court as follows:-

(a) the condition must be imposed for a planning purpose;

(b) the condition must relate to the development subject of the appeal; and,

(c) the condition must be reasonable.

Mr. Massey discussed the Social Plan to show that:-

(a) the development proposed will increase the population which in turn will place additional demands on the Shire in meeting community facilities and services;

(b) the Social Plan in formulating these catchment areas has given consideration to the range and distribution of urban services,

(shopping, community and recreation facilities), local topography and accessibility (road network and movement patterns) to identify the appropriate catchment areas and as a result establish the nexus between the development site and the public reserve area; and

(c) Council, in assessing the contribution, has taken into account the Court's adoption of the Revay and Scott formula and has applied it in the local context for each catchment area by reference to the generally accepted standard for active open space, recognising that rural dwellers have sufficient space within their own sites to cater for their passive needs.

Insofar as the basis for a contribution rate of $850 was concerned, it was conceded on behalf of the applicant that the respondent Council's case was well researched and well presented and therefore was not in issue. However the applicant did seek to challenge the reasonableness of applying the contribution rate to the subject application having regard to the circumstances of the case.

Similarly, Mr. Walker presented a comprehensive statement as to the respondent Council's rural roads needs study which considered the following matters:-

1. Population growth and destination in rural areas.
2. Road needs.
3. Available Council resources.
4. Access road and structures needs estimates $84 - 1984/1993 and 1993/2001.
5. Level of contributions and reasonableness.
6. Contribution to be placed in trust fund.
7. Annual review of studies.
8. Definition of dwelling.

In summary the report documented the proposed extent of access road and structures development and their cost. After considering the financial resources available to Council, about one third of the estimated cost was proposed for contribution pursuant to the provisions of s. 94 of the Environmental Planning and Assessment Act.

This represented, on a per dwelling basis, $3,300 for the period of 1984/1993 for 680 additional dwellings and $3,700 per dwelling during the period 1993/2001 for an increase of 905 dwellings.

The Council's policy adopted on 3 July 1985 with effect from 19 July 1985, requires all contributions received for new dwellings to be held in a trust fund and used on the work identified as benefitting the road system on which the dwelling is constructed. In the subject case, bitumen sealing of one km of Taylors Arm and 5 km of Burrapine Road is proposed in 1984/1993, and 5 km of Burrapine Road in 1993/2001. Taylors Arm Road is proposed to be reconstructed and raised above flood level near Macksville in 1993/2001. The estimated cost of all of those works is $1.8 million.

The policy also states that a dwelling, described as follows, will attract a contribution:-

"(a) all newly subdivided rural lots on which a dwelling is able to be erected;

(b) dwelling houses approved for erection on existing portions;

(c) workers dwellings;

(d) each dwelling house approved for erection on land used for multiple occupancy;

but does not include lots previously subdivided and approved for development."

Insofar as the respondent Council's condition 10(b) requires a cash contribution of $3,300 towards the upgrading of access roads and their structures in respect of the subject application, it was conceded by the applicant in the same manner as that described earlier, concerning Condition 10(a), that the nexus between the Council's policy and development of the subject site was not an issue. However the applicant submitted that it was again a matter of reasonableness as to whether the charge ought to be applied in respect of the subject application.

Ms. Guest described to the Court how she and Mr. Young had visited the

locality over a period of about 5 years and, having selected the subject site, exchanged contracts on 2 April 1984 to purchase the subject land. They then submitted a development application for erection of a dwelling on 13 April 1984. To her understanding there was meant to be a condition in the agreement for sale of the land that the sale was subject to Mr. Young and herself receiving development consent for erection of a dwelling-house.

The agreement for sale of land was tendered in evidence and shows that the date of making the agreement was 2 April 1984 in the amount of $40,000 without any condition attached relating to subsequent development consent for the proposed dwelling.

Ms. Guest understood that from her enquiries at the Council and negotiations conducted through her solicitor that it would be possible to erect a dwelling but she had no knowledge of the likely scale of contributions to be required by the Council as a condition of development consent.

It was submitted on behalf of the applicant that as the application was one of the first "to pass through the turnstile" in respect of the new policy on s. 94 contributions, the applicant had been disadvantaged by Council's decision by virtue of the vendor's agent being "new to it" and the legal advisors involved in the transaction being "new to it".

It was submitted further that more effective publicity of the contribution rates would lead to similar circumstances being avoided by other parties.

On behalf of the respondent Council it was submitted that the policies for contributions flow from a series of increases since 1977 and 1979 for public reserves and upgrading of roads, and after a considerable amount of public discussion flowing from exhibition of the various studies referred to in evidence. Therefore the Council considered that it was reasonable to assume that anyone involved locally in the property field would have been aware of the amounts of contribution the subject of this appeal and that it was also reasonable to assume that anyone involved in negotiations with

real estate agents and solicitors would be reasonably aware of those requirements.

It was submitted that insofar as the applicant was concerned to require development consent as a basis of the completion of the exchange of contracts in the purchase of the subject property, the absence of such a condition is a matter for resolution between the applicants and their advisors as to what lapse occurred. Accordingly it was further submitted that it was not for the Court to look at what advice the applicant might have received and not for the Council to look behind it at what advice may have been received in the determination of the subject application; those matters, of course, may become the subject of consideration by another jurisdiction.

Submissions were made by both parties on the matter of contributions being set aside in circumstances where a proposed residential property had frontage to a Main Road. However, such an ameliorating factor is not applicable in the subject case.

The Court has noted that the respondent Council has received contributions in respect of subdivisions along the Brothers Ridge, some 3 km south of Taylors Arm, and in the vicinity of Thumb Creek, some 17 km to the north west of Taylors Arm, and that those funds have been placed in the relevant trust fund. In viewing the locality, the Court noted the relatively poor condition of the narrow and winding unsealed road that extends some 10 km to the north west from Taylors Arm to the subject site and beyond that to the Burrapine Bridge and further towards Thumb Creek. As indicated earlier that road is included in the road needs estimates and the Court agrees with the parties that a substantial case has been presented on behalf of the respondent Council to warrant the consideration of cash contributions being required of the applicant, to pay in part for road access improvements as well as for local community facilities and active open space areas in the Macksville catchment.

As to the reasonableness of those contributions, the Court has not been persuaded by the applicant's submissions relating to the contemporary

nature of the policies upon which the contributions are based or the circumstances of negotiation which led to contracts being exchanged without there being protection of the applicants' interests concerning development consent. However, the Court would draw the applicants' attention to the submissions by the respondent Council in that regard, as referred to earlier; should there have been any oversight in the undertaking of contractual arrangements, that is not a matter able to be considered pursuant to the powers of this Court as specified in s. 39 of the Land and Environment Court Act, but that issue may be open to consideration in another jurisdiction.

Therefore the Court has concluded pursuant to s. 94 of the Environmental Planning and Assessment Act and s. 39 (4) of the Land and Environment Court Act, that the cash contributions sought by the respondent Council pursuant to Condition 10 of the subject development consent are both fair and reasonable in the circumstances of the case.

Accordingly the Court orders that -

1. The appeal be dismissed.

2. Development consent for Development Application No. DA 820 granted by Nambucca Shire Council on 28 May 1984 for the erection of a rural dwelling subject to Conditions Nos. 1 to 10 inclusive be confirmed.

3. There be no order as to costs.

4. Exhibit B may be returned.

G. Andrews
Assessor

P.H. 76
S.94

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

APPEAL NUMBER 10052 of 1985 DECISION DATE 31 October 1985

APPLICANT A.C. Mylrea and Ors.

v

RESPONDENT Nambucca Shire Council

HEARD BY Assessor G. Andrews

HEARING DATE 6 September 1985

REPRESENTATIVES

Applicant: Mr D. Perry, Solicitor of Perry & Tuckerman.

Respondent: Mr J. Hannaford, Solicitor of Sly & Russell.

ACT/SECTION Environmental Planning & Assessment Act, 1979; s. 97(1)

Appeal No: 10052/85

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

Heard by: Assessor G. Andrews
Decision date: 31-10-85

ARTHUR CONVERY MYLREA,
DEBBIE ANN MYLREA,
SCOTT MYLREA,
DEBBIE JOY MYLREA and
WENDY ANNE MYLREA

v

NAMBUCCA SHIRE COUNCIL

JUDGMENT

This is an appeal to the Court pursuant to s. 97(1) of the Environmental Planning and Assessment Act, 1979, against the granting of development consent subject to conditions by the respondent Council for the erection of two rural worker's dwellings upon lot 4 DP 601358 Upper Newee Creek, known as "Hilland", Soldier Settlers Road, Newee Creek via Macksville.

The subject site of some 41 ha adjoins the intersection of Upper Newee Creek Road and Soldier Settlers Road, having frontage to Soldier Settlers Road on the west and a common boundary with Newee Creek on the east. There exists on the site an old farm dwelling-house, a barn with garage and a substantially completed new dwelling-house, being one of the subject rural worker's cottages as discussed later, all of which are occupied by the applicants except that Debbie Ann Mylrea has recently moved away from the site.

The site is approximately 8 km from Macksville and 7 km from Nambucca Heads, the route to Macksville being via Upper Newee Creek Road and Wirrimbi Road, and to Nambucca Heads either via Soldier Settlers Road and

Gordon's Knob Road or via Wirrimbi Road and the Old Coast Road. It is is zoned Non-Urban 1(a) under the deemed environmental planning instrument, Interim Development Order No. 1 - Shire of Nambucca, gazetted on 16 June 1967, pursuant to the provisions of which cll. 12(4) and 12(5) provide for the erection of rural worker's dwellings subject to development consent as follows:-

> "(4) One dwelling house may be erected on a parcel of land referred to in sub-cl. (1)(a) for each 40 ha contained within the parcel, provided that any dwelling-house (hereinafter called "a worker's dwelling-house") erected after the first dwelling-house has been erected shall be only used to accommodate a person employed or engaged in the use of the parcel for the purposes of agriculture.
>
> (5) Notwithstanding sub-cl. (4) a worker's dwelling-house, which but for this sub-clause could not be erected, may be erected with the concurrence of the Commission."

The respondent has adopted a Code for the Control of Worker's Dwelling-houses pursuant to cl. 12 as described above, and effective as a development control plan pursuant to s. 72 of the Environmental Planning and Assessment Act, 1979, from 23 December 1983, as amended on 18 April 1984.

The Code indicates the range of information sought by the respondent Council to assist its evaluation of applications pursuant to s. 90 together with its requirements for contributions pursuant to s. 94 for each worker's dwelling-house.

As the subject site is situated within the Nambucca Heads catchment, the required contribution for public reserve and open space purposes as adopted by Council on 18 April 1984 is $1,075 per worker's dwelling and the contribution for up-grading of access roads and structures is $3,300 or a fee as determined by Council from time to time. The open space contribution is based upon the formula to supply 1.21 ha of active public reserve for 1000persons assuming an occupancy rate of 3.1 persons per worker's dwelling-house.

Development Application No. 714 dated 27 October 1983 for the erection

of a worker's cottage by Scott Anderson and Debbie Joy Mylrea was granted consent by the respondent Council on 14 December 1983, prior to the Council's adoption of revised s. 94 contribution rates, subject to the following conditions:-

"(1) The development being carried out substantially in accordance with plans submited to Council on 27th October, 983 with the application for development approval.

(2) Building Application being submitted to and approved by Council prior to construction commencing.

(3) Any stock loading race proposed to be constructed on the subject property must be located on a site approved by the Shire Engineer prior to construction.

(4) The dwelling house or any ancillary outbuildings, sheds, etc. being setback a minimum of 20 metres from the alignment of Soldier Settlers Road.

(5) Vehicular access to the development site being to the satisfaction and specifications of the Shire Engineer. Attention is drawn to the need to contact Council's Engineering Department to arrange an inspection.

(6) Payment into Council's Trust Fund of a sum of $700 as a contribution in respect of the provision of open space for active public reserves or the improvement or embellishment of existing open space for such purpose.

(7) Public road up-grading contribution of $3,300 to be used for the up-grading of Newee Creek/Soldier Settlers Road systems."

Development Application No. 715 dated 28 October 1983 for the erection of a family worker's cottage by Debbie Ann Mylrea was also granted consent on 14 December 1983, subject to conditions including Nos. (6) and (7), similar to those quoted above in respect of DA 714.

The respondent Council's reasons for the imposition of the above described Conditions Nos. 6 and 7 in accordance with the requirements of Section 91 of the Environmental Planning and Assessment Act 1979, having regard to the relevant provisions of ss. 90 and 94 are as follows:-

"To protect the public interest.

To satisfy the provisions of Clause 12(4) and (5) of

the Deemed Environmental Planning Instrument, I.D.O. No. 1, Shire of Nambucca.

The proposal will create a need for additional land for active public reserve purposes assuming an occupancy rate of 4 persons per house, one additional house based on a formula of 1.619 ha pr 1,000 persons.

As the worker's dwelling-house will generate additional traffic in the locality Council has requested a road-upgrading contribution in proportion to the additional need."

On 13 August 1984 the respondent Council declined the applicants' requests for the deferment of payments in respect of Conditions Nos. (6) and (7) of both Development Application No. 714 and 715.

In the meantime, Development Application No. 873 of 4 July 1984 for the erection of a dwelling-house upon portion 244, adjoining the subject land, by Debra Ann Mylrea was granted consent by the respondent Council on 11 July 1984 subject to conditions not including s. 94 contributions as the proposed dwelling was the first to be erected upon an existing parcel. The intention of the latter application was to replace that previously described as Development Application No. 715. However, the Court was informed that Debra Ann Mylrea was unable to proceed with the erection of the dwelling on portion 244 and consequently she wished to continue with the proceedings relating to Development Application No. 715.

Arthur Convery Mylrea and his wife, Wendy Anne Mylrea submitted Building Application No. 84/235 on 31 July 1984 pursuant to development consent No. 714 and obtained building approval subject to conditions on 21 August 1984. Condition No. 6 of the building approval is as follows:-

"6. Compliance with the requirements of the development consent."

Thereafter on 20 August 1984 the respondent Council received payment of $4,000 being the contributions pursuant to Condition Nos. (6) and (7) of development consent No. 714.

The Court notes that upon undertaking a view of the subject site and its locality, the dwelling house subject to both development consent and

building approval as described above appeared to be substantially constructed and occupied, although not yet completed to final inspection stage.

On 18 December 1984 the subject appeal was filed with the Court by the applicant s in reference to the issues of Condition Nos. (6) and (7) in the Notices of Determination of Development Applications Nos. 714 and 715.

Evidence was given on behalf of the applicants by Mr A.C. Mylrea and his son Mr Scott Anderson Mylrea, while on behalf of the respondent Council, evidence was given by Mr J.G. Massey, Chief Town Planner and Mr D.C. Walker, Shire Engineer.

Mr Massey presented a comprehensive statement of evidence which represented the nexus between a social study report prepared by D.C.P. McInnes Rigby, Planners Economic and Tourism Consultants in 1983, the adoption of the Social Plan by the respondent Council on the proposed expenditures in the Nambucca Heads catchment, within which the subject land is located, and the respondent Council's condition that there be a cash contribution of $700 per dwelling towards community reserves, amenities and services, such contribution to be used for the establishment and/or improvement of park recreation areas and community facilities in the Nambucca Heads district.

Mr Massey's evidence addressed the necessary test for the application for conditions now well established in the practice of this Court as follows:-

(a) The condition must be imposed for a planning purpose;

(b) The condition must relate to the development subject of the appeal; and,

(c) The condition must be reasonable.

Mr Massey discussed the Social Plan to show that:-

(a) The development proposed would increase the population which in turn will place additional demands on the Shire in meeting community facilities and services;

(b) The Social Plan in formulating these catchment areas has given consideration to the range and distribution of urban services, (shopping, community and recreation facilities), local topography and accessibility (road network and movement patterns) to identify the appropriate catchment areas and as a result established the nexus between the development site and the public reserve areas; and

(c) Council, in assessing the contribution, has taken into account the Court's adoption of the Revay and Scott formula and has applied it in the local context for each catchment area by reference to the generally accepted standard for active open space, recognising that rural dweller's have sufficient space within their own sites to cater for the passive needs.

In so far as the basis for a contribution rate of $700 was concerned, it was conceded on behalf of the applicant that the respondent Council's case was not in issue. However, the applicant did seek to challenge the reasonableness of applying the contribution rate to the subject application having regard to the circumstances of the case.

Similarly, Mr D.C. Walker presented a comprehensive statement as to the respondent Council's Rural Roads Needs Study which considered the following matters:-

1. Population growth and destination in rural areas.
2. Road needs.
3. Available Council resources.
4. Access road and structures needs estimates $84 - 1984/1993 and 1993/2001.
5. Level of contributions and reasonableness.
6. Contribution to be placed in trust fund.
7. Annual review of study.
8. Definition of dwelling.

In summary, the report documented the proposed extent of access road and structures development and their cost. After considering the financial

resources available to Council, about one-third of the estimated cost was proposed for contribution pursuant to the provisions of s. 94 of the Environmental Planning and Assessment Act.

Mr Walker also tested the condition pursuant to the three steps described earlier. As to the planning purpose, the same view is held by the respondent Council about the growth in population placing additional demands on the shire in meeting road access as in the case of community facilities and services.

The proposed condition recommended by the study represented, on a per dwelling basis, $3,300 for the period of 1984/1993 for 680 additional dwellings and $3,700 per dwelling during the period 1983/2001 for an increase of 905 dwellings.

The Council's policy adopted on 3 July 1985 with effect from 19 July 1985, requires all contributions to be held in a trust fund and used on the work identified as benefitting the road system on which the dwelling is constructed. In the subject case, sections of Wirrimbi Road, Gordon's Knob Road, Soldier Settlers Road and Newee Creek Road are proposed to be upgraded, together with structures, the expenditure being estimated to be $0.6 m in 1984/1993 and $0.6 m in 1993/2001.

The policy also states that a dwelling, described as follows, will attract a contribution:-

"(a) All newly subdivided rural lots on which a dwelling is able to be erected;

(b) Dwelling-houses approved for erection on existing portions;

(c) Workers' dwellings;

(d) Each dwelling approved for erection on land is for multiple occupancy;

but does not include lots previously subdivided and approved for development."

In examination Mr Massey advised that Council had considered the

merits of the subject applications and that while in some circumstances the amount of contribution might be altered, the Council did not agree to do so on this occasion. He also explained that the contribution was based upon the likely effect of development of dwellings and not on the population which might presently inhabit the existing dwelling on the site or was likely to inhabit the new dwelling. Thus the contribution was based upon an average rate of occupation for the locality and its subsequent application to the Nambucca Heads catchment having regard to the programme of open space and community facilities adopted for that catchment.

Mr Walker advised the Court that the sum of $3,300 contributed pursuant to condition No. 7 for consent to Development Application No. 714 had already been applied to roadworks during 1984 for the partial upgrading of Wirrimbi Road which provides road access between the subject site and Nambucca Heads. The contributions were included in a sum of $7,700 transferred from the Trust Fund and applied to a total cost of $182,700 for the construction of a sealed surface to the previously unsealed road. The Court was informed of the manner of recording the contributions paid into the trust fund and their reallocation to general fund expenditures on roadworks.

As to the merits of the particular case, Mr Walker explained that the amount of traffic is calculated by reference to the increase in dwelling-houses, similarly to the approach to open space and community facilities and that amount is based upon an average population per dwelling and car occupancy, trip generation and experience in the locality. Mr Walker was of the opinion that notwithstanding the fact that the Mylrea family group proposed to live on the subject property in three separate dwellings, he considered that each unit of the family would create additional road trips for such matters as schooling, shopping and recreation, together with external work trips. He noted that there was an increasing incidence of travel to work from rural properties to local employment centres because those living on the farms could not be supported solely from farm production. Therefore Mr Walker concluded that improvement of the Newee Creek/Soldier Settlers road system benefits the applicants.

He also indicated from his experience, that in the event of payment of a s. 94 contribution for road access improvements being accompanied by a letter indicating that the payment was made under protest, the Council would return such a cheque until determination of any appeal on the matter. In the subject case he was not aware of any such protest advice having been received.

Mr A.C. Mylrea advised the Court that he owns the property in conjunction with his wife and children having purchased the land late in 1981 and then occupied the existing farm dwelling-house in January 1982. Their objective was to establish the farm and to enable the whole family to develop its production.

At present Scott and Debbie Joy Mylrea occupied the existing farm-house with their three children while Mr A.C. Mylrea and his wife use the latter house's facilities but otherwise reside in the dwelling under construction as approved pursuant to Development Application No. 714 and Building Application No. 84/235

Mr A.C. Mylrea stated that he had advised the Chief Building Inspector, upon applying for release of building plans that he was paying the required s. 94 contributions of $4,000 under duress. The Court notes that no records are available of such a claim either by letter from Mr Mylrea or by note or minute held in the Council's records. The Court's attention was drawn to the applicants' correspondence relating to the deferment of payment of contributions which was subsequently refused by the Council, as referred to earlier.

Mr A.C. Mylrea explained that his son Scott helps to farm the property while he (Mr A.C. Mylrea) constructs the new dwelling as an owner-builder. There is about 1 ha under cultivation for small crops presently, together with some stock being grazed on the remainder of the property.

He also advised the Court that the two dwelling-houses were proposed in lieu of extensions being made to the existing farm house. As indicated

earlier, Debbie Ann Mylrea has since moved away from the site, while Mr A.C. Mylrea's wife Wendy works at the Macksville Hospital on a daily basis.

Mr A.C. Mylrea estimates that it will take another two years to be able to support the two families on the property, using the arable land adjoining the creek-line for such crops as Kiwi-fruit in an area of approximately 3 ha which will require two full-time persons to be employed.

Mr Scott Mylrea described the work he undertook on the property and confirmed that he and his wife and three children reside in the old farm-house while his parents live partly in the new dwelling under construction and partly within the farm-house. He acknowledged the use by the family of community facilities in Macksville and the likelihood of further demands by the family for other facilities in due course. He also acknowledged the role of the Council's social plan in providing a programme for the development of such facilities.

It was submitted on behalf of the applicants that the development of the rural worker's dwellings on the subject land would not create any decline in amenity on the roads or affect the community services, and that as the farm was being developed for the lineal family, they considered that there would be no more impact on the roads than when the family lived in the one dwelling-house; additionally they considered that there was no nexus between the contribution sought and the development proposed to be undertaken on the site, only a generalised approach to the area as described by the Council's staff. The applicants did not challenge the respondent Council as to the general principles of the social plan although they considered that there were some aspects of the future provision of open space which were questionable.

The applicants also submitted that money spent on Wirrimbi Road was not in accordance with the works programme which provided for the up-grading of Soldier Settlers and Newee Creek Road systems.

In their opinion, the circumstances of their settlement on the subject

property were such that it was simply a matter of personal social advantage for three dwellings to be located on the property rather than creating an extended single farm dwelling-house within which the various units of the family could reside. Therefore they considered that aspect of settlement was different from three separate equivalent lots, insofar as the development was likely to place demands on the community's services and access routes. They also consider that Council should have taken into account the time required to phase-in the horticultural development on the better quality agricultural land in the vicinity of Newee Creek.

As to the question of whether the applicants were still aggrieved in respect of the conditions of consent attached to Development Application No. 714, as a consequence of proceeding to obtain building approval and erecting the approved dwelling, it was submitted for the applicants that following an unsuccessful application to the Council to achieve deferral of payment of contributions pursuant to s. 94 of the Environmental Planning and Assessment Act 1979, Mr A.C. Mylrea did say to the Chief Health and Building Inspector, prior to uplifting the approved building plans, that he was paying the contributions under protest. As previously noted, there is no official record of such a protest having been lodged by the applicants.

Accordingly, the applicants submitted that their present application to the Court properly sought the deletion of condition 6 and 7 from the conditions of development consent for development applications 714 and 715.

It was submitted on behalf of the respondent Council that the only merit issue in respect of both applications was the reasonableness of the conditions seeking financial contributions. In that regard, the respondent Council considered that the applicants not only conceded the substance of the basis for determination of contributions by reference to the social plan and the rural roads needs study, but also acknowledged the likely use of the and new facilities by their families, being typical of the increasing population of the Shire as discussed in the social plan. The Council does not view the applicants as being "not newcomers";rather, they represent the very people the Council expects to seek to use those

facilities in the Nambucca Heads catchment, as described in the social plan and the road needs study.

Insofar as there is required to be a reasonable nexus between the circumstances of the subject development and any condition requiring a cash contribution pursuant to s. 94, the respondent Council considers that its evidence is satisfactory in that regard and reveals a direct quantifiable benefit for the applicants.

As to the question of the applicants being dissatisfied with the consent conditions in respect of Development Application No. 714 it was submitted on behalf of the respondent Council that at 20 August 1984 the applicant was not dissatisfied because upon payment of the required contributions when up-lifting the building plans, the applicants had effectively complied with the development consent and were no longer dissatisfied. The respondent Council drew upon the decisions in Bryson Industries Ltd v Sydney City Council (1963) 8 LGRA 395 and Parramatta City Council v Travenol Laboratories Pty Ltd (1978) 35 LGRA 368 as relevant authorities on this aspect.

The respondent Council submitted that the Court was entitled to conclude that the applicants had paid the contributions because that was necessary in order obtain the plans and build the house, thereby complying with the development consent. If the monies had been paid under protest it was submitted that the respondent Council would not have accepted the money and would have required a decision on appeal before concluding the matter.

Alternatively, it was submitted that the applicants were estopped from exercising their right of appeal by having paid the contributions but not telling the Council that they were preserving their rights of appeal in respect of those payments. Thereafter the Council had spent the contributed funds on the programmed works and accordingly the conditions could not now be challenged in respect of Development Application No. 714.

The circumstances of the subject application are considered to

different from those distinguished in Bankstown Municipal Council v White (1963) 10 LGRA 125, as discussed in Parramatta City Council v Travenol Laboratories Pty Ltd, earlier referenced. In that matter a notice of appeal was lodged against a condition requiring a monetary contribution for public garden and recreation space pursuant to s. 333(2) of the Local Government Act, 1919 as amended, pursuant to a subdivision application. Thereafter, and before the hearing of appeal, the appellant paid the sum in question under protest, the Council delivered all the necessary plans and certificates to the appellant, the subdivision was registered with the Registrar General and all the allotments in the subdivision sold. His Honour, Hardy J held that in the circumstances the appellant had not lost her right of appeal. That case is different from the present case in that while the applicants initially wished to defer payment of the contribution and may have been minded to regard the payment thereafter as being in protest or under duress, insufficient evidence is available to persuade the Court that the respondent Council could reasonably have understood that it had been notified of those circumstances.

The Court also notes that in his conclusion to Parramatta City Council v Travenol Laboratories, His Honour Waddell J observed as follows:-

> "There must be many cases, where the imposition of a condition is all that is in contest between an applicant and a Council in which the proper and convenient course to follow would be to permit the development in question to proceed immediately and leave the justification for the condition to be determined later on appeal. To follow such a course would often prevent financial loss to the land owner, be in the public interest, and be a responsible exercise of local government power."

Therefore the Court has concluded that if the applicants were aggrieved prior to erecting the dwelling pursuant to Development Application No. 714, it would have been reasonable for them to have notified the respondent Council accordingly in order that the Council could have considered what steps it might have wished to have taken in respect of the contributions, such as holding the monies in a trust fund but not expending them until the outcome of the appeal. Notwithstanding the plea on behalf of the applicants, the Court is of the opinion that appropriate

communications were not undertaken between the applicant and the Council. The Court is of the opinion further that in respect of that part of the application before the Court relating to Development Application No. 714 the applicants are not aggrieved. However, in the event of there being a contrary view in respect of this point of law, the Court intends to consider the questions of merit of the latter described application as if the applicants are aggrieved, as they now state, insofar as the conditions of consent are in dispute, with reference to both Development Applications No. 714 and 715.

In the matter of Building Owners and Managers Association of Australia Ltd v Sydney City Council, Appeal No. 40084/83, His Honour Cripps J, in his judgment of 2 April 1984, discussed the principles of financial contributions in respect of development applications, as follows:-

> "The circumstances entitling a council to require a monetary contribution in the administration of planning (or environmental) laws, has been the subject of a great deal of litigation. The general nature of council's powers was defined by Walsh J. in Allen Commercial Constructions Pty Limited v. North Sydney Municipal Council (1970) 20 LGRA 208 at 216, with which Barwick CJ, Menzies and Windeyer JJ agreed, as follows:
>
> > "In accordance with a well-recognised rule, cl. 40(1) ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in Fawcett Properties Limited v. Buckingham County Council [1961] AC 636 at 684, as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the ordinance, and not from preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained".
>
> In Newbury District Council v. Secretary of State for

the Environment [1981] AC 578, the House of Lords was concerned with a consent for the use of two war-time hangars as warehouses on conditions that the buildings were removed at the expiration of a stated period. The authority for the imposition of conditions was s. 29(1) of the Town and Country Planning Act which provided, relevantly:

> "Where an application is made to a local planning authority for planning permission, that authority in dealing with the application, shall have regard to the provisions of the development plan so far as material to the application and to any other material considerations, and (subject to section 41, 42, 70, 77 and 80 of this Act) may grant planning permission, either unconditionally or subject to such conditions as they think fit ... ." (Emphasis mine.)

Their Lordships reviewed the relevant authorities and concluded as follows:

1. The observation of Lord Denning in Pyx Granite Company Limited v. Ministry of Housing and Local Government [1958] 1 QB 554 at 572 was correct, viz.:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authorities are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest".

2. That the three tests for validity of a condition were:

   (i) It must be for a planning purpose or relate to a planning purpose;

   (ii) It must fairly and reasonably relate to the subject development, and

   (iii) It must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed.

(See also R.V. Hillingdon; London Borough Council ex parte Royco Homes Limited [1974] QB 720 and Hall and Company Limited v. Shoreham-by-Sea Urban District Council [1964] 1 WLR 240.)

The concept of reasonableness referred to in the third test is that expounded in Associated Provincial Picture Houses

Ltd v. Wednesbury Corporation [1948] 1 KB 223 at 229, i.e. that a condition will be invalid if it is "so clearly unreasonable that no reasonable planning authority properly could have imposed it".

When administering the planning and environmental laws of the State, a council is entrusted with a discretion whether to grant development consent and to impose such conditions as it considers appropriate. The ambit of its discretion is, however, to be found in the planning and environmental legislation. Relevantly, it is to be found in s. 90, s. 91 and s. 94. In my opinion, a council may not adopt a rule or policy disabling itself from exercising its discretion in individual cases and may not adopt a rule or policy inconsistent with its statutory obligations and duties. Even if the policy can be said to relate to a subject identified by the relevant legislation, a council may not adopt a rule that that policy is to be applied in every case without regard to individual circumstances.

Sections 90, 91 and 94 relevantly provide:

"90 (1) In determining a development application, a consent authority shall take into consideration such of the following matters as are of relevance to the development the subject of that development application:-

(a) the provisions of-

(i) any environmental planning instrument;

(ii) any draft environmental planning instrument that is or has been placed on exhibition pursuant to section 47(b) or 66(1)(b);

(iii) any draft State environmental planning policy which has been submitted to the Minister in accordance with section 37 and details of which have been notified to the consent authority; and

(iv) any development control plan in force under section 72,

applying to the land to which the development application relates.

(b) the impact of that development on the environment (whether or not the subject of an environmental impact statement) and, where harm to the

environment is likely to be caused, any means that may be employed to protect the environment or to mitigate that harm;

(c) ...

(d) the social effect and the economic effect of that development in the locality;

...

(o) the existing and likely future amenity of the neighbourhood;

(p) ...

(q) the circumstances of the case;

(r) the public interest; ... ".

Section 91 deals with the grant of development consent and the power to impose conditions.

91(3) provides:

"A condition may be imposed for the purposes of subsection (1) if it-

(a) relates to any matter referred to in section 90(1) of relevance to the development the subject of the consent;

...

(h) is authorised to be imposed under section 94".

Section 94 provides:

"(1) Subject to subsection (2), where a council, being the consent authority, is satisfied that a development, the subject of a development application, will or is likely to require the provision of or increase the demand for public amenities, and public services within the area, the council may grant consent to that application subject to a condition requiring-

(a) the dedication of land free of cost; or

(b) the payment of a monetary contribution,

or both.

(2) A condition referred to in subsection (1) shall be imposed only-

(a) where an environmental planning instrument identifies a likely increased demand for public amenities and public services as a consequence of the carrying out of development in accordance with that instrument and stipulates that dedication or a contribution under subsection (1) or both may be required as a condition of any consent to that development; and

(b) to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services mentioned in that subsection.

(3) The council shall hold any monetary contribution in trust for the purpose for which the payment was required and apply the money towards providing public amenities or public services or both within a reasonable time and in such a manner as will meet the increased demand for those amenities or services or both.

(4) Land dedicated in accordance with a condition imposed under subsection (1) shall be made available by the council for the purpose of providing public amenities or public services or both within a reasonable time.

...

(7) Subsection (2)(a) does not apply in the case of a deemed environmental planning instrument.

... ".

As these sections make clear in terms, the power of a council to impose a monetary contribution depends upon the establishment of a direct connection between the development the subject of the contribution and the works, activities, services or amenities for which the contribution is claimed. Whether section 94 is the exclusive code for the imposition of monetary contributions need not be determined in these proceedings. But where a contribution is sought for the provision of a "public service", within the meaning of s. 94, the requirements of that

section must be met, in my opinion, before such a contribution can be lawfully exacted."

The Court is satisfied that Conditions Nos. 6 and 7 attached to consents for development applications Nos. 714 and 715 are for a planning purpose, this matter not being in issue between the parties, insofar as the Social Plan and Rural Roads Needs Study have identified the financial programme associated with the provision of open space for active public reserves and the improvement or embellishment of existing open space for such purpose and the upgrading of public roads in relevant areas of the Shire.

The Court is also satisfied after considering the evidence and submissions of both parties that the contested conditions fairly and reasonably relate to the subject development, being an increase in dwelling-houses over and above the initial settlement of the farm, as a consequence of which it may be reasonably assumed that the occupants will seek to satisfy a range of needs through the use of community facilities and open space as well as increasing the use of the public road system in the locality of the development.

The Court has not been persuaded by the applicant that the reference in condition 7 to "upgrading of Newee Creek/Soldier Settlers Road systems" excludes Wirrimbi Road insofar as that road provides access between both Nambucca Heads and Macksville to the subject site, by inter-connection with Soldier Settlers Road and Newee Creek Road.

The Court is further satisfied that the financial implications of the Council's policies relating to the provision of improved rural roads and the development of community facilities and open space had regard to public interest in those policies and the varying expenditures anticipated in particular localities of the shire. Accordingly the Court has not been persuaded that the conditions disregard the circumstances of settlement submitted by the applicant as warranting the payment of no contributions because of a lineal family, albeit extended, being proposed for residence in the three dwellings.

The Court has concluded pursuant to s. 39(2) that acting as a reasonable planning authority, duly appreciating its statutory duties, conditions 6 and 7 can be properly imposed in reference to the erection of additional dwellings on the subject land. The Court is mindful of the fact that although the applicants may be confident of the numbers of persons now resident and about to be resident on the subject site, such ownership and/or tenancy leading to residential use of the site may change in time. This is readily evident in the experience of the Shire of Nambucca and well documented in the studies of rural-residential development along the North Coast of NSW, necessitating reasonable estimates of demand for access, recreation and community facilities for which an average occupation per dwelling and contribution per dwelling represents the only reasonable basis of contribution, provided that local/district variations have been taken into account as already described in this particular matter.

Therefore, the Court has concluded pursuant to ss.90, 91 and 94 of the Environmental Planning and Assessment Act, 1979 and s. 39 of the Land and Environment Court Act, 1979, that Condition Nos. 6 and 7 attached to the consents for development applications Nos. 714 and 715, are fair and reasonable and that on that basis the appeal must fail. The Court also notes that as the contributions required in the latter consents have been paid and partially applied already by Council to budgetted facilities, it would be unreasonable to increase the rates of contributions to those applying now at the time of the Court's decision.

Accordingly the Court orders that:-

1. The appeal be dismissed.

2. Development consent in respect of Development Application Nos. 714 and 715 for the erection of dwelling-houses subject to Condition Nos. 1 to 7 for each consent, as granted by Nambucca Shire Council on 14 December 1983, be confirmed.

3. There be no order as to costs.

G. Andrews.
ASSESSOR.

cc.

(0427) (NSW) LAND AND ENVIRONMENT COURT

Silverton Limited v North Sydney MC Bignold N R, Senior Assessor No 10185/81 23 July 82, 23 August 82.

The Applicant appealed to the Court about development and building applications for the erection of a residential flat building comprising 6 residential floors over basement parking on land at Falcon Street, North Sydney.

The Court had previously considered a development appeal by the same Applicant for the same premises involving a proposed residential flat building of 8 residential floors over basement parking. Whilst the Court dismissed the previous appeal, the Court had stated it would be prepared to approve the building subject to certain matters — with which the current application complied. The matters determined in the case were; the effect of the previous Court decision; the relevance and weight to be given to the Respondent's draft LEP and its residential flat building code; whether the proposed development would adversely affect the environment and amenity of the locality; and costs.

HELD: The council was not bound to give effect to the Court's previous expression of opinion nor did the Court consider that that matter was very relevant as a "circumstance of the case" (s39(4)); nor in this case was there issue estoppel; the case was fully reconsidered by the Court).

The draft LEP had been with the DEP for some 18 months; it generally imposed and would impose on the subject property a 2 story height limit for residential flat buildings. In view of the uncertainty of the future of the draft plan and the doubtful soundness of the contents concerning controls on development in residential zones and on the subject land in particular, the existence of the draft LEP provided no reason for refusing consent to the proposal.

The provisions of the residential flat code of the council did not justify refusal of development consent: this was partly on the same basis as the decision on the draft LEP, partly on the basis of "inflated reliance" on the influence of the code by the Respondent (see ***Hooker Home Units v North Sydney Council*** 21 LGRA 101) and the numerous reviews of the code which did not inspire confidence in the code's contents. The June and October 1980 decisions about the code did not appear to be soundly based or substantiated, particularly regarding the subject land.

The Court adopted the approach of Else-Mitchell J. in ***Rommell & Associates v North Sydney Council*** 23 LGRA 99 and concluded that the proposal was compatible with the mixed scale of development making up the overall character of its surroundings, and with the urban design features of its street boundaries; the proposal is harmonious with the environment and character and amenity of the precinct and with the civic and urban design features of the locality and the scenic and landscape qualities of the locality.

There would be no significant effect on the operation of traffic in the street system, the traffic options had not been exhausted and the relevant government bodies had no objection to the proposal.

There would be no unreasonable interference with the privacy of nearby residents; the alternative of townhouses on the site would mean there would be buildings closer to the boundary of the property; there was no real question of overshadowing and the objection of the s342 / A objectors was not substantiated.

On the basis of evidence of lack of comparable sites and of the special attributes of the subject site for medium to high rise development (site area and location adjoining the expressway) and having regard to the draft LEP, approval of the proposal would not create an adverse precedent for the locality.

The Court applied ***McDonald Industries*** v ***Sydney City Council*** and ***Geoffrey Twibill & Associates*** v ***Ku-ring-gai Municipal Council*** in the questions of costs: exceptional circumstances were involved in the history of the development application, including the previous appeal with the same parties, same site, similar development proposal and substantially the same planning issues. In particular, the aspect of the previous decision which formulated the modified development proposal which the Court "would be prepared to approve" and to which this development application conformed was a special circumstance. As the reasons for the Respondent's determination of the development application were virtually identical to its reasons for refusing the original application, the Applicant had succeeded in demonstrating "exceptional circumstances". (BW).

Appeal allowed and Respondent to pay Applicant's costs.

KEYWORDS: Draft LEP/code/amenity/previous decision/costs.

[SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)]

LEICHHARDT MUNICIPAL COUNCIL *v.* DANIEL CALLAGHAN PTY LTD

[HUTLEY, GLASS AND SAMUELS JJ.A.]

Aug. 14; Sept. 4, 1981.

Development application — Residential flat building — Whether building contained more than four floors or more than three storeys — Meaning of "storey" — Whether question of law — Proper order for Court of Appeal — Land and Environment Court Act, 1979 *(N.S.W.)* s. 57 — *Leichhardt Draft Planning Scheme Ordinance, cl.* 51.

The *Land and Environment Court Act,* 1979 (N.S.W.), s. 57 provides for an appeal from the Land and Environment Court to the Supreme Court (Court of Appeal) on a question of law. Section 57(2) provides that on the hearing of an appeal the Supreme Court shall remit the matter to the Land and Environment Court for determination by the Land and Environment Court in accordance with the decision of the Supreme Court or make such other order in relation to the appeal as seems fit.

By virtue of an interim development order development within the Municipality of Leichhardt was governed by the *Leichhardt Draft Planning Scheme Ordinance* which defined the word "storey" as:

"A floor other than a floor

(a) used principally for storage; or

(b) used wholly or partly for parking."

The term "floor" was not defined.

Clause 51 of the draft ordinance prohibited, within the relevant zone, the erection of a building either containing more than four floors or more than three storeys.

The respondent sought consent to the erection of a building comprised of seven levels at the southern end and five levels at the northern end. The proposed building was stepped back against a cliff face so that there was no part of the building which rose from the ground in a vertical plane for a distance of more than three storeys. The Council refused the application and the applicant thereupon appealed to the Land and Environment Court. In that Court the question arose as to whether the building contravened cl. 51 of the draft ordinance, as containing more than three storeys. Cripps J. held that it was proper to count the number of storeys in any particular vertical plane and that, so counting, the building was a three-storey building only. He granted development consent. The Council appealed to the Court of Appeal and, upon the hearing of the appeal, the question arose as to whether the Court of Appeal had jurisdiction, it being contended on behalf of the respondent that the matter determined by Cripps J. was one of fact and that no appeal lay from such decision to the Court of Appeal.

Held: (1) The question whether the building was prohibited by cl. 51 involved two steps. First, the Court had to determine the proper construction of the clause and, in particular, the meaning to be assigned to the word "storey".

Hope v. Bathurst City Council (1980) 41 L.G.R.A. 262 and *Australian Gas Light Co. Ltd. v. Valuer-General* (1940) 40 S.R. (N.S.W.) 126, referred to.

(2) The second question is whether the proposed development fell within the ordinance description, properly interpreted, of prohibited buildings. This is a question of fact.

(3) As the first of the two relevant questions was one of law the Court of Appeal had jurisdiction to entertain the appeal.

(4) The proposed building was a building containing more than three storeys.

(Per Hutley J.A.) A building does not cease to be a seven-storey building because the various levels are stepped back.

(Per Glass J.A.) The number of floors or storeys in a building should be ascertained not by counting the number of different levels in it but by counting the number of levels of approximately similar floor area ranged above the ground floor in a vertical plane and incorporated in its structure and then adding one. It is immaterial that the levels are not themselves in a single vertical plane. There are not two storeys because of a merely internal change in level within what appears externally to be a single storey.

(Per Samuels J.A.) The word "floor" means an interior level forming part of the structure of the building. The number of floors may be ascertained by counting the number of different interior levels.

(5) (Per Hutley and Samuels JJ.A., Glass J.A. dissenting) As the proposed development was prohibited by the interim development order the matter ought not to be remitted to the Land and Environment Court. Rather, the orders made by the Land and Environment Court should be set aside and in lieu thereof it should be ordered that the appeal to that Court be dismissed.

APPEAL.

This was an appeal by a council to the Court of Appeal against a decision of the Land and Environment Court (Cripps J.) allowing the appeal to that Court by the respondent against refusal of development consent. The facts are set out in the judgment.

Murray Wilcox Q.C. and *P. D. McClellan*, for the appellant.

T. F. M. Naughton and Miss *W. L. Robinson*, for the respondent.

Judgment reserved.

Sept. 4.

HUTLEY J.A. This is an appeal from a decision of Cripps J. in the Land and Environment Court giving developmental consent to the erection of a building in the Municipality of Leichhardt. The Court has jurisdiction only to entertain an appeal on a question of law and the first submission of the respondent was that the issue decided by Cripps J. was one of fact and, therefore, no appeal lay.

The respondent submitted plans for the construction of a building or buildings on the waterfront, the structure following the contours of a cliff leading down to the waterfront.

Among the objections made by the Council to the application for developmental consent were the terms of cl. 51 of the *Leichhardt Planning Scheme Ordinance* objecting to giving consent on the ground that it was a building either containing more than four floors or more than three storeys, both of which were prohibited. A "storey" is defined in the ordinance as:

"a floor other than a floor

(a) used principally for storage; or

(b) used wholly or partly for parking."

It is clear from the terms of his Honour's judgment that he had to construe the meaning of cl. 51. It is clear that this involves a construction of the whole ordinance. Indeed, argument for the respondent relied in part upon the terms of cl. 52, as contrasted with cl. 51. The construction of a written instrument involves a question of law, even though questions of fact

may also arise. The question being whether on the true construction of the whole of the ordinance, and, in particular, whether the proposed structure in this case comes within the prohibition in cl. 51, in my opinion, involves a question of law and the challenge to the jurisdiction of this Court is unfounded.

In construing cl. 51, his Honour said that it was "clearly concerned with the height requirement". If this is accepted, the question still arises as from whence the height is to be considered. From the waterfront, it is apparent from the plans that this would be a seven-storey building. It does not, in my opinion, cease to be such a building because the various levels are stepped back. His Honour said:

> "... the design of this building is such that the front walls of the units on the fourth level are in line with the rear walls of the units of the first level and the front walls of the units at the fifth level are in line with the rear walls of the units of the second level and so on. Adopting the approach of the Department of Environment and Planning and the approach adopted by all experts in this matter I have concluded this is a three storey building."

The construction of an ordinary word such as "storey" is not a matter of expert evidence. The word is not a technical one, except to the extent that it is defined in the ordinance itself; that definition does not bring any technical term into play, the word "floor" itself being an ordinary English word.

The *Leichhardt Draft Planning Scheme Ordinance* is not something which is drafted for the benefit of the technical experts in the Department of Environment and Planning; where it uses terms of common parlance, it presumably uses them in the way they are ordinarily understood, except where specially defined. It would be strange if the eloquent pleas which are daily pouring from the lips of law reformers that the law should be expressed in plain language had not been heard by the draftsmen of environmental plans which are to be put into the hands of the ordinary citizen to be acted on by him at least in the first instance without technical assistance. This is one field of law in which verbal technicality has no part. Though his Honour said that this structure "could not, in my opinion, be described as a seven-storey development," I am quite unable to see it could be described in any other terms. In my opinion, the appeal should be allowed, as the development is prohibited.

The appeal to this Court is solely one of law. I am of the opinion that the judgment under appeal contains errors of law, in that the construction of cl. 51 of the *Leichhardt Planning Scheme Ordinance* was erroneous. The application was for development consent, the plans show what was intended. On the construction of the application and the ordinance which I favour, the appeal to the Land and Environment Court should have been dismissed, despite the "overwhelming town planning considerations favouring this development", to quote the judgment of Cripps J.

The powers of this Court are set out in s. 57 (2) of the *Land and Environment Court Act*, 1979, which reads as follows:

> "On the hearing of an appeal under subsection (1) the Supreme Court shall —
>
> (a) remit the matter to the Court for determination by the Court in accordance with the decision of the Supreme Court; or

> (b) make such other order in relation to the appeal as seems fit."

Counsel for the respondent asked that the matter be remitted to the Land and Environment Court, but was unable to suggest what practical advantage could flow from this. The application to the Court launched on 22nd September, 1980, was on the ground that the Council had not given a decision. The Council gave a decision refusing the application on 16th October, 1980, on many grounds, one of which is, in my opinion, a complete bar, namely, that the development is prohibited under cl. 51. The appeal was treated as an appeal from the decision of the Council, even though it was given subsequently to the launching of the appeal. This was, no doubt, proper: see *Grace Bros Pty Ltd v. Willoughby Municipal Council* (1981) 44 L.G.R.A. 422. If the construction, which I favour, is correct, the only order which should have been made was that the application to the Land and Environment Court be dismissed. No order was made for the payment of costs and no application for costs of the hearing in the Land and Environment Court was made in this Court by the appellant.

It was submitted that no order could be made finally disposing of the matter in this Court because the appeal was one of law only. In many cases no order fully disposing of the matter can be made, but where it can, I am unable to see that because the appeal is one of law alone that precludes a final order being made. Where the procedure is by case stated, there may be difficulties derived from that procedure.

Appeals from the Workers' Compensation Commission where the facts are fully found, can be finally disposed of in an appellate court. In *Darling Island Stevedoring Co. v. Hankinson* (1967) 117 C.L.R. 19, at p. 28, Barwick C.J. said:

> "Can the Court give effect to the only view of the facts which I think they bear, namely, that there was an injury within the unextended meaning of the definition causing incapacity both immediately and mediately through the acceleration of the disease. In my opinion, it can. The basic facts are found by the Commissioner and there is no need for this Court, in order to give effect to the interpretation of them to which I have referred, itself to find any fact. The Court is in such a case able to refer the facts to the appropriate category of injury, particularly where the question is whether there is any evidence to support the making of an award."

The orders of the High Court are consistent with this view. This was an appeal by notice of motion (see the same case in this Court, (1966) 67 S.R. (N.S.W.) 130) and is on all fours with this case from a procedural point of view.

In my opinion, the appeal should be allowed, the orders made on 19th December, 1980, be set aside and in lieu it be ordered the application to the Land and Environment Court be dismissed. The appellant should have the costs of the appeal and the respondent, if qualified, a certificate under the *Suitors' Fund Act*.

GLASS J.A. The appellant Council submits that Cripps J. sitting in the Land and Environment Court fell into error of law when he held that a building described in a certain development application was a three storey building. The plans showed a building containing thirty two-bedroom residential units to be erected on ground which fronts the foreshore at

Johnson's Bay on the eastern boundary and rises from southeast to southwest. It also has a cliff running through the middle in a north-south line. The proposed structure to be stepped back into the rising land would contain seven levels at the southern end and five levels at the northern end.

The appellant Council refused the development application upon the ground, inter alia, that the proposed building contravened the provisions of cl. 51 of the *Leichhardt Planning Scheme Ordinance* which reads as follows:

"(1) This clause applies to buildings used as dwelling-houses or residential flat buildings.

(2) A building containing more than 4 floors shall not be erected.

(3) A building containing more than 3 storeys shall not be erected."

Floor is not defined but cl. 3 of the ordinance defines storey as follows:

"'storey' means a floor other than a floor —

(a) used principally for storage; or

(b) used wholly or partly for parking;".

The plans showed that the building was so designed that the front walls of units on the fourth level were in line with the rear walls of the units on the first level. The same position applied mutatis mutandis to the units on the fifth level in relation to the second, the sixth in relation to the third, the seventh in relation to the fourth. In other words there was no part of the building which rose from the ground in the vertical plane for a distance of more than three storeys. Having regard to these matters the learned judge held that the building for which the plans provided was a three-storey building and did not offend against the prohibition contained in cl. 51 of the ordinance.

The appellant submits that the subject decision involved legal error. The respondent submits first that the question decided by his Honour was one of fact from which no appeal lies and second that if a question of law was involved his Honour fell into no error.

The Land and Environment Court in determining the appeal was exercising an original jurisdiction to hear and determine the developer's application for consent: *Randwick Municipal Council v. Janlz Constructions Pty Ltd* (1976) 35 L.G.R.A. 70. To do so it was required inter alia to decide:

(1) what was the proper construction of the prohibition contained in cl. 51 and in particular what meaning should be assigned to the word storey?

(2) whether the proposed structure fell within that prohibition properly construed.

The first is a question of law although it may incorporate a question of fact as to the meaning of an ordinary English word, *Hope v. Bathurst City Council* (1980) 41 L.G.R.A. 262, at pp. 266, 267; *Australian Gas Light Co. Ltd v. Valuer-General* (1940) 40 S.R. (N.S.W.) 126, at p. 137. Nevertheless the ultimate question of construction posed by cl. 51, viz. to what kind of buildings is the prohibition directed, is a question of law.

The next question for his Honour was whether the proposed development fell within the ordinance description of prohibited buildings. There has been division of opinion as to whether a conclusion, when the facts are fully found, that a state of affairs falls inside or outside a statutory description is one of law or fact: *Mattinson v. Multiplo Incubators Pty Ltd* (1977) 1 N.S.W.L.R. 368, at p. 372. In *Hope v. Bathurst City Council* (1980) 41 L.G.R.A. 262, the High Court has decisively favoured the latter view.

The conclusion of Rath J. was not displaced because in deciding a question of law he came to the wrong conclusion. It was set aside because in deciding a question of fact he came to a conclusion which was not reasonably open on the facts which he had found. It was a finding of fact which was wrong in law, *Australian Gas Light Co. Ltd v. Valuer-General* (1940) 40 S.R. (N.S.W.) 126, at p. 138; *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150, at p. 160; *New South Wales Associated Blue-metal Quarries Ltd v. Federal Commissioner of Taxation* (1956) 94 C.L.R. 509, at p. 512. Of course if more than one conclusion is open on a given set of facts the conclusion reached is a finding of fact which is in law unimpeachable, *Hope v. Bathurst City Council* (1980) 41 L.G.R.A. 262, at p. 348. The difference between a wrong decision of a question of law and a decision of a question of fact which is wrong in law is no mere quibble. It is proper to describe a jury verdict which has no support in the evidence as wrong in law although no questions of law are confided to the decision of jurors. Further, if it were true to say that, once the facts are found, the conclusion whether they fall within a statutory description is a conclusion of law it would be possible to appeal by way of stated case against every decision rendered in the Workers' Compensation Commission.

It is important I believe not to allow these two questions viz. the legal question of interpreting the ordinance and the factual question of classifying the proposed development to be telescoped into one. This is what happens if upon an examination of the plans the inquiry is framed so as to ask: Is this a building containing three or more than three storeys? The question so put cannot be answered without first deciding what is the meaning of storey and floor in the prohibition. If this first question is elided from consideration, a conclusion of fact is being reached by applying a concealed first premise being one of law which has not been examined.

Before recording the competing submissions made for appellant and respondent on the question of construction, it is useful to note how cll. 51(2) and 51(3) interact with the definition of storey and the absence of a definition of floor. They collectively prohibit, it seems to me, the erection of any building which contains more than three storeys (not counting parking floors and storage floors) or which contains more than four floors (counting parking or storage floors). So although floor and storey are defined in relation to each other they are not defined in relation to the building which contains them. It is forbidden to have more than a certain number of them within the building but how you reckon the number contained in a building is left undefined.

Upon the construction question of how you calculate the number of floors or storeys in a building the contentions ranged in opposition were as follows. The Council submitted that his Honour fell into legal error when he refused to construe the words storey and floor as synonymous with floor level. According to this approach one simply counts the number of different horizontal levels in the building and this yields the number of floors or storeys. Reference was made to a judicial observation that "a floor is the lower surface of an enclosed space": *Sullivan v. Hall Russell & Co. Ltd* (1964) S.L.T. 192, at p. 193. So it was implied that you simply count the number of enclosed spaces. But this could not be right since it would yield a number of different floors on the same horizontal level. For the respondent

it was submitted that no error was disclosed because storey meant a level superimposed vertically upon another level. Its counsel referred to the *Shorter Oxford Dictionary* which defines storey as meaning "each of the stages or portions one above the other of which a building consists" and submitted that the test to be applied upon the proper construction of the clause is "how many storeys above ground does the building rise at any point?"

The word storey, it seems, is always used to denote a structural feature of a building. Floor, on the other hand, is sometimes used in that sense but at other times denotes merely a feature of an enclosed space. It is clear that the ordinance uses floor in the former sense. So the problem in point of construction is to decide what meaning the terms floor and storey bear in a clause which says that a building may not contain more than a certain number of them. I do not think that the prohibition is simply directed to the number of horizontal levels in the building. I think that it is directed to those levels in the building which form part of its structural unity as a building. A house which to an external viewer has one storey only may be so designed that in some rooms on the ground floor the floor level is higher than in others. I do not believe that it would accord with ordinary linguistic usage to describe it as a two storey house. This suggests to me that one determines the number of floors or storeys in a building not by counting the number of different levels in it but by counting the number of levels of approximately similar floor area ranged above the ground floor in a vertical plane and incorporated in its structure and then adding one. I would stress ground floor and not ground. If a building has six levels vertically superimposed above each other and three of them are below ground level it would according to this construction be a six-storey not a three-storey building.

On the other hand I see no reason why a building containing two floor levels, one superimposed vertically on top of the other, would cease to be a two storey building because those horizontal levels do not coincide in the vertical plane. In other words one storey may be stepped back on the storey below. So I would construe cl. 51(3) of the ordinance as if it read: "No building shall be erected which contains more than three levels which form part of its structural unity and are vertically superimposed upon each other in whole or in part". Architectural ingenuity can produce a numberless variety of designs for buildings occupying different levels, particularly when applied to rising ground. It is not possible to give a construction to cl. 51 which will supply an anwer to the question arising in these multifarious circumstances whether the number of storeys in the building does or does not exceed three. The proposed design will require consideration in order to determine whether in point of fact it should or should not be classified as falling within the description of buildings according to the meaning assigned by this construction.

It was urged upon us that some assistance in the task of construction could be gained from cl. 52 which imposes height limitations of vertical distance from ceiling to ground level. The clause does not apply to the subject development. On the other hand cl. 50 (which also does not apply to it) is concerned with limitations on bulk expressed in terms of floor space ratios. I can derive from these conflicting signals no indication of the purpose behind cl. 51 in a way which could influence its construction.

It is now necessary to consider the appellant's first submission that his Honour fell into legal error in construing the clause. There is substance in its complaint that his Honour erred when he adopted the approach of the Department of Environment and Planning "that the height of the proposal for the above site could be measured in terms of the height defined by storeys or floors vertically from any point above the natural ground level". Not only were the views of the commission irrelevant to the question of the meaning of the ordinance but in addition their views were directed to the measurement of the height of the proposed development and not to the meaning of a prohibition on buildings which contained more than a given number of floors or storeys.

Since his Honour, with respect to him, misconstrued the relevant clause, it is necessary to determine afresh the question of fact whether the proposal offended against the prohibition in the clause properly construed. If only one conclusion in fact were open upon the evidence, it would not be necessary to refer this question back to the Land and Environment Court since our power to decide questions of law would permit us to say that there is only one finding of fact open in point of law. But when the above definition is applied to the facts proved in the evidence, I am not convinced that only one answer to that question of fact is open in point of law.

The question of fact to be answered may be posed in the following extended form. Given that the ordinance forbids the erection of any building which contains more than three levels in the horizontal plane forming part of its structure as a building and place in whole or in part above each other in the vertical plane, is this such a building? I do not think that the answer to this question of fact is so obvious that only one conclusion is reasonably open. Nor does a question which in point of doctrine can only be one of fact become a question of law because to answer it, it is necessary to consider documentary evidence in the form of plans. In any event the plans form only part of the evidentiary material to be evaluated before reaching an answer. I consider that a tribunal of fact examining all relevant evidence and having to answer this question would need to weigh and choose between arguments of the following kind. In favour of the developer it could be said that no section of the building plans can be made which shows it rising vertically for more than three storeys. On the other hand the Council could respond that, if you look at the proposed building as shown in section B of the plans, levels 1, 2 and 3 contain three storeys and so do levels 4, 5 and 6 and accordingly the building containing all these levels contains more than three storeys. It might also urge that, because the front wall of level 4 coincides with the rear wall of level 1, it is proper to conclude that levels 1, 2, 3 and 4 contain four storeys. These are questions of degree and fact not open to determination in an appeal limited to questions of law only. They should therefore be remitted to the Land and Environment Court for decision having regard to the proper construction of the ordinance.

The appellant Council also submitted that the Court erred in law when it refused to find that the open air terraces on each level constituted a further storey so that e.g. the front terrace on level 4 was a fourth storey measuring upwards from level 1. In my opinion, having regard to the meaning of storey already discussed, an open terrace necessarily falls outside that description

and his Honour's finding of fact to that effect was in law the only conclusion open to him.

I would therefore propose that the appeal be allowed with costs, the respondent to have a certificate under the *Suitors' Fund Act*. The matter should be remitted to the Land and Environment Court for further determination in accordance with this decision.

SAMUELS J.A. I have had the advantage of reading the judgments prepared by Hutley J.A. and Glass J.A., and I am relieved from setting out all the facts. I agree that Cripps J. applied a wrong criterion by which to construe cl. 51 of the ordinance, and that we must therefore attempt the task ourselves.

The ordinance does not contain a definition of "floor", but defines "storey" to mean a floor subject to an exception which is not directly material. Hence the appropriate question is whether this building contains more than four floors; and the answer first entails ascertaining the meaning of the word "floor" in cl. 51 of the ordinance.

In the context of cl. 51 "floor", in its ordinary sense, means level, layer or stratum, rather than "the under surface of the interior of a room" (*Shorter Oxford English Dictionary*) or "the lower surface of an enclosed space", *Sullivan v. Hall Russell & Co. Ltd* [1964] S.L.T. 192, at p. 193. Although cl. 3 (1) of the ordinance defines "storey" in terms of "floor", and not the other way about, I think that "floor" in cl. 51 bears the meaning attributed to "storey" by the *Shorter Oxford English Dictionary*, namely, "each of the stages or portions one above the other of which a building consists". I would add "levels" as a current and relevant synonym for "stages" or "portions". But the phrase "one above the other" does not mean "one directly above the other", because "above" does not ordinarily mean "directly above" i.e. in precisely the same vertical plane, but only "higher than". Usually, it is true, the floors, storeys or levels of a building are found directly one above the other or others; but this circumstance cannot determine the meaning ordinarily given to those words. The idea of multiple or comparative levels involves difference in the horizontal plane. Hence a difference in level is established whenever one object, assuming a common datum point, is higher or lower than another. In that event there are two levels, even though the higher level is not superimposed directly above the lower. Assume a building, stepped back into a rising slope with ten "steps" incorporated in its structure, none of which is directly above the "step" below, in the fashion of the treads and risers of an ordinary staircase. I do not see how it would be possible to conclude otherwise than that this was a building which contained ten levels or floors; the alternative being to say that it contained only one.

In my opinion, "floor" in cl. 51 means an interior level forming part of the structure of the building. In order to ascertain whether this building contains more than three floors it is necessary only to start at the bottom and count the different interior levels as they ascend. The only answer open (*Hope v. Bathurst City Council* (1980) 41 L.G.R.A. 262) is, in my opinion, that the building contains more than three floors. Indeed, given the construction that I would place upon cl. 51 I do not think that the respondent would argue the contrary.

It is therefore necessary for the respondent to attribute to "floor" a meaning which will justify the conclusion at which Cripps J. arrived. In

order to do so it would be necessary to discard what I regard as the ordinary meaning of "floor" in favour of some other meaning required to give effect to the perceived intention of cl. 51 yielded by its examination in the context of the ordinance as a whole: see *Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation* (1981) 55 A.L.J.R. 434. The respondent submits that:

> "The purpose of cl. 51 is to provide a height control. This is achieved by relating the number of storeys to natural ground level — so that the building at no point stands proud of the ground by more than the prescribed limit."

It seems to me that this argument runs into difficulties at the outset. No doubt cl. 51 does provide control over the height of buildings. But this is not to say that this is its sole or predominant purpose. It is intended, to my mind, to serve another purpose too, and its language should not be construed so as to advance one purpose while stultifying the other.

Obviously, one effect of cl. 51, however construed, must be to control the height of dwellinghouses or residential flat buildings. But it makes no express reference to height. Clause 52, however, does; and it is concerned solely with height control (and see cl. 35 (1) (e)). It adopts the mode of vertical measurement — from natural ground level — which the respondent seeks to imply into cl. 51, but which the expressio unius rule would tend to exclude. In any case cl. 51 has another clear purpose which is to limit the size of buildings and thus to control the density of population in the area. There are other provisions, in the ordinance and in the *Local Government Act* itself, which are designed to control the density of development, and which form, with cl. 51, a linked code regulating various critical aspects of the development of land for, and the building of, residential flat buildings.

Clause 55 controls the density of development by specifying a minimum relationship between the floor space of each dwelling in a residential flat building and the site area. Schedule 7 is concerned with building regulations (per McClelland J. *McDonald Industries v. Sydney City Council* (1980) 43 L.G.R.A. 428) and determines site coverage and set back from boundaries. It specifies the proportion of the area of the allotment which a residential flat building may occupy, according to its number of storeys. It contemplates buildings of one, two and three storeys, and of unlimited storeys, namely, "a building containing more than two storeys". Hence both site coverage and setback depend upon the number of storeys which the building contains. Schedule 7, amongst other things, provides that in certain cases the total floor plan area shall not exceed one and one-half times the total area of the site. It defines "total floor plan areas" to mean "the sum of the floor plan areas of the various storeys" and the floor plan area of any storey to mean "the area contained within the external boundaries of such storey as shown on the floor plan".

It is evident that the schedule has regard to storeys both as a measure of height and a measure of area. Since the number of storeys which a building contains must be ascertained for the purposes of cl. 51 and Schedule 7, which are each concerned with height control and part of a connected code, it is necessary to give "storey" the same meaning in each of them; or, at least, since the schedule does not define "storey" while the ordinance does, to give "floor" in cl. 51 and "storey" in the schedule consistent meanings. It

may be that the use of the word "storey" in cl. 51 is deliberately designed to link up with Schedule 7. It does not, I think, appear any where else in the ordinance (except in cl. 3 (1)) and seems quite unnecessary where it does appear, having regard to its definition. Clearly "storey" cannot bear the meaning which the respondent would assign to "floor"; because the result would be simply to exclude areas of a building from any consideration for the purposes of the schedule. It would, for example, be quite misleading to calculate the total floor plan area of this building by including only the area of any three storeys.

Accordingly, the respondent's first proposition, that the purpose (semble, the sole purpose) of cl. 51 is to provide a height control is not made good. Clause 51 does not yield any intention which requires "floor" to be read in a way which would facilitate a particular, or any, view of town planning considerations regarding height control. A literal construction would not produce a result so inconvenient or unjust as to demand its rejection. As I have pointed out, cl. 51 does not expressly mention height; it requires a count to be made of the number of floors in a building. There are sensible reasons why it should be framed in this way. I can see no warrant for the conclusion that in making the required count the ordinary meaning of "floor" should be eschewed, and the aggregation confined to those floors which lie, wholly or partly, in the same vertical plane.

I attach to these reasons a copy of a photograph showing the eastern elevation of the proposed development as it would appear viewed from Peacock Point.

I agree with the orders proposed by Hutley J.A.

Appeal allowed. Orders of the Land and Environment Court set aside and application dismissed. Appellant to have costs of the appeal. Certificate under the Suitors' Fund Act.

Solicitors for the appellant: *Pike Pike and Fenwick.*

Solicitors for the respondent: *Robert Burge & Co.*

M.R.W.

[SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)]

ROCKDALE MUNICIPAL COUNCIL *v.* TANDEL CORPORATION PTY LTD

[MOFFITT P., GLASS AND SAMUELS JJ.A.]

Oct. 14, 1974; April 29, 1975.

Town planning—Development consent—Condition requiring monetary contribution for provision of open space—Whether payment made as a result of coercion—Validity of condition—County of Cumberland Planning Scheme Ordinance, cl. 27.

Clause 27 of the *County of Cumberland Planning Scheme Ordinance* provides that the responsible authority in respect of any application for consent to erect a building, shall decide whether to give or withhold consent and may, in granting a consent, attach conditions. A proviso to that clause requires the authority in respect of any such application to take into consideration, inter alia, the existing and likely future amenity of the neighbourhood, including the question of whether the proposed development is likely to cause injury to such amenity, and the circumstances of the case and the public interest.

The respondent sought the approval of the Council to the erection of a three-storey residential flat building containing twelve units and at the same time applied for development consent. The Council by letter informed the respondent that although it was not prepared to approve the proposal as submitted as the design was considered in certain respects to be inadequate it would be prepared to approve amended plans subject to the payment of a contribution of $3,000 for public open space. The respondent subsequently lodged an amended plan and prior to any approval paid to the council the sum of $3,000. Council approved the amended plans unconditionally.

The respondent sued to recover the payment in an action commenced in the District Court. The trial judge found that the respondent had been coerced into making the payment and that as payment of the money was effected prior to any consent and not as a result of a condition attached to the Council's final approval it was unnecessary to decide whether the Council had power to require a contribution as a condition of giving its consent to a development.

Held: (1) That the trial judge was not entitled to find a verdict for the plaintiff without first finding that the Council had no power to impose as a condition of the development consent that the plaintiff pay the $3,000 in question.

(2) That the question for decision was whether the course of the dealings between the Council and the developer amounted, on a proper analysis, to the grant of consent conditional on a money payment.

(3) That the trial judge's failure to consider whether the Council had the power to impose such a condition and whether in its dealings with the respondent it had exercised such a power meant that the action must be set down for a new trial.

(4) (Per Glass and Samuels JJ.A., Moffitt P. not deciding.) That a condition requiring a payment of money is not necessarily invalid. Whilst it is not open to a council to require a payment merely for the purpose of augmenting its revenue it may require a contribution towards the cost of open space if the money is impressed with a trust which would prevent its expenditure for any other purpose and the space is so proximate to the development site as to present a reasonable connexion with the needs generated by it.

Woolworths Properties Pty Ltd v. *Ku-ring-gai Municipal Council* (1964) 10 L.G.R.A. 177; *Gillott* v. *Hornsby Shire Council* (1964) 10 L.G.R.A. 285; *Jumal Developments Pty Ltd* v. *Parramatta City Council* (1969) 17 L.G.R.A. 111; *Granville Developments Pty Ltd* v. *Holroyd Municipal Council* (1969) 18 L.G.R.A. 34, discussed.

Allen Commercial Constructions Pty Ltd v. *North Sydney Municipal Council* (1970) 20 L.G.R.A. 208, applied.

APPEAL.

This was an appeal against judgment entered for the plaintiff in an action in the District Court to recover a payment made by the plaintiff to the defendant. The facts are set out in the judgments.

Murray Wilcox, for the appellant.

B. S. J. O'Keefe, for the respondent.

Judgment reserved.

April 29.

MOFFITT P. I have had the benefit of reading the judgment of Glass J.A. and agree that the learned trial judge was not entitled to find a verdict for the plaintiff without first finding that the Council had no power to impose as a condition of the development consent that the plaintiff pay the $3,000 in question. This means that an error of law has been demonstrated sufficient to invalidate the decision at first instance. This raises a series of questions. The plaintiff and the defendant each contend that in consequence it is entitled to a verdict. For either contention to succeed, the *District Court Act*, s. 128 (3) (b) requires that the right to the verdict claimed must be as a matter of law. Otherwise the appropriate course is to order a new trial: s. 128 (3) (c).

The learned judge determined that there was coercion of the respondent causing him to pay the $3,000, treating as irrelevant any invalidity of the condition requiring the payment of the $3,000. He must have treated as irrelevant the nature of or the circumstances concerning any such invalidity. Whether there was coercion can only be determined by relating the conduct of the person said to be coerced to the precise acts found to be an invalid exercise of power. Therefore it now becomes necessary to determine not only whether the Council had power to impose the condition in question, but also to redetermine whether the respondent made the payment as a result of coercion. As was pointed out in *Lloyd* v. *Robinson* (1), a finding that a condition to an approval is invalid does not necessarily mean that the approval will stand freed from the void condition or that the Council is bound to give a fresh approval subject to no other condition than that declared invalid. By way of illustration, in a case where a somewhat similar condition was imposed by a Council, Holland J. found the consequence of invalidity of the condition was that the development consent itself was void (*Greek Australia Finance Corporation Pty Ltd* v. *The Council of the City of Sydney* (2)).

In the present case a possible view is that the payment was made not by reason of oppression, but in order, at all costs, to retain and act upon the consent to the development, the consent being considered doubtfully vulnerable if the condition were challenged prior to being acted upon. Further, as the view must have been well open that any invalidity of the condition would depend upon the Council being unable to relate their exercise of power to some fund or project having a sufficiently direct connexion with the development, a developer such as the respondent could well have expected that the exercise by him of the right of appeal to the Local Government Tribunal, referred to in the Council's letter to him of

(1) (1962) 8 L.G.R.A. 247, at p. 253. (2) (1974) 29 L.G.R.A. 130.

2nd March, 1973, even if successful, could only have delayed consent until the Council required a more proximate alternative to aid its planning policy. It is relevant to note that the respondent paid the $3,000 without waiting until the development application was more formally dealt with and did not seek to exercise any right of appeal. The respondent is a company which purchases real estate without development consent and then sells with or subject to such consent. In this instance it purchased the land for $65,000, then sold it subject to obtaining the necessary consents, then completed the sale for $95,700 some two months after the initial purchase. It was conceded that the principal reason for the increase in price was the Council approval. After completion it commenced this proceeding to recover the moneys paid. It is not the function of this Court in this appeal to determine any factual issue, but reference to these facts are sufficient to indicate that it is necessary to review the entire issues in the light of the particular findings concerning the asserted invalidity of the condition. It follows that, whatever be the legal conclusion upon the evidence as it now stands as to the validity of the condition, the respondent is not entitled as a matter of law to retain its verdict.

The appellant's claim to a verdict raises, at least to some degree, before us the question, not resolved by the learned trial judge, namely whether the Council had the power to impose as a condition to a development consent a condition in the terms it foreshadowed. If the learned trial judge as a matter of law were bound to hold that the imposition of the condition was valid, then the plaintiff must fail for s. 128 (3) (b) of the *District Court Act*, earlier referred to, would dictate that a verdict should now be entered for the appellant. In my view, for the reasons I will shortly indicate, the judge was not bound as a matter of law to find the condition was valid upon the evidence before him.

The reverse position, however, does not apply. If, upon some basis upon the evidence at the trial, the imposition of the condition, even as a matter of law, appears to be beyond power, the respondent, for the reasons just indicated, would not be entitled to a verdict as a matter of law. As the case will have to be retried, the question arises whether it is desirable now to express conclusions concerning the alleged invalidity of the condition based on the evidence as it now is. The respondent submitted that, on a number of alternate bases, the condition imposed was invalid. The argument at one extreme was that a condition to a development consent requiring a money payment was invalid. An alternate argument at the other extreme accepted that a condition of this type could be imposed, but asserted that the width of possible uses of the money exacted open to be found on the evidence, demonstrated uses so remote from the development of the subject land that imposition of the condition was beyond power. To pronounce upon the respondent's submissions as to the significance in law of the evidence as it now stands would only serve to provide dicta. Apart from the usual disadvantages associated with such pronouncements, I think there are cogent reasons why this Court should abstain from expressing conclusions as to the invalidity of the condition upon the evidence as it now stands. The issue between the parties as confined by the somewhat indirect and unclear evidence as it now stands may not be quite the same upon the second trial and any dicta may prove irrelevant to any final decision based upon a presentation of the full documentary evidence. In the present case

there are other serious disadvantages. It appears that of fairly recent times it has been the extensive practice of some councils to impose conditions to development consents requiring the payment of money. Councils and developers have an interest in this type of question. It is important that an interested party be not disadvantaged by having a decision considered adverse, which cannot be tested by further appeal. This very problem in this very field is illustrated by litigation resulting in the decision of this Court given today in *Greek Australian Finance Corporation Pty Ltd* v. *The Council of the City of Sydney* (3). Certainty is called for. If the field is one where the power to impose conditions upon the grant of development consents ought desirably to be wide enough to include the imposition of conditions requiring money contribution to Council development projects in which the public generally is interested, as well may be desirable, there would be much benefit in a legislative amendment expressly granting the power and providing express financial provision within the scheme of Pt VII of the *Local Government Act* ensuring use for properly designated purposes: Cf. s. 333 (2). In default of any such amendment, it is better in my view that the determination of this class of question be reserved by this Court until it can be directly and authoritatively decided and an aggrieved party can, if he wishes test our decision upon appeal. I think it desirable without deciding the question, to indicate the ambit of such question. In the end it will be necessary to embark upon it to some degree in order to deal with the appellant's claim to a verdict from us earlier referred to.

The question is whether it is beyond the power conferred by cl. 27 of the *County of Cumberland Planning Scheme Ordinance* to impose conditions requiring a money contribution for intended use in the acquisition of land by the Council for general public use, the land to be acquired being outside the land the subject of the development consent. The question must be regarded as an open one at least so far as this Court is concerned. The analysis of the relevant decisions by Holland J. in the case earlier referred to demonstrates this. While ultimately the approach of Walsh J. in *Allen Commercial Construction Pty Ltd* v. *North Sydney Municipal Council* (4) must be the guide to the question of construction and while the matter cannot be resolved simply by an inquiry whether the exacting of the money is in the nature of a tax (*Marsh* v. *Shire of Serpentine-Jarrahdale* (5)), the problem seems to remain, despite the label a council may put upon moneys collected, that such moneys do not appear to fall into any category of a council's funds provided for in Pt VII of the *Local Government Act* other than the general fund, that they do not appear to fall within any category of trust fund in s. III or to be subject to legislative restrictions upon use such as is provided in s. III (2). If they are held as part of the general funds, their use or variation of use would appear to be subject to the decision or variation of decision of the Council from time to time. The lack of express power in cl. 27 is to be compared with that provided in s. 333 (2). Upon this subject the ultimate views of Else-Mitchell J. in *Granville Developments Pty Ltd* v. *Holroyd Municipal Council* (6) warrant consideration.

As I have said I prefer to treat the question, just referred to, as an open one. It is upon a narrower, and clearer ground that I reject the appellant's

(3) (1974) 29 L.G.R.A. 130.
(4) (1970) 20 L.G.R.A. 208, at pp. 215, 216.
(5) (1966) 120 C.L.R. 572, at p. 580.
(6) (1969) 18 L.G.R.A. 34, at pp. 37, 38.

request for a verdict. For this purpose I will assume that a council is empowered in an appropriate case to impose as a condition of granting a development consent that the developer contribute moneys for the acquisition of open space land for general use outside the subject land. A valid exercise of that power however would need to have sufficient relation to the exercise of the power to grant or withhold development consent, having regard to the terms of cl. 27. It would be open to the trial judge to find on the facts that the purpose for which the money was exacted was so unrelated to the exercise of the powers in question that there was no valid exercise of the power to impose the condition and that the condition was void. A similar question arose in a slightly different context in *Lloyd* v. *Robinson* (7) in which Kitto, Menzies and Owen JJ. said:

"The assumption may be accepted that the statutory power to annex conditions to an approval of a subdivision does not extend to requiring the setting aside for public recreation of land which is so unrelated to the land to be subdivided, because of remoteness from it or some other circumstance, that there is no real connexion between the provision of the open space and the contemplated development of the area to be subdivided."

See *Allen Commercial Constructions Pty Ltd* v. *North Sydney Municipal Council* (supra).

The evidence before the trial judge leaves open the view that the purpose for which the $3,000 was exacted and/or the purpose for which the Council might decide to use it, were so remote from any development consideration relevant to the subject land that the imposition of the condition was not in exercise of the power provided by cl. 27. It can be observed that the recommendation of the Building Subdivisions and Development Committee, adopted by the Council on 14th December, 1972, and set out in the judgment of Glass J.A., while providing a scheme of general application, did not relate it to any specific projects and went no further than provide for the ward aldermen designating the areas to be acquired. The oral evidence of the town planner was inconclusive, and did not produce the relevant documents of the Council. Much of his evidence was a statement of his view of the legal consequences of what he said the Council did. He said that any money "would go into the trust fund under an item showing it in the first ward" and that "it is to be used only in respect of the acquisition or improvement of reserves in the first ward". "First" seems to be a mistake for "third" ward the subject land being said to be in the third ward. However, his evidence went no further than that the Council had "given consideration" to rezoning certain areas for open spaces and to "the possible acquisition of particular areas". At the date of the trial, which was about eight months after the payment, the Council was awaiting the accumulation of sufficient moneys before making a decision. So far as the evidence reveals, when the respondent was informed of the condition and made the payment, he was given no indication at all as to any proposal or decision to apply the money for any purpose having relation to planning considerations relative to the subject land.

It is sufficient to say that a finding is open on the present evidence that exacting the $3,000 was not related to any purpose having sufficient proximity to the development consent to make the imposition of the condition within the power provided in cl. 27. On the evidence it cannot be

(7) (1962) 8 L.G.R.A. 247, at p. 253.

said that as a matter of law there must be a finding that the imposition of the condition was valid.

In my view the following orders should be made: The notice of appeal may be amended to include a claim for a new trial; the appeal is allowed with costs; the verdict set aside and a new trial ordered; the costs of the first trial to abide the event of the new trial. The respondent to have a certificate under the *Suitors' Fund Act*.

GLASS J.A. This is an appeal against a verdict in the sum of $3,000 recovered in an action heard in the District Court. The plaintiff in the action, Tandel Corporation Pty Ltd (which I shall call the developer) claimed that the defendant, the Council of the Municipality of Rockdale, (which I shall call the Council) was indebted to it for money had and received by the defendant for the use of the plaintiff.

It is necessary to recapitulate the facts which were proved before his Honour largely by means of documentary evidence. On the 14th December, 1972, the Council resolved to adopt a recommendation of its Buildings, Subdivisions and Developments Committee made in the following terms:

The Committee RECOMMENDED that, from 1st January, 1973 Council's Residential Flat Building 2C Code be amended by including the following clause:

"An area of 400 sq. feet per unit shall be allowed for public recreation purposes within the site; such may not be included in calculating the site area of the property, or a contribution of $250.00 per unit in lieu of providing the area required, the contribution to be paid at the time of lodging the building application and held in Council's Trust Fund.

"The Committee further RECOMMENDED that the Ward Aldermen designate the areas to be acquired from the contributions so paid.

"The Committee also RECOMMENDED that consideration be given in Council's Varying Scheme, to zoning the areas to be acquired for open space purposes from the contributions paid by the developers; the Officers to report on this proposal."

Some time before the 26th January, 1973, the developer contracted to buy a block of land in President Avenue, Kogarah. It sought approval for the erection on that site of a three storey residential flat building containing twelve units and at the same time it applied for development consent. On the 1st March, 1973, the two applications came before a meeting of the Council together with another recommendation from its aforesaid Committee. The Council adopted that recommendation and by letter of the 2nd March, 1973, informed the developer of its decision. The letter from the town clerk reads as follows:

"I wish to say that the matter was discussed by Council at its last meeting, but it regrets that it is unable to approve the proposal as submitted in terms of Section 313 of the Local Government Act, 1919 as amended, for the reason that the design is unsatisfactory in that—

(a) Eighteen balconies do not have a minimum width of 5-ft. for at least 60 sq. feet of the area.
(b) Twelve kitchen alcoves are, in fact, kitchens and have floor areas less than that required by Ordinance 71.

I am to add, however, that Council is prepared to approve final plans and specifications complying in all respects with the requirements of the

Local Government Act and Ordinances, Council's Residential Flat Building 2C Code and Planning Scheme Ordinance to be prescribed, subject to:—

(1) Such plans providing for—
  (i) All balconies with a minimum of 5-ft. for an area of 60 sq. feet.
  (ii) All flats being provided with kitchens with floor area as required by Ordinance 71.
  (iii) More extensive front balconies to improve the frontal appearance.

(2) Payment of a contribution of $3,000 ($250 per Unit) in lieu of providing 400 sq. feet of open space per Unit within the site, such amount to be paid at the time of lodging the building application.

(3) The retention of the Gum tree on the eastern boundary.

The amended plans are to be lodged with the Building Inspector during his office hours which are from 9 a.m. to 12 noon Mondays to Fridays. Will you please present this letter when calling.

If the outline of the building varies to any great extent from that shown on the sketch plans, it may be necessary for the proposal to be re-advertised in terms of Section 342ZA of the *Local Government Act*, in which case the appropriate fee of $60 will have to be paid by your Company. However, whether this action will be necessary can only be determined when the amended plans are submitted.

It is pointed out that, should you feel aggrieved in any way by Council's decision, you can exercise the right of appeal to the Local Government Appeals Tribunal, 332 Castlereagh Street, Sydney (telephone 20 982)."

On some later date which the evidence does not identify the developer lodged amended plans with the Council in a form which met the Council's building requirements. On the 20th March, 1973, the developer paid the Council the sum of $3,000. On some date thereafter the Council stamped on the plans a notation recording the grant of building approval and development consent. The latter was given unconditionally. The plaintiff brought proceedings to recover the sum of $3,000 so paid by it. It contended that the Council had no power to require the payment of money in connexion with the granting of any development consent and that it is entitled to recover the sum paid as money demanded from it without lawful justification and paid under circumstances amounting to legal coercion.

The powers of the Council relevant for present purposes are set out in cl. 27 of the *County of Cumberland Planning Scheme Ordinance* in the following terms:

"Where application is made to the responsible authority for its consent to the erection or use of a building in a zone in which a building of the type proposed may be erected and used only with its consent, the responsible authority shall decide whether to give or withhold consent and in the former event what conditions, if any, shall be imposed."

A proviso requires that the responsible authority before determining its application shall take into consideration six tabulated matters of which the following are of particular relevance:

"(e) the existing and likely future amenity of the neighbourhood including the question whether the proposed development is likely to cause injury to such amenity including injury due to the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, grit, oil, waste water, waste products or otherwise; and

(f) the circumstances of the case and the public interest."

There was much debate at the trial touching the question whether the Council had power to levy a contribution in the manner proposed as a condition of giving its consent to a development. For the developer it was contended that such a levy was upon proper analysis a tax invalidly imposed because the statutory conditions respecting rates had not been observed. For the Council it was argued that the Council could lawfully exact a contribution to be used with other contributions to provide open space which, because of its proximity to the development, was reasonably connected with it.

In the outcome his Honour took a view of the facts which in his belief rendered it unnecessary for him to decide these questions. He based a verdict for the developer in the amount claimed upon the following findings of fact:

1. Payment of the money was sought and was effected prior to any decision by the Council as to the giving of the relevant consent.

2. When it exercised its power under cl. 27 of the Ordinance the Council did not then condition that consent by requiring the payment of money.

3. Accordingly the demand by the defendant and the payment by the plaintiff did not result from any valid exercise by the defendant of its power to impose conditions on its consent.

4. The plaintiff company paid the money as a result of fears based on the seeming authority of the Ordinance in question.

With great respect to his Honour I am of opinion that the findings made did not entitle the plaintiff to a verdict and that it was not possible to decide the action without first determining the question principally in debate. The constituents of an action for debt in the circumstances with which his Honour was concerned have been formulated by the High Court (*Mason* v. *The State of New South Wales* (8); *Marsh* v. *Shire of Serpentine-Jarrahdale* (9)). To succeed in the action it was necessary for the plaintiff to prove (a) that it had made the payment as a result of coercion, (b) that the demand was made without lawful justification. No doubt there was material which would have justified a finding that the first of these constituents was present. The second element, however, could not be found in favour of the plaintiff without first deciding whether the Council did or did not have power to require the payment of money as a condition of its consent. Assuming it did have such power and had received the money after imposing a condition to that effect, the payment would have been irrecoverable. Upon the same assumption and in the events which happened the question which his Honour was obliged to consider was whether the course of dealings between the Council and the developer amounted on proper analysis to the grant of a consent conditional on a money payment.

It was open to argument that the decision of the developer not to appeal against the refusal followed by its payment of the sum specified and the lodgment of an application which met the Council's other requirements constituted an acceptance in advance of a condition which, on this assumption, the Council was lawfully entitled to impose. Upon this view of

(8) (1959) 102 C.L.R. 108.

(9) (1966) 13 L.G.R.A. 216.

the material before him the trial judge was at liberty, although not bound, to come to the conclusion that the Council had approved the development subject to a condition as to payment which had been made in anticipation. It has been held that in considering whether a charge not lawfully due has been levied for an official service, it is immaterial whether the payment was made before or after the service was rendered (*Steele* v. *Williams* (10)). His Honour's failure to consider whether the Council had the power to impose such a condition and whether in its dealings with the developer it had exercised such a power means that the action must be sent down for a new trial. Unless the complexion which the defendant sought to place on what happened had been explicitly considered and rejected, the plaintiff was not entitled to recover.

Since it is necessary to remit the action to the District Court to obtain a determination of the questions involved, it is perhaps desirable to express some views on the questions of law which have been debated before this Court. A number of cases have referred to the question whether a council may impose as a condition of its consent the payment of money to be used by it for the provision of a facility the developer might be required validly to provide. In *Woolworths Properties Pty Ltd* v. *Ku-ring-gai Municipal Council* (11) the following passage appears:

> "It may well be that a question of fact or degree must arise in each case as to whether a public facility is so placed or regulated that it can be so identified or restricted, but in the present case I should not wish to say more than that any power to require a contribution of money towards the provision of parking space, whether by the imposition of a condition or otherwise, cannot in my view be exercised unless the facilities, actual or proposed, are so situated, and defined in such a fashion, as to enable a decision to be reached that they are capable of being identified with or restricted to use in connection with the proposed development."

The question was further considered by Else-Mitchell J. in *Gillott* v. *Hornsby Shire Council* (12), where he said in reference to the preceding passage:

> "I think it would not be inconsistent with this statement to say that the council might have been able, before allowing any industrial development in this area, to require a contribution from each developer towards the construction of new access facilities which would solely or mainly serve the land on which new industries were established in the area; in illustration, it could construct a new road, refrain from dedicating it to public use, and make a charge in the nature of a toll or otherwise for that use."

In *Jumal Developments Pty Ltd* v. *Parramatta City Council* (13), the same judge expressed the following opinion:

> "It is, moreover, not to the point to say that because a levy of money cannot be imposed there is no power to require the dedication of land. The levy of money as a condition of the exercise of a statutory discretion has always been regarded as suspect because it need not necessarily be related to the lawful exercise of the power conferred so that it assumes the character of an exaction or tax (cf. *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd* (14); *Attorney-General* v. *Wilts United Dairies Ltd* (15); *Ex parte Australian Property Units Management* [*No.* 2] *Ltd*; *Re Baulkham Hills Shire Council* (16))."

(10) (1853) 155 E.R. 1502, at p. 1505.
(11) (1964) 10 L.G.R.A. 177.
(12) (1964) 10 L.G.R.A. 285, at p. 290.
(13) (1969) 17 L.G.R.A. 111, at p. 113.

The problem has been most recently encountered in *Granville Developments Pty Ltd* v. *Holroyd Municipal Council* (17) which contains the following observations by Else-Mitchell J.:

> "In the present cases the construction of blocks of flats with inadequate open space adjoining or nearby could undoubtedly lead to interference with the amenity of the neighbourhood, but before a money payment could be required to enable a council to acquire or provide some open space to make good this inadequacy the council should surely have taken the course of refusing the development or granting consent conditionally upon the developer acquiring other land adjoining or nearby so as to provide some open space, or by requiring the building owner to reduce the magniture of his development so that each building would stand in grounds of ample extent. This is a course which is plainly open to a council under most planning scheme ordinances, which confer powers extensive enough to require the dedication to public use as open space of some part of the land to be developed (cf. *Jumal Developments Pty Ltd* v. *Parramatta City Council* (18)). It may be proper, as an alternative to the imposition of some such condition, for a council to require the payment of a sum of money to enable it to provide an appropriate or corresponding area of open space nearby, but I am at the moment, for reasons set out in other decisions I have given, not able to agree that payment of a sum of money at large can be required as a condition of granting consent to a development which generates some demand for or greater use of facilities of a public nature."

It will be seen that the learned judge's views have moved by perceptible degrees from the position first adopted by him in *Woolworths Properties Pty Ltd* v. *Ku-ring-gai Municipal Council* (supra) that contributions could not be levied except for facilities restricted to use in connexion with the proposed development. In *Gillott* v. *Hornsby Shire Council* (supra) money could be exacted for facilities which mainly served the development. In *Jumal Developments Pty Ltd* v. *Parramatta City Council* (supra) the validity of a contribution so framed as to be related to the power to approve the development was conceded and in *Granville Developments Pty Ltd* v. *Holroyd Municipal Council* (supra) the previous decisions are explained as prohibiting only the payment of a sum of money at large. The position is, with respect, accurately stated in the last two passages. The general nature of the Council's power has been defined by Walsh J. in *Allen Commercial Constructions Pty Ltd* v. *North Sydney Municipal Council* (19), with which Barwick C.J., Menzies and Windeyer JJ. agreed as follows:

> "In accordance with a well-recognized rule, s. 40 (1) ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for

(14) (1922) 31 C.L.R. 421.
(15) (1922) 91 L.J.K.B. 897.
(16) (1962) 9 L.G.R.A. 115, at p. 121.
(17) (1969) 18 L.G.R.A. 34, at pp. 38, 39.
(18) (1969) 17 L.G.R.A. 111.
(19) (1970) 20 L.G.R.A. 208, at p. 216.

which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in *Fawcett Properties Ltd.* v. *Buckingham County Council* (20), as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained."

The test of validity having been expressed in such wide terms it is not possible in my opinion to state a priori that all conditions involving a money payment lack validity. It will no doubt be impossible to justify the collection of money with which the Council intends merely to augment its revenue or which it proposes to spend on certain purposes without any obligation to do so. But I consider that a council may arguably claim that it has imposed a valid condition in circumstances where residential development in a given area will create a need for additional open space if the amenities of the neighbourhood are to be preserved, the provision of open space on the development site is not commercially feasible, money collected from each developer is to be expended on the provision of such open space, the money is impressed with a trust which would prevent its expenditure for any other purpose and the space to be provided is proximate enough to the site to present a reasonable connexion with the needs generated by development on it. It goes without saying that the relationship between the proposed development and the proposed facility raises questions of degree and therefore of fact which the trial judge will determine by applying to his findings on the evidence the appropriate measure of validity expressed, as it must be, in the general language adopted by the High Court. On the other hand, it will be necessary for him to consider and deal with the submission that the Council in requiring the payment was not exercising power under the Ordinance at all but imposing a local rate otherwise than in accordance with the *Local Government Act*. The resolution of this disputed question of characterization will depend upon an examination of the relevant provisions of the Act and Ordinance, the December policy decision and the course of dealings between the parties. The answer to these questions must depend upon a consideration of all the circumstances proved and cannot be allowed to turn on the simple temporal relationship between the date of payment and the date of consent.

I would propose that the appeal be allowed with costs, that the verdict and judgment be set aside and that the action be sent down for a new trial. The costs of the first trial should abide the result of the second trial. The respondent, if entitled, should have a certificate under the *Suitor's Fund Act*.

SAMUELS J.A. I agree in the judgment of Glass J.A. and with the orders proposed.

Appeal allowed with costs. Verdict and judgment set aside and new trial ordered, costs of first trial to abide the costs of

(20) [1961] A.C. 636, at p. 684.