

TRANSCRIPT OF PROCEEDINGS

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PLANNING AND ENVIRONMENT P & E Appeal No 113 of  
COURT 1992

JUDGE ROW

HERVEY BAY PROJECTS Appellant

and

HERVEY BAY CITY COUNCIL Respondent

and

MARCELHURST PTY LTD First Respondent by Election

and

FENTWAY PTY LTD Second Respondent by Election

P & E Appeal No 90 of 1992

MARCELHURST PTY LTD Appellant

and

HERVEY BAY CITY COUNCIL Respondent

and

HERVEY BAY PROJECTS Respondent by election

P & E Appeal No 93 of 1992

FENTWAY PTY LTD Appellant

and

HERVEY BAY CITY COUNCIL Respondent

and

HERVEY BAY PROJECTS

Respondent by Election

BRISBANE

..DATE 04/12/92

JUDGMENT

HIS HONOUR: On all the evidence, Hervey Bay Projects has established that the combined application should be approved subject to conditions. The appeal by Marcelhurst, P & E Appeal No 90 of 1992, is dismissed. The appeal by Fentway, P & E Appeal No 93 of 1992, is dismissed. The appeal by Hervey Bay Projects is upheld. I adjourn the further hearing of P & E Appeal No 113 of 1992 to 4 p.m., 11 December, 1992.

I publish my reasons.

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IN THE PLANNING & ENVIRONMENT  
COURT OF QUEENSLAND

P. & E. Appeal No.  
113 of 1992

MARYBOROUGH: 28-30 September, 1992

BETWEEN:

HERVEY BAY PROJECTS

Appellant

AND:

HERVEY BAY CITY COUNCIL

Respondent

AND:

MARCELHURST PTY. LTD.

First Respondent by Election

AND:

FENTWAY PTY. LTD.

Second Respondent by Election

AND IN

P. & E. Appeal No. 90 of 1992

BETWEEN:

MARCELMURST PTY. LTD.

Appellant

AND:

HERVEY BAY CITY COUNCIL

Respondent

AND:

HERVEY BAY PROJECTS

Respondent by Election

AND IN

P. & E. Appeal No. 93 of 1992

BETWEEN:

FENTWAY PTY. LTD.

Appellant

AND:

HERVEY BAY CITY COUNCIL

Respondent

AND:

HERVEY BAY PROJECTS

Respondent by Election

BRISBANE: 1; 2; 8-16 October and 9-10 November, 1992

REASONS FOR JUDGMENT - ROW D.C.J. - 4TH DECEMBER, 1992 -  
BRISBANE

The above appeals which were ordered to be heard together relate to a combined application made by Hervey Bay Projects to the respondent seeking the rezoning of land located at Boat Harbour Drive, Central Avenue, Pialba described as Lot 4 and part of Lot 5, RP835505, Parish of Urangan, County of March by excluding the said land partly from a nominated Special Facilities Zone and partly from the Rural "B" Zone and including the land so excluded in the Business Zone and the consent of the respondent to use the subject land for a proposed development including a major shopping centre, indoor

entertainment and coach terminal. The combined application was lodged with the respondent under cover of a letter dated 17th December, 1991 from M.C. Challoner & Associates Pty. Ltd, Consultant Town Planners. A shopping centre is within the definition of shop under the relevant planning scheme. Marcelhurst Pty. Ltd. ("Marcelhurst") and Fentway Pty. Ltd. ("Fentway") objected to the said combined application.

The respondent approved, subject to conditions, the said combined application and notified its decision by letter dated 26th March, 1992. Hervey Bay Projects being dissatisfied with certain of the conditions of the approval appealed to the Court consequent thereon seeking a variation or amendment of those conditions (P. & E. Appeal No. 113 of 1992).

Marcelhurst objected to the combined application and appealed consequent upon the decision approving the said combined application. It sought orders that the said combined application be refused and that its appeal be upheld (P. & E. Appeal No. 90 of 1992). Hervey Bay Projects elected to become a respondent to that appeal.

Fentway objected to the combined application. Consequent upon the notification of the decision of the respondent to approve, subject to conditions, the said combined application it appealed to the Court seeking orders that the combined application be refused and that its appeal be upheld (P. & E. Appeal No. 93 of 1992). Hervey Bay Projects elected to become the respondent to that appeal.

On the appeal coming on for hearing Senior Counsel for Hervey Bay Projects and Counsel for the respondent Council advised the Court that the issues as to conditions in P. & E. Appeal No. 113 of 1992 had been resolved between their respective clients and that the Council agreed to an Order by Consent to amend certain conditions (Exhibit 18). Fentway raised objections to some of the proposed amendments.

Hervey Bay Projects proposes to develop the subject land which has an area of 9.05 hectares for the purpose

of a sub-regional shopping centre having a total gross floor area of approximately 15,450m<sup>2</sup> comprising a discount department store; a supermarket; specialty shops and associated on site car parking having 959 spaces. Marcelhurst has a conditional contract over land opposite the subject site on the other side of Boat Harbour Drive having an area of 10.94 hectares which is zoned Business (the Coogal site). Consents to use the Coogal site which were made in 1986 and 1989 for the purposes of a shopping centre and other uses were revoked by the Court on the 21st day of July, 1992. On or about 22nd September, 1992 an application was made by Coogal Developments Pty. Ltd. ("Coogal") for consent to use the Coogal site for the purposes of a major shopping centre. No decision has been made by the respondent in relation to that application. Coogal proposes to develop that land for the purpose of a major shopping centre having a discount department store; supermarket; specialty shops and child care centre in Stage I having an area of 9,558m<sup>2</sup>. Stage II is proposed to increase the floor area by an additional 9,492m<sup>2</sup> with Stage III providing additional development having an area of 3,520m<sup>2</sup>.

Fentway was up to 31st August, 1992 the owner of land situated at the corner of Main Street and Torquay Road, Pialba on which is developed Pialba Place, a shopping centre comprising a Coles Extra Supermarket and 32 specialty shops having a gross floor area of 6,959m<sup>2</sup>. The land has an area of 2.192 hectares. That development is separated from a shopping development known as Bay Plaza which is situated on Torquay Road and separated from Pialba Place by Hunter Street. The Bay Plaza has as its major tenant a Woolworths Supermarket and 10 speciality shops having a gross floor area of 3,650m<sup>2</sup>. By a Contract of Sale dated 30th July, 1992 Patterdale Pty. Ltd. ("Patterdale") purchased the Pialba Place shopping centre. The Contract of Sale was settled on 31st August, 1992. The principal of Patterdale is Geza Seidl. Since acquisition of the Pialba Place shopping centre Mr. Seidl has been negotiating with major retailers and other land owners and has prepared a plan for a proposed redevelopment of the Pialba Place and Bay Central shopping centres to incorporate a discount department

store and additional retail facilities. No application has been lodged with the respondent in relation thereto. A proposal plan (Exhibit 44A) is indicative of the preliminary nature of the proposed redevelopment scheme.

Under the relevant Town Planning Scheme gazetted on 12th May, 1979 about two-thirds of the subject land is included within the Rural "B" Zone and the balance in the Special Facilities (Shopping Centre, Indoor Entertainment, Transport Terminal. Generally in accordance with Plan of Development No. PD3) Zone. This zoning permits, inter alia, for the erection of a shopping development with a gross floor area of 3,920m<sup>2</sup>. That part of the subject land was rezoned from Rural "B" to its present zone on 20th June, 1991. That land being Lot 4 on RP835505 contains an area of 3.318 hectares. No objections to that rezoning application were lodged, within time, with the Respondent. Other rezonings in the immediate area on the southern side of Boat Harbour Drive west of the railway reserve as indicated on Figure 3A Exhibit 58 include Special Facilities (Retail Warehouse, Consulting Rooms and Commercial Premises); (Service Station); (Fast Food Outlets); (Tavern); (Retail Warehouse) and (Exhaust Repair and Replacement Centre). The Special Facilities Zone on the southern side of Boat Harbour Drive east of the railway reserve to Main Street is nominated as Home Furnishing, Warehouse, Building Supplies, Service Station, Tyre and Accessory Merchant. That zoning was gazetted on 4th August, 1988. The various Special Facilities Zones are for a variety of commercial and/or retail purposes. The Rural "B" Zone land of the rezoning component of the subject combined application has an area of 5.732 hectares.

The combined application as lodged with the respondent seeks the establishment of a Target Discount Department Store and a Bi-Lo Supermarket as the major tenants. The proposed Target Discount Department Store will have a gross floor area of approximately 5,450m<sup>2</sup> and the Bi-Lo Supermarket 2,000m<sup>2</sup>. Both proposed major tenants, namely Target and Bi-Lo have obtained "Board of Directors' approval" for their participation in the proposed development. Each is eager to proceed. A number

of other expressions of interest have been received from a range of potential tenants. The evidence of Mr. Kelly, Construction Manager for Bi-Lo and Mr. Zilm, Queensland Regional Manager, Target Australia Pty. Ltd. confirm the intentions of their respective companies. The proposed indoor entertainment facility and coach terminal will serve the needs of the city as a whole. The location of the coach terminal is perceived to be suitably located in that bus traffic would be excluded from the somewhat traffic congested existing business area of Pialba.

In the Business Zone within the relevant Planning Scheme shops exceeding 700m<sup>2</sup> are purposes for which buildings or other structures may be erected or used for which land may be used only with the consent of the respondent under and pursuant to Column IV of the Table of Zones. "Shop" is defined in the Planning Scheme to include any land, building or other structure or any part thereof used or intended for use for the purpose of or displaying or offering goods for sale by retail. The term does not include a catering establishment, hotel, junk yard, pet shop or any type of industry as defined and listed herein. There is no definition of shopping centre or major shopping centre. By virtue of the size of the proposal and the area of land the proposed development is under the provisions of the Planning & Environment Regulations a major shopping development being situated on land greater than 2.5 hectares in area and consisting of a building or structure greater than 6,000m<sup>2</sup> in area. A major shopping development is "designated development" within the provisions of the Planning & Environment Act being one of the designated developments included in the relevant schedule made under and pursuant to the Local Government (Planning & Environment) Regulations.

The appeals are to be determined under the Planning & Environment Act. The onus is on Hervey Bay Projects to prove that the combined application should be approved.

The subject land lies to the south of Boat Harbour Drive with a frontage of approximately 20 metres to Boat Harbour Drive and 200 metres approximately to a proposed extension of Central Avenue. Boat Harbour Drive is under

the control the Department of Transport and forms part of the Maryborough-Urangan route. It is presently the main access to the urban area of the City of Hervey Bay from the west. It is designated by the respondent as a primary traffic route. Near the vicinity of the proposal it has a reserve width of approximately 30 metres. In 1991 Boat Harbour Drive was upgrade between the railway crossing to the east and its intersection with Beach Road to a four lane standard with central median. Associated with this upgrading roundabouts were constructed at its junction with Central Avenue and Beach Road. A roundabout was already in existence at the intersection with Main Street to the west of the railway crossing. The roundabouts at Beach Road/Boat Harbour Drive and Central Avenue/Boat Harbour Drive have two circulating lanes and that at Main Street/Boat Harbour Drive is a single lane roundabout. A 70 kilometres per hour speed limit is in force past the subject land and changes to 60 kilometres per hour immediately to the east. The crossing over the railway which is approximately 100 metres to the east of the subject land is controlled by warning lights.

The subject land forms part of a development concept area associated with what is called the Bay Central Project. There have been a number of developments carried out to date within the project area which comprise McDonalds and the Pizza Hut (which lie between the subject land and Boat Harbour Drive and gain access by an easement across part of the land). Further to the west is Lot 3 which is presently being development for a tavern. Within the concept development area a 19 lot commercial subdivision was completed in July, 1991. A service station has been constructed by Caltex on the corner of Boat Harbour Drive and Beach Road and a retail showroom is erected in Beach Road. Running along the eastern boundary of the subject land is the Pialba-Urangan railway. A single track occupies the railway reserve. The line is no longer used by passenger services but is serviced by a freight train once a week. Beyond the railway line lying between it and Main Street to the south of Boat Harbour Drive there is an area of commercial development comprising service station, tyre depot, electrical goods retail outlet, building and



plumber supply depot and timber yard. The area beyond Main Street to the south of Boat Harbour Drive land is utilised for the purpose of sugar cane growing. To the north on the opposite side of Boat Harbour Drive the area between the railway line and unformed O'Rooke Street including the Coogal site appears to be used only for grazing. The Coogal site which is zoned Business is vacant. Land to the east is undeveloped beyond which is the commercial subdivision above referred to. Adjoining land to the south comprises undeveloped land within the basic concept area and a cane farm with the Hervey Bay Senior College being further removed to the south.

The relevant Planning Scheme includes a Statement of Intent. The Planning Scheme does not incorporate a Strategic Plan but there is a Development Control Plan. The subject land is located within the D.C.P.1 area. The Intent of Zones was introduced into the Planning Scheme in October, 1983. The Business Zone comprises those areas of the town which the Council consider are suitable for commercial and retail uses to adequately serve the needs of the total population. The Business Zone has provision through the Council's consent to grant approval for shops, above 700m<sup>2</sup>, professional offices and multiple units. Approvals to multiple units will only be in accordance with the terms and provisions of a Development Control Plan formulated to direct the placement of multiple units. The emphasis of the Business Zone will be on trading of goods and services rather than the provision of residential accommodation. As such, good access to zoned areas is considered a necessity as well as suitable off-street parking. The Special Facilities Zone is intended to be applied to uses which do not fall within the intent of other zones. In order that such uses may be easily identified and their impact upon adjacent zones may be readily appreciated, the particular use will be printed on the zoning map over the land on which the use is being carried on. It will be necessary to lodge a plan with the Council indicating the manner in which the site will be developed.

Shops are a prohibited use in the Rural "B" Zone. In the Special Facilities Zone the purpose for which

buildings may be erected or used or for which land may be used without the consent of the Council are public recreation and the use indicated by purple lettering on the Scheme Map. The relevant lettering on the Scheme Map for Lot 4 is "Shopping Centre, Indoor Entertainment, Transport Terminal". Shops are prohibited in the Special Facilities Zone unless the use is so indicated on the Scheme Map. Shops where the gross floor exceeds 700m<sup>2</sup> is a permissible use in the Business Zone.

Under Clause 3 of Part II Division 1 of the Planning Scheme where any building or other structure or any land is used or is intended to be used for more than one purpose it shall be deemed, for the purpose of the Town Planning Scheme, to be used for and intended for use for each of those purposes. In the Business Zone catering shops; commercial premises; consulting rooms; general stores and shops not exceeding 700m<sup>2</sup> are purpose for which buildings or other structures may be erected or used or for which land may be used without the consent of the Council under and pursuant to Column III of the Table of Zones.

The subject land is included in a designated uncommitted area within the provisions of the Development Control Plan 1 which was gazetted in March, 1987. The intent of the Development Control Plan is to define those areas within which Council will support rezoning to permit specified uses and to control the height of all types of building with the aim of preserving the visual and urban amenity of areas as they are developed for residential, commercial and business uses. The Development Control Plan map indicates areas within which Council will support rezoning from an existing zone to a new zone which would permit uses as specified in Development Control Plans. One of these areas is:-

"(e) Uncommitted Areas

Areas within which Council has not determined the nature of future development and within which Council will consider a rezoning application to any new zone on the merit of the proposal, having regard to the principal objectives and integrity of the plan."

(As inserted by Order in Council dated 9th June, 1988.)

Proposed amendments to Development Control Plan 1 which virtually introduce a new Development Control Plan were before the respondent in April, 1992 and were referred to the Department of Housing, Local Government and Planning prior to the document being placed on public exhibition. By letter dated 2nd September, 1992 (Exhibit 56) the Department of Housing, Local Government and Planning wrote to the Chief Executive Officer of the respondent advising as to its having conducted a review of the proposed amendments to DCP1 (Exhibit 55). The letter set out a number of comments which broadly categorise the concerns held by the Department. In broad terms it may be said that the document as forwarded to the Department was one on which the Department required further advice and a considerable amount of information prior to a further review of the draft DCP1. The draft DCP1 has not been placed on public exhibition nor has it been adopted by the respondent as policy. Whether the proposed amendment of DCP1 is based on legitimate town planning considerations is of some doubt having regard to the letter from the Department (Exhibit 56). In addition to the concerns expressed therein the document in itself has a number of inconsistencies which in themselves would create some problems in relation to the application of the proposed amendment to the combined application. In its terms the proposed amendment does not accord with existing planning strategies and philosophies of the respondent as exhibited in the existing DCP1, although it may be said that in relation to the subject land it confirms generally with the rezoning which were made in 1991. In accepting the various concerns expressed in Exhibit 56 and the fact that resolution of those concerns have not been achieved the proposed DCP1 which has been submitted for preliminary review to the Department should in the circumstances hereof not be given any weight on the hearing of the appeal.

The consent component of the combined application in relation to the proposed development was indicative of a retail component having a gross area of 12,150m<sup>2</sup> and an

area of approximately 2,300m<sup>2</sup> of service areas. It was proposed that the development be enclosed and air conditioned. The total gross floor area of the proposed centre is approximately 14,450m<sup>2</sup>. The indoor entertainment component is proposed to remain in the same position in which it is shown on Plan of Development No. PD3. The coach terminal is proposed to be reallocated from the position shown on Plan of Development No. PD3 to a position in proximity to the McDonalds, Pizza Hut and indoor entertainment.

Consequent upon the advertisement of the combined application 71 objections were received by the respondent. The text of 66 of the objections is identical. No objections were received from any persons residing in the vicinity. The respondent referred the combined application to consultants for advice. The matters were reported on by Mrs. Kerr, an experienced Town Planning Consultant. It was recommended on the 10th March, 1992 by the consultants as follows:-

"Council resolves for the purpose of advising the applicant and objectors that it refuses a combined application for rezoning and consent for Lot 4 and part of Lot 5 on RP835505 for the following reasons:

- (1) there is sufficient land zoned and approved for shopping centre purposes in the subject locality to cater for present and future needs,
- (2) the rezoning if approved would adversely impact on the balance of zones in the Planning Scheme,
- (3) the combined application is premature in the light of available land zoned Business,
- (4) the proposal involved would lead to the fragmentation of retailing in Pialba which is contrary to the desirable planning for the area."

At that time the Coogal site had existing lawful consents to use that land for the purposes of a shopping centre having a gross floor area of 15,717m<sup>2</sup> and other uses. Mrs. Kerr was of the opinion that the Coogal site from a town planning point of view had certain advantages over the subject land. In her opinion the subject

combined application could not be supported: Principally the considerations which led to this view had been the acknowledgment of sufficient land already zoned for business purposes and the adverse impact of the proposed rezoning and development on the future development (of the) business centre at Pialba.

The City Planner on 11th March, 1992 reported to the respondent as follows:

"I tender herewith the consultant's report which in my opinion is a proper and relevant analysis of the issues involved. The recommendation of the consultant is submitted for Council's consideration and decision. ..."

At the request of the Mayor the City Planner prepared a set of conditions which in his opinion would be appropriate should the respondent consider for whatever reason it deems appropriate that the combined application ought to be approved. On or about 25th March, 1992 the respondent resolved to approve, subject to conditions, the combined application for rezoning and consent.

The disputed issues in the appeal were identified generally as those set out in the appeals and Exhibit 117. Those issues include need, in the planning sense; balance of zones; economic impact; traffic and the effect of the draft Development Control Plan.

The scheme of the Planning and Environment Act makes provision for a combined application whereby a person may make application to a Local Authority for approval at the one time in respect of two or more of the applications as identified in s.4.11(1)(a) to (e). The provisions of s.4.11(2) are indicative of the requirement that a separate application is to be made to the Local Authority but the component parts are to be identified. On a consideration of the combined application the provisions of the Planning and Environment Act preserve the separate character of the component parts. Section 4.11(3). There is no provision within s.4.11 comparable to s.4.4(5) or 4.13(5) of the Act. Under s.4.11 (7) where a combined application includes a component referred to in paragraph

(a) and (b) in sub-s. 1 and a Local Authority refuses to approve that component in whole or in part and no appeal has been instituted by the applicant pursuant to s.7.1 those other components of the combined application which were dependent upon the refused components and which cannot otherwise be lawfully established are to be taken to have been also refused. A rezoning application is within the provisions of s.4.11(1)(a) or (b). Without the rezoning of the subject land to Business the proposed development would be a purpose for which buildings or other structures may not be erected or used or which land may not be used in both the Rural "B" Zone and in the nominated Special Facilities Zone being within Column V of the relevant Tables of Zone.

In assessing the rezoning component of the combined application each of the matters set out in s.4.4(3) of the Act, to the extent they are relevant to the application, are to be considered. In further assessing the consent component of the combined application the provisions of s.4.13 are to be considered. Pursuant to s.4.4(5a) and s.4.13(5a) the Local Authority must refuse to approve the relevant component of the combined application if the application conflicts with any relevant strategic plan or development control plan and there are not sufficient planning grounds to justify approving the application despite the conflict.

Submissions were made to the Court in relation to the issue as to whether the combined application and in particular the rezoning component thereof was in conflict with DCP1. The provisions of DCP1 have little if any relevance to the rezoning of the subject land other than that as the land is within an uncommitted area as shown on the DCP map the provisions of the DCP1 are indicative that within such areas the respondent shall consider a rezoning application to any new zone on the merit of the proposal having regard to the principal objectives and integrity of the plan. Whilst it cannot be said that the proposal that seeks rezoning on its merits is in conflict with DCP1 it is further difficult to say that the proposal in relation to the rezoning component complies in any realistic sense with the provisions of DCP1. I am

satisfied that the provisions of DCP1 offer little or no guidance in relation to a decision relative to the application for the rezoning of the subject land. The matter was fairly put by Mr. Challoner, an experienced town planning consultant, who adopted the view that none of the nine objectives in DCP1 supported the proposal and that they were generally irrelevant or inapplicable. At the best it may be said that the rezoning component of the combined application is neither consistent with nor inconsistent with any of the particular provisions of DCP1 because it provides no relevant guidance on the subject application.

Under s.4.4(3) when considering an application to amend a planning scheme the Local Authority is to assess each of the matters therein stated to the extent that they are relevant to the application. The issue of need in a town planning sense, is referred to within the matters listed in sub-clause (b) where it is incorporated with the matter of balance of zones. The provisions of sub-paragraph (1) are indicative that the list of enumerated matters is not to be regarded as exhaustive. Under the provisions of the superseded legislation the Local Government Court had held that the issue of need was a relative consideration in a rezoning application. If need, in the town planning sense, is not incorporated within sub-clause (b) clearly it is a relevant consideration and is a matter to be considered under the provisions of sub-clause (1).

The substantive issues in relation to the proposed rezoning of the subject site in relation to traffic issues concerned whether the efficiency of the existing road network and/or the orderly development of the existing zoned land would be prejudiced. The proposed development provides for access from Boat Harbour Drive and at two points from the proposed extension of Central Avenue which is to extend along the major part of the western boundary of the subject land. Boat Harbour Drive is designated by the Council as a primary traffic route and is under the control of the Department of Transport. Boat Harbour Drive was considerably upgraded in the vicinity of the subject land in 1991 with the

construction of a four lane carriageway with a central median and roundabouts at certain intersections. Evidence was led from a number of experienced consultant traffic engineers on issues associated with what effects traffic generated by the proposed development was likely to have on the existing road system. Whilst there were points of disagreement between the various experts, I am satisfied that there is no substantial disagreement in relation to existing traffic flows, development generation rates and distribution of traffic from the proposed development. It was agreed by Mr. Eppell and Mr. Brameld that assuming there was no major shopping development on the Coogal site the proposal would not detrimentally affect the efficient operation of the roundabouts at Boat Harbour Drive/Beach Road and at Boat Harbour Drive/Central Avenue to an unacceptable degree. The disagreement generally related to the roundabout at Boat Harbour Drive/Main Street. Undoubtedly the difference in the methodology adopted would produce variances such as were exhibited in the evidence. The evidence of Mr. Holland demonstrates that in his view upgrading of the roundabout at the intersection of Boat Harbour Drive and Main Street should be carried out before the proposed shopping centre opens. It was further his opinion that the road reserve for Boat Harbour Drive should be widened by two metres. Acknowledging the differences that exist in relation to the evidence given by the various traffic consultants who gave evidence on the hearing of the appeal it is of more significance in assessing traffic considerations that Boat Harbour Drive is under the control of the Department of Transport. Mr. Duldig, a senior officer of the Department gave evidence at the hearing of the appeal. In addition to that evidence the Court has before it the fact that the Department considered the proposal. By letter dated 23rd September 1992 (Exhibit 68) to the solicitors for Hervey Bay Projects relative to an inquiry by letter as to the requirements of the Department in relation to the proposal the Department advised as follows:

"In summary Queensland Transport considers that the work undertaken by the developer on Boat Harbour Drive and the developer's undertaking to upgrade the Central Avenue intersection if required at a future date,



adequately provides for access to the subject property."

The reference in Exhibit 68 to the provision of an undertaking by the developer to further upgrade the Central Avenue/Boat Harbour Drive intersection should the intersection prove inadequate to handle traffic movements prior to the year 2000 is incorrect in that the applicant notwithstanding a request of some months standing had not provided the written undertaking. Any earlier correspondence between the Department, Hervey Bay Projects and the respondent has to be read in light of the most recent correspondence and expression of views as set out in Exhibit 68. This evidence which I have no hesitation in accepting establishes that the Department has intentions to upgrade the roundabout at Boat Harbour Drive/Mains Road. Mr. Duldig is unable to say whether it would in fact be so upgraded prior to the opening of the proposed development if the combined application be approved. Mr. Duldig acknowledged that it was desirable but not necessary to upgrade that roundabout before the shopping centre opens. Mr. Eppell worked on the assumption that the roundabout would be upgraded before the shopping centre opens. Mr. Holland was of the view that the upgrading of the intersection to a full two lane roundabout is required at or prior to the commencement of trading of the development. Mr. Brameld was of the view that the proposed development would cause the capacity of the Boat Harbour Drive/Main Street roundabout as existing to be exceeded and that further work would be required to increase the capacity of the roundabout to a two lane roundabout. The overwhelming view of the traffic engineering witnesses requires that the Boat Harbour Drive/Main Street roundabout be upgraded to two lanes at or prior to the commencement of trading of the proposed development. I am satisfied that the imposition of such a condition is appropriate and/or reasonable and relative and should be imposed if the combined application is approved. If by the time the proposed development is opened the Department of Transport has not constructed the roundabout the developer should not be permitted to use the development until the work is completed.

Other matters of traffic detail relating to internal movement and the dedication and construction of Bay Avenue are matters on which I am satisfied, accepting the evidence of Mr. Banks, will be in place prior to the operation of the shopping centre. Such matters are of significance in relation to the practical operation of traffic movements associated with the proposed development and are not sufficiently covered by the proposed conditions. However to ensure the dedication and construction of Bay Avenue a condition is reasonably required by the application and is relevant and appropriate in the circumstances. On all of the evidence I am satisfied that there are no valid traffic matters which would warrant refusal of the application subject to the imposition of appropriate conditions to ensure that the Boat Harbour Drive/Main Street roundabout is enlarged to two lanes prior to the opening of the proposed development and the dedication and construction of Bay Avenue.

The reference by Mr. Holland to a requirement for a further widening of Boat Harbour Drive by two metres was not seen as being required by Mr. Duldig. Mr. Holland's requirement is based on certain road widths and width of median. In relation to those matters, Mr. Duldig does not agree that the lane widths and median widths as proposed are required. Mr. Duldig is satisfied that the existing road reserve is adequate for the proposed development. As Boat Harbour Drive is under the control of the Department of Transport, I prefer the approach and evidence of Mr. Duldig as to whether, as a condition of approval of the combined application, a condition should be imposed for widening of the existing road reserve. I am satisfied that in all of the relevant circumstances such a condition is not appropriate or reasonably required by the said combined application.

The assessment of the matters prescribed under s.4.4(3), in the absence of a Strategic Plan and a meaningful Development Control Plan requires such an assessment to be made of the combined application, on general principles. The issue of need was, if not the basic issue before the Court, a matter on which

substantial evidence was called and on which significant submissions were addressed to the Court. Unlike most other shopping centre appeals, in this appeal, it was agreed between the various economic witnesses called that there was an economic need for a major shopping centre primarily with the provision of a discount department store as the major tenant. Whilst there was some doubt as to the requirement for the provision of an additional supermarket, the evidence of the various representatives of the major supermarket operators is indicative that there is perceived to be an economic need in the City of Hervey Bay for the provision of such facilities as is proposed by Hervey Bay Projects. Whilst there were some relatively minor differences between the economic witnesses, those differences are not such as to warrant an examination in detail of the evidence given on the hearing of the appeal. Professor Kiel and Mr. Norling, whilst agreeing to disagree on some inconsequential minor matters, both concluded that the impacts of the proposed development would be manageable and that the rather extensive escape expenditure that presently exists within the area would be captured to a significant extent by the proposed development. The evidence of Mr. Calabro, whilst of some assistance, was, because of the situation in which he found himself in relation to obtaining specific details, confirmatory in a limited sense of the views expressed by Professor Kiel and Mr. Norling in relation to the probable impacts. It was common ground that existing escape expenditure is of a very high order and that the proposed development is likely to capture a substantial part as well as capture trade from areas outside of the City of Hervey Bay. Professor Kiel was of the view that, due to population growth, increased visitor numbers and reduced escape expenditure it is likely the proposed development will have a negative impact on existing retailers in the locality. In determining the economic assessment, all witnesses made reference to the significant population growth that has occurred in the area over recent years with projections for future growth remaining at a high level. Mr. Calabro saw Pialba Place as achieving a high rate of investment return. In his view, should the need arise, there was ample scope to substantially reduce rentals within Pialba

Place to assist any store owner adversely affected by the proposed development whilst still retaining a high rate of investment return on capital.

The fact that an economic need has been established does not, of necessity, turn into need in the planning sense in relation to the proposed rezoning and subsequent development of the subject land. The availability or otherwise of other land in the locality of the same zoning as that applied for and which might be put to the proposed use is a relevant consideration. The weight to be given to such consideration will depend on the circumstances of each case. Such a consideration may relate as to whether the balance of zones in the city as a whole on that sector of the city within which the land is situated, is likely to be adversely affected. Whilst the Court is entitled to consider the current zoned land, the Coogal site, as a relevant factor, it ought generally not to be regarded as a determinative factor in assessing the rezoning component of the application. It is but one of the many relevant factors which are to be considered in arriving at a decision on the relevant application. In some cases, the existence of zoned land may be less significant in the circumstances of the particular case. Anka Builders (Gold Coast) Pty. Ltd. v. Maroochy Shire Council (1986) Q.P.L.R. 436, Gold Coast Carlton Pty. Ltd. v. Beaudesert Shire Council (1985) Q.P.L.R. 343.

In assessing the issue of need in a planning sense, it is legitimate to take into consideration that during the currency of a consent to use land for a purpose for which the rezoning is being sought from a Local Authority, the Court on appeal should not act so as to prejudice an earlier consent. Gold Coast Carlton Pty. Ltd. v. Beaudesert Shire Council (supra); Dalgety Australia Ltd. v. Brisbane City Council (1980) Q.P.L.R. 198. The existence of appropriately zoned land may be of little consequence where that land has not been used for a purpose for which it could be used under the relevant Planning Scheme.

The Coogal site is zoned Business. It is located directly opposite the subject site and is in the vicinity

of the existing business area of Pialba although separated by the railway reserve. It is vacant. At the present time it is the subject of an application to the respondent for use for a major shopping centre. It is of a similar area to that of the subject land. The Coogal site had, up until July 1992, permissions for its use for the purpose of a major shopping centre and other uses. Those permissions had not crystallised in any form of development on the site. The permissions were revoked by order of the Court on 23rd July, 1992. The Coogal site whilst it has not the benefit of any permission for a particular permissible use, remains zoned Business under the relevant planning scheme. The Coogal site can be used for any of the permitted purposes under the Planning Scheme and, with the consent of the respondent, for any of those permissible purposes for which consent is granted. On the basis that the original approval was given in 1986, it follows that a need for such a facility as a major shopping centre was then perceived within the City of Hervey Bay. That perceived need has not been realised as there has been no perfection of the permissions granted in relation to the Coogal site. The current application for permission to use the Coogal site was made on or about 22nd September, 1992. Whilst it is not suggested that the application is a sham, or is otherwise not a valid and proper application, it is of significance that no activity took place in relation to the development of the Coogal site for a major shopping centre prior to that date. The Coogal site and the subject land each is suitable for development for a major shopping centre. Accepting, and as the evidence of the economic witnesses established that there is need only for one proposed major shopping centre with a discount department store as a major tenant, the granting of the subject application would not render the Coogal site sterile. The Coogal site could still be used for a multiplicity of purposes as of right and with the consent of the respondent for a major shopping centre if and when the need for a further shopping centre is established. Under the relevant Planning Scheme, there is no zone in which a major shopping centre can be established as of right. In the Business Zone such a use requires the consent of the respondent. On the evidence of the

economic expert witnesses it is clear that the economic need which is perceived is one which goes beyond an exercise in entrepreneurial skill and is one which on the analyses undertaken is clearly demonstrated in fact.

In considering and assessing the rezoning component of the combined application the actions of the respondent in approving Special Facilities rezonings on the southern side of Boat Harbour for significant commercial and retail activities is of importance. The rezoning of part of that land to a Special Facilities Zone which would permit, as of right, retail development having a floor area of 3,920m<sup>2</sup>, which is in excess of that occupied by the Woolworths Supermarket within the Pialba business area, is significant. In the absence of any forward strategic planning documents it is some indication of the planning philosophies and strategies of the respondent. The 1988 and 1991 rezonings of those areas of land on the southern side of Boat Harbour Drive is indicative that that area is seen by the respondent as being part of the orderly development for commercial or non-residential development in the vicinity of the town of Pialba. Whilst that area is removed from the existing business area of Pialba which is concentrated along Main Street and Torquay Road the actions of the respondent are indicative of the philosophies or strategies of the respondent to establish this commercial/retail node on the southern side of Boat Harbour Drive. In addition the action of the respondent in revoking the consents on the Coogal site is a further indication that the planning strategies or philosophy of the respondent seek to provide that area on the southern side of Boat Harbour Drive as a commercial and/or retail location. In addition to the rezonings the fact that development of a retail and/or commercial nature has occurred in that location is further evidence that the philosophies or strategies of the respondent in extending commercial and/or retail development to the southern side of Boat Harbour Drive is being effected by development.

A number of the witnesses referred to the forms of development that are occurring on the southern side of Boat Harbour Drive as being "fringe" retail or "service"

retail development. The relevant Planning Scheme makes no distinction between what may be regarded as city core or city heart type development and fringe or service development of a retail, commercial or business nature. There is no justification in my view on a perusal of the planning documents of the respondent whereby such a distinction can validly be drawn. Further reference to such development as being highway orientated or dependent on a highway location is again a matter which is not adverted to within the provisions of the relevant scheme.

The rezoning of part of the land on the southern side of Boat Harbour Drive to the Special Facilities (Shopping Centre, Indoor Entertainment and Transport Terminal) Zone is particularly significant since within that area so zoned a shopping centre having a gross floor area of 3,920m<sup>2</sup> could be developed as of right. The evidence of Mr. Kelly from Bi-Lo is indicative that regardless of the outcome of the appeals Bi-Lo intends to develop that land for the purposes of a discount supermarket facility having a gross floor area of approximately 2,000m<sup>2</sup>. Whilst such a facility would function at a level different to the sub-regional function of the proposed facility it is nevertheless a use for the purpose of shops within the provisions of the Planning Scheme. The absence of a valid objection to that application is a factor to be taken into account in relation to the subject application. The subject land is not isolated from other retail business or commercial uses in the immediate locality. The rezoning of the tavern site to an appropriate Special Facilities Zone and the development of the tavern is a further indication of the appropriateness of the location of the subject land for the proposed development. In the existing Special Facilities zonings an extensive range of commercial and/or retail activity are permitted as of right in the relevant zone.

The rezonings south of Boat Harbour Drive approved by the respondent relate to relative substantial areas of land. Coupled with the decision of the respondent to revoke the consent approvals on the Coogal site the actions of the respondent are indicative of the

intentions of the respondent to permit development of such land in that area for significant retail and commercial purposes confirming the planning strategy or philosophy for that location.

Having regard to the intent of the Rural "B" Zone I am satisfied that the Rural "B" Zoning of part of the land is unlikely to be achieved and that the land use pattern in the locality establishes that such land is unlikely to be used for cane farming purposes.

Having regard to the attitude of the two major tenants the application may be seen to be "retail lead" which is of significance in relation to economic demand and/or need. The fact that Mr. Seidl proceeded with the purchase of Pialba Place a short time ago with full knowledge of the subject approval and of the 1991 rezonings is further indication of a recognition of an economic need. The evidence of the witnesses called on behalf of other major retailers is further indicative that there is seen by all players in the field to be an economic demand and/or need for a facility such as proposed in the locality. The evidence indicates that both Woolworths and Coles, the two major national retail chains, see a perceived need for the establishment of a major shopping facility which would function at a sub-regional level. The evidence of some of the major supermarket retailers is further indicative that such a need for an additional supermarket is perceived to exist in the locality.

The evidence of local residents supportive of the proposal refer to many difficulties, lack of choice and need for a D.D.S. facility. For major shopping facilities, most visit areas outside of the City. The local business people who gave evidence saw the proposal as a possible economic threat. Some, however, have recently taken steps to consolidate their positions with knowledge of the approval of the proposed development. It is not uncommon to see differing points of view expressed in those circumstances where a new modern air-conditioned retail facility is proposed. I am satisfied each witness



gave evidence of opinions honestly held and of sincere concerns.

Because of the lateral or elongated nature of the existing business area of Pialba centred on Main Street and Torquay Road it is unlikely that there will be pedestrian traffic moving between that area and the subject land. That in itself does not indicate that the proposal will fragment the existing business area. The proposal will not consolidate that existing business area.

On the evidence I am satisfied this is not a case where Hervey Bay Projects is seeking to rezone inappropriately zoned land for the proposed use in that about one-third of the subject land is presently so zoned whereby, as contrasted with the Business Zone, a shopping centre development of 3,920m<sup>2</sup> could be developed as of right.

The proposal will add to a retail facility that, within the Special Facilities Zone, could be developed, as of right, incorporating a discount supermarket and a number of speciality shops that could function at a Neighbourhood or District level. The proposed retail facility would function at a Sub-Regional level with aspects of the development functioning at a Neighbourhood and/or District level. On this basis the proposal can be readily seen to be an orderly development of retailing facilities in the particular locality; a locality that is different to that located in Main Street/Torquay Road. The subject area is one which the planning intent of the respondent as evidenced by the 1988 and 1991 rezonings sees as suitable for retail and/or commercial development. The existing business area of Pialba has limited convenience, low visual/functional amenity, poor pedestrian environment and a high level of dispersed uses intermingled with vacant land and inappropriate developments.

The evidence in relation to Pialba Place and Bay Plaza and the attempts to marshal a sufficient area of land is indicative, that there is not sufficiently zoned land within the existing business area of Pialba

available for a proposed development incorporating a discount department store. The evidence of Mr. Maddern, a Registered Valuer, confirms the lack of available land and the difficulties associated with the amalgamation of a series of smaller sites.

The rush of activity in relation to the proposal incorporating the redevelopment of Bay Plaza and Pialba Place is indicative that the provision of a major shopping centre incorporating a D.D.S. is aimed at meeting a demand for such form of development. Having regard to the traffic disabilities that currently exist, the redevelopment is unlikely to be achieved within that existing business area. Major retailers perceive the location as unsuitable. Target would not go there. Professor Kiel detailed problems with the proposal, which I accept. Mrs. Kerr was of the opinion that a D.D.S. based centre could not be developed within the existing Pialba business centre. Mr. Seidl recognised the problems with parking. To overcome those problems he foresaw that the relocation of the R.S.L. was required. No relevant material discussions have taken place with the R.S.L.

The subject land is removed somewhat from the existing business area of Pialba. The assertion that the proposal represents fragmentation ignores the existing zoning of Lot 4. The addition of a D.D.S. and additional specialty shops to a development of a retail character which could proceed as of right would amount to consolidation not fragmentation. The proposed development I am satisfied would not result in the fragmentation of the existing business area but would result in the creation and consolidation of what is clearly indicated by the planning philosophies and strategies of the respondent to be another location where retail and/or commercial development should occur. The elongated nature of the existing business area is such that it is unlikely that consolidation in a real sense can be achieved within the existing business area. The unavailability of appropriately zoned land of sufficient area is unlikely to see any strengthening of the business area of Pialba. Consolidation could undoubtedly occur if redevelopment occurs and many of the non-business uses are replaced

with more appropriate uses in the business zone. Whether the proposal ought to be seen as a separate node of retail and commercial development is of little significance. In fact such a commercial and/or retail facility could exist as of right, in the location. Any increase in the area would be an expansion in an orderly fashion having regard to the existing Special Facility Zones.

Doubtless the rezoning of the subject land will have a bearing on the time at which the Coogal site may be developed, if at all, for a major shopping development. The evidence establishes that the economic need for a second major shopping development incorporating a D.D.S. may not occur for a period of not less than 5 years. The development of the Coogal site for a major shopping development requires the consent of the respondent. In making such an assessment, the respondent will be obliged to consider all relevant factors including that of need to the extent that it may be relevant.

The proposed rezoning is consistent with the intent of the Business Zone. It is located in an area which the planning strategies of the respondent consider suitable for commercial and retail uses to serve the needs of the total population. Good access is available to the subject land. Many of the uses specified in the Special Facilities Zones have a broad city wide catchment.

On the evidence I am satisfied that it has been established that there is need for the rezoning of the subject land.

On the finding that there is a planning need for the subject land to be rezoned to "Business", I am satisfied that the rezoning will not upset the Balance of Zones in the City as a whole nor that part of the City within which the subject land is located. The exclusion of part of the subject land from the nominated Special Facilities Zone cannot be seen as being affected by the Balance of Zones criteria. The Rural "B" Zone in the City as a whole and in the locality is reasonably extensive. The rezoning of that land will not result in the deficiency of Rural "B" zoned land to be developed for the purposes of

agriculture and/or other permitted purposes. Having regard to the intent of the Rural "B" Zone, the exclusion of that part of the subject land from the Rural "B" Zone, I am satisfied would not upset the balance of the Rural "B" Zone. The inclusion of the subject land within the Business Zone will increase the area of land so zoned but having regard to the permitted and permissible uses in that zone there will be no imbalance. The rezoning of the subject land would not preclude the development of the Coogal site in accordance with the Table of Zones. The considerable growth that is occurring in the area is likely to create a need for further retail or business facilities in the future.

Whilst an appropriately Special Facilities Zone may be seen as the more preferable zone, having regard to the nature and character of the proposed development, I am satisfied that the Business Zone is nevertheless an appropriate zone for the subject land.

The town planning evidence of Mr. Challoner which I prefer is indicative that the consent component should be approved. The proposal is not likely to prejudice the business development centred around Main Street and Torquay Road as the economic impacts are seen by the economic expert witnesses to be manageable. The need for higher order retail facilities to serve the city which has been perceived since 1986 has not been satisfied. With the significant population increase that need despite the inclusion of the Coogal site in the Business Zone and the approvals in relation thereto is more evident now. The actions of the major retailers and supermarket operators demonstrates a high level of demand which is not being satisfied.

I am satisfied it has been established that both components of the combined application should be approved subject to appropriate conditions.

It was submitted by senior counsel on behalf of Marcelhurst that the consent application should be subject to a condition whereby if the proposal is not developed or substantially commenced within a limited time, the consent approval should lapse. Under s.4.13(18)

of the Act, a consent permit issued pursuant to s. 4 sub-s.12 lapses where the use of land or the use or erection of a building the subject of the approval has not been commenced within four years of the date of the issue of the permit or such extended period or periods as the Local Authority, upon application made to it may approve. Where a permit has not been acted upon, a Local Authority may take steps to revoke that permit upon following the procedures set out in s.4.14 of the Act. The Local Authority may institute such revocation procedures after a period of two years following the date on which the permit was issued. The evidence on behalf of the major discount department store, Target, and major supermarket operator, Bi-Lo, and the economic witnesses demonstrate that there is perceived by such persons to be a current need for retail facilities such as is proposed. The Board commitments of Target and Bi-Lo are indicative of a present intention by those companies to participate as soon as practicable. In those circumstances I do not consider it appropriate that any time constraints should be imposed as a condition relative to the approval of the combined application.

On all the evidence Hervey Bay Projects has established that the combined application should be approved, subject to conditions.

The appeal by Marcelhurst (P. & E. No. 90 of 1992) is dismissed. The appeal by Fentway (P. & E. No. 93 of 1992) is dismissed.

The appeal by Hervey Bay Projects is upheld. On the hearing of the appeal the relevant plan of development was Concept Plan No. 605SK8 prepared by Multispan Australia Pty. Ltd. which was submitted with the combined application. The combined application is approved subject to the conditions set out in the letter dated 29th June, 1992 from the respondent to the solicitors for that appellant, with the deletion therefrom of the second paragraph of Condition B1 and subject to further conditions to be brought in by the appellant in conformity with the judgment herein. Condition B1

(Exhibit 18) should be amended to refer to the relevant plan of development, No. 605SK8.

I adjourn the further hearing of P. & E. Appeal No. 113 of 1992 to 4.00p.m. 11th December, 1992.