

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER: of 2004
NUMBER: 252 of 2004

Appellants (First and
Second Respondents)

**PELICAN LINKS PTY LTD AND
TITANIUM ENTERPRISES PTY LTD**

AND

Respondent (Applicant):

CALOUNDRA CITY COUNCIL

NOTICE OF APPEAL

To the Respondent

And to the Registrar, Planning and Environment Court at Maroochydhore

TAKE NOTICE that the Appellants appeal to the Court of Appeal against the whole of the Order of the Planning and Environment Court at Maroochydhore made on 24 September and 4 October 2004.

DETAILS OF THE JUDGMENT APPEALED AGAINST ARE:-

Date of the Judgment: 24 September 2004
Description of Proceedings: Maroochydhore Planning and Environment
Application No. 252 of 2004
Description of parties involved
in the proceedings: Caloundra City Council as Applicant
and

Notice of Appeal
Filed on behalf of the Appellants
Form 64, Rule 747

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Pelican Links Pty Ltd as First Respondents
and
Titanium Enterprises Pty Ltd as Second
Respondents

Name of Primary Court Judge: His Honour Judge J.M. Robertson

Location of Primary Court: Maroochydore

GROUNDS:-

1. With the finality principle point, the primary judge erred in law:
 - (a) in concluding that condition A12 was an ancillary condition (RJ [64]);
 - (b) in regarding it as permissible, in applying the principle, to take into account what development had taken place since the rezoning approval in 1996 and since the preparation of Plan of Development No. 63 in 1997 (RJ [65]);
 - (c) in apparently concluding that the development which had taken place was entirely in accordance with Plan of Development No. 63 (RJ [65]), when there was no evidence to support it;
 - (d) in failing to conclude that condition A12 offended the principle of finality.

2. With the as of right point, the primary judge erred in law:
 - (a) in apparently regarding it as permissible to take into account what development had taken place (RJ[69]-[70]);
 - (b) in apparently concluding that the development which had taken place was entirely in accordance with Plan of Development No. 63 (RJ [69]-[70]), when there was no evidence to support it;
 - (c) in failing to conclude that condition A12 offended the principle that it is impermissible by a condition to restrict or deny an as of right use of



3. With the legislative power point, the primary judge erred in law:
- (a) in concluding that condition A12 was not such as to go to the core or substance of the planning scheme but rather related to the proper administration of the scheme (RJ [79]);
 - (b) in failing to conclude that condition A12 involved the exercise of a legislative power under the guise of the exercise of an administrative power.

ORDERS SOUGHT:

4. (a) An Order that the Appeal be allowed;
- (b) An Order that the decision of the Planning & Environment Court at Maroochydore made on 24 September 2004 in Maroochydore Planning & Environment Court Application No. 252 of 2004 be set aside;
- (c) An Order:
- (1) that Maroochydore Planning & Environment Court Application No. 252 of 1998 be dismissed; or
 - (2) alternatively, that Maroochydore Planning & Environment Court Application No. 252 of 2004 be returned to the Planning and Environment Court at Maroochydore for decision in accordance with this Court's reasons.
- (d) An Order that the Respondent pay the Appellants' costs of and incidental to this Appeal;
- (e) Such further or other orders as this Court deems fit.

RECORD PREPARATION:-

We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and practice directions and any order or direction in the proceedings.

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PARTICULARS OF THE APPELLANTS:

Name: Pelican Links Pty Ltd and Titanium Enterprises Pty Ltd
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 Applicant's solicitor's name: Michael Connor
 and firm name: Connor O'Meara
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PARTICULARS OF THE RESPONDENT:

Name: Caloundra City Council
 Residential or business address: 1 Omrah Avenue CALOUNDRA 4551
 Respondent's solicitor's name: Michael Heiner
 and firm name: Heiner & Doyle Solicitors
 Solicitor's business address: 2 Otranto Avenue CALOUNDRA 4551
 Address for service: As above
 Telephone: (07) 5491 7877
 Fax: (07) 5491 7638

Signed:

Description: Solicitors for the Appellants

Dated: 5th November 2004

This Notice of Appeal is to be served on:-

The Respondent
 Caloundra City Council

