



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2018] NSWCA 304

Basten JA, Payne JA, Emmett AJA

The Court of Appeal has allowed an appeal brought by Moorebank Recyclers against Tanlane Pty Ltd concerning a planning proposal for the development of part of Tanlane's land in Moorebank which contains contaminated land.

The appellant, Moorebank Recyclers Pty Ltd, and the first respondent, Tanlane Pty Ltd, own neighbouring lots of land. The first respondent sought to develop its land for residential subdivision and for the construction of a marina. It developed a planning proposal involving two amendments to the Liverpool Local Environmental Plan 2008. In 2016 the planning proposal came before the Liverpool City Council, who passed resolutions supporting it and authorising that it be forwarded to the Greater Sydney Commission. In 2017 a delegate of the Commission made a gateway determination that the planning proposal should proceed.

The land the subject of the planning proposal is contaminated land. As such, prior to any amendment to the Liverpool Local Environmental Plan, it was necessary that the requirements of clause 6 of State Environmental Planning Policy No 55 – Remediation of Land would need to be complied with. The appellant commenced proceedings against the first respondent claiming that the 2016 resolutions of the Council and the 2017 determination of the Commission were invalid by reason of a failure to comply with clause 6.

The primary judge dismissed the appellant's claim on the basis that clause 6 did not need to be complied with at the point in time of the impugned decisions.

On appeal, the issues were:

- (1) Whether the Council resolutions were amenable to judicial review;
- (2) Whether the Council and Commission were required to comply with clause 6;
- (3) Whether clause 6 applied to the whole of the planning proposal;
- (4) Whether the Council complied with clause 6;
- (5) Whether failure to comply with clause 6 invalidates both or either of the Council resolutions and the Gateway decision.

The Court (Basten JA, Payne JA, Emmett AJA) allowed the appeal. The Court held that the Council resolutions were reviewable and that, as a matter of construction, both the Council and Commission were required to comply with clause 6 which applied to both of the proposed amendments in the planning proposal. The Court further held that the evidence

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did not demonstrate that the Council complied with clause 6. As compliance with clause 6 was a mandatory step in the process of making a valid instrument, the Council resolutions and Gateway determination were invalid.