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IN THE PLANNING AND ENVIRONMENT COURT	P&E Appeal No. 32 of 1996

HELD AT BRISBANE

QUEENSLAND

Before His Honour Senior Judge Skoien

[Pacific Exchange Corporation Pty Ltd and Anor v. Gold coast City Council and Anor.]

BETWEEN:

PACIFIC EXCHANGE CORPORATION PTY LTD AND TREASURE & ASSOCIATES PTY LTD	Appellants

AND:

GOLD COAST CITY COUNCIL	First Respondent

AND:

THE STATE OF QUEENSLAND	Second Respondent

REASONS FOR JUDGMENT

Judgment delivered: 29 October 1996

Catchwords:

Counsel:	Mr. J. Heydon for appellant Mr. C. Hughes for first respondent Mr. A. Innes for second respondent
Solicitors:	D. Kelly for appellant McDonald Balanda & Arcuri for first respondent Crown Solicitor for second respondent
Hearing Dates:	23, 24 & 24 September, 1996

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REASONS FOR JUDGMENT - SKOIEN S.J.D.C.

Delivered the Twenty-ninth day of October, 1996

This is an appeal by Pacific against the imposition by the Council of a condition of a subdivision, a condition imposed at the behest of the Department of Main Roads of the State of Queensland. In these proceedings the interests of the State of Queensland were represented by the Department of Main Roads so all references to the second respondent or to the chief Executive of the Department of Main Roads will be to "Main Roads".

On 28 February 1996 Pacific applied to the Council to subdivide 4.046 hectares of vacant land at Irene Street, Tugun into forty-two residential allotments. On 20 May 1996 the Council advised Pacific that it had approved the application subject to some conditions, one of which was:

> "47. The applicant shall provide written evidence to Council from Queensland Transport prior to the sealing of survey plans indicating compliance with its conditions under section 40 of the Queensland Transport Infrastructure Act 1994 (reprint No. 4) and section 134 of the Transport Operations (Passenger Transport) Act 1994 (reprint No. 1) to the satisfaction of the Chief Executive Officer."

On 3 June 1996 Pacific's solicitor wrote to Queensland Transport (the former name of Main Roads) seeking notification of the Department's requirements. On 14 June 1996 Main Roads replied:

> "Queensland Department of Main Roads' requirements are for payment of a monetary contribution calculated by individual assessment based on a transport impact analysis or on a per lot basis.
>
> The contribution on a per lot basis is $63,000 for 42 lots assessed at the following rates which may be subject to review and indexation at the time of payment.
>
> - $1,000 per lot for lots less than 500 m^2
> - $1,500 per lot for lots 500 - 1000 m^2
> - $2,000 per lot for lots greater than 1000 m^2
>
> Upon payment of the above amount, Queensland Department of Main Roads will issue a compliance letter and advise Council that our requirements have been satisfied."

As each of the proposed lots has an area of between 500 and 1000 m^2 the second category was the one used by the Department to arrive at $63,000.

<u>The Site and Locality</u>

Irene Street, to which the proposed lots have access, is to the west of the Gold Coast Highway at Tugun. Irene Street has access only to Boyd Street, which does not connect directly with the highway. Motorists from Boyd Street wanting to get to the highway have to turn left onto Coolangatta Road (which runs parallel to the highway and performs a type of service road function for it) and then right into Kitchener Street, a street which intersects with the highway. That is an unsignalised all-movements intersection. Alternatively this traffic could proceed further north along Coolangatta Road and turn right into Toolona Street which has a major signalised intersection with the highway. A further option would be to travel south from Boyd Street

on Coolangatta Road and turn left into Kirribin Street which has a signalised intersection with the highway.

The Pacific Highway, the main north-south road in the Gold Coast, travels to the west of the major built-up area until it reaches Tugun. It there swings towards the sea and, now called the Gold Coast Highway, passes through a built-up area for some kilometres. This is necessitated predominantly by the proximity, just to the west, of the New South Wales/Queensland border. Were the road to continue to by-pass the built-up area in its passage south it would have to cross into New South Wales, through an area over which there is an Aboriginal land claim and then cross Cobaki Broadwater, before joining up with the Tweed By-pass in New South Wales. To achieve this will involve interstate co-operation which has not yet eventuated. The position is further complicated by the presence of Coolangatta Airport which necessarily squeezes traffic into a narrow corridor containing the Gold Coast Highway and a limited pattern of streets around it.

Traffic on the Gold Coast Highway in this corridor is very heavy and this congestion urgently needs easing. It is hoped that the by-pass from Queensland to New South Wales will be constructed before very long, but obviously the date of that cannot be confidently predicted. So the heavy use of the Gold Coast Highway at Tugun will continue for the foreseeable future.

Boyd Street currently serves a residential access function but also provides access to other large traffic generators to the west of the Gold Coast Highway such as the John Flynn Hospital and medical Centre, the rubbish tip, a Council depot and sporting fields. There is a proposal to extend Boyd Street into New South Wales in order to provide access to a proposed major residential subdivision of some 4000 allotments and a regional shopping centre at Cobaki Lakes. Undoubtedly this would then necessitate the joining of Boyd Street to the Gold Coast Highway and installation of signals there. So should the Cobaki development proceed it is certain that

even more traffic will be injected onto the Gold Coast Highway.

The Legislation

Condition 47 refers to two statutes, but only the Transport Infrastructure Act 1994 is applicable to this appeal. The relevant provisions are ss.40, 42 and 196. Omitting immaterial parts s.40 is:

> "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 a 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."

It is accepted all round that the Gold Coast Highway is a State-controlled road.

Section 196 gives an applicant the right to appeal to this Court against the imposition of a s.40 condition which affects its interest. Section 42 relevantly provides that the Court may amend such conditions but not without giving Main Roads the chance to be heard. That is how Main Roads comes to be the second respondent in the appeal.

Some discussion of s.40 in the context of this appeal is called for. Subsection (1) obliged the Council to obtain Main Road's written approval if it intended to approve the subdivision application if that approval had one of the consequences set out in paragraph (b). It was not suggested that this subdivision would itself require the carrying out of road works on the highway and the questions were whether it would have a "significant adverse impact" on the highway (paragraph (b)(ii)) or a "significant impact on the planning" of the highway (paragraph (b)(iii)). No other State-controlled road or future State-controlled road was suggested as having relevance. I was not told of any guidelines made under subsection (2). Subsection (3) permitted Main Roads to give an approval subject to conditions including conditions for compensation "for the impact that the subdivision ... will have." That "impact" must be a reference back to the two impacts specifically referred to in paragraphs (b)(ii) and (iii). No specific reference is made to the works referred to in paragraph (b)(i) and it seems that the drafter was content to leave it to the implication (obvious to my mind) that the "conditions" first referred to in subsection (3) related to those works.

Because of subsection (4) the Council did not have to apply under subsection (1) if Main Roads had previously fixed "permission criteria" which the Council then applied in conditions imposed on the subdivision. Obviously the fixing of the permission criteria must precede their application by the Council to the subdivision. Subsection (5) allows the permission criteria to contain conditions and the types of conditions provided for are in identical terms to those in subsection (3). As a matter of strict logic,

subsection (1) being excluded from consideration when subsections (4) and (5) come into play, it would be difficult to read those conditions as referring to the conditions of subsection (3). But I think they must be so read. Because the fixing of permission criteria by Main Roads obviates the necessity for compliance by the Council with subsection (1), but as s.40 only gives Main Roads the right to intervene in the circumstances contemplated by subsection (1), those permission criteria must have already dealt with the matters contained in subsection (1).

The term "permission criteria" is not defined in the Act. "Permission" is a clear enough word. "Criterion" (plural "Criteria") is defined in the Shorter Oxford English Dictionary as "an organ or faculty of judging," and by the Macquarie Dictionary as "a standard of judgment; an established rule or principle for testing anything". So "permission criteria" must mean a set of rules or standards according to which the Council would determine whether to impose a condition, and if so what condition, dealing with the effect of the subdivision on a State-controlled road. As I have said those rules or standards would have to judge the subdivision in the light of the matters laid down in subsection (1)(b)(i),(ii) and (iii).

Mr. Haydon of counsel, for Pacific, submitted that Main Roads must be taken to have given its approval because it failed within the twenty-one days laid down by subsection (10) to respond to the Council's application. No notification of extension of time under subsection (9) was ever made. The Council wrote to Main Roads on 14 March 1996 enclosing a copy of the subdivision application and asking for "any objections or comments." It was not until 1 May 1996 that Main Roads replied in these terms:—

> "Pursuant to section 40 of the Transport Infrastructure Act 1994 (reprint no. 4), the Chief Executive, (Department of Transport and Main Roads) is prepared to approve the proposal subject inclusion (sic) of the following conditions:—
>
> GENERAL COMPENSATION

The applicant shall compensate the Chief Executive (Queensland Transport and Main Roads), whether monetary or otherwise, for the impact that the subdivision, rezoning, development, road works or changes will have on transport infrastructure (relating to State-controlled roads and the planning of State-controlled roads and future State-controlled roads).

This may require the undertaking of a Transport Impact Analysis.

COMPLIANCE LETTER

The applicant shall provide written evidence to Council's Chief Executive Officer indicting compliance with Queensland Transport's conditions under section 40 of the Transport Infrastructure Act 1994 (reprint no. 4).

Approval shall not be given for any new use or, in the case of subdivisions, the plans should not be sealed by Council until all the requirements of Queensland Transport are satisfied.

A copy of Council's full set of conditions would be appreciated in due course if the application is approved."

That response was well beyond twenty-one days from 14 March 1996. However Mr. Innes of counsel, for Main Roads, submitted that Main Roads had, by letter dated 16 May 1995 (exhibit 2), already laid down permission criteria.

That letter contains, relevantly, the following:—

"It is Queensland Transport's intention to require contributions from every development that impacts on the transport network or generates a need for transport infrastructure. However, it is not necessary for all development proposals to be referred to Queensland Transport where they are remote from a state controlled road, provided the following permission criteria is included in any approval given by the Local Government.

'Provision of written evidence from Queensland Transport indicating compliance with the Department's conditions under Section 38 (now s.40) of the

> Transport Infrastructure Act 1994 and Section 134 of the Transport Operations (Passenger Transport) Act 1994'
>
> Other permission criteria may be specifically advised on referral of the individual application or on written request by the applicants, when full details of the development are known. This may require the undertaking of detailed traffic and drainage studies by the developer to determine the impact of the development."

and it refers to attached guidelines. Those guidelines are too lengthy to set out here, but I think they can only be described as extremely general. They would not permit anyone to determine what Main Roads might require of a developer in work to be done or money to be paid.

In my opinion the letter of 16 May 1995 (exhibit 2) does not constitute permission criteria because it does not provide the necessary rules or standards. Further emphasis is added by the use in subsection (3) of the word "fixed." In Fraser Henleins Pty. Ltd. v. Cody (1945) 70 CLR 100 at 128 Dixon J. said:—

> "It may be conceded, and, indeed, it appears to be have decided, that a bare power to 'fix' a price cannot be validly exercised without naming a money sum, or prescribing a certain standard by the application of which it can be calculated or ascertained definitely. Otherwise the price is not 'fixed'."

Similar statements can be found in King Gee Clothing Company Pty. Ltd. v. The Commonwealth (1945) 71 CLR 184 and Cann's Pty. Ltd. v. The Commonwealth (1946) 71 CLR 120.

The letter of 1 May 1966 cannot be permission criteria either. It also fails to set down any rules or standards.

As neither the letter of 16 May 1995 nor the letter of 1 May 1996 sets out permission criteria, it follows that Main Roads approval is deemed to have been given at the expiration of twenty-one days from 14 March 1996.

That, however, is not the end of the matter because the Council itself applied condition 47. Whether or not that condition was sufficiently certain, the further particulars of Main Roads requirements which were provided on 14 June 1996 have made it so. Despite the wording of the first paragraph, which appears to offer an alternative, the thrust of the particulars and the conduct of the appeal make it clear that what Main Roads requires is $63,000 ($1,500 per lot).

So the position is that the Council has applied a condition which stated compendiously, is that Pacific must pay $63,000 ($1,500 per lot) that being the amount needed (according to Main Roads) to comply with the requirements laid down by s.40. The evidence makes it clear, as did the submissions by Mr. Hughes of counsel for the Council, that it has no independent opinion of the proper requirements in relation to the effect this subdivision may have on the Gold Coast Highway. It simply accepted what Main Roads said as to the need for contribution and the amount. Although that might seem at first sight paradoxical, Main Roads being deemed to have approved the application without imposing a condition, further thought tells me that it is a proper attitude by the Council to adopt. Main Roads is not a party to the appeal pursuant to the provisions of the Transport Infrastructure Act because it got out of time. However, Main Roads may still have a valid opinion on what is required by the subdivision in relation to a State-controlled road and the Council may well accept that as a reasonable condition "in the interests of the rational development of the area in which the subdivision is located". See Proctor v. B.C.C. (1994) QPLR 309 at 314.

The effect of my reasoning so far is, of course, that the second respondent (Main Roads) has no locus standi. The right of Main Roads to be heard given by s.42(5) is limited by the terms of the rest of the section. They all relate to the case in which either a s.40(1) approval applies or permission criteria apply. Neither applies here, nor does Main Roads have any right to appear conferred by the Local Government (Planning and Environment) Act 1990. But, probably taking the pragmatic

approach, Pacific took no preliminary point, preferring to let the argument wait till the appeal was heard. The Council, having accepted Main Road's requirements, allowed Main Roads to argue the merits and adopted a neutral role.

I accept the submission of Mr. Hughes that if condition 47 was originally too vague, that has been cured by the particulars which were supplied before the filing of the notice of appeal. But in any event, his submission continued, the appeal is a hearing de novo and the Court's decision becomes the decision of the Council. See P & E Act, s.7.1A(4). Furthermore the Court has power to cure any uncertainty in a condition. See P & E Act s.7.1A(3B).

In considering what is relevant to and what is reasonably required by the proposed subdivision so far as the probable effect on the Gold Coast Highway is concerned, it seems to me that one can properly restrict the inquiry to a consideration of the matters laid down by s.40(1) of the Transport Infrastructure Act, even though this is not an appeal under that Act. Section 40(1), in my opinion, lays down the circumstances in which a developer can be required to pay for, or otherwise be responsible for the effect of the development on a State-controlled road. That is what the legislature obviously intended. I am unable to think of any better set of criteria. The three sets of circumstances listed in subsection 1(b) seem to me to cover the field.

The first circumstance, in paragraph (i) does not apply to this appeal. No one argued that it did. The argument revolved around the contents of paragraph (ii), "a significant adverse impact on" the highway and (iii) "a significant impact on the planning of" the highway. The first question raised by each of those is the meaning of the word "significant".

The primary meaning of the word "significant" given by the Shorter Oxford English Dictionary is "full of meaning or import". The word does not make sense if read that way in either paragraph (ii) or (iii). It must, in

each case, bear the secondary dictionary meaning of "important, notable". It is frequently, perhaps most commonly used in that sense, often, one suspects, by people ignorant of its primary meaning.

So the test to be applied is whether the subdivision will have an important or notable adverse impact on the Gold Coast Highway (paragraph (ii)) or whether the subdivision will have an important or notable impact on the planning of the Gold Coast Highway (paragraph (iii)).

That is a question of fact to which I now turn. Obviously forty-two residential allotments will have some adverse impact on the highway at its intersection with Kitchener Street, or Toolona Street, or Kirribi Street. I suppose even one extra vehicle would have that effect. One extra vehicle would also have an impact on the planning of the intersection of the highway with Kitchener Street in that it would add some tiny weight to the need for traffic lights to be installed there. Similarly it would also add to the need to continue Boyd Street to intersect with the highway and to install traffic signals there. However none of those impacts can be said to be important or notable. Nor, on the evidence which I accept would the impact caused by the traffic from forty-two allotments. The evidence of Mr. Viney, the traffic engineer called by Pacific was that this small number of lots will not substantially increase any traffic flow. In fact he described (transcript 40/40; 49/20), the effect of the forty-two lots as "marginal, almost negligible". Mr. Olsen, the traffic engineer called by Main Roads, gave evidence that the highway/Toolona Street intersection was operating at a 75% degree of saturation (well within acceptable limits) but that the Kitchener Street/highway intersection was beyond tolerable levels (exhibit 7 p.3). But his evidence was not that the forty-two lot subdivision will have a large effect. He described the projected traffic generation for these forty-two lots as modest. The thrust of his evidence, as exemplified in cross-examination (transcript 110/111), was that the highway was congested and dangerous and he referred specifically to the Kitchener Street intersection. However his report

(exhibit 7 p.9) indicates that over the past four years there have been only eleven traffic accidents there, none fatal, with seven involving injury. Forty-two lots would add to the safety concerns by "a small part" (transcript 104/30). Of course the addition of one vehicle to any road will add to the chances of an accident occurring but hardly to an important or notable degree. In my opinion the likely extra traffic at this intersection from the forty-two lots falls into that category.

On the balance of probabilities I am unable to see that this subdivision will have either of the "significant" impacts referred to in s.40(1)(b). Therefore condition 47 ought not have been imposed.

I think I should also consider the position if condition 47 is to be judged not by reference to the criteria laid down by s.40(1) of the Transport Infrastructure Act but according to the principles generally applied in considering conditions under the P & E Act.

Under s.5.1(3)(h) of the P & E Act the Council was obliged to assess, to the extent to which it was relevant to the application to subdivide, any possible traffic generation and the effect of this upon the road system in the locality. A general duty to assess any other relevant matter is imposed by s.5.1(3)(u).

Under s.6.1(1) of the P & E Act a condition may not be imposed that is not relevant or reasonably required in respect of the subdivision. Those requirements are disjunctive, Proctor v. B.C.C.supra, although in that case the Court was careful to point out that the mere fact that a condition is relevant to a proposed subdivision will not necessarily be sufficient to justify its imposition (at p.314). And the Court referred (at p.403) to the decision of the High Court in Lloyd v. Robinson (1962) 107 CLR 142 which approved a condition as being "well within the limits of a proper understanding of the Board's functions under the Act".

A Council, exercising its powers, must exercise them fairly and reasonably. See Newberry D.C. v. Secretary of

State for the Environment (1981) A.C. 578. See also Wootton v. Woongarra S.C. (1985) 56 L.G.R.A. 301 at 303 where Ryan J. said:

> "The question must be whether there is a relevant nexus between the use of the land and the conditions sought to be imposed, that nexus being that the proposed use creates such a change in existing affairs that the condition is a reasonable response to it."

Mr. Olsen sought to justify the levy of $1500 per lot by calculations based on various assumptions. However common to each of them was the need to construct and the cost of constructing a signalised intersection between the highway and an extended Boyd Street. However that is not needed now and will only be done if and when Boyd Street becomes the access road for the Cobaki development. I think it probably that the Cobaki development will take place, but when that will be is unclear. When it occurs it is most likely that a full scale signalised intersection will be built at the cost of some $9,000,000 and, most probably, at Cobaki's cost. The effect on that of these forty-two lots would be minuscule.

Mr. Olsen's interim concern is, as I have said, on the safety aspect. For the reasons I have discussed I do not consider the effect on safety at the highway/Kitchener Street intersection to be important or notable. There is however a nexus between the condition and the minor extra danger at the intersection created by the extra forty-two lots. What would be a reasonable response to it? Not, in my view, the imposition of a per-lot contribution based on a share of major road works which are not in any but a minuscule way, called for by the subdivision. So there is not sufficient relevance in the condition and it is unreasonable in the circumstances.

In reaching that conclusion I have preferred the evidence of Mr. Viney on the lack of any real change in traffic impact which this subdivision would effect. I also accept the validity of his criticisms of Mr. Olsen's methodology in assessing this per-lot contribution.

The evidence of Mr. Dippelsmann, the Main Roads' Acting Manager for the Gold Coast was that the arrangement with the Cobaki developer was very much up in the air. It further seemed, on his evidence, that the sum of $1500 contribution per lot was based on very broad estimates and was by no means specific to the site or even to its immediate area. He also made it clear that no work alleviating the relevant traffic problems (for example at Kitchener Street) was planned and I was left with the impression that, even with the injection of $63,000 it was unlikely that anything would change. Nothing in his evidence led me to consider that condition 47 was reasonable response to the traffic problems generally nor that it bore any sufficient relationship to this subdivision.

It seemed to me that much of the thrust of the argument for Main Roads was that it was only fair that a new subdivision should contribute to the cost of headworks in the area. In considering that I think I should first take into account, as a matter of commercial reality, that any such contribution by the developer will be passed on, at least in part, to the purchasers of the lots. Those purchasers will operate vehicles, and will pay taxes when they register those vehicles and buy fuel. Many will also pay income tax, sales tax and the like. Those taxes will, in part, be spent on State-controlled roads both for headworks and for maintenance. If the subdivision in which this taxpayer takes up residence puts some extraordinary demand on a local State-controlled road (or as Parliament put it causes some "significant adverse impact") then it seems to me to be eminently fair (or as Parliament also put it, both "relevant" and "reasonable") for the developer (and thus the resident) to make some provision for that impact over and above the general payment of tax. On the other hand if the subdivision does not necessitate State roadworks nor in any measurable way eat into the road network's reserve capacity so as to advance other than theoretically the need for such works, then I do not see any justifiable reason for calling for extra money sacrifice. I am satisfied that Pacific's subdivision falls into the latter category.

I conclude therefore that condition 47 should be deleted.

There are, I was told, some other conditions (in which Main Roads has no interest) which the Council and Pacific have agreed should be varied. I invite them to present a draft order incorporating those amendments.

The appeal will be allowed.