SUPREME COURT OF QUEENSLAND

CITATION:	*Hammercall Pty Ltd v Gold Coast City Council & Anor* [2005] QCA 29
PARTIES:	**HAMMERCALL PTY LTD** ACN 002 663 587 (appellant/applicant) **v** **GOLD COAST CITY COUNCIL** (respondent/first respondent) **STATE OF QUEENSLAND** (co-respondent/second respondent)
FILE NO/S:	Appeal No 8381 of 2003 P & E Appeal No 12 of 2003 P & E Appeal No 477 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	15 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2004; 14 September 2004; 15 September 2004
JUDGES:	McMurdo P, Jerrard JA and Cullinane J Separate reasons for judgment of each member of the Court, Jerrard JA and Cullinane J concurring as to the orders made, McMurdo P dissenting
ORDER:	**1. Grant application for leave to appeal** **2. Appeal allowed** **3. Vary the judgment under appeal by deleting condition 3 from the conditions imposed in Appeal No 12 of 2003 to the Planning and Environment Court, and by deletion of conditions 5 and 18 of the conditions imposed in Appeal No 477 of 2003 to that court** **4. Parties have leave to make written submissions within one month of publication of these reasons for judgment with respect to costs orders**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – CONDITIONS – RELEVANCE AND REASONABLENESS – PARTICULAR CASES – where applicant obtained development approval subject to particular conditions imposed by respondent Council – where three of the

conditions imposed were disputed by applicant in the Planning & Environment Court – where trial judge upheld the imposition of these conditions under s 3.5.30(1)(a) of the *Integrated Planning Act* 1997 (Qld) – where s 3.5.30(1)(a) of the Act requires that the conditions be relevant to, but not an unreasonable imposition on, the development – whether the trial judge was entitled on the evidence to conclude that the conditions were relevant and not an unreasonable imposition on the development

Integrated Planning Act 1997 (Qld), s 3.5.29, s 3.5.30
Local Government (Planning & Environment) Act 1990 (Qld), s 6.1
Transport Infrastructure Act 1994 (Qld), s 40

Arlenby Marketing Pty Ltd v Chief Executive of Queensland Department of Transport & Ors [1997] QPELR 137, approved
Lloyd v Robinson (1962) 107 CLR 142, applied
Pacific Exchange Corporation Pty Ltd v Gold Coast City Council & the State of Queensland [1997] QPELR 129, approved
Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 211 ALR 472, applied

COUNSEL: D Gore QC, with B G Cronin, for the applicant
M D Hinson SC, with S M Ure, for the respondents

SOLICITORS: Andrew P Abaza for the applicant
King & Company for the first respondent
C W Lohe, Crown Solicitor, for the second respondent

[1] **McMURDO P:** I have read the reasons for judgment of Jerrard JA in which the facts, issues and relevant law are comprehensively set out. I will repeat and expand on these only to explain my reasons for reaching a different conclusion from my colleagues and for refusing the application for leave to appeal.

[2] The applicant, Hammercall Pty Ltd ("the developer"), has developed and is continuing to develop in stages a residential estate, "Old Burleigh Town", in the Gold Coast hinterland south-east of the Andrews Interchange on the Pacific Highway, potentially involving between 800 and 1,127 residential allotments. About half of these were developed at the time of the primary court hearing.

[3] The developer applies for leave to appeal under s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) ("the Act") from orders of the Planning & Environment Court dismissing its appeals as to the conditions imposed by the respondent Gold Coast City Council ("the Council") in the approval of an application for a reconfiguration of Lot 710 in Wonga Street, Andrews into an 11 unit residential development (Planning & Environment Court Appeal No 477 of 2003) and in respect of a combined application for a material change of use (waste recycling facility and land fill operation) and operational works in respect of Lot 176 (Planning & Environment Court Appeal No 12 of 2003).

[4] The Council has imposed the first disputed condition in the development approval of both Lots 176 and 710. It is that the developer must dedicate free of cost to the Council a specified area of land of 2.39 hectares contained within Lot 176. The land to be dedicated is in the shape of a wishbone. The left arm of the wishbone (the Bermuda Street extension) will run between Old Coach Road, itself to be upgraded into the Tallebudgera Connection Road, and the Pacific Highway at the Andrews Interchange. The proposed Bermuda Street extension will be an important road linking the Pacific Highway by way of the Andrews Interchange through Andrews to Tallebudgera, Elanora and ultimately the Gold Coast Highway. The right arm of the wishbone will provide a permanent service road to the developer's Old Burleigh Town Estate. The two arms of the proposed wishbone are joined at their widest part by what is the presently existing Oyster Creek Drive, referred to as a temporary service road; it currently links the estate with the Pacific Highway by way of the Andrews Interchange. On construction of the proposed wishbone-shaped roads, this temporary service road is to be closed and returned to the developer on payment of $1,000. This condition has the effect of cutting off road access to part of Lot 176 so that the developer will have to obtain an easement over part of the land on the left arm of the wishbone that it is required by the condition to dedicate.

[5] The development approval of Lot 710 is subject to a further disputed condition that the developer dedicate free of cost to the Council land within Lot 710 required for new roads and Lot 809. The dedicated land is required to widen Old Coach Road as part of the Tallebudgera Connection Road.[1] The developer's Old Burleigh Town Estate presently has no access to Old Coach Road since the southern end of Cowell Drive has been closed.

[6] The developer contends that the primary judge erred in law in dismissing the appeals and in upholding the imposition of the conditions on the basis that each condition was not an unreasonable imposition under s 3.5.30(1)(a) of the Act because of a 1997 agreement between the developer and the Department of Main Roads ("the Department") to dedicate similar land for road works; that agreement could not provide justification for the conditions because the conditions could not then be lawfully imposed under s 6.1 of the *Local Government (Planning & Environment) Act* 1990 (Qld) ("the 1990 Act"). The developer also contends that there was no nexus between the land dedication required under the conditions and the proposed developments (whether the stage of the developments to which the conditions are attached or the development of the Old Burleigh Town Estate as a whole) and that, because of the entitlement of the State of Queensland to compulsorily acquire land with compensation, it was unreasonable to impose conditions requiring the developer to dedicate land to the Department for no payment.

[7] The onus was on the developer in the Planning & Environment Court to establish that its appeals to that court should be upheld.[2] It can appeal to this Court only by leave on limited grounds, here, an error or mistake of law on the part of the primary

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1 The parties agree that this condition has been too widely drafted in the order the subject of appeal and should read "The appellant shall dedicate, free of cost to Council, Lot 809 on SP137578 for road widening purposes, to the requirements of the Respondent's Chief Executive Officer."

2 The Act, s 4.1.50(1).

court,[3] legislative recognition of the desirability for factual issues in planning matters to be determined by the specialist planning court.

The learned primary judge's findings

[8] The learned primary judge made the following findings and referred to the following evidence in reaching the conclusions which the developer contends are flawed by legal error.

[9] The roads to be constructed on the land required by the disputed conditions to be dedicated free of charge have been planned by the Council for some time. They are a rational and necessary enhancement of the road system, regardless of the development of Lots 176 and 710 or of the Old Burleigh Town Estate. On completion, the anticipated roadwork, other than the proposed service road, will provide a useful link for road users generally. The proposed service road will provide an important link for those who have purchased or will purchase land in the Old Burleigh Town Estate as well as those with interests in Lots 176 and 710. The additional pressure on the road system from implementation of the developer's proposals for Lots 176 and 710 would be minimal.[4]

[10] It is common ground that the Pacific Highway and the Andrews Interchange are State-controlled roads whilst the proposed roads the subject of this application are presently matters for the Council. Both the Department[5] and the Council had a statutory interest in seeking dedication of the land for road purposes as a condition of the development approvals because the Bermuda Street extension[6] may at some future time become a State-controlled road.

[11] The developer purchased much of the land developed as Old Burleigh Town Estate in 1974 and from at least 1994 had discussions with the Department over their road requirements. By letter of 6 December 1995, the Council agreed to a temporary connection of the Old Burleigh Town Estate[7] to Old Coach Road[8] on conditions including that the connection be limited to 100 lots and temporary only and that the developer agree to dedicate land[9] for future road corridors as highlighted on an attached plan[10] including what is now Lots 176, 710 and 809 and, in general terms, the proposed roads now referred to in the disputed conditions. On 18 December 1995 the Council wrote to the developer's surveyors approving a development application for 90 allotments subject to conditions including the provision of engineering plans to detail the proposed temporary access to Old Coach Road, construction of the temporary road and reconstruction of Old Coach Road. Condition 36 of that approval provided:

> "Compliance with any requirements of the Queensland Department of Transport, including:-
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> A. "Provision of written evidence from Queensland Transport indicating compliance with the Departments [sic] conditions under

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3 See The Act, s 4.1.56(1)(a).

4 Reasons for judgment, para [8].

5 *Transport Infrastructure Act* 1994 (Qld), s 2(2)(b)(ii).

6 The left arm of the wishbone.

7 Then known as Valley Vista Estate.

8 Via Colwell Drive. This connection was closed by the time of the development approvals the subject of these applications.

9 The letter does not state whether or not the dedication is to be free of charge although his Honour seems to have inferred that the dedication was to be free of charge.

10 See R 135 and R 136.

> Section 40 of the Transport Infrastructure Act 1994 and Section 134 of the Transport Operations (Passenger Transport) Act 1994."
> B. The requirements may include but are not necessarily limited to the following:
> i. Dedication of Land for Transport Infrastructure. (Survey plans showing the new transport reserve are to be submitted, for sealing by Council).
> ii. Contributions for External Transport Infrastructure.
> iii. Access to Old Coach Road is limited to 100 lots only.
> iv. Upgrading of Tallebudgera Ck. Road/Old Coach Road intersection in accordance with "AUSTROADS" standards.
> v. Construction within the State Controlled Road Reserve is to be carried out in accordance with Queensland Transport approved drawings and specifications.
> vi. Provision of Adequate Drainage – maintenance of bunds until all retardation basins are in place.
>
> F. Subdivision plans should not be sealed by Council, or approval given for any new use until all the requirements of Queensland Transport are satisfied."[11]

[12] On 27 November 1996 the Council approved the temporary service road (which became Oyster Creek Drive and linked Old Burleigh Town Estate to the Pacific Highway by way of the Andrews Interchange) on the understanding that this temporary road will be realigned as the right arm of the wishbone when the Bermuda Street extension[12] between the Pacific Highway at the Andrews Interchange and Old Coach Road/proposed Tallebudgera Connection Road is completed. This temporary service road is unsuitable in the long term.[13]

[13] The developer's engineers wrote to the Department on 12 February 1997 with the developer's actual authority in these terms:

> "… we confirm that our Client is prepared to undertake the following items.
>
> We confirm that these items represent the total obligation of our Client in respect to Department of Main Roads requirement for the need of the following allotments included in Schedule A.[14]
> …
> Item 3 Dedication of land for the Tallebudgera Connection Road Across Lot 76 on RP 215311,[15] not including the lands subject to previous resumption notices.
> Item 4 Dedication of land for the Service Road through the development.[16]
> Item 5 Construction of the Service Road through the development.

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11 R 144.

12 The left arm of the wishbone.

13 See Reasons for judgment, para [14]. This finding is supported by the report of civil engineer, Mr Grose at R 34.

14 Schedule A included nine lots of land roughly equating to the developer's Old Burleigh Town Estate and including much of the area now encompassed in Lots 176, 710 and 809.

15 Effectively the Bermuda Street extension; Lot 76 roughly equates to what is now Lot 176.

16 The proposed service road constituting the right arm of the wishbone.

…
Item 7 Design and construction of a temporary Service Road through Lot 76 to the Andrews Interchange including the connection of same to the Andrews Interchange.[17]

It should be noted that the dedication of land and construction of the service road will be effected on a staged basis as required to suit the efficient development of the site."[18]

[14] The Department responded on 24 February 1997 confirming "agreement in principle", requiring dedication of the land in items 3 and 4[19] by 30 June 1997 and adding:

"Item 8 Dedication of land for future Tallebudgera Connection Road Extension between Old Coach Road Intersection and Cowell Road (on eastern side). It is envisaged that the realignment of the road boundary wil [sic] involve some road closures in favour of the developer as well as road openings. It is expected that the Department will use it's [sic] best endeavours to facilitate this exchange.
NB. The dedication of land and construction of the service road will be effected on a staged basis, as required, to suit the efficient development of the site.

A copy of this letter has been sent to Gold Coast City Council for their information."[20]

[15] On 20 May 1997 the developer's engineers wrote to the Council in these terms:

"**Old Burleigh Town**
Subdivision for Road Dedication Purposes

As you might be aware, the agreement between the Developer and the Department of Main Roads requires the Developer to dedicate the area to be used as road reserve for the future construction of the section of the Tallebudgera Road between the Andrews Interchange and Old Coach Road, and the remainder of the proposed service road (along the ultimate alignment). In order to accomplish this it is necessary to subdivide Lot 176 (as shown on the attached plan).

The following information is pertinent to this application:-

…
6. The road construction is to be carried out at some time in the future, dependent on the proposed timing of the construction of the Tallebudgera Connection Road from the Andrews Interchange to the Tallebudgera Creek Road. No time frame for this construction currently exists.

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17 The now constructed Oyster Creek Drive.
18 R 157-158.
19 The Bermuda Street extension and the service road, i e the right and left arms of the wishbone.
20 R 163.

> Accordingly we request your delegated approval of the proposed subdivision, as detailed in the attached subdivision application.
>
> As the proposed subdivision is a requirement of approval and will result in the loss of land from the Developer to the State of Queensland, we feel that the imposition of subdivision fees would not be fair and reasonable. The matter of fees has been discussed with your Mr Glew, who agrees with our assessment in this case. Accordingly, we have not provided any fees with the application. …"[21]

[16] On 2 June 1997, the Department wrote to the developer's engineers referring to a meeting on 14 May 1997 and asking for written confirmation of their agreement approving traffic access to the Andrews Interchange from the temporary service road in return for dedication of the land for the ultimate service road alignment as road reserve by 30 June 1997; the design and documentation of the service road in its ultimate position to be completed by 13 June 1997; construction of the service road in its ultimate position to be at the developer's cost, the timing to be determined by the Department on 12 months notice to the developer prior to work commencing and to be completed within six months of commencing work and otherwise construction of the service road may be undertaken by the Department and the cost recovered from the developer; design and documentation of Tallebudgera Connection Road from Andrews Interchange to the intersection with Old Coach Road to be completed by 6 June 1997; dedication of land for the Tallebudgera Connection Road across Lot 176 by 30 June 1997; once the service road is constructed in its ultimate position[22] construction of Tallebudgera Connection Road from Andrews Interchange to its intersection with Old Coach Road[23] is to commence but if the Department is unable to complete the construction of this road the developer may do so at its expense and the Department will permit the temporary service road access to the Andrews Interchange to continue in the meantime.[24]

[17] Although there was no evidence of any written confirmation, his Honour found that the developer's engineers proceeded as if there had been agreement in accordance with that letter,[25] which they forwarded with a plan highlighting the proposed dedications[26] to the developer's surveyors who advised it would be difficult to meet the 30 June 1997 deadline.[27] The plan[28] referred only to the proposed wishbone road, not to what is now Lots 710 and 809.

[18] On 10 June 1997 the Council wrote to the developer's engineers about its subdivision application for Lot 176 to create a new road and a balance allotment consistent with its negotiations with the Department, stating that approval was granted subject to the following condition:

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21 R 172-173.
22 The right arm of the wishbone road.
23 The left arm of the wishbone road.
24 R 210-211.
25 See Reasons for judgment, para [20].
26 R 219-220.
27 R 224.
28 R 220.

> "The applicant proved to Council written evidence from the … Department that the proposed road dedication meets their requirements."[29]

[19] The engineers faxed the Department asking them to draft a response to that condition to enable the developer to dedicate the property. On 16 June 1997 the Department replied:

> "From the information that has been supplied, it has been assessed that the … Department … has no requirements for this application, on the basis that this is a management lot subdivision only and no additional traffic generating lots have been created.
>
> A copy of this letter has been sent to Council for their information."[30]

[20] His Honour rejected the developer's contention that this response demonstrated an absence of agreement between the developer and the Department and instead found that the Department's response in context was generated only in order to enable dedication and that the Council had its own interest and duty to identify appropriate conditions to include in development approvals.[31]

[21] On 26 June 1997 the Department wrote to the developer's engineers referring to the correspondence of 21 May, 2 June and 11 June 1997 and approving a number of plans as amended for temporary connection only. The Department stated that subsequent approvals for ultimate works will be required to be resubmitted for approval with revision as necessary and noted:

> "• Dedication of the required land for the ultimate service-road … to be completed by 30 June 1997[32]
>
> • Dedication of the required land for the Tallebudgera Connection Road extension to be completed by June 1997[33]
>
> …
>
> *Should the above conditions not be met, access to the State-controlled road from the temporary connection road may be denied.*
>
> This approval is valid for two (2) years only from the date of this letter."[34]

[22] The developer's engineers wrote to the Department on 12 August 1997 attaching draft plans for the ultimate road dedications which they anticipated would be lodged with the Council on 22 August 1997. These plans again referred to the land the subject of the wishbone-shaped road but not Lot 809.[35] The Department responded on 27 August 1997 that alteration to bulk earthwork levels or road alignments at the final design stage may necessitate further land dedication by the developer at no cost to the Department.[36]

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29 R 226.
30 R 233.
31 See Reasons for judgment, para [21].
32 The right arm of the wishbone.
33 The left arm of the wishbone.
34 R 240-241.
35 R 244 and attached plans.
36 R 251.

[23] On 28 August 1997 the developer's engineers again wrote to the Council referring to their meeting on 21 August 1997 and confirming that subdivisional approval for Stage 1 of Old Burleigh Town had lapsed, noting:

> "… Significant other items relating to the subdivisional approval conditions have been satisfied viz:-
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> ♦ Agreements in respect of land dedication for the service road with both Council and the Department … have been made.
>
> … ."[37]

[24] The developer's surveyors informed the developer's engineers on 2 September 1997 that they required a letter from the Department confirming that the proposed road dedication met their requirements so that they could lodge the plan relating to the wishbone-shaped road dedication with Council for sealing. On 3 October 1997 the surveyors sent a copy of the plan to the Council.

[25] His Honour found that the developer, through its engineers who were experienced negotiators, agreed with the Department to dedicate the land for the wishbone-shaped road in accordance with the subdivision referred to by the Council in the letter of 10 June 1997.[38] His Honour also found that but for that agreement the road dedication requirement in the conditions the subject of the appeals could not conceivably be held to be reasonably required in respect of the development because the potential impact of each of the developments of Lots 176 and 710 on the road system would be tiny.[39] The conditions would be difficult to support in the absence of the developer's agreement to them and were not themselves reasonably required in respect of these developments.[40] His Honour found,[41] however, that under s 3.5.30(1)(a) of the Act the conditions were relevant to, but not an unreasonable imposition on, the development because of the proximity of the areas of land required to be dedicated as roads to the location of the proposed developments;[42] a condition may be relevant to a development even if not required by the subdivision itself but reasonably imposed in the interests of the rational development of the area in which the subdivision is located and the developer's earlier agreement with the Department to dedicate the land for road purposes suggested the conditions were not unreasonable.[43]

Did his Honour err in law in finding the conditions were relevant to and not an unreasonable imposition on the development?

[26] Was it open to his Honour to conclude on the evidence that the conditions were lawful? Section 3.5.30(1) of the Act relevantly requires that a condition in development approval must:

> "(a) be relevant to, but not an unreasonable imposition on, the development …; or

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37 R 253.

38 Reasons for judgment, para [31] and [32].

39 Reasons for judgement, para [34].

40 Cf The Act, s 3.5.30(1)(b).

41 Reasons for judgment, para [32].

42 *Lloyd v Robinson* (1962) 107 CLR 142, Kitto, Menzies and Owen JJ, 153; *Proctor v Brisbane City Council* (1993) 81 LGERA 398, 403-404.

43 *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P&CR 55, 64 (English Court of Appeal); *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88.

(b) be reasonably required in respect of the development … ."[44]

[27] The learned trial judge held that the conditions imposed by the Council were not reasonably required in respect of the development[45] so the issue here is whether the judge was entitled on the evidence to conclude that the conditions were relevant and not an unreasonable imposition on the development.

General observations

[28] The dedication of land free of cost as part of a development approval will not necessarily be unreasonable: see, for example, *Jumal Developments Pty Ltd v Parramatta City Council*.[46] In *Lloyd v Robinson*,[47] as here, the developer was subdividing and selling a parcel of land in stages. The developer applied for a further approval of a proposed subdivision of part of the unsubdivided land and as a condition of approval was required to transfer, free of cost to the Crown for park and recreation purposes, 20 acres of land[48] in addition to 10 acres already provided. The area to be transferred was outside the area of land to which the condition of subdivision approval attached but was part of the land the subject of the entire subdivision. The High Court found that the condition was entirely relevant to the application for approval because it was imposed in good faith as part of a series of connected subdivisions; the condition related to the land and was consistent with recognised principles of town planning; as the developer had a choice whether to accept the conditions and proceed with the development, the imposition of conditions of this kind cannot be likened to compulsory acquisition of land without compensation.[49] Those principles have been recently affirmed by the majority of the High Court in *Western Australian Planning Commission v Temwood Holdings Pty Ltd*.[50]

[29] The disputed conditions here related to the dedication of land for local roads within the control of the Council and were apparently in accordance with sound town planning principles. The land to be dedicated bordered the land the subject of the development approvals. The conditions were apparently imposed in good faith. The proposed roads were also proximate and relevant to earlier related staged subdivisions of the developer's Old Burleigh Town Estate. These factors, consistent with the principle discussed in *Lloyd v Robinson*, supported his Honour's conclusion that the conditions were relevant and not unreasonable impositions on the developments.

[30] The learned primary judge's conclusion also turned very significantly on his finding that the developer had earlier agreed with the Department to dedicate the wishbone-

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44 "Development" is a key definition under the Act and means any of the five things set out in s 1.3.2 of the Act, here relevantly:
"(d) reconfiguring a lot [Lot 710]; and
(e) making a material change of use of premises [Lot 176]."

45 The Act, s 3.5.30(1)(b).

46 (1969) 17 LGRA 111, 114.

47 (1962) 107 CLR 142.

48 On appeal to the Minister for Town Planning the conditions were varied to reduce the dedicated area from 20 acres to 15 acres.

49 Cf the principle, discussed in *Minister of Housing and Local Government v Hartnell* [1965] AC 1134, that the law ordinarily entitles a person whose land is taken for a highway to compensation unless the statutory intention to resume without compensation is expressed in clear and unambiguous terms.

50 [2004] HCA 63, McHugh J para [49]-[53] and [72]; Hayne and Gummow JJ para [117]-[119].

shaped land for road purposes. His Honour did not clearly state in his reasons the terms of that agreement but inferentially they included the developer's dedication of that land free of charge for road purposes in return for the Department allowing the developer to have access from its proposed subdivision of Old Burleigh Town to the Pacific Highway, a State-controlled road. This access seems to have been crucial to the success of the subdivision for without it the estate would not have convenient access to the Pacific Highway.[51] His Honour noted that the developer's engineers were experienced negotiators[52] and they had the developer's actual authority. There is certainly no suggestion of unconscionability. As his Honour recognised, the fact that parties have agreed to the imposition of conditions did not necessarily make the conditions reasonable but it was significant evidence in all the circumstances from which his Honour was entitled to infer that the conditions concerning the wishbone-shaped road on Lot 176 were not an unreasonable imposition on the two specific developments subject to conditions.

[31] The fact that the Department's Chief Executive did not impose conditions on the developer under s 40 *Transport Infrastructure Act* 1994 (Qld)[53] consistent with the agreement found by his Honour did not prevent his Honour from concluding that the developer and the Department reached that agreement. His Honour was impressed, not with the fact that the developer had an enforceable agreement or that the Department had imposed lawful conditions upon any development approval, but with the fact that the conditions ultimately imposed in these two development approvals were not unreasonable because the developer had earlier agreed to them in the context of related subdivisional work. It was never the developer's case that it simply pretended to agree to the conditions to gain some short-term advantage in progressing subdivisional approval.

[32] For like reasons and also for those explained by Jerrard JA in his reasons [54], nor did it matter that it may have been unlawful for the Council to impose those conditions under the 1990 Act at the time of the agreement between the developer and the Department.

[33] It is useful to next consider separately the different issues concerning each disputed condition.

The condition requiring dedication of the wishbone-shaped land on Lot 176.

[34] The dedication of the wishbone-shaped land to the Council may require the developer to obtain an easement over part of the dedicated land to gain road access to its proposed short-term recycling facilities. Despite that factor, on the application of the principles in *Lloyd v Robinson*, affirmed in *Temwood Holdings*, discussed earlier in these reasons his Honour was entitled to conclude that the condition was relevant to but not an unreasonable imposition on the development. The development of Lot 176 was but a small part of a series of staged subdivisions of the much larger parcel of land comprising Old Burleigh Town Estate and the land to be dedicated for the wishbone-shaped roads is adjacent to the land the subject of the development application. Whilst the development of the Bermuda Street extension[55] will benefit the general public, it will also benefit those who purchase

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51 See *Transport Infrastructure Act* 1994 (Qld), s 40 (now s 42).

52 Reasons for judgment, para [31].

53 See fn 51.

54 See Jerrard JA's Reasons for judgment, para [84].

55 The left arm of the wishbone.

the subdivided land from the developer once that road system is completed, providing an efficient connection between the Pacific and Gold Coast Highways. His Honour was entitled to conclude on evidence capable of being accepted that the present temporary service road (Oyster Creek Drive) was unsuitable in the long term as a connection to the Pacific Highway so that once the Bermuda Street extension is built, the new and permanent service road[56] would be needed. The permanent service road[57] will then directly benefit the developer and those who purchase land in the subdivision, rather than the general public.

[35] It does not matter that there is a possibility that neither the Council nor the Department may ever build the Bermuda Street extension even if the developer's land is dedicated for that purpose. His Honour was entitled on the evidence before him to conclude that it was likely that the wishbone-shaped road will be built in the future. The position is apposite to that discussed in *Lloyd v Robinson*[58] where the court, in answer to the suggestion that the Crown may not preserve the land required to be dedicated as parkland, observed that the fact that only political sanctions could be relied upon to enforce the government's moral obligation to preserve the land as parkland did not make the condition unlawful. It seems probable that as traffic builds up in this fast-growing part of southeast Queensland, road-using rate payers and electors will demand that either the Council or the Department provide adequate road infrastructure on land dedicated for that purpose.

[36] An important factor in his Honour's determination that the condition was relevant and not an unreasonable imposition on the development was the developer's earlier agreement with the Department to dedicate the relevant land (and indeed to do other even more onerous things not imposed in the disputed conditions) earlier in the subdivision's history. It seems without that agreement the Department may not have given the subdivision its vital temporary access to the Pacific Highway by way of the temporary service road.[59] In the light of these combined factors his Honour was entitled to conclude that the disputed condition requiring the dedication of land for the wishbone-shaped road was relevant and not an unreasonable imposition on the developments and to refuse the appeal in respect of it.

The disputed condition as to the dedication of Lot 809 attached to the redevelopment of Lot 710

[37] The disputed condition requiring the dedication of Lot 809 attached to the redevelopment of Lot 710 was not a clear part of the earlier agreement between the Council and the Department upon which his Honour placed such emphasis, although it had been discussed in earlier negotiations between the developer and the Council. The land required to be dedicated under this condition is adjacent to Lot 710, although the 11 lots into which Lot 710 will be subdivided will not have direct access to it. This lack of direct access did not compel his Honour to find the condition was not relevant or that it was an unreasonable imposition on the development. The developer and those who purchase from it will benefit from an improved and upgraded Old Coach Road, although no more than other local road users.

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56 The right arm of the wishbone.
57 The right arm of the wishbone.
58 (1962) 107 CLR 142, 155.
59 Oyster Creek Drive.

[38] Whilst the agreement upon which his Honour placed considerable emphasis between the Department and the developer did not specifically refer to Lot 710 and Lot 809, the agreement, the background to the agreement and the history of the full subdivision did indicate that the developer was prepared to dedicate very substantial portions of land in order to gain access from the Department to the Pacific Highway, access vital to its successful subdivision. This, together with the proximity to Lot 710 of the land to be dedicated, and the principles discussed earlier in these reasons in *Lloyd v Robinson* as approved in *Temwood Holdings*, persuade me that his Honour was entitled to conclude that the condition imposed in respect of the development of Lot 710 relating to the dedication of Lot 809 was relevant and not an unreasonable imposition on that development.

[39] For the reasons discussed in respect of the condition apposite to Lot 176,[60] the fact that there is a possibility that Old Coach Road may not be widened despite the dedication of the land (Planning & Environment Court Appeal No 477 of 2003) does not make the condition unlawful. There was evidence to support his Honour's view that the road work was likely to be carried out.

[40] It follows that I am not persuaded there has been any error of law warranting the granting of the application for leave to appeal.

[41] The parties agree that condition 18 of the primary judge's order relating to Lot 710 should be redrafted in these terms:

> "The Appellant shall dedicate free of cost to Council, Lot 809 on SP137578 for road widening purposes, to the requirements of the Respondent's Chief Executive Officer."

The parties can rectify that matter by agreement; it is certainly not a matter which on its own would justify the granting of an application for leave to appeal.

[42] I would refuse the application for leave to appeal with costs to be assessed.

[43] **JERRARD JA:** This proceeding is for leave to appeal pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) ("the *IPA*") from a decision of the Planning and Environment Court dismissing two "conditions" appeals to that Court brought pursuant to s 4.1.27(1)(b) of the *IPA*, and heard together. The reasons for judgment were delivered on 28 August 2003, and the final orders made on 11 December 2003, with separate orders being made that day in each appeal. The orders in what had been Appeal No 12 of 2003, concerning Lot 176 on RP 899491 ("the Lot 176 appeal"), approved an application by Hammercall for a material change of use for a waste transfer and recycling facility on that lot, subject to 46 conditions specified in the order. The application for leave to appeal in the Lot 176 appeal is about condition 3.

[44] In Appeal No 477 of 2003 the Court approved an application for reconfiguration of Lot 710 on SP 137578 ("the Lot 710 appeal") for an 11 Lot Community Title Subdivision over Lot 710, subject to 29 conditions specified in the order; this appeal concerns conditions 5 and 18. Those conditions were imposed under s 3.5.30 of the *IPA*, whose relevant sections read:

> **"3.5.29 Application of div 6**

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[60] See these reasons [35].

This division applies to each condition in a development approval whether the condition is a condition –

(a) a concurrence agency directs an assessment manager to impose; or
(b) decided by an assessment manager; or
(c) attached to the approval under the direction of the Minister.

3.5.30 Conditions must be relevant or reasonable

(1) A condition must –

(a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
(b) be reasonably required in respect of the development or use of premises as a consequence of the development."

The conditions generally

[45] Those three conditions[61] require Hammercall to dedicate certain land for future road construction or widening, free of cost to the Council. The error of law asserted in the grounds of appeal is that the learned judge gave, as the sole justification for the imposition of those particular conditions, that an agreement was made in about 1997 between Hammercall and the Department of Main Roads ("the Department") to dedicate that same land to the Department, and Hammercall contends that that agreement could not supply that justification. Hammercall argued that at the time that agreement was made with the Department, dedication of those lands could not have been imposed upon it by the respondent Council as a development condition, or agreed to by Hammercall, because of:

(a) s 6.1(2) of the *Local Government (Planning & Environment Act)* 1990 (the "*P&E Act*");
(b) the lack of any nexus between the dedication and Hammercall's development, whether that be the development the subject of the present appeals to the Planning and Environment Court, or the development to which the 1997 agreement purported to attach;
(c) the entitlement of the State of Queensland (a co-respondent by election in this application for leave) to acquire compulsorily the land required by the conditions under appeal to be dedicated.

[46] Mr Gore QC, Hammercall's Senior Counsel, argued other grounds for finding an error of law in imposing those conditions, including that the learned judge should not have had any regard at all to the 1997 agreement. His other submissions can be understood as being that no reasonable judge could have concluded that the appealed conditions satisfied s 3.5.30(1)(a) of the *IPA*. That last proposition is what Mr Hinson SC, for the respondents, submitted was what Hammercall had to establish to succeed; and that was an argument to which Mr Hinson SC responded.

The land

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61 They are reproduced in the Respondent's Appeal Record, Volume 1, at pages 2, 14, and 16

[47] The application for reconfiguration of Lot 710, (a process commonly called subdivision) was part of a larger development Hammercall had carried on, known as the "Old Burleigh Town" development. That larger development had occurred in an area of land owned by Hammercall and which can be inaccurately but conveniently described as resembling the shape of a parallelogram, and lying south of and immediately adjacent to the Pacific Highway. That highway has been at all times a State controlled road, within the meaning of the *Transport Infrastructure Act* 1994 (Qld).

[48] The parallelogram shaped area of land can be described (again, not quite accurately but usefully) as having its two longer parallel sides running in an east-west direction, and bordered on its northern long parallel by the Pacific Highway, which runs east-west in that part. On its southern long parallel the land is bordered by Old Coach Road. To the east that parallelogram is bordered by other property, some belonging to other parties, and to the west by Lot 176.

[49] Lot 710 is a relatively small area entirely within the parallelogram, situated towards its southern part, below the centre. Adjoining Lot 710 on its southern boundary is Lot 809, also within that parallelogram and also owned by Hammercall, and the southern boundary of Lot 809 forms part of the southern boundary of the parallelogram. Lot 809 has a frontage onto Old Coach Road.

[50] Lot 176, to the west of the parallelogram, was accurately and helpfully described by the learned trial judge as shaped like a truncated F-111 Jetfighter or similar aircraft. The rear side (or leech) of that notional aircraft tailfin forms the western boundary of the parallelogram. That tailfin is not fully vertical; it inclines in a north easterly direction, as therefore do the western and eastern sides of the parallelogram.

[51] The application for a waste recycling facility and landfill, a material change of use of Lot 176, was restricted to the western end, at the nose and cockpit section of that aircraft; except for the associated use of a proposed sealed and temporary access road located roughly along the axis of the lot. Lot 176 had previously been used as a quarry, and the proposal was for a landfill operation lasting up to eight years, which would re-conform the land where there is presently a deep cutting, creating instead a hill top. The land fill is to be demolition material which builders will pay to have received on the site, and a recycling operation will separate out items that can be profitably sold. It may be necessary to take away items which may not be used as fill.

The dedications required

[52] Hammercall's application to the respondent Council for development approval for Lot 176 was for a "development" as defined in s 1.3.2(e) of the *IPA*, namely making a material change of use of premises. Its application for the 11 Lot Community Title Scheme reconfiguring (or subdividing) Lot 710 was for "development" as defined in s 1.3.2(d) of the *IPA*, "reconfiguring a lot". The conditions the Council imposed on its approval of the subdivision application for Lot 710 included that Hammercall dedicate the entirety of Lot 809 for future road widening of Old Coach Road, and that Hammercall dedicate land in Lot 176 for the purpose of, and itself design and construct, two roads, both in Lot 176, one being a significant arterial road generally; and the other a service road for the development carried on or to be carried on in the parallelogram. In the Lot 710 appeal the Council abandoned the

requirement Hammercall design and construct the two roads as a condition of development approval, and instead contended for the dedication of Lot 809 and the land on Lot 176 necessary for the construction of the arterial and service roads. As modified, those conditions were upheld on appeal. Regarding the Lot 176 appeal, the respondent Council's originally imposed conditions had not required the design and construction of either of the two roads on Lot 176, but had required dedication of the necessary land. That was upheld on appeal as a condition for the change of use to recycling and landfill.

The roads proposed

[53] The significant arterial road across Lot 176 for which Hammercall is to dedicate its land, as a condition independently required in each development approval, will run for about 300 metres in a north-south direction and link a roundabout or interchange on the Pacific Highway (the "Andrews Interchange") at the northern end of that proposed arterial road with Old Coach Road at the southern end of the proposed arterial road. Where those two latter roads join there will be an interchange, controlled by signals, created on Old Coach Road. That will be on part of Lot 176, where it abuts that road at about the exhaust position of the notional jetfighter. That arterial road will run in a generally north-westerly direction from that interchange on Old Coach Road to the Andrews Interchange on the Pacific Highway.

[54] The proposed service road will run from that proposed interchange on Old Coach Road, and in a north-easterly direction, also for about 300 metres, linking the proposed interchange to be constructed on Old Coach Road with the north western corner of the parallelogram. Those two roads, to be constructed on the land Hammercall is required to dedicate, together form a wishbone shape, within and marking the eastern and western edges of the tail of the notional F-111. The significant arterial road intended to be constructed, forming the western or left hand side of that wishbone, has been described in documents and in evidence as the "Bermuda Street extension". More prosaically, the proposed service road, being the eastern or right hand side of the wishbone, is described in documents and in the evidence as the "future service road". That latter road would allow traffic to enter or exit the development Hammercall has carried on in the parallelogram. Traffic would travel from that development along the future service road to the proposed interchange, and then either in an east or west direction along Old Coach Road, or else back north to the Andrews Interchange and the Pacific Highway. The Bermuda Street extension would obviously carry much more traffic than just that emanating from Hammercall's development of the parallelogram.

[55] Those dedication requirements prima facie appear draconian when applied to either of the specific developments for which planning approval was sought. Their imposition was upheld because Hammercall had agreed some years earlier to dedicate that same land for those purposes. The history of Hammercall's development of the area, and how those conditions were originally agreed to, is relevant to understanding the issues and deciding whether an error of law has been shown.

Background history to Hammercall's agreement

[56] The Department, the first respondent Gold Coast City Council, and the then Albert Shire Council, had undertaken a transport system study in 1987, and the report of

that study had suggested the construction of the Bermuda Street extension. Another and later study of future transport needs carried out by those same two local authorities and the Department resulted in a recommendation for the preservation of a road corridor for that arterial road. Bermuda Street (not the Bermuda Street extension) runs northward from the Andrews Interchange. The evidence before the learned trial judge was said by the respondents to show a long history of planning for the Bermuda Street extension as an important arterial road which would provide a major traffic connection to the south of the Pacific Highway, available for the developing community south and west of it.

[57] In December 1993 Hammercall made application to the respondent Council to rezone the approximately 76 hectares of land constituting the parallelogram to a Special Residential Zone. The parallelogram then consisted of five separate lots, for each of which rezoning was sought. On 2 June 1994 the Council approved that application, noting that the proposal allowed for the development of a maximum of 1137 dwelling units in the future, and that no permanent access onto Old Coach Road was proposed, it being intended that all vehicles' entry and exit to and from the site would be from "newly constructed ramps on the Pacific Highway". The Council minutes record that temporary access onto the Old Coach Road might be required until such time as the Department's approval was obtained for construction of the Pacific Highway ramps. Condition 12 of the rezoning approval required Hammercall to design and construct those ramps at full cost to itself, and condition 13 provided that the Council would permit "temporary ingress/egress only on Old Coach Road until such time as the proposed Pacific Highway interchange and ramps are constructed."

[58] Mr Hinson SC suggested on the appeal that the reference to the ramps and interchange in conditions 12 and 13 should probably be understood as a reference to the two wings of the wishbone and to the (then un-constructed) Andrews Interchange; Mr Gore QC did not expressly challenge that submission. The parties treated the interpretation of that part of clauses 12 and 13 as of minor importance, and likewise the fact that no express dedication requirements were then made.

[59] The *Transport Infrastructure Act* came into force on 15 April 1994, and was in force at the time of that rezoning approval, but not at the time of the application for it. The then applicable provisions of the *P&E Act* relevantly provided in s 6.1(1)(b) that where an application was made to a local government for any approval, consent or permission to use land for any purpose as required by a planning scheme:

> "the local government is not to –
>
> (c) subject its approval of that application to a condition that is not relevant or reasonably required in respect of the proposal to which the application relates, notwithstanding the provisions of a planning scheme;
>
> **(2)** The local government and an applicant or owner of land are not to enter into an agreement and a local government is not to accept any consideration in respect of a condition that, pursuant to subsection (1), is unlawful for the local government to impose.
>
> **(3)** Subsections (1) and (2) do not apply to an infrastructure agreement under division 2."

[60] It was common ground that there had not been an infrastructure agreement for any of Hammercall's applications regarding the development proposed in the parallelogram or in Lot 176. Hammercall and the Council were accordingly both subject to the restraints imposed by s 6.1(1) and (2) of the *P&E Act*. It was a rezoning condition that Hammercall submit a master plan for the whole site, and Hammercall was proposing to develop that site in stages.

[61] In late July 1995 the Department resumed from Hammercall a portion of its land abutting the Pacific Highway on Lot 176. The land so resumed and other land was used by the Department to construct the Andrews Interchange. Hammercall was compensated for that compulsory acquisition.

[62] Hammercall made an application in August 1995 to subdivide one of the five rezoned lots into 90 allotments, and the Council approved that application by letter dated 18 December 1995. On 6 December 1995 the Council advised Hammercall that the Department had advised it that the Department would agree to a temporary connection to Old Coach Road – which connection the Council had approved on a temporary basis in the rezoning application – subject to conditions, which included both that the connection to Old Coach Road be limited to 100 lots and be temporary, and that Hammercall agree to dedication of land for future road corridors, as demonstrated on a plan attached to the Council's letter to Hammercall. That plan shows that Queensland Transport required the dedication of both sides of the wishbone, as well as a quite extensive tract of land running right along the northern boundary of the parallelogram, and also some land on the southern boundary of the parallelogram abutting Old Coach Road.

[63] The Department's land dedication requirements conveyed to Hammercall by the Council reflected the expectation that all five rezoned lots within the parallelogram would eventually be subdivided, and that the approximately one thousand or more resulting residential lots would potentially cause considerably increased daily use of the Pacific Highway. However, although s 40(1) of the *Transport Infrastructure Act* required the Council to submit applications for development approval to the CEO of the Department, who could impose conditions on the development, that statutory procedure was not followed. Instead, on 18 December 1995 the Council advised Hammercall that it had resolved to approve Hammercall's application for subdivision and creation of 90 allotments, subject to specified conditions. Those included – as the Department was said to have required – that there be no more than 100 lots in total which would require temporary access onto Old Coach Road, and, by condition 36, that Hammercall comply with any requirements of the Department. That condition specified Hammercall was to provide written evidence indicating compliance with the Department's conditions under s 40 of the *Transport Infrastructure Act*, and condition 36 stated that those requirements might include but were not necessarily limited to dedication of land for transport infrastructure. Proceeding in that fashion made compliance with the Department's requirements a condition that the Council had imposed.

What might have happened

[64] If the provisions of the *Transport Infrastructure Act* had been complied with by the Council, s 40(3) would have permitted the Department to impose conditions directly upon Hammercall. Mr Gore QC submitted that s 40 only allowed the Department to

impose conditions on a Council, but I respectfully disagree. The section provides as follows:

> "**Impact of certain local government decisions on State-controlled roads**
>
> **40.(1)** A local government must obtain the chief executive's written approval if –
>
> (a) it intends to –
>
> (i) approve a subdivision, rezoning or development of land; or
>
> (ii) carry out road works on a local government road or make changes to the management of a local government road; and
>
> (b) the approval, works or changes would –
>
> (i) require the carrying out of road works on a State-controlled road; or
>
> (ii) otherwise have a significant adverse impact on a State-controlled road; or
>
> (iii) have a significant impact on the planning of a State-controlled road or a future State-controlled road.
>
> **(2)** The chief executive may make guidelines to which local governments must have regard in deciding whether an approval of the chief executive under subsection (1) is required.
>
> **(3)** An approval by the chief executive under subsection (1) may be subject to conditions, including a condition that consideration, whether monetary or otherwise, be given in compensation for the impact that the subdivision, rezoning, development, road works or changes will have.
>
> **(4)** Subsection (1) does not apply if the conditions applied and enforced by the local government for the subdivision, rezoning, development, road works or changes comply with permission criteria fixed by the chief executive.
>
> **(5)** The permission criteria may include conditions, including a condition that consideration, whether monetary or otherwise, be given in compensation for the impact that the subdivision, rezoning, development, road works or changes will have.
>
> **(6)** A local government must comply with conditions that apply to it under this section.
>
> **(7)** A failure by a local government to obtain an approval under subsection (1) in relation to the approval of subdivision, rezoning or development of land does not invalidate the approval by the local government.
>
> **(8)** If a local government contravenes subsection (1) or a condition that applies to it under this section, the local government is

liable to compensate the chief executive for the cost of road works to State-controlled roads that are reasonably required because of the contravention.

(9) An approval by the chief executive under subsection (1) must be given –

(a) within 21 days after receiving the application for approval; or

(b) within a longer period notified to the local government by the chief executive within the 21 day period.

(10) If –

(a) a local government applies for an approval under subsection (1); and

(b) the chief executive does not respond to the application within 21 days after receiving the application;

the chief executive is taken to have given approval at the end of the 21 days.

(11) In this section –

"future State-controlled road" means a road or land that the chief executive has notified the local government in writing is intended to become a State –controlled road.

(12) The chief executive must cause a copy of each notice under subsection (11) to be published in the gazette."

[65] This section is expressed widely enough to allow the Department to impose conditions as to compensation directly on an applicant, as well as on a local government. Section 196 of that Act provides that a person whose interests are affected by a decision described in schedule 2 may ask the chief executive to review the decision; and if the chief executive confirms or amends the original decision or substitutes another decision, that person may appeal against the confirmed, amended or substituted decision to the court stated in schedule 2. Schedule 2 expressly permits a person whose interests are so affected by the imposition of conditions under s 40(3) or s 40(5) to appeal to the Planning and Environment Court. I respectfully agree with the observation of Skoien SJDC in *Pacific Exchange Corporation v Gold Coast City Council & The State of Queensland* [1997] QPELR 129 at 132, that s 196 gives an applicant (for development approval) the right to appeal to the Planning and Environment Court against the imposition of a s 40 condition which affects its interest, and with His Honour's other observation in *Arlenby Marketing Pty Ltd v Chief Executive of Queensland Department of Transport & Ors* [1997] QPELR 137 at 140 that on such an appeal against a s 40 condition two questions arise.

> "First, is there a nexus between the approval and a State-controlled road in that the development of the site will fall within any of the three criteria in s 40(1)(b)? Second (if the first question is answered "yes") are the conditions imposed justifiable in the sense that they

> are a reasonable response to that? See *Newbury DC v Secretary of State for the Environment* [1981] AC 578."

[66] That test described by Skoien SJDC, derived from *Newbury District Council*,[62] has been recently restated in the judgment of McHugh J in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 211 ALR 472.[63] His Honour relevantly wrote that "…the power to attach conditions to development consents is limited to those conditions that are reasonably capable of being regarded as related to a legitimate planning purpose. That purpose is ascertained from a consideration of the applicable legislation and town planning instruments to which the responsible authority is subject."[64] He also wrote:

> "[57] The commission also does not dispute that a condition attached to a consent must reasonably and fairly relate to the development permitted. A condition attached to a grant of planning permission will not be valid therefore unless:[65]
>
> (1) The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.
>
> (2) The condition reasonably and fairly relates to the development permitted.
>
> (3) The condition is not so unreasonable that no reasonable planning authority could have imposed it.
>
> [58] A condition attached to a grant of planning permission may be invalid although its ulterior purpose is not the sole purpose. If the ulterior purpose is a substantial purpose for which the authority is exercising its power, the condition is invalid.
> …
>
> [60] A condition is imposed for a proper planning purpose if it is 'imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists'."[66]

[67] Regarding the second question identified in [57], McHugh J cited *Lloyd v Robinson* for a principle described by His Honour (at [72]), namely that a condition need not relate to the subdivision in question, if the subdivision is one of a series of subdivisions of a larger parcel of land, and the condition relates to the larger parcel of land as a whole. His Honour also explained that a condition was relevant to a development if it fell within the proper limits of an authority's function under applicable legislation, or was imposed to maintain proper standards in local

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62 At [1981] AC at 599H; 607G – 608B; 618H; and 627B

63 At [15], [53], [57], [60]

64 At [56], citing from *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 577, where the High Court endorsed the statement of Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* at (1970) 123 CLR 490 at 499-500

65 Referring to *Newbury District Council v Secretary of State for the Environment* [1981] AC 578

66 *Lloyd v Robinson* (1962) 107 CLR 142 at 154

development. Gummow and Hayne JJ, the other members of the majority in *Western Australian Planning Commission v Temwood Holdings* agreed[67] with what McHugh J had written in [56]. They cited *Lloyd v Robinson* with approval for the proposition that the imposition of the relevant conditions in the case under appeal did not acquire the character of an exercise of power to achieve extraneous ends or objects merely because the inescapable effect of the legislation under which it was imposed was that, if Temwood were to proceed to subdivide, the right to do so may have been achieved at what Temwood regarded as too high a cost. The unanimous judgement of Kitto, Menzies, and Owen JJ in *Lloyd v Robinson* had held[68] that:

> "If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a quid pro quo is received, namely the restored right to subdivide the first…If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions."

[68] In *Western Australian Planning Commission v Temwood Holdings* Callinan J specifically criticised the reasoning in *Lloyd v Robinson.* The other member of the minority, Heydon J, found it unnecessary to consider the correctness of that decision; and this Court is obliged to apply it. The recognition in that judgment, that conditions can lawfully be imposed on a development approval which the developer considers too onerous to make the development worthwhile, says nothing about whether onerous conditions are lawful in a particular case.

[69] The respondent Council did not follow the requirement in s 40(1) of the *Transport Infrastructure Act* and obtain the written approval of the Department's chief executive when approving the subdivision creating 90 allotments, which arguably would have a significant impact on the planning of a State controlled road, namely the Pacific Highway. Condition 36 was not imposed on Hammercall by the Department's chief executive under s 40(3) and accordingly its validity has never fallen for consideration by reference to that power and the requirements repeated by McHugh J in *Western Australian Planning Commission v Temwood Holdings*.

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67 At [93]

68 At 107 CLR 154

What did happen

[70] Instead, a much more informal procedure was followed than what s 40 required, in which Hammercall and the Department negotiated directly; and the Council relayed the Department's requirements as conditions imposed by the Council. Where that latter procedure was followed, then while the legislation applicable to planning was the *P&E Act*, the conditions imposed by the Council had to satisfy s 6.1(1)(c) of that Act, as Mr Hinson SC accepted. When the *IPA* came into force on 30 March 1998, the conditions had to satisfy s 3.5.30 for that same reason, being imposed by the Council; s 3.5.29 in any event applied the same constraint to a condition in a development approval which is a condition directed by a concurrence agency, which the Department relevantly was.[69]

[71] The context in which condition 36 was imposed by the Council in December 1995 included that the approved development would have only temporary access to Old Coach Road, and instead would have permanent access only to the Pacific Highway, by means of the two sides of the wishbone, the signalised interchange on Old Coach Road, and the Andrews Interchange. In that context the dedication foreshadowed in the letter from the Council of 6 December 1995, when the overall development Hammercall intended would be over 1000 allotments – estimated thereby to have a potential of 10,000 vehicle trips per day added to the existing use of the Pacific Highway - may have been readily identifiable as dedication conditions imposed for planning purposes, reasonably and fairly relating to the requested and future subdivisions of a large parcel of land by the one developer, and not so unreasonable that no reasonable planning authority could have imposed it. However, that background context was changing.

An extra service road

[72] It is obvious negotiations took place between the Council, the Department, and Hammercall about the Department's requirements. On 12 February 1997 Hammercall's engineers wrote to the Department, relevantly stating that:-

> "In order to attenuate the impact of the development on the state controlled road network, we confirm that our Client is prepared to undertake the following items."

The reference to the State road network was clearly written with s 40 in mind. The matters that Hammercall were prepared to undertake were specified as being in respect of nine allotments nominated by Hammercall, which included the five contained within the parallelogram, Lot 176, and three other lots owned by Hammercall and abutting the parallelogram on its northern and eastern boundaries. Hammercall's engineers confirmed in that letter of 12 February 1997 that it would *inter alia* dedicate the land for the Bermuda extension and the land for the future service road (the two wishbone wings), as well as designing and documenting both those roads. It also offered to construct the future service road; and design and construct new ramps on the Pacific Highway. The position of those ramps on an attached sketch[70] is to the north and east of the parallelogram, where those three other properties of Hammercall are, and make possible that that was the position of

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69 It was common ground the Integrated Planning Regulation 1998, by Regulation 4 and Schedule 2, made the Department a "concurrence agency" on Hammercall's applications under appeal

70 Shown at the respondent's record Volume 2/160

the ramps originally referred to in conditions 12 and 13 of the June 1994 rezoning approval.

[73] Hammercall's offer of 12 February 1997 also contained a proposal for a temporary service road through Lot 176, which would run from the north-western edge of the parallelogram across the top of the proposed wishbone and connect to the Andrews Interchange. Hammercall also offered to connect it to that interchange. That road, which has been built and now provides the only connection between Hammercall's development and the Pacific Highway, is called Oyster Creek Drive. Its construction and use removed any immediate necessity that Hammercall had, as developers, for the construction of the wishbone or the interchange on Old Coach Road. In the Land Court proceedings in which Hammercall's compensation for the loss of part of its land for the Andrews Interchange was settled, that court described the construction of Oyster Creek Drive by Hammercall as a strategic marketing decision by it, and the description seems accurate.

[74] The Department responded to Hammercall's engineers on 24 February 1997, agreeing to the matters offered by Hammercall, but added an eighth requirement, namely the dedication of land on Old Coach Road, to permit realignment of its road boundary. The accompanying map indicates that the Department was then seeking far more than the presently imposed condition requiring dedication of Lot 809. The learned judge found, and the finding is not challenged, that Hammercall and the Department did agree to the eight specified matters, which therefore included the dedication of more land than Hammercall is now asked to dedicate as a condition of its most recent applications.

[75] Thereafter matters moved very promptly. The Andrews Interchange was opened around late June 1997. Hammercall had already applied by then to the Council for approval to sub-divide Lot 176 to allow dedication of the land to be used for the Bermuda Street extension and the future service road. That application, dated 20 May 1997, described the relevant land as having been previously cleared, with bulk earth works already carried out on it. Preliminary road design planning for those roads was described as already completed on behalf of both the Council and the Department. Eight days later the Council, (finally) acting pursuant to s 40(1), sought the written approval of the Chief Executive Officer of the Department for that application for the subdivision of Lot 176 for road dedication purposes. On the same date the Council sealed the plans approving the subdivision of the two lots (part of Lot 176 and part of another lot owned by Hammercall) necessary for the dedication and construction of Oyster Creek Drive.

[76] The Department (on 2 June 1997) insisted to Hammercall's engineers that it would approve traffic access to the Andrews Interchange – about to be opened – from what became Oyster Creek Drive only when the land was dedicated for the wishbone. On 5 June 1997 the previously sealed plans approving Oyster Creek Drive were registered, and Oyster Creek Road was accordingly dedicated and open as a road.

[77] Some three weeks later on 26 June 1997 the Department approved Hammercall's plans for that subdivision, on the condition that dedication of both sides of the wishbone was completed by 30 June 1997. That dedication did not happen, although the construction of Oyster Creek Drive did very promptly, it being completed by 13 August 1997. Not only did Hammercall do that at speed, but on 5 September 1997 it opened the temporary access it was allowed from the

parallelogram to Old Coach Road, at Cowell Drive. It then had two means of ingress and egress to the parallelogram, although the Cowell Drive connection was subsequently closed in 2001, leaving only the Oyster Creek Drive access to the Andrews Interchange as the connection between the parallelogram and the rest of Queensland.

[78] Regarding the wishbone dedication, on 10 June 1997 Hammercall's engineers forwarded to the Department correspondence received from the Council, which approved the application to create new roads and a balance allotment in Lot 176, subject to Hammercall providing the council with written evidence from the Department that the proposed road dedication met the Department's requirements. Hammercall's engineers asked the Department to draft a response that would enable dedication of the land. The response was unexpected, although accurate in a way. It advised Hammercall's engineers on 16 June 1997 that the Department had no requirement for that application, because it was a "management lot subdivision only" (meaning that Lot 176 would remain one lot, although now fragmented into a total of four different parts) and no additional traffic generating lot would be created by that management lot subdivision. That was true enough, if all that happened was that subdivision by dedication, and if no roads were ever built on that now dedicated land.

[79] The Department thus denied Hammercall the opportunity to obtain what was by then purely pro-forma approval from it to dedicate to it the land in Lot 176 for which it had been asking nearly two years. During that same period – late June to early September 1997 – Hammercall extracted agreements from the Department that when that dedication of the wishbone did occur, Hammercall would be entitled to close Oyster Creek Drive and have that land returned to its ownership, upon payment of a relatively nominal fee. The Department agreed to that.

[80] On 3 October 1997, having by then two working road access points to its parallelogram, Hammercall asked the Council to consider the conditions it would impose if Hammercall's road dedication of Lot 176, instead of being a "management lot subdivision only", was changed to an application to subdivide Lot 176 into four lots, those being the four separate parcels of land which would be created by the dedication. Those lots would be the land to the west of the left side of the wishbone, the land below Oyster Creek Drive where it crossed the two arms of the wishbone, the land above Oyster Creek Drive and lying between the wishbone arms, and a small lot below the bottom right hand of the wish bone.

[81] The record does not disclose that the Council ever responded to that query, nor any correspondence between Hammercall and either the Council or the Department about the fact that Hammercall simply took no further steps thereafter to dedicate any land to the Department. It had gone very close to doing so, and there was no suggestion in argument on the appeal that it had not been entirely genuine in its attempt until oddly thwarted by the Department's response of 16 June 1997.

The present applications

[82] Regarding the applications now under appeal, the Department advised the Council on 29 October 2002[71] of two conditions it required regarding the application for a material change of use for Lot 176, of which one was the prohibition of direct

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[71] Applicant's appeal record Vol 3/298

access to the adjacent Pacific Highway. No dedication requirements were suggested. That Department advice was presumably given in response to a s 40 application to it by the Council. Nor does the appeal record show that the Department requested any land dedication in respect of the Lot 710 application. The dedication requirement for Lot 176 was imposed by the Council independently of any Department request; the position may be identical for Lot 710. The judgment under appeal quotes from a letter by the Department dated 13 January 2003 referring to "*low priority"* and the "*responsibility to investigate the need for the road"*, referring to the Bermuda Street extension and the probability of its construction. Although it is not made crystal clear in the record, it appears the Department has not requested dedication under s 40 as a condition of its approval for either development. The dedication conditions accordingly are the Council's requirements only.

[83] Mr Gore QC submitted that the Council could not have entered into the agreement made between Hammercall and the Department in 1997, and accordingly the agreement could not validly be used now to justify a development approval condition intended to effect the same purpose as that agreement. The submission was developed to be that those conditions could not have lawfully been imposed by the Council in 1995 or 1997, and for that reason could not have been the subject of a agreement between the Council and Hammercall. This was because, in his submission, there was not relevant nexus between the land required for dedication and Hammercall's overall development, whereas on the facts there had been in *Lloyd v Robinson.* Mr Gore QC argued the Bermuda Street extension would never occur if the Council was looking only at Hammercall's development. Instead that road was proposed for the benefit of the general public. Referring specifically to s 6.1(1)(c) of the *P&E Act*, Mr Gore QC submitted that the dedication condition 36, or the dedications agreed to by Hammercall if imposed by the Council as a condition, were not relevant or reasonably required in respect of Hammercall's then proposals, or overall development proposal. He further submitted that it was of no consequence that Hammercall had not attempted to appeal condition 36 as explained by the Council's letter of 6 December 1995, there being clear authority entitling Hammercall to argue now that it was invalid then.[72]

[84] I consider those submissions interesting but not quite to the point. This Court need not decide now whether Hammercall would have succeeded then in overturning its agreement, if made with the Council and not the Department. Its agreement *was* with the Department; and to change history in Hammercall's favour by substituting the Council as a party is no more persuasive or determinative than it would be to change history by assuming that the Council had complied with its s 40 obligations and referred the application to the Department, which had independently imposed either condition 36, or conditions in the same terms as the agreement, pursuant to s 40(3). The point for decision now is whether the learned trial judge erred in law in holding that the two conditions now imposed satisfied s 3.5.30(1)(a) of the *IPA*.

[85] The learned trial judge found that the dedication conditions did not satisfy s 3.5.30(1)(b), they not being reasonably required in respect of either development or proposed use of premises as a consequence of either development applied for. Mr Hinson SC conceded the accuracy of that finding, and that the test required by that subsection, as explained in *Cardwell Shire Council v King Ranch Australia Pty*

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72 *Felixstowe Pty Ltd v Gladstone City Council* (1994) 85 LGERA 234 at 237 and 241 – 2

Ltd[73], was that the Council should consider what changes that development applied for would be likely to produce, and impose such conditions as appear to be reasonably required in those circumstances. The learned trial judge found that the potential impact on the road systems of each of the separate developments of Lot 176 and 710 approved by the Council, when imposing the appealed conditions, would be tiny.[74] The learned judge also found that there was no contest about the Bermuda Street extension being needed in the public interest, but that what was lacking was any significant contribution by Hammercall's present proposals to the need for that extension which might justify saddling the company with having to make an expensive contribution to its provision now.

[86] The learned judge was nevertheless satisfied that those dedication conditions were not unreasonable impositions on the development, in the circumstances of Hammercall's prior agreement to that dedication. The judge cited with approval from the observations in *City of Bradford Metropolitan Council v Secretary of State for the Environment*[75], in support of the judge's finding that while mere agreement of the parties did not make a manifestly unreasonable condition permissible, the fact that an applicant had suggested a condition or consented to its terms was likely to be powerful evidence that the condition was not unreasonable on the facts. The judge considered that the dedication conditions were relevant to the development applied for, because of the propinquity of the areas required to be dedicated to the specific locations of the development(s) proposed, which propinquity gave sufficient nexus.[76]

[87] The learned trial judge found that the Oyster Creek Drive connection to the Andrews Interchange was unsuitable as a long term design. Mr Gore QC argued in his response that the future service road (the wishbone's right side) was only needed because of the proposal for the Bermuda Street extension, the wishbone's left side. This was because, in his submission, Oyster Creek Drive would be an adequate carriageway for the development overall were it not for the proposed Bermuda Street extension entering Andrews Interchange. The engineering requirements for the future service road occurred because of the desire not to have too many connections at the Andrews Interchange, that is, traffic from Oyster Creek Drive entering the Bermuda Street extension where the latter road itself entered the Andrews Interchange. Mr Hinson SC did not have the opportunity to contradict that submission at the hearing; a communication from all parties' Senior Counsel to the Court dated 17 September 2004 cited evidence which supported the argument.

[88] Mr Hinson SC summarised his argument in these terms: he relied on the earlier agreement to show it was open to conclude that the conditions were not an unreasonable imposition on either application or the overall development; and he relied on the judgment of this court in *Proctor v Brisbane City Council*[77] to support his argument that it was open to find the conditions imposed were relevant. This was because they were imposed to maintain proper development standards in the area, namely the provision of the preferred and planned for access to the Pacific Highway. The conditions imposed would benefit the applicant's purchasers, and were necessary for the proper development of the area as a whole.

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73 (1984) 53 ALR 632 at 635

74 At reasons for judgment [34]; AR Vol 1, page 28

75 (1986) 53 P & Cr 55 at 64

76 At reasons [35]; Appeal Record 1/28

77 (1993) 81 LGERA 398

Conclusion

[89] The terms of s 3.5.30 necessarily require that conditions must be relevant to the particular development approved to be lawfully required. However, application of the planning principles described by McHugh J in *Temwood*, relying on *Lloyd v Robinson,*[78] means that it is sufficient if the condition under consideration is relevant to development (as defined in the *IPA*) of a larger parcel of land being subdivided or developed in a series of subdivisions or developments. Considering the two applications for development approval here as part of Hammercall's overall plan, which on completion will have both the parallelogram and the truncated F-111 subdivided into allotments, I consider that the problem for the respondent is that the conditions do not achieve the goal described by Mr Hinson SC. That is, imposition of those conditions does not go far enough to achieve the provision of the preferred and planned for access to the Pacific Highway. The Bermuda Street extension, construction of the future service road and interchange, and widening of Old Coach Road, may not occur for years, if done by the Council. The evidence did not indicate any firm proposal that those works were envisaged as future State controlled roads, which the Department would build. Accordingly, prosecution of these developments by Hammercall, if its appeal fails and it considers the cost to it of those dedications acceptable for either its overall or the specific development under appeal, would not increase the probability of either successful respondent actually constructing any of those works; this is because there would have been so little extra traffic generated by both approved developments. All the imposition of these conditions would achieve would be to cheapen the future cost to either respondent if and when those works were done. The evidence to which this court was directed could not have satisfied the learned trial judge that upholding the conditions would result in the foreseeable future in any identifiable improvement or change in the standard of the road system in the area.

[90] Further, the respondents accepted that even if the decision under appeal was upheld, Hammercall could simply elect not to proceed further with either of the developments applied for, and then no land would be available for these works foreseen as needed nearly 20 years ago, unless the necessary land was resumed from Hammercall, as it could be. Relying on the dedication conditions as a means of acquiring that land for future road works leaves it entirely up to Hammercall whether those ever happen. Imposing dedication requirements alone, without conditions requiring construction of the relevant works, does not sufficiently achieve the goal Mr Hinson SC urges as their justification and relevance.

[91] However, the Council need not reproach itself for having asked now for too little; requiring the dedication *and* construction of the Bermuda Street extension, the future service road, the interchange, and widening Old Coach Road, would now be too onerous and accordingly an unreasonable imposition on the development of Hammercall's larger parcels of land as a whole. This is because imposition of those conditions now would have come too late. It would have been defensible imposed in 1995-1997 in respect of the application to develop 90 lots, considered as part of Hammercall's overall development, before Oyster Creek Drive was built. But that road now exists, it provides a connection to the Pacific Highway, and the evidence and judgment under appeal did not describe it as inadequate to service the completed development as its means of ingress and egress. I observe that Oyster

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78 In a passage at (1962) 107 CLR 153

Creek Drive was described in evidence as capable of carrying a traffic flow of close to twice the traffic generated by Hammercall's development to date.

[92] I respectfully consider that the opportunity to impose those dedication conditions before the construction of Oyster Creek Drive, and as a section 40(3) requirement, was lost when the respondent Council did not comply with the *Transport Infrastructure Act*. If the opportunity to enforce condition 36 as a s 6.1(1) condition imposed under the *P&E Act* existed in 1997, the Council and the Department lost that opportunity by their not adhering to and enforcing the Department's requirements for those dedications as a condition of the Department's agreement to Oyster Creek Drive, and by the Department's obstruction of efforts to dedicate the land. No action has been taken against Hammercall for non-compliance with that condition.

[93] I consider that it is only when the Bermuda Street extension is constructed or under construction that a condition requiring or regarding the construction of the future service road would be relevant to the Lot 710 application or any other development applications involving the parallelogram. Now that Cowell Drive has been closed, traffic entering or leaving the parallelogram must do so on either Oyster Creek Drive or the proposed future service road. When that Bermuda Street extension is built or under construction, it would not be unreasonable to impose either dedication or construction requirements, or both, on Hammercall for that future service road. The obligation to dedicate land as roads within the parallelogram has been accepted without demur in the past by Hammercall, as it must, those being the inner roads leading to the various lots. Hammercall accepts that as a developer it can reasonably be required to make a contribution of land, money, and/or services for the benefit it gives and gets as a developer; the future service road is not a large area of land for Hammercall to contribute; and it would give the necessary ingress and egress from its development once the Bermuda Street extension and interchange is constructed. Further, Hammercall had agreed to make dedications of more land, albeit when it had little choice.

[94] However, I consider for the reasons given that a condition simply requiring Hammercall now to dedicate the land needed for either the Bermuda Street extension, or the future service road, is not relevant to the development of Hammercall's larger parcel of land, nor to either of the two specific developments for which it has applied. Those two developments will only marginally increase road usage and will not prompt any road works by the Council. There is now an existing and adequate road connection to the Pacific Highway. Additionally, Mr Gore QC reminded this court that the land fill application for Lot 176 was a relatively short term and isolated use with no connection to Hammercall's overall development plans, which included future applications to reconfigure Lot 176 and further reconfiguration applications within the parallelogram. At present some 440 lots have been successfully subdivided. Returning to Lot 176, if the appeal's conditions are upheld, the effect will be to land lock the western end of that lot, since Hammercall will need to obtain an easement from the Department over the land it needs to dedicate for construction of the Bermuda Street extension. This is because Hammercall's proposed internal sealed road joining Oyster Creek Drive, and to be used for the land fill activity, will cross the left wing of the wishbone. Mr Gore QC submitted, and I agree, that that further demonstrated the lack of relevance of that dedication requirement to the particular development applied for on lot 176. He also submitted that that development might be completed, that is all the landfill

required received and the hill built, before the Council constructed either the Bermuda Street extension or the future service road. The obligation to construct both of those still rests on the Council, it not having sought a condition that Hammercall be required to construct either road as distinct from dedicate the land.

[95] Regarding the required dedication of Lot 809 and construction of the road widening of Old Coach Road, this was not much discussed in the appeal but is not relevant to the Lot 710 application. This is because the propinquity between Lot 809 and Lot 710 is simply a coincidence. The appeal record strongly suggests that the request for dedication of Lot 809 would still have been made had Lot 710 been on the northern or eastern part of the parallelogram rather than the southern.

[96] My conclusion is that imposition now of the respective dedication conditions is not relevant to, and for that reason not a reasonable imposition upon, Hammercall's development approved for Lot 176 and Lot 710, whether considered in respect of those individual developments approved or as part of the development of a larger parcel of land. I respectfully consider that the learned judge erred in law in holding otherwise. I would grant leave to appeal, allow the appeal, and order that the judgment under appeal be varied by deleting condition 3 from the conditions imposed in Appeal No 12 of 2003 to the Planning and Environment Court, and by the deletion of conditions 5 and 18 of the conditions imposed in Appeal No 477 of 2003 to that court.

[97] Subject to persuasion by written submissions to the contrary, to be submitted within one month of publication of these reasons for judgment, I would order that the respondents pay the appellant's costs of the appeal limited to those costs of and incidental to the prosecution and hearing of the appellant's amended notice of appeal; and that the appellant pay the respondents' costs thrown away in preparation of the respondents' responses to the appellant's notice or notices of appeal, other than the final one. I note that the appellant relied on only the first three books of its appeal record, and prepared a much larger and rather irrelevant one, perhaps relevant to the many issues it ultimately abandoned at the last moment.

[98] **CULLINANE J:** I have had the advantage of reading the reasons of Jerrard JA in this matter. I agree with those reasons and the orders he proposes.