

Gregan S. 94

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# FAX DOCUMENT FROM PETER HAMILTON

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TO: Graham Irvine

FAX No: Ind office

DATE: 24-8-95

Number of pages (including this sheet): 7

SUBJECT: Newport no 5. 94

COMMENTS: Herewith copy as discussed.

Regards  
Peter



**Greg Newport**  
**Barrister at Law**

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*PH 76*

11 August, 1995

Messrs. Bondfield Riley,  
Solicitors,  
**FAX (066) 219059**

**DX 7712 LISMORE**

Dear Sirs,

**RE IMPOSITION BY LISMORE CITY COUNCIL OF CONDITIONS REQUIRING  
ROAD WORKS**

I am briefed to advise whether the Council has power pursuant to Section 90 of the Environmental Planning and Assessment Act 1979 ("EPA Act") to impose conditions of consent requiring road works and the like, external to a development site where such works are not part of a Section 94 contributions plan.

Section 94 relevant provides that the Council may impose a condition requiring payment of a reasonable monetary contributory, where it is satisfied that the development will or is likely to require the provision of or an increase in demand for public amenities and public services within its local government area. (s94(1)). Additionally, the Council may impose such a reasonable contribution condition toward recoupment of costs already incurred in the provision of such public amenities or public services (s94(2A)). Finally, the Council may accept the provision of a material public benefit in part or full satisfaction of a condition imposed in accordance with sub-sections (1) or (2A) (s94(2C)).

Section 90 requires the Council, when determining a development application, to take into account and to properly consider such matters as access, drainage and the like. Access includes both internal and external ingress and egress to the subject site. It follows that if the Council is of the opinion that development will require improved access, it may, pursuant to s91 impose a condition relating to that access.

The first thing that must be said is that Section 91 only empowers the Council to impose a contribution for road works where that contribution is included within a s94 contribution plan. (Fitch v. Shoalhaven City Council (1987) 67 LQRA 165 at 170). The main contention is whether the Council, in lieu of requiring the payment of a contribution for improved road works, may impose a condition pursuant to s91 requiring actual construction of such road works at the cost of the Applicant.



I am reminded of two recent determinations by the Land and Environment Court which I am told cast doubt upon the Council's ability to require road works external to the subject site in instances where such works are not part of a s94 contribution plan.

*non sequita*

I advise as follows:-

#### ADVICE

1. In my opinion the Council is empowered to require by condition of consent, reasonable road work construction where it can be established that such a development is likely to lead to the demand for such facilities. The tests of reasonableness are known as the threefold test and were cited in Newbury District Court v. Secretary of State [1981] AC 578 and provided that the condition must:-

*Contradictory*

- (a) serve a planning purpose;
- (b) relate to the use;
- (c) not be unreasonable that a reasonable planning authority would not apply it.

Such power is vested with the Council notwithstanding the fact that it may have elected not to require (the imposition of) a contribution (to cover such works, as part of) its s94 contribution plan.

*under*

2. Section 91(3)(f) and (h) EPA relevantly provide:

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

- (f) requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in Section 90(1) applicable to the development the subject of the consent;

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

The statutory provision clearly envisages the carrying out of works (as distinct from the levying of a contribution) where such works relate to a section 90 matter.

3. Section 94 relevantly provides for the levying of a monetary contribution and the Council may determine that the provision of a comprehensive road work scheme to provide access to the subject allotment together with other allotments, should be the subject of a contribution plan. It is trite to say that where the Council elects to incorporate the access to a particular allotment within a comprehensive road work scheme, it is then without power to require the Applicant to carry out such works pursuant to s91(f). As a practice, yet it is conceded that it is not universal, a Council will ordinarily include within its s94 contribution plan, requirements for payment of contributions for provision of higher order roads (as



distinct from local roads). Conveniently the construction of local roads is again ordinarily required as a construction requirement for the initial subdivision. The difficulty facing the Council is that there are many local roads which have not been the subject of construction requirements at subdivision, and the Council is faced with the dilemma of including upgrading of such local roads as part of a s94 contribution plan or as an alternative elects to require the Applicant to carry out construction works when development of a particular allotment occurs. There are well known advantages and disadvantages in including such road works within a comprehensive s94 contribution plan. The first advantage is that it puts beyond doubt the Council's ability to require contributions and ensure Council of a funding source but the immediate disadvantage is that the Council cannot be sure of the stage of development. Where one development occurs, the Council is required to expend such contribution within a reasonable period of time and this may well mean that it is required to do so before it has adequate funds from other development sites, such funds absolutely necessary to provide an effective road system. In such circumstances, the Council is required to expend the money on a temporary road works function or alternatively fund the additional works from its general rate revenue and attempt to recoup such moneys at a later and uncertain date.

*cannot make  
good chart  
for the  
past errors.*

The above is background to the dilemma facing Council but it is clear that the statutory provisions of s94 provide for the levying of a road work or access contribution where such a contribution plan is in force. I note that the Department of Planning, as it was then in its s94 contribution manual and relevantly at para 7.8 refer to the requirement that a developer carrying out works as being empowered by s94 as a "material public benefit". Such a statement is particularly unhelpful when one appreciates that s94(2C) empowers the Council to accept the provision of material public benefit only where it has imposed a condition requiring a monetary contribution in the first instance. It follows that if the Council wished to require the Applicant to carry out works, it must firstly impose a condition of consent requiring payment of a monetary contribution in accordance with a scheme forming part of a contribution plan, and thereafter agree to accept such road works in lieu of payment of the monetary amount. Carried to its logical extension, the Department's advice would suggest that the Council must include all local road works within its s94 contribution plan and in lieu of payment of such a contribution, the Council accept that the Applicant provide material public benefit by allowing that person to carry out part of the road construction works. However, this seems to be further complicated by the fact that the Applicant must agree to the carrying out of such works in lieu of payment of contribution.



In my opinion s94 is not the exclusive source of power enabling the Council to impose road construction works as a condition of consent.

4. I do not believe that the Department, as it was then, is concluding otherwise but the reference in paragraph 7.8 does suggest that such works be carried out in accordance with s94(2C).
5. I agree with the Department that there do not appear to be many cases where the argument has been put to the Court that s.94 is the only source of a requirement for construction work to be carried out in the absence of a contribution plan for such works. However, there have been a number of determinations by Assessors of the Court where construction works have been the subject of conditions notwithstanding s94 plans in place. There is no argument that the s94 plans required a contribution for the same works but rather in facts similar to the subject case, the s.94 contribution plan was silent and the consent authority attempted to impose conditions requiring construction works. In Blackhorse Creek Pty, Limited v. Kyogle Shire Council (41 APA 356) the Senior Assessor determined that a condition requiring improvement to intersection works so as to provide a 130 metre sight distance was held to be valid notwithstanding s.94 contributions for other road works. In Rees v. Bellingen SC (ELR 92/102) an Assessor validly imposed a condition of consent relating to a reasonable road construction requirement, being an access road to a subdivision, where there was in place a Section 94 contribution plan for other works. Finally, in an earlier decision of Kell v. Blacktown City Council (7 APAD 325) an Assessor allowed the imposition of a condition requiring construction of kerb and guttering and full half width road construction along the total frontage of an allotment of land.

It can be seen from the above instances that the Courts have not been constrained from imposing road construction works both immediately in front of the subject development and in the immediate vicinity of the development. I am of the opinion that any attempt to impose conditions requiring road works, other than those in the immediate vicinity of the subject site, are likely to be held to be unreasonable. I will return to this point.

6. In the two Council cases of Anson and Jonathon, the Court did not allow the Council's conditions requiring road works which were external to the subject site.

In Jonathon the Court at pages 9 and 10 referred to the following -

"The Council also sought a further contribution for road works and reconstruction of a concrete causeway and deck overlay on Davis Road and Davis Bridge, citing increased traffic generation as a reason."



*ethic - he argued it!*

The Court's finding that such a contribution was invalid given the fact that it was not part of the s.94 plan is entirely correct.

*subject garbled*

In Apson the Court noted that the Council had in place a s.94 contribution plan for the carrying out of the road works in Standing Street and at the same time sought additional road works which amounted to "double dipping". Once again I agree with that conclusion. However, when one looks at conditions 2 and 3 which were imposed by the Court it is clear that firstly the Court allowed a valid s94 contribution for road works and that condition 3 imposed a condition requiring construction of certain road works. Relevantly, condition 3 lends support to the proposition that the Council is empowered to impose construction works external to a subject site where the s.94 contribution plan is silent on such works.

- How come they don't think this is merely what the CPs do?*
7. I do not believe there is any doubt that the Council is with power to impose construction work conditions pursuant to s91 of the EPA Act provided such works are immediately in front of the subject site and where such works are not included as part of a s94 contribution plan. The contentious area is where the Council, in similar circumstances, attempts to impose a condition requiring construction works of such matters as culverts, bridges or intersections which are removed from the subject site. I apprehend that if the Court is faced with a challenge to the validity of a condition of consent requiring the Applicant to carry out construction works, where such works are significantly removed from the subject site, and in circumstances where the Council has not incorporated the cost of such works as part of a contribution plan, the Court will not allow such a requirement. In my opinion the Council ought to contemplate incorporation of such works as intersection, or culvert or bridge works as part of a s94 plan, given the fact that such a scheme is the only equitable way of apportioning the cost between existing and potential users.

#### CONCLUSION

- I have, but I think one is mistaken.*
8. s.94 is the exclusive source of power available to the Council to impose a contribution requiring road works. s.91 authorises the imposition of conditions requiring the Applicant to carry out certain works but they must satisfy the threefold test set out above. I am of the opinion that there is clear power in the circumstances for the Council to impose conditions where the works external to the site are in the immediate vicinity of the site and particularly where they adjoin the site. The main contention is that where the Council attempts to impose conditions requiring the Applicant to carry out works on facilities which are significantly removed from the subject site, the Court will not allow such conditions. I have not been able to find any instances where this matter has been judicially considered and the question of power must remain open. However, I believe that the better view is that the Court would not allow such conditions not



quite No 6

because they are beyond power but simply because they are more likely to be unreasonable in the circumstances. It is far more difficult for a Council to establish reasonableness for such more distant works where there are clearly many other existing and potential users and this raises the very issue of reasonableness and equitable apportionment.

I would be pleased to discuss any aspect of this advice should it be required.

Yours faithfully,

*Greg Newport*

GREG NEWPORT

Summary,  
Require a familiarisation with the CPs & the Manual,  
I suspect the L's CP have much to be desired.  
Question. Are there any roads not covered by a  
CP & if so, why not?

This contradictory situation can only lead to ad hoc  
planning, bamboozling planners, admin staff  
& developers alike - not to mention property  
owners & the like.

Such gabbled de goop subverts time &c!!!



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MASTER  
MURPHY

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#### CONCLUSION

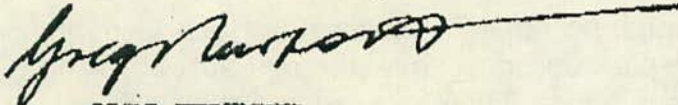
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The Court's finding that such a contribution was invalid given the fact that it was not part of the s.94 plan is entirely correct.

In Adson the Court noted that the Council had in place a s.94 contribution plan for the carrying out of the road works in Standing Street and at the same time sought additional road works which amounted to "double dipping". Once again I agree with that conclusion. However, when one looks at conditions 2 and 3 which were imposed by the Court it is clear that firstly the Court allowed a valid s94 contribution for road works and that condition 3 imposed a condition requiring construction of certain road works. Relevantly, condition 3 lends support to the proposition that the Council is empowered to impose construction works external to a subject site where the s.94 contribution plan is silent on such works.

7. I do not believe there is any doubt that the Council is with power to impose construction work conditions pursuant to s91 of the EPA Act provided such works are immediately in front of the subject site and where such works are not included as part of a s94 contribution plan. The contentious area is where the Council, in similar circumstances, attempts to impose a condition requiring construction works of such matters as culverts, bridges or intersections which are removed from the subject site. I apprehend that if the Court is faced with a challenge to the validity of a condition of consent requiring the Applicant to carry out construction works, where such works are significantly removed from the subject site, and in circumstances where the Council has not incorporated the cost of such works as part of a contribution plan, the Court will not allow such a requirement. In my opinion the Council ought to contemplate incorporation of such works as intersection, or culvert or bridge works as part of a s94 plan, given the fact that such a scheme is the only equitable way of apportioning the cost between existing and potential users.

#### CONCLUSION

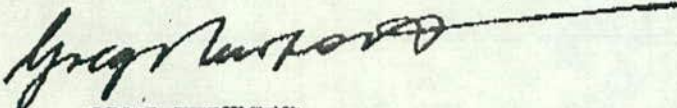
8. s.94 is the exclusive source of power available to the Council to impose a contribution requiring road works. s.91 authorises the imposition of conditions requiring the Applicant to carry out certain works but they must satisfy the threefold test set out above. I am of the opinion that there is clear power in the circumstances for the Council to impose conditions where the works external to the site are in the immediate vicinity of the site and particularly where they adjoin the site. The main contention is that where the Council attempts to impose conditions requiring the Applicant to carry out works on facilities which are significantly removed from the subject site, the Court will not allow such conditions. I have not been able to find any instances where this matter has been judicially considered and the question of power must remain open. However, I believe that the better view is that the Court would not allow such conditions not



because they are beyond power but simply because they are more likely to be unreasonable in the circumstances. It is far more difficult for a Council to establish reasonableness for such more distant works where there are clearly many other existing and potential users and this raises the very issue of reasonableness and equitable apportionment.

I would be pleased to discuss any aspect of this advice should it be required.

Yours faithfully,



GREG NEWPORT



Peter

For your info.

Secn 9lt committee received  
this yesterday & have asked for  
a comment from Nic Juradowitch  
& Bill Moorhouse re the implications  
for Council & what we should  
put in place for the future.

Diana.



**Greg Newport**  
Barrister at Law

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11 August, 1995

Messrs. Bondfield Riley,  
Solicitors,  
FAX (066) 219059

DX 7712 LISMORE

Dear Sirs,

RE IMPOSITION BY LISMORE CITY COUNCIL OF CONDITIONS REQUIRING  
ROAD WORKS

I am briefed to advise whether the Council has power pursuant to Section 90 of the Environmental Planning and Assessment Act 1979 ("EPA Act") to impose conditions of consent requiring road works and the like, external to a development site where such works are not part of a Section 94 contributions plan.

Section 94 relevant provides that the Council may impose a condition requiring payment of a reasonable monetary contributory, where it is satisfied that the development will or is likely to require the provision of or an increase in demand for public amenities and public services within its local government area. (s94(1). Additionally, the Council may impose such a reasonable contribution condition toward recoupment of costs already incurred in the provision of such public amenities or public services (s94(2A). Finally, the Council may accept the provision of a material public benefit in part or full satisfaction of a condition imposed in accordance with sub-sections (1) or (2A) (s94(2C).

Section 90 requires the Council, when determining a development application, to take into account and to properly consider such matters as access, drainage and the like. Access includes both internal and external ingress and egress to the subject site. It follows that if the Council is of the opinion that development will require improved access, it may, pursuant to s91 impose a condition relating to that access.

The first thing that must be said is that Section 91 only empowers the Council to impose a contribution for road works where that contribution is included within a s94 contribution plan. (Fitch v. Shoalhaven City Council (1987) 67 LGRA 165 at 170). The main contention is whether the Council, in lieu of requiring the payment of a contribution for improved road works, may impose a condition pursuant to s91 requiring actual construction of such road works at the cost of the Applicant.



I am reminded of two recent determinations by the Land and Environment Court which I am told cast doubt upon the Council's ability to require road works external to the subject site in instances where such works are not part of a s94 contribution plan

I advise as follows:-

#### ADVICE

1. In my opinion the Council is empowered to require by condition of consent, reasonable road work construction where it can be established that such a development is likely to lead to the demand for such facilities. The tests of reasonableness are known as the threefold test and were cited in Newbury District Court v. Secretary of State [1981] AC 578 and provided that the condition must:-

- (a) serve a planning purpose;
- (b) relate to the use;
- (c) not be unreasonable that a reasonable planning authority would not apply it.

Such power is vested with the Council notwithstanding the fact that it may have elected not to require the imposition of a contribution to cover such works, as part of its s94 contribution plan.

2. Section 91(3)(f) and (h) EPA relevantly provide:

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

- (f) requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in Section 90(1) applicable to the development the subject of the consent;

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

The statutory provision clearly envisages the carrying out of works (as distinct from the levying of a contribution) where such works relate to a section 90 matter.

3. Section 94 relevantly provides for the levying of a monetary contribution and the Council may determine that the provision of a comprehensive road work scheme to provide access to the subject allotment together with other allotments, should be the subject of a contribution plan. It is trite to say that where the Council elects to incorporate the access to a particular allotment within a comprehensive road work scheme, it is then without power to require the Applicant to carry out such works pursuant to s91(f). As a practice, yet it is conceded that it is not universal, a Council will ordinarily include within its s94 contribution plan, requirements for payment of contributions for provision of higher order roads (as



distinct from local roads). Conveniently the construction of local roads is again ordinarily required as a construction requirement for the initial subdivision. The difficulty facing the Council is that there are many local roads which have not been the subject of construction requirements at subdivision, and the Council is faced with the dilemma of including upgrading of such local roads as part of a s94 contribution plan or as an alternative elects to require the Applicant to carry out construction works when development of a particular allotment occurs. There are well known advantages and disadvantages in including such road works within a comprehensive s94 contribution plan. The first advantage is that it puts beyond doubt the Council's ability to require contributions and ensure Council of a funding source but the immediate disadvantage is that the Council cannot be sure of the stage of development. Where one development occurs, the Council is required to expend such contribution within a reasonable period of time and this may well mean that it is required to do so before it has adequate funds from other development sites, such funds absolutely necessary to provide an effective road system. In such circumstances, the Council is required to expend the money on a temporary road works function or alternatively fund the additional works from its general rate revenue and attempt to recoup such moneys at a later and uncertain date.

The above is background to the dilemma facing Council but it is clear that the statutory provisions of s94 provide for the levying of a road work or access contribution where such a contribution plan is in force. I note that the Department of Planning, as it was then in its s94 contribution manual and relevantly at para 7.8 refer to the requirement that a developer carrying out works as being empowered by s94 as a "material public benefit". Such a statement is particularly unhelpful when one appreciates that s94(2C) empowers the Council to accept the provision of material public benefit only where it has imposed a condition requiring a monetary contribution in the first instance. It follows that if the Council wished to require the Applicant to carry out works, it must firstly impose a condition of consent requiring payment of a monetary contribution in accordance with a scheme forming part of a contribution plan, and thereafter agree to accept such road works in lieu of payment of the monetary amount. Carried to its logical extension, the Department's advice would suggest that the Council must include all local road works within its s94 contribution plan and in lieu of payment of such a contribution, the Council accept that the Applicant provide material public benefit by allowing that person to carry out part of the road construction works. However, this seems to be further complicated by the fact that the Applicant must agree to the carrying out of such works in lieu of payment of contribution.



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In my opinion s94 is not the exclusive source of power enabling the Council to impose road construction works as a condition of consent.

4. I do not believe that the Department, as it was then, is concluding otherwise but the reference in paragraph 7.8 does suggest that such works be carried out in accordance with s94(2C).
5. I agree with the Department that there do not appear to be many cases where the argument has been put to the Court that s.94 is the only source of a requirement for construction work to be carried out in the absence of a contribution plan for such works. However, there have been a number of determinations by Assessors of the Court where construction works have been the subject of conditions notwithstanding s94 plans in place. There is no argument that the s94 plans required a contribution for the same works but rather in facts similar to the subject case, the s.94 contribution plan was silent and the consent authority attempted to impose conditions requiring construction works. In Blackhorse Creek Pty, Limited v. Kyogle Shire Council (41 APA 356) the Senior Assessor determined that a condition requiring improvement to intersection works so as to provide a 130 metre sight distance was held to be valid notwithstanding s.94 contributions for other road works. In Rees v. Bellingen SC (ELR 92/102) an Assessor validly imposed a condition of consent relating to a reasonable road construction requirement, being an access road to a subdivision, where there was in place a Section 94 contribution plan for other works. Finally, in an earlier decision of Kell v. Blacktown City Council (7 APAD 325) an Assessor allowed the imposition of a condition requiring construction of kerb and guttering and full half width road construction along the total frontage of an allotment of land.

It can be seen from the above instances that the Courts have not been constrained from imposing road construction works both immediately in front of the subject development and in the immediate vicinity of the development. I am of the opinion that any attempt to impose conditions requiring road works, other than those in the immediate vicinity of the subject site, are likely to be held to be unreasonable. I will return to this point.

6. In the two Council cases of Anson and Jonathon, the Court did not allow the Council's conditions requiring road works which were external to the subject site.

In Jonathon the Court at pages 9 and 10 referred to the following -

"The Council also sought a further contribution for road works and reconstruction of a concrete causeway and deck overlay on Davis Road and Davis Bridge, citing increased traffic generation as a reason."



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The Court's finding that such a contribution was invalid given the fact that it was not part of the s.94 plan is entirely correct.

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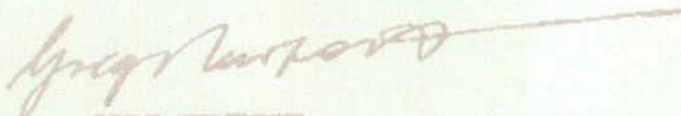


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