1st Draft
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Sent to Graham Warwick / Simon / Piv. Staff.

Land and Environment Court of New South Wales

CITATION :

Jonathan and Ors v Lismore City Council [2002] NSWLEC 134

PARTIES :

APPLICANT :Jonathan and Ors

RESPONDENT Lismore City Council

FILE NUMBER(S) : 10353 of 1994

CORAM: Pearlman J

KEY ISSUES: Development Consent :- rural land sharing community modification application - variation or deletion of condition s 94 contributions- whether contributions plan valid - effect of repeal and replacement of contributions plan - whether contributions reasonable -characteristics of rural land sharing community – discretion

LEGISLATION CITED: Environmental Planning and Assessment Act 1979 s 94, s 94B, s 94C, s 96

Lismore Contributions Plan 1994

State Environmental Planning Policy No 15

CASES CITED: Benalup Holdings Pty Ltd v Lismore City Council (1993) 81 LGERA 257;

Jonathan and Ors v Lismore City Council (Bannon J, NSWLEC, 24 April 1995, unreported);

Mirvac Homes (NSW) Pty Ltd v Baulkham Hills Shire Council (2000) 110 LGERA 100;

Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236.

DATES OF HEARING: 08/07/2002, 09/07/2002, 10/07/2002

DATE OF JUDGMENT: 09/08/2002

LEGAL REPRESENTATIVES:

APPLICANT: Jonathan (in person); ~~SOLICITORS,N/A~~

RESPONDENT: Mr J M Atkin (Barrister), SOLICITORS,Walters

JUDGMENT:

IN THE LAND AND ~~10353 of 1994~~

ENVIRONMENT COURT Pearlman J

OF NEW SOUTH WALES 9 August 2002

JONATHAN AND ORS, Applicant

v

LISMORE CITY COUNCIL, Respondent

JUDGMENT

Typed

Introduction

1. Jonathan and twelve other persons hold between them 16 shares in a multiple occupancy of rural land at Jiggi near Lismore.

2. Development consent, subject to 39 conditions, was granted by this Court on 15 June 1995 for the use of the land as a multiple occupancy. The consent was granted pursuant to transitional provisions which permitted the application of State Environmental Planning Policy No 15 ("SEPP 15") to the consent, even though that instrument has been repealed.

3. By an application filed on 12 November 1999, Jonathan sought, on behalf of himself and his co-owners, modification of the conditions of consent. The application has been treated as an application under s 96 of the Environmental Planning and Assessment Act 1979 ("the EP&A Act"). The application has, with leave, been changed on a number of occasions. Ultimately, it sought modification of the conditions by deletion of some and by variation of others.

4. In these proceedings, Jonathan, who goes only by that one name, represents all co-owners. He appeared without legal representation and conducted the whole proceedings himself.

5. After the hearing had commenced, the parties came to an agreement on most aspects of the modification that was sought, and, by orders made on 10 July 2002, the Court gave effect to the agreement which had been reached. That left one outstanding matter that required the Court's determination. It related to the modification that was sought to condition 2, being a condition concerned with contributions under s 94 of the EP&A Act. This judgment deals with that outstanding matter.

6. The modification sought by Jonathan was the deletion of condition 2 or, alternatively, a variation of it so as to reduce the amount of the s 94 contribution originally imposed. Condition 2 provides as follows: 2 Payment of levies under Section 94 of the Environmental Planning and Assessment Act as a contribution towards the provision of public services or amenities identified in the attached schedule be paid at the rates and amounts applying at the date of this notice, totalling as $91,965 set out in the schedule. Payment to the Council must be by bank cheque or cash. The sum of $91,965 is to be paid by annual instalments over a period of seven (7) years, the first payment to be made on April 30, 1996, and unpaid instalments shall carry interest at the rate of 6% per annum, such interest to be paid seriatim with each instalment.

7. The attached schedule was in the following form (omitting formal and irrelevant parts):

8. No instalments have been paid. According to the council's evidence, the amount currently payable, that is, the contribution of $91,965 plus accrued interest, is $116,893.67.

9. Jonathan put his case on alternative grounds. His first ground was that the Lismore Contributions Plan 1994 ("the 1994 Plan") pursuant to which the contribution required by condition 2 was imposed has been repealed by the Lismore Contributions Plan 1999 ("the 1999 Plan") and therefore it does not provide a valid basis for determining the contribution. Jonathan argued accordingly that condition 2 should be deleted.

10. His second ground was the unreasonableness of the contribution imposed by condition 2 in the circumstances of the proposed multiple occupancy development on the site. He contended accordingly that condition 2 should be varied in material respects and in particular should impose a contribution of $7,266.45.

11. The council took issue with both these grounds. However, it was prepared to agree to a variation of condition 2 so as to incorporate a contribution based on the 1999 Plan rather than the 1994 Plan. The amount would be $79,751.

Jonathan's case

12. The true basis for Jonathan's challenge to condition 2 is his claim that the s 94 contribution is unreasonable as it applies to the multiple occupancy. He did not put forward any real basis for invalidity of the 1994 Plan, except to say that it has been repealed. However, its repeal by the 1999 Plan does not justify a finding of its invalidity, particularly in view of s 94C(3) of the EP&A Act, which provides that the repeal of a contributions plan does not affect the previous operation of the plan furthermore, on analysis, the reasons for invalidity put forward by Mr G P Meineke, a consultant town planner who gave evidence for Jonathan, really amount to reasons why, in his opinion, the s 94 contribution is unreasonable they do not go to any issue of invalidity.

13. I turn then to examine in detail Jonathan's claim of unreasonableness. In doing so, I note three preliminary matters. First, s 94(12) empowers this Court on an appeal to disallow or amend a condition imposing a s.94 contribution because it is unreasonable. Secondly, Jonathan's claims of unreasonableness were directed to the 1999 Plan - it was accepted by both parties that the 1999 Plan is the appropriate contributions plan to consider in this appeal. Thirdly, the 1999 Plan refers to "rural land sharing communities" to describe multiple occupancy of rural land of the kind regulated by SEPP 15. I will refer to this concept generally as "a RLC" and to the multiple occupancy the subject of the development consent as "the Jiggi RLC".

14. Jonathan's claim was directed to a number of specific issues. I deal in summary form with the most important of his submissions as follows:

First, the equivalent tenement (ET) concept. Contributions under the 1999 Plan are based on an ET standard, representing the demand for services and facilities equivalent to a household on a standard residential allotment. It is based on an average occupancy rate of 2.7 persons per dwelling, but for smaller less intensive forms of development, the ET is expressed as a proportion of this figure. Thus, for medium density development, it is expressed in the 1999 Plan to be 0.75 ET per unit (1999 Plan s 5.1).

Jonathan claimed that the standard of 2.7 persons per dwelling was an unreasonable standard to apply to the Jiggi RLC, nor could the Jiggi RLC be described as demanding the same level of service as a "standard residential allotment". On this basis, he claims that the ET should be discounted to 0.37%, representing an occupancy of one person per dwelling. Mr Meineke

supported his claim in this regard, pointing out that RLC's traditionally have their own open space, they pool transport resources to and from town, have their own internal social networks, and usually have a community hall on site. Their demand for services is accordingly reduced.

Secondly, vehicle trips per day. The formula adopted by the 1999 Plan includes a factor based on the number of trips per day generated by the development (1999 Plan section 3.2.3). This factor is based upon an estimate ~~test~~ set out in table 1 (1999 Plan p 35). The estimate in respect of RLC's located more than 8 km from Lismore is 3 vehicle trips per day.

Jonathan claimed that 3 vehicle trips per day for the Jiggi RLC was an exaggeration, and was up to 15 times greater than was likely to be the fact. He contended that the occupants of multiple occupancies are unlikely to be employed, are unlikely to make many trips by vehicles, and their children are likely to go to school by bus. In his submission, the realistic estimate should be one vehicle trip per five days.

Thirdly, the H factor. The formula adopted by the 1999 Plan for road contribution includes a factor based on the percentage of heavy vehicles – the H factor. It provides for 4% in respect of RLC's, although a different percentage may be applied if the council "is satisfied with another figure after substantiation by the developer" (1999 Plan p 38). (Jonathan never provided substantiation as contemplated by this provision).

Again, Jonathan claimed that it was unreasonable to apply this figure to the Jiggi RLC, because occupants of the dwellings on the site were likely to use low cost housing materials and they were likely to transport materials themselves in order to save costs. Thus, for the Jiggi RLC, there will not be a heavy vehicle demand. He contended that the percentage should be 1% or 2%. Mr Meineke supported this claim, stating that there was no rationale for setting the percentage of 4% and it was inappropriate for low-cost housing that is in the main occupied by "do-it-yourself" people.

Fourthly, demand generally. Throughout the 1999 Plan, various percentages are stipulated as being attributable to the demand generated by new development. Percentages of this nature apply in relation to contributions for open space, community facilities and transport.

Jonathan claimed that the various percentages unreasonably fail to recognise the unique qualities of the Jiggi RLC. It will be, he submitted, a self-contained community, with pooling of resources and utilisation of common areas. The demand will be as little as 1/20 of the assumed usage and accordingly the appropriate percentage, in his submission, is 5% for contributions for open space, community facilities and transport.

Fifthly, the remoteness discount. The 1999 Plan recognises that demand for district and regional open space facilities located in the urban area will diminish in proportion to the distance from those facilities. Accordingly, the 1999 Plan provides for a discount in respect of remoteness, and, in relation to the area in which the Jiggi RLC is located, the discount is 25%.

Jonathan claimed that 25% discount is unreasonable. It puts the Nimbin district on a par with the area in which the Jiggi RLC is located, but fails to recognise that the two areas are different in terms of distance from Lismore, and in terms of available amenities, facilities and utilities. In his submission, the discount should be 75%.

Sixthly, rural road contribution. The 1999 Plan sets out a formula for calculating contribution to the upgrading of the rural road network.

Jonathan took issue with the reasonableness of a number of the factors in the formula. One of those is vehicle trips per day, another is the H factor, and I have referred to both above. However, Mr R J Smith, who is a consulting engineer, gave evidence on behalf of Jonathan, and he identified another factor as being unreasonable, namely, the construction cost per kilometre, which, in his opinion, should be $19 instead of $39 as adopted by the council. Mr Smith prepared calculations for Davis Road, Jiggi Road and Nimbin Road based on the factors he considered to be reasonable (ex 29).

The net result of all these submissions culminated in the tender of two documents prepared by Mr Meineke and Mr Smith. One of them, ex 30, contained calculations of contributions (based on Jonathan's submissions) for open space (city wide), community facilities (local and city wide), state emergency services and bushfire services. The other, ex 31, contained the figures that, in accordance with the calculations in ex 30, Jonathan claimed ought to be substituted for the figures adopted by the council (shown in par 7) and which would yield a contribution of $7,266.45 or $484.43 per ET.

Should the s 94 contribution be varied?

15 There are two things to notice about the Court's power under s 94(12) to disallow or amend condition 2. In the first place, it requires a finding that condition 2 is unreasonable, and, in the second place, the Court's power to amend condition 2 is discretionary.

16 I am not satisfied that condition 2 is unreasonable. The main thrust of Jonathan's submissions is that an RLC is unique because, amongst other things, it involves low-cost development, a pooling of resources, use of internal facilities, and occupation by low-income occupants. He has argued that, accordingly, application of the 1999 Plan is unreasonable because it is predicated on average standards and makes no allowance for the unique nature of the Jiggi RLC. However, in my opinion, this argument does not stand up to analysis. The 1999 Plan does make adjustments for departure from the average. It specifically takes into account the nature of an RLC in setting the vehicles per day factor and the H factor in the rural roads contribution formula. It specifically takes into account remoteness of location by applying a discount factor, in this case, 25%. And, as pointed out by Mr C J Soulsby, a town planner in the employ of the council, it discounts the ET standard by applying a lesser percentage for developments of less intensity.

17 Furthermore, it is erroneous, in my opinion, to apply a contributions plan according to the characteristics of the persons who might occupy a proposed development, rather than according to the nature of the proposed

development itself. I accept that the occupants of the Jiggi RLC are likely to be in the low income bracket (a fact specifically noted by Bannon J at p 9 of his judgment), and that accordingly the Jiggi RLC is designed for low cost housing. I consider that this fact is recognised by the discounts I have referred to in par 16. But I do not accept that the demands for services and facilities of the occupants will be universally modest. The demands will change from time to time and from person to person. The occupants may wish to use open space and other community facilities in the local government area from time to time, even though there may be community facilities on the site itself. They may wish to travel more often than at a rate of one vehicle movement per five days. They may wish from time to time to have construction items delivered to the site by heavy haulage rather than hauling it themselves. And it should be borne in mind that the development consent permits 16 dwellings upon the site.

18 I turn now to discretionary factors. These weigh heavily against Jonathan. Bannon J imposed condition 2 when granting development consent, and his Honour expressly noted that no argument had been presented as to why the contribution should not be paid - see p 9 of the judgment. His Honour recognised the modest means of the co-owners by allowing for payment over seven years at an interest rate of 6%. (p 9). The development in respect of which Bannon J granted consent remains the same, its nature remains the same, and the means of the co-owners to pay the contribution appears to be the same. Although the co-owners have not yet had the full benefit of the development consent since the site remains largely undeveloped, there has been no change of circumstance subsequent to the judgment of Bannon J, and this is a discretionary factor which the Court is entitled to take into account - see Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236.

19 A further discretionary factor is that no payments whatsoever have been made over the past seven years in at least partial compliance with condition 2. Interest has simply accrued at the rate set by Bannon J, and both the contribution and the interest remain unpaid.

20 For all these reasons, I am not prepared to modify condition 2 to vary the rate of contribution as Jonathan claims. The question then is as to whether the Court should modify condition 2 in the manner suggested by the council, the principal effect of which is to reduce the contribution from $91,965 to $79,751. There are other variations in the version of condition 2 suggested by the council. The most important is that contributions will be payable per each ET and the time of payment will be prior to the grant of the construction certificate for that ET. This will allow the total contribution to be paid in instalments as each dwelling is constructed which will appropriately link payment with occupation.

21 Two separate matters need to be considered in regard to the suggested variation of condition 2. The first arises out of the fact that it is the council, rather than Jonathan, which has suggested variation of condition 2 in this manner. It was held in Benalup Holdings Pty Ltd v Lismore City Council (1993) 81 LGERA 257 that, in the exercise of the discretion to modify a development consent, a consent authority can do so only in the terms applied for by the applicant for modification. However, Jonathan is unrepresented. I am prepared to assume that, had it been put to him that he might not succeed in having condition

2 deleted or varied to an amount of $7,266.45 but might be able to succeed in a reduction of the contribution from $91,965 to $79,751, he would have made an application for a variation in the terms suggested by the council. It would be unrealistic to think otherwise, having regard to the fact that it is a substantial reduction.

22 The second matter concerns the retrospective effect of imposing a new s. 94 contribution based on the 1999 Plan instead of the 1994 Plan. Section 94(11) provides that a council may impose a condition requiring contribution, but only if it is of a kind allowed by, and is determined in accordance with, a contributions plan approved under s.94B. Section 94B provides that a council may prepare and approve a contributions plan for the purpose of imposing such a condition. Condition 2 was of a kind allowed by and determined in accordance with the 1994 Plan. The 1999 Plan was not in existence when condition 2 was imposed. In Mirvac Homes (NSW) Pty Ltd v Baulkham Hills Shire Council (2000) 110 LGERA 100, Talbot J held that, since a contributions plan operates and has effect at the date of imposition of a condition, the rate of contribution can be adjusted at the time of payment, but only if the adjustment is capable of being ascertained from the provisions of the contributions plan current at the date of the imposition of the condition. If that contributions plan has been repealed, then no adjustment is permissible.

23 According to the evidence of Mr Soulsby, the council resolved in 1999 to reduce s 94 contributions by 50% in order to stimulate economic development in the area, and it also resolved to apply this reduction in respect of approved development that had not yet commenced. Mr Soulsby was of the opinion that it would be fair and equitable to vary condition 2 so as to levy a contribution in accordance with the 1999 Plan and permit the Jiggi RLC to have the benefit of the 50% reduction. It is unclear to me why the total figure of $79,751 is now suggested when that is more than 50% of the original total figure of $91,965, but Mr Soulsby noted that the basic rates set out in the 1999 Plan have been adjusted in accordance with the Consumer Price Index, and this may explain this point. In any event, however, the figure now suggested is a substantial reduction.

24 I have some misgivings about the appropriateness of the council's approach, but I have not had the benefit of detailed argument about it. Mr Atkin, appearing for the council, properly drew the Court's attention to the relevant statutory provisions and to the decision in Mirvac v Baulkham Hills, but did not go so far as to suggest that the suggested variation was beyond power. Jonathan did not make any submissions on the point. Furthermore, the facts in Mirvac v Baulkham Hills can be distinguished from the facts of this case. In that case, the local council sought an increase in the rate of contribution - in this case, the council is prepared to accept a reduction in the rate of contribution. In addition, there is the fact that none of the 16 dwellings have yet been constructed on the site, and accordingly, the development is far from being fully implemented. Lastly, there is at least an argument that condition 2 was allowed by and determined in accordance with a contributions plan prepared and approved in accordance with s 94B and all that is being sought here is merely a variation of the calculations of the amount of contribution.

25 For all these reasons, I conclude that it is appropriate to vary condition 2 in the manner suggested by the council.

Orders

26 For the above reasons, I make the following formal orders:

(1) Pursuant to s 96 of the Environmental Planning and Assessment Act 1979, condition 2 of the development consent granted by the Court on 15 June 1995 is modified by substituting the following condition:

Condition 2
Payment of contributions levied under Section 94 of the Environmental Planning and Assessment Act and Lismore Contributions Plan 1999 (as amended) are required. Such levies shall contribute towards the provision of public services and/or amenities identified in the attached schedule. Such levies shall be calculated at the rate(s) in effect on the date the relevant certificate is issued. The rates and amounts applying at the date of this notice, totalling $ 79,751, are set out in the schedule for your information. Where the total contribution payable exceeds $20,000 payment to Council must be by bank cheque or cash. Personal cheques are not acceptable. All contributions per equivalent tenement shall be paid prior to the Construction Certificate, Interim or Permanent Occupation Certificate or Section 149D certificate being granted for that tenement.

Should levies set out in the attached schedule not be paid within twelve (12) months of the date of this consent, the rates shall be increased in accordance with the listing of rates applicable for the financial year in which payment is made. This listing of rates reflects the adjustment made for the Consumer Price Index (CPI) on an annual basis.

The contributions set out in the schedule are exclusive of any GST (if any) and where the provision of any services or the construction of any infrastructure or any other thing with those contributions occurs, then in addition to the amount specified above the Applicant will pay to the Council the GST (as defined below) which is payable by the Council in respect of the provision of such services or construction of any infrastructure or any other thing.

If the contributions set out in the schedule, or part thereof, are to be met by the dedication of land or other approved Material Public Benefit, then the Applicant will pay to Council the GST (defined below) applicable to the value of land dedicated or (Material Public Benefit) which is payable by the Council in respect of the provision of such services or construction of any infrastructure or any other thing.

GST means any tax levy charge or impost under the authority of any GST Law (as defined by the GST Act) and includes GST within the meaning of the GST Act.

The GST Act means A New Tax System (Goods and Services Tax) Act 1999 or any amending or succeeding legislation.

(2) The exhibits except exhibit N may be returned.

(3) I make no order as to costs.

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Vic Stott

My Summary of Jonathan case 9-8-02

- v - LCC.

(All figures approx. used Rule one "rounded" and

- Council awarded $117,000 for non payment of s.94 fees for 7 years (civil interest) (19) (8) p2
- Jonathan sought payment of $7,000 in lieu (19) p3.
- Council argued that the 1999 s.94 fees should apply rather than the 1994 fees. (13)
- Court ordered payment of $80,000 (26 p8)
- Payment to be made at the time "Construction Certificate" for each dwelling. (17) (20)
- No order as to costs 26 (p9)
- If payment not made within 12 months then interest to apply at CPI rate

Peter Hamilton

From: "Diana Roberts" <dianar@nor.com.au>
To: <peterh@nor.com.au>
Sent: Monday, 9 September 2002 9:02 AM
Subject: Fwd: Jonathan

Email copy
Keep for comptions.
9/9/02

Hi Peter,
Thought the following may be of interest
Regards
Diana

>X-From_: chriss@liscity.nsw.gov.au Mon Aug 12 12:16:03 2002
>X-Authentication-Warning: cheetah.nor.com.au: Host [203.44.230.226]
>claimed to be lcc_erelay.liscity
>From: Chris Soulsby <chriss@liscity.nsw.gov.au>
>To: "'dianar@nor.com.au'" <dianar@nor.com.au>
>Subject: Jonathan
>Date: Fri, 9 Aug 2002 10:46:41 +1000
>X-MailScanner: Found to be clean
>
>Dear Cr Roberts,
>
>Mike Bismire asked me to froward to you a copy of the judgement for Jonathan
>ats Lismore City Council.
>
>Chris Soulsby
>Development Assessment Planner
>
>Lismore City Council
>43 Oliver Ave, Goonellabah NSW 2480
>DX 7761 Lismore
>
>Ph: 02 66 250 542
>Fax: 02 66 250 434
>Mob: 0427 664 493
>
>
>
>Land and Environment Court
>of New South Wales
>
>
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>- modification application - variation or deletion of condition - s 94
>contributions - whether contributions plan valid - effect of repeal and
>replacement of contributions plan - whether contributions reasonable -

>characteristics of rural land sharing community - discretion
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>1979 s 94, s 94B, s 94C, s 96
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>SOLICITORS
>N/A
>
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>of State Environmental Planning Policy No 15 ("SEPP 15"), although that
>instrument has been repealed.
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>3. By an application filed on 12 November 1999, Jonathan has sought, on

>behalf of himself and his co-owners, modification of the conditions of
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>the Environmental Planning and Assessment Act 1979 ("the EP&A Act"). The
>application has, with leave, been changed on a number of occasions.
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>2002, the Court gave effect to the agreement which had been reached. That
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>Jonathan claimed that 3 vehicle trips per day for the Jiggi RLC was an >exaggeration, and was up to 15 times greater than was likely to be the fact. >He contended that the occupants of multiple occupancies are unlikely to be >employed, are unlikely to make many trips by vehicles, and their children

>are likely to go to school by bus. In his submission, the realistic estimate
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>Thirdly, the H factor. The formula adopted by the 1999 Plan for road
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>the H factor. It provides for 4% in respect of RLC's, although a different
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>after substantiation by the developer" (1999 Plan p 38). (Jonathan never
>provided substantiation as contemplated by this provision).
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>Again, Jonathan claimed that it was unreasonable to apply this figure to the
>Jiggi RLC, because occupants of the dwellings on the site were likely to use
>low cost housing materials and they were likely to transport materials
>themselves in order to save costs. Thus, for the Jiggi RLC, there will not
>be a heavy vehicle demand. He contended that the percentage should be 1% or
>2%. Mr Meineke supported this claim, stating that there was no rationale for
>setting the percentage of 4% and it was inappropriate for low-cost housing
>that is in the main occupied by "do-it-yourself" people.
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>Fourthly, demand generally. Throughout the 1999 Plan, various percentages
>are stipulated as being attributable to the demand generated by new
>development. Percentages of this nature apply in relation to contributions
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>Jonathan claimed that the various percentages unreasonably fail to recognise
>the unique qualities of the Jiggi RLC. It will be, he submitted, a
>self-contained community, with pooling of resources and utilisation of
>common areas. The demand will be as little as 1/20 of the assumed usage and
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>contributions for open space, community facilities and transport.
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>Fifthly, the remoteness discount. The 1999 Plan recognises that demand for
>district and regional open space facilities located in the urban area will
>diminish in proportion to the distance from those facilities. Accordingly,
>the 1999 Plan provides for a discount in respect of remoteness, and, in
>relation to the area in which the Jiggi RLC is located, the discount is 25%.
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>Jonathan claimed that 25% discount is unreasonable. It puts the Nimbin
>district on a par with the area in which the Jiggi RLC is located, but fails
>to recognise that the two areas are different in terms of distance from
>Lismore, and in terms of available amenities, facilities and utilities. In
>his submission, the discount should be 75%.
>
>Sixthly, rural road contribution. The 1999 Plan sets out a formula for
>calculating contribution to the upgrading of the rural road network.
>
>Jonathan took issue with the reasonableness of a number of the factors in
>the formula. One of those is vehicle trips per day, another is the H factor,
>and I have referred to both above. However, Mr R J Smith, who is a
>consulting engineer, gave evidence on behalf of Jonathan, and he identified
>another factor as being unreasonable, namely, the construction cost per
>kilometre, which, in his opinion, should be $19 instead of $39 as adopted by
>the council. Mr Smith prepared calculations for Davis Road, Jiggi Road and
>Nimbin Road based on the factors he considered to be reasonable (ex 29).
>
>The net result of all these submissions culminated in the tender of two
>documents prepared by Mr Meineke and Mr Smith. One of them, ex 30, contained
>calculations of contributions (based on Jonathan's submissions) for open

>space (city wide), community facilities (local and city wide), state
>emergency services and bushfire services. The other, ex 31, contained the
>figures that, in accordance with the calculations in ex 30, Jonathan claimed
>ought to be substituted for the figures adopted by the council (shown in par
>7) and which would yield a contribution of $7,266.45 or $484.43 per ET.
>
>Should the s 94 contribution be varied?
>
>15. There are two things to notice about the Court's power under s 94(12) to
>disallow or amend condition 2. In the first place, it requires a finding
>that condition 2 is unreasonable, and, in the second place, the Court's
>power to amend condition 2 is discretionary.
>
>16. I am not satisfied that condition 2 is unreasonable. The main thrust of
>Jonathan's submissions is that an RLC is unique because, amongst other
>things, it involves low-cost development, a pooling of resources, use of
>internal facilities, and occupation by low-income occupants. He has argued
>that, accordingly, application of the 1999 Plan is unreasonable because it
>is predicated on average standards and makes no allowance for the unique
>nature of the Jiggi RLC. However, in my opinion, this argument does not
>stand up to analysis. The 1999 Plan does make adjustments for departure from
>the average. It specifically takes into account the nature of an RLC in
>setting the vehicles per day factor and the H factor in the rural roads
>contribution formula. It specifically takes into account remoteness of
>location by applying a discount factor, in this case, 25%. And, as pointed
>out by Mr C J Soulsby, a town planner in the employ of the council, it
>discounts the ET standard by applying a lesser percentage for developments
>of less intensity.
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>17. Furthermore, it is erroneous, in my opinion, to apply a contributions
>plan according to the characteristics of the persons who might occupy a
>proposed development, rather than according to the nature of the proposed
>development itself. I accept that the occupants of the Jiggi RLC are likely
>to be in the low income bracket (a fact specifically noted by Bannon J at p
>9 of his judgment), and that accordingly the Jiggi RLC is designed for low
>cost housing. I consider that this fact is recognised by the discounts I
>have referred to in par 16. But I do not accept that the demands for
>services and facilities of the occupants will be universally modest. The
>demands will change from time to time and from person to person. The
>occupants may wish to use open space and other community facilities in the
>local government area from time to time, even though there may be community
>facilities on the site itself. They may wish to travel more often than at a
>rate of one vehicle movement per five days. They may wish from time to time
>to have construction items delivered to the site by heavy haulage rather
>than hauling it themselves. And it should be borne in mind that the
>development consent permits 16 dwellings upon the site.
>
>18. I turn now to discretionary factors. These weigh heavily against
>Jonathan. Bannon J imposed condition 2 when granting development consent,
>and his Honour expressly noted that no argument had been presented as to why
>the contribution should not be paid - see p 9 of the judgment. His Honour
>recognised the modest means of the co-owners by allowing for payment over
>seven years at an interest rate of 6%. (p 9). The development in respect of
>which Bannon J granted consent remains the same, its nature remains the
>same, and the means of the co-owners to pay the contribution appears to be
>the same. Although the co-owners have not yet had the full benefit of the
>development consent since the site remains largely undeveloped, there has
>been no change of circumstance subsequent to the judgment of Bannon J, and

>this is a discretionary factor which the Court is entitled to take into
>account - see Progress and Securities Pty Ltd v North Sydney Municipal
>Council (1988) 66 LGRA 236.
>
>19. A further discretionary factor is that no payments whatsoever have been
>made over the past seven years in at least partial compliance with condition
>2. Interest has simply accrued at the rate set by Bannon J, and both the
>contribution and the interest remain unpaid.
>
>20. For all these reasons, I am not prepared to modify condition 2 to vary
>the rate of contribution as Jonathan claims. The question then is as to
>whether the Court should modify condition 2 in the manner suggested by the
>council, the principal effect of which is to reduce the contribution from
>$91,965 to $79,751. There are other variations in the version of condition 2
>suggested by the council. The most important is that contributions will be
>payable per each ET and the time of payment will be prior to the grant of
>the construction certificate for that ET. This will allow the total
>contribution to be paid in instalments as each dwelling is constructed which
>will appropriately link payment with occupation.
>
>21. Two separate matters need to be considered in regard to the suggested
>variation of condition 2. The first arises out of the fact that it is the
>council, rather than Jonathan, which has suggested variation of condition 2
>in this manner. It was held in Benalup Holdings Pty Ltd v Lismore City
>Council (1993) 81 LGERA 257 that, in the exercise of the discretion to
>modify a development consent, a consent authority can do so only in the
>terms applied for by the applicant for modification. However, Jonathan is
>unrepresented. I am prepared to assume that, had it been put to him that he
>might not succeed in having condition 2 deleted or varied to an amount of
>$7,266.45 but might be able to succeed in a reduction of the contribution
>from $91,965 to $79,751, he would have made an application for a variation
>in the terms suggested by the council. It would be unrealistic to think
>otherwise, having regard to the fact that it is a substantial reduction.
>
>22. The second matter concerns the retrospective effect of imposing a new s
>94 contribution based on the 1999 Plan instead of the 1994 Plan. Section
>94(11) provides that a council may impose a condition requiring
>contribution, but only if it is of a kind allowed by, and is determined in
>accordance with, a contributions plan approved under s 94B. Section 94B
>provides that a council may prepare and approve a contributions plan for the
>purpose of imposing such a condition. Condition 2 was of a kind allowed by
>and determined in accordance with the 1994 Plan. The 1999 Plan was not in
>existence when condition 2 was imposed. In Mirvac Homes (NSW) Pty Ltd v
>Baulkham Hills Shire Council (2000) 110 LGERA 100, Talbot J held that, since
>a contributions plan operates and has effect at the date of imposition of a
>condition, the rate of contribution can be adjusted at the time of payment,
>but only if the adjustment is capable of being ascertained from the
>provisions of the contributions plan current at the date of the imposition
>of the condition. If that contributions plan has been repealed, then no
>adjustment is permissible.
>
>23. According to the evidence of Mr Soulsby, the council resolved in 1999 to
>reduce s 94 contributions by 50% in order to stimulate economic development
>in the area, and it also resolved to apply this reduction in respect of
>approved development that had not yet commenced. Mr Soulsby was of the
>opinion was that it would be fair and equitable to vary condition 2 so as to
>levy a contribution in accordance with the 1999 Plan and permit the Jiggi
>RLC to have the benefit of the 50% reduction. It is unclear to me why the

>total figure of $79,751 is now suggested when that is more than 50% of the
>original total figure of $91,965, but Mr Soulsby noted that the basic rates
>set out in the 1999 Plan have been adjusted in accordance with the Consumer
>Price Index, and this may explain this point. In any event, however, the
>figure now suggested is a substantial reduction.
>
>24. I have some misgivings about the appropriateness of the council's
>approach, but I have not had the benefit of detailed argument about it. Mr
>Atkin, appearing for the council, properly drew the Court's attention to the
>relevant statutory provisions and to the decision in Mirvac v Baulkham
>Hills, but did not go so far as to suggest that the suggested variation was
>beyond power. Jonathan did not make any submissions on the point.
>Furthermore, the facts in Mirvac v Baulkham Hills can be distinguished from
>the facts of this case. In that case, the local council sought an increase
>in the rate of contribution - in this case, the council is prepared to
>accept a reduction in the rate of contribution. In addition, there is the
>fact that none of the 16 dwellings have yet been constructed on the site,
>and accordingly, the development is far from being fully implemented.
>Lastly, there is at least an argument that condition 2 was allowed by and
>determined in accordance with a contributions plan prepared and approved in
>accordance with s 94B and all that is being sought here is merely a
>variation of the calculations of the amount of contribution.
>
>25. For all these reasons, I conclude that it is appropriate to vary
>condition 2 in the manner suggested by the council.
>
>Orders
>
>26. For the above reasons, I make the following formal orders:
>
>(1) Pursuant to s 96 of the Environmental Planning and Assessment Act 1979,
>condition 2 of the development consent granted by the Court on 15 June 1995
>is modified by substituting the following condition:
> Condition 2
>
> Payment of contributions levied under Section 94 of the
>Environmental Planning and Assessment Act and Lismore Contributions Plan
>1999 (as amended) are required. Such levies shall contribute towards the
>provision of public services and/or amenities identified in the attached
>schedule. Such levies shall be calculated at the rate(s) in effect on the
>date the relevant certificate is issued. The rates and amounts applying at
>the date of this notice, totalling $ 79,751, are set out in the schedule for
>your information. Where the total contribution payable exceeds $20,000
>payment to Council must be by bank cheque or cash. Personal cheques are not
>acceptable. All contributions per equivalent tenement shall be paid prior to
>the Construction Certificate, Interim or Permanent Occupation Certificate or
>Section 149D certificate being granted for that tenement.
>
> Should levies set out in the attached schedule not be paid
>within twelve (12) months of the date of this consent, the rates shall be
>increased in accordance with the listing of rates applicable for the
>financial year in which payment is made. This listing of rates reflects the
>adjustment made for the Consumer Price Index (CPI) on an annual basis.
>
> The contributions set out in the schedule are exclusive of
>any GST (if any) and where the provision of any services or the construction
>of any infrastructure or any other thing with those contributions occurs,
>then in addition to the amount specified above the Applicant will pay to the

>Council the GST (as defined below) which is payable by the Council in
>respect of the provision of such services or construction of any
>infrastructure or any other thing.
>
> If the contributions set out in the schedule, or part
>thereof, are to be met by the dedication of land or other approved Material
>Public Benefit, then the Applicant will pay to Council the GST (defined
>below) applicable to the value of land dedicated or (Material Public
>Benefit) which is payable by the Council in respect of the provision of such
>services or construction of any infrastructure or any other thing.
>
> GST means any tax levy charge or impost under the authority
>of any GST Law (as defined by the GST Act) and includes GST within the
>meaning of the GST Act.
>
> The GST Act means A New Tax System (Goods and Services Tax)
>Act 1999 or any amending or succeeding legislation.
>
>
>
>(2) The exhibits except exhibit N may be returned.
>
>(3) I make no order as to costs.
>
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Land and Environment Court of New South Wales
CITATION :
Jonathan and Ors v Lismore City Council [2002] NSWLEC 134
PARTIES :
APPLICANT :Jonathan and Ors
RESPONDENT Lismore City Council
FILE NUMBER(S) : 10353 of 1994
CORAM: Pearlman J

KEY ISSUES: Development Consent :- rural land sharing community modification application - variation or deletion of condition s 94 contributions- whether contributions plan valid - effect of repeal and replacement of contributions plan - whether contributions reasonable -characteristics of rural land sharing community – discretion

LEGISLATION CITED: Environmental Planning and Assessment Act 1979 s 94, s 94B, s 94C, s 96
Lismore Contributions Plan 1994
State Environmental Planning Policy No 15

CASES CITED: Benalup Holdings Pty Ltd v Lismore City Council (1993) 81 LGERA 257;
Jonathan and Ors v Lismore City Council (Bannon J, NSWLEC, 24 April 1995, unreported);
Mirvac Homes (NSW) Pty Ltd v Baulkham Hills Shire Council (2000) 110 LGERA 100;
Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236.

DATES OF HEARING: 08/07/2002, 09/07/2002, 10/07/2002
DATE OF JUDGMENT: 09/08/2002

LEGAL REPRESENTATIVES:
APPLICANT: Jonathan (in person); SOLICITORS,N/A
RESPONDENT: Mr J M Atkin (Barrister), SOLICITORS,Walters

JUDGMENT:

IN THE LAND AND 10353 of 1994
ENVIRONMENT COURT Pearlman J
OF NEW SOUTH WALES 9 August 2002
JONATHAN AND ORS, Applicant
v
LISMORE CITY COUNCIL, Respondent

JUDGMENT

Introduction
1. Jonathan and twelve other persons hold between them 16 shares in a multiple occupancy of rural land at Jiggi near Lismore.

2. Development consent, subject to 39 conditions, was granted by this Court on 15 June 1995 for the use of the land as a multiple occupancy. It was granted pursuant to transitional provisions which permitted the application of State Environmental Planning Policy No 15 ("SEPP 15"), although that instrument has been repealed.

3. By an application filed on 12 November 1999, Jonathan has sought, on behalf of himself and his co-owners, modification of the conditions of consent. The application has been treated as an application under s 96 of the Environmental Planning and Assessment Act 1979 ("the EP&A Act"). The application has, with leave, been changed on a number of occasions. Ultimately, it sought modification of the conditions by deletion of some and by variation of others.

4. In these proceedings, Jonathan, who goes only by that one name, represents all co-owners. He appeared without legal representation and conducted the whole proceedings himself.

5. After the hearing had commenced, the parties came to an agreement on most aspects of the modification that was sought, and, by orders made on 10 July 2002, the Court gave effect to the agreement which had been reached. That left one outstanding matter that required the Court's determination. It related to the modification that was sought to condition 2, being a condition concerned with contributions under s 94 of the EP&A Act. This judgment deals with that outstanding matter.

6. The modification sought by Jonathan was the deletion of condition 2 or, alternatively, a variation of it so as to reduce the amount of the s 94 contribution originally imposed. Condition 2 provides as follows: 2 Payment of levies under Section 94 of the Environmental Planning and Assessment Act as a contribution towards the provision of public services or amenities identified in the attached schedule be paid at the rates and amounts applying at the date of this notice, totalling as $91,965 set out in the schedule. Payment to the Council must be by bank cheque or cash. The sum of $91,965 is to be paid by annual instalments over a period of seven (7) years, the first payment to be made on April 30, 1996, and unpaid instalments shall carry interest at the rate of 6% per annum, such interest to be paid seriatim with each instalment.

7. The attached schedule was in the following form (omitting formal and irrelevant parts):

8. No instalments have been paid. According to the council's evidence, the amount currently payable, that is, the contribution of $91,965 plus accrued interest, is $116,893.67.

9. Jonathan put his case on alternative grounds. His first ground was that the Lismore Contributions Plan 1994 ("the 1994 Plan") pursuant to which the contribution required by condition 2 was imposed has been repealed by the Lismore Contributions Plan 1999 ("the 1999 Plan") and therefore it does not provide a valid basis for determining the contribution. Jonathan argued accordingly that condition 2 should be deleted.

10. His second ground was the unreasonableness of the contribution imposed by condition 2 in the circumstances of the proposed multiple occupancy development on the site. He contended accordingly that condition 2 should be varied in material respects and in particular should impose a contribution of $7,266.45.

11. The council took issue with both these grounds. However, it was prepared to agree to a variation of condition 2 so as to incorporate a contribution based on the 1999 Plan rather than the 1994 Plan. The amount would be $79,751.

Jonathan's case

12. The true basis for Jonathan's challenge to condition 2 is his claim that the s 94 contribution is unreasonable as it applies to the multiple occupancy. He did not put forward any real basis for invalidity of the 1994 Plan, except to say that it has been repealed. However, its repeal by the 1999 Plan does not justify a finding of its invalidity, particularly in view of s 94C(3) of the EP&A Act, which provides that the repeal of a contributions plan does not affect the previous operation of the plan furthermore, on analysis, the reasons for invalidity put forward by Mr G P Meineke, a consultant town planner who gave evidence for Jonathan, really amount to reasons why, in his opinion, the s 94 contribution is unreasonable they do not go to any issue of invalidity.

13. I turn then to examine in detail Jonathan's claim of unreasonableness. In doing so, I note three preliminary matters. First, s 94(12) empowers this Court on an appeal to disallow or amend a condition imposing a s.94 contribution because it is unreasonable. Secondly, Jonathan's claims of unreasonableness were directed to the 1999 Plan - it was accepted by both parties that the 1999 Plan is the appropriate contributions plan to consider in this appeal. Thirdly, the 1999 Plan refers to "rural land sharing communities" to describe multiple occupancy of rural land of the kind regulated by SEPP 15. I will refer to this concept generally as "a RLC" and to the multiple occupancy the subject of the development consent as "the Jiggi RLC".

14. Jonathan's claim was directed to a number of specific issues. I deal in summary form with the most important of his submissions as follows:

    First, the equivalent tenement (ET) concept. Contributions under the 1999 Plan are based on an ET standard, representing the demand for services and facilities equivalent to a household on a standard residential allotment. It is based on an average occupancy rate of 2.7 persons per dwelling, but for smaller less intensive forms of development, the ET is expressed as a proportion of this figure. Thus, for medium density development, it is expressed in the 1999 Plan to be 0.75 ET per unit (1999 Plan s 5.1).

    Jonathan claimed that the standard of 2.7 persons per dwelling was an unreasonable standard to apply to the Jiggi RLC, nor could the Jiggi RLC be described as demanding the same level of service as a "standard residential allotment". On this basis, he claims that the ET should be discounted to 0.37%, representing an occupancy of one person per dwelling. Mr Meineke

supported his claim in this regard, pointing out that RLC's traditionally have their own open space, they pool transport resources to and from town, have their own internal social networks, and usually have a community hall on site. Their demand for services is accordingly reduced.

Secondly, vehicle trips per day. The formula adopted by the 1999 Plan includes a factor based on the number of trips per day generated by the development (1999 Plan section 3.2.3). This factor is based upon an estimate set out in table 1 (1999 Plan p 35). The estimate in respect of RLC's located more than 8 km from Lismore is 3 vehicle trips per day.

Jonathan claimed that 3 vehicle trips per day for the Jiggi RLC was an exaggeration, and was up to 15 times greater than was likely to be the fact. He contended that the occupants of multiple occupancies are unlikely to be employed, are unlikely to make many trips by vehicles, and their children are likely to go to school by bus. In his submission, the realistic estimate should be one vehicle trip per five days.

Thirdly, the H factor. The formula adopted by the 1999 Plan for road contribution includes a factor based on the percentage of heavy vehicles – the H factor. It provides for 4% in respect of RLC's, although a different percentage may be applied if the council "is satisfied with another figure after substantiation by the developer" (1999 Plan p 38). (Jonathan never provided substantiation as contemplated by this provision).

Again, Jonathan claimed that it was unreasonable to apply this figure to the Jiggi RLC, because occupants of the dwellings on the site were likely to use low cost housing materials and they were likely to transport materials themselves in order to save costs. Thus, for the Jiggi RLC, there will not be a heavy vehicle demand. He contended that the percentage should be 1% or 2%. Mr Meineke supported this claim, stating that there was no rationale for setting the percentage of 4% and it was inappropriate for low-cost housing that is in the main occupied by "do-it-yourself" people.

Fourthly, demand generally. Throughout the 1999 Plan, various percentages are stipulated as being attributable to the demand generated by new development. Percentages of this nature apply in relation to contributions for open space, community facilities and transport.

Jonathan claimed that the various percentages unreasonably fail to recognise the unique qualities of the Jiggi RLC. It will be, he submitted, a self-contained community, with pooling of resources and utilisation of common areas. The demand will be as little as 1/20 of the assumed usage and accordingly the appropriate percentage, in his submission, is 5% for contributions for open space, community facilities and transport.

Fifthly, the remoteness discount. The 1999 Plan recognises that demand for district and regional open space facilities located in the urban area will diminish in proportion to the distance from those facilities. Accordingly, the 1999 Plan provides for a discount in respect of remoteness, and, in relation to the area in which the Jiggi RLC is located, the discount is 25%.

Jonathan claimed that 25% discount is unreasonable. It puts the Nimbin district on a par with the area in which the Jiggi RLC is located, but fails to recognise that the two areas are different in terms of distance from Lismore, and in terms of available amenities, facilities and utilities. In his submission, the discount should be 75%.

Sixthly, rural road contribution. The 1999 Plan sets out a formula for calculating contribution to the upgrading of the rural road network.

Jonathan took issue with the reasonableness of a number of the factors in the formula. One of those is vehicle trips per day, another is the H factor, and I have referred to both above. However, Mr R J Smith, who is a consulting engineer, gave evidence on behalf of Jonathan, and he identified another factor as being unreasonable, namely, the construction cost per kilometre, which, in his opinion, should be $19 instead of $39 as adopted by the council. Mr Smith prepared calculations for Davis Road, Jiggi Road and Nimbin Road based on the factors he considered to be reasonable (ex 29).

The net result of all these submissions culminated in the tender of two documents prepared by Mr Meineke and Mr Smith. One of them, ex 30, contained calculations of contributions (based on Jonathan's submissions) for open space (city wide), community facilities (local and city wide), state emergency services and bushfire services. The other, ex 31, contained the figures that, in accordance with the calculations in ex 30, Jonathan claimed ought to be substituted for the figures adopted by the council (shown in par 7) and which would yield a contribution of $7,266.45 or $484.43 per ET.

Should the s 94 contribution be varied?

15 There are two things to notice about the Court's power under s 94(12) to disallow or amend condition 2. In the first place, it requires a finding that condition 2 is unreasonable, and, in the second place, the Court's power to amend condition 2 is discretionary.

16 I am not satisfied that condition 2 is unreasonable. The main thrust of Jonathan's submissions is that an RLC is unique because, amongst other things, it involves low-cost development, a pooling of resources, use of internal facilities, and occupation by low-income occupants. He has argued that, accordingly, application of the 1999 Plan is unreasonable because it is predicated on average standards and makes no allowance for the unique nature of the Jiggi RLC. However, in my opinion, this argument does not stand up to analysis. The 1999 Plan does make adjustments for departure from the average. It specifically takes into account the nature of an RLC in setting the vehicles per day factor and the H factor in the rural roads contribution formula. It specifically takes into account remoteness of location by applying a discount factor, in this case, 25%. And, as pointed out by Mr C J Soulsby, a town planner in the employ of the council; it discounts the ET standard by applying a lesser percentage for developments of less intensity.

17 Furthermore, it is erroneous, in my opinion, to apply a contributions plan according to the characteristics of the persons who might occupy a proposed development, rather than according to the nature of the proposed

development itself. I accept that the occupants of the Jiggi RLC are likely to be in the low income bracket (a fact specifically noted by Bannon J at p 9 of his judgment), and that accordingly the Jiggi RLC is designed for low cost housing. I consider that this fact is recognised by the discounts I have referred to in par 16. But I do not accept that the demands for services and facilities of the occupants will be universally modest. The demands will change from time to time and from person to person. The occupants may wish to use open space and other community facilities in the local government area from time to time, even though there may be community facilities on the site itself. They may wish to travel more often than at a rate of one vehicle movement per five days. They may wish from time to time to have construction items delivered to the site by heavy haulage rather than hauling it themselves. And it should be borne in mind that the development consent permits 16 dwellings upon the site.

18 I turn now to discretionary factors. These weigh heavily against Jonathan. Bannon J imposed condition 2 when granting development consent, and his Honour expressly noted that no argument had been presented as to why the contribution should not be paid - see p 9 of the judgment. His Honour recognised the modest means of the co-owners by allowing for payment over seven years at an interest rate of 6%. (p 9). The development in respect of which Bannon J granted consent remains the same, its nature remains the same, and the means of the co-owners to pay the contribution appears to be the same. Although the co-owners have not yet had the full benefit of the development consent since the site remains largely undeveloped, there has been no change of circumstance subsequent to the judgment of Bannon J, and this is a discretionary factor which the Court is entitled to take into account - see Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236.

19 A further discretionary factor is that no payments whatsoever have been made over the past seven years in at least partial compliance with condition 2. Interest has simply accrued at the rate set by Bannon J, and both the contribution and the interest remain unpaid.

20 For all these reasons, I am not prepared to modify condition 2 to vary the rate of contribution as Jonathan claims. The question then is as to whether the Court should modify condition 2 in the manner suggested by the council, the principal effect of which is to reduce the contribution from $91,965 to $79,751. There are other variations in the version of condition 2 suggested by the council. The most important is that contributions will be payable per each ET and the time of payment will be prior to the grant of the construction certificate for that ET. This will allow the total contribution to be paid in instalments as each dwelling is constructed which will appropriately link payment with occupation.

21 Two separate matters need to be considered in regard to the suggested variation of condition 2. The first arises out of the fact that it is the council, rather than Jonathan, which has suggested variation of condition 2 in this manner. It was held in Benalup Holdings Pty Ltd v Lismore City Council (1993) 81 LGERA 257 that, in the exercise of the discretion to modify a development consent, a consent authority can do so only in the terms applied for by the applicant for modification. However, Jonathan is unrepresented. I am prepared to assume that, had it been put to him that he might not succeed in having condition

2 deleted or varied to an amount of $7,266.45 but might be able to succeed in a reduction of the contribution from $91,965 to $79,751, he would have made an application for a variation in the terms suggested by the council. It would be unrealistic to think otherwise, having regard to the fact that it is a substantial reduction.

22 The second matter concerns the retrospective effect of imposing a new s.94 contribution based on the 1999 Plan instead of the 1994 Plan. Section 94(11) provides that a council may impose a condition requiring contribution, but only if it is of a kind allowed by, and is determined in accordance with, a contributions plan approved under s.94B. Section 94B provides that a council may prepare and approve a contributions plan for the purpose of imposing such a condition. Condition 2 was of a kind allowed by and determined in accordance with the 1994 Plan. The 1999 Plan was not in existence when condition 2 was imposed. In Mirvac Homes (NSW) Pty Ltd v Baulkham Hills Shire Council (2000) 110 LGERA 100, Talbot J held that, since a contributions plan operates and has effect at the date of imposition of a condition, the rate of contribution can be adjusted at the time of payment, but only if the adjustment is capable of being ascertained from the provisions of the contributions plan current at the date of the imposition of the condition. If that contributions plan has been repealed, then no adjustment is permissible.

23 According to the evidence of Mr Soulsby, the council resolved in 1999 to reduce s 94 contributions by 50% in order to stimulate economic development in the area, and it also resolved to apply this reduction in respect of approved development that had not yet commenced. Mr Soulsby was of the opinion that it would be fair and equitable to vary condition 2 so as to levy a contribution in accordance with the 1999 Plan and permit the Jiggi RLC to have the benefit of the 50% reduction. It is unclear to me why the total figure of $79,751 is now suggested when that is more than 50% of the original total figure of $91,965, but Mr Soulsby noted that the basic rates set out in the 1999 Plan have been adjusted in accordance with the Consumer Price Index, and this may explain this point. In any event, however, the figure now suggested is a substantial reduction.

24 I have some misgivings about the appropriateness of the council's approach, but I have not had the benefit of detailed argument about it. Mr Atkin, appearing for the council, properly drew the Court's attention to the relevant statutory provisions and to the decision in Mirvac v Baulkham Hills, but did not go so far as to suggest that the suggested variation was beyond power. Jonathan did not make any submissions on the point. Furthermore, the facts in Mirvac v Baulkham Hills can be distinguished from the facts of this case. In that case, the local council sought an increase in the rate of contribution - in this case, the council is prepared to accept a reduction in the rate of contribution. In addition, there is the fact that none of the 16 dwellings have yet been constructed on the site, and accordingly, the development is far from being fully implemented. Lastly, there is at least an argument that condition 2 was allowed by and determined in accordance with a contributions plan prepared and approved in accordance with s 94B and all that is being sought here is merely a variation of the calculations of the amount of contribution.

25 For all these reasons, I conclude that it is appropriate to vary condition 2 in the manner suggested by the council.

Orders

26 For the above reasons, I make the following formal orders:

(1) Pursuant to s 96 of the Environmental Planning and Assessment Act 1979, condition 2 of the development consent granted by the Court on 15 June 1995 is modified by substituting the following condition:

Condition 2
Payment of contributions levied under Section 94 of the Environmental Planning and Assessment Act and Lismore Contributions Plan 1999 (as amended) are required. Such levies shall contribute towards the provision of public services and/or amenities identified in the attached schedule. Such levies shall be calculated at the rate(s) in effect on the date the relevant certificate is issued. The rates and amounts applying at the date of this notice, totalling $ 79,751, are set out in the schedule for your information. Where the total contribution payable exceeds $20,000 payment to Council must be by bank cheque or cash. Personal cheques are not acceptable. All contributions per equivalent tenement shall be paid prior to the Construction Certificate, Interim or Permanent Occupation Certificate or Section 149D certificate being granted for that tenement.

Should levies set out in the attached schedule not be paid within twelve (12) months of the date of this consent, the rates shall be increased in accordance with the listing of rates applicable for the financial year in which payment is made. This listing of rates reflects the adjustment made for the Consumer Price Index (CPI) on an annual basis.

The contributions set out in the schedule are exclusive of any GST (if any) and where the provision of any services or the construction of any infrastructure or any other thing with those contributions occurs, then in addition to the amount specified above the Applicant will pay to the Council the GST (as defined below) which is payable by the Council in respect of the provision of such services or construction of any infrastructure or any other thing.

If the contributions set out in the schedule, or part thereof, are to be met by the dedication of land or other approved Material Public Benefit, then the Applicant will pay to Council the GST (defined below) applicable to the value of land dedicated or (Material Public Benefit) which is payable by the Council in respect of the provision of such services or construction of any infrastructure or any other thing.

GST means any tax levy charge or impost under the authority of any GST Law (as defined by the GST Act) and includes GST within the meaning of the GST Act.

The GST Act means A New Tax System (Goods and Services Tax) Act 1999 or any amending or succeeding legislation.

(2) The exhibits except exhibit N may be returned.

(3) I make no order as to costs.

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A One Day Workshop and an Evening Slideshow. Presented by Robina McCurdy of the "Earthcare Education Aotearoa (New Zealand).

"SUSTAINABLE SOCIAL ORGANISATION"

A Workshop for people contemplating joining or forming a Landsharing Intentional Community or restructuring an existing community (Topics will follow indicated areas of interest when Registering) and include:

- The Group as an Organism - phases and cycles of a group; group identity; shaping a code of behaviour; clarifying a common purpose/vision; building group power for effective action.

- Group Process Skills - keys to good communication; designing out conflict and designing in trust and safety; conflict resolution strategies; support systems; leadership and power; meeting facilitation; working with gender differences; formats for successful meetings; decision making methods; working with the consensus process.

Sunday 20 October, 9am - 5.00pm. Cost: $65 - $95 (income sliding scale)

"COMMUNITY GLUE"

A public slideshow of global examples of processes and activities that build healthy community and bind it together, followed by discussion.

Sunday Evening 20th October 7.30pm - 10pm . Entry $8

Background: Robina McCurdy is a founder of the Tui Land Trust in New Zealand. She holds a Diploma of Permaculture Design and for the past fifteen years has been engaged in broader community development, along with the development of educational resources and participatory processes for decision making. As well as working extensively in NZ, she has given workshops in North and South America, Europe, UK and South Africa.

Registration and Enquires: For the Workshop and Evening Screening at Tyagarh, Byron Bay,c/- Leone, PO Box 1544, Byron Bay, 2481.(M)0410-627-310.

Note: As the numbers may be limited for the Workshop please register at least one week prior to the Workshop, by sending a deposit of $30 made out to: Earthcare Education Aotearoa.

Venue: Community Centre, "Gondwana Community"- Lot 1, Preston Lane, Tyagarah, Byron Bay.

Directions: Byron Bay Workshop and Evening Screening: To get to the Community Hall from Byron, head to the Highway, go north and take the Grays Lane exit towards the beach, (see the signs to the airport), go to the top of the hill and turn left into Preston Laine, please park on the ocean (right) side of the road.

Workshop Content Esquires: Email: robina@win.co.nz.