

ROM: *Times Report by James + released in 1984*
SUE DRYDEN --

FROM: ALAN NICOL - LEGAL (DRAFTING)

Commission of Enquiry into M.O.
FILE NO.

DATE: 7th February, 1984

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- (a) in respect of a deemed environmental planning instrument which has not been altered since 1st September, 1980 a condition may be imposed without the instrument containing an identification clause as referred to in s.94(2)(a) of the Act.
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- (c) in respect of a local environmental plan a condition may be imposed provided the instrument contains an identification clause as referred to in s.94(2)(a) of the Act.

2. In each case many difficulties present themselves to a council wishing to impose a valid condition of consent. Various tests and preconditions have been established by the Court.

3. Firstly, the council must form an opinion that the proposal "will or is likely to require the provision of or increase the demand for public amenities and public services within the area"; e.g., by virtue of population increase. The condition, also, must be fairly and reasonably related to the development.

4. Secondly, the contribution sought must be for the purpose of providing, extending or augmenting those public amenities and public services. Examples of public amenities and services which contributions or the dedication of land have been required by the Court under s.94 include public car parking, drainage, open space, the upgrading of stormwater channels and traffic planning study and possible parking contributions consequent on the findings and adoption of that study.

5. Thirdly, the Court has held that there must be a causal nexus between the development and a decline in the amenity of the area and this decline must be substantiated e.g., the council will need to show that "the expected increase in population in the locality with the expectant resultant demand for increased facilities ... (will) necessarily result in a decline or a depreciation of the amenities in that neighbourhood". It would seem that it is imperative to establish an amenity decline.

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11. The conditions imposed by the council, would, therefore, be beyond power.

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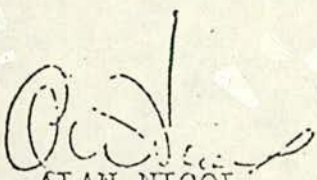
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14. Nor do I think it advisable for the Department to proffer legal advice to the Council as to the bases upon which contributions may be sought. If advice given transpires to be incorrect the Minister or the Department may be placed in an embarrassing situation. The council has available to it competent legal advisers and should be encouraged to seek advice from that quarter as to its powers.


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Legal (Drafting) Branch

Endorsed *Deirdre Campbell* 7/2/84.

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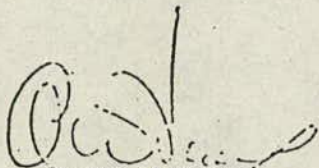
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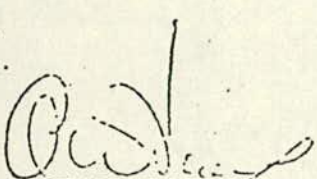
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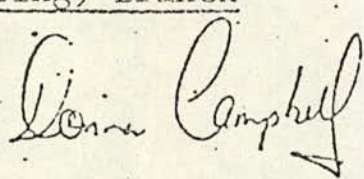
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Endorsed  7/2/84.

Summary

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3 - 1, 34

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SPAIN

Second draft

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Copy. Another copy
attached to Palan View
Hamlet P/L. Judgement
(Spain)

Crystal Vale v. Tweed Shire Council

Land and Environment Court,

#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 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". The question in this case is whether a contribution, extracted for rural roads anywhere in the shire, is "within the area".

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 "within the area" 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 Ranch⁴ 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 improper⁷.

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".

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. Peterson¹. 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 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 conjunction 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 argument¹². It was not necessary for the council to prove a direct geographical connection between the subject development and the proposed council carpark -- it was 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 Environment¹² (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 Council⁷, wherein the requisite "fair and reasonable" relationship appeared to be extended 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.

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 appears to hold that this "reasonable" nexus is established wherever a development creates a need anywhere in a [local government] area, and where the condition (monetary contribution) is for expenditure on assuaging that need anywhere in the [local government] area.

However, 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 actual expenditure (disputed though it was) 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 expressly, and by way of limitation, saying¹⁵ "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.

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.

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.

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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.

David Spain,
Solicitor,
16 March 1988.

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2-15,23

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