PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Barns v Maroochy Shire Council & Anor* [2005] QPEC 111
PARTIES:	**JAMES THOMAS BARNS** Appellant v **MAROOCHY SHIRE COUNCIL** Respondent and **RELIANCE PETROLEUM and FIMA & ASSOCIATES PTY LTD** Co-respondent and **THE STATE OF QUEENSLAND** Second Co-respondent
FILE NO/S:	3/2005
DIVISION:	Planning & Environment Court
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning & Environment Court of Queensland, Maroochydore
DELIVERED ON:	4 November 2005
DELIVERED AT:	Maroochydore
HEARING DATE:	31 October 2005
JUDGE:	**Judge J M Robertson**
ORDER:	**Matter adjourned to enable parties to formulate conditions**
CATCHWORDS:	PLANNING LAW – *Integrated Planning Act 1997 s 3.5.30(1)* considered *Integrated Planning Act* 1997 *Local Government (Planning and Environment) Act* 1990 Cases considered: *Pinjarra Hills & Ors v Brisbane City Council & Ors* [1995] QPLR 334 *Crane v Brisbane City Council & Anor* [2003] QPEC 025
COUNSEL:	Mr W L Cochrane (for the appellant) Mr M A Williamson (for the respondent Council) Mr S Ure (for the co-respondent)

	Mr D O'Brien (for the second co-respondent)
SOLICITORS:	P&E Law (for the appellant)
	Maroochy Shire Solicitor (for the respondent)
	Kerry Connolly & Howard Solicitors(for the co-respondent)
	Crown Law (for the second Co-respondent)

[1] On the 16 November 2004 the Council approved a material change of use application by the co-respondent (Reliance) relating to an existing service station which has operated at 45 Yandina-Coolum Road, Coolum Beach, for many years. The application was to redevelop the existing site which has a mechanical shop, a snack shop and a congested bowser forecourt area into a modern BP shop relocated to the rear of the block and a much more efficient service area for the sale of petroleum products. The appellant (Barns) is a commercial competitor of Reliance and made a submission during the assessment process. As a direct consequence of successful expert conclaves and sensible compromise only one discrete issue remains for the Court's determination.

[2] The site is located in a mixed housing precinct at the corner of Yandina-Coolum Road, Key West Avenue and Daytona Avenue, Coolum. The Yandina-Coolum Road is a state controlled road, thus the Department of Main Roads (DMR) was a concurrency agency for the purposes of the application and the State of Queensland participated actively in the appeal.

[3] All traffic issues bar one were resolved either at conclave or leading up to the hearing of the appeal. Town planning issues and noise and odour issues were all resolved by agreement.

[4] The Appellant submits that there should be a development condition which will prevent access to the site from the Yandina-Coolum Road for cars coming from the east and turning right into the service station, and for cars leaving the site and turning right into Yandina-Coolum Road. Such access is permitted presently by the simple facility of breaks at the access and egress points in the double white line, and the creation of a no parking yellow line on the southern side of the road opposite the service station.

[5] I think it is correct, as Mr Ure implied in his opening, that this specific issue really arose at conclave, and probably as a result of Mr Brameld's concerns; and certainly this issue was not raised in the Notice of Appeal. Nothing turns on this.

[6] Three traffic engineers provided reports and gave oral evidence about the issue. Mr Burgess gave evidence on behalf of Reliance which has the onus of satisfying me that the disputed condition is one that is not caught by s 3.5.30(1) of the *Integrated Planning Act 1997* (*IPA*), which provides:

> (1) A Condition must-
>
> (a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or

> (b) be reasonably required in respect of the development or use fo the premises as a consequence of the development.

[7] As Mr Cochrane pointed out in his concluding submission, the s 3.5.30 test adds an embellishment to the s 6.1 test under the repealed *Local Government (Planning and Environment) Act* 1990, and that is that the condition must not be an unreasonable imposition. As the learned authors of '*Planning and Development Queenslan*d' observe at (4400), "It remains to be seen what change is wrought by the revised *IPA* formula", and the extent to which the decision in *Proctor v Brisbane City Council* (1993) 81 LGERA 398 (which construed the test in the repealed Act), is applicable to s 3.5.30. The test in the *IPA* is expressed positively i.e. "A condition must", in contrast to the approach in s 6.1 i.e. "the local government is not to…(etc)"; and s3.5.30 uses the phrase "as a consequence of the development", whereas the words in s 6.1 are "in respect of the proposal to which the application relates".

[8] Reliance argues strongly that the proposed condition is not relevant to the use; alternatively, if relevant it constitutes an unreasonable imposition on the use, and is not reasonably required.

The Evidence

[9] Mr Brameld (who gave evidence for the appellant) based his opinion primarily on safety issues. He generally accepted the evidence of Mr Burgess to the effect that the road carries approximately 10,000 vehicles per day, and that the redevelopment will contribute up to 108 vehicles per hour (vph), an increase based on his design calculations from 85 vph from the existing site. I accept Mr Brameld's evidence (and the evidence of Mr Beard who gave expert evidence on behalf of the State of Queensland) that it is probable that the existing site, because of inefficiency, is not contributing as many as 85 vph. However this difference has little practical effect on the overall forecasts. In my mind, there is not doubt that the development will be a significant contribution to the daily traffic volume, as is the present use. Mr Beard helpfully set out the options in his report at pages 3 & 4. No one suggests that option (c) (construction of a raised concrete median in the road to eliminate the potential for right turn ingress and egress) is reasonable; however he (and Mr Brameld) favoured option (b) which would involve Reliance paying for line marking and signage in accordance with a drawing annexed as appendix D to his report.

[10] As to the option (a), contended for by Reliance and supported by Mr Burgess, that is "do nothing" he says this in his report (at page 3):

1. "…and accept the relatively small increases in hazard and congestion associated with the redevelopment, noting that the site traffic generations could increase anyway as a consequence of refurbishment rather then redevelopment necessitating an MCU application. This was essentially the approach adopted by DMR in respect of the imposition of conditions. In my opinion, this is a reasonable approach because of the low reported accident rate at the site, and the high number of similar sites which would reasonably

> require similar treatment if remedial works were conditioned at this site. Further, the subject redevelopment does not preclude DMR action in the future to control or eliminate right turns if the accident rate increases for any reason".

[11] Although, Mr Beard's report was commissioned by the State of Queensland, the attitude of DMR, the relevant concurrence agency, whose attitude was positively adopted by Council, is set out in Crown Law's letter dated 27 October 2005 to the solicitors for each of the parties:

> "In light of the traffic conclave that was held between Mr Colin Beard, Mr Steve Burgess and Mr Roger Brameld on 24 October 2005, I am instructed to advise that the Department of Main Roads proposes to maintain its position as set out in its concurrence agency response dated 10 October 2005, in the appeal.
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> *My client does not consider that a condition requiring the construction of a median and right turn lane in Yandina-Coolum Road is relevant or reasonably required as a consequence of the proposed development*." (My emphasis)

[12] This letter, and the instructions that provoked it were obviously written with full knowledge of the attitude of all 3 engineers and the more elaborate draft warrants commissioned by DMR in relation to intersection treatment and safety referred to by Mr Cochrane in his cross-examination of Mr Burgess and in the evidence of Mr Brameld.

[13] In my opinion, the evidence as it is, leads me to the conclusion that the safety issues to which Mr Brameld very properly referred are significantly to do with the intersection of the State controlled road with Daytona Avenue and Key West Avenue; that is these are pre-existing problems not brought about by the re-development. Mr Cochrane is right by reference to cases such as *Pinjarra Hills & Ors v Brisbane City Council & Ors* [1995] QPLR 334 when he submits that the pre-existence of a traffic problem which is exacerbated by a development does not preclude an assessment-manager from imposing a condition that seeks to relieve the problem. However, as Senior Judge Skoien noted in *Crane v Brisbane City Council & Anor* [2003] QPEC 025, this court has, on occasions, adopted a robust approach to traffic issues, recognizing that we do not live in a perfect world. In this case, based on the evidence, I am satisfied that the approach of Reliance supported as it is by DMR and the Council is reasonable, and that a condition of the kind proposed by Mr Brameld on behalf of Barns although relevant, would most certainly be an unreasonable imposition on the development as a consequence of the development. I am also satisfied that such a condition is not reasonably required in respect of the development as a consequence of the development.

[14] As Mr Ure (and indeed Mr Beard in his report), observed, DMR could very easily and inexpensively relieve any perceived safety problem caused by right-turn ingress and egress to the service station by simply painting in the gaps in the double white lines. Equally, at any time it could choose to achieve the same effect by adopting either option (b) or (c) in Mr Beard's report. If DMR decided, as the entity

responsible for this State controlled road, to take any of those steps, Reliance could do nothing about it.

[15] In light of my reasons, I will adjourn to enable the parties to formulate the agreed and undisputed conditions.