

16 February 2017

Planning Panels Secretariat
Hunter and Central Coast Joint Regional Planning Panel
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By Email: enquiry@planningpanels.nsw.gov.au
Copy to: Council

Dear Sir/Madam

DA/1043/2015 by HammondCare for aged care facility (DA)
Lot 2 DP 788892 (Lot 2)
JRPP reference 2015HCC020
Our Ref: PLM:4226379

We confirm we act for Misonpet Investments Pty Ltd (**Misonpet**) and refer to the Hunter and Central Coast Joint Regional Planning Panel (**Panel**) meeting held on 9 February 2017 with respect to the above DA.

At that meeting, Misonpet made submissions objecting to the DA based on its letter dated 9 February 2017 (see Annexure A). The Panel deferred its decision on the DA and allowed Misonpet until 16 February 2017 to review the additional material placed on the Panel website and supplement its submission to the Panel.

Misonpet continues to object to the DA and to the draft conditions of approval prepared by Council as per our letter dated 9 February 2017 and as supplemented by this letter relating to:

- assessment and determination processes, being the legal challenge to the Area Plan and the requirement to be satisfied as to clause 6.3 and 7.15 of LEP 2014;
- applicability of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**Seniors SEPP**) because of “environmentally sensitive land” exclusions;
- flooding/stormwater impacts:
 - Dr Brett Phillips’ comments on the inadequacies of the flood and stormwater assessment (see attached);
 - Requirements of clause 7.15 and that both lots must detain the water or ensure they can in the future continue to detain water;
 - Discharge of water onto Lot 1 without any easement (and it not being a natural watercourse) or assessment of ability of Lot 1 to manage flood waters when it has not been approved to detain water;
- finality and certainty of the determination.

Our supplementary comments are detailed below.

Non-compliance with clause 6.3 of LEP 2014

Clause 6.3(2) of LEP 2014 provides:

“Development consent must not be granted for development on land in an urban release area unless a development control plan that provides for the matters specified in subclause (3) has been prepared for the land.”

The Panel asked whether it is enough that there is a development control plan for this clause to be satisfied and which elements of subclause (3) we say are not covered by the development control plan.

One of the requirements under clause 6.3(3) is the formulation of a staging plan for the timely and efficient release of urban land, making provision for necessary infrastructure and sequencing.

Both the applicant and Council rely upon on the *Lake Macquarie Development Control Plan 2014 (DCP 2014)* which includes a Part 12 – Precinct Plan – Ada Street Cardiff (**Area Plan**). The Area Plan contains a ‘structure plan’ which purports to provide an outline for future development of Lot 1 and Lot 2.

Although the plan illustrates the desired future characteristics of the site, there is no indication of how development is to be achieved in a timely and efficient manner. There is no timeline provided for the release of land covered by the Area Plan, nor is there any provision made for specific infrastructure or sequencing such as for stormwater infrastructure.

We maintain the submission that the Panel itself must be satisfied that that development control plan “provides for the matters specified in subclause (3)”, not just that there is a development control plan.

Integrated development

Integrated development is relevantly defined in section 91 of the *Environmental Planning and Assessment Act 1979* as development that requires both development consent and one or more approvals under certain other Acts in order for it to be carried out. The approvals referred to in section 91 include a permit under section 15 of the *Mine Subsidence Compensation Act 1961*.

There was and is no compulsion on an applicant to make an application for an integrated development approval: see *Maule v Liporoni & Anor* [2002] NSWLEC 25. However, in making the DA HammondCare ticked the box on the application form to indicate that consent was being sought for an integrated development approval, and subsequently that general terms of approval from the MSB would be required before consent could be granted.

The MSB provided its general terms of approval based on the original DA plans lodged in July 2015. These plans have since been updated, however the MSB has not been called upon to assess the current plans or to determine whether new terms of approval are required.

Inadequacy of flooding and stormwater assessment

The Flood Impact Report and Stormwater Report prepared by TTW reveal that not all flows will be managed totally within Lot 2 and that substantial volumes of water will be directed onto Lot 1. HammondCare has no legal rights for water to be drained onto or stored on Misonpet’s land.

There is no evidence to suggest that there was or is a natural watercourse where the flow is to be directed, nor that the level of water to be directed onto Lot 2 is natural. We refer you to Annexure B with extracts from case law on what constitutes a natural water course. Council in its assessment report for the Panel admits that the channel is not noted as a blue line on any topographical map (page 19). It is Misonpet’s assertion that the gully or swale has been created over time due to Council approving development upstream with inadequate detention controls and then subsequent development by the owners of Lot 2. We refer you to the historical aerial photos provided at the Panel meeting.

Dr Brett Phillips (see Annexure C) provided detailed comments at the Panel meeting concerning inadequacies in the applicant’s assessment. These should be addressed by the applicant and then considered by Council in a revised assessment report.

The Panel asked about whether the proposed location of the detention basin is subject to overland flows in the 100 year ARI flood which will diminish its effectiveness. The Stormwater Report indicates that when larger storm events occur in the catchment, flows from the detention basin will discharge via a weir or spill way into the drainage swale and then onto Lot 1. The applicant then relies on Lot 1 to manage that water with no indication of how that can be done, whether the land is suitable and whether Lot 2 has rights to discharge such water onto Lot 1. The Panel is obliged to consider the impacts of the development including what happens to the water once it leaves Lot 2.

The Panel asked whether it is acceptable for the applicant to just ensure the level of water exiting Lot 2 is the same as pre-development. We submit:

1. the Panel cannot be so satisfied because of the inadequacies in the assessment as noted by Dr Brett Phillips. For example, the applicant is relying on old rainfall models;
2. the application proposes relocation of a Council easement which directs water onto Lot 1 and then a detention basin, which directs water onto Lot 1. The Panel must be satisfied that the amount of water can be appropriately managed once it enters Lot 1 and that the site is suitable and not adversely impacted by the level of water where there are no legal rights for such a discharge of water and it is not a natural watercourse. Even if there is or was a natural watercourse, considering needs to be given to the flow and volume of water and whether that is natural; and
3. approval of this DA will continue and worsen what Misonpet considers is a nuisance being the concentration and diversion of water onto Lot 1 from upstream.

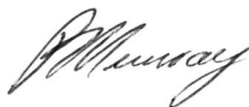
Summary of requested decision by the Panel

The Panel should require:

1. a proper assessment of the impacts on Lot 1 because of the water to be discharged onto Lot 1 from the basin and Council easement to be relocated;
2. the applicant to address the issues raised by Dr Brett Phillips;
3. an assessment of how the HammondCare site can equitably manage existing stormwater flows with Lot 1 assuming it is developed in the future (it is also zoned residential) so that the Panel can be satisfied with the requirements of clause 7.15. For example, by enlarging the basin on Lot 2;
4. as a condition of any consent, that the applicant obtain an binding agreement from Misonpet to drain water onto Lot 1.

Yours faithfully

DibbsBarker



Penny Murray

Partner

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Annexure A



9 February 2017

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Dear Sir/Madam

DA/1043/2015 by Hammondcare for aged care facility (DA)
Lot 2 DP 788892 (Lot 2)
JRPP reference 2015HCC020
Our Ref: PLM:4226379

We act for Misonpet Investments Pty Ltd (**Misonpet**). Misonpet is the owner of Lot 1 in DP 788892 (**Lot 1**) being the land immediately adjacent to Lot 2 being the site the subject of the above DA that is scheduled for a public meeting for determination by the Hunter and Central Coast Joint Regional Planning Panel today.

Misonpet objects to the DA as currently submitted and on the basis of the draft conditions of approval prepared by Council. Misonpet's submission is based on the following issues:

- assessment and determination processes;
- applicability of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP)*;
- flooding/stormwater; and
- finality and certainty of the determination.

Misonpet will request the panel at its meeting to defer consideration of the DA until certain matters are addressed or that it refuse the DA.

Assessment and determination processes

We submit that the panel should refuse or defer consideration of the DA because:

1. clause 6.3 of the *Lake Macquarie Local Environmental Plan 2014 (LEP 2014)* requires a development control plan for urban release areas dealing with certain matters before development consent is granted. The Applicant and Council relies on the Lake Macquarie Development Control Plan 2014 (**DCP 2014**) which includes a Part 12 - Precinct Plan – Ada Street Cardiff (**Area Plan**). The adoption of the Area Plan by way of amendment to DCP 2014, is subject to a legal challenge and does not address the required matters:
 - a. The Points of Claim filed in the Class 4 Land and Environment Court proceedings challenging the validity of the Area Plan are at Appendix C and include claims about the bias of Council and its conflict of interest in adopting the Area Plan. Council is now assessing and making a recommendation on a DA that relies on the Area Plan and

that purports to narrow or wrongly interpret clause 7.15 of LEP 2014. The Class 4 proceedings are in a state of abeyance to see if a resolution can be reached with Council without the need for a hearing.

- b. If the panel approves the DA and the Area Plan is declared to be invalid, then any approval of the DA will be invalid.
 - c. Regardless of the Class 4 proceedings, the panel has to form its own view as to whether clause 6.3 has been met with the Area Plan. That is whether the Area Plan satisfies the requirements of clause 6.3. For example, does it have a staging plan?
 - d. The challenge to the Area Plan goes very much to the requirement to manage stormwater flows. Even without the legal challenge, the panel must be satisfied that it is correctly interpreting the requirement in clause 7.15 of LEP 2014 which relates to stormwater. The panel cannot be satisfied that the requirements or intent of clause 7.15 have been met because the DA does not propose any detention other than detention relating to the DA site itself. Clause 7.15 requires both lots to manage detention or find another location approved by Council.
2. The panel failed to comply with its own published operational procedures by failing to have the relevant documents on the website and available to interested parties for 7 days. The delay has been prejudicial to Misonpet because it has not had time to review and prepare an informed response to the material in time for this meeting. See the chronology prepared at Appendix A.

Application of Seniors SEPP

The DA relies on and has been assessed against the Seniors SEPP. However, the Seniors SEPP does not apply to "environmentally sensitive land" listed in Schedule 1 and such land includes "Land identified in another environmental planning instrument by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions:...

(h) high flooding hazard,

(i) natural hazard,"

The Council assessment report provides that Lot 2 is a "flood control lot – high hazard" at page 8 of the Council assessment report which suggests the Seniors SEPP does not apply.

Flooding and stormwater assessment and impact

There is a long history of discussions between Council, Hunter Water Corporation and landowners about the rezoning, development and management of stormwater for this vicinity. Misonpet has tried to collate some relevant historical events in the chronology at Appendix A.

In summary, Misonpet submits that the panel cannot be satisfied with the level of assessment relating to stormwater and flooding impacts and it should refuse the DA or defer the DA until there is an adequate assessment undertaken. The key reasons are:

1. Council misrepresents the DA site (Lot 2) and Lot 1 as having a natural watercourse. There is no evidence that it is natural. Misonpet submits that the "channel" is not a natural watercourse, but has been created because of a concentration and diversion of water overtime through the Lot 2 that has created a swale or channel. This channel receives concentrated Council pipe flows from Macquarie Road and urban development from around Hoddington Drive. Urban development on part of Hoddington Drive includes Council drains discharging to a drainage line along the eastern side of Lot 1. A private stormwater pipe is located on Lot 1 to partly abate the nuisance to the lot caused by surrounding upstream development by collecting and conveying flows along the western and northern sides of the soccer field to an outlet adjacent to the eastern end of the tennis courts.

Council in its assessment report for the panel admits that the channel is not noted as a blue line on any topographical map (page 19). The applicant's engineers describe it as a drainage

gully or grassed overland flow path or swale. Council is trying to create a creek by requiring a riparian zone because it is trying to overcome its failure to adequately manage stormwater upstream in the past by arguing that it is completely natural. It is Misonpet's assertion that the gully or swale has been created over time due to Council approving development upstream with inadequate detention controls and then subsequent development by the owners of Lot 2. This water is directed and concentrated onto Lot 2 via the channel and underground pipes the subject of Council easements. However, those easements do not carry over onto Lot 1. Approval of this DA will continue and worsen what our client considers is a nuisance being the concentration and diversion of water onto Lot 1 from upstream. It will approve works on the channel, new pipes and box culverts to transmit water directly onto Lot 1.

2. Council and Hammondcare are relying on and assuming that Lot 1 will continue to have a role in managing stormwater and the impacts of flooding from upstream. But the mounds that inadvertently detain water on Lot 1 are illegal works and were never designed to detain water and could fail creating a risk of downstream flooding. These reasonably likely impacts of the DA have not been assessed. The pipes underneath Lot 1 are private and not the subject of an easement benefitting Council or Lot 2. The panel has no comfort that Lot 1's role in detaining water will be maintained in the absence of legal rights for water to be drained or stored on Lot 1 and compensation for such rights paid to Misonpet.
3. Clause 7.15 of LEP 2014 is being interpreted by Council to require Lot 1 not Lot 2 to deal with detention. Whereas the intent of Lot 1 was for a wholesale solution to be agreed and not to transfer a public obligation onto one lot. Clause 7.15 requires detention for all lots referenced in the clause to be resolved prior to any DA or if Lot 2 relies on Lot 1 for detention, for that detention right to be secured with legal rights to drain water. The objective of clause 7.15 is also not met because the arrangements cannot be considered to be "appropriate".
4. If the DA is approved, the panel will be magnifying the nuisance by requiring Lot 1 and no other lot to manage the stormwater. This could result in an action for nuisance against those causing or continuing the nuisance.
5. The Flood Impact Report reveals that not all flows will be managed totally within Lot 2 and that overland flow will be directed to the drainage swales or box culverts which then drain to Lot 1.
6. The Council assessment report gives the panel no comfort that stormwater and flooding have been assessed. Paragraph 10 merely says "stormwater design has been deemed satisfactory subject to conditions of consent". Condition 7 and in particular (b) and (e) does not overcome this deficiency.
7. Dr Brett Phillips from Cardno has identified numerous inadequacies in the assessment of stormwater and flooding that should be addressed.

Finality and certainty

Council's draft conditions seek to defer essential matters that must be considered by the panel before making a determination. If the panel approves the DA as currently proposed and based on Council's assessment report, the approval is at risk of being legally challenged for lacking finality and certainty and because of a failure of the panel to consider mandatory issues. We submit:

1. The MSB general terms of approval do not give any comfort that the site is suitable for development. Further, the general terms of approval relate to DA plans from 2015 that have since been updated and the MSB general terms of approval attaches stamped plans that do not relate to the DA or Lot 2. See Appendix B for more information.
2. There is no deferred commencement condition relating to the intersection with Macquarie Road despite the Council assessment report indicating that such a condition would be imposed. Further, it is clear that RMS is not yet satisfied that the intersection design is suitable. Approval of the DA when the RMS is not so satisfied, is unlawfully deferring a mandatory matter for consideration.

Summary of requested decision by the panel

The panel should refuse the DA or defer a determination on the DA until:

1. There is a proper assessment of how the DA will not cause an increase in downstream pre-development (not just Hammondcare DA development) flows.
2. The flooding and stormwater assessment addresses the issues raised by Dr Brett Phillips.
3. There is an assessment of how the Hammondcare site can equitably manage existing stormwater flows with Lot 1 assuming it is developed so that the panel can be satisfied with the requirements of clause 7.15.
4. The DA be referred to MSB and RMS for approval/concurrence and final conditions.
5. Consideration be given to whether Lot 2 is "environmentally sensitive land".
6. Hammondcare has obtained an agreement from Misonpet to drain water over its land.

Yours faithfully

DibbsBarker



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Appendix A**Misonpet's Chronology of Events**

Date	Event	Source Document/Comment
1975	Soccer field constructed	
1985 onwards	Urban development upstream of the soccer field in the 1980s and early 1990s caused increased flows of water in the Winding Creek Catchment (including to the Misonpet site/soccer former field).	1992 HWC Flood Mitigation Study page 1.
Late 1980s/early 1990s	Council created pipes for stormwater management on Hammondcare lot that end just before the boundary with the soccer field.	Council does not have an easement or infrastructure on the soccer field lot.
December 1990	Hunter Water Corporation (HWC) "Winding Creek Hydrology Study" in response to flooding in the catchment.	1994 Deed between Hunter Water Corporation and Council
December 1992	HWC Flood Mitigation Study references proposed mitigation methods including Scheme 3 which includes upgrades to Basin 8 which is the location of the soccer field and capital costs to upgrade mounds and outlets on the field to detain water.	1994 Deed between Hunter Water Corporation and Council. No allowance for land costs. Report also recommends that Council ensure that in assessing DAs sites to limit stormwater runoff to pre-development levels.
1993	The golf driving range on the Hammondcare site was established with significant bulk earthworks in 1993 which included formation of a drainage channel which drained into the Misonpet pipe drainage system even though this is a private system and Council has no drainage easement benefits.	NPC. This caused further concentration of flow and flooding nuisance on the Misonpet site.
20 April 1994	Deed between Council and Hunter Water Corporation whereby the parties agree to implement option 3 of the 1992 Study. The Deed refers to "Basin 8" being the soccer field and that the Corporation will be responsible for dealing with the owner to implement the "scheme"	Deed between Council and HWC dated 20 April 1994 attached to MOU between HWC and Council dated January 2012 (available on HWC website)
Early 2001	Misonpet acquired Lot 1 in DP 788892 (Lot 1). Zoned private recreation with tourist facilities permitted in the zone.	PWA letter 21 Feb 2006
2001-2002	Draft Lake Macquarie LEP was publicly exhibited and identified Lot 1 as Zone 10 (Investigation).	PWA letter 21 Feb 2006
19 March 2004	Lake Macquarie LEP 2004 gazetted. Lot 1 remained as an investigation zone but subject to notation "urban/conservation."	PWA letter 21 Feb 2006

Early 2002 - 2004	Investigations by Misonpet for rezoning and DA for residential. Applications were made for a residential rezoning at the same time as development consent for a tourist facility and subdivision (which did not require a rezoning). Deemed refusal appeals with respect to the applications were lodged in the Land and Environment Court. Council asked that the appeals be withdrawn so Council could allocate resources to a rezoning rather than an appeal. In good faith, Misonpet withdrew the appeals on 11 September 2004 and in August 2004 Misonpet lodged supplementary information to support the rezoning.	PWA letter 21 Feb 2006
15 October 2004	Council agrees that "stormwater drainage design for the stormwater bypass system around the field inadvertently allowed stormwater to be temporarily stored on the field" and that "this has been a result of the construction of the earth mound surrounding the field conducted without Council consent...by previous owners...". Council also said that stormwater needs to be resolved and if there is to be a downstream detention basin it is to be at no cost to Council.	PWA letter 21 Feb 2006; Council letter 15 October 2004 to PWA
2005	Comparison of peak flow rates in Hunter Water studies in 1992 and 2005 for the site catchment indicate up to 20% increases in run off rates.	NPC notes on Draft Area plan lodged with Bray, Jackson & Co letter to Council dated 15 January 2016
March 2011	Misonpet make submission in relation to exhibition of amendment no. 46 to Lake Macquarie LEP 2004 where Lot 1 and Lot 2 were earmarked to be rezoned from private recreation to residential.	
Late 2011	Amendment No. 46 made to LEP 2004 to rezone Lots 1 and 2 to residential.	
January 2012	HWC and Council enter into Memorandum of Understanding relating to co-operation for stormwater management in the Winding Creek catchment.	MOU dated January 2012 (available on HWC website)
24 January 2013	Misonpet writes to Council noting that the upstream land has been sold to HammondCare and advising that upstream development on that lot would cause significant adverse downstream impacts on flows on the subject land unless adequate detention facilities are provided on Lot 2. Noting that it has always been proposed that both Lots 1 and 2 would provide detention on a proportionate basis. Lot 1 does not agree to accommodate detention of water from Lot 2.	Misonpet letter 24 January 2013

October 2014	Lake Macquarie LEP 2014 commences which contains clause 6.3 requiring development control plans for urban release areas	
July 2015	Lodgement of HammondCare DA	
15 December 2015	Council convenes a meeting to discuss the preparation of a Draft Area Plan (being a site specific development control plan for the Ada Street Cardiff Area) which covers Lot 1, Lot 2 and Council's Lot A.	
15 January 2016	Bray, Jackson & Co (on behalf of Misonpet) letter to Council raising concern with process of making Draft Area Plan and that it has been driven by Hammondcare's DA and there is bias against Lot 1 requiring detention on Lot 1 not Lot 2. NPC attachment notes that flood planning affectation is not natural but because of inadequate upstream detention capacity and directing flows to Lot 1. Council should contribute to cost of managing the flows which are caused by the upstream development.	Bray, Jackson & Co letter to Council dated 15 January 2016
8 February 2016	Misonpet lodges DA 167/2016 for earthworks on Lot 1 to regrade mounds that are scoured and not designed for flood detention.	
19 February 2016	Bray, Jackson & Co letter to Council against draft Area Plan and asking that Council abate its nuisance by working with the land owners of Lot 1 and Lot 2 to pipe the water through the lots and then to a basin downstream of Lot 1 which can be financed through a s. 94 plan or VPA.	Bray, Jackson & Co letter to Council 19 February 2016
February and March 2016	Draft Area Plan on public exhibition.	
24 March 2016	Npc on behalf of Misonpet lodges submission with Council on Draft Area Plan submitting Area Plan does not reflect clause 7.15 of the LEP and puts onus on one lot and not Council or anyone else to manage stormwater from other properties. Misonpet noted the nuisance caused by the water being conveyed onto Lot 1. Misonpet also disputes the existence of a natural watercourse and notes Council does not have any easements to transfer water onto or through Lot 1. Misonpet submitted that no development should occur on either lot until drainages issues are resolved – that is the clear intent of clause 7.15. It should be resolved with all land owners and a section 94 plan.	NPC letter to Council dated 24 March 2016.
21 April 2016	Council issues Notice of Determination refusing Misonpet DA for earthworks	Notice of Determination dated 21

	(Misonpet Earthworks DA).	April 2016
9 May 2016	Council adopts the Area Plan.	
18 May 2016	Misonpet files Class 4 Land and Environment Court appeal challenging the validity of the Area Plan.	
22 July 2016	Misonpet files Class 1 Land and Environment Court appeal against refusal of Misonpet Earthworks DA.	
5 December 2016	Misonpet Earthworks DA on-site conciliation conference.	
1 February 2017	Misonpet receives notice of panel meeting scheduled for 9 February 2017	
3 February 2017	DibbsBarker attempts to download Council assessment report for panel meeting. Page will not load. DibbsBarker leaves phone message with panel enquiries.	
6 February 2017	<p>DibbsBarker attempts to download Council assessment report for panel meeting. Page will not load. DibbsBarker rings panel enquiries and advised that there was a problem with the file name being too long which affected its ability to load. DibbsBarker is emailed the Council Assessment Report. The Council Assessment Report refers to a Flood Impact Report by TTW dated December 2016. The Flood Impact Report is not on the panel website. DibbsBarker rings panel enquiries and is advised that that is an error and it should have been loaded, The Report is emailed to DibbsBarker and loaded onto the website.</p> <p>DibbsBarker sends letter to panel and Council requesting deferral of panel meeting on 9 February 2017 because it has not had sufficient time to review the information and in particular consider the technical content of the Flood Impact Report.</p>	
7 February 2017	DibbsBarker asks for confirmation by panel of receipt of letter and advice as to meeting. DibbsBarker advises that the project officer is in meetings that day.	
8 February 2017	DibbsBarker is advised that the meeting will not be deferred.	
10 February 2017	Class 4 mention to ascertain progress of Class 1.	
22 February 2017	Class 1 Misonpet Earthworks DA final conciliation conference.	

Appendix B

Mine Subsidence submission

Lot 2 is identified as being located within a Mine Subsidence District in accordance with the Mine Subsidence Board's Lake Macquarie and Extension District Map.

HammondCare sought in its application general terms of approval under Section 15 of the *Mine Subsidence Compensation Act 1961*. The HammondCare DA was subsequently referred to the Mine Subsidence Board (**MSB**) as Integrated Development pursuant to Section 91 of the *Environmental Planning and Assessment Act 1979 (EPAA)*.

By letter dated 27 August 2015, Peter Evans, a Subsidence Risk Engineer at the MSB, granted conditional approval for the HammondCare DA. The Board's conditions 1 to 3 are detailed below:

1. Demonstrate by geotechnical investigations that mine workings are;
 - a. Long term stable and there is no risk of mine subsidence affecting the site;
 - Or alternatively;*
 - b. Eliminate any risk of mine subsidence by a suitable means, such as grouting;
 - Or alternatively;*
 - c. By geotechnical investigation and analysis, recommend mine subsidence design parameters for the Board's acceptance.

In each case, the geotechnical investigation shall contain confirmation of the depth of coal seam, height of the workings, thickness of competent rock, as well as detailing the pillar dimensions used in any analysis. It should also include sensitivity and risk analysis, and a review of potential subsidence scenarios with a recommendation for the Board's consideration and acceptance.

The removal of mine subsidence risk shall be substantiated through advice from a qualified geotechnical engineer with experience in mine subsidence. A copy of the proposal with verification measures shall be submitted for the Board's acceptance. In addition to this, the outcomes of verification shall be reported for the Board's acceptance.

2. Where mine subsidence design parameters are nominated, or there is a risk of mine subsidence:
 - 2.1 Submit an "Impact Statement" prior to commencement of detailed design for acceptance by the Board, which shall:
 - a. Identify the Mine Subsidence Parameters used for the design;
 - b. List the structures and building elements;
 - c. Summarise the outcome of a mine subsidence risk assessment;
 - d. List the design mitigation measures proposed; and
 - e. Comment on the sensitivity of the design to greater levels of mine subsidence.
 - 2.2 The final design shall:
 - a. Be developed from the concept design accompanying the Building Application;
 - b. Include sufficient drawing plans, long-sections, elevations and details, to describe the work and proposed mine subsidence mitigation measures;
 - c. Include design mitigation measures to reduce the transfer of horizontal strain into building structures;

- d. Include an additional grade for tilt due to mine subsidence, in excess of the minimum Code requirements for structures including pipes, gutters and wet areas;
- e. For underground pipes or conduits, allow for flexible joints, flexible bedding surround and flexible building connections and penetrations;
- f. Ensure there is sufficient capacity in any storage structure for tilt due to mine subsidence;
- g. Locate underground structures to facilitate ease of repair and replacement;
- h. Ensure internal finishes are installed in accordance with relevant codes and standards and industry best practice guidelines with additional provision for mine subsidence;
- i. Ensure there is suitable provision for articulation jointing in building elements. All control joints including articulation for mine subsidence are to be shown on the design plans and elevations;
- j. Ensure there is provision for isolation joints between adjoining structures. For example between a building and adjacent paving; and
- k. Ensure roads, driveways and pavement areas are designed as flexible structures with an asphalt surface and unbound base course. If a concrete surface course is required; it shall be designed so any damage is slight classification and include expansion and crack control joints or sacrificial sections.

2.3 Submit final design drawings incorporating the mine subsidence mitigation measures identified in the "Building Impact Statement" for approval by the Board prior to commencement of construction. This shall include certification by the project engineer to the effect that the improvement will remain "safe, serviceable and any damage from mine subsidence will be slight, localised and readily repairable" taking into account the mine subsidence parameters.

- 3. On completion, certification by a qualified structural engineer is to be forwarded to the Board, that all improvements have been constructed in compliance with plans approved by the Board under this development application with supporting documentation.

The conditional approval granted by the MSB in 2015 was based upon the original plans that accompanied the HammondCare DA. These plans were subsequently amended in 2016, however the amendments and their potential impact on mine subsidence have not been addressed.

The geotechnical report produced by JK Geotechnics and attached as Annexure 7 to the SEE indicates that mine workings below the site must be grouted to be able to satisfy the MSB that the site is sufficiently low risk to allow the proposed development to proceed. Condition 2.1 General Terms of Approval provides that where there is a risk of mine subsidence, an "impact statement" must be submitted. To date, HammondCare has not complied with this requirement.

A link to the mine subsidence conditions of approval and endorsed plans is available on the Lake Macquarie City Council website. These endorsed plans, however, depict a proposed service station at Dora Creek. At present, there are no endorsed plans available for viewing which accurately depict the subject site.

Appendix C Class 4 Points of ClaimForm 85 (version 2)
UCPR 6.2, 59.4**SUMMONS (JUDICIAL REVIEW)****COURT DETAILS**

Court Land and Environment Court of New South Wales
Division Class 4

Registry Sydney
Case number 16/40 458

TITLE OF PROCEEDINGS

Applicant **Misonpet Investments Pty Limited**

Respondent **Lake Macquarie City Council**

DECISION BEING REVIEWED

Title Ada Street Cardiff Area Plan to insert into Part 12 of the
Lake Macquarie Development Control Plan 2014
Decision-maker Lake Macquarie Council (via the City Strategy Committee)
adopted the Ada Street Cardiff Area Plan on 9 May 2016

Material date 9 May 2016
Decision of Council

FILING DETAILS

Filed for **Misonpet Investments Pty Limited (Applicant)**
Filed in relation to Whole decision
Legal representative Penny Murray
DibbsBarker
Lawyers
Level 8 Angel Place
123 Pitt Street
SYDNEY NSW 2000
DX 101 SYDNEY
Legal representative reference PLM:4224435
Contact name and telephone Penny Murray (02) 8233 9557
Contact email Penny.Murray@dibbsbarker.com

A copy of this document
must be served
by 23 MAY 2016

28595532 v2 National 18 05 16

HEARING DETAILS

This summons is listed at

9.30am

17 JUN 2016

225 Macquarie St Sydney
(WINDEYER CHAMBERS)

TYPE OF CLAIM

Planning Law- Other Civil Enforcement (s 123 *Environmental Planning and Assessment Act* 1979 (NSW), s 20(2) *Land and Environment Court Act* 1979 (NSW))

ORDERS SOUGHT

- 1 A declaration that the Ada Street Cardiff Area Plan adopted on 9 May 2016 is invalid and of no legal effect.
- 2 In the alternative, a declaration that part 1.7 of the Ada Street Cardiff Area Plan is invalid and of no legal effect.
- 3 Costs.
- 4 Such further or other orders as the Court deems fit.

DETAILS OF DECISION

- 1 The decision maker was Lake Macquarie City Council (by its City Strategy Committee).
- 2 The decision to be reviewed was the adoption of the Ada Street Cardiff Area Plan to be inserted into the *Lake Macquarie Development Control Plan 2014 (DCP 2014)*.
- 3 The applicant seeks relief from the whole of the decision.

GROUND

- 1 Part 1.7 of the Ada Street Cardiff Area Plan is inconsistent or incompatible with the *Lake Macquarie Local Environmental Plan 2014 (LEP 2014)* contrary to section 74C(5)(b) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

Particulars

- a. The effect of the part 1.7 of the Ada Street Cardiff Area Plan is to limit the proposed use of Lot 1 DP 788892 (**Lot 1**) to a drainage reserve and not predominantly for residential use as it is zoned in LEP 2014.
- b. The Ada Street Cardiff Area Plan is not consistent with clause 7.15 of LEP 2014 because part 1.7 requires only Lot 1 not both Lot 1 and 2 to manage

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existing on-site storm water detention and requires that it be within the boundaries of Lot 1 not both Lot 1 and 2 and not at an alternative location approved by Council. Also, the Ada Street Cardiff Area Plan requires stormwater be retained not detained on Lot 1.

- 2 The Ada Street Cardiff Area Plan does not meet the principal purpose of development control plans as set out in section 74BA of the EP&A Act being either:
- a. Giving effect to the aims of any environmental planning instrument that applies to the development,
 - b. Facilitating development that is permissible under any such instrument,
 - c. Achieving the objectives of land zones under any such instrument.

Particulars

The Ada Street Cardiff Area Plan does not facilitate development permissible under LEP 2014 with respect to Lot 1, but seeks to in effect sterilise it for a public purpose by requiring Lot 1 to detain water from upstream catchments for the benefit of downstream catchments.

- 3 There is an apprehension of bias in the Council's adoption of the Ada Street Cardiff Area Plan.

Particulars

Any fair minded observer might entertain a reasonable apprehension that the Council might not have brought an impartial and unprejudiced mind to the question of whether to adopt the Ada Street Cardiff Area Plan because:

- a. of Council's role in creating and perpetuating a nuisance over Lot 1 by having its stormwater pipes directly transfer water onto Lot 1,
 - b. of the potential cause of action and possible damages against Council,
 - c. Council has a direct financial interest in the outcome of the Ada Street Cardiff Area Plan, and/or
 - d. Council failed to undertake an independent probity review of its actions.
- 4 Council took into account an irrelevant consideration in making the Ada Street Cardiff Area Plan, being Council's use of private land for a public function.

Particulars

- a. Pages 60 and 61 of the City Strategy Committee Meeting papers notes the stormwater detention function of Lot 1 which benefits downstream properties.

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- b. Council is on notice of its actions or omissions in causing stormwater to drain and collect on Lot 1 and that it is creating a nuisance.
 - c. Council does not commit to sharing responsibility for stormwater management (see page 75 of the City Strategy Committee Meeting papers)
- 5 Council's decision to not permit the Applicant an opportunity to address Council on the Ada Street Cardiff Area Plan on 9 May 2016 was a breach of procedural fairness and/or manifestly unreasonable.

Particulars

No reasonable person would have formed the opinion that the proposed address was on "the same issue".

- 6 The decision to make the Ada Street Cardiff Draft Area Plan is manifestly unreasonable.

Particulars

- a. It is not for a planning purpose nor reasonable to require a private landowner to carry out a public function by retaining water generated upstream.
- b. The matters in grounds 1 to 5 above are repeated.

SIGNATURE OF LEGAL REPRESENTATIVE

This summons does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.

I have advised the Applicant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on record

Date of signature

18 May 2016

NOTICE TO DEFENDANT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings.

Before you can appear before the court you must file at the court an appearance in the approved form.

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HOW TO RESPOND

Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

REGISTRY ADDRESS

Street address	Level 4, 225 Macquarie Street, Sydney NSW 2000
Postal address	GPO Box 3565 Sydney NSW 2001
Telephone	(02) 9113 8200

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FURTHER DETAILS ABOUT PLAINTIFF**Applicant**

Name Misonpet Investments Pty Limited
Address C/- 5 Fernleigh Gardens
Rose Bay NSW
2029

Legal representative for Applicant

Name Penny Murray
Practising certificate number 35367
Firm DibbsBarker
Contact solicitor Tracey Lynch
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DETAILS ABOUT RESPONDENT**Respondent**

Name Lake Macquarie City Council
Address Lake Macquarie City
Council Administration
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Road, Speers Point, NSW
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PO Box 1906,
Hunter Regional
Mail Centre
NSW 2310

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Annexure B

Chief Justice Barwick said in *Knezovic v Shire of Swan-Guildford* [1968] HCA 38 at 475-476:

"It is settled that a watercourse consists of a stream with a bed, with banks, and water. That the flow of the water in the stream is intermittent or seasonal will not prevent what would otherwise be a watercourse from being accounted such: but though it is quite true that a watercourse may exist though its bed be dry for some periods, the watercourse, in my opinion, must exhibit features of continuity, permanence and unity, best seen, of course, in the existence of a defined bed and banks with flowing water. It must, in my opinion, essentially be a stream and be sharply distinguished from a mere drain, or a drainage depression in the contours of the land which serves to relieve upper land of excess water in times of major precipitation. It is not enough that the water, when it does flow, does so in what may be seen as a defined course or channel. In the case of a drainage depression, the water being drained off can be expected to flow in the lowest portion of the contours confined by the rising levels of the adjacent land: thus water can be seen when flowing to do so in what could be called a defined channel. If the seasonal rainfall is within an average tolerance in amount and timetable, the flow in the depression may well exhibit some regularity in the depth of water flowing in the contour depression and in the extent to which it spreads as it flows. If there is some such normality in the volume flowing, the impression of a defined channel with limiting margins will be enhanced. If, as I would expect to be the case, there is considerable variation in the rainfall and in the volume and velocity of the water flowing in the depression, the impression of a defined channel may be considerably less. But, in any event, the existence of such a defined channel will not make the drainage depression a watercourse nor the limiting margins of the water's flow in a rainy season or period 'banks' of a stream. Thus, though water when it flows in such a period flows in what can be called a defined channel, such a drainage depression will lack banks and a bed in the proper sense of that term, that is to say, identifiable margins of a continuous and permanent stream"

Windeyer J in *Gartner v Kidman* (1962) 36 ALJR 43 at [27]:

"[T]he depressions which provide the natural course or outlet for [surface water flooding] may be called watercourses. But the law treats such valleys and depressions very differently from watercourses that have the qualities of rivers and streams."

Referring to *Gales Holdings Pty Limited v Tweed Shire Council* (2013), at [133] 'There is a difference between the flow of surface waters and the flow of natural watercourses. Riparian rights attach to the flow of natural watercourses such as rivers or streams, but not to the flow of surface waters... A riparian owner, being the proprietor of land on the banks of a natural stream of running water, is entitled to enjoy, and is obliged to accept, the flow of water past the land. The law of natural watercourses, not surface waters, applies even to waters of a river flowing in a wider channel than usual, when the river is swollen in time of flood, even though they flow on land outside the riverbed while still following the river's general course'

Annexure C



2015HCC020 – DA/1043/2015
Aged Care Facility, Dementia, 158 Macquarie Road, Cardiff

Summary

In Section 2.7 Stormwater Management & 2.8 Catchment Flood Management of Council's Assessment Report it is stated that:

A revised Stormwater Report, prepared by Taylor Thomson Whitting dated 16 December 2016 was submitted to Council along with further details relating to the stormwater system. Council's Development Engineer has assessed the proposal and is satisfied the stormwater system and proposed stormwater management on site is satisfactory.

In Section 7.3 Flood Planning of Council's Assessment Report it is stated that:

The site is identified as 'flood planning area' on the Flood Planning Map. The applicant has submitted flood modeling and a Flood Impact Report stating the impact on the proposed development will be acceptable and not result in unreasonable impacts on surrounding properties. Council's Development Engineer has reviewed the submitted information and concurs with the conclusions drawn in this report.

It is unclear how Council arrived at these conclusions given that:

- No details on hydrological modelling undertaken by TTW in December 2016 or GHD in June 2015 are given in either report;
- No existing conditions or post-development peak flows reported for any events in either study;
- No comparison of peak flows with peak flows estimated by the overall WBNM catchment model is reported;
- There is no indication that the hydrological model was modified to represent proposed development;
- The design rainfall data on which the assessments are based was superseded by the release of the 2016 edition of Australian Rainfall & Runoff on 25 November 2016;
- The 1% AEP storm burst depths of 60 min, 90 min and 120 min durations have increased by 24%, 21% and 18% respectively.
- No details are provided to support the claim that the floodplain model was "validated against flood levels in the *Winding Creek and Lower Cockle Creek Flood Study* for the Lymington Park Sports field";
- There are no results which demonstrate that the proposed drainage works are included in the floodplain model;
- There are no results which demonstrate the impact of the proposed civil works attached in Appendix C of the 2016 TTW report and that the proposed scheme functions as intended.
- It appears that the post-development storage is achieved by increasing the 100 yr ARI water level in Lot A DP 398188 by 0.5 m or more in some locations.
- The underlying assumption is that the OSD is not inundated by floodwaters;
- The current proposed location of the OSD is subject to overland flows in the 100 yr ARI flood which will diminish the effectiveness of the OSD.



[GHD \(2015\) Macquarie Road, Cardiff Flood Impact Assessment](#)

Hydrology	Local WBNM catchment model	<ul style="list-style-type: none"> • No details on the hydrological model except that “simulated with the same hydrological parameters suggested in the <i>Winding Creek and Lower Cockle Creek Flood Study</i>”; • No plan showing the discretisation of the catchment; • No peak flows reported for any events; • No comparison of peak flows with peak flows estimated by the overall WBNM catchment model assembled for the <i>Winding Creek and Lower Cockle Creek Flood Study</i>. • No indication that the hydrological model was modified to represent proposed development; • No post-development peak flows reported for any events.
Hydraulics	Local TUFLOW floodplain model	<ul style="list-style-type: none"> • Based on photogrammetry derived DEM supported by survey data and stormwater infrastructure data • 1 m x 1 m grid size; • No details on the roughness values nor spatial distribution of roughness; • Inflow hydrographs at upstream boundaries • Downstream flood level boundary from <i>Winding Creek and Lower Cockle Creek Flood Study</i>; • No details on inflows or inflow locations with the domain of the hydraulic model. • It is claimed that the floodplain model was “validated against flood levels in the <i>Winding Creek and Lower Cockle Creek Flood Study</i> for the Lymington Park Sports field” • No details whether the starting water level in the Lymington Park Sports field was brimfull at the start of the design storm as assumed in the <i>Winding Creek and Lower Cockle Creek Flood Study</i>; • No comparison of water levels in the Lymington Park Sports field

[TTW \(2016\) Flood Impact Report, Hammond Care Cardiff](#)

Hydrology	Local WBNM catchment model	<ul style="list-style-type: none"> • GHD (2015) WBNM model adopted on the basis that “all results and flows were calibrated to the <i>Winding Creek and Lower Cockle Creek Flood Study</i>”; • It has never been claimed by GHD nor demonstrated that the flows were calibrated to the <i>Winding Creek and Lower Cockle Creek Flood Study</i>; • Hydrology based on ARR1987 which is now superseded by ARR2016 released 25 November 2016. • No indication that the hydrological model was modified to represent proposed development; • No existing conditions or post-development peak flows reported for any events.
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Hydraulics Local TUFLOW floodplain model

- It is claimed that GHD "hydraulic modelling is still relevant and this report allows for the updated layout with revised earthworks tin and model runs";
- It is stated that "The proposed development was added to the model to determine the flood impact of the development. The flood extent and flood impact is shown within Appendix A" – Appendix A is the 2015 GHD report
- There are no results which demonstrate the impact of the proposed civil works attached in Appendix C.
- There are no results which demonstrate that the proposed drainage works are included in the floodplain model.

Flood Storage Appendix C

- Within the subject property the boundary for the volume calculation appears to be the limit of proposed works
- It is unclear as to the basis on which the boundary of the volume calculation in Lot A DP 398188 was selected
- It appears that the post-development storage is achieved by increasing the 100 yr ARI water level in Lot A DP 398188 by 0.5 m or more in some locations.

[TTW \(2016\) Stormwater Report, HammondCare Cardiff](#)

On-Site Detention

- The report references the TTW, 2016 Flood Impact report
- The estimated pre-development 5 yr ARI peak flow is 0.519 m³/s
- The estimated post-development 100 yr ARI peak flow is 0.833 m³/s
- The impact of the proposed development on the peak flow is less than expected.
- The proposed OSD storage volume is 540 m³ (which equates to around 245 m³/ha)
- The underlying assumption is that the OSD is not inundated by floodwaters;
- The current proposed location of the OSD is subject to overland flows in the 100 yr ARI flood;
- This will diminish the effectiveness of the OSD.

Stormwater Quality

- No details are provided on the parameter values adopted for the MUSIC model
- No details are provided on the size of proposed treatment measures.

Stormwater

- Piped drainage system capacity – 20 yr ARI allow for 20% blockage
- Overland flow capacity – 100 yr ARI with 0% blockage

50 Ada Street, Cardiff**1987 ARR Storm Burst Depths (Adjusted to AEP) (mm)**

Storm Burst Duration (mins)	Exceedances per Year	Annual Exceedance Probability					
		1	50.0%	20.0%	10.0%	5.0%	2.0%
5	8.3	8.3	10.9	12.9	14.9	17.5	19.5
10	12.7	12.7	16.8	19.8	22.9	26.9	30.0
15	15.7	15.6	20.6	24.4	28.1	33.1	36.9
30	22.8	22.6	29.8	35.3	40.8	48.0	53.5
45	26.8	26.7	35.3	41.7	48.2	56.8	63.3
60	30.8	30.8	40.7	48.1	55.6	65.5	73.0
90	35.4	35.6	47.2	55.9	64.7	76.3	85.1
120	40.0	40.4	53.7	63.8	73.9	87.2	97.3
180	45.9	46.8	62.6	74.6	86.5	102.3	114.3
360	58.2	60.4	81.4	97.3	113.3	134.3	150.2
720	74.5	78.6	107.0	128.6	150.1	178.6	200.1
Average Recurrence Interval (yrs)							
	1	1.44	4.48	9.5	19.5	49.5	99.5

2016 ARR Storm Burst Depths (mm)

Storm Burst Duration (mins)	Exceedances per Year	Annual Exceedance Probability					
		1	50.0%	20.0%	10.0%	5.0%	2.0%
5	7.5	8.7	12.4	15.2	18.1	22.2	25.5
10	12.0	13.7	19.7	24.2	28.9	35.6	41.2
15	15.0	17.2	24.7	30.3	36.2	44.7	51.8
30	20.6	23.6	34.0	41.7	49.7	61.3	70.8
45	23.6	27.2	39.1	47.9	57.1	70.1	80.8
60	26.6	30.7	44.2	54.1	64.4	78.9	90.8
90	30.2	34.8	50.2	61.4	73.0	89.4	102.7
120	33.7	38.9	56.1	68.6	81.6	99.8	114.6
180	38.8	44.8	64.6	79.1	94.0	115.2	132.5
360	50.0	57.7	83.3	102.3	122.1	150.5	173.9
720	65.6	75.5	109.4	135.1	162.6	201.7	234.6
Average Recurrence Interval (yrs)							
	1	1.44	4.48	9.5	19.5	49.5	99.5

Differences between 1987 and 2016 Storm Burst Depths

Storm Burst Duration (mins)	Exceedances per Year	Annual Exceedance Probability					
		1	50.0%	20.0%	10.0%	5.0%	2.0%
5	-10%	5%	14%	18%	22%	27%	31%
10	-6%	8%	17%	22%	26%	32%	38%
15	-4%	10%	20%	24%	29%	35%	41%
30	-9%	4%	14%	18%	22%	28%	32%
45	-12%	2%	11%	15%	18%	23%	28%
60	-14%	0%	9%	12%	16%	20%	24%
90	-15%	-2%	6%	10%	13%	17%	21%
120	-16%	-4%	4%	8%	10%	14%	18%
180	-15%	-4%	3%	6%	9%	13%	16%
360	-14%	-4%	2%	5%	8%	12%	16%
720	-12%	-4%	2%	5%	8%	13%	17%
Average Recurrence Interval (yrs)							
1		1.44	4.48	9.5	19.5	49.5	99.5

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a_TR100.xlsx Comparison