Land and Environment Court
New South Wales

Medium Neutral Citation: **Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 142**

Hearing Dates:	21, 22 (statement of facts) August 2013
Decision Date:	03/09/2013
Jurisdiction:	Class 1
Before:	Pepper J
Decision:	Appeal allowed. The decision and orders of Tuor C made on 18 July 2013 are set aside. The matter is remitted to Tuor C or, if she is unavailable to hear and determine the matter expeditiously, to another Commissioner of the Court, for determination in accordance with the decision of the Court. The hearing of the remitted matter is to be expedited.
Catchwords:	APPEAL: appeal pursuant to s 56A of the Land and Environment Court Act 1979 - whether Commissioner failed to take into account a mandatory relevant consideration - whether Commissioner misconstrued a savings provision in Local Environmental Plan - proper construction of cl 1.8A of Willoughby Local Environmental Plan 2012 - appeal allowed - whether it was fair and reasonable that the respondent to pay appellant's costs - no costs ordered.
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 5, 56(2)(c), 79C, 97 Land and Environment Court Act 1979, s 56A Land and Environment Court Rules 2007, r 3.7 State Environmental Planning Policy No 1 - Development Standards Uniform Civil Procedure Rules 2005, r 42.1 Willoughby Local Environmental Plan 1995, cl 24(1)(d) Willoughby Local Environmental Plan 2012, cl 1.8A
Cases Cited:	Abret Pty Limited v Wingecarribee Shire Council [2009] NSWLEC 132 Alamdo Holdings Pty Limited v The Hills Shire Council [2012] NSWLEC 1302 Carstens v Pittwater Council [1999] NSWLEC 249; (1999) 111 LGERA 1 Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297 Egan v Hawkesbury City Council (1993) 79 LGERA 321 Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2) [2013] NSWLEC 38 Hall v Jones (1942) 42 SR (NSW) 203 Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 1127 Modern Motels Pty Limited v Fairfield City Council [2013] NSWLEC 138 Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144 Terrace Tower Holdings Pty Ltd v Sutherland Shire Council [2003] NSWCA 289; (2003) 129 LGERA 195 Village McEvoy Pty Ltd v Council of City of Sydney (No 2) [2010] NSWLEC 17; (2010) 176 LGERA 119
Category:	Principal judgment
Parties:	Maygood Australia Pty Ltd (Applicant) Willoughby City Council (Respondent) (submitting appearance)
Representation:	D C Balog & Associates (Applicant) King & Wood Mallesons (Respondent) Mr J Johnson (Applicant) N/A (Respondent)
File Number(s):	10553 of 2013

JUDGMENT

Clause 1.8A of the Willoughby Local Environmental Plan 2012 is Misconstrued in

Earlier Decisions of the Court

1 This appeal from the decision of Tuor C (*Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 1127) is unusual insofar as the respondent, Willoughby City Council ("the council"), has only filed a submitting appearance save as to costs in the appeal and thus there is no contradictor before the Court. This is so notwithstanding that the council argued in favour of the construction of cl 1.8A of the *Willoughby Local Environmental Plan 2012* ("the 2012 LEP") that was adopted by the Commissioner that is the gravamen of this appeal.

2 The appeal has been expedited on the basis that the effect of the appeal on the development is materially adding to its costs and that in order to prevent construction work ceasing entirely on site, thereby causing significant economic loss, the appeal must be determined by 15 September 2013.

3 It was, unsurprisingly, not in contention that the grounds challenging the Commissioner's decision were characterised as errors of law (*Village McEvoy Pty Ltd v Council of City of Sydney (No 2)* [2010] NSWLEC 17; (2010) 176 LGERA 119 at [25] and the authorities cited thereat). They are.

4 In my opinion, the appeal must be allowed and the matter remitted to the Commissioner for determination in accordance with the findings in this decision. This is because, by reason of her misconstruction of cl 1.8A of the 2012 LEP, the Commissioner has failed to have proper regard to a relevant mandatory consideration, namely, the 2012 LEP, in determining whether to grant development approval to the proposed development (as opposed to merely determining whether the SEPP 1 objections should be upheld).

The Council Refuses Maygood's Application to Reconfigure and Add to an Approved Residential Flat Building

5 By way of necessary background, on 16 August 2012 the applicant, Maygood Australia Pty Ltd ("Maygood"), lodged a development application (DA 2012/301, or "the DA") with the council seeking consent to refigure a ninth level and add a tenth level to an approved residential apartment building at 31-35 Devonshire St, Chatswood, New South Wales ("the site").

6 On 19 December 2012 Maygood appealed the deemed refusal of the council in proceedings commenced in Class 1 of the Court's jurisdiction under s 97 of the *Environmental Planning and Assessment Act 1979* ("the EPAA").

7 On 31 January 2013, that is to say, after the appeal had been filed, the 2012 LEP was gazetted, repealing the *Willoughby Local Environmental Plan 1995* ("the 1995 LEP"). Clause 24(1)(d) of the 1995 LEP provided for a maximum height limit of nine stories for the site. However, under the 2012 LEP the additional floor proposed by Maygood would have been permitted (at [11] and [52] of the Commissioner's judgment).

8 The 2012 LEP contained the following savings provision in cl 1.8A (emphasis added):

> If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined *as if this Plan had not commenced*.

9 On 4 March 2013 the council determined the DA by refusal.

The Proceedings Before the Commissioner

10 The appeal was heard before Tuor C on 18 July 2013. Maygood submitted objections under the *State Environmental Planning Policy No 1 - Development Standards* ("SEPP 1") to applicable height and floor space ratio ("FSR") standards in the 1995 LEP, contending that strict compliance with the standards was unnecessary and unreasonable.

11 The gravamen of the dispute before the Commissioner concerned, first, the weight, if any in light of cl 1.8A, to be given to the 2012 LEP in assessing the DA, and second, whether the SEPP 1 objections were well founded. Resolution of the former issue turned on the proper construction of cl 1.8A of the 2012 LEP.

12 In this respect, the council submitted, relying on an earlier decision of this Court in *Alamdo Holdings Pty Limited v The Hills Shire Council* [2012] NSWLEC 1302 (at [20]-[21]), that no weight whatsoever should be given to the 2012 LEP because the application of cl 1.8A of that LEP deemed it irrelevant (at [18]).

13 By contrast, Maygood contended that the provisions of the 2012 LEP were highly relevant, relying on the decision of the Court of Appeal in *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* [2003] NSWCA 289; (2003) 129

LGERA 195, and should have been considered.

14 The Commissioner accepted the council's argument noting that *Alamdo* had been followed by a number of subsequent decisions in this Court (at [25]-[27]):

> 25. I accept the reasoning by Dixon C in *Alamdo,* which has been followed by other decisions of the Court, including decisions made after this hearing (see *Moscaritolo v The Hills Shire Council* [2013] NSWLEC 1014, *Signature Gardens Retirement Resort Pty Limited v Cessnock City Council* [2013] NSWLEC 1070, *Greenwood v Warringah Council* [2013] NSWLEC 1119 and *Wang and Anor v Canterbury City Council* [2013] NSWLEC 1098)
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> 26. The savings clause in WLEP 2012 is identical to the clause considered in *Alamdo* but is different to that considered in *Terrace Towers* in that the requirement to determine the application "as if the plan had been exhibited but not been made" has been removed and replaced with the requirement that the application "must be determined as if this plan had not commenced". While there would appear to be a lack of logic in allowing the exhibited plan to be considered under s 79C(1)(a)(ii) prior to the making of the Plan, but not to do so after it has commenced, I accept that *Alamdo* is the correct interpretation of the words in cl1.8A. There is no reason to indicate that the outcome that results from the application of cl 1.8A was not intended by the draughtsperson.
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> 27. In accepting that the Court has no authority to take WLEP 2012 into account in its assessment of the development application under s 79C (1)(a)(i) or (ii), I note that in *Alamdo* at [7] and [12], the applicant accepted that the LEP is relevant as an aspect of the public interest under s 79C(1)(e), but that "by its terms cl 1.8A speaks against the instrument operating to prohibit the present application or be of determinative weight". Dixon C at [21] found:
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> > 21 Despite that it is a consideration under s 79C (1) (e) as part of the public interest however, in accepting that I must have regard to the words in the savings provision in cl1.8A that removes it from consideration.

15 Accordingly, the Commissioner determined the DA as if the 2012 LEP "had not commenced" and only measured the development against the FSR and height standards in the 1995 LEP, against which the development was not compliant (at [29]).

16 However, in determining the SEPP 1 objections, the Commissioner found it relevant to assess the existing and likely future context of the site, which in turn meant having regard to the 2012 LEP. In her opinion, the instrument should be considered in determining whether strict compliance with the FSR and height standards in the 1995 LEP were unreasonable, unnecessary or tended to thwart the attainment of the objects of the EPAA specified in s 5, and thus, whether the SEPP 1 objections were well founded. In short, the 2012 LEP provided "guidance as to the development likely to occur through future development applications on other land and to the likely future character of the locality of the site" (at [29]).

17 But notwithstanding the provisions of the 2012 LEP, the Commissioner held that the SEPP 1 objections were not well founded and she dismissed the appeal (at [59]-[61]).

18 No issue was raised in this appeal as to whether, even if I upheld the grounds of appeal raised by Maygood, the appeal should nevertheless be dismissed on the basis that any error by the Commissioner was immaterial to her decision given her consideration of the 2012 LEP in determining the SEPP 1 objections. In the absence of any argument on this point I would have extreme misgivings about entertaining it, and therefore, as a matter of fairness to Maygood, do not do so.

Statutory Framework

19 In addition to cl 1.8A of the 2012 LEP, s 79C(1)(a) and (e) of the EPAA state (emphasis added):

> **79C Evaluation**
>
> (1) **Matters for consideration-general**
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> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) *any proposed instrument* that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
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> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
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> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
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> (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),
>
> that apply to the land to which the development application relates,
>
> ...

(e) the public interest.

The Decisions in *Alamdo* and *Terrace Towers*

20 Because of the Commissioner's reliance on *Alamdo*, and the pivotal importance of the decision in *Terrace Towers*, it is necessary to briefly set out the reasoning in each case.

21 Prior to doing so, it should be noted that I am not required to follow *Alamdo*, or any of the cases in this Court adopting its reasoning, as a matter of comity. Likewise I need not be satisfied that *Alamdo* is plainly wrong to depart from it (see the discussion in *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38 at [278]-[281]). This is because neither *Alamdo* nor any of its offspring were decisions of judges of this Court. But having said this, they are nevertheless decisions of the Court and cautious consideration should be given if this nascent line of authority is to be overturned by reason of the outcome of this appeal.

22 In *Terrace Towers* the appellant sought development consent from the council for a bulky goods retail centre. The development application was lodged while the *Sutherland Shire Local Environmental Plan 1993* ("the 1993 LEP") was operational. Subsequently the *Sutherland Shire Local Environmental Plan 2000* ("the 2000 LEP") was gazetted. The 2000 LEP required a bulky good retailer to have a minimum gross floor space of 1000m². The proposed development had been designed to accommodate several tenancies with smaller gross floor space than this stipulated standard. One of the issues on appeal was the appropriate treatment to be given to the 2000 LEP. Clause 4(1) of the 2000 LEP repealed the 1993 LEP, however, cl 6(2) of the 2000 LEP provided by way of transitional provision the following (emphasis added):

> Despite cl 4(1), local environmental plans (including Sutherland Shire Local Environmental Plan 1993) and deemed environmental planning instruments, as in force immediately before the commencement of this plan, apply to a development application that was made but had not been finally determined before that commencement *as if this plan had been exhibited but had not been made*.

23 The Court of Appeal held that the transitional provision contained in cl 6(2) of the 2000 LEP and s 79C(1)(a)(ii) of the EPAA both required that proper regard be given to draft instruments that had been exhibited. This meant that a consent authority could give weight to its perception of the imminence of relevant provisions in a draft exhibited instrument, or if it had already come into force, to treat it as if its provisions were certain and imminent. The greater the certainty that a draft instrument would in fact be adopted, the greater the weight that could be given to that draft.

24 As the President (with whom Spigelman CJ and Ipp JA agreed) stated (at [50]-[51] and [53]):

> 50 The cases acknowledge that (as regards a proposal) the relevant instrument is not to be treated as made. But the terms of the transitional provision and the command of s79C(1)(a)(ii) themselves require proper regard to be given to draft instruments that have been exhibited. The cases recognise that proper regard means that some draft instruments are entitled to significant weight.
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> 51 Cowdroy J did not err in law in paying significant weight to the fact that LEP 2000 was actually in force at the time of the proceedings before him. It remained a draft instrument as far as the proposal was concerned, by virtue of the command of the transitional provision. Section 79C(1)(a)(ii) nevertheless authorised the consent authority to pay regard to relevant provisions in a draft instrument. Its provisions had become certain and its commencement imminent (in relation to the date of lodgment of the instant development application). Common sense explains why significant regard may be given to one whose commencement is imminent and whose terms have become certain. "Imminence" indicates close temporal proximity of application, but stops short of "presence" or "arrival".

...

> 53 The relationship between LEP 1993 and LEP 2000 was correctly stated in the next paragraph of the judgment (emphasis added):
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> > [17] Hence the *relevan*t planning controls for the purposes of this development application are to be found in LEP 1993 although the *otherwise applicable provisions* of LEP 2000 are *matters to be taken into consideration*. Such provisions are to be *given weight as if they were certain and imminent* because LEP 2000 has now been gazetted (*Detita Pty Ltd v North Sydney Council* [2001] NSWLEC 209*)*.

25 The Court of Appeal emphasised that s 79C(1) of the EPAA did not stipulate or imply a hierarchy among its various paragraphs or among the planning instruments falling within subparagraphs (a)(i) and (ii) (at [56] and [6]). Likewise, the savings clause did not assign any hierarchical relationship between the 1993 and 2000 LEPs other than "any directly applicable commands of LEP 1993 must be complied with" (at [60]).

26 In *Alamdo*, the Commissioner distinguished *Terrace Towers* on the basis that the words that underlined the reasoning in that case, namely, "as if the Plan had been exhibited", had been purposely removed from cl 1.8A of the 2012 LEP. The Commissioner therefore concluded (at [20]-[21]):

> 20. The transitional provision in cl1.8A requires the LEP 2012 to be taken into consideration under s 79C(I) of the Act as if the Plan had been made but not commenced. The words in the savings clause under review in this case are different to those considered by the Court of Appeal in *Terrace Towers*. Therefore, the case at hand can be distinguished from reasoning of the Court of Appeal in *Terrace Towers*. I accept the applicant's submission that there must have been a purpose in the drafter of the clause removing the words "*had been exhibited*" from the final Plan as made. If I accept the Council's interpretation of the clause then it is irrelevant that the words "*had been exhibited*" were removed from the final version of cl1.8A.
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> 21. The only interpretation of the savings clause, which I can accept on the evidence and submissions is that proposed by the applicant. It is simply illogical to adopt the legal reasoning of the Court of Appeal in *Terrace Towers* with respect to the savings clause under consideration in this case. The words, which underline the reasoning of the Court in *Terrace Towers*, "*as if the Plan had been exhibited* ", are purposively removed from cl1.8A of LEP 2012. Accordingly, it must follow that the prevailing planning instrument remains the LEP 2005 for this application by dint of the savings provision in cl1.8 A of LEP 2012. It also follows that LEP 2012 is not a relevant consideration under s 79C (1)(a) (i) and (ii) because I am directed to determine the application as if the Plan had not been commenced. I agree with the applicant that it has no legal status for this application. Despite that it is a consideration under s 79C (1) (e) as part of the public interest however, in accepting that I must have regard to the words in the savings provision in cl1.8A that removes it from consideration.

27 Hence she considered that while the Court was directed by cl 1.8A to have regard to the making of the instrument, because it could not treat it as having commenced, the 2012 LEP "simply has no legal status or application to this case under s 79C(a)(i) or (ii) and is of no determinative weight under the public interest" (at [12]).

The 2012 LEC Was a Mandatory Relevant Consideration

28 I must respectfully disagree with the Commissioner's reasoning. First, the words "as if this Plan had not commenced" are not to be equated with, as has occurred, the words 'as if this Plan had not existed'. No such proscription is mandated by the change in terminology and there is no warrant for construing cl 1.8A in this manner having regard to the text of the clause or when proper consideration is given to its scope and purpose.

29 On the contrary, cl 1.8A is a deeming provision that does no more than fictitiously set the 2012 LEP back to a point in time immediately before its commencement. At that moment the 2012 LEP is a "proposed instrument" and must be considered pursuant to s 79C(1)(a)(ii) of the EPAA. In other words, the LEP becomes a mandatory relevant consideration under that Act, assuming, of course, that the proposed instrument has been the subject of public consultation and proper notification to the consent authority, and failure to take it into account will give rise to jurisdictional error. In the present case it was not an issue that the 2012 LEP had been the subject of public consultation and that the council had been notified of it.

30 Second, no legislative intention has been evinced to abrogate the reasoning in *Terrace Towers* and the "stream of authorities" both preceding and succeeding that decision by the adoption of the words "not commenced" in cl 1.8A. On the contrary, the different wording harmonises the savings provision with the community consultation requirements under s 56(2)(c) of the EPAA consequent upon the removal of the requirement for public exhibition in the former s 66 of that Act. As Maygood submitted, it would have been anomalous to continue to refer to the term "exhibition" in cl 1.8A after the requirement for and reference to "exhibition" had been removed from the Act.

31 In my opinion, if the wording in cl 6(2) of the 2000 LEP ("but had not been made") in *Terrace Towers* was insufficient to permit a consent authority to shut its eyes to otherwise relevant provisions of a draft planning instrument, it is even less likely that a draft instrument that has been made but has "not commenced" can be ignored. As the Court in *Terrace Towers* observed while rejecting a similar argument to the effect that none of the 2000 LEP could be taken into account (at [59]):

> 59 ...The argument was that none of LEP 2000 was relevant or applicable under the transitional provision. This submission fails to recognise the second part of the transitional provision or the stream of caselaw forming the background against which its terms are properly to be construed. The transitional provision requires LEP 2000 to be taken into account, albeit on the basis that it is not to be regarded as "made". This cannot be read as a self-referential, self-defeating indication that only the transitional provision itself is to be taken into account. The obvious intent is that the consent authority may look at those provisions of LEP 2000 that are pertinent to the zone and the proposed development. This is what Cowdroy J did when he had regard to the "otherwise applicable" provisions of LEP 2000 (at [17]).

32 Third, the council's construction of cl 1.8A of the 2012 LEP would effectively give either that clause, or s 79C(1)(a)(ii) of the EPAA, no work to do. A construction of this kind should not be easily adopted (*Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [97] and the authorities cited thereat).

33 Fourth, as Tuor C herself noted (at [26]), the construction of cl 1.8A contended for by the council results in absurdity. On the one hand, if by reason of cl 1.8A, the 2012 LEP was not a proposed instrument for the purpose of s 79C(1)(a)(ii) of the EPAA because it had in fact commenced and was therefore an irrelevant consideration; but on the

other hand, if as a matter of fact the LEP had not commenced, then it would be a mandatory consideration under 79C(1)(a)(ii). Thus, an instrument that had commenced would be deemed less relevant than an instrument that had not. Given this irrationality of operation, it may be concluded that it was not the intention of the drafters that the clause operate in this manner. Although it must be recalled that planning instruments are not always drafted with pellucid clarity or a keen eye to taxonomy (*Egan v Hawkesbury City Council* (1993) 79 LGERA 321 at 331), nevertheless "a court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense" (*Hall v Jones* (1942) 42 SR (NSW) 203 at 208 per Jordan CJ; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 304 and 320 and *Abret Pty Limited v Wingecarribee Shire Council* [2009] NSWLEC 132 at [26]-[30] and the authorities cited thereat).

34 Fifth, even if the 2012 LEP is not a proposed instrument to be considered under s 79C(1)(a)(ii), it is, in my opinion, given that the instrument had commenced, a matter that was relevant to "the public interest", and therefore, was necessary to consider pursuant to s 79C(1)(e) of the EPAA. The breadth of matters that can be taken into account as an element of "the public interest" is considerable (*Village McEvoy* at [38]-[40]) and it may be expected that only the clearest and most unequivocal of words in a planning instrument would displace the statutory operation of s 79C(1)(e) of the EPAA.

35 Alternatively, even if the 2012 LEP is not a mandatory consideration under s 79C of the EPAA, this does not mean that a consent authority is precluded from considering it as a draft or final planning instrument. It is still a matter to which the consent authority may nevertheless, absent clear language or necessary implication to this effect, have regard in making its determination. As the Court stated in *Carstens v Pittwater Council* [1999] NSWLEC 249; (1999) 111 LGERA 1 (at [22] and [25]):

> 22. These objects, in my opinion, can only be given full effect by not adopting a narrow construction of s 79C(1). A narrow construction would exclude from consideration the objects of the Act. For example, one of the objects of the Act is to encourage ecologically sustainable development (s 5(a)(vii)). If s 79C(1) were to be regarded as an exclusive list of relevant considerations it would result in the exclusion from consideration of an important objective of the Act. I am thus inclined to the view that s 79C(1) does not exclude the kind of considerations to which Mahoney JA referred in *BP Australia Ltd v Campbelltown City Council*. That is to say, I am inclined to the view that s 79C(1) sets out the matters that *must* be taken into consideration, but does not exclude from consideration other matters not included in those listed and which may be of relevance to the particular development application and which furthers the objects of the Act. The view of Cripps J in *Ian Turner Partners* is clearly *obiter* and I do not regard myself as bound by it.
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> ...
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> 25. I thus conclude that the matters for consideration listed in s 79C(1) are not the only matters to which a consent authority may have regard. The listed matters are those which a consent authority *must* consider. The consent authority may also take into consideration other matters not included in those which are listed. Those other matters include, in the public interest, any matter which relates to the objects of the Act set out in s 5. This does not mean that the decision-maker may take anything into consideration. The relevant considerations are confined so far as the subject-matter, scope and purpose of the Act and any environmental planning instruments allow. The draft DCPs and the Values Statement in the present case are relevant as documents which relate to the matters described in sub-paras (i), (ii), (vi) and possibly (vii) of para (a) of those objects. In taking those matters into consideration the Commissioner made no error of law.

36 Similarly in *Terrace Towers*, the Court of Appeal observed (at [81]):

> 81 In any event, matters relevant to the public interest touching a particular application are not confined to those appearing in published environmental planning instruments, draft or final. Obviously such instruments carry great and at times determinative weight, but they are not the only source of information concerning the public interest in planning matters. The process of making such instruments is described by Beazley JA in *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 42-44. Nothing in the Environmental Planning and Assessment Act stipulates that environmental planning instruments are the only means of discerning planning policies or the "public interest". For one thing, the government is not the only source of wisdom in this area. A consent authority may range widely in the search for material as to the public interest (see generally *Shoalhaven City Council v Lovell* (1996) 136 FLR 58 at 63; *Patra Holdings Pty Ltd v Minister for Land and Water Conservation* [2001] NSWLEC 265; (2001) 119 LGERA 231 at 235).

37 It therefore follows that insofar as the Commissioner improperly construed cl 1.8A of the 2012 LEP, and therefore, failed to take it into account in determining whether to grant development consent (other than in respect of dealing with the SEPP 1 objections), the appeal must be allowed.

Costs of the Appeal

38 Because these are proceedings in Class 1 of the Court's jurisdiction, being an appeal under s 56A of the *Land and Environment Court Act 1979*, r 3.7 of the *Land and Environment Court Rules 2007* ("the Rules") applies (*Modern Motels Pty Limited v Fairfield City Council* [2013] NSWLEC 138 at [48]). That rule provides that the Court is not to

make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.

39 Maygood urged the Court to make a costs order, first, on the basis that while the council, in its capacity as a model litigant, had submitted at first instance that *Alamdo* was good law and ought to be followed, it had not sought to defend this position on appeal; and second, because it has been wholly successful in this appeal.

40 Plainly success alone by an appellant to an appeal governed by r 3.7 of the Rules is not enough to displace the presumption contained in that rule that there is to be no order as to costs absent any demonstrated fairness and reasonableness warranting the making of such an order. If success of itself were sufficient this would render otiose those requirements and r 3.7 would operate in a manner similar to r 42.1 of the *Uniform Civil Procedure Rules 2005*, where costs generally follow the event.

41 Therefore, was the conduct of the council before the Commissioner or on appeal such that it is fair and reasonable to award Maygood its costs? In my opinion it is not.

42 First, before the Commissioner the council did no more than contend that she should follow and apply the existing law that had been established by a number of decisions of the Court, including a decision of the Senior Commissioner. In doing so it acted, in my view, entirely reasonably and fairly. Second, it is not for the Court to second-guess, absent any evidence, the reason or reasons for the council's decision to file a submitting appearance in this appeal. To elect not to participate in the appeal, with all of its attendant risks and costs consequences, is not a circumstance that justifies the making of a costs order against the council. Third, if anything, Maygood has enjoyed a benefit in savings both in terms of efficiency and expense by virtue of the council not being present at the appeal. And fourth, by not participating in, and thereby prolonging, the appeal, the council has acted in conformity with, rather than in derogation of, its obligations as a model litigant.

43 I therefore do not consider that in all the circumstances it would be fair and reasonable to make a costs order in Maygood's favour and I decline to do so.

Orders

44 The orders of the Court are therefore that:

(1) the appeal is allowed;

(2) the decision and orders of Tuor C made on 18 July 2013 are set aside;

(3) the matter is remitted to Tuor C or, if she is unavailable to hear and determine the matter expeditiously, to another Commissioner of the Court, for determination in accordance with the decision of the Court;

(4) the hearing of the remitted matter is to be expedited; and

(5) the exhibit is to be returned.

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