PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Allen-Co Holdings Pty Ltd v Gympie Regional Council* [2021] QPEC 64
PARTIES:	**ALLEN-CO HOLDINGS PTY LTD** (appellant) **v** **GYMPIE REGIONAL COUNCIL** (respondent)
FILE NO:	1504 of 2020
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	19 November 2021
DELIVERED AT:	Southport
HEARING DATE:	29 September and 9 November 2021
JUDGE:	Rackemann DCJ
ORDER:	**The appeal is allowed in part. The infrastructure charges notice will be set aside and replaced by one in the terms of the draft annexed to the respondent's particularised list of reasons filed on 24 August 2021. I will invite the parties to submit appropriate minutes of order.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – appeal against an infrastructure charges notice (ICN) – where there was an error in the calculation of the charge and the ICN should be set aside and replaced – where debate as to the terms of the replacement ICN – where a charge may be levied because the development will place extra demand on trunk infrastructure – where the adopted charge in the charges resolution must be used to calculate the levied charge – where the adopted charge rate for the development is $13,330 – where the Council asserts this rate should be the basis for the replacement ICN – where the appellant contends that the rate of $13,330 should be discounted on the basis that the development will generate extra demand on some forms of trunk infrastructure, but not others – whether the charges resolution should be so construed as to justify the application of a proportional discount

LEGISLATION:	*Planning Act* 2016 (Qld) ss 112(1), (3), 113(1), 119, 120, 130 229(a), Sch 1 Table 1 Item 4, Sch 2 *Planning Regulation* 2017 (Qld) s 52(3)(a), Sch 16
CASES:	*Toowoomba Regional Council v Wagner Investments Pty Ltd* [2020] QCA 191
COUNSEL:	N Loos for the appellant K Wylie for the respondent
SOLICITORS:	Connor O'Meara Solicitors for the appellant McInnes Wilson Lawyers for the respondent

[1] This appeal relates to an Infrastructure Charges Notice (**ICN**) given to the appellant coincident upon the approval of its application for a development permit for reconfiguring a lot to create a 61-lot sub-division in five stages on land situated at 2110 Gympie Woolooga Road, Widgee. Following representations, the Council issued a Negotiated Decision Notice with respect to the development approval, but maintained the ICN.

[2] An appeal against an ICN may only be on one or more of the following grounds:[1]

> (a) the notice involved an error relating to:
>
> > (i) the application of the relevant adopted charge; or
> >
> > (ii) the working out of extra demand, for s 120; or
> >
> > (iii) an offset or refund; or
>
> (b) there was no decision about an offset or refund; or
>
> (c) if the infrastructure charges notice states that refund will be given – the timing for giving the refund; or
>
> (d) for an appeal to the P&E Court – the amount of the charge is so unreasonable that no reasonable relevant local government could have imposed the amount.

[3] This appeal is on the ground that there was an error in the calculation of the charge (engaging grounds (a)(i) and/or (ii)). It is common ground that there was an error, such that the ICN should be set aside and replaced. The debate is as to the terms of the replacement ICN.

[4] A local government may, by resolution, adopt charges for providing trunk infrastructure for development.[2] A regulation may prescribe development for which there may be an adopted charge and a maximum amount for providing infrastructure in

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1 *Planning Act* 2016 (Qld) (***PA***) Sch 1 Table 1 Item 4.

2 *PA* s 113(1).

relation to that development.[3] The *Planning Regulation* 2017 (Qld) (the **Regulation**) sets out, in schedule 16, the prescribed maximum for development by way of (relevantly for present purposes) reconfiguring a lot for a range of uses[4] in respect of which a local government may have an adopted charge. No point is taken by the appellant in relation to the specified maximum amounts.[5] The Council adopted charges on 23 November 2017 when its infrastructure charges resolution (the **charges resolution**) came into effect. It remains in effect. An appeal to this Court must not be about the adopted charge.[6] The adopted charge is, for present purposes, immutable.[7]

[5] The local government must give an ICN if a development approval has been given and an adopted charge applies to providing trunk infrastructure for the development.[8] It is common ground that is the case in this instance.

[6] A charge may only be levied, by an ICN, for extra demand placed on trunk infrastructure that the development will generate.[9] To levy a charge in accordance with that limitation, the Council therefore:[10]

(i) identifies whether the development will generate extra demand on trunk infrastructure. That is done by identifying relevant trunk infrastructure and determining whether extra demand will be placed upon it by the development;[11] and

(ii) if so, calculate the levied charge by using the adopted charge. There is no requirement to put the adopted charge to one side in order to consider the quantum of the charge to be levied on a first principles basis, having regard to the extent of extra demand to be placed upon the relevant trunk infrastructure. The adopted charge is used, even though it might involve a "broad brush" approach.

[7] The first question is whether the development will generate extra demand on trunk infrastructure, within the meaning of the *PA*. That expression is defined to include, relevantly for present purposes, development infrastructure identified in an LGIP as trunk infrastructure.[12]

[8] Development infrastructure is, in turn, defined as follows:

development infrastructure means—

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3 *PA* ss 112(1) and (3).
4 s 52(3)(a) of the Regulation.
5 T1-12.
6 *PA* s 229(a).
7 *Toowoomba Regional Council v Wagner Investments Pty Ltd* [2020] QCA 191 at [89].
8 *PA* s 119.
9 *PA* ss 119(12)(a) and 120(1).
10 *Toowoomba Regional Council v Wagner Investments Pty Ltd* supra at [78] and [79].
11 but, subject to s 120(3), not including the matters in s 120(2) of the *PA*.
12 *PA* Sch 2.

(a) land or works, or both land and works, for—

(i) water cycle management infrastructure, including infrastructure for water supply, sewerage, collecting water, treating water, stream managing, disposing of waters and flood mitigation, but not water cycle management infrastructure that is State infrastructure; or

(ii) transport infrastructure, including roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities predominantly serving a local area, cycleways, pathways and ferry terminals; or

(iii) public parks infrastructure, including playground equipment, playing fields, courts and picnic facilities; or

(b) land, and works that ensure the land is suitable for development, for local community facilities, like—

(i) community halls or centres; or

(ii) public recreation centres; or

(iii) public libraries.

[9] It is agreed, between the parties, that the subject development would generate extra demand on trunk infrastructure identified in an LGIP as trunk infrastructure. In particular it is agreed as follows:

> "For the purposes of the *PA,* the LGIP and the 2017 charges resolution, the development approved by the P & E Court approval will generate extra demand upon the following trunk infrastructure networks:
>
> (a) transport – trunk roads;
>
> PARTICULARS
>
> (i) trunk roads, future roadworks, trunk road bridges, trunk road bus shelters, future intersection upgrades, future transport facilities and future bridge upgrades in the Gympie catchment identified in maps PFTI-TRD-1 to PFTI-TRD-20.
>
> (b) transport – trunk pathways; and
>
> PARTICULARS
>
> (i) trunk pathway depicted on map PFTI-TPW-63, as well as other trunk pathways in the Gympie catchment.

(c) parks and community facilities

PARTICULARS

(i) the community facility and district sports park (Winifred Power Park) depicted on map PFTI-PCF-63, as well as other parks and community facilities in the Western Catchment and the Gympie Urban Catchment.

[10] It follows that a charge may be levied for the extra demand placed on trunk infrastructure by the development. Attention then turns to the charges resolution in order to identify the adopted charge to be used in calculating the charge to be levied.

[11] The charges resolution applies to the entirety of the local government area[13] but, as it may do by reason of s 114(2) of the *PA*, sets different adopted charges for development in different parts of the local government area. Part 3 of the charges resolution deals with the adopted charge rate. It does so by reference to different kinds of development. It distinguishes between development by way of reconfiguration of a lot (s 3.1) and development by way of a material change of use. Insofar as the latter is concerned, it further distinguishes between a material change of use for residential development (s 3.2) and for non-residential development (s 3.3).

[12] The relevant development, in this case, is reconfiguring a lot. That is dealt with in s 3.1 of the charges resolution which provides as follows:

> "The adopted infrastructure charge for reconfiguring a lot is the amount stated in for residential (three or more bedroom dwelling) in Table 2 less any credit identified in 4.2."

[13] Table 2 appears in s 3.2 of the charges resolution and, as its heading states, sets out the adopted infrastructure charge for material changes of use for residential development. The adopted charge rate for residential (three or more bedroom dwelling) varies depending upon the location of the development. For Imbil and Kilkivan (within which the subject site is located) the rate is $13,330 per dwelling. The effect of s 3.1, read with Table 2, is that the adopted charge rate for reconfiguring a lot in Imbil and Kilkivan is $13,330 per lot, less any credit. That figure is, indeed, what the Council asserts should be the basis for the replacement ICN.[14] The ICN the subject of the appeal utilised a figure of $15,839, which Council concedes is wrong.

[14] The appellant acknowledges that the correct starting point is the rate of $13,330 per lot, but contends that the rate should be discounted. Although s 3.1 does not expressly provide for any discount, the appellant contends, in effect, as follows:

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13 s 2.1 of the charges resolution.

14 It acknowledges that credit should be given for the one dwelling currently on site.

(i) The statutory limitation that a charge may only be levied for extra demand on trunk infrastructure should be read as a limitation with respect to each kind of trunk infrastructure. In that regard it points to the definition of development infrastructure extracted above to submit that the legislation requires the charges resolution to adopt charges which facilitate charges being levied by reference to amounts for extra demand on the relevant constituent components of trunk infrastructure, being the four broad types of development infrastructure (water cycle, transport, public parks and local community facilities) referred to in the definition (rather than the five networks in the charges resolution);

(ii) The charges resolution refers to five trunk infrastructure networks, namely transport, public parks, stormwater, water supply and sewerage;

(iii) Whilst it is accepted that the development will generate extra demand on some forms of trunk infrastructure, it is also agreed that it will not generate extra demand upon other forms of trunk infrastructure referred to in the charges resolution, namely trunk water, sewerage or storm water infrastructure (all of which are forms of water cycle management infrastructure);

(iv) In the absence of the application of a discount to the rate of $13,330, the replacement ICN, as contended for by the Council, would impermissibly impose a charge for networks upon which the appellant's development would generate no additional demand, and

(v) The charges resolution should therefore be applied or construed in such a way as to afford a level of discount to avoid that consequence. That can be done by reference to a certain table in the charges resolution.

[15] In order to better appreciate that argument and how the appellant contends the discount ought be quantified, it is necessary to say something more about the charges resolution. It has already been observed that the charges resolution deals with different kinds of development in different sections. It also deals with each of those kinds of development in different ways. Development by way of a material change of use for non-residential development is dealt with in s 3.3. It contains Tables 3 and 4 which apply to different localities. The latter applies to the area within which the subject site falls. The table has six columns. The first lists the adopted infrastructure charge category. The second lists the planning scheme use definitions which correspond with the relevant category. The third describes a relevant unit of demand (per square metre GFA). Columns four, five and six set out the rate (dollars per unit of demand) for each

of the five trunk infrastructure networks referred to in the charges resolution.[15] This facilitates a network-by-network calculation of the charge. The charges resolution then provides, in effect, that the water supply and/or sewer charges will not apply where development is not serviced by water or by both of those networks, as the case may be.

[16] The adopted charge for a material change use for residential development is dealt with in s 3.2 and is calculated on a different and more broad brush basis. The section does not nominate a rate for each type of infrastructure network. Rather, it applies various units of demand (depending on the type of the residential use) to various specified amounts of money (depending on the location) to arrive at the charge. The adopted charge is however, reduced as follows:

(i) 25 per cent where the development is serviced by water but not by sewer, or

(ii) 45 per cent where the development is not serviced by either water or sewer.

[17] The provision as to a discount is introduced by a paragraph that commences "the proportional network split is generally in accordance with Table 1". Table 1, which immediately follows the provision about the discount is as follows:

Network	**Total trunk infrastructure network value**	**Proportional split**
Water	$93,116,531	26%
Sewer	$74,639,643	21%
Stormwater	$10,282,077	3%
Transport	$101,528,418	29%
Parks	$74,593,012	21%

[18] The provision as to the discount and Table 1 to which it refers, are both contained within s 3.2 of the policy dealing with the adopted infrastructure charge for a material change of use for residential development. Those provisions are obviously not of general application. For example, the discount is dealt with in an entirely different way in s 3.3. Further, s 3.1 makes no mention either of any discount, or of Table 1. The purpose of including Table 1 appears to be to give some explanation for the derivation of the discount provision in s 3.2, although the quantum of the discount for having no connection to water and/or sewer does not match precisely the proportional split for those items in Table 1.

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15 water supply and sewerage are both in column 4, whilst transport and public parks are each in column 5.

[19] Notwithstanding the above however, the appellant contends that s 3.1 of the charges resolution should be read or applied so as to include the "proportional network split" referred to in s 3.2 and particularised in Table 1, to facilitate a network by network proportional discounting of the charge otherwise set by s 3.1. The consequence, for which it contends, is a discount of 50 per cent to reflect the fact that its development will not generate additional demand on trunk infrastructure for water (26 per cent), sewer (21 per cent) or storm water (3 per cent). Alternatively, it submits that it should, at least, receive the 45 per cent discount that would be applicable if its development fell under the discounting provisions in s 3.2. The appellant submitted that the approach for which it contends is consistent with construing the charges resolution purposively and in light of the statutory limitation in s 120 of the *PA* as to what a charge may be levied for.

[20] It is difficult to find any justification on the face of the charges resolution for the construction contended for by the appellant. As has already been observed:

(i) The charges resolution sets the adopted charge rates in three distinct sections.

(ii) Each of those sections deals with different development under different headings.

(iii) Each of the sections sets the adopted rate in different ways.

(iv) Two of the sections deal with discounts, but in different ways, whilst the section that applies to the subject form of development makes no reference to any discount.

[21] It is difficult to reach the conclusion that the above distinctions are anything other than intended. It is particularly difficult to accept that the charges resolution should be construed as requiring or permitting the adopted charge to be identified, for the purposes of calculating the charge to be levied in relation to a reconfiguration of a lot, by reference to Table 1 in circumstances where the table:

(i) appears in s 3.2, which deals with a material change of use for residential development, but even then only as information as to what the "proportional network split" is "generally" in accordance with;

(ii) is not adopted, even in s 3.2, for quantifying the discount, since the discounts adopted are slightly different to the proportional splits for water and sewer in the table, and

(iii) is neither referred to within s 3.1 nor adopted by it, notwithstanding that s 3.1, which deals with a different type of development, otherwise expressly adopts one aspect of another table (Table 2) in s 3.2.

[22] It is unnecessary to adopt the highly strained construction contended for by the appellant in order to read the charges resolution or to apply it harmoniously with s 120 of the *PA*. The premise of the appellant's argument is that the charge now contended for by the Council would impermissibly impose a levy for demand placed on each and every one of the trunk infrastructure networks referred to in the charges resolution when its development will, in fact, only generate demand on some. Indeed counsel for the appellant, in the course of argument,[16] accepted that his submission depended upon the $13,330 rate, as applied to reconfiguration of a lot, being a charge for all five of the networks referred to in the charges resolution in accordance with the proportional split the Court was being asked to apply in order to arrive at the discount sought by the appellant. He contended that is to be inferred from the charges resolution read as a whole.[17] The charges resolution does not so provide.

[23] Section 3.1 does not adopt a charge by reference to discrete infrastructure networks. Rather, it adopts a single charge for development of a particular kind, namely reconfiguring a lot.[18] Because of s 120 of the *PA*, that can only be construed and applied to levy a charge in relation to development of that kind which generates extra demand on trunk infrastructure.[19] Where, as here, the development does so, the adopted charge is as provided for in s 3.1, by reference to the specified part of Table 2. The quantum of the adopted charge in relation to development by way of reconfiguring a lot is not divisible or dependent upon the type or types of trunk infrastructure upon which the development will generate extra demand.[20] The quantum of the charge is the same irrespective of the type or number of networks upon which the extra demand will be generated. It is, arguably, the broadest of broad brushes, but that is different from saying that the charge when levied is for extra demand on each and every one of the infrastructure networks in accordance with the proportional split in Table 1.

[24] It was submitted, for the appellant, that the legislation does not contemplate a "global charge" of this kind which, it was said, would take meaning away from s 120(1). It has already been observed that the appellant placed reliance on the definitions of 'trunk infrastructure' and 'development infrastructure' to submit that there must be differentiation between the components of trunk infrastructure. The charges resolution does not do that in relation to development by way of reconfiguring a lot. This appeal cannot be about the adopted charge. The appellant's submissions, in this regard, are something of a veiled attack on the adopted charge under the guise of a submission on the proper interpretation of the charges resolution.

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16 T1-44, 45.

17 T1-46.

18 It may be noted that Sch 16 of the Regulation, in setting the prescribed amounts, does so by reference to amounts for trunk infrastructure not for particular kinds of trunk infrastructure.

19 See *Toowoomba Regional Council v Wagner Investments Pty Ltd* supra at [103].

20 It was not suggested that *PA* s 115(4) is applicable.

[25] In any event, the definition of trunk infrastructure, when read with that for development infrastructure informs the parameters of what a charge may be levied for, rather than mandates the structure of the charges resolution. It might be, as counsel for the appellant points out, that the limitation in s 120(1) of the *PA* is relatively undemanding in circumstances where the charges resolution adopts a charge which is applied in the context of development of a specified kind whenever there is extra demand placed on any trunk infrastructure, but that does not mean that s 120(1) is robbed of meaning. Further, s 120 of the *PA* does not, in my view, require the adopted charge in s 3.1 of the charges resolution to be applied or to be construed as applying, without discount, only in circumstances where the subject development would generate extra demand on each and every one of the networks referred to in the charges resolution.

[26] The appellant sought to call in aid the statement of purpose in the charges resolution which is as follows:

> "The purpose of the resolution is to assist with the implementation of the applicable local planning instruments by stating the following:
>
> (a) An adopted charge for the purpose of determine [sic] a levied charge for funding part of the establishment cost of the following trunk infrastructure networks:
>
> (i) Transport network;
>
> (ii) Public parks network;
>
> (iii) Storm water network;
>
> (iv) Water supply network;
>
> (v) Sewerage network.
>
> (b) Other matters relevant to the adopted charges.

[27] It may be accepted that the purpose of levying charges, in accordance with the charges resolution, throughout the local government area is to obtain money to fund 'part' of the establishment costs of the nominated networks. It does not follow however, that the charges resolution is properly construed or applied as if it adopted differential rates on a network-by-network basis or was subject to a discounting mechanism for development by way of reconfiguration of a lot, so that development that places extra demand on one kind of trunk infrastructure is levied a different amount to that which places extra demand on another or others. It also does not follow that by setting a single adopted charge the charges levied are for something other than the extra demand placed on trunk infrastructure that the development will generate.

[28] That the amount of $13,330 where applied in s 3.2 is subject to a discount of 25% or 45% where water or water and sewer is not connected supports the proposition that,

where applied without discount in the context of development by way of a material change of use for residential development, it is levied for extra demand placed on trunk infrastructure that includes extra demand on those two networks. It does not follow however, that the same applies where the figure is used for a different form of development, dealt with in a different section of the policy and in circumstances where there is no discount or breakdown of the charge on a network-by-network basis.

[29] It was also submitted that to use Table 1 in the manner contended for by the appellant would be consistent with s 2.1 of the charges resolution which provides, in part, as follows:

> "But where development is outside the priority infrastructure area shown in the LGIP, Council will assess the impact of the development upon the trunk networks."

[30] The location of development outside of a priority infrastructure area (PIA) is also referred to in s 2.3 as follows:

> "**2.3 Development inconsistent with assumptions about future development**
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> Development is inconsistent with the assumptions about future infrastructure in the local government infrastructure plan (LGIP) if:
>
> …
>
> (c) the location of development – the premises is located outside the priority infrastructure area (PIA) as identified in the LGIP; or
>
> …"

[31] As counsel for the respondent pointed out, the reference to the Council assessing the impact of development where premises are located outside of the PIA is likely explained by the fact that s 130 of the *PA* permits the imposition of a development condition requiring the payment of extra trunk infrastructure costs (after taking into account levied charges for the development), in certain circumstances, for premises that are completely or partly outside the PIA. In any event, there was no evidence before the Court which would permit an assessment of the impact of the development upon the trunk networks on a first principles basis and I do not consider that the provision should be construed or applied as an obstacle to a charge being levied on the basis of the adopted charges in part 3 of the charges resolution. Further, I do not consider that the provisions justify adopting the rate in accordance with s 3.1 of the charge resolution subject to a discounting regime grafted onto it by reference to either Table 1 or the discounting provisions of s 3.2. That is not a necessary or proper application of the charges resolution.

[32] The appellant might well feel aggrieved that the application of the charges resolution leads to a levied charge which is of the same quantum as that which would be levied in respect of reconfigurations which placed extra demand upon a different number of the trunk infrastructure networks referred to in the charges resolution. Others might feel aggrieved by the adoption, for all development by way of reconfiguration of a lot that generates extra demand on trunk infrastructure, of the amount specified in Table 2 for residential (3 or more bedroom dwelling) even where the reconfiguration is not to facilitate a use of that kind. Such grievances are not uncommon where broad brush approaches are taken. The appellant did not directly attack the validity of the charges resolution and, as has been observed, the appeal may not be about the adopted charge. Further, the appellant did not attempt to advance the unreasonableness ground of appeal and no sufficient evidentiary basis was laid for it in any event. It has also been noted that the statutory scheme involves specified maximum charges for development, including, relevantly, reconfiguration (which are specified in schedule 16 of the regulation as 'global' amounts ie not by reference to components of infrastructure) in respect of which a local government may have an adopted charge and there was no issue about the maximum charge.

[33] For the reasons given, the ICN should be replaced with one which levies a charge in the manner proposed by the respondent. The parties agree that, in those circumstances, the replacement should be in the terms of the draft ICN annexed to the respondent's particularised list of reasons filed on 24 August 2021.