

ITEM 10
TIMING OF IMPLEMENTATION OF DEVELOPER CC
DEVELOPMENTS
WS113/637/09(P20)

GOLD COAST WATER

CRIME & MISCONDUCT COMMISSION
No. 2005-5 Date 16 Nov 05
IN THE MATTER OF:

1 BASIS FOR CONFIDENTIALITY

OP GRAND

Not applicable.

2 EXECUTIVE SUMMARY

EXHIBIT No. 243
CLERK

This report specifically concerns the timing of implementation of water supply and sewerage developer contributions for development applications made prior to 2 February 2004. Water supply and sewerage developer contributions increased on 2 February 2004, generally by around 40% north of the Coomera River and 20% in the south.

Water supply and sewerage developer contributions are levied by way of condition of development approval. Conditions of development approval require the applicant to pay "at the rates applicable at the time". Developments paid headworks charges at the time of sealing of survey plans. This means that payments can be up to five years in the making.

Council has obtained legal advice from Stephen Fynes-Clinton, Barrister-at-Law. For the reasons outlined in that advice, Mr Fynes-Clinton is of the view that Council's development conditions require payment "at the rates applicable at the time of payment" validly apply to the rates existing at the time payment is made. In Mr Fynes-Clinton view it is immaterial whether the rate applying at the time payment is made is referable to a new planning scheme policy that came into effect after the condition was imposed.

Alternative views do exist, namely that the contribution rates payable should be those applying in accordance with the policy applying at the time the condition was imposed. The development industry has argued that the sudden impost of increased charges on existing development approvals from 2 February 2004 represents a significant burden, which if sufficient notice had been given, could have been factored into their arrangements.

In response, Council has three alternatives:

- Retain current price increases and apply them in accordance with the rates applying when payment is made;
- Deal with specific developer instances on a case-by case basis; or
- Adopt a transitional price pathway, which sees the gradual implementation of the new prices based on when an application was made. This would apply to development applications made up to the 2 February 2004.

3 PURPOSE OF REPORT

The purpose of this report is to recommend alternative arrangements with regard to the timing of implementation of water supply and sewerage developer contribution charges price increases, which came into force on 2 February 2004.

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4 PREVIOUS RESOLUTIONS

Council at its ordinary meeting on 23 January 2004 resolved as follows:

Ex Minute No. C04.0116.002:

- "1 *That the submissions from interested stakeholders be noted.*
- 2 *That the recommended changes and corrections arising from the submissions as documented in "Attachment 1" be approved for inclusion into the final versions of the Policies for Infrastructure.*
- 3 *That Council adopts the following Planning Scheme Policies for Infrastructure as modified consistent with resolution 2 above to include into Our Living City - Gold Coast Planning Scheme:*
 - a *Policy 3A Policy for Infrastructure (Water Supply Network developer Contributions);*
 - b *Policy 3B Policy for Infrastructure (Sewerage Network Developer Contributions);*
 - c *Policy 16 Policy for Infrastructure (Recreation Facilities Network Developer Contributions); and*
 - d *Policy 19 Policy for Infrastructure (Transport Network Developer Contributions).*
- 4 *That the operation of the adopted new Policies for Infrastructure commence on 27 January 2004."*

Due to issues concerning notification in the local paper as required by the Integrated Planning Act (1997), the new policies came into effect on 2 February 2004.

5 DISCUSSION

5.1 Background

In response to development industry concerns a review of the timing of implementation of increased water supply and sewerage developer contribution has been undertaken. Legal advice commissioned by Council from Corrs Chambers Westgarth Lawyers and Counsel, Mr Fynes-Clinton, Barrister-at-Law has been obtained where necessary.

5.2 Adoption of Policies 3A and 3B

Council resolved on 23 January 2004 to increase water supply and wastewater developer contributions effective from 2 February 2004. In addition, Council introduced two new infrastructure policies for developer contributions; Recreation Facilities Network (Policy 16) and Transport Network (Policy 19).

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This report only concerns water and sewerage developer contributions for those developments, the subject of applications made before 2 February 2004, which already have development approval. New recreation and transport charges, could not prima-face be applied to existing developments as these have existing approvals (with few exceptions) that did not require the payment of recreation facilities and transport developer contributions.

The net effect of the adoption of Policy 3A & 3B is that water supply and sewerage developer contribution charges were increased for new development approvals as well as existing development approvals. For existing developments approvals, this impacts upon those developments that are progressing but have not as yet paid their developer contributions.

5.3 Concerns

Council has received complaints concerning the timing for implementation of the new water supply and sewerage developer contribution charges on existing development approvals; namely, the policy lacked a price pathway or transitional arrangements. It was stated by developers that:

- It is unlawful for Council to increase charges on existing development approvals above CPI (Consumer Price Index);
- Hardship where commercial arrangements had been entered into formally prior to the price rise being known; and
- Individuals, at the height of the property market, purchased lands based upon then known costs regime.

5.4 Analysis of Concerns

Concerns have been raised that the water supply and sewerage developer contribution price increases on 2 February 2004 created hardship where agreements were entered into before the price rise was known. There are two primary occurrences. The first concerns the development of commercial sites. This is where the developer not only provides the land but also constructs a commercial building. These types of agreements have few conditions with long lead times. The other type concerns the 'bulk' sale of allotments. For example, one developer entered a contract for the sale of allotments in February 2003, prior to the substantial rise in land prices. In this instance, the developer did not enjoy the higher market prices for the land but was required to pay higher developer contributions. While the current market prices can support higher developer contributions, there are genuine instances of hardship in the transition.

The last element concerns individuals who purchased lands at the height of the property market. A minority of investors have the expectation that Council must hold costs (plus CPI) in relation to existing development approvals for up to eight years while their development proceeds. This expectation is unrealistic and unsustainable.

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5.5 Alternatives

Three alternatives are possible:

- Retain current price increases for all existing development approvals where developer contributions have not yet been paid by the development;
- Deal with specific developer instances on a case-by case basis; or
- Adopt a transitional price pathway.

Council may resolve to retain the current practice, namely, to reaffirm that the policies adopted, commencing on the 2 February 2004 will apply in relation to all existing development approvals, which have a condition requiring payment at the rate applying when payment is made rather than when the condition is imposed. Legal advice suggests that Council's position is sustainable.

Alternatively Council could decide upon a "case-by-case" approach to accommodate instances of hardship. This concept is by no means alien to Council. For example, s.1031 to s.1033 of the Local Government Act (1993) relates solely to the remission either in whole or part in respect of Council rates based upon amongst other matters "that the payment of the rate would cause the owner hardship".

The third and final alternative involves a transitional price pathway. This Report favours such an option, which would not impose any additional burden on ratepayers and would ensure proper funding for water supply and sewerage infrastructure.

5.6 Impact Analysis

This Section provides an impact assessment of the three policy positions being examined. From a Council perspective, it solely relates to revenue streams and lawfulness. Revenue streams are discussed here with lawfulness considered in Section 5.8 & 5.9 that follows.

5.6.1 No Change

The 'No Change' position potentially represents the maximum revenue position for Council. Proponents have indicated they may litigate this position arguing that the rates applying to existing development approvals should be those applying under the policies in place at the time the condition was imposed (plus CPI). While this should not be a determinant, commercial pragmatism is a consideration. The reasons for Council holding to the 'No Change' option would include:

- The funding of Gold Coast Water's water supply and wastewater capital expenditure program that is significant, exceeding \$625m over five years;
- The funding of the Interest and Redemption payments for the loan program; and
- Council should not be locked into financial arrangements that are many years old.

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The reasons for not adopting the 'No Change' position include:

- Uncertainty in the outcome of any potential legal challenge;
- Recognition and management of genuine hardship cases, namely a matter of equity that some had entered agreements without knowledge of the pending increases; and
- Sustainable management of the development industry.

The 'No Change' philosophy is by no means straightforward. Council's legal position on this matter is firm as advised by Mr Fynes-Clinton (Barrister).

5.6.2 Case-by-Case

Council may decide to adopt a 'Case-by-Case' approach. Under this scenario, proponents would make a detailed submission stating the nature of the hardship together with providing an understanding of their financial undertakings, specifically what was known and unknown at the time the arrangements were entered into. Council may need to seek advice from an accountant, economist and lawyers to determine whether the case is genuine or related to poor investment decisions or poor commercial clauses.

The advantage of this policy position is that it would elicit the genuine hardship cases and direct the limited resources to target relief where it is specifically required. The disadvantage though is that it would consume considerable internal resources that otherwise would be productively involved in managing the delivery of Council services and would not treat the industry in a uniform way. Issues of equality of treatment may therefore arise. This policy position is not recommended.

5.6.3 Transitional Price Pathway

This Report favours a transition of the 2 February 2004 water supply and sewerage developer contribution increases for existing development applications, a "price pathway". The proposal is not unlike the price pathways Council has previously adopted for periodic charges.

A Developer Reference Group was formed to examine industry concerns. The Group comprised consultants who represent key development industry players: Gassmann & Associates, Michel Survey Group, Dredge and Bell Planning, Morton Urban Solutions, Burchill Partners, Cozens Regan Williams Prove and Weathered Howe.

The favoured option agreed with this Group is based upon the date of lodgement of a properly made application:

- From 2 February 2004 - 100% of the new charges (plus CPI)
- 2 February 2003 to 1 February 2004 - Pay 75% of the increase in charges (plus CPI)
- 2 February 2002 to 1 February 2003 - Pay 50% of the increase in charges (plus CPI)
- 2 February 2001 to 1 February 2002 - Pay 25% of the increase in charges (plus CPI)
- Lodged on/by 1 February 2001 - Pay charges at the "old" rates (plus CPI)

The date of lodgement is the date of the last information lodged at Council to form a properly made application, where the original application has not properly made.

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The new charges would apply for all applications that had not reached decision making as at 2 February 2004, irrespective of when these applications were made.

This proposal has a subset clause. The arrangement would only operate to the close of business (5PM) on the 1 February 2006. Any payments for developer contributions made after that date (including those in the post or transit) will be required to be made at the current developer contributions (or infrastructure charges) for water supply and sewerage effective on 2 February 2006, or if later, applicable on the date the payment is made, no matter when the application was received.

5.7 Administration and Implementation

5.7.1 Administration

The corporate Infrastructure Charges Evolution Project identified a significant increase in workload for Council's Subdivisions Headworks Unit, which would be commensurate with the increase developer contribution revenues. This is the subject of a Business Review Process (BPR) being undertaken by the Strategic and Environment Planning Branch. It is clear that additional resources are required in line with the introduction of IPA compliant infrastructure charges regime that is managed by the Subdivisions Headworks Unit.

It is proposed as part of this Report that an additional temporary position, funded by water supply and sewerage developer contributions for the period up to 30 June 2005, be created to assist with the management of the transitional price pathway proposal. The future of the temporary position will be reviewed in response to increased workloads from the collection of recreation and roads contributions. This is being addressed as part of the Business Review Process, with the results of this investigation to be reported to Council.

5.7.2 Treatment of Applications

Planning applications are multi-layer, for example, MUC's are followed by ROL's. These links can go back years. The effect is that if this is permitted Council would be locking itself into financial arrangements some many years old in ways that other institutions are not. Accordingly the latest application is the most relevant.

5.8 Funding of Transitional Price Pathway

The transition is likely to cost in the order of \$8M in lost revenue compared with the current arrangements. The Developer Reference Group suggested that the proposal be "revenue neutral" with no impact upon the ratepayer. That is, any shortfall should be made up in future contributions. If distributed over future growth as part of the risk profile for the development of infrastructure charges rates, this amounts to around \$30/ET.

A legal opinion is being obtained for Council's consideration. The basis of our position is that it is not a shortfall representing "backlog works", nor is it a shortfall representing cross-subsidy between groups. Rather it is a transitional arrangement when introducing new charges that should be spread over all growth going forward, which is part of the risk factors necessarily applied to pricing of infrastructure charges.

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By way of comment, the \$8M shortfall is part of \$1.5b in future growth infrastructure contributions that Council will receive in future years or 0.5%. Some of this \$8M has been collected and would need to be returned under this proposal. The question is whether refunds are automatic or should these refunds be made only upon request to Council. The recommendations assume that Council will automatically return the concession. The temporary staff position is estimated to cost \$45,000 for nine months, which is not included in the revenue shortfall amount.

5.9 Audits

Gold Coast Water commissioned PricewaterhouseCoopers (PWC) to undertake an audit of the estimation of the shortfall in revenue from the proposal. The audit was undertaken by PWC's Performance Improvement Division, Brisbane. The section specialises in providing assurance and advice to clients in relation to their financial and non-financial systems and processes. That experience in systems and processes is necessary for this audit. Mr Chris Johnson heads the section as the responsible Partner.

The audit has been completed. It found that the shortfall estimate ranges from \$6.9M to \$9.4M, based upon no sunset clause. The impact of this sunset clause is to reduce the amount of the estimates. The PWC audit report will be made available to the Committee.

5.10 Legal Reviews

The opinion by Mr Fynes-Clinton (Barrister) and Corrs Chambers Westgarth Lawyers received to date are available to Council. Both the current approach and proposed approach are sound. In addition, Corrs Chambers Westgarth Lawyers have been requested to advise upon whether the shortfall can be reasonably included into any future infrastructure charges review process since the preparation of infrastructure charges pricing necessarily involves transitional arrangements. This advice will be made available to the Committee on the day.

5.11 Consultation and Communication

A communication and consultation plan will be prepared to ensure key stakeholders are fully aware of the transitional price pathway proposal. Consultation and communication plan includes:

- Individual briefings and feedback;
- Industry briefings and feedback;
- Fact Sheets (key information);
- Website materials; and
- Media briefings.

6 STATUTORY MATTERS

Not applicable.

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7 CORPORATE/OPERATIONAL PLAN

The transitional price pathway contributes to Council's "Strategic Priorities" identified in the Corporate Plan 2003-2007 (Ex.Min.No.C03.0613.014) as follows:

10 - City Image:

Infrastructure Funding Strategy

12 - Land Use and Development Control:

Appropriate public infrastructure is supplied in a manner that ensures efficient use of resources

The proposed strategy will also contribute to the following "Key Themes" of Gold Coast Water's 2000-2003 Strategic Plan:

- Quality Water Service Provision;
- Environmental Sustainability;
- Commercial Sustainability; and
- Accountability.

8 COUNCIL POLICIES

This Report concerns the following planning scheme policies (including predecessors):

- a Policy 3A Policy for Infrastructure (Water Supply Network developer Contributions); and
- b Policy 3B Policy for Infrastructure (Sewerage Network Developer Contributions).

The proposal to introduce a transitional price pathway, which sees the gradual implementation of the 2 February 2004 water supply and sewerage development contributions, is to be offered as a concession or rebate.

9 DELEGATIONS

Not applicable.

10 BUDGET/FUNDING

Refer to Section 5.8 above.

11 COORDINATION & CONSULTATION

Refer to Section 5.11. Gold Coast Water formed a Developer Reference Group to provide a forum to discuss the timing of implementation of increases in water supply and sewerage developer contributions. Four (4) meetings have been held. The transitional price pathway is the result of these discussions.