



## Land and Environment Court New South Wales

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**Case Title:** Blakeney v Mosman Municipal Council  
(No 2)

**Medium Neutral Citation:** [2013] NSWLEC 100

**Hearing Date(s):** 19, 20, 21, 22 March 2013

**Decision Date:** 11 July 2013

**Jurisdiction:** Class 1

**Before:** Craig J

**Decision:**

1. The appeal is dismissed.
2. Development application No. 8.2012.063.1 lodged on 13 April 2012 is refused.
3. Exhibits may be returned.

**Catchwords:** DEVELOPMENT APPLICATION – proposed provision of on-site car parking area and construction of an access driveway along an unformed road – whether that road was a ‘public road’ within the meaning of the *Roads Act 1993* – whether the Court had the power to consent under s 138 of the *Roads Act* to construct the access driveway on that road – application of s 39(2) of the *Land and Environment Court Act 1979* – impact of driveway construction for private use of land zoned for public recreation purposes – long-term pedestrian use of unformed road for access to harbourside bushland reserve and beach – development inconsistent with objectives of planning controls and bushland management plan – application refused

**Legislation Cited:** Environmental Planning and Assessment Act 1979

Conveyancing Act 1919

Land and Environment Court Act 1979

Roads Act 1993

Local Government Act 1906 (now repealed)

Local Government Act 1919 (now repealed)

State Environmental Planning Policy No 19  
– Bushland in Urban Areas

Sydney Regional Environmental Plan  
(Sydney Harbour Catchment) 2005

Threatened Species Conservation Act 1995

Water Management Act 2000

**Cases Cited:**

Australian Leisure and Hospitality Group Pty  
Ltd v Manly Council (No 4) [2009] NSWLEC  
226; 172 LGERA 1

Blakeney v Mosman Council [2013]  
NSWLEC 37

Casson v Leichhardt Municipal Council  
[2011] NSWLEC 243; 186 LGERA 34

Connery v Manly Council (1999) 105  
LGERA 451

Gibson v Mosman Municipal Council [2001]  
NSWLEC 134; 114 LGERA 416

Goldberg v Waverley Council [2007]  
NSWLEC 259; 156 LGERA 27

Newington v Windeyer (1985) 3 NSWLR  
555

Owen v O'Connor [1964] NSWLR 1312;  
(1963) 9 LGERA 159

Permanent Trustee Company of NSW Ltd v  
Campbelltown Municipal Council [1960]  
HCA 62; 105 CLR 401

Sanderson v Wollongong City Council  
(1998) 102 LGERA 1

Schubert v Lee [1946] HCA 28; 71 CLR 589

Stojan (No. 9) Pty Ltd v Kenway [2009]  
NSWCA 364

Super Studio v Waverley Council [2004]  
NSWLEC 91

Sydney City Council v Ipoh Pty Ltd [2006]  
NSWCA 300; 68 NSWLR 411

Category: Principal judgment

Parties: Michael Blakeney (Applicant)  
Mosman Municipal Council (Respondent)

#### Representation

- Counsel: J E Robson SC with C R Ireland (Applicant)  
P C Tomasetti SC with A C Hemmings  
(Respondent)

- Solicitors: Bartier Perry Solicitors (Applicant)  
Pikes & Verekers Lawyers (Respondent)

File number(s): 11022 of 2012

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## JUDGMENT

- 1 The property known as 22B Burran Avenue, Mosman (**the Site**) lacks any frontage to a formed public road. However, it does have the benefit of a right of way over adjoining land known as 24 Burran Avenue, Mosman. The right enjoyed over the latter property not only includes a right of general passage but also includes a right to park motor vehicles using or associated with the Site. Presently, there is no car parking area within the Site.
- 2 At various times over the past 20 years, Mr Paul Delprat, the owner of the Site, has sought development consent to enable him to gain access to the rear of the Site and there to provide a platform for car parking in his yard. Access to the Site has, on each occasion, been proposed along an unformed section of road that is nominated on various plans, including the deposited plan for the land owned by Mr Delprat, as Stanton Road. That section of unformed road appears to represent an extension of a formed

and sealed road bearing the same name and which is accepted by all as being a public road. The unformed road adjoins the eastern boundary of the Site.

- 3 The most recent development application submitted by Mr Delprat, seeking consent to provide parking on the Site and to construct access to it along the unformed road, was lodged with Mosman Council (**the Council**) on 13 April 2012. That application was refused by the Council on 20 November 2012.
- 4 Being dissatisfied with the Council's decision, Mr Delprat has appealed to this Court pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* (**the EPA Act**). For reasons that follow, I have determined that the appeal should be dismissed and the development application lodged on 13 April 2012 refused.
- 5 In hearing this appeal I was assisted by Commissioner Morris. Her assistance is gratefully acknowledged.

## **Issues**

- 6 Ultimately, there were two issues, broadly described, that were raised for determination by the parties to the appeal. The first was whether, in determining the appeal, this Court had power to exercise the function of the Council to grant consent under s 138 of the *Roads Act 1993* for construction of the access road to the Site along the unformed road. The second broad issue raised was whether, in the exercise of planning discretion, development consent should be granted under s 80(1) of the EPA Act. In the context of the latter issue, the compatibility of the development proposed with the objects expressed in relevant planning instruments was agitated as was the visual impact of the development proposed along the unformed road together with consideration of the public interest.

- 7 The Council also raised an issue as to the adequacy of the proposed car parking area and the capacity of vehicles to manoeuvre within it, having regard to the design presently proposed. This issue will be addressed in due course although I am of the opinion that any present inadequacy in this regard could be solved by appropriate design.

*An application for joinder is made*

- 8 On the day prior to commencement of the hearing, I heard and refused an application for joinder to the proceedings made by Janice and Bruce Simpson (*Blakeney v Mosman Council* [2013] NSWLEC 37). Mr and Mrs Simpson reside at 6 Stanton Road. Their land is located at the northern end of the formed section of Stanton Road and also adjoins the eastern boundary of the unformed section of that road.
- 9 One of the issues raised by Mr and Mrs Simpson needs to be noticed because of its relevance to the issues considered in the course of hearing the appeal. They submitted that the unformed section of Stanton Road was not, in law, a public road. The Council had, until one business day prior to the joinder application being heard, advanced a contention to similar effect. On the hearing of the joinder application, the Council accepted that it had advanced the contention but that it had been withdrawn on the basis of legal advice provided to it. Nonetheless, both the Council and the legal representatives of Mr Delprat accepted that evidence would be led and submissions made in the course of hearing the appeal directed to establishing the status of the unformed road as a public road.
- 10 It is apparent that the legal status of the unformed road was the principal legal issue identified at the time at which the proceedings were fixed for hearing, as a result of which a judge was listed to hear the matter. Accordingly, I will address that issue later in these reasons.

## **The Site and its environs**

- 11 The Site comprises the whole of the land in Lot 5 DP 53944. Lot 5 is triangular in shape with its apex to the north-west. The existing dwelling on that Lot is located towards that apex.
- 12 The Site falls steeply to the east and to the south. It is that steepness which presently prevents vehicles being able to move onto the Site from the right of way over 24 Burran Avenue. At the rear or south-eastern section of the Site there is an area with only a gentle fall. It is this area within which the vehicle parking area is proposed.
- 13 The Site is bounded on the south by an unformed section of Fairfax Road which also falls steeply from Burran Avenue towards the east. This section of unformed road is vegetated by a number of native trees, exotic species and weeds with a stairway constructed through it from Burran Avenue down to the unformed section of Stanton Road. The unformed section of Fairfax Road then extends south-easterly from the unformed section of Stanton Road to the highwater mark of Edwards Bay and Beach. That bay lies at the northern extremity of Balmoral Beach.
- 14 On its east, the Site has a frontage of about 60m to the unformed section of Stanton Road. Located within that section of road is a watercourse that, at its southern end, close to the formed section of Stanton Road, has been modified in order to facilitate its drainage function. In addition to the provision of drainage infrastructure within the area of the unformed road, a pathway, stairs and ramp have been provided in order to afford pedestrian access not only through the unformed section of that road, but also through the unformed section of Fairfax Road, so as to provide pedestrian access to Edwards Beach. Located to the east of the unformed section of Stanton Road is an area known as Wyargine Reserve that extends to Edwards Beach and the headland to its north. The area of that Reserve is owned, in part, by the Council, with the balance comprising Crown land.

Wyargine Reserve, together with the areas within the unformed sections of both Stanton Road and Fairfax Road, are vegetated by a mix of native vegetation and invasive exotic species. These areas have the appearance of bushland, albeit altered by the introduction of the urban infrastructure to which I have referred.

- 15 Land to the west of the Site, together with land to the north and south of the unformed roads and Wyargine Reserve, is developed for housing.

### **Proposed development**

- 16 The elements of the development for which Mr Delprat seeks consent are:

- construction of a parking hardstand area for two cars towards the rear south-eastern corner of the Site;
- provision of a concrete turning bay adjacent to these parking spaces to enable vehicles to exit the Site in a forward direction;
- construction of a 3m wide concrete driveway over the unformed section of Stanton Road so as to connect the parking hardstand and turning area within the Site to the formed section of Stanton Road, including the provision of a box culvert within the existing watercourse to provide a driveway crossing; and
- realignment and reconstruction of a section of the existing pedestrian path and steps that lead from the formed section of Stanton Road into Wyargine Reserve.

- 17 The proposed access driveway takes a curved form in order to address both the fall in level from the end of the formed section of Stanton Road to the south-eastern corner of the site and also to accommodate the existing pedestrian path and watercourse crossings. Within the 3m driveway width

it is proposed to provide an inset, about 900mm wide and 110mm deep, in which to plant native grasses. A 1500mm wide by 900mm high reinforced concrete box culvert would be built over the centre line of the watercourse with pigmented concrete keystone retaining walls on either side of the culvert.

- 18 The existing kerb where the formed section of Stanton Road ends would be removed and a layback constructed to facilitate vehicular access onto the proposed driveway. Work in this vicinity would also involve demolition of a section of the existing pedestrian pathway and steps that would be rebuilt with treads and risers that meet current building standards.
- 19 Apart from minor excavation at either end, the proposed driveway is to be constructed on consolidated fill that would vary in depth from 1mm to a depth in excess of 1m in the vicinity of the watercourse. The creek bed would be widened in the area of the proposed culvert and backfilled after its installation. The height of the keystone retaining wall on the eastern face of the culvert would rise to a height of over 2.2m above the bed of the watercourse and have a maximum width of 2.5m. The fill would be battered to or retained by proposed walls, depending upon the depth of fill at a particular location.
- 20 A galvanised guardrail is proposed to be installed along the western side of the driveway in order to provide a safety barrier between that driveway and the open watercourse immediately to its west. Other safety fencing would be provided and is proposed to be of the same materials and style of construction as existing fencing located adjacent to sections of the existing path and steps.
- 21 The driveway within the unformed section of road would have a length of approximately 25m. At the point at which the driveway meets the boundary of the Site, it is proposed to provide double gates. Within the Site a 2.6m wide turning bay is proposed to be provided parallel to the existing chain wire boundary fence with two parking bays to be located

perpendicular to the turning bay. Each parking bay is shown to have a dimension of 7.8m x 2.6m with the outline of a future metal clad garage indicated on plans but not the subject of the present application. In order to accommodate the manoeuvring and parking areas within the Site, the plans show that an existing tree would need to be removed and concrete masonry walls constructed around the parking spaces.

## Planning controls

- 22 The Site is zoned R2 Low Density Residential under the provisions of Mosman Local Environmental Plan 2012 (**the LEP**). The unformed sections of both Stanton Road and Fairfax Road are zoned RE1 Public Recreation under the LEP while the balance of the land included within Wyargine Reserve is zoned E2 Environmental Conservation.
- 23 Clause 2.3 of the LEP requires that regard must be had to the objectives for development in a zone when determining a development application in respect of land within that zone. The objectives of the R2 Zone include:
- To provide for the housing needs of the community within a low density residential environment.
  - ...
  - To retain the single dwelling character of the environmentally sensitive residential areas of Mosman.
  - To maintain the general dominance of landscape over built form, particularly on harbour foreshores.
  - To ensure that sites are of sufficient size to provide for buildings, vehicular and pedestrian access, landscaping and retention of natural topographical features."
- 24 Dwelling houses are permissible with consent in the R2 Zone. The provision of a hardstand turning area and parking spaces on the Site are therefore permissible with consent, being development that is ancillary to the use of the Site for the purpose of a dwelling house. It was not submitted by the Council that the provision within the Site of the hardstand

area and car parking spaces would be inimical to the objectives of the R2 Zone.

25 The objectives of the RE1 Zone are:

- To enable land to be used for public open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.
- To protect and enhance areas of ecological, scientific, cultural and aesthetic values.
- To maintain and provide visual open space links to a diversity of public and private spaces and facilities as an integral part of the open space system.
- To recognise the visual, aesthetic and amenity importance of bushland."

26 Among the forms of development that are permissible with consent in the RE1 Zone are roads. The Council accepted that the proposed access driveway was permissible with consent as a "road" within the meaning of the land use table. For the purpose of this judgment I will assume, without deciding, that the Council's position in this regard is correct. The focus of the Council's case in relation to the land within the RE1 Zone is that the development proposed is incompatible with the objectives expressed for development of land within that Zone.

27 The watercourse that I have described as running within the unformed section of Stanton Road and the lower part of the unformed section of Fairfax Road is identified on a map entitled Natural Resources Watercourse Map. As such, the provisions of cl 6.2 of the LEP are engaged. That clause is in the following terms:

## **"6.2 Natural watercourses**

- (1) The objectives of this clause are as follows:
  - (a) to protect natural watercourses and their role in disposing of stormwater and controlling pollution and sedimentation,
  - (b) to facilitate continuing biodiversity in a freshwater environment.
- (2) In assessing an application for development consent relating to land in the vicinity of a natural watercourse marked blue on the Natural Resources Watercourse Map, the consent authority must consider:
  - (a) whether, or the extent to which, the proposed development would affect the water quality or obstruct the natural waterflow, and
  - (b) the likelihood of increased run-off from the proposed development leading to the degradation or erosion of the natural watercourse, and
  - (c) whether, or the extent to which, fauna and flora habitats would be affected by the proposed development."

28 The Council contends that taking into account the objectives of cl 6.2 and the considerations required by subclause (2), the proposed access driveway would impact adversely upon the identified watercourse.

29 The land within which the proposed development is to be undertaken is identified as being within a "Scenic Protection Area" on the Scenic Protection Map. The fact that the land is so located engages the provisions of cl 6.4 of the LEP, the objectives of which are expressed in subclause (1) in the following terms:

- "(a) to recognise and protect the natural and visual environment of Mosman and Sydney Harbour,
- (b) to reinforce the dominance of landscape over built form,
- (c) to ensure development on land to which this clause applies is located and designed to minimise its visual impact on those environments."

30 The plenary provision of cl 6.4 is contained in subclause (3). The subclause provides:

- "(3) Development consent must not be granted to any development on land to which this clause applies unless the consent authority is satisfied that:
  - (a) measures will be taken, including in relation to the location and design of the proposed development, to minimise the visual impact of the development to and from Sydney Harbour, and
  - (b) the development will maintain the existing natural landscape and landform."

31 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (the REP) applies to the local government area of Mosman, its area falling within the Sydney Harbour Catchment. The Site is not identified as being located within specific areas to which particular provisions of the REP apply. The provisions of Pt 1 and cl 12 and 13 are nonetheless applicable. They are important to be noticed in the present context.

32 Clause 2 of the REP sets out its aims with respect to the Sydney Harbour Catchment. Those aims expressed in paragraphs (a) and (g) are of present relevance and provide:

- "(a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:
  - (i) as an outstanding natural asset and,
  - (ii) as a public asset of national and heritage significance, for existing and future generations,
- ...
- (g) to ensure the protection, maintenance and rehabilitation of watercourses, wetlands, riparian lands, remnant vegetation and ecological connectivity, ... "

33 The planning principles for land within the Sydney Harbour Catchment are found in cl 13 of the REP. Those principles include:

- "(a) development is to protect and, where practicable, improve the hydrological, ecological and geomorphological processes on which the health of the catchment depends,
- (b) the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values and their biodiversity and geodiversity,
- (c) decisions with respect to the development of land are to take account of the cumulative environmental impact of development within the catchment,
- ...
- (f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,
- ...
- (j) development is to protect and, if practicable, rehabilitate watercourses, wetlands, riparian corridors, remnant native vegetation and ecological connectivity within the catchment ...".

34 The Council had initially raised an issue founded upon the provisions of State Environmental Planning Policy No 19 – Bushland in Urban Areas (**SEPP 19**). It had contended that by applying the provisions of cl 9 of SEPP 19, the application should be refused. However, that contention was withdrawn on the basis, as I understand it, that within the area proposed for development, both on the Site and along the unformed portion of Stanton Road, there was not bushland falling within the definition of that term in cl 4. While I accept that the evidence supports the factual basis upon which the Council withdrew its contention founded upon SEPP 19, the impact upon bushland elsewhere located within both the other areas of unformed road and Wyargine Reserve remains relevant to the determination of the present application.

35 In February 2004, the Council adopted the Wyargine Point Bushland Vegetation Management Plan (**the VMP**). The area to which the VMP relates not only includes the Wyargine Reserve but also the unformed

sections of both Stanton and Fairfax Roads. The VMP provides detailed management practices and work plans for the care, maintenance and regeneration of bushland within the area to which it relates. The proposed driveway is located within identified Management Zones 10 and 11. Within those Zones the VMP identified weed and invasive species that are to be removed and native plant species to be planted, particularly native species to provide groundcover. While identifying the need for weed removal in the area of Zone 11, the VMP records that only limited work is to be undertaken in this area given the uncertainty as to whether the driveway, currently proposed, will be approved.

### **Stanton Road: a public road**

36 As I have earlier indicated, the parties to these proceedings have agreed that the unformed section of Stanton Road is, for all relevant purposes, a public road. Nonetheless, they have each provided evidence and submissions to support their agreed position. Having considered that evidence and the submissions made in respect of it, I am satisfied that the submissions by the parties are correct. This being the case, I will state my reasons for accepting those submissions in a shorter form than would have been the case had there been a contest.

37 The term "public road" is defined in the Dictionary to the *Roads Act* to mean:

- "(a) any road that is opened or dedicated as a public road, whether under this or any other Act or law, and
- (b) any road that is declared to be a public road for the purposes of this Act."

The parties submit that the unformed section of Stanton Road has been "opened or dedicated as a public road" at common law. As will become apparent, the road has been offered for dedication and that offer has been

accepted by public user (*Permanent Trustee Company of NSW v Campbelltown Municipal Council* [1960] HCA 62; 105 CLR 401).

- 38 Stanton Road, including the unformed section of that road, is identified by that description in DP 4582. That deposited plan reflects a survey carried out in March 1904 and lodged with the Registrar General in September 1905. At that time, dedication of land as a public road at common law could be achieved without reference to any relevant public authority notwithstanding that upon dedication a burden of maintenance was potentially imposed upon that authority.
- 39 This potential impost was addressed with the enactment of the *Local Government Act 1906* (now repealed) that prohibited public roads being opened unless the dedication took place with the consent of the local council and the road was constructed to a standard acceptable to that council. However, this constraint did not apply to public roads dedicated at common law prior to 1 January 1907, being the date upon which the relevant provisions of the 1906 Act commenced. Constraints upon the dedication and opening of a public road have continued since that time by operation of the provisions of the *Local Government Act 1919* and following its repeal by the provisions of the *Roads Act*.
- 40 Further, it is now well-settled law in this State that at common law a proffered dedication of land as a public road prior to commencement of the 1906 Act could be accepted by public use but only if such acceptance occurred before 1 January 1920 (*Casson v Leichhardt Municipal Council* [2011] NSWLEC 243; 186 LGERA 34 at [65] and the cases there cited). In *Casson*, Biscoe J held that acceptance of dedication by public user prior to 1920 can be proved by acts after 1 January 1920 but only if they are acts from which inferences can be drawn as to conduct before that date (at [66]). The proffered dedication of Stanton Road as a public road is evident from its designation as a "road" in DP 4582 and from the lodgement of that plan with the Registrar General in 2005.

- 41 While not exhaustive of what is required, s 249 of the *Roads Act* addresses evidence that is relevant in order to establish that a particular area of land is a public road. The section provides:

**"249 Evidence as to whether a place is a public road**

- (1) Evidence that a place is or forms part of a thoroughfare in the nature of a road, and is so used by the public, is admissible in any legal proceedings and is evidence that the place is or forms part of a public road.
- (2) This section is subject to s 178 of the *Conveyancing Act 1919* (No way by user against Crown etc)."

Subsection (2) is not presently relevant.

- 42 Acceptance of dedication at common law, including evidence necessary to satisfy the provisions of s 249, has been the subject of a number of decided cases. The principles to be deduced from those cases may be stated as follows:

- (1) whether there has been acceptance by public use prior to 1920 is a question of fact (*Sanderson v Wollongong City Council* (1998) 102 LGERA 1 at 7);
- (2) explicit direct evidence from witnesses is not required and recourse may be had to any available legal presumption, documentary proof or inferences to be drawn from documents (*Casson*) at [67]);
- (3) when a road, identified as such, is left in a plan of subdivision created before 1 January 1907 and runs into a public road system, the inference usually to be drawn is that it was dedicated as a public road unless there is evidence that access to the road in question is prevented by fencing or other actions (*Newington v Windeyer* (1985) 3 NSWLR 555 at 559);

- (4) the area identified as the road in the plan of subdivision and left for acceptance by public usage may remain in a state of nature and be impassable over substantial portions of its length, being terrain over which construction of a roadway would seem likely to be prohibitive, but that circumstance would not deny its availability for acceptance by public usage (*Permanent Trustee Company of NSW Ltd v Campbelltown Municipal Council* at 412 and 415);
- (5) lesser evidence of acceptance by the public may be required where the land is rough, timbered and full of obstructions, with the wearing of footpaths ample demonstration of public use (*Permanent Trustee Company of NSW Ltd v Campbelltown Municipal Council* at 415);
- (6) where there has been an express offer of dedication, such as in a plan of subdivision, no great amount of use is necessary to make the dedication complete and any use of such a road as a means of passage by members of the public is sufficient (*Owen v O'Connor* (1963) 63 SR 151 at 159); and
- (7) the use of the road by public utilities and infrastructure, although not of itself sufficient without more, is relevant to the determination as to whether there has been acceptance of public user (*Sanderson v Wollongong City Council* at 8).

43 The provisions of s 249 of the *Roads Act* were considered by the Court of Appeal in *Stojan (No. 9) Pty Ltd v Kenway* [2009] NSWCA 364 in which the leading judgment was delivered by McColl JA (Ipp and Basten JJA agreeing). McColl JA identified three conditions that were required to be satisfied by subsection (1) of the section. The first was that the place formed "part of a thoroughfare". Adopting the manner in which the notion of a thoroughfare had been considered in earlier decided cases, her Honour accepted that it meant "a road which, either regularly or by licence,

passes from one place to another not necessarily by a specifically defined way, ... over an intervening space, by right or by permission of the owner" and along which people usually pass.

- 44 Her Honour identified the second requirement arising from s 249(1) as being that the thoroughfare be "in the nature of a road". In respect of the latter phrase her Honour said (at [105]):

"... it should be observed that it is apparent from the generality of the first object (s 3(a)) that the rights of members of the public to pass along public roads means in whatever manner, whether by foot or in vehicle. That should be borne in mind when considering the expression "in the nature of a road".

- 45 The third requirement of s 249 was that the road be "used by the public". Quoting from the joint judgment of Latham CJ, Rich and Dixon JJ in *Schubert v Lee* [1946] HCA 28; 71 CLR 589 (at 592) her Honour accepted that the phrase "open to or used by the public" was apt to describe a factual condition consisting of any real use of the place by the public as the public – as distinct from use by licence of a particular person or only casual or occasional use. It was noted that in the joint judgment of the High Court it was held that a lane fell within the definition of a road if it was open to or used by the public whether or not there is a public highway over it.
- 46 The evidence read by the parties in the present case makes abundantly clear that both the intention to dedicate Stanton Road, formed and unformed, and acceptance by the public of that proffered dedication are satisfied. As I have already indicated, the marking of Stanton Road as a "road" on DP 4582 was an effective offer of dedication as a public road prior to commencement of the *Local Government Act 1906*.
- 47 Affidavit evidence from five long-term residents of the area was read by the Council. That evidence reveals that the unformed section of Stanton Road has been regularly and frequently used by members of the public,

accessed either from the formed section of Stanton Road or from the unformed section of Fairfax Road. Many of these people were strangers to the observers and appeared to pass along the road in order to gain access either to Wyargine Reserve or to Edwards Beach. Many of those observed over the years to be passing along the road, were carrying beach towels, surfboards or fishing equipment, being the indicia that caused the observers to believe that the road was being used as a means of access to the beach.

- 48 Mr Delprat gave evidence that he had lived on or adjacent to the Site from the age of two. He recalled the manner in which the adjoining land, including the unformed section of Stanton Road, was used from the 1940's, including by himself as a track while walking to school. He confirmed the evidence given by local residents of the use of the road as a means of access to Edwards Beach by members of the public.
- 49 Records maintained by the Council extend back to 1929. Those records reveal that the Council has carried out work on or within the unformed section of Stanton Road since 1929. It has no record of any person owning that section of road or any record of rates ever having been levied on that land.
- 50 Records kept by the Council show that since 1920, public utilities and infrastructure works have been carried out on the unformed section of road. These include works on part of that road shown on a sewerage plan dated in 1924; construction of a concrete path and bridge over the watercourse shown on a plan prepared in 1929; installation of concrete pipes in 1969 and the construction through the land of stairs and a pathway, on a date that is unknown, leading to Edwards Beach. In short, for as long as the Council records extend, the unmade portion of the road has been treated by the Council as if it was a public road, with works undertaken by it facilitating access from the formed section of Stanton Road and from Burran Avenue to Edwards Beach. The records and

documents also support an inference that public use of the unformed road had commenced prior to 1920.

- 51 The evidence of local residents as to their observations of user over many years together with the evidence from the records of the Council demonstrate, conformably with the principles that I have earlier discussed, that the unformed section of Stanton Road has been dedicated as a public road at common law. That evidence satisfies the requirements of s 249 of the *Roads Act* so as to lead to the conclusion that this section of road is a public road within the meaning of that Act.

### **Section 138 of the *Roads Act***

- 52 My determination that the unformed section of Stanton Road is a public road within the meaning of the *Roads Act* has a further consequence for determination of the present development application. Before construction of the driveway and works ancillary to it can be undertaken on that road, consent is required for that work under Div 3 of Pt 9 of the *Roads Act*: s 138. That consent is required to be given by the Council in its capacity as a roads authority: s 7(4) of the *Roads Act*.
- 53 The Council contends that the Court does not have power to grant the consent required by s 138 of the *Roads Act*, either in the circumstances of this case or at all. It points to the fact that the *Roads Act* contains no provision for appeal from a decision of the Council under Div 3 of Pt 9. Moreover, so it is submitted, s 39(2) of the *Land and Environment Court Act 1979* (the **Court Act**) cannot be relied upon as a source of power enabling the Court to grant the requisite consent.
- 54 When the present development application was lodged with the Council in April 2012, no application, in terms, was made for consent under s 138. It was not until 4 March 2013 last, shortly prior to commencement of the appeal hearing, that Mr Delprat's solicitor wrote to the Council's solicitor

stating that consent was sought pursuant to s 138 to carry out driveway construction on the unformed section of Stanton Road in the form proposed by the development application. The Council complains that no "formal" application was submitted to it in accordance with its procedures for the making of such an application nor was the required fee paid for that application.

- 55 Mr Delprat accepted that no separate right of appeal is afforded by the *Roads Act* from the determination of an application made under s 138. However, he submits that the power of the Court to grant that consent when hearing and disposing of the present appeal is found in s 39(2) of the Court Act. The subsection provides:

"(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal." (Emphasis added)

- 56 Critical to the determination of the present issue is the identification of "the matter the subject of the appeal". If the matter the subject of the appeal is the application to carry out works within both the Site and Stanton Road (formed and unformed), then conformably with s 39(2), the Court may exercise the functions which the Council had in respect of those works.
- 57 As would be apparent from my earlier description of the development proposed in Mr Delprat's development application, the consent sought was for work both within the Site and within Stanton Road. The provisions of the LEP required that development consent be obtained under the EPA Act for the works proposed in both locations. The development application having been refused, "the matter the subject of the appeal" brought pursuant to s 97 of the EPA Act is the determination of the application for development consent which includes construction of the driveway in Stanton Road.

- 58 In respect of that same work ("matter"), the Council had a function or discretion to exercise under s 138 of the *Roads Act*. It matters not that considerations informing the performance of the function or exercise of the discretion under s 138 differ from those considerations applicable to the determination to be made under the EPA Act (cf *Australian Leisure and Hospitality Group Pty Ltd v Manly Council* (No 4) [2009] NSWLEC 226; 172 LGERA 1 at [78]). The provisions of s 39(2) do not require a coincidence of relevant considerations by the original decision maker when exercising discretions under different sources of power in relation to the same subject matter. Assuming the grant of development consent under the EPA Act, that development could not proceed without the grant of consent under s 138. The exercise of the function to grant consent under the latter section was inextricably bound up with the determination of the development application under s 80 of the EPA Act (*Sydney City Council v Ipoh Pty Ltd* [2006] NSWCA 300; 68 NSWLR 411 at [78]).
- 59 The power of the Court to exercise the function of a council, as a roads authority, under s 138 of the *Roads Act* when disposing of an appeal from a decision of that same council under s 97 of the EPA Act, has been considered on a number of occasions by this Court. In particular, the Court has considered the exercise of that function where the development in question has involved development on private land together with ancillary works on a public road to provide access to the development on private land (see *Connery v Manly Council* (1999) 105 LGERA 451; *Gibson v Mosman Municipal Council* [2001] NSWLEC 134; 114 LGERA 416; *Goldberg v Waverley Council* [2007] NSWLEC 259; 156 LGERA 27). In each case the Court has held that the function of the council under s 138 was a function open to be exercised by the Court pursuant to s 39(2) of the Court Act when determining development appeal. The facts considered in those cases are relevantly indistinguishable from the facts of the present case. I am not persuaded to depart from the reasoning expressed in those cases nor am I persuaded that there is any presently relevant basis upon which to distinguish them. My reasoning essentially accords with that articulated in those cases.

60 In the circumstances of this case, I am satisfied that the Court has power to exercise the function of the Council to grant consent under s 138 of the *Roads Act*. The late application made by Mr Delprat's solicitors for consent under that section does not impact upon my conclusion that the power is available to the Court. In November 2012 when the Council determined the present development application, it **had** available to it the function of granting consent under s 138, even in the absence of an application having been made to it under that section: s 139(1)(a) of the *Roads Act* (see also *Connery* at [20] and *Gibson* at [51]).

61 My conclusion that the Court has power, when disposing of the present appeal, to exercise the function of the Court under s 138 does not conclude the matter. Whether that function should be exercised in this case depends upon my decision as to whether Mr Delprat's appeal under s 97 of the EPA Act should be upheld and development consent granted in accordance with s 80(1) of the EPA Act. It is to that issue that I now turn.

## **Merit consideration**

### *Evidence*

62 The hearing commenced on-site when evidence was received from a number of local residents as well as representatives of the Mosman Parks and Bushland Association, all of who objected to the proposed development. Photographs taken within the unformed portion of Stanton Road together with notes of the evidence heard on-site were received as Exhibit 13. Issues raised in that evidence are summarised as follows:

- Public space should not be alienated for private use, particularly as the Site has available access from Burran Avenue.
- Loss of biodiversity and bushland which is to be replaced with a concrete structure.

- Disturbance to and destruction of a watercourse and bushrock, the latter being a "key threatening process" under the *Threatened Species Conservation Act 1995*.
- The area affected is environmentally sensitive and "home" to bird and animal species.
- Loss of amenity/ambience.
- Adverse visual impacts to an area zoned for public open space.
- Safety concerns regarding use of the driveway by persons looking for parking near the beach, entering the driveway and then having to reverse into the formed section of Stanton Road when, at the same time, the road and pathways are being used to access the beach and Wyargine Reserve.
- The existing electricity pole located where the formed and unformed sections of Stanton Road intersect will require relocation, necessitating either severe pruning or removal of a large macadamia tree considered to provide amenity to the area.
- Impacts on Aboriginal heritage within Wyargine Reserve.
- The proposed development is said to be contrary to the objectives of the Foreshore Scenic Protection Area under the REP.
- Impact upon the heritage significance of the area having regard to its past use as an artist's camp.
- The proposed landscape plan lacks detail and should reflect the long term planting for the Wyargine Reserve which is an open landscape gully forest.

- The proposed driveway would prevent regeneration of native tree and plant species within the riparian zone of the existing watercourse.

- 63 Each party called planning evidence from a planning consultant. Mr B Daintry was retained by the applicant and Mr K Nash by the Council. In accordance with the Court's practice requirements, the planning consultants met prior to the hearing and produced a joint statement of evidence (Exhibit 2).
- 64 There are two matters raised by local residents that have been addressed by the planners and which they agree would not provide a basis upon which to reject the present application. First, it is accepted by them that the Site and proposed access driveway does not fall within the area identified as Foreshore Scenic Protection Area under the REP. Consequently, the particular provisions of that instrument pertaining to an area so described have no application. I accept that as a correct statement of position. However, the general provisions of the REP to which I have earlier referred remain relevant to consideration of the development proposed.
- 65 Further, the planners agreed that the works proposed by the development application would not be visible from Edwards Beach or the Harbour foreshore. My site inspection would support that conclusion. However, the impact which the proposed driveway and its ancillary structures would have when using the public pathways and moving within Wyargine Reserve remain important to be considered.
- 66 The planners also agree that neither the Site itself nor the section of unformed road over which the driveway is to be constructed is an "Aboriginal place of heritage significance" within the meaning of the LEP for the reason that it is not identified as such on a map identified by the relevant provisions of the LEP. They are correct in so agreeing. The Aboriginal heritage of the area in question has been the subject of a

separate study undertaken for and adopted by the Council. That study does not reveal the existence of any item of Aboriginal heritage in the location proposed for development. However, against the possibility that any item is discovered in the course of excavation, the Council has proposed a condition of consent to address the prospect of that occurrence in the event that development consent is granted. I am satisfied that the terms of that condition are appropriate if it is otherwise determined that consent should be granted.

*The planners' evidence as to the hardstand area*

- 67 Notwithstanding the history of applications by Mr Delprat to provide a hardstand area in the south-eastern corner of his property, the planning consultants agreed that the plans prepared for the proposed hardstand car parking area in the present application neither accurately reflect the existing site conditions nor did they demonstrate appropriate manoeuvring areas to achieve the stated objective of allowing vehicles to enter and to leave the Site in a forward direction. They agreed that it would be unsatisfactory to contemplate vehicles reversing from the Site along the proposed driveway due to its curved configuration, its length and the fact that it intersects with a pedestrian pathway.
- 68 The position taken by the planners resulted in additional plans being submitted during the course of the hearing. Even faced with amended plans, it was necessary for the planners, accompanied by surveyors, to attend the Site on the third day of hearing when it became apparent that further change would be required in order to accommodate both parking spaces and the requisite manoeuvring area in order to accommodate the forward movement of vehicles in both directions.
- 69 This process demonstrated that more detailed consideration of vehicle manoeuvring areas, levels and siting of car spaces is necessary. Nonetheless, it would appear that there is an area available within the Site towards its south-eastern corner that may be sufficient to provide both car

parking and manoeuvring in a manner that will meet the requirements of the Council.

*The planners' evidence as to the access driveway*

- 70 The joint report of the planners identified two substantive issues concerning the driveway. The first issue pertains to the impact that the existence and appearance of the driveway would have upon the public user of that land in providing a thoroughfare to the adjacent bushland Reserve and beach. The second issue they identified related to the necessity for that driveway, given the availability of access to and parking for occupants of the Site made available by the existing right of way over 24 Burran Avenue.
- 71 For his part, the essence of the evidence given by Mr Daintry was to the following effect:
- (i) the area over which driveway construction was proposed was degraded and characterised by poorly executed public infrastructure works, being an area of no ecological, scientific or cultural value;
  - (ii) the area to be disturbed is used or is adjacent to an area used only as a thoroughfare and is not an area which, in itself, is useful for any recreational purpose;
  - (iii) the driveway structure proposed is properly described as a strip driveway with the strips separated by grass that would soften its appearance;
  - (iv) while he would not support the strip driveway without additional landscaping and while the landscape plan presently submitted is not sufficient, with appropriate

landscaping the driveway will be softened and the public will benefit from that landscaping;

- (iv) construction of a new section of pathway from the point where the formed and unformed sections of Stanton Road intersect would improve the present pathway and that construction together with appropriate landscaping will provide a public benefit for the area;
- (v) the only visual impact imposed by the driveway would be the new keystone headwall for the drainage culvert of 2.2m in height, although the headwall would stand only 1.2m above the adjoining footpath level and so would have negligible visual impact upon persons walking from the beach or bushland Reserve towards Stanton Road; and
- (vi) while the driveway would not enhance the open space area, public benefit would be derived from path reconstruction and provision of landscaping.

72 The essence of the evidence given by Mr Nash as to the impact of the proposed driveway was:

- (i) while the area of the unformed section of Stanton Road for driveway construction was presently degraded, that circumstance does not detract from the fact that the proposed work would offend the zone objectives of the RE1 Zone applicable to that land; it would remove land from public open space use, introduce potential safety conflicts, not enhance the natural environment nor maintain existing visual open space links but rather obstruct such links;
- (ii) the length of the concrete driveway at a little over 25m together with associated works, including batters extending

up to 7m in width, will present as a strong visual barrier that fails to respect the visual, aesthetic and amenity attributes of the bushland/open space context in which it is to be located;

- (iii) the intrusion of a structure foreign to the bushland environment is made the more apparent by the need for balustrades, retaining walls and additional culvert/drainage structures;
- (iv) while there may be minimal impact on remnant native bushland within the area upon which driveway works are proposed, this fact does not detract from the visual impact that the new structures and works, including excavation works in the watercourse, will have on the immediately adjoining area; and
- (v) this impact is not addressed or mitigated by the landscaping actually or prospectively proposed on behalf of Mr Delprat.

*The competing contentions of the planners as to "need"*

73 Mr Daintry and Mr Nash disagreed on the issue of the need for the existing driveway. For his part, Mr Daintry maintained that the parking available on the right of way that benefited the Site was not sufficient and did not comply with the relevant Australian standard because of the absence of a splay where the right of way intersected with Burran Avenue. The absence of the splay, according to his evidence, presented a potential safety hazard for vehicles reversing from the right of way into Burran Avenue because of restricted sight distance created by landscaping and vegetation along the road frontage to the property that adjoins the right of way to the south.

74 For his part, Mr Nash considered that parking on the right of way was sufficient for a single dwelling house property and that reversing onto the

public street was a common occurrence for the majority of residents living in the residential areas of Mosman. Further, he considered that sight distance for reversing vehicles into Burran Avenue was adequate, particularly given that this section of Burran Avenue was one way so that approaching vehicles on the eastern carriageway would be travelling from north to south where a clear line of view was available.

- 75 Both planning consultants sought to apply to this issue a planning principle articulated by the former Senior Commissioner of the Court in *Super Studio v Waverley Council* [2004] NSWLEC 91. Relevantly, the planning principles stated in that case were articulated as follows (at [5]):

"5. Several planning principles are relevant to the determination of this appeal. The first is that the acceptability of an impact depends not only on the extent of the impact but also on reasonableness of, and necessity for, the development that causes it."

- 76 Consistent with the way in which Mr Daintry had assessed the impact of the proposed driveway, he says that there is no non-compliance with the LEP or relevant development control plan causing any impact that warrants refusal and that, by contrast, the existing provision of right of way parking for the Site is inadequate. He further contends that if driveway access and a parking structure were to be provided at the north-western or upper end of the Site a very large and visually intrusive structure would result. Mr Nash opines that the adverse planning and environmental impacts of the driveway structure proposed in the present application far outweigh the perceived need to change existing access and parking arrangements for the Site which he considers to be adequate.

#### *Other evidence*

- 77 The proposed development was submitted as an integrated development application that required the concurrence of the Office of Water under the *Water Management Act 2000* (s 91 of the EPA Act). General terms of approval have been issued by that office to the Council.

- 78 Ecological consultants were retained by each party. Their respective reports were tendered in evidence but neither consultant was required to attend for cross-examination. These reports concluded that the development proposed was unlikely to have any significant impact upon threatened species, populations of endangered ecological communities or their habitats, either at a local or broader geographical level. The effect of the conclusions reached by the ecologists was also that the development proposed was unlikely to have a significant impact upon the value of urban bushland when considered in the context of SEPP 19.
- 79 Ausgrid is responsible for the poles and electrical conduits that run along Stanton Road, including the pole and conduit on the southern section of the unformed portion of that road. Ausgrid required that there be a minimum clearance of 500mm between that pole and the proposed driveway, with a 200mm separation from that pole to the public pathway. These dimensions would indicate the need for relocation of the existing pole further to the east that would move it closer to or within the tree canopy of the large macadamia tree that is said to be an important landscape element in the immediate locality. According to Mr Daintry, movement of the pole would, at worst, require only marginal pruning of the macadamia tree while Mr Nash expressed the opinion that in order to comply with the requirements of Ausgrid, the tree may require removal which, if it occurred, would have a significant impact. The evidence available to the Court, including survey data, did not enable an assessment to be made of the extent to which movement of the power pole would intrude into the canopy of the macadamia tree and so it was not possible to determine the extent of impact which movement of the power pole might have.

## Consideration

- 80 My inspection of the Site and its environs, including along the length of the unformed sections of both Stanton Road and Fairfax Road to Edwards Beach and into Wyargine Reserve, has caused me to prefer the evidence of Mr Nash to that given by Mr Daintry. I have earlier summarised the essence of Mr Nash's evidence that I accept. To my mind, Mr Daintry focussed too narrowly on the present state of the land over which the proposed driveway is intended rather than the likely state of that land if the objectives of the RE1 Zone are fulfilled and management proposals identified in the VMP realised. A broader consideration of the likely future for this area is required by s 79C(1) of the EPA Act.
- 81 While I have indicated that the provision of car parking and a hardstand area for vehicle manoeuvring is likely to be achievable in the south-eastern portion of the Site, notwithstanding shortcomings in the present plans for that area, it is the proposed driveway along the unformed section of Stanton Road providing vehicular access to the Site that I regard as unsatisfactory and justifies refusal of the application. These reasons focus upon that aspect of Mr Delprat's development application.
- 82 I do not accept Mr Daintry's evidence that the area to be occupied by the proposed driveway has no value for public use as open space or recreation other than as a pedestrian thoroughfare. It is apparent from the evidence given by local residents, supported by my own observations, that the land within the road reserve and its environs offers a relatively attractive bushland enclave within an otherwise developed urban area. It offers passive recreation with sufficient attraction to warrant volunteer bushcare groups participating in its management, as has happened. Indeed, it is apparent from the evidence, including the terms of the VMP, that the degraded state of the land along which the proposed access driveway is to run is, at least in part, a consequence of years of indecision as to the fate of the access driveway proposal for access to the Site. This

is not said by way of criticism of Mr Delprat but simply identifies a reason for the present state of the land and tends to support my appreciation that the bushland characteristics of that land are not only capable of improvement but are likely to improve.

- 83 I have earlier identified the objectives of the RE1 Zone expressed in the LEP. I do not repeat those objectives. The form, length, height and levels of the driveway and its associated structures leads me to conclude that it does not meet the objectives of that Zone. Not only does its private use alienate it from the public user intended for that land but its physical presence is antipathetic to the land's open space designation, particularly in its juxtaposition to Wyargine Reserve. The impact of the driveway and its inconsistency with the values of the public open space in which it is proposed to be located would not, to my mind, be mitigated by the landscape treatment conceptualised by Mr Daintry.
- 84 Further, the construction of the proposed driveway would be inconsistent with the planning principles identified in cl 13 of the REP. Granting consent to construction and use of the driveway would not be consistent with maintaining the natural assets of the catchment as it would not provide for them to be restored "for their scenic and cultural values and their biodiversity and geodiversity". Observance of the objectives of the RE1 Zone of the LEP, when considering any development proposal, is more likely to achieve that end and, having regard to the VMP, would appear to be achievable. Secondly, construction of further hard drainage structures is not consistent with rehabilitation of the natural watercourse or riparian corridor.
- 85 As I have earlier acknowledged, the driveway, if constructed, would not be visible from Edwards Beach or Sydney Harbour. However, that fact takes no account of the visual impact of the structure from within the surrounding area, including the impact upon those moving from the residential areas to Edwards Beach or the Harbour foreshore. The proposed structure

therefore fails to reinforce the dominance of landscape over built form as expressed in cl 6.4(1) of the LEP.

- 86 Quite apart from applying the provisions of the planning instruments to which I have referred, I am required by s 79C(1)(c) of the EPA Act to determine whether the Site is suitable for the development proposed. Clearly, the present zoning of the land, the adopted policy for its continued management under the VMP and the long time use of the land by the public as open space are all matters informing that consideration. Properly considered, they lead to the conclusion that the construction of the driveway as proposed would thwart the intended rehabilitation of this land as harbourside bushland and its enjoyment as such, by the public at large.
- 87 I accept that the existing right of way over 24 Burran Avenue, lawfully used both for access to and parking for the Site, does not comply with the Australian Standard in provision of the requisite splay at its intersection with Burran Avenue. Observations made in the vicinity would suggest that there are very few, if any, of the existing residential driveways that meet this standard. However, I accept that the sight lines available to a driver reversing from the right of way would appear to be sufficient to see an oncoming vehicle moving from the north or west in a southerly direction towards and across that intersection. The view to the south is obscured by a hedge that appears to be planted within the footpath area adjacent to the adjoining property. Pruning of that hedge to an appropriate height could readily improve the view line to the south. That would appear to be a matter that the Council is able to address if the user of the right of way harbours a concern as to the safety of reversing onto Burran Avenue.
- 88 In reaching my decision that the development application should be refused, I am not influenced by the evidence given by Mr Daintry to the effect that driveway access in the manner proposed will have less environmental impact than a hypothetical driveway and on-site parking area located in or towards the north-western or upper section of the Site. I am required to assess the development application before me. It has the

unsatisfactory elements that I have described. I cannot and do not hypothesise about the impact of a different form of development, in a different location and for which no design has been provided. In any event, the relevant considerations to be applied to a development application under the provisions of the EPA Act do not call for a decision to be made on the basis that consent be given to development that is less undesirable than some other form of development seen to serve the same end. It may be that provision of on-site parking cannot be achieved in any environmentally acceptable form.

89 Finally, I heed the evidence of the planners that a vehicle reversing movement along the proposed access driveway would be inappropriate. The possibility that strangers to the area seeking to park a vehicle for the purpose of using Wyargine Reserve or gaining access to the beach would drive a vehicle onto the driveway only to find that it is blocked at entry to the Site. As the driveway affords no opportunity for parking without blocking it, the consequence would likely be a reversing manoeuvre back to the formed section of Stanton Road. That potential could only be avoided by provision of a driveway gate at the intersection between the formed and unformed sections of Stanton Road or the provision of signage indicating that the driveway constituted private property. Neither "solution" would be acceptable to the Council: either "solution" would involve the erection of some form of structure that would further demonstrate inconsistency with the open space and public user characteristics of the area in question. This circumstance is a further demonstration that both the driveway structure itself and its private use is inconsistent with the proper use and enjoyment of that land as public open space.

90 For all these reasons I have concluded that the appeal should be dismissed and the development application refused.

### **Post-hearing material is received**

- 91 After I had reserved judgment in this matter an Express Post envelope addressed to me was received in my chambers. The envelope was marked "Confidential". I assumed that it contained documents that were of a personal nature.
- 92 However, when opened, the envelope was found to contain a letter addressed to me and signed by Mr Bruce Simpson who, with his wife, were the applicants for joinder to the proceedings and who, following refusal of their application, were called as witnesses in the proceedings. Attached to Mr Simpson's letter were a number of photographs and what appeared to be statements by each of Mr and Mrs Simpson together with other documents. Also included within the envelope first opened by me was a further sealed envelope, also bearing my name and at the top of which were written the words "for your eyes only". On the bottom of the envelope appeared the words "From: Janice Simpson". The latter envelope was not and has not since been opened by me.
- 93 The forwarding of these documents to me was highly irregular. At the time at which I announced that my judgment would be reserved, I did not give leave to either party to make further submissions or file further evidence, let alone extend an opportunity for any witness so to do.
- 94 Upon receipt of the documents that I have described, my Associate immediately notified each of the parties that this had occurred. They each made arrangements to inspect the documents and subsequently forwarded a note to my Associate indicating that neither of them sought to tender or rely upon the documents that I had received. Other than to identify the sender and the nature of the documents, I have not considered them. They have played no part in the determination that I have made. They will be returned with the exhibits to the Council's solicitor, the Council

being the party who called Mr and Mrs Simpson as witnesses at the hearing.

### Orders

95 For the reasons that I have given I make the following orders:

1. The appeal is dismissed.
2. Development application No. 8.2012.063.1 lodged on 13 April 2012 is refused.
3. Exhibits may be returned.

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THE 36 I CERTIFY THAT THIS AND  
PRECEDING PAGES ARE  
A TRUE COPY OF THE REASONS FOR  
THE JUDGMENT OF THE HONOURABLE  
JUSTICE MALCOLM CRAIG

  
Associate  
Date 11/7/2013

**Attachment 4 – Council report of 3 December 2013**