SUPREME COURT OF QUEENSLAND

CITATION:	*Mudie v Gainriver P/L & Ors* [2001] QCA 382
PARTIES:	**KAREN GAYE MUDIE** (applicant/appellant) **v** **GAINRIVER PTY LTD** ACN 010 965 929 (first respondent/first respondent) **GATTON SHIRE COUNCIL** (second respondent/second respondent)
FILE NO/S:	Appeal No 142 of 2001 P&E No 1387 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	14 September 2001
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2001
JUDGES:	Davies and Thomas JJA, White J Judgment of the Court
ORDER:	**Allow appeal. The respondents are ordered to pay to the appellant costs of the appeal. The order below is varied:** **a) by adding the following:** **"1. That Gainriver Pty Ltd cause the construction of the dedicated road to the east of the land of Gainriver Pty Ltd situated at Flagstone Creek Road to be removed and the level of the road be restored to natural surface level;"** **and** **b) by renumbering the remaining paragraphs 2, 3 and 4 respectively.**
CATCHWORDS:	LOCAL GOVERNMENT – SUBDIVISION OF LAND - CONSENT AND APPROVAL OF COUNCILS – ROADS AND ACCESS – ROADS – where respondent developer constructed a road adjacent to the appellant's land without council approval – where appellant under continuing disadvantage from its presence – where council ultimately approved the road – whether the trial judge erred in failing to order that the road be removed PROCEDURE – INFERIOR COURTS – PLANNING AND

ENVIRONMENT COURT – DISCRETIONARY POWERS – NATURE OF DISCRETION – where the Court's proper function in such matters is to perform a balancing exercise with a view to matters of private and public interest – road unlawfully built by developer upon dedicated public road area – public nuisance – whether order should be made for its removal – where trial judge placed too much emphasis on attitude of Council – failure to perform requisite balancing exercise

Local Government Act 1993 (Qld), s514, s901
Local Government (Planning and Environment) Act 1990 (Qld), s2.23(1), s2.23(1)(a), s2.24, s2.24(4), s2.24(5)(a), s2.24(5)(b), s2.24(5)(c)

Gatton Shire Council v Mudie (1999) 103 LGERA 419, considered
Mudie v Gatton Shire Council [1998] QPECR 375, considered
Tynan v Meharg (1998) 101 LGERA 255, followed
Warringah Shire Council v Sedevic (1987) 10 NSWLR 335, followed

COUNSEL: A Vasta QC for the appellant
P J Lyons QC for the respondents

SOLICITORS: Andrew P Abaza for the appellant
King & Company for the first and second respondents

[1] **THE COURT:** The appellant in this case is Mrs Mudie who commenced proceedings in the Planning and Environment Court in April 1997 seeking relief against Gainriver Pty Ltd (a developer of a neighbouring property) and the Gatton Shire Council. The parties will be referred to respectively as Mrs Mudie, Gainriver and the Council.

[2] Both Gainriver and Mrs Mudie owned neighbouring properties with a frontage to Flagstone Creek Road. The relevant area forms part of the eastern escarpment of the Great Dividing Range and contains very steep areas. Their properties were separated by a dedicated unmade road. The dispute between the parties arose in connection with Gainriver's conduct in relation to an application to subdivide its land. Portion of Gainriver's works included constructing (without any authority to do so) a concrete road over portion of the dedicated road (adjacent to Mrs Mudie's land) causing the road level to be raised by 3 metres. The concrete strip was placed upon earth fill with batter banks. This part of the road provided access between Flagstone Creek Road and the main internal subdivisional road.

[3] The present appeal is against the refusal of a judge of the Planning and Environment Court to grant relief sought by Mrs Mudie for the removal of the unauthorised road. The litigation between the present parties has a substantial history and it will be necessary to recount part of it in order to define the issues which arise on the present appeal.

[4] Initially the learned judge conducted a six day hearing and gave judgment on 27 February 1998, substantially in Mrs Mudie's favour, declaring inter alia that Gainriver had committed certain offences under the *Local Government (Planning & Environment) Act* 1990 ("the LGPE Act"), that various requirements of the planning scheme had not been complied with, that two boulder walls had been unlawfully placed on the dedicated road by Gainriver, and that they were a nuisance. However his Honour did not determine all the issues that had been raised between the parties in the application, and adjourned "all other issues between the parties" for further consideration.

[5] Gainriver and the Council then appealed against his Honour's decision. The decision in the Court of Appeal[1], although confirmatory of the unlawfulness of relevant activities of Gainriver, identified a different basis for it. It allowed the appeal, and made the following declarations in substitution for the original declarations.

> "1. Declare that Gainriver Pty Ltd. by constructing a roadway and two boulder walls on the dedicated but unmade road to the east of its land without first obtaining the approval of the Gatton Shire Council pursuant to par 7.3.1(2)(a) of the planning scheme for the Shire of Gatton, has contravened par 7.3.1(2)(a) and has thereby committed an offence under s 2.23(1)(a) of the *Local Government (Planning and Environment)Act*.
>
> 2. Declare that Gainriver Pty Ltd. by completing the construction referred to in declaration 1 without first having plans and specifications for it approved by the Gatton Shire Council pursuant to a subdivisional approval, has contravened par 7.3.1(2)(b) of the planning scheme for the Shire of Gatton and has thereby committed an offence under s 2.23(1)(a) of the *Local Government (Planning and Environment) Act*.
>
> 3. Declare that the construction of two boulder walls on the dedicated road in contravention of pars 7.3.1(2)(a) and 7.3.1(2)(b) constitutes a public nuisance."

It was further ordered that the matter be remitted to the Planning and Environment Court "to consider whether, in the light of these declarations, an order should be made under s 2.24(5)(b)" (of the *LGPE Act*).

Further hearing in March 2000

[6] The matter then came back on before his Honour. The proceedings were of course a continuation of the original proceedings which had not been concluded. The following express findings of fact that in his Honour's original determination remained relevant for the purposes of the further proceedings.

> "(b) The Council approval of 21 December 1994 required the access road to be on Gainriver's land.
>
> (c) Mr Keogh's [Gainriver's engineer's] amended plans, placing the access track on the dedicated road, were not approved by Council. No

---

1 *Gatton Shire Council v Mudie* (1999) 103 LGERA 419

Council officer had authority to change the position of the access track.

(d) Gainriver had no approval to build the access track on the dedicated road.

(e) In building the access track on the dedicated road, Gainriver committed an offence against the *P & E Act*.

(f) The access track, as constructed is steep and dangerous. However, the state of that track is ultimately a matter for Council and not the Court.

(i) Council's apparent approval of 16 October 1996 is void and of no effect, as a geotechnical was not obtained, and also because Condition 16 was never fulfilled;

(o) The present regrettable situation has been caused by the Council's officers. At the hearing, they were determined to justify their actions."[2]

[7] Further material was tendered on Mrs Mudie's behalf, updating the position and complaining that neither the boulder walls nor the roadway had been removed by Gainriver despite her requests in that behalf. It is unnecessary to restate further facts that are set out in the judgment of this Court in *Gatton Shire Council v Mudie*[3]. Mrs Mudie's affidavit further indicated a continuation of ingress of dirt and water onto her property from the loose batters to the roadway, that heavy erosion was occurring on the batters, and that her upper paddock had been consequently inundated with inkweed. Her evidence in the earlier proceedings had described the road access area as a source of ongoing nuisance to her, and she said that it still continued. As noted in paragraph [1] the unauthorised road that had been constructed on the dedicated road area had raised levels at the relevant area by 3 metres. At one particular point where Mrs Mudie's gate opened on to the dedicated road area, that particular access was rendered ineffectual by the bank supporting the road. Mrs Mudie also raised her concern that her privacy was invaded, as users of the road overlooked her property.

[8] In the course of the March hearing it was made clear that all parties agreed that the boulder walls should and would be removed at the cost of Gainriver. However the removal of the unauthorised road, which connected the internal subdivisional road near Flagstone Creek Road, was opposed.

[9] In the Court of Appeal a declaration had been made that the boulder walls constituted a public nuisance. A similar declaration of "public nuisance" could have been made in respect of the construction of the unauthorised roadway, but for reasons which emerge at pp 430-431 of the report of that decision it was not necessary for the Court of Appeal to determine that particular question, and no request was made for such relief in the somewhat disjointed procedure that occurred by way of supplementary submissions. Instead, the making of such a declaration or finding, and the question whether an order for removal of the road should be made was left to the Planning and Environment Court.

[10] In the March hearing, Gainriver relied upon an affidavit sworn by its director, Mr Nikdin, requesting that the road remain in place, and exhibited a document signed by

---

2 (1998) QPECR 375, 378-379

3 *Mudie* fn 1 above.

a Mr Schumacher which Mr Nikdin described as an approval issued by the Gatton Shire Council in respect of his company's application for approval of the road. Questions were then raised concerning whether the Council had power to grant a retrospective approval of this kind and the further question whether Mr Schumacher in any event had the authority of the Council to grant such an application (it may be noted that in subsequent proceedings for judicial review of this "approval", its invalidity was conceded by the Council). In the course of argument before his Honour it became clear that the full Council had not considered what should be done in relation to the road. His Honour expressed a desire to know Council's views on the matter and its response to Gainriver's belated application for approval. In the result, his Honour stated short oral reasons identifying some of the issues that had been brought forward and concluded with the words, "adjourn the appeal so that the attitude of Council may be known and taken into effect."

Final hearing in December 2000

[11] The matter did not come back before his Honour until 9 months later (15 December 2000) when the matter was listed for mention. On this occasion counsel for the Council handed up a draft order to his Honour "to help determine the scope of the hearing" that would be required. In the event, after hearing further submissions and receiving evidence of various resolutions that had been passed in the Council during the interim (showing its desire that the road should remain) his Honour dealt with the outstanding issues by refusing to order that the road be removed. His Honour also made what were, in effect, unopposed orders in relation to the removal of the boulder walls and certain rehabilitation works that were recommended in a report by an engineer (Mr Brameld). The present appeal is against his Honour's decision rejecting Mrs Mudie's application for removal of the road.

Applicable principles

[12] The Court had adequate power to make an order of the kind requested by Mrs Mudie. S 2.24 of the *LGPE Act* contains the following provisions;

> "(4) Where the Court is satisfied that an offence defined in section 2.23(1) has been committed (whether prosecuted or not) or that such an offence will, unless restrained by order of the Court, be committed, it may make such order as it considers appropriate to remedy or restrain that offence.
>
> (5) An order made by the Court under subsection (4) may –
>
> (a) order the defendant to cease any activity that is a contravention of or failure to comply with a provision of a planning scheme; or
>
> (b) order the defendant to do any act or thing required to comply with or to cease a contravention of a provision of a planning scheme, or
>
> (c) specify that the failure to comply constitutes a public nuisance;
>
> and be in such terms as the Court considers appropriate to secure compliance with the planning scheme."

[13] The application of similar statutory powers in New South Wales when work has been performed without necessary planning approval has been considered in *Tynan v*

Meharg[4] and in *Warringah Shire Council v Sedevcic*[5]. The Court's function in determining what is to be done in such cases is to perform a balancing exercise with a view to matters of both private and public interest. It is a discretionary power. Indeed, one of the principal submissions of Mr Lyons QC, who appeared for the Council and Gainriver in this matter, is that the discretion is a broad one and it cannot be shown that his Honour erred in law in arriving at the decision he did. Certain "guidelines for the exercise of discretion" were formulated by Kirby P in *Sedevcic*'s case, and it is enough to refer to pp 339-341 of that case and to pp 259-260 of *Tynan*'s case as useful checklists of points that will often need consideration in such matters. Among potentially relevant matters is the aspect of discouraging potential developers from thinking that planning requirements may lightly be disobeyed.

> "Also relevant to the discretion is the 'orderly enforcement' of a 'public duty' to comply with the requirements of planning laws: see *Sedevcic* (at 339-340; 365-366). Another way of putting this is that there is a public interest in upholding the law and seeing that it is obeyed. As Kirby P said in *Sedevcic* (at 340; 365), Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy."[6]

Some relevant considerations

[14] In the present matter the following would seem to have been relevant considerations:

- Gainriver's contraventions were not merely technical – they were serious contraventions and were a means of private gain. This included the obtaining of two extra blocks for sale.

- The cost of removal in reinstatement to natural surface level was surprisingly small – about $35,000.

- The road contained slopes exceeding recognised requirements of public safety; the only solution suggested by the Council was its proposal to erect warning signs.

- No evidence was produced that suggested any satisfactory intermediate remedy for Mrs Mudie short of removal of the unauthorised road so that the former levels would be restored.

- The placement and construction of this material was substantially different from the original proposal whereunder access was to be wholly on the lands of Gainriver.

- No evidence was produced to show whether alternative arrangements could be made between Gainriver and the Council to achieve a substitute connection to the subdivisional road which presently connects with the dedicated road at its elevated height, in a way that would eliminate the nuisance to Mrs Mudie, or that

---

4 (1998) 101 LGERA 255.
5 (1987) 10 NSWLR 335.
6 Per Stein J in *Tynan* above at 259 - 260

it would be uneconomic to make some alternative arrangement after removal of the nuisance.

- A different access to the subdivision had earlier been sought by Gainriver by means of "the bush track" and from Upper Flagstone Creek Road. Although it would no doubt be inconvenient and expensive for Gainriver if it was now forced to re-subdivide using access other than the dedicated road, such an option was by no means ruled out.

- Mrs Mudie was unlawfully deprived of access which she had formerly enjoyed to the dedicated road.

- There was uncontradicted evidence of ongoing ingress of dirt and other problems occasioned by the batter banks onto Mrs Mudie's property.

[15] The new material containing the views of the Council was presented in the form of the minutes of Council meetings of 2 May 2000, 20 September 2000 and 15 November 2000. The effect of a series of motions and decisions was "that the Planning and Environment Court be advised that Council wishes the works in the road reserved to remain", subject to some limited modifications and additions, largely those suggested in a report by Roger Brameld Consulting Pty Ltd. Inter alia the Council desired speed and hazard signs to be erected "in strategic positions". Mrs Mudie's interests were acknowledged to the extent "that if any part of this road encroaches onto Dr Mudie's property, that portion should be removed".

Submissions on present appeal

[16] The basic submission by Mr Vasta QC on behalf of Mrs Mudie is that his Honour's determination was preoccupied with or overwhelmed by the Council's views, and that his Honour failed to perform the requisite balancing exercise. As the following discussion will reveal, this submission appears to be well founded.

[17] The Local Council is a road making authority for the relevant area within its boundaries. Section 901 of the *Local Government Act* 1993 gives local governments the control of all roads in its area and that control includes the capacity to construct, maintain and improve roads. The opinion (as distinct from the desire) of such a body would therefore be a relevant matter that a court might take into account in an exercise of the present kind. At the same time, in the present circumstances it seems obvious that considerable circumspection would be required before acceding to the "wishes" of a council which was a party to pending litigation and which might be placed in a position of difficulty, even of having to spend money, if the existing road were removed and if the developer failed to pay the costs of consequential rectifications. In the present matter the Council was plainly a party with an interest. Furthermore, his Honour had already noted in his original Judgment the determination of the Council's officers to justify their actions. A similar attitude seems to have continued after the decision of the Court of Appeal in the production of what seems to have been an invalid, retrospective and unauthorised consent for the unauthorised road. It was possible of course that a decision of the Council might override or rise above the views of its officers, but in the event, this does not seem to have happened. In the present circumstances, considerable caution was required

before placing weight upon the opinion, let alone the wishes of the Council involved. The determination of what should be done to remedy Mrs Mudie's complaint was for his Honour, not the Council.

[18] In the course of the original Judgment delivered by his Honour in February 1998, his Honour found that the access track, as constructed, was steep and dangerous. His Honour then commented "However, the state of that track is ultimately a matter for Council and not the Court." When the matter was further heard in March 2000, after the appeal to this Court, his Honour noted that in view of the "neutral attitude" of the Council about the boulder walls and because the Court of Appeal had declared them to constitute a public nuisance, there was no difficulty in deciding that they should be removed. His Honour then turned to the removal of the road which he described as being "in a somewhat different category", noting that no order had been made about it in the original Judgment and that the Court of Appeal had referred it back to him. His Honour then repeated and perhaps extended the statement quoted above from the original Judgment and observed that "ultimately the continuing existence of the road is a matter for Council and not the Court." His Honour then adjourned the matter so that the attitude of the Council might be known and taken into account.

[19] When the matter was finally brought back before his Honour upon a mention day in December 2000, his Honour indicated that "The essential thing is it was up to the Council as a whole to decide if they wanted this road to be there or not…they have now decided they want it haven't they?" A number of comments on this subject ensued. Such comments were made in the course of legal argument and must be regarded as arguendo comments, or merely provisional attitudes which might be reversed or varied. In the present matter some of those comments are of some assistance in gleaning his Honour's reasoning because they are repeatedly and strongly made and demonstrate the basis upon which the briefly expressed final decision was made. They were followed by short oral reasons for the decision, presumably because the judicial attitude towards what was clearly regarded as the central point had already been made clear.

[20] During the proceedings the following exchanges took place between his Honour and Mr Abaza, the solicitor who appeared for Mrs Mudie:

> "His Honour: Now, Mr Abaza, I have to say Council seems to have expressed its view now in the formal way that the road should remain…which was really my principal concern. It looks to me as if that's now been disposed of, that issue, because the Council has expressed its view about that.
>
> Mr Abaza: Well, we seek to persuade your Honour to the contrary.
>
> His Honour: But how could you possibly persuade me? I'm not going to give you more time to do something that is obviously destined to fail."

[21] With reference to the three Council resolutions, his Honour observed:

> "[E]ach one though contains a resolution that the road should remain, doesn't it?..that seems to me to be the important feature."

[22] Later when the question of possible adjournment was raised, his Honour stated:

> "What I've in mind just saying to Mr Abaza that I just do not see how you can proceed further in your opposition to this roadway; I do not see it. I don't see how you can do it. The council has made clear the very thing that this Court needed to know, that is, it wishes to keep the road rather than having it removed. It's been absolutely clear. I just do not see how you can challenge that here.
>
> If it be the case that for some reason the council has acted in some way ineffectively or improperly my immediate impression is I just don't see how this Court could deal with – even attempt to deal with that. And I wouldn't like to think there's any prospect of demonstrating it either, because these minutes seem to record meetings in which there were formal resolutions carried on a number of occasions to the effect they want to keep the road.
>
> Though they did debate the final form of the conditions. And then we see there's a mistake in it. But that mistake doesn't affect us here today. I just don't see why it's in anyone's interest to prolong the matter any further, frankly, Mr Abaza. Unless you just tell me in a way that I can understand that there's something this Court can and should do."

[23] Mr Abaza then submitted that the Court should proceed in accordance with the findings of fact made at first instance and the decision of the Court of Appeal and go on to consider those matters under a section of the *LGPE Act* (which would seem to have been an intended reference to s 2.24(5)). He submitted that the public nuisance factor was relevant and referred to decisions including *Sedevcic*. He referred to the low cost of removal and submitted that it should occur at the time of removal of the boulder walls. There should be reinstatement to the natural surface level, leaving it to the Council, if it wished, to have a road accessing the subdivision to be put in where it originally ought to have been, namely on the old bush track. He also invited his Honour to consider "what the Council would think now when facing a difficult situation where purportedly an approval has been given quite unlawfully by the Council officers", submitting that in the light of probable complaints by the developer "they would be running for cover". At the end of Mr Abaza's submissions, his Honour referred to the draft that had been presented and stated:

> "The matter was adjourned so that the attitude of the Council might be now taken into account. Well, Mr Abaza, I think it's the end of the road for Mrs Mudie, frankly.
>
> I just do not see that the time is going to advantage her or the Court. The Court has now got the attitude of the Council. It's acted on the basis of an engineer's report which says that the road is very steep and can be considered dangerous but it's manageable.
>
> That was the very thing I said was important, the attitude of the Council, back in my own judgment. Why shouldn't I just bring it to an end. I don't see that anything you do on behalf of your client or anything else is going to make any difference."

[24] The short reasons for judgment that were then delivered suggest that his Honour doubted that he had the power to act contrary to the view expressed in the Council's resolutions. He repeated his statement in the original judgment that it was "very much a matter for Council", adding "That is to say that the road was not such that the Court could as a matter of law declare that it should be removed, rather, that the attitude of Council was an important factor in reaching that decision." Further observations include "The important thing is that it now appears that the Council has on more than one occasion expressed a view that the work should remain" and, "Mr Abaza wished to say that the Council's resolutions might be invalid or improper. However, if they are (and there is no demonstrated reason at all to think that they are), then it is very doubtful that this Court would have any power to deal with those matters."

[25] Mr Lyons, on behalf of Gainriver and the Council, sought to place reliance upon the above somewhat ambiguous reference to the attitude of Council as being "an important factor" as indicating that his Honour recognised that he had a discretion to exercise in relation to the removal of the road. He referred to the fact that there had been no objection in March 2000 to an adjournment to enable the Council's attitude to be ascertained. Mr Lyons, rightly in our view, submitted that the view of the Council was a relevant matter, although in our view it was not a factor that could be regarded as determinative or even of significant weight in the present circumstances. Mr Lyons pointed out that it was the function of such councils to control roads in their areas with capacity to take all necessary steps for their maintenance and the regulation of their use.[7] However, it was not and could not rightly have been submitted that Council could control the exercise of the discretion of the Court in an issue of the present kind, or that its consent would be necessary before the Court could remove the earth and concrete that Gainriver had deposited on a dedicated road without permission. In the light of the original findings and of the approach taken in the Court of Appeal, the unauthorised road should have been regarded as a public nuisance. No defence of statutory authorisation[8] or any other basis for a contrary view was suggested.

[26] Mr Lyons also referred to evidence suggesting that the impact upon Mrs Mudie's activities was not significant and that further access along the dedicated road (beyond the area of the unauthorised road) was in any event impeded by a dam that she sometimes uses. Mr Lyons also referred to evidence that Mrs Mudie had moved her gate in order to reduce the effect of the nuisance. It was submitted that his Honour looked at a broad range of matters in reaching his decision. However, the reasons for judgment do not suggest that such matters were taken into account or that a balancing exercise of the kind recognised as necessary in *Sedevcic* and *Tynan* was performed. It seems perfectly clear that his Honour regarded the views of the Council as of overwhelming significance. Such a view was contrary to the proper exercise of the power and constitutes an error of law.

Determination of issue

[27] The question remains whether this Court should determine the issue or remit it for further consideration. For the reasons which have already been stated we consider

---

7 *Local Government Act* 1993 s 901.

8 Halsbury's Laws of England 4th ed Vol 34 para 375.

that the road as constructed was a public nuisance, that Mrs Mudie demonstrated a continuing disadvantage from its presence, and that no sufficient reason of either a private or public nature exists to decline to make an order against Gainriver for its removal. A number of the more significant considerations that arise in this matter have been set out in para [14] above. The estimated cost of removal is relatively modest, and it is undesirable that this expensive forensic exercise be protracted further than is necessary. Quite apart from further proceedings in relation to the present claim, the refusal of an order for removal would almost certainly lead to further litigation for damages for trespass and nuisance, and possibly for compensation under s 514 of the *Local Government Act*. We consider that his Honour erred in failing to order the removal of the unauthorised materials, and that this court should now make such an order.

Orders

[28] The appeal is allowed. The respondents are ordered to pay to the appellant costs of the appeal. The order below is varied:

(a) by adding the following:

> "1. That Gainriver Pty Ltd cause the construction of the dedicated road to the east of the land of Gainriver Pty Ltd situated at Flagstone Creek Road to be removed and the level of the road be restored to natural surface level."

and

(b) by renumbering the remaining paragraphs 2, 3 and 4 respectively.