



## Land and Environment Court New South Wales

---

Case Title: Hrsto v Canterbury City Council (No 2)

Medium Neutral Citation: [2014] NSWLEC 121

Hearing Date(s): 7 February 2014

Decision Date: 14 August 2014

Jurisdiction: Class 1

Before: Sheahan J

Decision: (1) The separate question posed by the parties is answered in the affirmative.  
(2) The question of the costs of this hearing is reserved.  
(3) The matter is referred back to the Registrar for further directions on Friday 22 August 2014.  
(4) Exhibit C2 may be returned.

Catchwords: CONSTRUCTION and INTERPRETATION:  
Is some of the residential component of the proposed development 'shop top housing'? – principles of construction and characterisation.

Legislation Cited: Environmental Planning and Assessment Act 1979  
Canterbury Local Environmental Plan 2012

Cases Cited: Abret v Wingecarribee Shire Council [2011] NSWCA 107; (2011) 180 LGRA 343  
Baulkham Hills Shire Council v O'Donnell (1990) 69 LGRA 404  
Botany Bay City Council v Pet Carriers International Pty Limited [2013] NSWLEC

147; (2013) 201 LGERA 116

Chamwell Pty Limited v Strathfield Council  
[2007] NSWLEC 114; (2007) 151 LGERA  
400

Council of the City of Newcastle v Royal  
Newcastle Hospital [1957] HCA 15; (1957)  
96 CLR 493; (1957) 4 LGRA 69

Cranbrook School v Woollahra Council  
[2006] NSWCA 155; (2006) 66 NSWLR 379;  
(2006) 146 LGERA 313

Crosland v North Sydney Council [2000]  
NSWLEC 165; (2000) 109 LGERA 244

Foodbarn Pty Ltd v Solicitor-General (1975)  
32 LGRA 157

House of Peace Pty Ltd v Bankstown City  
Council [2000] NSWCA 44; (2000) 48  
NSWLR 498; (2000) 106 LGERA 440

Hrsto v Canterbury City Council [2013]  
NSWLEC 195

Project Blue Sky Inc v Australian  
Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355

T & K Berry v Wollongong Council [2008]  
NSWLEC 210

Texts Cited:	Macquarie Dictionary (4 <sup>th</sup> ed., 2005)
Category:	Separate Question
Parties:	Andrew Hrsto (First Applicant) Troy Pestano Douglas (Second Applicant) Canterbury City Council (Respondent)
Representation	
- Counsel:	Mr C E Hage, agent (First & Second Applicants) Mr A Seton, solicitor (Respondent)
- Solicitors:	N/A (First & Second Applicants) Marsdens Law Group (Respondent)
File number(s):	10740 of 2013

## JUDGMENT

### Introduction

- 1 This judgment answers a question which has been identified and set aside for separate consideration in this Class 1 appeal against the deemed refusal of a development application ("DA").
- 2 The applicant's DA seeks approval to:
  - (1) demolish all existing structures on the subject land at 717-727 Canterbury Road, Belmore, (corner of Burwood Road), and
  - (2) build a 5-6 storey mixed use development comprising 224 residential apartments, communal facilities, basement car parking, and some ground floor retail/commercial spaces, across 5 separate structures known as "Building" "B", "C", "F", "L", and "N", respectively (shown on the plan in *Exhibit C1*).
- 3 The Council contends in the appeal (Statement of Facts and Contentions Part B) that the proposal is **prohibited**, and (contention 2(b)) that the proposed development is "predominantly residential with only a small number of retail and commercial tenancies proposed along the Burwood Road frontage", and is, therefore, inconsistent with the stated objectives of its zone ("B2" Local Centre).
- 4 The Council proposed, and the applicants and Biscoe J (*Hrsto v Canterbury City Council* [2013] NSWLEC 195) agreed to, the separation of the following question for decision in advance of other issues in the appeal:

Whether the development application seeks consent for "residential accommodation" which cannot be characterised as "**shop top housing**" and is therefore prohibited on land within

- 5 "Shop top housing" is defined by dictionary in the LEP (*Exhibit C2*, tab 3, p91 of 97) in the following terms:

**shop top housing** means one or more dwellings located above ground floor retail premises or business premises.

**Note.** Shop top housing is a type of **residential accommodation** ...

- 6 The dictionary does **not** include definitions of "one", "more" or "above".
- 7 The issue before the Court is whether that part of the proposal which seeks consent for "residential accommodation" on the ground floor level of the project can be characterised as "shop top housing".
- 8 The Court has been assisted by a Statement of Agreed Facts ("SAF" – *Exhibit C3*), and by the parties' agreement on a bundle of documents (*Exhibit C2*).

## The LEP

- 9 The LEP is in the modern generic format, and prohibits in the **B2 zone** "residential accommodation" which is neither "shop top housing" nor "boarding house", as defined. (There is no "boarding house" in the proposal).
- 10 Clause 2.3(3)(b) of the LEP (p9 of 97 in tab 3) provides that in the Land Use Table a reference to a type of building or other thing does not include a reference to a type of building or other thing "referred to separately" in the Table. "Shop top housing" is referred to separately in the Table in relation to the B2 zone, so it cannot be embraced by the definition "residential accommodation". The parties agree on this position.

- 11 Item 3 of the Land Use Table (p13 of 97) relevantly specifies that “commercial premises”, “shop top housing” and “any other development not specified in item 2 or 4” is permissible with consent in that zone, but item 4 provides that “residential accommodation” is prohibited. (The only use permitted without consent is “home occupations”).
- 12 The dictionary to the LEP defines the word “**building**” (at p60 of 97) in terms of the definition of it in the *Environmental Planning and Assessment Act 1979*, namely:

**building** includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure or part of a manufactured home, moveable dwelling or associated structure.

- 13 The following definitions which are included in the dictionary are set out in full, for completeness:

**basement** means that space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).

**business premises** means a building or place at or on which:

- (a) an occupation, profession or trade (other than an industry) is carried on for the provision of services directly to members of the public on a regular basis, or
- (b) a service is provided directly to members of the public on a regular basis,

and includes a funeral home and, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, betting agencies and the like, but does not include an entertainment facility, home business, home occupation, home occupation (sex services), medical centre, restricted premises, sex services premises or veterinary hospital.

**Note.** Business premises are a type of **commercial premises** ...

**commercial premises** means any of the following:

- (a) business premises,
- (b) office premises,

- (c) retail premises.

**mixed use development** means a "building or place comprising 2 or more different land uses."

**multi dwelling housing** means 3 or more dwellings (whether attached or detached) on one lot of land, each with access at ground level, but does not include a residential flat building.

**Note.** Multi dwelling housing is a type of **residential accommodation** ...

**residential accommodation** means a building or place used predominantly as a place of residence, and includes any of the following:

- (a) attached dwellings,
- (b) boarding houses,
- (c) dual occupancies,
- (d) dwelling houses,
- (e) group homes,
- (f) hostels,
- (g) multi dwelling housing,
- (h) residential flat buildings,
- (i) rural workers' dwellings,
- (j) secondary dwellings,
- (k) semi-detached dwellings,
- (l) seniors housing,
- (m) shop top housing,

but does not include tourist and visitor accommodation or caravan parks.

**residential flat building** means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.

**Note.** Residential flat buildings are a type of **residential accommodation** ...

**retail premises** means a building or place used for the purpose of selling items by retail, or hiring or displaying items for the purpose of selling them or hiring them out, whether the items are goods or materials (or whether also sold by wholesale), and includes any of the following:

- (a) bulky goods premises,
- (b) cellar door premises,
- (c) food and drink premises,
- (d) garden centres,

- (e) hardware and building supplies,
  - (f) kiosks,
  - (g) landscaping material supplies,
  - (h) markets,
  - (i) plant nurseries,
  - (j) roadside stalls,
  - (k) rural supplies,
  - (l) shops,
  - (m) timber yards,
  - (n) vehicle sales or hire premises,
- but does not include highway service centres, service stations, industrial retail outlets or restricted premises.

**Note.** Retail premises are a type of **commercial premises** ...

## The Project

- 14 SAF 16 records that the ground floor plan (*Exhibit C1*) shows the following, with respect to each “building”:

Building B	two areas described as “Retail” having an area of 89.23m <sup>2</sup> and 102.74m <sup>2</sup> , 2 x 1 bedroom dwellings and 3 x 2 bedroom dwellings.
Building C	the ground floor of 12 x 1 bedroom dwellings.
Building F	an area described as “Retail (café)” having an area of 76.77m <sup>2</sup> , and area described as “Gym + Common Facilities” having an area of 189.65m <sup>2</sup> and 2 x 2 bedroom dwellings.
Building L	5 x 1 bedroom dwellings, 4 x 2 bedroom dwellings and 1 x 3 bedroom dwelling.
Building N	5 x 1 bedroom dwellings and 7 x 2 bedroom dwellings.

- 15 SAF 17 notes that the proposal includes an “upper ground floor” which involves, with respect to each building:

Building B	1 x 1 bedroom dwelling, 6 x 2 bedroom dwellings and 1 x 3 bedroom dwelling.
------------	---

Building C	the upper/first floor of 12 x 1 bedroom dwellings and 12 areas described as "Office".
Building F	three areas described as "Retail 1", "Retail 2" and "Retail 3" each having an area of 63.34m <sup>2</sup> , 87.89m <sup>2</sup> and 51.37 m <sup>2</sup> respectively, 1 x 1 bedroom dwelling and 3 x 2 bedroom dwellings.
Building L	6 x 1 bedroom dwellings and 5 x 2 bedroom dwellings.
Building N	5 x 1 bedroom dwellings and 7 x 2 bedroom dwellings.

- 16 It is clear from *Exhibit C1* that the area of the proposal's ground floor which is designated for residential use far exceeds the area on that level which is proposed for retail/commercial use.

## Submissions

- 17 The **applicants** submit that the proposal meets the zone objectives by locating retail and commercial premises on main road frontages, but that it is "indivisible", and cannot be staged (Tp13, LL25 – 37). They submit that the plan (in *Exhibit C1*) uses the term "building", not in its statutory meaning, but merely to identify the different components of that indivisible project (Tp12, LL41 – 44).
- 18 Further, they submit (par 21) that each of the proposed "mixed" uses of the subject land is "separately permitted and/or ancillary to the permitted development", and (par 25) that, to satisfy the definition of "shop top housing" in the LEP, only one dwelling, not "all" proposed dwellings, need be located "above ground floor retail premises or business premises", in the sense of having "a floor level that is lower (sic) than the top most part of the ground floor retail premises or business premises" (par 35, as corrected at Tp11, LL45 – 50).
- 19 They submit that the Court should adopt a "wide view" of the term "shop top housing", because, if it were the LEP's intention that there would be no



dwellings on the same level as the retail and commercial uses, it would have used the term “all”, rather than “one or more” (Tp11, LL14 – 31).

- 20 They submit (par 60) that the LEP’s use of the term “shop top housing” is intended:

... to allow flexibility for applicants and consent authorities to consider alternate configurations for development, provided that at least “*one or more*” than one dwelling/s are located above some form of retail premises or business premises.

and that (par 58):

The proposal has provided retail and commercial premises to (sic) the most logical and accessible locations, namely the main road frontages to the proposed development, Canterbury Road and Burwood Road as the primary Retail Roads and has satisfied the objectives of the Zone B2 Local Centre of the CLEP 2012.

- 21 In his oral submissions on their behalf Mr Hage said (Tp11, LL21 – 32):

There's no presumption in the Canterbury Local Environmental Plan that states that all dwellings must be located above retail premises or business premises. We feel that as long as one retail premises or business premises is located on the ground floor level, it would suffice to satisfy the definition of shop top housing.

So the applicants contend that the residential accommodation that is at floor level, that is lower than the topmost part of the ground floor retail premises or business premises, can be characterised as shop top housing so long as at least one dwelling in the building as defined has a floor level that is lower than the topmost part of the ground floor retail premises or business premises, your Honour.

- 22 Their submissions are based on the characterisation of the five separate “buildings” ([14] and [15] above) “as one building, with a podium connected to a common basement car park and a switch room” (par 36).

- 23 The various components of the proposal – residential, commercial, or retail – could not “function on the land” without the “basement, driveway ... and access ways”, the physical acts of construction of which “represent the

means by which the land is made to serve the ‘mixed use purpose’ of the proposal (pars 19 and 54. See also *Council of the City of Newcastle v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493; (1957) 4 LGRA 69, at 508).

24 They contend (par 57) that:

... the character, extent and other features of the uses of the common basement and access ways and their integral relationship with the podium incorporating purposes for the use of a “mixed use development” means that it is appropriate to characterise the uses as being for the purpose of a “mixed use development” and as such must be seen as ancillary to the permissible development.

25 The **respondent** insists (par 27 on p10, not p8) that there are five separate “buildings”, to which the principles it espouses must be applied.

26 Across the five buildings, there are many dwellings proposed for “a floor level that is completely higher than the top of the ground floor retail [or business or commercial] premises” proposed (see eg subs par 29 on p10, not p8), and the respondent accepts that such dwellings “would be properly categorised as being ... ‘shop top housing’ ... even where some of them are not *directly* over the top of the ground floor retail [or business or commercial] premises”.

27 However, a number of dwellings are proposed for the ground floor level of Buildings B and F, and would not be “above” any ground floor retail or business premises. They are “residential accommodation” not capable of being properly categorised as “shop top housing” (see pars 28 – 35 on p10, not p8 – 9).

28 Home office floor space is proposed for the upper ground floor of Building C. This space would comprise business premises (par 36 on p10, not p8), but it is at ground level at Canterbury Road (par 37). Twelve dwellings proposed in Building C are not “above” any ground floor retail or business premises (par 39).

- 29 Dwellings on the ground floor of Buildings B and F and some of those in Building C have ground floor access, and would be properly characterised as “multi dwelling housing”, which is prohibited, by the LEP, in the B2 zone (par 41).
- 30 The ground floors of Buildings L and N are proposed to have 10 and 12 dwellings respectively (with ground floor access), and no retail or business premises. The two buildings would properly be characterised, Council submits, as “residential flat buildings”, which would also be prohibited in the zone (pars 42 – 49).
- 31 The Council submits (par 28 on p8, not p10) that “only dwellings that are ‘above’ ground floor retail premises or business premises are capable of being characterised as ‘shop top housing’”.
- 32 As the word “above” is not defined in the model/standard instrument, nor in the LEP, Council submits (par 30 on p8, not p10), and the applicants accept (par 27), that it must be given “its ordinary meaning in the context in which it appears” in the LEP.
- 33 Council refers (par 31 on p8, not p10) to the definition of “above” in the Macquarie Dictionary (4<sup>th</sup> ed., 2005), namely “in or to a higher place; overhead”, and submits (pars 32f on p8, not p10) that the “housing” indicated by the term “shop top housing” must be “at a place or level that is higher” than “the top most part of the ground floor retail premises or business premises ...”
- 34 The respondent Council’s written submissions continue (at pars 33ff on p9, not p10):

33. ... a dwelling must be in the same building as the ground floor retail premises or business premises and on a floor of that building that is at a level higher than the top most part of the ground floor

retail premises or business premises in order to be characterised as "shop top housing" as defined.

34. Residential development that has a floor level that is lower than the top most part of ground floor retail premises or business premises could not be properly characterised as "shop top housing".

35. The Respondent accepts that dwellings do not need to be *directly* or *immediately* above ground floor retail premises or business premises in order to be characterised as "shop top housing". If it was intended that "shop top housing" be limited to dwellings that are *directly* or *immediately* above ground floor retail premises or business premises it is expected that those words would have been included in the definition of the term 'shop top housing'.

36. The Respondent contends that dwellings must be in the same building as the ground floor retail premises or business premises for the purposes of the term "shop top housing". However, the Respondent accepts that a broad interpretation of the word "above" in the definition should be given which would suggest that the dwellings need only be at a floor level that is higher than the top of the ground floor retail or business premises and do not need to be contained in an envelope on the higher floor level that would be intersected by a line drawn vertically from within the envelope of the ground floor retail or business premises.

35 In his oral submissions on Council's behalf, Mr Seton relied on cl 2.3(3)(b) of the LEP, which provides:

A reference to a type of building or other thing does not include, despite any definition, being a reference to a type of building or other thing referred to separately in the land use table in relation to the same zone,

and submitted (Tp7, LL8 – 14):

So once you take shop top housing out of the definition of "residential accommodation", the conflict is no longer there between the two uses, so you can have shop top housing as a permitted development in this zone even though it is a form of residential accommodation, but there is no other form of residential accommodation that is permitted on land within this zone, other than, as I said, boarding houses which are not relevant here. There's no argument that boarding houses are proposed on this site.

- 36 Mr Seton insists (Tp14, LL22 – 31 and LL41 – 44) that multiple dwellings located above the retail and commercial premises may be categorised as “shop top housing”, and, in order to be “above” the retail and commercial premises, a dwelling “has to be above the topmost part” of them. Most of the dwellings here proposed are “above”, as so defined, but those on the ground floor level are not, and they cannot be “grandfathered” into the category of “shop top housing”.
- 37 He also submitted (Tp8, LL20 – 27) that that part of the proposal “that comprises of shop top housing, being the dwellings that are above, and any of the dwellings that are above the ground floor retail or commercial premises are permitted, but the dwellings and the 41 of them that are at the ground floor level, being the same level as the commercial and retail premises, are just residential accommodation that is not excluded from the definition”, and (Tp9, LL1 – 8) that such dwellings not permitted as “shop top housing”, namely the 41 out of 228 (Tp7, L45), which are “at the ground floor level” (Tp8, L25), and so “not above any ground floor retail or commercial premises” (Tp14, L29), are **prohibited** (residential) development.
- 38 In that situation (Tp14, LL13 –15), “whether it’s characterised as being one building or five separate buildings doesn’t really matter on the basis of the ground floor plan that is proposed in this particular development”.
- 39 In response (Tp14, LL17 – 19) to the respondent’s submission “that if you have one or more dwellings above ground level, then all dwellings in the development can be categorised as shop top housing”, Mr Seton said (Tp14, LL23 – 31):

... that simply can't be correct in this particular case. We accept that any of the dwellings that are located above - so there can be multiple dwellings located above ground floor retail commercial premises, as the definition says "one or more", and that's the only work that those words have to do, except that they can be categorised as shop top housing but where the dwellings are not above, and the substantial number of them in this case, 41 of

them, are not above any ground floor retail or commercial premises, they simply can't be categorise or characterised as being for the purpose of shop top housing.

- 40 The Council disputes the applicant's submission that the development is permissible as a "mixed use development" (defined in [13] above), under item 3 in the zoning table (as an innominate use).

- 41 Mr Seton relies on the Court of Appeal's reasoning in *Abret v Wingecarribee Shire Council* ("Abret") [2011] NSWCA 107; (2011) 180 LGERA 343, to submit that that term (Tp8, LL15 – 18):

doesn't have any work to do in the context of the zoning table that applies to B2 because it's not a term that is specifically mentioned anywhere within B2. Nor is it an exclusion from "residential accommodation" definition.

- 42 Beazley JA said in *Abret* at [62]:

On this approach, which in my opinion is correct, the appellant's argument that because 'seniors housing' is a defined term within the LEP and is not listed as a prohibited use in the planning table, it is permissible with consent, must be rejected. The matter cannot be approached so simply. Rather, it is necessary to characterise the use, so that, if the purpose of the use is otherwise controlled under the LEP, the proposed use is controlled by that provision. However, the rejection of that argument does not conclude the matter in the respondent's favour. It is still necessary to characterise the use by reference to the purpose of the development.

- 43 Council also refutes the applicant's submission that the challenged ground floor residential elements are "ancillary" to the permissible retail and commercial uses.

## Discussion

- 44 The proper construction of LEPs and the proper characterisation of development are everyday tasks in this Court, and, although each case

depends on its own facts, the general principles are well-recognised and regularly quoted.

- 45 On characterisation, see, eg, the Chief Judge's analysis and discussion in *Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114; (2007) 151 LGERA 400, and in *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147; (2013) 201 LGERA 116. On construction principles, see, eg, the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, and the Court of Appeal in *Cranbrook School v Woollahra Council* [2006] NSWCA 155; (2006) 66 NSWLR 379; (2006) 146 LGERA 313.

- 46 When construing an LEP, any particular provision must be construed within the context of the instrument as a whole, including its stated objectives: *Abret*, at [45]. Also I would again adopt here what Beazley JA said, in *Abret* (at [62] – quoted at [42] above).

- 47 As Jagot J observed, in *T & K Berry v Wollongong Council* [2008] NSWLEC 210, at [34] (emphasis mine):

Whether a place is being used as a manager's residence or not, as with all questions of the purpose of a use, will depend on a **common sense assessment of the character, extent and features of the various uses and the ends they apparently serve.**

- 48 The long-debated question of using dictionaries to arrive at the meaning of a term in a document was revisited, in detail, by the Court of Appeal in *House of Peace Pty Ltd v Bankstown City Council* ("*House of Peace*") [2000] NSWCA 44; (2000) 48 NSWLR 498; (2000) 106 LGERA 440, at [25] – [33].

- 49 Mason P said, at [28] and [30]:

28. A dictionary may offer a reasonably authoritative source for describing the range of meanings of a word, including obsolete

meanings. Dictionaries recognise that usage varies from time to time and place to place. However, they do not speak with one voice, even if published relatively concurrently. They can illustrate usage in context, but can never enter the particular interpretative task confronting a person required to construe a particular document for a particular purpose...

...

30. ... In the end it is a search for the meaning of a particular document issued in a particular context.

- 50 Later in 2000 in this Court, Bignold J decided *Crosland v North Sydney Council* [2000] NSWLEC 165; (2000) 109 LGERA 244, to which the applicant in the present matter drew the Court's attention. Bignold J did not refer to *House of Peace*, but he had been referred to dictionary meanings of the expression "health centre" ([12]).
- 51 His Honour said (at [23] and [24]) that the "question of the true meaning of the term '*health centre*' is one of statutory construction in which dictionary meanings have a legitimate role but not a determinative role ... Dictionaries are not a substitute for the judicial determination of the interpretation and then construction of statutes and other documents".
- 52 His Honour continued (at [24] – [26]):

it is, of course, necessary first to determine what is the ordinary or natural meaning of the words used because primarily it is from that that the intention of the legislator or of the parties is to be ascertained ... And it is to be taken from the judge's understanding of the sense in which words are used ...

The present case, in my opinion, is an example of a word (or expression), namely "health centre" which has gained a modern day meaning or signification which demonstrates that the dictionary meanings referred to, offer only limited assistance.

In my opinion, the proposed development accords with the current day understanding and experience of the existence in our community of medical centres or health centres, being places offering an extensive range of professional services of medical and health care to the local community.



53 His Honour concluded (at [36]) that the proposal there involved was “properly categorised” as a “health centre”, and, so, “permissible”, as it fell within the nominated permissible purpose of “hospital”.

54 I adopt in this case the Macquarie definition of “above” ([33] above).

## Conclusion

55 The Council’s submissions on this separate question and allied issues are clearly to be preferred.

56 To qualify as “shop top housing” the relevant part of the building must be truly “above” the relevant retail or commercial parts. I respectfully adopt the Council’s submissions (pars 33 – 36), set out in [34] above.

57 The proposed development is not one indivisible “building”, but a series of “buildings”, and, as the Council contends (contention 2(b) – [3] above), the predominant use in the proposal is “shop top” residential accommodation, properly so described.

58 The proposed retail, business and commercial uses are not predominant, and are not “ancillary”, but they clearly serve the objective(s) of the zone, while the residential elements on the same level as those uses, i.e. ground floor, are prohibited, and not severable.

59 Those offending residential elements of the proposal are fundamental to it, but they “cannot be subsumed in to the ‘shop top housing’ element”, and they are “not ancillary or subservient to the permissible development” (Council subs pars 51 – 52).

60 They do not come within the principles of “inter-dependence” of use, established by the line of cases which includes *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157, *Baulkham Hills Shire Council v*

*O'Donnell* (1990) 69 LGRA 404, and *Botany Bay City Council v Pet Carriers Association International Pty Ltd* [2013] NSWLEC 147; (2013) 201 LGRA 116.

- 61 They constitute a substantial proportion of the project, and, therefore, in my view, probably so infect the whole proposal that it must be adjudged prohibited.
- 62 The question the parties agreed to be separated is answered in the affirmative.
- 63 That outcome would appear to dispose of the appeal. If so, the Council may be entitled to an order for its costs, but I will reserve that question.

## Orders

- 64 The orders of the Court are:
- (1) The separate question posed by the parties is answered in the affirmative.
  - (2) The question of the costs of this hearing is reserved.
  - (3) The matter is referred back to the Registrar for further directions on Friday 22 August 2014.
  - (4) Exhibit C2 may be returned.

\*\*\*\*\*

I CERTIFY THAT THIS AND  
THE 17 PRECEDING PAGES ARE  
A TRUE COPY OF THE REASONS FOR  
THE JUDGMENT OF THE HONOURABLE  
JUSTICE SHEAHAN

  
Associate

Date...14/08/2014...