



Land and Environment Court  
New South Wales

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Case Name:	Refalo v Camden Council
Medium Neutral Citation:	[2021] NSWLEC 1485
Hearing Date(s):	12 May 2021; 30 July 2021
Date of Orders:	24 August 2021
Decision Date:	24 August 2021
Jurisdiction:	Class 1
Before:	Gray C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted for intensive plant agriculture (hydroponics), including the construction of a raised hydroponic farm pad, sheds, pivot irrigation system and associated works, at 84 Cut Hill Road, Cobbitty, subject to the conditions in Annexure A.</p> <p>(3) Exhibits 1, 2, 3, 6, 8 and G are returned.</p>
Catchwords:	<p>APPEAL – development application - intensive plant agriculture – adequacy of written letter of owner’s consent – visual impact of the raised hydroponic growing pad – whether earthworks have been minimised – whether there are traffic and acoustic impacts</p>
Legislation Cited:	<p>Camden Local Environmental Plan 2010, cll 2.3, 7.4</p> <p>Environmental Planning and Assessment Act 1979, ss 8.7, 4.15</p> <p>Environmental Planning and Assessment Regulation 2000, cl 49(1)</p> <p>Standard Instrument (Local Environmental Plans) Order 2006</p> <p>State Environmental Planning Policy No 55 –</p>

## Remediation of Land, cl 7

Cases Cited:	Codling v Central Coast Council [2019] NSWLEC 1158 CSKS Holdings Pty Ltd v Woollahra Council [2014] NSWLEC 176 Harry's Real Estate Agency Pty Ltd v Canterbury Municipal Council (Land and Environment Court of New South Wales, 8 July 1981, unreported) Stafford Quarries Pty Ltd v Kempsey Shire Council (1992) 76 LGRA 52
Texts Cited:	Camden Development Control Plan 2019
Category:	Principal judgment
Parties:	David Refalo (Applicant) Camden Council (Respondent)
Representation:	Counsel: A Hemmings (Applicant) J Reid (Respondent)  Solicitors: Beatty Legal Pty Limited (Applicant) HWL Ebsworth (Respondent)
File Number(s):	2020/271780
Publication Restriction:	No

## JUDGMENT

- COMMISSIONER:** The land alongside Cut Hill Road, within the rural town of Cobbitty in Greater Sydney, is zoned for primary production. Mr Refalo seeks to carry out development for the purpose of intensive plant agriculture (hydroponics) for the farming of lettuce at 84 Cut Hill Road, Cobbitty. He lodged a development application with Camden Council (the Council), which was refused on 20 October 2020. The current proceedings are an appeal by Mr Refalo against that refusal, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- The proposed development includes the construction of hydroponic growing areas with shade structures on a single hydroponic farm pad, and two metal sheds of 1152m<sup>2</sup> to support the hydroponics operations by providing storage

for machinery and the storage and packing of the agricultural products. The proposed development also includes the construction of an office for administration and staff facilities. It also includes the removal of trees, the installation of a pivot irrigation system, car parking, an on-site wastewater management system, landscaping around the growing areas and along the site boundaries, and associated site works. There are also some works proposed on the right of carriageway over the adjoining land, through which the site is accessed.

- 3 The farming of lettuce requires a level pad to enable control over the nutritional load and growing environment, as well as to ensure safe passageway for persons who manually carry out the planting, feeding, harvesting and packing. A slope of 1:60 is considered optimal. In order to achieve this slope, a total of 119,847m<sup>3</sup> of fill is required to be imported to the site. Of this, 47,400m<sup>3</sup> of fill has already been approved by a complying development certificate (CDC No. 1454/19), although Mr Refalo has agreed that if development consent is granted, a condition can be imposed to surrender the complying development certificate.
- 4 The Council is opposed to the grant of development consent on the basis that the proposed development does not minimise the excavation, that the raised hydroponic farm pad created by the fill and the shade structure will have adverse visual impacts, and that the number of truck movements required for the earthworks will create unacceptable traffic and acoustic impacts. The Council also contends that the written owner's consent of the owner of the land on which the right of way is located, Mrs Head, does not constitute owner's consent as required by the applicable legislative provisions.
- 5 For the reasons that are set out below, I have determined that none of the contentions raised by the Council warrant refusal of the development application. The owner's consent is sufficient to satisfy me that the legislative requirement is met. As set out below, I consider that the raised hydroponic farm pad will not cause an adverse visual impact as it will not be obtrusive in the landscape, will be landscaped, and is of a size and type that can be reasonably anticipated by the zoning and the development controls. I have also

found that, having regard to the nature of the proposed development and the characteristics of the site, the extent of cut and fill is minimised to the greatest extent possible, and the earthworks do not cause any adverse impacts.

### **The site and the locality**

- 6 A site inspection was conducted at the commencement of the hearing. The site is known as 84 Cut Hill Road, Cobbitty and is legally described as Lot 322 DP 848633. It does not have street frontage, but is accessed by a 10m wide right of carriageway and easement for services over 86 Cut Hill Road. The right of carriageway dissects 86 Cut Hill Road, and the dwelling and sheds for 86 Cut Hill Road are located adjacent to the right of carriageway.
- 7 The site is irregular in shape and has an area of 30.96 hectares. The site levels vary from 73.77AHD at the southern boundary to 55.83AHD at the northern boundary, which runs along the watercourse known as Cobbitty Creek. The northern half of the site is flood affected to the 5% and 1% annual exceedance probability (AEP) levels and the majority of the site is affected by the probable maximum flood level.
- 8 The site contains several farm sheds, a dam and vegetation, which consists of grassed pasture with paddock trees and some stands of larger trees located towards Cobbitty Creek.
- 9 Cut Hill Road contains a number of dwellings on large lots, together with a number of intensive livestock agriculture and intensive plant agriculture activities. Residential dwellings are located to the west of the site, at 94 and 110 Cut Hill Road, and to the south of the site at 66, 70, 50 and 64 Cut Hill Road.
- 10 The site is bordered by the Cut Hill Reserve, a public open space playing field to the west that also contains a scout hall, an archery field and a public recreation area.
- 11 A poultry farm is located directly opposite the site on Cut Hill Road. A duck farm is located at 69 Cut Hill Road, plant agriculture is located at 61 Cut Hill Road and 49 Cut Hill Road and a large plant agricultural facility operated by the University of Sydney is located at 107 Cobbitty Road. The site inspection

included observing the duck farm and the poultry farm from the road, as well as an inspection of the agricultural operations at 107 Cobbitty Road from the internal access driveways within that property.

### **The planning framework**

- 12 The site is zoned RU1 Primary Production pursuant to the Camden Local Environmental Plan 2010 (CLEP 2010). Intensive plant agriculture is a nominated permissible use in the zone. Further, rural industries are also a nominated permissible use in the zone, which is defined in the Dictionary to the CLEP 2010 to include agricultural produce industries. The objectives of the zone, which are required to be considered in determining a development application, are as follows:

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To encourage diversity in primary industry enterprises and systems appropriate for the area.
- To minimise the fragmentation and alienation of resource lands.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To permit non-agricultural uses (including tourism-related uses) that are compatible with the agricultural, environmental and conservation values of the land.
- To maintain the rural landscape character of the land.

- 13 Clause 7.4 of the CLEP 2010 concerns earthworks, and provides as follows:

#### **7.4 Earthworks**

- (1) The objectives of this clause are as follows—

- (a) to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land,
- (b) to allow earthworks of a minor nature without separate development consent.

- (2) Development consent is required for earthworks unless—

- (a) the work is exempt development under this Plan or another applicable environmental planning instrument, or
- (b) the work is ancillary to other development for which development consent has been given.

(3) Before granting development consent for earthworks, the consent authority must consider the following matters—

- (a) the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in the locality,
- (b) the effect of the proposed development on the likely future use or redevelopment of the land,
- (c) the quality of the fill or the soil to be excavated, or both,
- (d) the effect of the proposed development on the existing and likely amenity of adjoining properties,
- (e) the source of any fill material and the destination of any excavated material,
- (f) the likelihood of disturbing relics,
- (g) the proximity to and potential for adverse impacts on any watercourse, drinking water catchment or environmentally sensitive area.

- 14 Clause 7.1 of the CLEP 2010, which concerns flood planning, was repealed by an amendment to the Standard Instrument prescribed by Standard Instrument (Local Environmental Plans) Order 2006. Nevertheless, the Council has a Flood Risk Management Policy that applies to the site. There are no issues raised by the Council with respect to flood management on the site.
- 15 The Camden Development Control Plan 2019 (CDCP) also applies to the site. Section 2.1 concerns earthworks, and sets out the following objectives and controls:

“Objectives

- a. To allow for the construction of retaining walls on sloping land at the subdivision works stage of a development;
- b. Minimise cut and fill through site sensitive subdivision, road layout, infrastructure and building design;
- c. Minimise additional earthworks of lots during the construction phase;
- d. Ensure land forming does not increase the potential for the inundation of water on any other land during the full range of flood events; and
- e. Protect and enhance the aesthetic quality and amenity of the area by controlling the form, bulk and scale of land forming operations to appropriate levels.

Controls

General

- 1. Subdivision and building work should be designed to respond to the natural topography of the site wherever possible, minimising the extent of cut and fill

(e.g. for steep land houses will need to be of a 'split level' design or an appropriate alternative and economical solution).

2. Subdivision and building work must be designed to ensure minimal cut and fill is required for its construction phase.

...

#### Use of Virgin Excavated Natural Material (VENM)

1. All land forming operations should involve the use of clean fill (also known as Virgin Excavated Natural Material or 'VENM'). The VENM must also meet the same salinity characteristics of the receiving land. Council may consider alternatives to VENM on merit."

- 16 Section 6.2.4 of the CDCP contains controls for farm buildings, which would include the sheds that form part of the proposed development. This includes controls requiring a minimum side and rear boundary setback of 5m, requiring cut and fill to be kept to a minimum "and slope should not exceed 15%", and a requirement for farm buildings to have pitched roofs.
- 17 Section 6.2.5 of the CDCP concerns agricultural development, and provides the following objectives and controls:

#### "Objectives

- a. Ensure that intensive plant agriculture is compatible with the rural environment;
- b. Minimise any adverse impact of intensive plant agriculture on surrounding properties; and
- c. Minimise the environmental impact of intensive plant agriculture on surrounding areas and watercourses.

#### Controls

1. The minimum lot size required to undertake intensive plant agriculture is 2 hectares.
2. The following setbacks apply to all buildings and structures associated with intensive plant agriculture:

Front boundary	20m
Side and rear boundary	5m
Watercourses	40m

Table 6-1: Setbacks

3. Only new and durable materials must be used in the construction of greenhouses/igloos/market gardens.

4. A suitable landscape screening or buffer must be established between any boundary and greenhouses/igloos/market gardens to effectively mitigate the visual impact and land use conflict from the development.

5. The landscape screening or buffers must be established through planting trees or shrubs (minimum 1.5m in height when mature), this should occur when any structures are erected.

6. On unsewered sites, development must be in accordance with Council's Sewage Management Strategy.

7. A Water Cycle Management Plan (WCMP) detailing how water will be sourced, stored, used, treated and recycled for the agricultural operation must be provided with any development application. The WCMP must demonstrate that the operation will not significantly impact on the total water cycle beyond the boundaries of the site.

8. Where the proposed use of the site is odour generating, an Odour Impact Assessment will be required.

- 18 The proposed development complies with the setback controls, and is supported by a Water Management Plan.

### **The residents' evidence**

- 19 A number of local residents made written submissions in response to the notification of the development application that was lodged with the Council. In addition, at the commencement of the hearing, resident objector evidence was given orally by a number of local residents, including evidence on site from Mrs Head, the owner of 86 Cut Hill Road, across which the right of way is located. The issues raised in the written submissions and in the evidence given orally can be summarised as follows:

- The fill on the land will result in an adverse visual outlook for neighbouring properties.
- The proposed development does not meet the Council's requirements for development to respond to the natural topography of the site.
- The importation of fill will result in adverse noise and traffic impacts, and some of those noise and traffic impacts will be ongoing as part of the ongoing development.
- The proposed development is out of character with the rural residential lifestyle of the area.
- There are issues concerning the signing of written consent by the owner of 86 Cut Hill Road.

- 20 As set out below, I am satisfied that the visual impact is acceptable on the basis that the built form of the fill and the shade structure is not obtrusive in the



landscape, it is development that is anticipated by the zoning and the development standards, and where it is not out of character for the area.

- 21 Further, as set out below, the acoustic experts agree that both the operation of the proposed development and the earthworks associated with construction will meet the relevant acoustic criteria, subject to the imposition of conditions of consent. The traffic evidence is also that truck volumes of up to 24 movements per hour during construction is acceptable, and this will be supported by a Construction Management Plan (see Ex 4 Attachments 5 and 8). Accordingly, the traffic and acoustic impact of the trucks passing along the right of way does not warrant refusal of the development application. Furthermore, the vehicles associated with the importation of the fill and the carrying out of the construction works, which will be more frequent and larger than the trucks required for the operation of the farm, will be a temporary impact.
- 22 The issue concerning the written consent of Mrs Head is considered below, but similarly does not warrant refusal of the development application.

### **The expert evidence**

- 23 Expert opinion evidence on the acoustic impact of the proposed development was given in a joint report prepared by Mr Richard Haydon, an acoustic engineer engaged by Mr Refalo, and Mr Steven Cooper, an acoustic engineer engaged by the Council.
- 24 They agree that the operation of the proposed development will not give rise to any adverse acoustic impact as it will achieve full compliance with the applicable noise limits. They agree that the principal issue of concern relates to the trucks associated with the provision of fill for the earthworks together with the operation of a dozer, dump truck and compactor. The modelling showed that there was a marginal exceedance at three residential receiver locations in a modelled scenario of all activities occurring simultaneously with respect to earthworks operations. Mr Cooper and Mr Haydon agree that there are two options that will achieve full compliance with the noise target, which are either not having any dozer, dump truck or compactor operations within 125m of the south-west corner of the earthworks site during the concurrent arrival of trucks carrying fill material, or, alternatively, the construction of a temporary 3m high

acoustic barrier or hoarding at the south-western corner of the earthworks site for the duration of the construction. If either of these options form part of the conditions of consent, Mr Haydon and Mr Cooper agree that there will be no adverse acoustic impact as a result of the activities associated with the earthworks.

- 25 Expert opinion evidence on the town planning issues, including on the visual impact of the proposed development, was given in a joint report and in oral evidence by Mr Jeremy Swan, a town planner engaged by Mr Refalo, and Ms Clare Aslanis, a town planner employed by the Council.
- 26 Ms Aslanis opines that the 119,847m<sup>3</sup> fill will alter the outlook of nearby residents and some areas of the public domain, and that the cut and fill works are “not consistent with the existing topography of the site nor any site within the immediate vicinity”. Ms Aslanis opines that an alternative design for the site should be pursued, which involves stepping of the beds such that it follows the topography of the land and minimises the extent of earthworks. Mr Swan instead relies on the visual impact assessment carried out by John Aspinall of Urbaine Architecture (February 2020) and opines that the visual impact is acceptable.

#### **The requirement for owner’s consent**

- 27 Clause 49(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) makes it clear that a development application can only be made “by the owner of the land to which the development application relates”, or “by any other person, with the consent of the owner of that land”.
- 28 When the development application the subject of the appeal was lodged with the Council on 4 November 2019, it concerned only the carrying out of development on 84 Cut Hill Road, Cobbitty, and there were no works proposed to be carried out on the right of way on 86 Cut Hill Road. On 18 June 2020, the development application was amended by way of an updated application package lodged with the Council. That amended development application contained updated civil work plans that proposed works on the right of way, and was accompanied by a letter signed by Mrs Head that starts “Dear Sir” and states “I/we... as the owner(s) of 86 Cut Hill Road Cobbitty, provide this letter

of owner's consent to David and Jannie Refalo to submit a Development Application to Camden Council for works within the right of carriageway on our land". The letter is dated 26 May 2020.

- 29 It is well established that the written consent relates to the lodgement of the development application (see *Harry's Real Estate Agency Pty Ltd v Canterbury Municipal Council* (Land and Environment Court of New South Wales, 8 July 1981, unreported) at [8]), and that, once provided, cannot be withdrawn (see *Stafford Quarries Pty Ltd v Kempsey Shire Council* (1992) 76 LGRA 52 at 55-56).

*The evidence of Mrs Head concerning the signing of the document*

- 30 The agreed record of the oral evidence of Mrs Head, given at the site inspection, concerning the signing of the document is in Ex 7. She expresses concerns that she "was stupid enough to sign the piece of paper" and that, when she signed it, she was "naïve and stupid", and "didn't put on her glasses". Her evidence was that Mr Refalo had said that he needed her "to sign the paper to let him seal the road". The following exchange then took place between counsel for Mr Refalo, Ms Hemmings, and Mrs Head (in accordance with the notes of the parties' legal representatives in Ex 7):

AH: Before you signed letter, you had the plans showed to you by your son?

Mrs Head: Yes

AH: Did you discuss with son prior to signing how you wanted the trees retained

Mrs Head: David said they were going to take down trees

AH: - and you wanted trees retained?

Mrs Head: I couldn't imagine why you would take them down

AH: Plans were shown to you that changed to keep the trees? Did your son show you those plans?

Mrs Head: - son told him (Refalo) that the trees could not be taken down

AH: So you do have plans?

NJH: Yes, they could be in there somewhere

AH: Your daughter with you when you signed?

NJH: Yes, but she didn't read it, I thought it was just needed to gravel the road"

*The Council's position that the owner's consent is inadequate or invalid*

- 31 The Council contends that “the development application was lodged without consent from 86 Cut Hill Road, Cobbitty” (Contention 7). It submits, in support of this contention, that the owner's consent may not be valid in circumstances where there is evidence that it was not properly procured. The Council relies on the decision of Pain J in *CSKS Holdings Pty Ltd v Woollahra Council* [2014] NSWLEC 176, in which her Honour states (at [40] & [42]):

“40... The requirement for owner's consent will not be satisfied "if a purported consent is not in law a consent at all": see *Mulyan Pty Ltd v Cowra Shire Council* [1999] NSWLEC 212; (1999) 105 LGERA 26 at [23]. Thus, if the owner's consent was obtained by fraud (for example, if the owner's signature is forged), then, as a matter of law, the consent would thereby be invalidated.

...

42 Under the general law, consent is vitiated by, amongst other things, unconscionable conduct, mistake, illegality and misrepresentation relying on Peter W Young *The Law of Consent* (1986, Law Book Company Limited) at p 73-79. Subject to further investigation, it is therefore possible that the owner's consent provided by the Minister was vitiated by corrupt conduct and was for that reason not a valid consent in law.”

- 32 In raising this contention, the Council says that it does so under the duty to investigate the circumstances in which owner's consent was provided, which is articulated by Pain J at [43]:

“Having been put on notice of those matters, the Council was therefore entitled (and possibly even under a duty) to investigate the circumstances in which owner's consent was provided by the Minister, and whether that consent was vitiated by corrupt conduct. That is precisely the purpose of the ICAC investigation. It was therefore appropriate for the Council to defer making a determination of the DA pending the outcome of that investigation. The Department has refused to provide a copy of the review report to the Council. Council can only act on the basis of information available to it.”

- 33 Counsel for the Council, Ms Reid, expressed in her submissions that there was some unfairness with Mr Head, who is the son of Mrs Head and has power of attorney for her, not being permitted to give evidence with respect to the signed letter giving owner's consent.

*The applicant submits that the owner's consent is adequate*

- 34 The applicant, Mr Refalo, submits that the Council's contention on this point is improper and should be withdrawn, in circumstances where the Court does not have power, in a merit appeal concerning the development application, to set aside landowner's consent which has been given in writing.

- 35 In any event, Mr Refalo submits that there is no basis for any suggestion that Mrs Head lacked capacity to grant owners' consent, or that the owner's consent was obtained by corrupt conduct, duress or misrepresentation. Ms Hemmings submits, as counsel for Mr Refalo, that any such allegation should be supported by sworn evidence with a proper opportunity for cross-examination, and that the burden of proof in establishing these matters rests with the Council.
- 36 Ms Hemmings submits that Mrs Head clearly had capacity to give oral evidence to the Court on site on the first day of the hearing, and that her oral evidence makes it clear that she was shown plans for the development, she had discussed those plans with her son, she had requested changes to the proposed development to retain the trees on the right of way, she had received the amended plans that retained the trees, and that she understood that she needed "to sign the paper to let him seal the road". Ms Hemmings submits that this is entirely consistent with the history of the amendment to the development application.
- 37 Further, Ms Hemmings points out that it can hardly be implied that Mrs Head signed the document under any duress, given that her daughter was present at the time that she signed the document providing owners' consent. Ms Hemmings submits that, at its highest, the evidence of Mrs Head can only demonstrate that, at the time of the hearing, she now regrets signing the document providing her consent.

*The owner's consent is adequate*

- 38 The letter dated 26 May 2020 and signed by Mrs Head is written owner's consent that is sufficient to satisfy me that the requirement of cl 49(1) of the EPA Regulation is met. There is insufficient evidence to establish that the document is invalid or that the signed consent was vitiated in any way. The regret expressed by Mrs Head in her evidence at the site inspection is not sufficient to establish that there was any unconscionable conduct, mistake, illegality or misrepresentation. Further, there is no evidence whatsoever that she lacked the capacity to sign the letter.

- 39 On the contrary, the evidence given by her at the site inspection is entirely consistent with the events that transpired in the progress of the development application. Her consent was required because the development application was to be amended to include works on the right of way, which mainly involved the sealing of the driveway, which Mrs Head referred to as “the road”. It is clear that Mrs Head understood that her signature was needed to “seal the road”.
- 40 I do not accept that there was any unfairness in preventing Mr Head from giving oral evidence concerning the signed owner’s consent, particularly in circumstances where his written submission concerning the development application constrains the evidence concerning the signed document to what Mrs Head has told him, and his evidence that he told Mr Refalo that “we wouldn’t be providing a letter” (Ex 2 p 363). There is no doubt that the letter was signed by Mrs Head, and, as Mr Head was not present when the document was signed, he has no direct knowledge of what occurred at that time. His evidence could not have assisted in establishing that there was any unconscionable conduct, mistake, illegality or misrepresentation, particularly in circumstances where it is clear that Mrs Head understood that the letter required her signature for the works to take place on the right of way.

### **The visual impact**

- 41 The Council contends that the raised hydroponic farm pad changes the topography of the site and will have create adverse visual impacts (Contention 1). The Council contends that the visual impact arises from an excessive amount of fill, and that the result is a significant alteration to the existing rural landscape which is contrary to the objectives of the RU1 zone. It says that the proposed development does not meet the requirements of Section 2.1 of the CDCP, which requires that building work respond to the natural topography of the land, and minimise the extent of cut and fill. Further, the Council contends that there is insufficient information to establish whether the tree plantings will actually screen the development, which it says is required by Section 6.2.5 of the CDCP. The Council’s contention is confined to the visual impact of the raised hydroponic farm pad, and does not concern the construction of the sheds or the pivot irrigation system.

- 42 The Council's contention is supported by the evidence of Ms Aslanis, who opines that the cut and fill works create a rectangular raised platform with harsh batter slopes that are not consistent with the existing topography, and that will be visually prominent from many areas of the public domain and private property "as a result of a building platform that is significantly higher than the natural ground level" (Ex 4 p 8). She considers that the landscaping will only provide limited visual screening, and that there is insufficient evidence to demonstrate that the proposed trees, in the 5m wide area between the swale and the boundary, will grow successfully.

*The visual impact assessment*

- 43 As indicated above, a visual impact assessment (VIA) was carried out by John Aspinall of Urbaine Architecture. The VIA provides an assessment of the visual impact from 23 viewpoints, which are primarily from public domain locations to the south, west and east of the site. Some of the viewpoints are immediately adjacent to residential premises, including 66 Cut Hill Road. The VIA assessed the impact from the majority of viewing locations as "low", with only two locations identified as being "low/medium" impact. The photomontages for each of the viewpoints are in evidence.
- 44 Mr Swan undertook his own assessment, and reached the same conclusion. He also considered the visual impact of additional viewpoints at 66 Cut Hill Road, 303 Cobbitty Road, 133 Chittick Lane and Cut Hill Reserve and opines the visual impact for each to be either low or nil. Mr Swan points out that the location of the greatest amount of fill is in the northern section of the site, which is the furthest away from neighbours to the south, and that the farm building will largely obscure any views of the site from 86 Cut Hill Road. Further, he considers that the extensive tree landscaping will soften any perceived impact, and that the surrounding landscape already accommodates a range of other intensive rural uses that involves cut and fill of land.
- 45 Ms Aslanis considers that the VIA has not accounted for several approved buildings on the subject site, and that any adverse visual impact could be mitigated by a reduction in earthworks by stepping the growing platform in a manner that is consistent with the topography of the site.

*The visual impact is acceptable*

- 46 From the outset and contrary to the position of Ms Aslanis, it is not the role of the Court, in exercising the functions of the consent authority, to consider whether an alternative proposal should be pursued, such as one that has multiple benched areas that step down with the topography of the land. Instead, the Court's role is to assess the acceptability of the current proposal, based on the evidence in the proceedings and in accordance with s 4.15 of the EPA Act. In doing so, I find that the visual impact of the proposed development is acceptable, for the following reasons.
- 47 Firstly, the proposed development is not obtrusive in the landscape. I accept the submission made on behalf of Mr Refalo that an altered outlook does not equate to an unacceptable visual impact, and that, on account of the location of the raised hydroponic farm pad and the aspect and distance of any views of it, it is not dominant, obtrusive or overwhelming from the affected outlooks. I accept the evidence in the VIA and the opinion of Mr Swan that each of the outlooks are affected in a way that can be described as "low impact" or in between "low" and "medium" impact. I have reviewed the photomontages of each viewpoint and consider that the raised hydroponic farm pad of the proposed development does not unacceptably impact any of the outlooks, even taking into account the fact that the shade cloth will appear white from a distance. At the site inspection, I observed that the raised hydroponic farm pad, which was marked by height poles, was not visible from the Scout Hall in the Cut Hill Reserve, and would not be prominent in view lines from the carpark in Cut Hill Reserve. Further, the location of the greatest amount of cut and fill is in the northern section of the site, which is the furthest away from the most affected neighbours, which are to the south (66 and 70 Cut Hill Road). As pointed out by Ms Hemmings in submissions, the site is, in fact, excavated on the southern side of the hydroponic farm pad. The view of the growing platform is obscured from the dwellings to the west by sheds.
- 48 Secondly, views to the raised hydroponic farm pad will be filtered by both existing landscaping on other sites and proposed landscaping that forms part of the proposed development. The batter slopes for the hydroponic farm pad are proposed to be grassed, and extensive tree landscaping is proposed on the



eastern, western and southern boundaries. There is 5m between the swale on the southern side of the hydroponic farm pad and the boundary. I do not accept Ms Aslanis' position that evidence from an arborist is required to establish that a tree can grow in an area that is 5m wide, with each tree given an area of around 5m by 5m. It is common logic that an area of that size can accommodate a tree. Further, contrary to Ms Aslanis' position, the plantings are not required to grow to a size that is greater than the built form proposed, but instead are required by Section 6.2.5(5) of the CDCP to be a minimum 1.5m in height when mature, and pursuant to s 4.15(3A)(a) of the EPA Act more onerous standards cannot be imposed.

- 49 Thirdly, the visual impact is acceptable in circumstances where the proposed development is of a type anticipated by the zoning, and of a size anticipated by the applicable height development standard and the standards under the CDCP. The site and its surrounds, north of Cobbitty Road, are zoned RU1 Primary Production. Intensive plant aquiculture is a nominated permissible use in the zone, and the raised hydroponic farm pad complies with the height development standard in the CLEP 2010 and with the setback requirements set out in Section 6.2.5 of the CDCP. Residents of the local area, and those using the public domain in the RU1 zone can reasonably have expected development of this type and size to be carried out in the area and within their outlook.
- 50 Fourthly, I accept the submissions made on behalf of Mr Refalo that the surrounding landscape already accommodates a number of other intensive agricultural uses, such that the 'benching' of the raised hydroponic farm pad is not out of character for the locality. The duck farm at 69 Cut Hill Road and the poultry farm at 99 Cut Hill Road both have benching, with the duck farm containing structures on benched areas that contained around 3-4m of fill and grassed batter slopes. Similarly, the poultry farm contained sheds erected on benched areas supported by retaining walls.
- 51 For those reasons, I find that the visual impact of the proposed development is acceptable in its context.

### **Consistency with the zone objectives**

- 52 The Council also contends that the proposed development is not consistent with the objectives of the zone, as it does not “maintain the rural landscape character of the land” (Contention 1(b)). The Council says that the proposal alters the landscape by the importation of fill and the construction of sheds and shade sails. This is supported by the evidence of Ms Aslanis, who opines that whilst the built form associated with rural agricultural land uses are common within the area, “they generally follow the natural topography of the site and are not significantly elevated by a building platform”. She considers that the rural landscape character includes undulating land with a gradual slope to Cobbitty Creek.
- 53 Whilst I am not required to be satisfied that the proposed development is consistent with, or achieves, the objectives of the zone, cl 2.3(2) of the CLEP 2010 requires the consent authority to “have regard to” the objectives, and I consider that the proposed development ought not be antipathetic to those objectives (see also *Codling v Central Coast Council* [2019] NSWLEC 1158 at [84]-[86]).
- 54 I accept the submissions made on behalf of Mr Refalo and Mr Swan’s evidence that the proposed development is consistent with the zone objectives (Ex 4 p 7). In particular, I accept that the proposed development maintains the rural character of the land by setting the area of earthworks away from the road and affected boundaries, by proposing a raised hydroponic farm pad and shade structure that is not obtrusive in the landscape and is not out of character with the existing benching of farm sheds in the locality. I do not accept the evidence of Ms Aslanis that rural agricultural land uses in the area follow the topography of the land. The agricultural uses at 69 Cut Hill Road, 99 Cut Hill Road and at 107 Cobbitty Road all have a degree of earthworks to create large level areas for plantings or agricultural farm sheds. I also note that, as expressed above at [49 [Ref80022372](#)], intensive plant agriculture is a nominated permissible use in the zone and it can therefore be reasonably expected to form part of the “rural character” of the area.

## **The earthworks and the amenity impacts**

- 55 The Council also contends that the proposed earthworks are unacceptable as they do not meet the requirements in Section 2.1 of the CDCP for the minimisation of cut and fill (Contention 1(c)). The Council says that the extent of the earthworks results in traffic and amenity impacts caused by the large number of trucks required to import the fill (Contentions 3 and 4). On the same basis, the Council contends that the proposed development is not suitable for the site (Contention 2).
- 56 The Council relies on the evidence of Ms Aslanis, who opines that a design that achieves the control in Section 2.1 would be designed to step down with the topography of the site. She considers that this could be done by “Stepping down each row of tables or reconfiguration”. Ms Reid also sought to suggest to Mr Swan in cross-examination that a reconfiguration of the raised hydroponic farm pad could be undertaken so that some of the planting beds could be relocated from the north side of the pad to the west, such that a larger portion of the raised pad ran along the southern boundary of the site.
- 57 Assessing compliance with a control that requires the minimisation of cut and fill, and that does not provide any numeric maximum on the extent of cut and fill permitted, requires looking beyond the crude measurement of fill required and considering the nature and design of the development, the characteristics of the site and surrounds, and the impacts of that cut and fill. The mere fact that the fill required to be imported to the site is as large as 119,847m<sup>3</sup> is not sufficient to refuse it on the basis that the extent of fill is not minimised. The controls require that “building work should be designed to respond to the natural topography of the site wherever possible, minimising the extent of cut and fill” (Section 2.1, control 1) and “building work must be designed to ensure minimal cut and fill is required for its construction phase” (control 2). The relevant objective of these controls is similar in its terms to the controls themselves, and states “Minimise cut and fill through site sensitive subdivision, road layout, infrastructure and building design”. For the following reasons, I consider that the extent of cut and fill is minimised given the nature of the development, the circumstances of the site, and having regard to its impacts.

- 58 Firstly, I accept that the nature of the development requires a level pad (with a slope of 1:60) to operate the hydroponic farming of lettuce, including enabling control over the growing environment and to support safe passageway for persons and small vehicles for the planting, feeding, harvesting and packing. This evidence is summarised by Mr Swan and is supported by photographs and descriptions from the operation of a similar facility at Kemps Creek, where there are a number of pad levels and the operation is described as sub-optimal. There is no evidence to contradict this. Ms Alanis' opinions as to how the proposed development could operate by stepping down rows of tables are merely speculation that are beyond her expertise as a town planner. Further, there is insufficient evidence in support of Ms Reid's proposition that the farm could operate successfully with the pads configured in a different location, or the extent of the cut and fill required for such a configuration. Accordingly, I accept the submission made on behalf of Mr Refalo that the extent of cut and fill has been minimised to the extent possible to still enable the operation of the proposed hydroponics farm to meet the specific requirements for the farming of lettuce.
- 59 Secondly, the extent of fill is minimised when considering the existing level of the site and the additional cut and fill required due to the flooding controls. To achieve compliance with the flood planning controls, the lowest part of the raised hydroponic farm pad must be above 67 AHD (see Ex A Tab 7 p 10), and compensatory cut is required to ensure that there are no changes to the total flood storage volume within the proposed development area (see Ex A Tab 7 p 1).
- 60 In the context of requiring a minimum height of 67 AHD for the pad, together with the slope of 1:60, the amount of fill is minimised by achieving 67 AHD at the lowest point of the site (to the north, towards Cobbitty Creek) and by following the topography of the site so that the 1:60 slope rises away from the creek, to an area towards the south of the site where the height of the pad will be similar to the natural ground level. This is clearly shown on civil works plans (Ex A Tab 3), which show the levels of the raised hydroponic farm pad, and include an earthworks plan that demonstrates that the natural levels of the land are being used for a portion of the raised hydroponic farm pad, with a small

amount of cut to the south of that area and with fill that increases to the north (but with a total height that decreases to the minimum height that is required). The fill is therefore minimised to the greatest extent possible by utilising the natural ground level for part of the highest area of the pad, and putting the greatest amount of fill at the lowest level of the pad where the natural ground level is lowest to achieve the minimum height of 67 AHD. This is supported by the fact that there was an earlier iteration of the plan that had a larger amount of fill proposed (see Ex G). Accordingly, I am satisfied that, in the circumstances, the raised hydroponic farm pad follows the topography of the land and is “designed to ensure minimal cut and fill is required for its construction phase” (control 2).

- 61 Thirdly, there is no evidence in support of there being an unreasonable traffic impact as a result of the earthworks, notwithstanding the contention raised by the Council in that regard. The letter from Traffix traffic consultants dated 25 March 2021 confirms that truck volumes of up to 24 truck movements per hour are considered supportable, having regard to “localised noise impacts arising from one truck being present and impacts on the external road network relating to environmental amenity issues”. This evidence is not contradicted, and Mr Swan and Ms Aslanis agree that the acoustic expert joint report has established a number of mitigation measures to address the acoustic impact of trucks, which can form conditions of consent. In addition, the agreed conditions of consent include a requirement for the development to be carried out in accordance with the Construction Management Plan and a Traffic Management Plan, which include measures to reduce noise from construction and earthworks vehicles. As such, there will not be any unreasonable traffic impacts occasioned by the importation of fill for the proposed development.
- 62 Fourthly, there will be no unreasonable acoustic impact during the importation of fill and for the earthworks. Contrary to what the Council contends, Mr Cooper and Mr Hayden agree that there will be no acoustic issues resulting from either the operation or construction of the proposed development, provided that the recommendations in the report by Mr Haydon are complied with.

- 63 As a result, I am satisfied that, having regard to the nature of the proposed development and the characteristics of the site, the extent of cut and fill is minimised to the greatest extent possible, and the earthworks do not cause an adverse acoustic impact or traffic impact. Further, as set out above, the extent of the fill will not cause an adverse visual impact in circumstances where it will not be obtrusive in the landscape, will be landscaped, and can be reasonably anticipated by the zoning and the development controls. In considering all of these factors, the work required for the construction of the raised hydroponic farm pad is “designed to respond to the natural topography of the site wherever possible, minimising the extent of cut and fill” (Section 2.1, control 1) and is “designed to ensure minimal cut and fill is required for its construction phase” (control 2).
- 64 For the same reasons, together with my reasons in support of the finding that there is no adverse visual impact, I accept that the site is suitable for the development. Whilst the Council contends that the site is not suitable for the development given the substantial earthworks required to be undertaken to make it suitable for the proposed use (Contention 2), I have found that the cut and fill is minimised and the earthworks do not cause any unacceptable adverse acoustic, traffic or visual impacts. The Council has raised no issues with respect to other aspects of the proposed development, such as the removal of trees, the construction of sheds, and the pivot irrigation system.

### **Development consent should be granted**

- 65 For the reasons that I have outlined, I am satisfied that the proposed development does not have any adverse traffic and acoustic impacts during construction and during its operation, and that the proposed raised hydroponic farm pad does not have an unacceptable visual impact. The proposed development is appropriate for the site, is not obtrusive in the landscape, and is development of a type that is anticipated by the zoning of the site for RU1 Primary Production and by the applicable controls. Additionally, I am satisfied that the following preconditions to the exercise of the Court’s jurisdiction have been satisfied:
- The proposed development complies with the applicable development standards in the CLEP 2010.

- Consideration has been given as to whether the subject site is contaminated, as required by cl 7(1) of the State Environmental Planning Policy No 55 – Remediation of Land. The preliminary site investigation identified an area requiring remediation. A remedial action plan has been prepared (Ex D Tab 8) and indicates that the site can be made suitable for the proposed use by excavation of the contaminated soil and disposal offsite.
- I have considered the matters required to be considered by cl 7.4 of the CLEP 2010, which are addressed in the Statement of Environmental Effects, the Concept Stormwater Management report and the Flood Impact Assessment.

### **Conditions of consent**

- 66 Development consent should therefore be granted, subject to conditions of consent. However, there is a dispute between the parties concerning the conditions of consent proposed to manage the acoustic impact of the construction works. As set out above at [24], there are two options that will achieve full compliance with the noise target. The first is not having any dozer, dump truck or compactor operations within 125m of the south-west corner of the earthworks site during the concurrent arrival of trucks carrying fill material, and the second is the construction of a temporary 3m high acoustic barrier or hoarding at the south-western corner of the earthworks site for the duration of the construction.
- 67 Whereas the Council seeks to impose a condition requiring the latter option, Mr Refalo would prefer that the two options remain available to him to choose from as he carries out the construction of the development. In support of Mr Refalo's position, Ms Hemmings points out that the conditions also separately impose noise targets with which compliance is required, and that the Construction Management Plan clearly prevents there being a dump truck or compactor operations within 125m of the south-west corner of the earthworks site during the concurrent arrival of trucks carrying fill material.
- 68 I accept the position advanced on behalf of Mr Refalo. It is appropriate for Mr Refalo to have the option to decide whether it is necessary to erect the 3m high acoustic barrier. The Construction Management Plan clearly includes the marking of the area within 125m of the south-west corner as an exclusion zone, within which no plant/equipment shall operate during the concurrent arrival or departure of trucks. If this is not successfully managed on an ongoing basis, it remains open to Mr Refalo to erect the 3m high barrier to achieve

compliance with the noise targets, and, if neither the wall is built nor the exclusion zone adhered to, it is open to the Council to commence enforcement action for failure to comply with the conditions of consent and the noise targets therein.

- 69 I note that the parties have agreed that the development consent is a deferred commencement consent that requires the surrender of the complying development certificate (CDC No. 1454/19).

### **Final orders**

- 70 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted for intensive plant agriculture (hydroponics), including the construction of a raised hydroponic farm pad, sheds, pivot irrigation system and associated works, at 84 Cut Hill Road, Cobbitty, subject to the conditions in Annexure A.
- (3) Exhibits 1, 2, 3, 6, 8 and G are returned.

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**J Gray**

**Commissioner of the Court**

Annexure A (346001,  
pdf)<http://www.caselaw.nsw.gov.au/asset/17b7671d316bdde925a23cfe.pdf>

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