Land and Environment Court
of New South Wales

CITATION :	**Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270**
PARTIES :	APPLICANT: Ku-ring-gai Council FIRST RESPONDENT: Sydney West Joint Regional Planning Panel SECOND RESPONDENT: Hyecorp Property Fund No. 6 Pty Ltd
FILE NUMBER(S) :	40689 of 2010
CORAM:	Biscoe J
KEY ISSUES:	JUDICIAL REVIEW :- whether regional planning panel had no power to determine development application because it was a pre-condition to carrying out permanent work that the council or panel form an opinion prescribed by an environmental planning instrument and pre-condition was not satisfied - whether regional panel had no power to determine development application because assessment of SEPP 1 objection by council or panel was a pre-condition which was not satisfied - whether there was a denial of natural justice arising from late submission of SEPP 1 objection - whether council has standing to bring the proceedings
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979, ss 21(1)(b), 23G, 79C 80, 97, 123 Environmental Planning and Assessment Regulation 2000, cl 123D, 123E Joint Regional Planning Panels Order 2009, cl 3(b) Ku-ring-gai Local Environmental Plan (Town Centres) 2010 Ku-ring-gai Planning Scheme Ordinance, cll 6, 13, 25B, 25I Land and Environment Court Act 1979, ss 17(d), 39 Local Government Act 1919 Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 Roads Act 1993 State Environmental Planning Policy (Major Development) 2005, cl 13F State Environmental Planning Policy No 1 – Development Standards
CASES CITED:	Balmain Association Inc v Planning Administrator for Leichhardt Council (1991) 25 NSWLR 615 Calardu Penrith Pty Ltd v Penrith City Council [2010] NSWLEC 50 Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and

Minister for
Mineral Resources (No 2) [2010] NSWLEC 1, 172 LGERA 25
Codlea Pty Ltd v Byron Shire Council [1999] NSWCA 399, 105 LGERA 370
Coffs Harbour City Council v Arrawarra Beach Pty Ltd [2006] NSWLEC 365, 148 LGERA 11
Commissioner of Police v Ryan [2007] NSWCA 196, 70 NSWLR 73
Cubic Transportation Systems Inc v State of New South Wales [2002] NSWSC 656
F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295
George v Rockett [1990] HCA 26, 170 CLR 104
Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23, 143 LGERA 277
Kioa v West (1985) 159 CLR 550
Lloyd v Minister Administering the Environmental Planning and Assessment Act 1979 (1992) 76 LGRA 158
Maritime Union of Australia v Geraldton Port Authority [1999] FCA 899, 93 FCR 34
McDougall v Warringah Shire Council [No 2] (1993) 30 NSWLR 258
Minister Administering the Environmental Planning and Assessment Act 1979 v Lloyd, NSWCA, unreported, 6 August 1993
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16, 240 CLR 611
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21, 197 CLR 611
North Sydney Municipal Council v P D Mayoh Pty Ltd (1988) 14 NSWLR 740
R v Connell; ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407
Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57, 204 CLR 82
Stewart v Ronalds [2009] NSWCA 277, 76 NSWLR 99
Sydney City Council v Building Owners and Managers Association of Australia Ltd (1985) 2 NSWLR 383

DATES OF HEARING: 14-17, 22 December 2010

DATE OF JUDGMENT: 31 December 2010

LEGAL REPRESENTATIVES:

APPLICANT:
Mr T F Robertson SC with Mr J E Lazarus
SOLICITORS:
HWL Ebsworth

FIRST RESPONDENT:
Ms S A Duggan SC with Mr A M Pickles
SOLICITORS:
Department of Planning

SECOND RESPONDENT:
Dr J Griffiths SC with Ms M Allars
SOLICITORS:
Kanjian & Associates

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

BISCOE J

31 December 2010

40689 of 2010

KU-RING-GAI COUNCIL v SYDNEY WEST JOINT REGIONAL PLANNING PANEL AND ANOR

JUDGMENT

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INTRODUCTION

1 **HIS HONOUR**: This is a challenge by Ku-ring-gai Council to the validity of a development consent granted by the first respondent, the Sydney West Joint Regional Planning Panel (**Panel**), on 29 April 2010 to the second respondent, Hyecorp Property Fund No 6 Pty Ltd, for the demolition of four existing dwellings and the construction of two residential flat buildings comprising 62 units at 27-33 Boundary Street, Roseville (**Land**).

2 The focus of the case is on (a) the Land's Boundary Street frontage which comprised a county road widening reservation (**road reserve**) under the *Ku-ring-gai Planning Scheme Ordinance* (**KPSO**), and (b) Hyecorp's objection under *State Environmental Planning Policy No 1 – Development Standards* (**SEPP 1**) to compliance with the deep soil landscaping development standard in cl 25I(2) of the KPSO (**DSL SEPP 1 objection**).

3 Three grounds of challenge are pressed:

(a) the Panel had no power to determine the development application because it was an essential pre-condition to carrying out permanent work proposed on the Land that the Council or alternatively the Panel, as the responsible authority, had to form the opinion required by cl 13(2) of the KPSO that the purpose for which the road reserve is reserved could not be carried into effect within a reasonable time after the appointed day (1 October 1971). The pre-condition was not satisfied because the Council or alternatively the Panel did not form that opinion;

(b) the Panel had no power to determine the development application because by reason of cl 13F(2)(d) of *State Environmental Planning Policy (Major Development)* 2005 (**Major Development SEPP**), assessment by the Council or alternatively the Panel was an essential pre-condition to the exercise of the Panel's power to determine the development application. The pre-condition was not satisfied because the Council or alternatively the Panel did not assess the DSL SEPP 1 objection. Alternatively, if the Panel had power to assess the DSL SEPP 1 objection and did so (which is denied), it failed to carry out the assessment required by cl 7 of SEPP 1;

(c) there was a denial of natural justice arising from the late submission of the DSL SEPP 1 objection.

4 Hyecorp challenges the Council's standing to bring these proceedings.

5 I uphold ground 1, reject grounds 2 and 3 and propose to grant relief.

BACKGROUND

6 The area of the Land is a little over 4,000 m^2. Under the KPSO most of the Land was zoned 2(d3) since 1971, except for the road reserve fronting Boundary Street which has an area of 760.5 m^2.

7 In 2008 the Council was proposing a draft *Local Environmental Plan (Town Centres)* (**DLEP**) and consulted with the Roads and Traffic Authority (**RTA**) pursuant to s 62 (since repealed) of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**). In response, on 24 October 2008 the RTA wrote to the Ku-ring-gai Planning Panel (not to be confused with the first respondent) enclosing plans showing the proposed RTA road widening schemes and abandonments which should be included within the maps for the DLEP.

8 On 22 December 2008 the RTA wrote to Hyecorp reducing its actual road widening requirements to 220 m^2 and indicating that it was interested in acquiring this area from Hyecorp and selling the residue to Hyecorp.

9 On 11 March 2009 there was a pre development application meeting between Hyecorp and the Council. Hyecorp's concept drawings produced at the meeting depicted the road reservation on the Land to be 220 m^2.

10 In a letter dated 14 April 2009 to Hyecorp, the RTA further reduced the area actually required for future road widening to 29.7 m^2 and offered to sell the residue to Hyecorp.

11 On 27 May 2009 the Council adopted the DLEP in which the area of the road reserve on the Land was 187 m^2. It appears that at that time the

Council was unaware of the RTA's 14 April 2009 letter. Hyecorp forwarded the relevant part of that letter to the Council on 30 June 2009.

12 On 2 July 2009 Hyecorp lodged the subject development application DA 0410/09 with the Council. The calculations for net site area, deep soil landscaping, site coverage and floor space ratio were based on an area of only 29.7 m^2 being required by the RTA.

13 In accordance with its Notification Development Control Plan, the Council notified owners of adjoining properties of the development application. Thirteen submissions were received.

14 The Council assessment officer assigned to the application was Kimberley Munn. Correspondence and discussions occurred between her and Mr Abolakian of Hyecorp and there were discussions at meetings between Hyecorp officers and Council officers. There is disagreement as to the precise terms of some of those discussions which it is generally unnecessary to resolve.

15 By letter dated 27 August 2009 to the Council, the RTA stated that it would grant concurrence to the development application subject to Council's approval and conditions.

16 On 24 September 2009 Council officers briefed the Panel.

17 On 15 October 2009 the RTA registered DP 1143956 as a plan of land to be acquired for the purposes of the *Roads Act* 1993. It subdivided the road reserve on the Land into two sections. One was the required road widening area of 29.7 m^2. The other was the residue available for development.

18 At a meeting with the Council on 4 February 2010, Hyecorp was informed by Council staff, who had previously supported the development application, that the Council could no longer support it because the road

reserve could not be included in the calculations and, consequently, there were significant departures from development standards. The Council confirmed its position in a letter to Hyecorp dated 11 February 2010.

19 By letter dated 17 February 2010 to the Council enclosing a copy of DP 1143956, the RTA confirmed that the area now required for future road widening was about 29.7 m^2. The letter stated:

> "The Roads and Traffic Authority (RTA) is currently developing a road widening project in Boundary Street, Roseville between the Pacific Highway & Spearman Street. In preparation for road widening, the RTA is carrying out property acquisitions to the required road widening boundary.
>
> Whilst the RTA in the past has provided information to Council of the likely position of the new road boundary, particularly during consultation for the Town Centres LEP, the road widening design has progressed to the stage that the actual effect on properties is now shown on DP 1143956 attached.
>
> It is understood that Council is in the process of arranging gazettal of the draft LEP (Town Centres) 2008 and it appears appropriate to reflect the final road widening boundaries in the LEP.
>
> I trust this advice will allow appropriate alteration to zoning boundaries prior to gazettal. If additional information is required, please phone me on ..."

20 On the same day, Hyecorp sent a copy of this letter by email and post to the Council's General Manager with copies (inter alia) to three other Council officers (Ms Munn and Messrs Watson and Miocic). Hyecorp's covering letter was headed "URGENT – Draft KMC LEP (Town Centres) 2008/RTA boundary error" and submitted that there was a clear discrepancy between the DLEP provision and the RTA's actual design.

21 On 24 February 2010 Hyecorp lodged with the Council a SEPP 1 objection to strict compliance with the site coverage standard in cl 25I(6) of the KPSO. It attached a copy of the RTA letters of 27 November 2009 and 17 February 2010 including the registered deposited plan enclosed with the latter. Although Ms Munn deposed in an affidavit that this was the first time the Council received a copy of the 17 February 2010 letter, the

evidence is too strong that she and other Council officers received a copy on 17 February 2010.

22 Council officers' development assessment report dated 12 April 2010 was provided to the Panel. It was prepared and signed by Ms Munn and signed by her superiors Messrs Garland, Swanepoel and Miocic. It stated on the front page that the proposed development was permissible under the KPSO. No reference was made to cl 13. It stated that the development cannot rely upon the road reserve area of the Land when calculating compliance with KPSO requirements including cl 25I. On that basis it calculated the deep soil landscaping area at 38 per cent of the site area compared with the standard of at least 50 per cent in cl 25I(2)(c) of the KPSO. It erroneously stated that the KPSO road reservation on the Land was 833.5 m^2. As Ms Munn conceded in evidence, it was actually 760.5 m^2. It erroneously stated that the road reserve on the Land under the DLEP was 247 m^2. In fact it was 187 m^2.

23 The report did not refer to the RTA's 2009 and 2010 letters and registered deposited plan. However, there is evidence which I accept that the 2009 RTA letter was submitted in the proponent's Statement of Environmental Effects which was before the Panel (but which was not tendered in evidence).

24 The report acknowledged that the gazettal of the DLEP was imminent and certain as it was before the Department of Planning awaiting gazettal.

25 The report recommended that the Panel refuse consent for eight reasons. One of the reasons was that the proposal did not comply with the 50 per cent minimum DSL area requirement of cl 25I(2) of the KPSO in that the proposed DSL area was only 38 per cent, and the development therefore could not be approved in the absence of a SEPP 1 objection.

26 A submission by Hyecorp to the Panel dated 23 April 2010 recounted the history of the matter; enclosed a number of documents including the said

RTA letters; and contended that cl 13(2) of the KPSO overcame the issues that Council believes are grounds for refusal.

27 On or about 27 April 2010 the Panel received a very large amount of documentation concerning an unrelated development application which it was also due to consider on 29 April. I mention this because the Council suggested at one point that it casts light on whether the Panel properly assessed the DSL SEPP 1 objection. However, I do not think it bears significantly on the issues I have to decide.

28 On 28 April 2010 Hyecorp's solicitors, Kanjian & Company, wrote to the chair of the Panel. They quoted cl 13(1) and (2) of the KPSO and argued that the RTA's letters of 27 August 2009 and 17 February 2010 modified its road widening requirements and made the KPSO zoning redundant, and that registration of RTA's deposited plan evidenced satisfaction of the precondition to cl 13(2) leading to the conclusion that development consent should not be withheld on the basis of failure to comply with landscaping and site coverage standards in cl 25I(2) and (6) of the KPSO and setback criteria in the Council's development control plan.

29 On or about 28 April 2010, Hyecorp lodged its DSL SEPP 1 objection with the Panel. It attached the various RTA letters. It noted that the Council's assessment report did not question the permissibility of the development. It stated that "Pursuant to cl 13(2) of the KPSO, any form of permanent development may be carried out within the CRW subject to consent of the responsible authority". The grounds of objection emphasised the fact that the RTA had registered the land subdivision of 29.7 m^2 which reflected its actual requirements for road widening and that the RTA had advised it had no objection to the proposed development provided any new buildings and structures were erected clear of the land required for road purposes.

30 The Panel comprised Janet Thomson (chair), Bruce McDonald, Paul Mitchell, Ian Cross and Elaine Malicki. The first three are planners by

profession. The last two were members of the Council, Mr Cross being the Mayor.

31 Prior to the Panel meeting on 29 April 2010 there was a site inspection and meeting at which the Panel was briefed by Council officers. The Council officers were informed that the Panel had just received Hyecorp's DSL SEPP 1 objection. They informed the Panel they had not had a chance to consider it as they had not seen it. Councillor Malicki queried how the Panel could proceed if Council staff had not had time to consider it.

32 The main contentious issues discussed, on which strong views were expressed, centred upon:

(a) whether the DSL SEPP 1 objection should be considered despite the absence of assessment by the Council, and the need for that to occur to allow merit determination;

(b) the justification for basing site cover and landscape area calculations on a definition of site that excluded county road reservation when that had been overtaken by RTA proposals with lesser effect as indicated in the RTA correspondence.

33 At the Panel meeting later on 29 April 2010 several objectors were present. On one version of the evidence, which I am prepared to accept, the chair asked Ms Munn to go outside and assess the DSL SEPP 1 objection and Ms Munn said that was inappropriate as there was insufficient time to consider it and that the Panel should defer consideration or adopt Council staffs' recommendation. Ms Munn gave detailed unchallenged evidence of what such an assessment by her would require, which satisfies me that there was insufficient time for her to carry it out at the Panel meeting.

34 The Council officers' assessment report made no mention of the RTA's 2010 letter addressed to the Council which indicated that the RTA's actual

requirements were only 29.7 m^2 and that the RTA had registered a deposited plan to give effect to this. At the Panel meeting, Mr Mitchell upbraided Ms Munn for not informing the Panel about this letter. There are differences in the evidence as to the precise terms of that exchange which it is unnecessary to resolve. According to Mr Mitchell, Ms Munn denied ever seeing the letter. According to Ms Munn's affidavit her proffered excuse was that Hyecorp had provided a copy of the letter to the Council and the Council did not receive it direct from the RTA. However, in oral evidence she accepted that it was not significant that the letter had not been received directly from the RTA. Given the terms of the letter, particularly its enclosed copy of the registered deposited plan, I have difficulty in seeing why it was not disclosed in the Council assessment report to the Panel.

35 The minutes record that at the Panel meeting on 29 April 2010 the following motion was passed by a four-one majority, Councillor Malicki dissenting:

> "that the SEPP 1 objection on deep soil landscaping be accepted for consideration as part of the application taking into account the discussions at the site inspection, pre-panel discussion and at the panel meeting itself all of which included the subject issue."

36 The following motion was subsequently passed at the meeting and recorded in the minutes by a three - two majority, Councillors Malicki and Cross dissenting:

> "The application be approved subject to conditions that have been issued without prejudice by the Council staff with the addition of a further condition that the gross floor area of the development is not to exceed 4,895m^2 and that in reaching that decision the panel accepts the SEPP 1 objections on the basis that compliance with the relevant standards is unreasonable and unnecessary in the circumstances of this case."

37 There is some evidence that the above motions were passed in reverse order (which seems illogical) but the weight of the evidence, including the minutes, favours the opposite conclusion.

38 For the majority who approved the application, the DLEP's reduced road reserve area (compared with the KPSO) was the conservative basis for assessment of the DLEP SEPP 1 objection, although they still took into account that the RTA had reached the point of registering a deposited plan for a much smaller road reserve area.

39 Council staff did not see or receive a copy of the DSL SEPP 1 objection until 5 May 2010.

40 On 25 May 2010 the *Ku-ring-gai Local Environmental Plan (Town Centres)* 2010 came into effect. It repeals all local environmental plans and deemed environmental plans including the KPSO; however, where a development application has been made and not determined before its commencement, the application must be determined as if it had not commenced: cll 1.8, 1.8A.

41 On 1 September 2010 the Council commenced these proceedings.

42 On 15 November 2010 the majority of the Panel who had voted in favour of development consent (Ms Thomson and Messrs McDonald and Mitchell) provided the following statement of their reasons for the purposes of these proceedings:

> 1. The development complied with the relevant provisions of the Ku-ring-gai Planning Scheme Ordinance apart from Clause 25I(2).
> 2. An objection under SEPP 1 was lodged in relation to compliance with Clause 25I(2) of the KSPO [sic] and the Panel resolved to accept this objection.
> 3. The Panel considered that the SEPP 1 Objection showed that compliance with the applicable development standard (Clause 25I(2)) was unnecessary or unreasonable.
> 4. The Panel was also in receipt of advice via Council of the contemporary position of the RTA specifying its road-widening requirement. This was related to the preparation of the Town Centres LEP the making of which was imminent. In taking its position that the development was complying the Panel relied on and gave appropriate weight to that factor.
> 5. Council officers confirmed at the meeting that the proposal was a complying development (with all the relevant planning controls) apart from the issue of cl 25I(2).

6. The Panel agreed that the proposal generally complied with the other planning controls relating to the site and did not have any significant adverse impacts on the surrounding area and was appropriate on merit.
7. The Planning Report provided a comprehensive analysis of the proposal and provided adequate information to demonstrate that if the contravention of cl 25I(2) was resolved the application was worthy of approval on merit.
8. The Council Planning staff had supplied conditions for approval of the development.

43 On 19 November 2010 short minutes of order made by the Court noted:

> "The Court notes that the first respondent [the Panel] has provided the applicant with a statement of reasons (attached) on 16 November 2010, which comprises a statement of reasons of the members of the first respondent that voted to approve the application, being a statement which includes the first respondent's findings on any material questions of fact and the reasons that led to the decision."

44 In their affidavits, those three Panel members amended their reasons to the following effect:

(a) contrary to paragraph 1 of the reasons, at the Panel meeting they were also conscious of the SEPP 1 objection to the site coverage area required by cl 25I(6) of the KPSO and they were aware that the Council had not accepted this SEPP 1 objection;

(b) paragraph 7 is incorrect where it suggests cl 25I(2) needed to be resolved; it should also have referred to cl 25I(6).

FUNCTIONS OF A REGIONAL PANEL

45 In 2009 the Minister constituted the Sydney West Joint Regional Planning Panel under s 23G(1) of the *EPA Act*: *Joint Regional Planning Panels Order 2009* cl 3(b). Section 23G relevantly provides:

> "**23G Joint regional planning panels**
>
> (1) The Minister may, by order published in the Gazette, constitute a joint regional planning panel for a particular part of the State specified in the order.
> (2) A regional panel has the following functions:

(a) **any of a council's functions as a consent authority that are conferred on it under an environmental planning instrument**,

...

(3) A regional panel has the functions conferred or imposed on it by or under this or any other Act.

...

(5A) Subject to the regulations, a regional panel is, in the exercise of functions conferred under subsection (2) (a), taken to be the council whose functions are conferred on a regional panel as referred to in subsection (2) (a).

(5B) A regional panel is to exercise functions conferred as referred to in subsection (2) (a) to the exclusion of the applicable council (subject to any delegation under this Act)."

(emphasis added)

46 Part 3 of the Major Development SEPP applies, inter alia, to development that has a capital investment value of more than $10 million. The subject development has a capital investment value of more than that amount. Clause 13F confers a council's functions on a regional panel, relevantly, as follows:

"**13F Council consent functions to be exercised by regional panels**

(1) A regional panel for a part of the State may exercise the following consent authority functions of the council or councils for that part of the State for development to which this Part applies:

(a) **the determination of development applications**...in accordance with Part 4 of the Act,

(b) without limiting paragraph (a), the functions of a consent authority under Divisions 2 and 2A of Part 4 of the Act and sections 89A, 93I, 94, 94A, 94B, 94C, 94CA, 94EF, 94F, 95 (2), 96 (2) and 96AA.

(2) However, the following functions of a council as a consent authority are not conferred by this clause on a regional panel:

(d) the receipt and **assessment of development applications**,

...

(3) **The council remains the consent authority for development to which this Part applies, subject to the exercise by regional panels of functions conferred on them by this clause**."

(emphasis added)

KU-RING-GAI PLANNING SCHEME ORDINANCE

47 The KPSO was made under part XIIA of the *Local Government Act* 1919, which was repealed when the *EPA Act* came into force on 1 September 1980. The KPSO in its then and current form became a deemed environmental planning instrument: cll 1(1) and 2(1) in Schedule 3 of the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979. A deemed environmental planning instrument is a planning instrument under the *EPA Act*: s 4(1) *EPA Act*.

48 Under the KPSO the Land other than the road reserve thereon is in Zone 2(d)(3), in which residential flat buildings are permissible with development consent.

49 Clause 6 of the KPSO defines who is "the responsible authority" and relevantly provides:

> "6. (1) In respect of the provisions of this Ordinance relating to –
>
> (a) the acquisition and transfer of land reserved under Division 2 or 3 of Part II for county open space, new county roads and widening of existing county roads;
>
> ...
>
> the Authority shall be the responsible authority and shall be charged with the functions of carrying into effect and enforcing such provisions.
>
> (2) The Council shall, subject to this Ordinance, be the responsible authority and shall be charged with the functions of carrying into effect and enforcing the provisions of this Ordinance relating to any power, authority, duty or function other than those enumerated in subclause (1) of this clause."

50 The "Authority" referred to in cl 6(1) is not defined but appears to be the State Planning Authority of New South Wales (now the Department of Planning), because cl 1(2) provides that the planning scheme prepared by that Authority is embodied in the KPSO. That Authority is therefore the "responsible authority" referred to in cll 18 and 19 which deal with the acquisition of reserved land.

51 Division 3 of Part II of the KPSO is entitled "Rail Corridor and St Ives Centre" and comprises cll 11-13. By cl 11, Division 3 only applies to "vacant land". The subject road reserve is vacant land. By cl 12, the road reserve of 760.5 m^2 is reserved for "widening of existing county roads".

52 Clause 13 is of critical importance in this case and provides:

> 13. (1) **Except as provided in subclause (2) of this clause a person shall not on land reserved under this Division** erect a building or **carry out** or alter **a work of a permanent character** or make or alter a permanent excavation other than a building or a permanent work or a permanent excavation required for or incidental to the purpose for which the land is so reserved.
>
> (2) Where it **appears** to the responsible authority that the purpose for which the land is reserved under this Division cannot be carried into effect within a reasonable time after the appointed day the owner of such land may with the **consent** of the responsible authority and of the Commissioner for Main Roads...carry out...work of a permanent character or make or alter a permanent excavation.
>
> (3) Any such consent shall be subject to such conditions with respect to the removal or alteration of the building, work or excavation or any such alteration of a work or excavation or the reinstatement of the land or the removal of any waste material or refuse, with or without payment of compensation, as the responsible authority thinks fit, and to such conditions as the Commissioner for Main Roads requires to be imposed.
>
> (4) Nothing in this clause shall operate to prohibit the erection of a fence on any land reserved under this Division."
>
> (emphasis added)

53 The appointed day referred to in cl 13(2) was 1 October 1971.

54 Clause 18 of the KPSO provides for owner-initiated acquisitions. Clauses 18 and 19 provide:

> "18. (1)The owner of any land reserved under Division 2 or 3 of this Part upon which...the carrying out ...of any work of a permanent character...is prohibited except for or incidental to a purpose for which the land is so reserved, or the owner of any land so reserved, in respect of which the responsible authority has refused its consent pursuant to...subclause (2) of clause 13...of this Ordinance, may, by notice in

writing, require the responsible authority to acquire such land.

(2) Upon receipt of such notice the responsible authority shall acquire the land to which the notice relates.

...

19. (1) The Authority may and upon such terms and conditions as may be agreed transfer any land which has been acquired by it in pursuance of clause 18 to the Commissioner for Main Roads."

55 The KPSO includes the following restrictions on deep soil landscaping and maximum site coverage:

"**25B Definitions**

deep soil landscaping means a part of a site area that:

(a) is not occupied by any structure whatsoever, whether below or above the surface of the ground (except for paths up to 1 metre wide), and

(b) is not used for car parking.

site area, in relation to proposed development, means the areas of land to which an application for consent to carry out the development relates, excluding the area of any access handle.

site coverage means the proportion of the building footprint to the site area, expressed as a percentage.

25I Site requirements and development standards for multi-unit housing

(2) Minimum standards for deep soil landscaping

The following standards relating to deep soil landscaping apply to multi-unit housing:

(c) a site with an area of 1,800 square metres or more is to have deep soil landscaping for at least 50% of the site area.

...

(6) Maximum site coverage

Buildings of a kind described below are not to occupy a greater percentage of the site area than is specified below for the kind of buildings. If a site is comprised of land in Zone No 2 (d3) and other land, the other land is not to be included in calculating site area. Residential flat buildings – 35%, Townhouses – 40%, Villas – 50%, Combination of townhouses and villas – 50%.

25M Non-discretionary development standards for residential flat buildings in Zone No 2 (d3)

> Pursuant to section 79C(6)(b) of the Act, the development standards for number of storeys, site coverage, landscaping and building set back that are set by this Part are identified as non-discretionary development standards for development for the purpose of a residential flat building on land within Zone No 2 (d3)."

GROUND 1 – THE DEVELOPMENT WAS PROHIBITED

56 The first ground of challenge to the validity of the development consent is that the Panel had no power to determine the development application because it was an essential pre-condition to carrying out permanent work as proposed on the road reserve that the Council or alternatively the Panel, as the responsible authority, form the opinion required by cl 13(2) of the KPSO that the purpose for which the road reserve is reserved could not be carried into effect within a reasonable time after the appointed day (1 October 1971); and it did not form that opinion.

57 Clause 13 is set out at [52] above. Section 26(1)(b) of the *EPA Act* provides that an environmental planning instrument may make provision for or with respect to (inter alia) "controlling" development. The word "control" is defined to include "consent" to development and to include conferring on a consent authority functions with respect to consenting to, regulating, restricting, permitting or prohibiting development: s 4(1). Clause 13(1) of the KPSO is a control, in the nature of a prohibition, on development on reserved land. Clause 13(1) is subject to cl 13(2) which, consistently with the definition of "control" in the *EPA Act*, provides for circumstances in which the responsible authority may lift the prohibition.

58 The opinion required by cl 13(2) of the KPSO is a pre-condition, a jurisdictional fact of the subjective opinion variety, which must be met in order to enliven the consent power of the responsible authority and the Commissioner for Main Roads: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21, 197 CLR 611 at [128] – [145]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, 240 CLR 611 at [23]-[24]; *Commissioner of Police v Ryan* [2007] NSWCA 196, 70 NSWLR

73 at [47]. The onus rests on the Council as the challenger of the decision to establish that the cl 13(2) opinion was not formed by the responsible authority: *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources (No 2)* [2010] NSWLEC 1, 172 LGERA 25 at [69]-[70]; *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 at [130].

59 Under cl 6(2) of the KPSO the Council is the responsible authority referred to in cl 13(2). However, if the cl 13(2) functions are part of the determination of a development application, then under s 23G(2)(a) of the *EPA* Act and cl 13F(1)(a) of the Major Development SEPP those functions are conferred on the Panel. And under s 23G(5A) the Panel, in the exercise of those functions, is taken to be the Council. Those provisions are set out at [45] – [46] above.

60 Thus, the first ground of challenge hinges mainly on whether the functions of the Council referred to in cl 13(2) of the KPSO are conferred on the Panel under s 23G of the *EPA Act* and cl 13F(1)(a) of the Major Development SEPP and, if so, whether the Panel formed the cl 13(2) opinion. In other words, the question is: what is the effect on cl 13(2) of this old environmental planning instrument (now repealed) of the modern statutory conferral of one consent authority function (the determination of development applications) on regional panels? Each of the parties has a different answer to the question.

61 The respondents admit on the pleadings that the development involves carrying out of works of a permanent character on the road reserve within the meaning of cl 13(1) of the KPSO. The "road reserve" means the area of 760.5 m^2 reserved under the KPSO. Hyecorp submits that its admission does not prevent it from disputing, as it does, that the works on the land reserved for road widening under the DLEP or under the RTA's letter of 17 February 2010 and deposited plan (29.7 m^2) are works of a permanent character; and therefore, cl 13(1) is inapplicable. I reject the submission. Those smaller areas are part of the 760.5 m^2 and the admission applies to

every part. Further, because of the admissions in the pleadings and my refusal of the respondents' belated applications to withdraw the admission at the commencement of the hearing, there was no evidentiary contest, as otherwise would have been likely, concerning the permanency of the works. Therefore it would be unfair to the Council to entertain it as an issue. If I am in error, I would be prepared to accept the Council's alternative submission that, as a matter of fact, the works comprising landscaping and access pathways, at least, are of a permanent character and are located along the frontage of the Land, well within the DLEP area.

62 To some extent the competing constructions are influenced by the relationship between provisions such as cll 13 and 18 of the KPSO established as follows by this Court in *Lloyd v Minister Administering the Environmental Planning and Assessment Act 1979* (1992) 76 LGRA 158 (upheld on appeal *Minister Administering the Environmental Planning and Assessment Act 1979 v Lloyd*, NSWCA, unreported, 6 August 1993; see also *North Sydney Municipal Council v P D Mayoh Pty Ltd* (1988) 14 NSWLR 740 at 742 (CA)):

(a) cl 13 determines the question whether permanent work is prohibited on land reserved under Division 3 of Part II of the KPSO;

(b) cl 13(1) prohibits permanent work, but only if cl 13(2) does not apply;

(c) cl 13(2) avoids the prohibition by giving a power of consent to the responsible authority and the Commissioner for Main Roads subject to a pre-condition that it appears to the responsible authority when it exercises the power that the relevant purpose "cannot be carried into effect within a reasonable time after the appointed day". The word "appears" means an opinion or conclusion: *Mayoh* at 747; *R v Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; *George v Rockett* [1990] HCA 26, 170 CLR 104 at 111;

(d) if the pre-condition is not met (that is, the responsible authority has not formed that opinion) then cl 13(2) does not apply and cl 13(1) prohibits carrying out permanent work;

(e) if there is a prohibition under cl 13(1), then the first limb of cl 18(1) applies and gives the land owner a remedy of requiring the responsible authority referred to in cl 18(1) to acquire the land;

(f) if there is no prohibition under cl 13(1), because the pre-condition in cl 13(2) is met, but the responsible authority has refused its consent, then the second limb of cl 18(1) applies to give the land owner the same remedy.

63 The Council submits that:

(a) while the consent authority functions of the Council are vested in the Panel by reason of cl 6(2) of the KPSO, the Council's functions as the responsible authority under cl 13(2) are not;

(b) however, by reason of cl 6(1)(a), the Council is not the responsible authority for the purposes of acquisition of reserved land under cl 18;

(c) the Council did not form the opinion required by the cl 13(2) pre-condition;

(d) alternatively, if the Panel is vested with the functions referred to in cl 13(2), the Panel did not form that opinion.

64 The respondents submit as follows:

(a) the Panel submits that the consent of the responsible authority referred to in cl 13(2) is development consent;

(b) Hyecorp submits that the consent of the responsible authority referred to in cl 13(2) is a necessary incident of a development consent where there is a development application;

(c) therefore, in the present case the Council's functions referred to in cl 13(2) are vested in the Panel;

(d) the Panel formed the requisite opinion.

65 In my opinion:

(a) the responsible authority referred in cl 13(2) is the Council: cl 6(2);

(b) the consent of the responsible authority referred to in cl 13(2) is the function of determining a development application by consent. Therefore that function is conferred on the Panel: s 23G *EPA Act*, cl 13F(1)(a) Major Development SEPP;

(c) whether or not (b) is correct does not matter in this case because neither the Council nor the Panel formed the cl 13(2) opinion.

66 As became common ground, the two references to "responsible authority" in cl 13(2) are references to the same responsible authority. In my opinion, cl 13F of the Major Development SEPP does not bifurcate the cl 13(2) functions: that is, it does not confer the opinion function on the Panel and the consent function on the Council. The two are inextricably joined. If the consent function is conferred on the Panel then so is the opinion function. If the Council submits to the contrary (by the end of the hearing I did not think it did), I do not accept the submission.

67 The essential question is: do the consent and opinion functions referred to in cl 13(2) of the KPSO fall within the description in cl 13F(1)(a) of the Major Development SEPP of a "consent authority function" being "the determination of development applications...in accordance with Part 4 of the [EPA] Act"? If so, then the cl 13(2) functions are conferred on the Panel; if not, those functions are conferred on the Council.

68 The Council cites *Codlea Pty Ltd v Byron Shire Council* [1999] NSWCA 399, 105 LGERA 370. That was a merit appeal to this Court under s 97 of the *EPA Act* against refusal of a development application. A local environmental plan provided that a council shall not consent to the carrying out of development unless it is satisfied that certain prior infrastructure arrangements had been made. The Court of Appeal held that the function of "satisfaction" was at the heart of and essential for the decision on the development application. The Court of Appeal also held that the "*satisfaction*" was a function which this Court could exercise on appeal under s 39(2) of the *Land and Environment Court Act* 1979 (**LEC**

Act). The Council's submission, as I understand it, is that this Court has a development consent function in a merit appeal by virtue of s 97 of the *EPA* Act and the *Codlea* founding of the "satisfaction" function on s 39(2) of the *LEC Act* indicates that the satisfaction is not a development consent function. Therefore, by analogy, the same should be said of the cl 13(2) opinion. Section 39(2) provides: "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."

69 I do not accept the submission. In my view, s 39(2) confers on this Court the function of granting development consent and *Codlea* did not hold to the contrary. The decision in *Codlea* that the "satisfaction" function was at the heart of and essential for the decision on the development application indicates that it is part and parcel of the function of determining a development application. Section 97 of the *EPA Act* gives a right of appeal to this Court to an applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's development application. Section 17(d) of the *LEC Act* gives the Court jurisdiction to hear and dispose of appeals under s 97. The powers of the Court on an appeal are stated in ss 39 and 40 of the *LEC Act*. The words "in respect of" in s 39(2) are of wide import. Section 39(2) places the Court fully in the shoes of the consent authority with the result that the Court may exercise all functions and discretions which were open to the consent authority: *McDougall v Warringah Shire Council [No 2]* (1993) 30 NSWLR 258 at 264 (CA). "Functions" is defined in s 4(1) to include powers, authorities and duties. That includes the consent authority's function under s 80 of the *EPA Act* of determining a development application by granting consent conditionally or unconditionally or refusing consent. If I am in error, in any event *Codlea* is distinguishable as it was concerned with the power of this Court on a merit appeal and with separate statutory regimes.

70 If, as the Panel submits, a cl 13(2) consent of the responsible authority is development consent then cl 13(2) cannot operate without lodging a development application.

71 Hyecorp's submission is that a cl 13(2) consent of the responsible authority can be given without a development application being lodged, but is necessarily incidental to a development consent where a development application has been lodged. The submission should not be accepted I think because apart from cl 13(2) there is not provision in the KPSO for consent to development on reserved land. Therefore the KPSO does not contemplate a separate development consent for reserved land to which the cl 13(2) consent is necessarily incidental. Even if that is incorrect, Hyecorp's submission has a strange result because in the first situation to which it speaks the Council is the responsible authority whereas in the second situation the Panel is the responsible authority. On Hyecorp's argument, in the case of a prospective developer/owner, the identity of the responsible authority turns on which procedure the prospective developer/owner opts to follow. If it lodges a discrete cl 13(2) application in order to see whether there is any point in making a development application (since there is no point if cl 13(2) consent is refused), the Council is the responsible authority. If it just makes a development application, cl 13(2) assumes a symbiotic relationship with the development application such that the Panel is the responsible authority.

72 Clause 13(1) provides that specified development may not be carried out except as provided in cl 13(2). Clause 13(2) provides for consent of the responsible authority to certain development on reserved land subject to formation of the prescribed opinion. The further "consent" of the Commissioner may be viewed as in the nature of concurrence. The KPSO contains no other provision for consent by the responsible authority to development on reserved land. The terms and context of cl 13 tend to suggest that the cl 13(2) consent of the responsible authority is development consent and that cl 13(1) and (2) together come within

s 76A(1) of the *EPA Act* which provides: "If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless: (a) such a consent has been obtained and is in force, and (b) the development is carried out in accordance with the consent and the instrument."

73 If the cl 13(2) consent is not development consent, then development on reserved land appears to lie outside the *EPA Act*'s threefold classification, based on provisions of environmental planning instruments, of development that does not need development consent, development that needs consent and development that is prohibited: ss 76-76C. If cl 13(2) consent of a responsible authority is not development consent but is nevertheless operative and there is no other provision in the KPSO for development consent on reserved land, then all the development assessment provisions in Part 4 of the *EPA Act*, which is concerned with development consent, would seem to be bypassed.

74 To hold that cl 13(2) consent of a responsible authority is development consent does not, in my view, diminish an owner-initiated right to compensation under cl 18 of the KPSO.

75 The conclusion I reach is that the cl 13(2) consent of the responsible authority is development consent. Accordingly, the cl 13(2) functions vested in the Council under cl 6(1) are conferred on the Panel by force of s 23G(2) of the *EPA Act* and cl 13F(1)(a) of the Major Development SEPP.

76 However, the Council then submits that:

(a) under cl 13(2) the responsible authority was only empowered to form the required opinion in relation to the entirety of the road reserve on the Land;

(b) therefore as the Panel proceeded on the basis that the purpose of the reservation was capable of being carried into effect within a

reasonable time in respect of part of the road reserve on the Land, namely the area in the DLEP (or alternatively 29.7 m^2), it could not have formed the prescribed opinion.

77 I disagree with the premise. It reads words into cl 13(2) that are absent. The cl 13(2) power is a dispensing power which lifts the burden on the owner of reserved land. It should be construed beneficially to the landowner. In the present case every part of the road widening reserve on the Land is "land reserved under this Division" referred to in cl 13(1). Accordingly, the responsible authority is empowered by cl 13 to form the required opinion and grant consent in relation to every part.

78 I turn to the question whether the evidence establishes that the cl 13(2) pre-condition was met. That is, did the Panel form the opinion that the purpose for which the Land was reserved cannot be carried into effect within a reasonable time after the appointed day in 1971?

79 The respondents submit that sufficient evidence was before the Panel to appear that the purpose of the road reservation would not be carried into effect within a reasonable time after the appointed day in 1971. They refer to the DLEP which was imminent and certain; the RTA correspondence indicating less area was required than that proposed under the DLEP; the fact that the RTA was the roads authority with power to carry out or approve works within the road reserve under the *Roads Act* 1993; the Council's connection with the formulation of the reservation in the DLEP through discussions with the RTA, the registration of the RTA's deposited plan; and the RTA's landowner's consent and concurrence to the development application.

80 In my view, whether the Panel members had sufficient material before them to form the requisite opinion is not to the point. The question is whether the Panel in fact formed that opinion.

81 As the Panel is a collegiate body deciding questions by majority, it is only if the cl 13(2) opinion was held by at least a majority that the opinion can be attributed to the Panel: *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23, 143 LGERA 277 at [66]; *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 899, 93 FCR 34 at [288] – [291].

82 I conclude that, on the evidence, at least a majority of the Panel did not form the opinion required by cl 13(2). My reasoning is as follows:

(a) the unchallenged evidence of the dissentients, Councillors Cross and Malicki, which I accept, was to the effect that they gave no consideration to the opinion required by cl 13(2);

(b) as Councillors Cross and Malicki did not form the cl 13(2) opinion, it is only necessary for the Council to establish that one more member of the five person Panel also did not do so;

(c) the minutes of the Panel meeting do not record the formation of the requisite opinion;

(d) the statement of reasons of the three majority members of the Panel, which included their factual findings, did not say they formed the cl 13(2) opinion, nor did their affidavits (see [42] – [44] above). I do not accept the respondents' suggestion that paragraph 4 of the majority's statement of reasons indicates that they formed the opinion;

(e) the Panel never discussed permissibility or the cl 13(2) opinion, nor was permissibility referred to in the Council's development assessment report;

(f) Ms Thomson's evidence was that:

(i) she satisfied herself that the RTA was the responsible Authority in respect of road widening and that the RTA stated it no longer required all the land in the DLEP thereby satisfying her that cl 13 was no impediment to the grant of consent. In my opinion, she was in error because the RTA was clearly not the responsible authority;

(ii) she gave no consideration to whether a reasonable time had passed since the appointed day. This evidence was given orally and the respondents suggest that the context in which it was given and her demeanour or tone of voice should lead to the conclusion that she intended to say that obviously a reasonable time had elapsed. I disagree;

(iii) she conceded that she only considered the road widening issue in the context of considering the DSL SEPP 1 issue (ie not in the context of the opinion required to be formed by cl 13(2));

(g) the respondents submit that Ms Thomson's evidence does not matter because the objective facts known to her dictated the outcome, ie the reasonable time question had been determined by the lapse of time and the imminence of the DLEP. I do not accept the submission, which is tantamount to inviting the Court to substitute its own opinion for the opinion of the Panel required by cl 13(2);

(h) the Panel submits that it is significant that Ms Thomson was not asked "Did you form an opinion that the purpose for which the land was reserved could not be carried into effect within a reasonable time after the appointed day?". I do not consider it necessary for that question to have been put given the evidence referred to in (f) (i) and (ii) above.

83 I conclude that at least Ms Thomson, as well as Councillors Cross and Malicki, did not form the required cl 13(2) opinion. As they constitute a majority of the Panel it follows that the Panel did not form that opinion.

84 Although it is unnecessary to go further and decide whether the Council has proved that the other two members of the Panel, Messrs McDonald and Mitchell, did not form the cl 13(2) opinion, I will do so. The evidence is more sparse than in the case of Ms Thomson. In the statement of reasons and their affidavits, they did not say whether or not they formed the required opinion. The short minutes of orders noted that the statement of

reasons included their findings on any material questions of fact: above at [42] and [43]. Since the state of a man's mind is as much a question of fact as the state of his digestion, that tends to suggest that they did not form the required opinion. In cross-examination Mr McDonald said he gave consideration to cl 13 when determining the development application in the context of the SEPP 1 proposal and not otherwise and that the question of permissibility had not been raised other than in context of the SEPP 1 objection. In cross-examination Mr Mitchell was asked whether he considered permissibility and answered that there were clear statements by the Council that it was permissible at the September 2009 briefing. He said he gave no consideration to future road widening at this location. They were not asked directly whether they formed the cl 13(1) opinion. Nevertheless, overall I think that the state of the evidence favours the conclusion that probably neither formed the cl 13(2) opinion, even if the note in the short minutes of order is left out of account.

85 Consequently, the first ground of challenge is made out.

86 If I am in error, and the Council (not the Panel) was the responsible authority required to form the opinion under cl 13(2), then I am satisfied that it did not do so. None of the Council officers who signed the assessment report had delegated authority to form the opinion. It is unnecessary to go further but I note that in any event (a) Ms Munn's affidavit evidence, which I accept (notwithstanding that she indicated that she otherwise considered cl 13(2), was that she did not turn her mind to the cl 13(2) opinion question and that it was not discussed among Council officers; and (b) although Ms Malicki said she considered cl 13(2) in the manner discussed in the Council officer's assessment report, that report did not discuss the cl 13(2) opinion.

87 Hyecorp submits that the Court in its discretion should refuse the Council relief on the ground of the Council's disentitling conduct, namely:

(a) the Council advised the Panel in its assessment report that the development was permissible but now claims that it was prohibited under cl 13 of the KPSO;

(b) if the Council was the responsible authority, its failure to form the cl 13(2) opinion was unreasonable.

88 Hyecorp refers to dicta that a plaintiff may be debarred from relief if the plaintiff has "acquiesced in the invalidity or has waived it...If his conduct has been disgraceful and he has in fact suffered no injustice": *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320 per Lord Denning MR (cited in *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, 204 CLR 82 at [57]). Hyecorp cites as an example *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656 where Adams J held that the disentitling conduct of the plaintiffs contributed to the legal error by the defendant in a tender evaluation process. Applying the maxim that equitable relief will not be granted to enable a party to derive advantage for its own wrong, his Honour would have exercised the discretion to decline relief.

89 I note the following:

(a) Hyecorp has not cited any authority in which relief has been withheld in circumstances similar to the present case. *Hoffmann La Roche* was a case in which a declaration was sought that orders made by the Monopolies Commission was invalid because its procedures were contrary to the rules of natural justice (ie a denial of procedural fairness). The quoted remarks of Lord Denning were made in that context. In contrast, Ground 1 in the present case is based on acting beyond power or jurisdiction. *Cubic* concerned the withholding of equitable relief in private law proceedings on the basis of unclean lands. It would be unusual to withhold relief where jurisdictional error is established, which in this case would involve the Panel not having the power to grant consent at all because of its failure to have formed the requisite opinion;

(b) the Council's failure to advise the Panel that the development was or may be prohibited in my view should not be categorised as seeking to take advantage of its own wrong;

(c) the question of the jurisdictional boundaries between the Council and the Panel raises a question of some public importance in relation to the construction of the relevant statutory provisions where the applicant's conduct may bear less heavily as the exercise of the discretion.

90 The Panel's submissions on discretion insofar as they were additional to Hyecorp's submissions were to the following effect: (a) the DLEP has been made and it reduces the area required for road widening; (b) the area agreed in the DLEP was agreed after consultation between the Council and the RTA; (c) there is no evidence of intention to increase the land required for road widening; (d) the DLEP does not require the formation of the same opinion as was required by cl 13(2) of the LEP; and (e) the works are such that they would not prevent the carrying out of either road widening as per the DLEP or the 29 m^2 proposal. To the extent that these matters are relevant to discretion, I think that they are insufficiently weighty.

91 The Panel also submits on discretion that there is no public purpose to be served by the order for invalidity. I disagree. To decline to grant relief would set at nought the provisions of cl 13(2) and would enable development on land reserved for road widening purposes when the relevant requirements of that provision have not been complied with.

92 On balance, I decline to exercise the discretion to withhold relief in relation to Ground 1.

GROUND 2 – NO ASSESSMENT OF SEPP 1 OBJECTION

93 The second ground of challenge is that the Panel had no power to determine the development application because by reason of cl 13F(2)(d)

of the Major Development SEPP, assessment by the Council, or alternatively the Panel, is an essential pre-condition to the exercise of the Panel's power to determine a development application, and the pre-condition was not satisfied because the Council did not assess the DSL SEPP 1 objection. Alternatively, if the Panel had power to assess the DSL SEPP 1 objection and did assess it (which is denied), the Panel failed to carry out the assessment required by cl 7 of SEPP 1, namely, whether the development application should be approved notwithstanding the breach of the development standard in cl 25I(2).

94 The DSL SEPP 1 objection relates to the deep soil landscaping development standard in the KPSO:

> "**25B Definitions**
>
> ***deep soil landscaping*** means a part of a site area that:
> (a) is not occupied by any structure whatsoever, whether below or above the surface of the ground (except for paths up to 1 metre wide), and
> (b) is not used for car parking.
>
> ***site area***, in relation to proposed development, means the areas of land to which an application for consent to carry out the development relates, excluding the area of any access handle.
> ...
>
> **25I Site requirements and development standards for multi-unit housing**
>
> **(2) Minimum standards for deep soil landscaping**
>
> The following standards relating to deep soil landscaping apply to multi-unit housing:
>
> ...
> (c) a site with an area of 1,800 square metres or more is to have deep soil landscaping for at least 50% of the site area.
>
> **25M Non-discretionary development standards for residential flat buildings in Zone No 2(d3)**
>
> Pursuant to Section 79C(6)(b) of the Act, the development standards for number of storeys, site coverage, landscaping and building set back that are set by this Part are identified as non-discretionary development standards for development for the purpose of a residential flat building on land within Zone No 2 (d3)."

95 The Council and the Panel proceeded on the basis that the proposed deep soil landscaping was not compliant with cl 25I(2). The Council's development assessment report to the Panel assessed the deep soil landscaping at 38 per cent of the site area excluding the KPSO road reserve which the report erroneously calculated at 833.5 m^2 when it in fact was 760.5 m^2. That error does not matter for present purposes because on the assumption that the road reserve is excluded, the deep soil landscaping proposed was still less than the minimum 50 per cent standard. If, however, the KPSO road reserve is included in the calculation of site area, cl 25I(2) is satisfied.

96 SEPP 1 provides:

> "**3 Aims, objectives etc**
>
> This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.
>
> **6 Making of applications**
>
> Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.
>
> **7 Consent may be granted**
>
> Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6."

8 Concurrence

The matters which shall be taken into consideration in deciding whether concurrence should be granted are:

(a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument."

97 The Major Development SEPP cl 13F(2)(d) left the function of assessment of a development application with the Council: see [46] above.

98 The importance of the assessment function in the statutory scheme is clear from the title of the *EPA Act* and from the title of Part 4 ("Development Assessment"). One of the mandatory considerations in determining a development application is any relevant environmental planning instrument, such as SEPP1 (where an objection thereunder is lodged): s 79C(1)(a)(i). Clause 123E of the *Environmental Planning and Assessment Regulation* 2000 expressly refers to the Council's role in providing assessment reports to the Panel, but there is no obligation on the Panel to determine the application consistently with such an assessment report.

99 Consistently with the statutory scheme (although it is not a guide to its interpretation), the NSW Government's publication "Joint Regional Planning Panels Operational Procedures" states: "The role of council staff is to undertake the assessment of the DA"; a council "is responsible through its staff for undertaking the assessment of the application in accordance with the provisions of the *EPA Act*. It is the council's responsibility to prepare a proper assessment report addressing all statutory requirements and properly considering all issues"; and "The assessment report submitted for consideration of the Regional Panel must address the matters raised in the SEPP 1 objection, and provide an assessment against the provisions of SEPP 1": at [3.1], [4.8].

100 The statutory scheme indicates in my view that a council's assessment of a development application is a condition precedent to a regional panel's determination of a development application, and that in the case of a non-compliant development a SEPP 1 objection is at the heart of the determination so that it must be included in the assessment.

101 I accept that matters may arise at the Panel meeting held to determine the application, such as new facts raised by speakers or the Panel, which have not been, and do not have to be, the subject of prior Council assessment. That is inherent in the process. But a SEPP 1 objection in the case of a non-compliant development is different. The requirement that it be assessed by the Council cannot be avoided by lodging it at the last moment with the Panel, as occurred in this case. If that happens, and the Panel decides to consider it, the Council must be given a reasonable opportunity to assess it, which in fact did not happen in this case.

102 Council staff did not assess the DSL SEPP 1 objection and did not even see it until after the Panel meeting. The Panel chair asked Ms Munn, the Council officer, to go outside and do an assessment of the DSL SEPP 1 objection, but she declined on the basis that it was inappropriate as there was insufficient time. I accept her evidence that in fact there was insufficient time at the meeting for her to carry out the assessment that she considered appropriate and which was reasonable: see [33] above.

103 The respondents submit, however, that:

(a) a SEPP 1 objection does not form part of a development application and therefore the assessment function conferred on the Council under cl 13F(2)(d) of the Major Development SEPP is inapplicable;

(b) alternatively, there is no legislative intention to invalidate the decision if the Council failed to carry out the assessment.

104 I do not accept the submission. Where a development application is non-compliant, consideration of development standards is essential as the

development will be prohibited unless the standards can be waived. The critical role of a SEPP 1 objection in the assessment of a non-compliant development application is apparent from the very terms of SEPP 1, particularly cll 6 and 7. If a SEPP 1 objection does not form part of a non-compliant development application assessment, it is difficult to see what other function it performs. It is not to the point that a regional panel need not accept a council's assessment and may ultimately base its decision on its own assessment (informed by the council's prior assessment) and that panel members may have qualifications which enable them to conduct an assessment. The statutory scheme is that there should be local input through an assessment by the local council.

105 Here the Council officers did not assess, were given no reasonable opportunity to assess, and did not see the DSL SEPP 1 objection before the development application was determined. In my opinion, in such circumstances the Panel had no power to determine the development application and, if the objection is legally material, the legislative intention is to invalidate the Panel's decision.

106 However, Hyecorp makes the telling submission that the DSL SEPP 1 objection is legally immaterial because the proposed development met the 50 per cent deep soil standard in KPSO cl 25I(2) of 50 per cent of the "site area". That is said to be because the road reserve should be included in calculating the site area. The reasoning is as follows: (a) the definition of "site area" in cl 25B in relation to proposed development means "the areas of land to which an application for consent to carry out the development relates, excluding the area of any access handle"; (b) this definition does not exclude a road reserve area; (c) in contrast to cl 25I(2), cl 25I(6) relating to maximum site coverage excludes a road reserve area because it provides that "If a site is comprised of land in Zone No 2(d3) and other land, the other land is not to be included in calculating site area"; (d) in this case the application for consent comprised land in Zone No 2(d3) and other land, namely the road reserve area, therefore the latter should be included under cl 25I(2).

107 The Council submits that the Court should not go behind the Panel's determination that the development was not compliant with cl 25I(2) and, if it does, should accept the 38 per cent DSL calculation in the Council's assessment report. I do not accept the submission because if the Panel and the Council both excluded the reserved land on an erroneous construction of the DSL provision, then the DSL SEPP 1 objection is immaterial and the Council's challenges thereto are likewise immaterial.

108 The Council then submits that (a) Part IIIA of the KPSO (cll 25A – 25NA) only applies to the land marked red in the relevant zoning maps, which excludes the reserved land; (b) in addition, the chapeau to the definition provision, cl 25B, states "In this Part and the matter relating to Zone Nos 2(c1), 2(c2) and 2(d3) in the Table to clause 23", requiring the definitions to be read for those purposes, which are restricted to specially zoned medium density residential land; (c) so construed, "site area" excludes reserved land and the Panel and the Council were legally correct in proceeding on that basis.

109 I accept Hyecorp's submission. The definition of "site area" simply applies to "the areas of land to which an application for consent" relates, which in this case prima facie includes reserved land. The fact that Part IIIA is expressed to apply to land which does not include reserved land does not mean that it cannot adopt a definition of site area calculated partly by reference to land adjoining land to which it does apply if both form part of the development application. On the Council's approach that the definition excludes reserved land, the reserved land components of all development applications in the large geographic area constituted by the Railway Corridor and St Ives Centre are entirely free of all Part IIIA controls, not just those under cl 25I. That seems an unlikely legislative intention.

110 Having accepted Hyecorp's submission that the DSL SEPP 1 objection is legally immaterial because the proposed development met the cl 25I(2) standard properly construed, it follows that I must reject Ground 2.

111 In case I am in error, I will for completeness deal with three residual matters:

(a) If I am in error such that I should accept Ground 2, I would not decline to grant relief on discretionary grounds. The respondents submit that the Court should, in its discretion, refuse relief on Ground 2 because, as Ms Munn accepted in oral evidence, her position was recorded in a council record of a pre-development application meeting on 29 March 2009 that a DSL SEPP 1 objection would not be supported to vary the 50 per cent minimum requirement. However, I consider that this consideration is outweighed by the following: (a) the document relied on contains a prominent highlighted box "It does not provide a basis for Councils [sic] formal consideration and determination of any subsequent application"; (b) Mr Abolakian of Hyecorp in oral evidence said he could not have proceeded on the basis that what was said at that meeting or what was contained in the document reflected Council's formal position; (c) he also accepted that the statement he attributed Mr Garland of the Council at a meeting on 4 February 2010 that Council would never support a SEPP 1 objection for DSL, was based on a very substantial level of non-compliance, and Mr Garland's unchallenged evidence, which I accept, was that he would have said Council was unlikely to support such an objection.

(b) If I am in error such that it was the function of the Panel to have assessed the DSL SEPP 1 objection, I am not satisfied that the Council has proved that it failed to do so. The evidence of Councillor Cross was that he could not recall any detailed discussion of the merits of the DSL SEPP 1 objection, he did not discuss it with other Panel members and he did not consider it. The evidence of Councillor Malicki was that she had said at the Panel meeting that she had scanned the DSL SEPP 1 objection but was unfamiliar with its details and that it was not discussed at the Panel

meeting. She deposed, however, that she now realised that she was mistakenly referring to the site coverage SEPP 1 objection. The Panel having resolved to consider the DSL SEPP 1 objection, it strains credulity that any member of the Panel would then vote on whether to uphold that objection without endeavouring to assess it. Be that as it may, I am not satisfied that the Council has proved that the majority who voted in favour of upholding the objection did not assess it

(c) The Council submitted in closing that deep soil landscaping and other calculations by Ms Munn in her affidavit were infected by error. I uphold the respondents' objection that this goes outside the Council's pleading and prejudices them in that they would have considered cross-examining Ms Munn on this matter if it had been pleaded.

112 As stated earlier, I do not accept Ground 2.

GROUND 3 – DENIAL OF NATURAL JUSTICE

113 The third ground of challenge is that there was a denial of natural justice arising from the late submission of the DSL SEPP 1 objection as a result of which objectors were not given an opportunity to make any informed submissions to the Panel in relation to that objection.

114 There is a common law duty to afford procedural fairness in the making of administrative decisions which affect rights, subject only to a clear manifestation of a contrary statutory intention: *Kioa v West* (1985) 159 CLR 550 at 584; *Stewart v Ronalds* [2009] NSWCA 277, 76 NSWLR 99 at [70], [113], [130]; *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 at [172] – [175].

115 The respondents submit that even if the Council has standing under s 123 of the *EPA Act* to bring these proceedings (which is denied – see [118]

below), there is no cause of action available to the Council on the ground that the Panel's decision is vitiated by reason of it having denied procedural fairness to a third party (the objectors). I do not accept the submission. In *Balmain Association Inc v Planning Administrator for Leichhardt Council* (1991) 25 NSWLR 615 at 638 the Court of Appeal held that the purpose of s 123(1) of the *EPA Act* is to widen the class of persons who have standing to bring proceedings and that an association of residents had standing to maintain proceedings founded on the alleged failure by the Minister to afford a third party, the council, procedural fairness.

116 However, as I have decided that the DSL SEPP 1 objection was legally immaterial because the proposed development was compliant with the DSL standard, Ground 3 is immaterial and therefore should be rejected.

117 If it were necessary to consider Ground 3, there would have to be taken into account that there was no statutory obligation to notify objectors of a SEPP 1 objection and the Council's Notification Development Control Plan and practice did not require notification. Ironically, if there is any substance to this ground then the Council itself may have failed to give procedural fairness to objectors because it did not give objectors notice of the earlier SEPP 1 objection relating to site coverage that Hyecorp lodged with the Council other than in its assessment report.

COUNCIL'S STANDING

118 Hyecorp submits that the proceedings should be dismissed on the ground that the Council does not have standing under s 123 of the *EPA Act*, which provides:

> "**123 Persons to be informed of proposed revocation or modification of consent under section 96A (3) of the Act**
>
> (1) For the purposes of section 96A (3) (a) (ii) of the Act, the Director-General of the Department of Fair Trading is a prescribed person if the proposed revocation or modification affects:

(a) the transfer, alteration, repair or extension of water service pipes, or
(b) the carrying out of sanitary plumbing work, sanitary drainage work or stormwater drainage work."

119 Section 23G relevantly provides:

> "**23G Joint regional planning panels**
>
> ...
>
> (2) A regional panel has the following functions:
> (a) any of a council's functions as a consent authority that are conferred on it under an environmental planning instrument
>
> ...
>
> (5A) Subject to the regulations, a regional panel is, in the exercise of functions conferred under subsection (2) (a), taken to be the council whose functions are conferred on a regional panel as referred to in subsection (2) (a)."

120 Regulation 123D(2) of the *EPA Regulation* provides:

> "**123D Provisions of Act not to apply as if regional panels were councils**
>
> ...
>
> (2) For the purposes of section 23G (5A) of the Act, a regional panel is not taken to be the council for the purposes of appeal proceedings under the Act, or proceedings under section 123 of the Act, if:
> (a) the council is the applicant for a development application or the modification of a development consent, and
> (b) the council makes an appeal under the Act, or brings proceedings under section 123 of the Act, in relation to a determination by the regional panel."

121 Hyecorp's argument is that the Council has brought proceedings against a body which under s 23G(5A) is taken to be the Council, the Council does not have standing to bring judicial review proceedings against itself, and cl 123D(2) impliedly indicates a legislative intention that a council is not to have standing under s 123 to bring judicial review proceedings against a regional panel unless it is the applicant for development consent.

122 The council is not suing itself. Rather, it is applying to set aside a consent which it is deemed to have granted. There is no reason in my opinion why

it cannot do so pursuant to s 123. There is precedent in this Court for a council to apply successfully for its development consent to be set aside on a judicial review: *Coffs Harbour City Council v Arrawarra Beach Pty Ltd* [2006] NSWLEC 365, 148 LGERA 11. Section 123 has never been read down: *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383. I conclude that the Council has standing under s 123 to bring these proceedings.

CONCLUSION

123 The orders of the Court are as follows:

1. Declaration that development consent DA0410/09 granted by the first respondent on 29 April 2010 for the demolition of four existing dwellings and the construction of two residential flat buildings at 27-33 Boundary Street, Roseville is void and of no effect.
2. Order that the second respondent by itself, its servants and agents be restrained from carrying out any work in reliance upon development consent DA0410/09.
3. The respondents are to pay the applicant's costs.
4. The exhibits may be returned.

I CERTIFY THAT THIS AND THE 39 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE P.M. BISCOE.

.....
Associate

Date 31 Dec 2010