



Land and Environment Court  
New South Wales

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Case Name: Johnson Property Group Pty Limited v Cessnock City Council; Mountview Grange 88 Pty Ltd v Cessnock City Council

Medium Neutral Citation: [2021] NSWLEC 1098

Hearing Date(s): 26-28 October 2020 and 5 February 2021

Date of Orders: 26 March 2021

Decision Date: 9 March 2021

Jurisdiction: Class 1

Before: Horton C

Decision: See directions at [148]–[149]

Proceedings 2019/275365  
See orders at [151]

Proceedings 2019/275377  
See orders at [152]

Proceedings 2019/219259  
See orders at [153]

Catchwords: DEVELOPMENT APPLICATION – Bellbird North Urban Release area – integrated development – subdivision of land – deemed refusal – conditions of a kind allowed by a contributions plan – impacts on state roads

Legislation Cited: Cessnock Local Environmental Plan 2011  
Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979  
National Parks and Wildlife Act 1974  
State Environmental Planning Policy No 55—  
Remediation of Land

Cases Cited:	Blacktown City Council v Satmell Holdings Pty Ltd [2019] NSWLEC 93
Texts Cited:	Cessnock Development Control Plan 2011 Environmental Planning and Assessment (Local Infrastructure Contributions) Direction 2012 North Bellbird Precinct Plan Recreation and Open Space Strategic Plan
Category:	Principal judgment
Parties:	Proceedings 2019/275365; 2019/275377 Johnson Property Group Pty Limited (Applicant) Cessnock City Council (Respondent)
	Proceedings 2019/219259 Mountview Grange 88 Pty Ltd (Applicant) Cessnock City Council (Respondent)
Representation:	Proceedings 2019/275365; 2019/275377 Counsel: A Galasso SC (Applicant) R White (Respondent) A Whiteley (Solicitor) Transport for NSW, intervening pursuant to s 64 of the Land and Environment Court Act 1979
	Solicitors: Storey & Gough Lawyers (Applicant) Lindsay Taylor Lawyers (Respondent) Maddocks (Transport for NSW)
	Proceedings 2019/219259 Counsel: A Galasso SC (Applicant) R White (Respondent) A Whiteley (Solicitor) Transport for NSW, intervening pursuant to s 64 of the Land and Environment Court Act 1979
	Solicitors: Storey & Gough Lawyers (Applicant) Lindsay Taylor Lawyers (Respondent) Maddocks (Transport for NSW)

File Number(s): 2019/275365; 2019/275377;  
2019/219259

Publication Restriction: No

## JUDGMENT

1 **COMMISSIONER:** Three appeals are brought to the Court for related development applications that are integrated development comprising subdivision of land, construction of roads and associated development. The three appeals may be described more fully as follows:

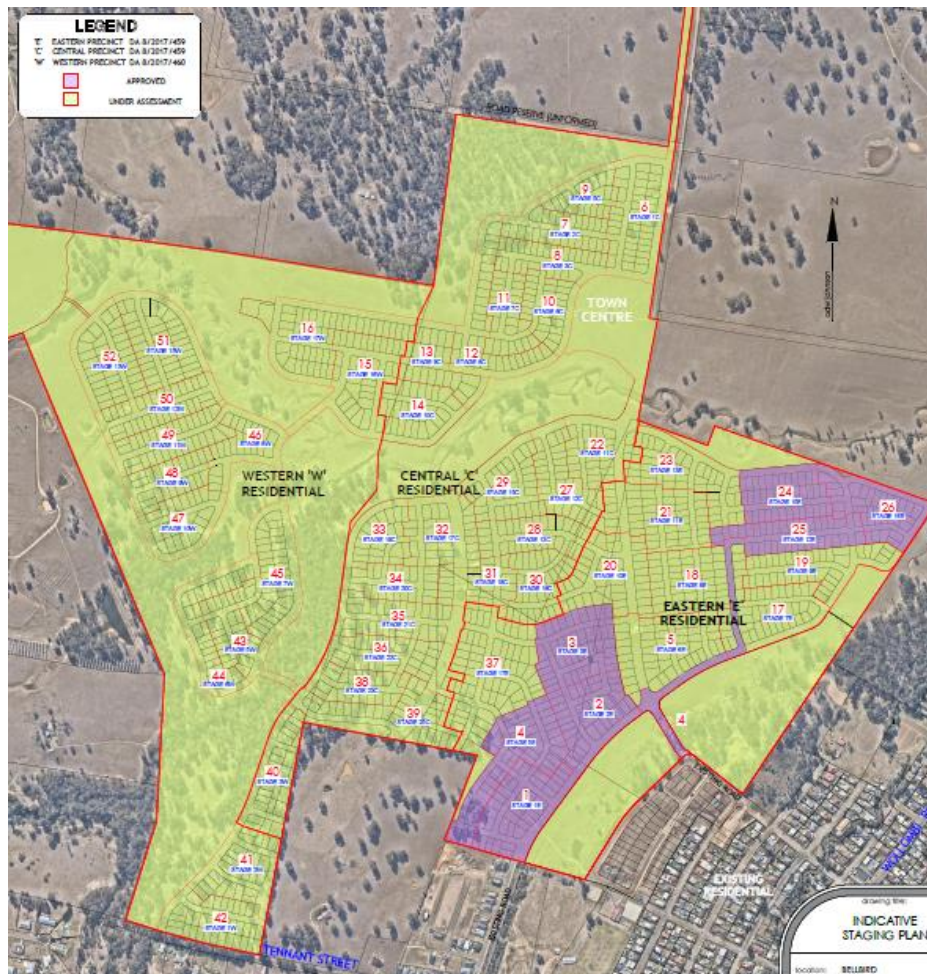
- (1) Proceedings 2019/275365 (Appeal 1) is for Development Application DA 8/2017/459/1 for a Torrens Title subdivision to be carried out in stages to create:
  - (a) Three hundred and fifty five (355) residential lots ranging in size from 450m<sup>2</sup> to 1,108m<sup>2</sup>;
  - (b) One infrastructure superlot;
  - (c) Two drainage lots;
  - (d) Three drainage lots; and
  - (e) Ancillary works comprising the removal of vegetation, new open space and landscaping, bulk earthworks, benching and retaining walls, demolition of existing structures, dewatering of exiting farm dams and stock water points, construction of new roads and stormwater detention basins and installation of associated servicing infrastructure, including water, sewer, power and telecommunications services.
- (2) Proceedings 2019/275377 (Appeal 2) is for Development Application DA 8/2017/460/1 for a Torrens Title subdivision to be carried out in stages to create:
  - (a) Four hundred and thirty nine (439) residential lots ranging in size from 480m<sup>2</sup> to 1,821m<sup>2</sup> and with one superlot of 43.92ha;
  - (b) One drainage reserve;
  - (c) Three residue lots; and
  - (d) Ancillary works comprising the removal of vegetation, new open space and landscaping, bulk earthworks, dewatering of dams, construction of new roads and stormwater detention basins and installation of associated servicing infrastructure, including water, sewer, electricity and telecommunications services.
- (3) Proceedings 2019/219259 (Appeal 3) is for Development Application DA 8/2018/837/1 for a Torrens Title subdivision to be carried out in stages to create:

- (a) Five hundred and seventy five (575) residential lots ranging in size from 450m<sup>2</sup> to 1,044m<sup>2</sup>;
  - (b) Two commercial super lots;
  - (c) Two drainage lots;
  - (d) One public reserve;
  - (e) One local park;
  - (f) Three residue lots; and
  - (g) Ancillary works comprising the removal of vegetation, landscaping, bulk earthworks, benching and retaining walls, dewatering of existing farm dams and stock water points, construction of new roads and stormwater detention basins, and installation of associated servicing infrastructure.
- 2 The appeals are brought by Johnson Property Group Pty Limited in respect of Appeals 1 and 2, and Mountview Grange 88 Pty Ltd in respect of Appeal 3 (together, the Applicants) under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) in response to the deemed refusal by Cessnock City Council (the Respondent) of the development applications set out at [1].
- 3 The background facts and contentions as originally set out by the Respondent in respect of the three appeals are contained in Exhibit 3 (Appeal 1), Exhibit 4 (Appeal 2) and Exhibit 5 (Appeal 3).
- 4 However, in opening submissions the parties agree that the issues in dispute are common to all three appeals, and are confined to just two principally contested matters that may be summarised as follows:
  - (1) The quantum of contributions payable by the Applicant under s 7.11 of the EPA Act, and
  - (2) The proposed staging of the developments the subject of the appeals, and the impact that imposes on the road network.
- 5 It is relevant to record here that after the Court had reserved its decision and before judgment, the circumstances of the case changed following a decision taken by the Minister for Planning and Public Spaces (the Minister).
- 6 On 21 December 2020, the parties sought leave to make submissions resulting from the Minister's decisions.

- 7 The Court granted leave for the appeals to be re-opened for the purposes of submissions on the decision taken by the Minister, and the matter was listed for short submissions on 5 February 2021.

### **The sites**

- 8 The three appeals are in respect of parcels of land that adjoin in what is known as the Bellbird North Urban Release Area (Bellbird North URA) at Bellbird, which is located to the south west of the City of Cessnock.
- 9 According to the Respondent, the BellBird North URA is to accommodate a population of around 10,000 people and revenue from what is commonly known as 'developer contributions' will assist to fund the infrastructure required by the future community.
- 10 The three appeal sites are identified by the parties as 'Eastern', 'Western' and 'Central' precinct, and which the Court identified as being Appeals 1, 2 and 3 respectively.
- 11 Where the matters are common to all three appeal sites, I will refer to the sites collectively as the 'appeal sites'. Otherwise I propose to refer to particular sites the subject of the appeal in the numerical manner set out at [10].
- 12 To further assist in understanding the geo-spatial characteristics of the appeal sites, the Staging Plan (Exhibit Z) is re-produced below.



#### Site – Appeal 1 (Eastern precinct)

- 13 The site the subject of Appeal 1 is part Lot 1 in DP597226 and part Lot 1 in DP327785, with frontages to Balangara Way, Ruby Street, Prince Street, Abbotsford Street and Hetton Street, Bellbird.
- 14 The site is zoned part R2 Low Density Residential, part RE1 Public Recreation and part SP2 Infrastructure – Water Recycling Facility as identified by the Cessnock Local Environmental Plan 2011 (CLEP).
- 15 The site is predominantly grassland currently used for grazing cattle and is largely free of any structures other than the remains of a former slaughterhouse complex, and house and other outbuildings.

#### Site – Appeal 2 (Western Precinct)

- 16 The site the subject of Appeal 2 is legally described as Lot 3 in DP 597226 with a total area of 93.71ha and having a frontage to Tennant Street, Bellbird.

- 17 The site is zoned part R2 Low Density Residential, part RE1 Public Recreation and part RU4 Primary Production Small Lots according to the CLEP.
- 18 The site is free of structures as it is currently used for grazing cattle with grassland and scattered vegetation across the site, and in the immediate vicinity of watercourses and small farm dams.

*Site – Appeal 3 (Central Precinct)*

- 19 The site the subject of Appeal 3 is legally described as Lot 2 in DP597226, part Lot 1 in DP597226, part Lot 3 in DP597226 and part Lot 1 in DP327785 with a frontage to Christy Road, Bellbird.
- 20 The site is zoned part R2 Low Density Residential, part B2 Local Centre and part RE1 Public Recreation according to the CLEP.
- 21 The site is largely free of structures as it is currently used for grazing cattle with predominantly grassland and scattered vegetation across the site and in the immediate vicinity of watercourses.

**Statutory framework**

- 22 In accordance with cl 2.3(2) of the CLEP, I must have regard to the objectives for development in the zones that include those that follow:
  - (1) In respect of land zoned R2 Low Density Residential, the objectives are:
    - To provide for the housing needs of the community within a low density residential environment.
    - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
  - (2) In respect of land zoned RE1 Public Recreation, the objectives are:
    - To enable land to be used for public open space or recreational purposes.
    - To provide a range of recreational settings and activities and compatible land uses.
    - To protect and enhance the natural environment for recreational purposes.
  - (3) In respect of land zoned SP2 Infrastructure, the objectives are:
    - To provide for infrastructure and related uses.
    - To prevent development that is not compatible with or that may detract from the provision of infrastructure.
  - (4) In respect of land zoned RU4 Primary Production Small Lots, the objectives are:

- To enable sustainable primary industry and other compatible land uses.
- To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To maintain prime viticultural land and enhance the economic and ecological sustainability of the vineyards district.
- To encourage appropriate tourist development (including tourist-related retail) that is consistent with the rural and viticultural character of the vineyards district.
- To enable the continued rural use of land that is complementary to the viticultural character of the land.

23 The development the subject of the three development applications on the appeal sites comprises development that is permitted with consent in each of the zones identified.

24 Provision is made, at cl 6.1 of the CLEP, for satisfactory arrangements in respect of designated State public infrastructure in the following relevant terms:

**6.1 Arrangements for designated State public infrastructure**

(1) The objective of this clause is to require satisfactory arrangements to be made for the provision of designated State public infrastructure before the subdivision of land in an urban release area to satisfy needs that arise from development on the land, but only if the land is developed intensively for urban purposes.

(2) Despite all other provisions, development consent must not be granted for the subdivision of land in an urban release area if the subdivision would create a lot smaller than the minimum lot size permitted on the land immediately before the relevant date, unless the Director-General has certified in writing to the consent authority that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure in relation to that lot.

...

25 The Applicant relies upon a Secretary's Certificate verifying Satisfactory Arrangements (Secretary's Certificate) for designated State public infrastructure for each of the appeal sites as follows; Appeal 1 (Exhibit J), Appeal 2 (Exhibit R), and Appeal 3 (Exhibit Y).

26 On the basis of the Secretary's Certificates, I am satisfied that satisfactory arrangements are in place for the provision of State public infrastructure for the appeal sites.



- 27 Development on land in an urban release area must occur in accordance with a staging plan, and only after the preparation of a development control plan, pursuant to cl 6.3 of the CLEP which provides, relevantly:

### **6.3 Development control plan**

(1) The objective of this clause is to ensure that development on land in an urban release area occurs in a logical and cost-effective manner, in accordance with a staging plan and only after a development control plan that includes specific controls has been prepared for the land.

(2) 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.

(3) The development control plan must provide for all of the following—

(a) a staging plan for the timely and efficient release of urban land making provision for necessary infrastructure and sequencing,

(b) an overall transport movement hierarchy showing the major circulation routes and connections to achieve a simple and safe movement system for private vehicles, public transport, pedestrians and cyclists,

...

(d) a network of passive and active recreational areas,

...

(j) suitably located public facilities and services, including provision for appropriate traffic management facilities and parking.

- 28 The North Bellbird Precinct is a Specific Area nominated in Part E, Chapter 11 of the Cessnock Development Control Plan 2011 (CDCP). The purpose of the North Bellbird Precinct Plan is described at Section 11.1.2 of the CDCP in the following terms (Exhibit 1, folio 232):

“ ...

The plan provides detailed guidelines for the development of land within the area to which the plan applies for the purpose of land subdivision so as to facilitate the erection of dwelling houses or other buildings, including supporting infrastructure and community related uses. The plan also provides a basis upon which to implement stated objectives for the North Bellbird Precinct.”

- 29 The objectives at Section 11.1.3 relevantly provide:

“ ..

(b) to provide accessible neighbourhoods with an interconnected network of streets which provides safe, direct access to public transport;

(c) To facilitate appropriate mixed use development which is compatible with residential amenity, capable of adapting over time as the community changes, and which reflects community standards of health, safety and amenity;

(d) to provide a variety of lot sizes and housing types to cater for the diverse housing needs of the community at a density that can ultimately support the provision of local services;

...”

- 30 As the appeal sites are, individually, integrated development, s 4.46 of the EPA Act applies and requires that certain authorities provide their concurrence through the grant of General Terms of Approval.
- 31 General Terms of Approval are found in the Respondent’s bundle (Exhibit 1) from the Natural Resources Access Regulator at folios 871-875 (Appeal 1), folios 952-956 (Appeal 2), and the Rural Fire Service at folios 876-880 (Appeal 1), folios 957-963 (Appeal 2) and folios 797-800 (Appeal 3).
- 32 General Terms of Approval have also been issued by Heritage NSW in respect of an Aboriginal Heritage Impact Permit pursuant to s 90 of the *National Parks and Wildlife Act 1974* at folios 970-972 (Appeal 2).
- 33 I have reviewed the General Terms of Approval listed above and I am satisfied that the requirements of s 4.47(2) of the EPA Act have been met.
- 34 Of particular relevance to this matter, Part 7 of the EPA Act provides, relevantly, for local infrastructure contributions.
- 35 Section 7.11 is in the following terms:

**7.11 Contribution towards provision or improvement of amenities or services** (cf previous s 94)

(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring—

- (a) the dedication of land free of cost, or
  - (b) the payment of a monetary contribution,
- or both.

(2) A condition referred to in subsection (1) may be imposed only to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned.

(3) If—

(a) a consent authority has, at any time, whether before or after the date of commencement of this Part, provided public amenities or public services within the area in preparation for or to facilitate the carrying out of development in the area, and

(b) development for which development consent is sought will, if carried out, benefit from the provision of those public amenities or public services,

the consent authority may grant the development consent subject to a condition requiring the payment of a monetary contribution towards recoupment of the cost of providing the public amenities or public services (being the cost as indexed in accordance with the regulations).

(4) A condition referred to in subsection (3) may be imposed only to require a reasonable contribution towards recoupment of the cost concerned.

(5) The consent authority may accept—

(a) the dedication of land in part or full satisfaction of a condition imposed in accordance with subsection (3), or

(b) the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with subsection (1) or (3).

(6) If a consent authority proposes to impose a condition in accordance with subsection (1) or (3) in respect of development, the consent authority must take into consideration any land, money or other material public benefit that the applicant has elsewhere dedicated or provided free of cost within the area (or any adjoining area) or previously paid to the consent authority, other than—

(a) a benefit provided as a condition of the grant of development consent under this Act, or

(b) a benefit excluded from consideration under section 7.4(6).

(7) If—

(a) a condition imposed under subsection (1) or (3) in relation to development has been complied with, and

(b) a public authority would, but for this subsection, be entitled under any other Act to require, in relation to or in connection with that development, a dedication of land or payment of money in respect of the provision of public amenities or public services or both,

then, despite that other Act, compliance with the condition referred to in paragraph (a) is taken to have satisfied the requirement referred to in paragraph (b) to the extent of the value (determined, if the regulations so provide, in accordance with the regulations) of the land dedicated or the amount of money paid in compliance with the condition.

36 Conditions of consent in respect of contributions are subject to contribution plans. Section 7.13 of the EPA Act is in the following terms:

**Section 7.11 or 7.12 conditions subject to contributions plan** (cf previous s 94B)

(1) A consent authority may impose a condition under section 7.11 or 7.12 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division).

(2) However, in the case of a consent authority other than a council—

(a) the consent authority may impose a condition under section 7.11 or 7.12 even though it is not authorised (or of a kind allowed) by, or is not determined in accordance with, a contributions plan, but

(b) the consent authority must, before imposing the condition, have regard to any contributions plan that applies to the whole or any part of the area in which development is to be carried out.

(3) A condition under section 7.11 that is of a kind allowed by a contributions plan (or a direction of the Minister under this Division) may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan (or direction). This subsection does not authorise the Court to disallow or amend the contributions plan or direction.

...

37 The Minister may make directions in accordance with s 7.17 of the EPA Act which relevantly provides:

(1) The Minister may, generally or in any particular case or class of cases, direct a consent authority as to—

(a) the public amenities and public services in relation to which a condition under section 7.11 may or may not be imposed, and

(b) in the case of a condition under section 7.11 requiring the payment of a monetary contribution—

(i) the means by which or the factors in relation to which the amount of the contribution may or may not be calculated or determined, and

(ii) the maximum amount of any such contribution, and

(c) the things that may or may not be accepted as a material public benefit for the purposes of a condition under section 7.11, and

(d) the type or area of development in respect of which a condition under section 7.12 may be imposed and the maximum percentage of the levy, and

(e) the use of monetary contributions or levies for purposes other than those for which they were paid, and

(f) the preparation of joint contributions plans by two or more councils, and

(g) how money paid under this Division for different purposes in accordance with the conditions of development consents is to be pooled and applied progressively for those purposes, and

(h) the time at which a monetary contribution or levy is to be paid.

(1A) A direction under subsection (1)(h) may be given only during the prescribed period within the meaning of section 10.17.

(1B) A provision of a development consent granted before and inconsistent with a direction under subsection (1)(h) is taken to be modified so as to be consistent with the direction, but only for a contribution or levy (or a component of a contribution or levy) that has not been paid before the direction is given.

(2) A consent authority to which a direction is given under this section must comply with the direction in accordance with its terms.

(3) A consent authority must not, in granting development consent in relation to which a direction under this section applies, impose a condition that is not in accordance with the terms of the direction, despite the other provisions of this Division and despite the provisions of any contributions plan.

38 A contributions plan is deserving of Judicial notice, according to s 7.20 of the EPA Act:

(1) Judicial notice is to be taken of a contributions plan and of the date on which the plan came into effect.

(2) It is to be presumed, in the absence of evidence to the contrary, that all conditions and preliminary steps precedent to the making of a contributions plan have been complied with and performed.

(3) The validity of any procedure required to be followed in making or approving a contributions plan is not to be questioned in any legal proceedings except those commenced in the Court by any person within 3 months after the date on which the plan came into effect.

(4) The amendment or repeal, whether in whole or in part, of a contributions plan does not affect the previous operation of the plan or anything duly done under the plan.

### **The Minister's Directions**

39 The Applicant does not dispute that local infrastructure contributions are payable on development of the land on the appeal sites. Instead, the parties dispute the quantum of the contribution required by the Respondent's proposed conditions of consent.

#### *The Minister makes a Direction*

40 On 21 August 2012, the Minister for Planning issued the Environmental Planning and Assessment (Local Infrastructure Contributions) Direction 2012 (Ministerial Direction) (Exhibit 2, tab 2), the effect of which was to cap the quantum of contributions payable by a proponent for development on a Lot of land.

41 The Ministerial Direction was made pursuant to s 94E of the EPA Act, as it was then, that relevantly contained the following:

## **6 Maximum amount of monetary contributions under s 94**

(2) A council (or planning panel) must not grant development consent (other than for development on land identified in Schedule 2) subject to a condition under s 94 (1) or (3) of the Environmental Planning and Assessment Act 1979 requiring the payment of a monetary contribution that:

...

(b) in the case of a development consent that authorises subdivision into residential lots, exceeds \$20,000 for each residential lot authorised to be created by the development consent.

- 42 The parties agree that the effect of the Ministerial Direction was to impose a 'cap' on the quantum of contributions amounting to \$20,000 per Lot that can be required by a consent authority.

### *The Minister makes a Further Direction*

- 43 As stated at [5], the Minister amended the Ministerial Direction on 6 December 2020 by gazetting an amendment to the Environmental Planning and Infrastructure (Local Infrastructure Contributions) Direction 2012 (the Further Direction).
- 44 The effect of the Further Direction is that the land within the Bellbird North Urban Release Area was added to schedule 2 so as to permit a maximum contribution to be levied of \$30,000 per Lot.
- 45 The Applicant invites the Court to exercise discretion and find that the cap of \$20,000 set by the Ministerial Direction is appropriate in the particular circumstances of the case, on three grounds:
- (1) Firstly, the cap on contributions of \$20,000 applied throughout the proceedings, until and including 17 December 2020 and where the development applications for the appeal sites were lodged in 2017 and 2018.
  - (2) Secondly, and relatedly, the consequence in time resulting from the Court's listing of the matter for hearing, and in preparing judgment that was not delivered prior to the gazettal of the Further Direction is not a result of the Applicant's actions, and yet is to its disadvantage.
  - (3) In the event the Court was minded, prior to the gazettal of the Further Direction, to apply the cap of \$20,000, then simply put: 'if it was good then, it is good now'.
- 46 Taken together, the above are matters that the Court would consider, in the circumstances of the case, to represent grounds on which the imposition of the

contribution of greater than \$20,000 per Lot is unreasonable in accordance with s 7.13(3) of the EPA Act.

- 47 In support of its submissions, the Applicant sought to tender a supplementary bundle of documents. The Respondent objected to material behind Tab 4 and 5 of the bundle on the grounds of relevance.
- 48 I determined to admit the Applicant's tenders on the grounds that the letters at Tab 4 and 5 post-date the hearing, and appear to directly relate to the Further Direction gazetted on 18 December 2020. The contents of the Applicants further supplementary bundle were entered behind Tabs 4-6 of Exhibit AA.
- 49 In support of its submissions, the Respondent tendered the cover notice of the Government Gazette No. 380 dated Friday 18 December 2020, and the Further Direction (marked Exhibit 15).
- 50 The area map referred to in the gazettal notice, titled URA\_006C was marked Exhibit 16.
- 51 As a result of the Further Direction, the dispute initially put to the Court changed from, simply put, whether there was a prohibition on the quantum of contributions sought to be imposed by the Respondent, to whether the contributions sought are reasonable in the circumstances of the case, or should be disallowed under s 7.13(3) of the EPA Act.

### **The quantum of contributions is considered**

- 52 The Applicant submits that the appeals, having been first lodged with the Respondent in August 2017 (for Appeal 1 and 2), and September 2018 (for Appeal 3), pre-date the adoption of the Citywide Infrastructure Contributions Plan 2020 (the Contributions Plan) (Exhibit 1, Tab 2) on 1 July 2020.
- 53 Throughout the proceedings, the Respondent has sought to agitate for a lifting of the cap of \$20,000 without success until after the close of proceedings.
- 54 Yet when the Respondent wrote to the Minister seeking a review of the 'contributions cap' in December 2019, the reply from the Department advised that the review is ongoing (Exhibit 2, folio 32).

- 55 Again, on 1 December 2020, the advice from the Department remained that the Respondent should continue to apply the cap of \$20,000 per Lot (Exhibit AA, Tab 5).
- 56 In the alternative, the Respondent submits that should the Court find that the quantum of contributions permitted by the Further Direction are unreasonable in the circumstances of the case, the result would be a shortfall of \$11.1m in contributions that the Respondent submits will have the effect of inhibiting the delivery of infrastructure needed by the community.
- 57 However, according to the Applicant, any shortfall in contributions is the result of the cap on local infrastructure contributions imposed by the Ministerial Direction first made in 2012, and left largely undisturbed but for minor amendment in 2019, and now in December 2020 after the proceedings had concluded.
- 58 Additionally, Attachment G of the joint expert report demonstrates that the Respondent resisted advice from the Department to seek a review of the Contributions Plan by the Independent Pricing and Regulatory Tribunal (IPART) that I understand would, if supported, have permitted the lifting of the contributions cap.
- 59 As is evident in the report prepared for the Council meeting on 20 May 2020 (Exhibit BB, p103), the Applicant submits that the timing of the Respondent's adoption of the Contributions Plan was influenced by "...recent and current legal appeals regarding proposed development within the Bellbird North URA. If this draft Plan is not adopted, then Council will continue to be open to legal risk in this area."
- 60 It is also plausible, according to the Applicant, that the cap on contributions in the Ministerial Direction was not inadvertent, but was a deliberate act of policy by the State government. Excerpts highlighted by Mr Greg New in Attachment H of the joint expert report suggest a nexus between levies imposed by government, and the supply of housing and its affordability.
- 61 Planning Circular PS 08-017 states at pp1-2:



“The objective of the review was to ensure that the contribution framework was supporting the state’s housing and employment targets...

As part of the review a \$20,000 threshold per residential dwelling has been identified as the point above which a local contribution may be unaffordable.”

*The contributions plan is considered*

62 The Court’s power to impose conditions is found at s 4.16 of the EPA Act which provides relevantly:

(1) **General** A consent authority is to determine a development application by—

(a) granting consent to the application, either unconditionally or subject to conditions, or

(b) refusing consent to the application.

...

63 Such a condition is imposed in accordance with s 4.17 of the EPA Act which provides, relevantly:

(1) **Conditions—generally** A condition of development consent may be imposed if—

(a) it relates to any matter referred to in section 4.15(1) of relevance to the development the subject of the consent, or

...

(h) it is authorised to be imposed under section 4.16(3) or (5), subsections (5)–(9) of this section or section 7.11, 7.12, 7.24 or 7.32.

...

64 Section 7.13(1) of the EPA Act provides for the imposition of a condition under s 7.11 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan.

65 The Respondent submits that its Contributions Plan is the result of consultation and exhibition, has been recently adopted, and is reasonably applied in this matter to derive a quantum of \$28,147.03 per Lot.

66 Further, the Contributions Plan is part of an integrated planning framework that “will be used to assist in the funding of local infrastructure and services as prioritised in the Delivery Program and Operational Plans, relevant to recreation and sporting facilities, open space, community facilities, roads and traffic facilities, as outlined in the Works Schedules of this Contributions Plan.” (Exhibit 1, folio 138).

- 67 To this end, the Respondent also relies on the 'Recreation and Open Space Strategic Plan' to demonstrate that local parks in the Bellbird North area are currently identified as being inadequate and that analysis by the Australian Government's Department of Sustainability, Environment, Water, Population and Communities found that residents in the Cessnock local government area are required to travel the furthest direct distance to greenspace when compared to the average in the Lower Hunter (Exhibit 13, p19).
- 68 This analysis is supported by Table 20 which quantifies the deficit of green space as 14ha less than the current need (Exhibit 13, p70).
- 69 Among other infrastructure, the Contributions Plan provides for the delivery in the future of 7 local parks.
- 70 The Applicant notes the extensive area of riparian lands in the appeal sites and questions the location of open space shown on Exhibit 1, folio 209 while also submitting to me that, as shown by Pepper J in *Blacktown City Council v Satmell Holdings Pty Ltd* [2019] NSWLEC 93 (Satmell), I should not 'go behind' the Contributions Plan as it would be to venture in to territory described, I note, by Her Honour as verboten.
- 71 The resulting quantum of contributions payable, according to the Respondent is itemised in the Table of local catchments, including the Bellbird North Local Catchment in a form re-produced below:

<b>Bellbird North Local Catchment</b>	
Open Space and Recreation Facilities	\$11,935.54
Community Facilities	\$1,729.41
Cycleway Facilities	\$1,371.90
Roads and Traffic	\$12,865.77
Plan Administration	\$244.41
<b>Total Contribution per lot/dwelling</b>	<b>\$28,147.03</b>

- 72 This quantum is reflected in Attachment C of the joint expert report prepared by Mr David Haskew and Mr New (Exhibit 8) which notes, upon correction, that infrastructure identified in the Contributions Plan for local parks, netball courts and multipurpose facilities amounts to \$18,982,139.00.

- 73 When considered in respect of the projected growth of 10,150 residents in the Bellbird North URA, factoring 2.9 residents per lot, a rate per lot of \$11,935.54 is recorded which accords to the first entry in the table at [71].
- 74 A further breakdown of the local infrastructure contributions owing, according to Mr New, appears in Attachment D of Exhibit 8. In his oral evidence, Mr New accepts that as the number of lots originally proposed for the Bellbird North URA has reduced from 3,500 lots to 3,094 lots, a corresponding reduction in works to be funded by contributions could result in no shortfall in contributions, or even the Applicants paying in excess of demonstrated need.
- 75 The CDCP contains objectives and requirements in respect of what it terms 'Section 94 Contributions' at Part E, Section 11.4.7.
- 76 The objectives are in the following terms:
- "To ensure that proposed development provides for the appropriate provision and upgrading of infrastructure and services including road infrastructure, off street parking facilities, open space and public recreation and community facilities.
- To ensure that Section 94 Contributions are collected commensurate with the requirements of Council's adopted Section 9 Contribution Plan."
- 77 The requirements of Section 11.4.7 are as follows:
- "Contributions are payable in accordance with Council's adopted Section 94 Contributions Plan prior to the release of the Subdivision Certificate."
- 78 The Applicant submits that as the Ministerial Direction imposed a cap on contributions throughout the lion's share of these proceedings, that it is unreasonable to apply a quantum that has only come into existence after the Court reserved its decision in the matter.
- 79 In the alternative, the Respondent submits that it sought to impose a quantum of contributions that is consistent with the Contributions Plan and which would, but for the Ministerial Direction, apply.
- 80 While the Ministerial Direction had, in my view, the effect of prohibiting the Respondent from applying the quantum of contributions set out in the Contributions Plan, that prohibition is now lifted by the effect of the Further Direction gazetted on 18 December 2020.

- 81 The Applicant also argues that the Court, in failing firstly to list the matters for hearing at an earlier date, and secondly in failing to deliver judgment sooner, effectively caused the determination of the matters to be delayed beyond the period in which the Ministerial Direction had effect.
- 82 In accordance with its usual practice, the Court listed the matters for conciliation between the parties. Upon the termination of the conciliation, the Court promptly listed the matter for hearing on the date it subsequently commenced. On the date of receipt of Court communication from the parties advising of the Further Direction, the Court had reserved judgment for a period of not quite 8 weeks which is within the Court's standard of 3 months.
- 83 I also note that at no stage did the Applicant apply for the matters to be expedited. Furthermore, the Applicant availed themselves of the period of time preceding the hearing to amend the application as late as 16 October 2020, causing the amendment to the Statements of Facts and Contentions in the matters which were filed on 20 October 2020.
- 84 As the Court facilitated the proceedings in accordance with its usual practice, and within its published standards, I do not accept the Applicant's invitation to regard the timing of the proceedings as grounds to disallow a condition that is otherwise of a kind allowed by a contributions plan.
- 85 As to the quantum of the contribution sought to be applied by the Respondent, the Applicant argues that the provision of infrastructure to which the quantum of contributions apply is excessive when the extent of riparian lands, and reduced number of Lots are considered.
- 86 I do not consider riparian lands to be a substitute for parks that support organized activities such as sport and other group-based activities. Furthermore, I do not accept Mr Haskew's supposition in the joint expert report that a lack of specificity as to the location of the parks in the Contributions Plan in Bellbird North raises a question of nexus between the quantum of contribution sought, and the local infrastructure nominated.
- 87 Nor do I accept that local infrastructure is so finely calibrated that the reduced number of lots in the appeal sites would render the quantum of contributions

sought as unreasonable when considered against the infrastructure needs of the Bellbird North URA.

- 88 The Applicant also considers the quantum of contributions sought by the Respondent includes provision for roads in respect of which a nexus is disputed.
- 89 It is helpful at this stage to set out the inventory of works that are the subject of the expert evidence.

### **The impact of staging on the road network**

- 90 The works the subject of the dispute originate from a report undertaken by Mr Hollyoak (TTPP Report) in December 2019 (Exhibit 2, Tab 8) and it is common ground that the TTPP Report formed the basis of the Respondent's Contributions Plan.
- 91 Table 6.12 of the TTPP Report indicates that without upgrade, intersections in the area will degrade to Level of Service (LoS) 'LoS E' and 'LoS F' in 2031 and mid-block capacity will be exceeded on Wollombi Road.
- 92 In a letter from Transport for NSW (TfNSW) said to be dated 23 October 2020, the modelling in both the TTPP Report, and that undertaken by the Applicant's traffic expert, Mr McLaren, receives critique (Exhibit 2, folio 30).
- 93 In summary, TfNSW states that modelling included in the TTPP Report is high-level and for the strategic purpose of preparing the Contributions Plan, and more detailed modelling is required of the Applicant to be satisfied that the proposed road upgrades are sufficient given the impact on the classified road network.
- 94 In his oral evidence, Mr Hollyoak agreed that the TTPP Report originally assumed 3,500 lots in the Bellbird Northern URA and that 3,094 lots are now proposed. Consequently, in his oral evidence, Mr Hollyoak acknowledges that the modelling in the TTPP Report may be regarded as conservative, as fewer lots are likely to reduce the traffic originally assumed to be generated.
- 95 By extension, Mr Hollyoak also acknowledges that the reduced number of lots may alleviate the need for some upgrades identified by him in Table 9.6 of the TTPP Report (Exhibit 2, folios 115-118). Intersections that are shown with a

LoS rated 'E' may improve as a result, but those intersections with a LoS rated 'F' are unlikely to be positively affected by the scale of change.

- 96 In the alternative, the Respondent submits that nowhere in the evidence does the Court have traffic modelling based on the reduced number of lots and so cannot be certain of the consequences arising from the traffic generated.
- 97 Mr McLaren's oral evidence is that the traffic report prepared by him at Exhibit X supplements, and perhaps may even replace, the Intersect Report (at Exhibit W). That said, Mr McLaren accepts a number of assumptions have changed since its preparation on 25 June 2020, including a north-south connection between lots identified DA Stage No. 6 and Stage 22 that was not previously assumed (Exhibit 7, Annexure F: Lot Staging), the future road works identified as 'RW66', and what might be broadly described as 'changing habits' such as 'work from home' arrangements and the like.
- 98 In broad terms, it is the extent and timing of works proposed to four intersections that is disputed, as is the need for the Applicant to widen a road in respect of Appeal 3.
- 99 The competing assessment of the experts is set out in Table 3 of the joint expert report and each intersection corresponds to road works identified in the Contributions Plan (Exhibit 1, folios 200-201) as follows:
- (1) Wollombi Road/Abbotsford Street (RW65 and RW67)
    - The intersection upgrade is required to be completed somewhere between the 655th lot, according to Mr Hollyoak, and the 787th lot, according to Mr McLaren.
  - (2) Christy Road/Mount View Road (RW62)
    - The intersection must be completed either before the northern lots are released, according to Mr McLaren, or before they are constructed, according to Mr Hollyoak.
  - (3) Mount View Road/ Oakey Road (RW68)
    - The intersection must be completed either before the northern lots are released, according to Mr McLaren, or before they are constructed, according to Mr Hollyoak if only to allow access for construction traffic.
  - (4) Wollombi Road/Mount View Road (RW34 and RW35)
    - The intersection upgrade is required to be completed at or around the release of the 1,062nd lot according to Mr Hollyoak as the intersection will exceed

capacity without land acquisition, while Mr McLaren is of the view that no nexus exists between the appeal sites and the intersection.

100 The upgrades that are principally in dispute, according to the Applicant, are:

- (1) The intersection identified in the TTPP Report as 'RW55', also known as RW66 in the Contributions Plan. For ease, I will refer to this intersection as the 'Wollombi Road/Bellbird North Road intersection', and;
- (2) The widening of road known as MC01 from a width of 20m as proposed, to 23m.

101 As a general statement, it is relevant to add here that Mr McLaren's modelling, contained in Exhibit X, concludes that Wollombi Road will require widening on the basis of background growth alone (Table 15, p25), and so is not attributable to what he calls 'development volumes'.

102 That said, Mr McLaren accepts that the mid-block performance of Wollombi Road will deteriorate to a LoS E as a result of the combination of background growth and development volumes.

103 The Respondent proposes a condition of consent making the issuance of a subdivision certificate contingent on upgrade works being completed. Mr Hollyoak's view is that such conditions serve as a means to align the road upgrades with the staging proposed on the appeal sites.

104 According to the Applicant, such conditions of consent will unreasonably inhibit the progress of stages of the subdivision.

#### *Wollombi Road/Bellbird North Road intersection*

105 At the outset, it is important to record that the location of the Wollombi Road/Bellbird North Road intersection is shown incorrectly in the map at folio 223 of the Contributions Plan. That said, the correct location is agreed to be that shown on Figure 1 of the TTPP Report and in greater detail at Figure 9 (folio 135).

106 As the author of the TTPP report, it is also relevant to record that while the works are described as 'intersection improvements' in the Contributions Plan, Mr Hollyoak acknowledges that the works are for a new intersection, as recorded in the TTPP Report.

- 107 According to the Applicant, an intersection of some kind would be required at this location in any event given the development proposed at Lots 1001-1004.
- 108 The proposed works are contested for two reasons. Firstly, the Applicant questions the basis for coupling the delivery of the subdivision stages with the Respondent's delivery of infrastructure. Secondly, as Wollombi Road is a classified road, funding for its maintenance and upgrade is not the responsibility of the Respondent and yet the Respondent seeks contributions in the Contributions Plan for its upgrade.
- 109 The Wollombi Road/Bellbird North Road intersection appears as a dashed dark line on Annexure E of the joint expert report. It does not appear on the Staging Plan (Exhibit Z) as it is not proposed as part of the developments the subject of the development applications.
- 110 Mr Hollyoak assumed the road was in place when completing the TTPP Report.
- 111 As the works are not proposed on the appeal sites, and are not the subject of the development applications before the Court, the finding I am asked to make is whether it is reasonable for the Applicants to make a contribution to these works.
- 112 For the following reasons, I conclude that it is reasonable for conditions to be imposed that would align the delivery of local infrastructure with the release of Lots in the appeal sites:
- (1) Firstly, such a position is consistent with Part E, Section 11.4.7 of the CDCP which states that Contributions are payable in accordance with the Contributions Plan prior to the release of the Subdivision Certificate, as the Respondent now seeks to do.
  - (2) Secondly, while the traffic modelling undertaken by Mr Hollyoak is said to be conservative, I do not consider this to be a reason for setting it aside, or giving it lesser weight. It is, as suggested by TfNSW, modelling of sufficient granularity to suffice for the purposes of preparing a contributions plan, and not for a specific development application.
  - (3) Thirdly, and relatedly, I accept Mr Hollyoak's evidence that the intersections most affected, and likely to perform at LoS F, are unlikely to be positively impacted by the reduced number of Lots. In other words, even if the modelling underpinning the Contributions Plan is



‘conservative’, the area will not be spared the worst of the impacts from the proposed development, absent upgrade.

113 For the following reasons, I also conclude that it is reasonable for the works proposed on the appeal sites to contribute to Wollombi Road/Bellbird North Road intersection works:

- (1) Firstly, as it is commonly held that Mr Hollyoak’s TTPP Report formed the basis of the Respondent’s Contributions Plan, I am hesitant to cast doubt on the report that informed the Contributions Plan at the risk of ‘going behind’ the Contributions Plan. The nexus between the TTPP Report and the Contributions Plan is made clear in the summary table at Table 9.6 (Exhibit 2, folios 115-118) which identifies road works marked in green that are included in the Contributions Plan.
- (2) Secondly, and relatedly, to accept the Applicant’s submission that the Contributions Plan, in seeking contributions for works associated with a classified road, effectively ‘double dips’ is, in my view, to suggest the process by which the Contributions Plan was determined by the Respondent is deficient. If I were to disregard the Contributions Plan, I would go much further than any orthodox exercise of merits review (Sattmell, at [37]).
- (3) Thirdly, road works proposed to Wollombi Road and marked green are entered on twenty-four separate occasions. I consider the references to be comprehensive and detailed. Whether or not the particular works are properly identified as intersection upgrade or new intersection works is secondary to the inclusion of those works in the Contributions Plan.
- (4) Fourthly, as Mr McLaren accepts that the development volumes will have an adverse impact on Wollombi Road, it is, therefore, the agreed position of the traffic experts that there will be adverse impacts on Wollombi Road to which contributions are appropriately directed so as to mitigate those impacts.

*The widening of the road known as MC01*

114 Mr McLaren considers the road, which is predicted to take 6,000 vehicles/day, to be more akin to a ‘Collector Road’ which is, according to Council’s Engineering Requirements (Exhibit 1, folio 475), 20m in width.

115 Furthermore, the proposed width allows for an 11m carriageway, and a 2.5m shared path on the western side which allows a connection to the Town Centre from the sites the subject of Appeals 1 and 3.

116 While the road shown in Figure 3 of the joint expert report, to the south of MC01, is 23m in width, comprising a 12m carriageway, 1m median and 1.5m footpath and 2.5m shared path, this road connects to the bridge over the creek,

before transitioning to a 20m road reserve. It is not unusual for a shared path, used by cyclists and pedestrians, to cross to the other side before continuing.

- 117 The Respondent queries whether it is good practice to require users of the path, which is likely to include children of the nearby high school, to cross, not once, but twice, on their way to the school from the new development proposed.
- 118 As I understand it, Mr McLaren considers it to be a reasonable approach for any further dedication of land beyond the 20m proposed by the Applicant for the Appeal site for the purposes of a road reserve to the east of MC01 to be provided by the landowner of the Lots shown on Annexure E of the joint expert report as Lots 1002.
- 119 The Applicant submits that the widening of the MC01 road will benefit the lots at 1001-1004 without a contribution from these lots being made, and draws my attention to Drawing 251 Rev E (Exhibit V) to demonstrate that the road can be widened in an easterly direction at a later stage when those lots are developed.
- 120 According to Mr Hollyoak, it is a better outcome for a consistent road reserve of 23m to be provided so that a consistent approach can taken in the Bellbird North URA, and be in accordance with Council's Engineering Requirements for a Trunk Collector Sub-Arterial Road.
- 121 The dispute is reflected in the proposed draft conditions of consent.
- 122 As road MC01 is within the Central Precinct (Appeal 3), Exhibit 12 contains the Respondent's proposed condition requiring a 23m road reserve, and Exhibit CC contains the Applicant's preferred condition requiring a 20m road reserve.
- 123 In my assessment of the evidence before me, the Applicant has not made out reasons for a departure from the published Engineering Requirements of the Respondent. Whether or not lots are developed at Lots 1001-1004, a consistency in approach to the north and south of the bridge on the MC01 road is, to my understanding, likely to remove the requirement for the shared path to cross the vehicular carriageway that would impose a unnecessary conflict that is removed by the provision of a 23m road reserve.

- 124 Furthermore, as the Town Centre could conceivably be developed in advance of Lots 1001-1004, it is desirable for the shared path and pedestrian path to be delivered whether or not Lots 1001-1004 are developed and whether or not the developer of Lots 1001-1004 elects to dedicate land for the widening of the MC01 road some time in the future.
- 125 As a result, I accept and adopt the Respondent's proposed condition of consent at Condition 1.6 (Exhibit 12) requiring an amendment to the plans to show the MC01 road as 23m in width.
- 126 As Condition 6.1 and Condition 6.10 (Exhibit 12) also provides for the construction of the MC01 road in Stage 1 and Stage 11, the Respondent's condition is also adopted.

*The quantum of contributions is not unreasonable*

- 127 For the reasons set out at [78]-[87], I have determined that the local infrastructure contributions sought by the Respondent are not unreasonable in respect of Open Space and Recreation Facilities and Community Facilities.
- 128 For the reasons at [113], I determine the contributions sought in respect of Roads and Traffic to also be appropriately grounded in the Contributions Plan and not unreasonable in their application.
- 129 I find the quantum of contributions sought to be imposed by the Respondent to be of a kind allowed by, and determined in accordance with, the Contributions Plan as required by s 7.13(1) of the EPA Act.
- 130 In arriving at my conclusion, I do not question the efficacy of the Contributions Plan itself, although the Court has been invited so to do.
- 131 However, as I am asked to consider conditions of consent in respect of the staging of works that are set out in the Contributions Plan, it is necessary to state here that I make no findings in respect of the Contributions Plan, or of the extent or adequacy of the provision for local infrastructure that is assumed by the Contributions Plan.

*The conditions of consent are considered*

- 132 As a result of discussions between the parties, the dispute in respect of conditions was further narrowed late on the third day of the hearing. The Court was assisted by a schedule of conditions in dispute that contained the Applicant's response dated 28 October 2020.
- 133 While the number of conditions in dispute were narrowed, those conditions that remain in dispute are consequential on a number of conditions across the three appeal sites.
- 134 For this reason, I consider the best course of action to be for the Court to deliver a judgment with findings that permits the parties to finally settle the conditions of consent relevant to each of the appeals in this matter.
- 135 As a consequence of the schedule so amended by the parties in closing submissions, I record here the matters requiring attention in the finally settled conditions of consent, and which are not otherwise addressed in the judgment above.
- 136 The relevant conditions of consent are as follows:
- (1) In respect of access to adjoining property known at 60 Christy Road, the Applicant accepts the conditions as proposed by the Respondent at Condition 1.4 (Exhibit 12), which may be a matter to be managed by the Construction and Traffic Management Plan at Condition 3.1, and which also applies to the site the subject of Appeal 2.
  - (2) In respect of the conditions sought by the Respondent to be amended to require road MC01 to be 23m in width, I consider this to be resolved in favour of the Respondent for the reasons stated at [125]-[126].
  - (3) Notwithstanding the Applicant's submissions that plans nominating the extent of cut and fill obviate the need for the condition, the Applicant accepts the condition proposed by the Respondent in respect of bulk earthworks at Condition 1.5 (Exhibit 12), and which applies across all appeal sites.
  - (4) In respect of Condition 2.3 (Appeal 1), the parties agree on the new wording proposed in Exhibit DD requiring evidence of marking of the Asset Protection Zone being provided to the Respondent prior to the commencement of works.
  - (5) The Applicant accepts the Respondent's proposed Condition 2.4 (Appeals 1 and Appeal 3) in respect of nesting boxes in hollow bearing trees (Exhibits 10 and 12).

- (6) In respect of the species management plan (Appeals 1 and 3), the parties agree that reference to *Prostanthera cineolifera* may be deleted from the conditions relevant to Appeal 1, but is appropriately retained in conditions relevant to Appeal 3.
- (7) In respect of the Vegetation Management Plan (VMP) at Condition 2.4 (Appeal 2), Condition 2.5 (Appeal 3), and Condition 2.6 (Appeal 1), the parties agree that the timing of the VMP is appropriate after completion of civil works, and prior to the Subdivision Certificate as proposed by the Respondent at point (d) of the relevant condition. However, the parties agree to adopt the Applicant's wording at point (g) of the relevant condition.
- (8) The parties agree that Condition 2.8 (Appeal 3) may be deleted.
- (9) The Applicant accepts the wording proposed by the Respondent in respect of applications requiring the approval of the Local Traffic Committee (Condition 2.8 in Appeal 1, Condition 2.5 in Appeal 2, and Condition 2.7 in Appeal 3).
- (10) In respect of Condition 2.7 (Appeal 2), the parties agree to delete point (b) as shown in Exhibit EE.
- (11) The Applicant accepts the Respondent's preferred approach to the Stormwater Construction Management Plan Requirement, and adopts the wording proposed by the Respondent in the relevant condition for each of the appeal sites.
- (12) The Applicant accepts the Respondent's preferred approach to Stormwater Detention Requirements in the relevant condition for each of the appeal sites.
- (13) The Applicant accepts the Respondent's preferred approach to the construction of Christy Road at Condition 4.1 (Appeal 3).
- (14) The Applicant accepts the Respondent's approach to the clearing of native vegetation and development activities in Asset Protection Zones across each of the appeal sites.
- (15) The Respondent accepts the Applicant's preferred approach to Clearing of Development Footprint as set out in Condition 5.6 (Appeal 3) in Exhibit CC and Condition 4.6 (Appeal 1) in Exhibit DD.
- (16) The parties agree that the Applicant's preferred approach should be adopted in respect of Crime Prevention so as to ensure consistency with the Bellbird North URA.
- (17) Conditions 6.1, 6.2 and 6.10 (Appeal 3) are disputed, and addressed in the judgment.
- (18) The Applicant accepts the Respondent's wording in Condition 5.1 (Appeal 2) in Exhibit 11.
- (19) The Respondent accepts the Applicant's modifications to Conditions 5.12 and 5.25 (Appeal 2) as shown in Exhibit EE.

- (20) The Applicant accepts Condition 5.47 (Appeal 2) as worded by the Respondent in Exhibit 11.
  - (21) The parties agree to the Applicant's amendment to Condition 5.1 (d) (Appeal 1), and Condition 5.31 (a) as shown in Exhibit DD.
  - (22) The parties dispute the Specific Intersection and upgrade works the subject of Conditions 5.35-5.40 (Appeal 1), Conditions 5.50-5.55 (Appeal 2), and Conditions 6.24-6.29 (Appeal 3) which are addressed in the judgment above at [114].
  - (23) The Respondent accepts the Applicant's approach to the Dedication of Land across each of the appeal sites, including Condition 6.8 (Appeal 1), Condition 6.8 (Appeal 2), and Condition 7.7 (Appeal 3).
  - (24) Resulting from the above, the Respondent accepts that the condition titled 'Stormwater – Dedication of Land' may be deleted from the conditions of consent for each of the appeal sites.
  - (25) The parties dispute the quantum of contributions shown in the condition titled 'Development Contributions', which is the subject of my finding at [88].
- 137 The parties also dispute whether a condition that has the effect of placing a covenant over the lots is reasonable and appropriate in the circumstances of the case.
- 138 As I understand it, the proposed condition sought by the Applicant is to impose certain restrictions on Residential Lots (residential lot restrictions) for reasons that the Applicant describes as 'good urban design'. The Respondent considers the residential lot restrictions to be in contravention of cl 1.9A of the CLEP which provides that no agreement, covenant or other similar instrument seeking to restrict the carrying out of the development permissible under the CLEP shall be applied to any residential lots.
- 139 To permit such residential lot restrictions imposes an administrative burden on the Respondent to advise future lot owners in preparing a development application of those matters that are relevant to consideration under s 4.15 of the EPA Act, and those that are not.
- 140 The Applicant accepts that, to the extent that it conflicts with the CLEP, the condition would be ineffectual, but as I understand its submissions, the proposed residential lot restrictions would seek to provide a disincentive to generic outcomes by operation what may be termed a 'style guide', which are matters that may be separate and distinct to those in the CLEP.

141 I accept the Applicant's submission that a style guide often deals with aspects of design and planning that are of a 'finer grain' than are contemplated by environmental planning instruments, and which can provide assistance in signalling the intent for an area to adopt certain materials, finishes, landscaping or other treatments and so is unlikely to impose an unreasonable administrative burden, if at all.

## **Conclusion**

142 As I have already stated, I find the contributions sought by the Respondent in respect of the appeal sites to be of a kind allowed by, and determined in accordance with, the Contributions Plan.

143 Furthermore, for the reasons set out above, I find the grounds upon which the Respondent seeks to have the quantum of contributions imposed to be reasonable in the circumstances of the case, and so should not be disallowed or amended by exercising the power at s 7.13(3) of the EPA Act.

144 In respect of the principally contested issues in this matter, I do not consider there to be any grounds on which the grant of consent would not be warranted for each of the appeal sites, subject to finally settled conditions of consent that reflect the agreement of the parties summarised above.

145 While not assisted by submissions on the matter, I am satisfied, on the basis of the conditions of consent that the site, if contaminated, will be made suitable for the purpose of the development as required by cl 7 of the State Environmental Planning Policy No 55—Remediation of Land.

146 In particular, I note the preparation of the Preliminary Site Investigation Bellbird North prepared by EP Risk for Appeal 1 (dated 17 July 2017), Appeal 2 (dated 17 August 2017), and Appeal 3 (dated 24 September 2018). In addition, I note the preparation of those plans and reports identified at Condition 6.1 (Appeals 1 and 2), and at Condition 7.1 (Appeal 3).

147 While not a matter contested by the parties, I note here that Appeal 3 relies upon an Aboriginal Heritage Impact Permit (AHIP) issued in accordance with s 90 of the *National Parks and Wildlife Act 1974* and General Terms of Agreement are in evidence (Exhibit 1, folios 805-806).

## **Directions**

148 For the reasons set out at [129]-[133], I consider the best course of action is for the parties to reconcile their agreement as to the final form of conditions of consent in respect of each of the appeal sites so as to facilitate the complete and final determination of proceedings.

149 The parties are to confer and settle the conditions of agreement for each of the appeal sites, and to file the same with the Court within 14 days of these orders.

## **Addendum made on 26 March 2021**

150 In accordance with the terms of directions in [148]-[149] of my judgment of 9 March 2021, the parties have conferred so as to settle the agreed conditions in a manner that is consistent with my findings at [136]-[141].

## **Orders**

*Proceedings 2019/275365*

151 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted for Development Application DA 8/2017/459/1 for a Torrens Title subdivision to be carried out in stages to create three hundred and fifty five (355) residential lots ranging in size from 450m<sup>2</sup> to 1,108m<sup>2</sup>; one infrastructure superlot; two drainage lots; three drainage lots; and ancillary works comprising the removal of vegetation, new open space and landscaping, bulk earthworks, benching and retaining walls, demolition of existing structures, dewatering of exiting farm dams and stock water points, construction of new roads and stormwater detention basins and installation of associated servicing infrastructure, including water, sewer, power and telecommunications services, subject to conditions of consent at Annexure 'A'.
- (3) All exhibits are returned, except for exhibits A, B, C, D, E, F, 15 and 16.

*Proceedings 2019/275377*

152 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application DA 8/2017/460/1 for a Torrens Title subdivision to be carried out in stages to create four hundred and thirty nine (439) residential lots ranging in size from 480m<sup>2</sup> to 1,821m<sup>2</sup> and with one superlot of 43.92ha; one drainage reserve; three residue lots; and ancillary works comprising the removal of vegetation, new open



space and landscaping, bulk earthworks, dewatering of dams, construction of new roads and stormwater detention basins and installation of associated servicing infrastructure, including water, sewer, electricity and telecommunications services, subject to conditions of consent at Annexure 'B'.

- (3) All exhibits are returned, except for exhibits K, L, M, N, O, 15 and 16.

*Proceedings 2019/219259*

153 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application DA 8/2018/837/1 for a Torrens Title subdivision to be carried out in stages to create five hundred and seventy five (575) residential lots ranging in size from 450m<sup>2</sup> to 1,044m<sup>2</sup>; two commercial super lots; two drainage lots; one public reserve; one local park; three residue lots; and ancillary works comprising the removal of vegetation, landscaping, bulk earthworks, benching and retaining walls, dewatering of existing farm dams and stock water points, construction of new roads and stormwater detention basins, and installation of associated servicing infrastructure, subject to conditions of consent at Annexure 'C'.
- (3) All exhibits are returned, except for exhibits S, T, U, V, 15 and 16.

.....

**T Horton**

**Commissioner of the Court**

[Annexure A \(427142, pdf\)](#)

[Annexure B \(462557, pdf\)](#)

[Annexure C \(369854, pdf\)](#)

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**Amendments**

26 March 2021 - See addendum at [150]-[153]

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