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NEW SOUTH WALES

COURT OF APPEAL

(25-138) South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2) [2024] NSWCA 113

Adamson JA, Basten and Griffiths AJJA– 16 May 2024

Keywords: administrative law - civil enforcement proceedings - interlocutory application - standing to bring proceedings - integrated forestry operations approval under Part 5B of the *Forestry Act 2012* (NSW)

South East Forest Rescue Incorporated (SEFR) commenced Class 4 proceedings against Forestry Corporation of New South Wales (FCNSW) seeking that it be restrained from conducting forestry operations as defined in Protocol 39 to the *Coastal Integrated Forestry Operations Approval* dated 16 November 2018 (CIFOA) unless certain habitat searches were carried out as required in condition 57 of the CIFOA, and seeking a declaration around identification of certain trees under the CIFOA conditions. The CIFOA was granted under Part 5B of the *Forestry Act 2012* (Forestry Act). SEFR also filed a notice of motion seeking interlocutory relief to stop any forestry operations in certain "compartments" in various State Forests unless certain surveys had been conducted.

The LEC determined that s 69ZA of the Forestry Act did not oust the common law principles of standing and preclude a private person from commencing proceedings seeking to enforce a CIFOA. However, SEFR did not have standing to do so because it did not have a sufficient special interest in the subject matter of the proceedings under the common law principles of standing to enforce the CIFOA.

From grounds raised by SEFR and a notice of contention filed by FCNSW, the issues for determination on appeal were whether:

a) On the proper construction of ss 69SB and 69ZA of the Forestry Act and ss 13.14 and 13.14A of the *Biodiversity Conservation Act 2016* (BC Act), private persons or entities are precluded from bringing civil enforcement proceedings.

b) The Court below had the power to dismiss the proceeding on the ground that the appellant did not have standing.

c) The appellant was denied procedural fairness and ought to have been allowed to adduce further evidence as to standing before the substantive proceeding was determined.

d) In any event, the primary judge erred in determining SEFR did not have standing.

The Court found on (a) that common law principles applied to the proceedings and the above sections of the Forestry Act or BC Act did not oust common law standing. At [116] Griffiths AJA stated that "much clearer language than that which appears in the provisions relied upon by the respondent is required to oust well established common law standing."

On the issue of standing, at [132] – [134] Griffiths AJA outlined that it is an area of law where adopting and applying a particular formula should be resisted, and the "special interest" test which is applied in such circumstances is fact and context specific in nature, as well as being fluid and evolving. The Court ultimately found on (d) that the primary judge did err, and that SEFR did have standing, after undertaking an evaluative judgment of SEFR's incorporation and history of activities, interests and concerns.

Having made this finding, the Court did not make finding on issues (b) and (c).

HELD:

Appeal allowed, with costs. Matter remitted to the LEC for determination.

APPEAL TO HCA

On 5 September 2024, FCNSW was granted special leave to appeal to the HCA and the Court confirmed the Court of Appeal's decision.

Reporter: Lee Cone

(25-139) Sader v Elgammal [2025] NSWCA 111

Griffiths AJA, Kirk and Free JJA - 23 May 2025

Keywords: Costs - where Class 4 proceedings dismissed by consent - where primary judge made no order as to costs - no question of principle or issue of public importance - no clear injustice which is more than merely arguable

The Appellants sought leave to appeal from orders made in relation to Class 4 proceedings in the Land and Environment Court (Class 4 Proceedings) where the primary judge declined to make orders as to costs.

The Appellants and the First Respondent live in adjacent properties in Connells Point. There has been a series of disputes in the LEC about the development on the First Respondent's land and the works prescribed in the construction certificate (CC). The CC had undergone several modifications.

The CC the subject of the Class 4 Proceedings included landscape plans showing overhanging concrete slabs, which the Appellants contented were inconsistent with the development consent.

The CC was then further modified to exclude the landscape plan and an external works plan. The Class 4 Proceedings were dismissed by consent, with the question of costs reserved.

The Appellants claimed that the First Respondent had capitulated by removing the landscape plan and external works plan without replacement and that they were entitled to their costs.

The primary judge rejected those claims and concluded that there should be no order as to costs, as:

1. there was "no clear winner" and the First Respondent had not surrendered or capitulated; and

2. it was not unreasonable for the First Respondent to defend the proceedings.

It was common ground that leave is required to appeal costs orders in class 4 proceedings and that to obtain leave, the applicants needed to demonstrate that there is an issue of principle, matter of general importance or clear injustice which is more than merely arguable.

The Court of Appeal considered that it was well open to the primary judge to take the view that the Class 4 Proceedings were terminated as a result of a compromise between the parties, rather than a capitulation by the First Respondent.

The compromise involved the First Respondent no longer defending the CC initially the subject of the Class 4 Proceedings and applying for a new CC, which excluded the landscape plan and external works plan. The Appellants compromised their claims and reliefs sought by agreeing to the Class 4 Proceedings being dismissed without the issue being determined. The Appellants' willingness to give up those various claims for relief strongly supports the primary judge's finding that the proceedings terminated by way of compromise and not a capitulation on the part of the First Respondent.

Assuming the issue of the reasonableness of the conduct of the First Respondent's defence is relevant (which is the assumption made by the primary judge), the Court of Appeal considered that no sufficiently arguable error been demonstrated in respect of the primary judge's reasoning and conclusion. The primary judge noted that no points of defence or any evidence had been filed and all orders and directions in the proceedings were made by consent. In addition, the primary judge reiterated that the removal of the landscape plan was not a capitulation which would otherwise have supported a finding of unreasonableness.

HELD:

1. As to the primary judge's reasoning why this case involved a compromise and not a surrender or capitulation, the Appellants did not identify any issue of principle, matter of general importance or clear injustice to warrant a grant of leave to appeal, nor have they demonstrated any error of fact or law which is more than merely arguable.

2. That, as to the primary judge's reasoning why the First Respondent's conduct of his defence was not unreasonable, the Appellants had not demonstrated any basis to grant leave.

3. Intermediate courts of appeal will generally adopt a restrained approach in determining whether to grant leave to appeal from a costs order. This is in the interests of finality in litigation and recognition

that costs are properly characterised as involving matter of practice or procedure.

The Court refused leave to appeal, with costs.

Reporter: Christina Zhang

LAND AND ENVIRONMENT COURT

(25-140) 2 Phillip Rise Pty Ltd v Kempsey Shire Council [2022] NSWLEC 1107

Bradbury AC – 1 March 2022

Keywords: construction certificate – development consent – jurisdictional prerequisite – lapsing of consent – whether development physically commenced – nexus between engineering works and conditions of consent

The Applicant appealed Council's deemed refusal of its application for a construction certificate to undertake site clearing works, relying on a development consent for a resort complex granted by Council on 24 February 1993 (Consent). Relevantly, a condition of the Consent required the Applicant to conduct acid sulphate soil testing on the site "prior to the release of the building application".

The key contested issue concerned whether the Consent was operative pursuant to s 99(1) of the EPA Act, as was then in force. This issue turned on whether engineering work "relating to" the approved development was physically commenced on the site before the date on which the Consent lapsed. Relevantly, after the grant of the Consent and before the date on which the Consent would have lapsed, acid sulphate soil testing was carried out on the site by engineering consultants engaged by Caltex Oil (Australia) Pty Ltd (**Caltex**). At that time, Caltex was carrying out remediation activities at the former Caltex Trial Bay Terminal site (Caltex Site) which included the drilling of boreholes and the installation of monitoring wells on the Caltex site on both the Applicant's site and on adjacent land.

A further preliminary issue related to whether the proposed site clearing works which involving the clearing of existing trees and vegetation, the stripping of topsoil, the erection of temporary tree protection barriers and the carrying out of erosion control works (Proposed Works), constituted "building work" which required, or could be made the subject of, a construction certificate.

HELD:

1. Whilst it was unusual for the issue of whether a development consent had lapsed to arise in Class 1 proceedings, the Court was satisfied that it was open to determine whether the Consent was in force as a jurisdictional prerequisite to the determination of the construction certificate application.

2. A construction certificate is required for the carrying out of "building work" pursuant to s 6.3(1) of the EPA Act. The definition of "building work" in s 6.1 of the EPA Act extends beyond the erection of a building and includes "any physical activity involved in the erection of a building". The Proposed Works were physical activities required for the erection of the buildings the subject of the Consent. As the development could not be carried out unless the site was cleared of vegetation and the necessary drainage and soil erosion controls were put in place, the Proposed Works relevantly constituted "building work" for the purposes of s 6.3(1) of the EPA Act and could not be carried out without a construction certificate

3. The acid sulphate soil testing carried out by Caltex was for the purpose of determining the presence of acid sulphate soils on its own land and on land in the adjacent area, as this would impact on the proposed method of remediating hydrocarbon contamination in the affected land. While the work carried out by Caltex was capable of also serving the purpose of satisfying the condition of Consent, the Court was not satisfied that the acid sulphate soil testing was also carried out for that purpose.

4. The acid sulphate soil testing carried out on the site was capable of constituting "engineering work" for the purposes of determining whether the Consent had lapsed, however it did not relevantly "relate to" the development approved by the Consent. The Applicant had failed to demonstrate that there was more than a merely notional or equivocal connection or a "real nexus" between the testing

carried out by Caltex and the additional testing required by the Consent. The testing was therefore not of the type required to satisfy the requirements of the condition of consent and did not "relate to" the Consent. Accordingly, the Consent had lapsed.

Appeal dismissed. Application for construction certificate refused.

Reporter: Phoebe Saxon

(25-141) 2 Phillip Rise Pty Ltd v Kempsey Shire Council [2023] NSWLEC 28

Moore J – 22 March 2023

Keywords: 56A appeal – construction certificate – lapsing of consent – whether engineering work related to development – construction of purpose of works

The Applicant brought an appeal pursuant to s 56A of the LEC Act against the whole of the Acting Commissioner's decision in ***2 Phillip Rise v Kempsey Shire Council* [2022] NSWLEC 1107**. In the Commissioner's decision, the Applicant's appeal against Council's deemed refusal of an application for a construction certificate was dismissed because the Acting Commissioner found that the 1993 development consent (Consent) had lapsed. The Applicant had relied upon acid sulphate testing carried out on the site by engineering consultants engaged by Caltex Oil (Australia) Pty Ltd (Caltex) pursuant to a deed between Caltex and the former owner of the site and provided to Council in the form of a report in 2007 to prevent the lapsing of the Consent. The Acting Commissioner found that the testing was not carried out for the purpose of complying with the condition of consent and so did not relevantly relate to the approved development.

The Applicant appealed the Commissioner's decision on two grounds. First, in finding the acid sulphate soil testing was engineering work required by the Consent and carried out before the lapsing date, the Applicant submitted that the Acting Commissioner should also have found that the engineering work related to the development approved by the Consent. Secondly, the Acting Commissioner erred in law in imposing an additional test not found in the statutory provision that it was necessary that the purpose of the acid sulphate soil testing was to comply with condition 38 of the Consent.

HELD:

1. The Acting Commissioner incorrectly interpreted "purpose" to mean the reason and motivation for the commissioning of the acid sulphate testing. The correct approach to the concept of purpose was to ask what had been sought to be achieved by the scope of the testing and the results. That the testing had occurred and the results noted was sufficient to satisfy the relevant condition of the Consent meant the Consent had not lapsed.

2. In finding that the Consent had not lapsed and no further impediment to the ordering of a construction of certificate was applicable, the Court held that it was appropriate to exercise its discretion pursuant to s 56A(2)(b) the LEC Act and order that the construction certificate be issued to the Applicant.

Appeal upheld and Respondent ordered to pay costs. Directions were made for the parties to confer and settle the terms of the orders necessary for the upholding the appeal and the issuing of the construction certificate.

Reporter: Phoebe Saxon

(25-142) 2 Phillip Rise Pty Ltd v Kempsey Shire Council (No 2) [2023] NSWLEC 56

Moore J – 30 May 2023

Keywords: costs – interlocutory proceedings – stay application pending appeal where no appeal commenced – costs follow the event

Following the orders made in ***2 Phillip Rise Pty Ltd v Kempsey Shire Council* [2023] NSWLEC 28** for the parties to confer and settle the terms of the orders necessary to uphold that appeal and issue the construction certificate, Kempsey Shire Council (Council) sought orders that the Court grant a stay of the orders pending a potential appeal to the Court of Appeal. Following two court listings, those proceedings were settled by way of an undertaking by the Applicant to not clear certain land until the expiry of the appeal period. The Council ultimately did not to appeal.

The Applicant submitted that Council's procedural irregularities in making its stay application, its failure to identify any relevant error in the judgment, its late and inadmissible filing of evidence and ultimate decision to not appeal the decision should warrant the Court exercising its discretion to order costs against the Council.

Council submitted that despite the Court's broad discretion, the usual rule that costs follow the event applied, with the relevant "event" being the practical result of a particular claim. As the result of the interlocutory proceedings reflected the outcome originally sought by Council, being the temporary stay of the proceedings, Council was successful and should be awarded its costs.

HELD:

1. In proceedings of this type where costs follow the event, the "event" is the practical result of a particular claim. This principle applies to both primary appeal proceedings and any subsequent procedural matters. In these proceedings, the relevant event was the Council's seeking of the stay application coupled with the Council's subsequent determination not to appeal which amounted to capitulation and acceptance of the Court's principal decision.

2. No good reason arose in these proceedings to exercise the Court's discretion and depart from the usual order.

Council to pay the Applicant's costs of the stay application and costs application.

Reporter: Phoebe Saxon

(25-143) Willoughby City Council v Blanc Black Projects Pty Limited [2023] NSWLEC 54

Robson J – 24 May 2023

Keywords: Section 56A LEC Act appeal – Appeal against Commissioner' s decision not to impose an affordable housing condition when granting development consent – Whether Commissioner made errors of law – errors of law established

Pursuant to s 56A of the LEC Act, the Appellant appealed against the decision of an Acting Commissioner (Commissioner) not to impose a condition requiring the Respondent to make a monetary contribution for affordable housing under s 7.32 of the EPA Act and cl 6.8 of the ***Willoughby Local Environmental Plan 2012*** (affordable housing condition) in granting development consent. There were six grounds of appeal.

HELD, with respect to each ground of appeal:

1. The Commissioner erred in finding that for the imposition of the affordable housing condition to be "authorised" pursuant to s 7.32(3)(b) of the EPA Act, it was necessary for the Appellant to prove, and for the Commissioner to be satisfied, that the proposed development would have a material impact on the existing and likely future mix of residential housing stock in the Willoughby local government area. Clause 6.8(2) of the WLEP does not constitute a jurisdictional precondition on the imposition of an affordable housing condition. Consequently, the Commissioner's conclusion that the affordable housing condition was not authorised by the WLEP constituted an error of law. The ground of appeal was upheld.

2. The Commissioner erred in finding that for the affordable housing condition to be lawfully imposed, it was necessary for the proposed development to have a "material" or "discernible" impact on the existing mix and/or likely future mix of residential housing stock in the Willoughby local government area. Such qualifiers should not be read into the otherwise clear meaning of cl 6.8(2)(b) of the WLEP. The ground of appeal was upheld.

3. Although the Commissioner's consideration of the *Newbury* test of validity was not legally flawed, exclusive reliance on that test could not ground consideration of the discrete matters set out in s 7.32(3)(c) of the EPA Act and, to the extent that the Commissioner failed to consider these matters, he made an error of law. The Commissioner's conclusions in relation to the *Newbury* test were material to his decision to reject the imposition of the affordable housing condition, and so the ground of appeal was upheld.

4. The Commissioner did not err in finding that the Appellant failed to adduce evidence which established that the proposed development would have

any discernible impact on the mix of affordable and other housing. The ground of appeal was not upheld.

5. With respect to the part of the fifth ground of appeal that did not overlap with grounds 1 and 3, the Commissioner did not err in his application of cl 10 of the ***State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)***. The ground of appeal was not upheld.

6. The Commissioner's decision not to impose the affordable housing condition was not legally unreasonable. The ground of appeal was not upheld.

Appeal upheld. Those aspects of the Commissioner's judgment relating to the imposition of the affordable housing condition were set aside. Consideration of the appropriateness of imposing an affordable housing condition was remitted to the Commissioner.

Reporter: Amelia Cook

(25-144) Wollondilly Shire Council v Kennedy [2023] NSWLEC 53

Pain J – 12 May 2023

Keywords: Administrative law - judicial review - complying development certificate - ancillary use - extraneous communications - purpose of development - characterisation of purpose

The Applicant brought Class 4 proceedings challenging the validity of a complying development certificate (CDC) issued by the Fourth Respondent.
The CDC purported to authorise development described as 'construction of a detached shed' 23.2 metres wide and 60 metres long, relying on cl 3A.5 of the Codes SEPP, which relevantly specified that new development that was ancillary to a dwelling house in land zoned RU1 to be complying development**.** The purpose of the shed was to store a personal collection of about 98 historic trucks, cars and motorbikes as well as machinery for upkeep, which in total was worth approximately $4.3M.

The Applicant brought seven (7) grounds of challenge, being:

- the CDC did not identify the purpose for the shed and accordingly:
  a) **Ground 1** - the development purported to be approved by the CDC could not be characterised as complying development for the purposes of s 4.26 of the EPA Act and Codes SEPP; and
  b) **Ground 2** – the certifier was unreasonable in issuing the CDC;
- **Ground 3** - the actual use and purpose of the shed was for a car park, which was prohibited in the zone and therefore not complying development**;**
- **Ground 4** - the proposed use of the shed was not ancillary to the use of the dwelling on the site for the purposes of the Codes SEPP due to its size and scale and the number of motor vehicles that could be accommodated;
- **Ground 5** - the shed was not an "outbuilding" under the Codes SEPP as it was a Class 7 building under the National Construction Code (NCC), so could not be 'ancillary development' as defined in cl 1.5 of the Codes SEPP;
- **Ground 6** - the CDC was not issued subject to the conditions specified in Schedule 6 to the Codes SEPP, contrary to cl 3A.39 of the Codes SEPP; and
- **Ground 7** - the CDC was uncertain and lacked finality given height discrepancies between plans and other errors in the plans.

The parties agreed that s 4.31 of the EPA Act (which allowed the Court to determine whether the CDC was authorised to be issued) enabled the Court to consider Grounds 1 and 3-5, Ground 2 was a judicial review ground and did not rely on s 4.31, and Grounds 6 and 7 were discrete issues concerning the validity of the CDC and did not rely on s 4.31.

HELD:

- **Ground 1** – Extrinsic evidence could not be used in construing the CDC. The CDC and application did not identify a purpose, so the CDC lacked a purpose. Without a purpose, it could not be determined that the CDC was 'ancillary' to a dwelling house under cl 3A.5 of the Codes SEPP, or that the shed was permissible in the zone (which it must be in order to be complying development under cl 1.18 of the Codes SEPP.) As such, Ground 1 was upheld.

- **Ground 2** – Given there was no evidence of the purpose for the shed known to the certifier, it was not apparent that he arrived at the conclusion that the shed was permissible in the RU1 zone or that the shed was for a purpose ancillary to the use of the dwelling house on any reasonable basis. As such, Ground 2 was upheld.
- **Grounds 3 and 4** – The consideration of characterisation of purpose of development was one of fact and degree. The use of the shed for storing many vehicles was a separate, independent use of the land, going beyond use as a garage for cars used in daily life by the occupants of the house. As such, the shed was proposed to be used for a car park, which was impermissible (establishing Ground 3) and was not ancillary to the use of the dwelling (establishing Ground 4).
- **Ground 5** - A non-habitable shed proposed to be used as a car park should be classified as Class 7a, not Class 10a under the NCC. As such, the shed was not 'ancillary development' as defined in cl 1.5 of the Codes SEPP. Ground 5 was upheld.
- **Ground 6** – Clause 3A.39 of the Codes SEPP required conditions specified in Sch 6 to be imposed in a CDC. The CDC did not annex these conditions, and this failure gave rise to invalidity. Ground 6 was upheld.
- **Ground 7** – There were discrepancies between the architectural plans and structural plans incorporated into the CDC, primarily in respect of differences in height of the shed. Given these discrepancies could not easily be rectified, the CDC was uncertain, lacked finality and was therefore invalid. Ground 7 was upheld.

CDC declared invalid. Costs reserved.

Reporter: Lee Cone

(25-145) Natural Grass at Norman Griffiths Inc v Ku-ring-gai Council [2023] NSWLEC 84

Duggan J – 11 August 2023

Keywords: Judicial review – infrastructure and environmental impact assessment of Council-owned land – requirement for and content of environmental impact statement – obligation to properly examine all matters affecting or likely to affect the environment

The Applicant brought Class 4 judicial review proceedings challenging the Respondent's decision to construct a synthetic grass playing field with associated stormwater mitigation works and other sporting-related structures at a local oval in circumstances where the Respondent was both the owner of the land upon which the development was to be carried out and the relevant consent authority for the development pursuant to Part 5 of the EPA Act.

The development site was surrounded by a critically endangered ecological community (Sydney Turpentine Ironbark Forest). The development was therefore considered to have numerous impacts on stormwater management, was likely to cause contamination from the artificial turf and filler, and could possibly have adverse bushfire, ecological flora and fauna impacts.

The above impacts were assessed in two separate Reviews of Environmental Factors prepared in 2023 (REFs), and in March 2023 before the development was commenced. The Applicant raised five grounds of challenge. Firstly, the Respondent was in breach of a broadly expressed duty to inquire into the environmental impacts of the development. Secondly, the Respondent was alleged to have failed to take into account the impact that microplastic pollution and stormwater would have on the surrounding environment. Thirdly, the Respondent failed to take into account the matters referred to in cl 171A(4) of the EPA Regulation concerning the impact of the development on the Sydney Harbour Catchment. Fourthly, the Respondent failed to comply with s 5.7(1) of the EPA Act by not obtaining and considering an environmental impact statement (EIS) assessing the stormwater and microplastic pollution issues. Fifthly and finally, the Respondent's assessing officer allegedly did not have the requisite delegation to specifically approve the carrying out of the development when he signed off on the second of the two REFs.

HELD:

1. The second REF contained a number of annexures containing, amongst others, a flooding/stormwater report and limited pollution assessment. The presence of those annexures indicated that Respondent had not failed to discharge its general duty to inquire as required by s 5.5 of the EPA Act, and the Court could not undertake a merit review of these assessments in judicial review proceedings.

2. On a proper construction of the provisions of cl 171A of the Regulation, the fact that the site was not land categorised as within the "Foreshores and Waterways Area" pursuant to s 6.28(1) of the Biodiversity SEPP meant that the Respondent was not required to consider all of the impacts that cl 171A of the Regulation would have otherwise called for.

3. The requirement for an EIS was determined to be a matter of jurisdictional fact, and on that basis the Applicant failed to establish that the decision-making process was flawed absent an EIS. Again, the Court could not undertake a merit review in judicial review proceedings.

4. The Applicant failed to prove that the Respondent's delegated officer did not relevantly duly exercise the delegation given to him by the Respondent. The use of the word "approval" in the officer's delegation by the Respondent's general manager could not be construed to limit the type of approval to mere regulatory functions when the proper rules of characterisation were applied.

The further amended summons was dismissed with costs reserved.

Reporter: Peter Clarke

(25-146) Pavlakos Capital Pty Limited v Canterbury Bankstown Council [2023] NSWLEC 1256

Dickson C – 31 May 2023

Keywords: Class 1 Appeal, whether development application properly made

This Applicant appealed the Respondent's refusal of its development application (which sought consent for the demolition of existing structures and the construction of an in-fill affordable housing development).

The Respondent contended that the development application should be refused on grounds relating to height, future character, solar access and amenity. The Respondent also contended that the development application was not validly made as the applicant had not paid the correct fee pursuant to cl.50(1) of the EPA Reg.

At the time of lodgement, the Applicant underestimated the cost of works of the development. The Respondent later identified this error and sought additional fees from the Applicant.

HELD:

1. For the purposes of cl.50(1)(b) of the EPA Reg, the 'fee' is that which is determined by Council.

2. Neither the Act nor the EPA Reg provide for redetermining or reviewing the Council's fee determination.

3. Clause 246A of the EPA Reg establishes a maximum ceiling of the fee that is able to be determined by the Council which is in turn determined by the provisions of cll.246B, 248 and 252 of the Regulation.

4. In this case, the originally paid understated fee was above the maximum permitted.

Appeal is upheld. Development consent granted.

Reporter: Alexander Murphy

(25-147) Harbord Hotel Holdings Pty Ltd v Northern Beaches Council [2023] NSWLEC 1270

Dixon SC – 2 June 2023

Keywords: Development appeal – whether certain conditions should be imposed on consent to works on Harbord Hotel – appeal against conditions allowed – impugned conditions deleted or amended – consent granted with revised conditions

The Applicant applied for development consent to carry out certain alterations and additions t0 the Harbord Hotel (the **Hotel**) (the **application**), a local heritage item under the *Warringah Local Environmental Plan 2011*.

Given significant public interest (a total of 130 submissions of which 101 were objections), the Respondent referred the application to the Northern Beaches Planning Panel, which granted approval to the application subject to conditions. The Applicant was dissatisfied with four conditions imposed by the Panel: condition 37 (relevantly requiring that loading and unloading of vehicles and delivery of goods be carried out within the site), condition 39 (amplified music noise must not be audible beyond the boundary of any residence from 10pm to 8pm), condition 43 (limiting maximum number of patrons to 650 at any time) and condition 45 (provision of a shuttle bus).

Two joint expert planning reports were tendered by the parties. The Court also had the benefit of submissions from objectors to the application.

HELD:

1. Condition 37 was amended to exclude keg deliveries. There was no expert evidence that the Applicant's arrangement of receiving kegs from Charles Street via an access hatch had or would cause any unacceptable traffic impacts. The Applicant was made to apply to the local traffic committee to install a sign designating a loading zone and short-term parking next to the access hatch, and to install said signage at its cost if the application was approved.

2. Condition 39 was deleted as being inconsistent with the Hotel's existing approved operations and the noise conditions in its licence. The Respondent had not separately enacted specific controls on noise emissions from licensed premises. Other conditions had also already required the adoption of measures recommended by acoustic expert reports accompanying the application.

3. The 650-patron limit in condition 43 was the result of a mistaken calculation, using a method that was not the only one open to be used. The limit was increased to 750 patrons, increasing further to 800 patrons for 12 events in a calendar year.

4. Condition 45 inexplicably went beyond the "courtesy" bus service offered by the Applicant. A revised condition and timetable jointly suggested by the experts was imposed in its place.

5. It was otherwise in the public interest to approve the application. There was no expert evidence to support a refusal, and appropriate conditions were in place.

Appeal against conditions allowed.
Development application granted, subject to revised conditions.

Reporter: Kevin Tanaya

(25-148) Queanbeyan-Palerang Regional Council v Banks [2024] NSWLEC 46

Pain J – 9 May 2024

Keywords – Contempt – previous consent orders – frustration

The Applicant commenced contempt proceedings against the Respondent's failure to carry out works in accordance with consent orders requiring the removal of vehicles and other structures from land owned by the Respondent.

The Respondent pleaded not guilty to the charges for contempt. The Respondent did not challenge the Applicant's extensive evidence, which clearly established that there had been a failure of the Applicant to comply with the consent orders.

The consent orders had been made in excess of 5 years prior to the contempt proceedings. There had been some progress over the 5 years towards compliance with the

consent orders. Notwithstanding multiple progress reports and updates and promises for completion of the works within certain timeframes, substantial works remained outstanding as at the time of the contempt proceedings.

The Respondent contended that compliance with the consent orders was frustrated by events beyond his control including wet weather, poor roads, illness, COVID-19, and his incarceration.

HELD:

1. None of the evidence provided by the Respondent established why he was unable to comply with the orders in 2018, when they were originally made by the Court.

2. The Applicant established that the Respondent was guilty of contempt, and that he failed to comply with a number of the consent orders.

3. The Respondent is to be sentenced.

A timetable was to be set for sentencing.

Reporter: Serafina Carrington

(25-149) Shoalhaven City Council v Easter Developments Pty Limited [2024] NSWLEC 49

Preston CJ – 16 May 2024

Keywords: s.56A Appeal - Planning for Bush Fire Protection - bush fire prone land - asset protection zones - remitter

The Appellant appealed Commissioner Espinosa's decision to grant development consent to a three-lot subdivision in Vincentia (Land) pursuant to s.56A of the Court Act. The Land was directly adjacent to Council owned land. Both the Land and Council land were designated as bush fire prone land to which the Planning for Bush Fire Protection guide (PBP) applied.

The Appellant raised two grounds of appeal. Firstly, that the Commissioner misconstrued the PBP and, secondly, that the Commissioner misdirected herself as to the task required under the PBP.

An Asset Protection Zone (APZ) of 21.5m was required for the proposed development under the PBP. Of this, the Respondent proposed that 15.5m would be on the Land and 6m would be on the adjoining Council land. The PBP relevantly provided a performance criterion for an APZ, being that it should be managed in perpetuity. To achieve this, ss 3.2.5 and 3.2.6 of the PBP provided that where an APZ is proposed on adjoining land, an easement may be obtained, a guarantee may be provided from the adjoining landowner, or, where the adjoining land is public land, a plan of management may provide assurance that an APZ will be managed in perpetuity.

At first instance, the Appellant argued that the proposed APZ did not comply with the PBP because there was no guarantee it would be managed in perpetuity as there was no plan of management or easement in place. It proposed a condition requiring the Respondent to obtain an easement over the Council Land.

The Commissioner held that the APZ complied with the relevant requirements under the PBP because the Appellant had managed the Council land as "managed land" under the *Rural Fires Act 1997*. In doing so, the Commissioner made reference to the Council Bushfire Mitigation Program and a generic community land plan of management. The Commissioner granted development consent without the easement condition proposed by the Appellant.

HELD:

1. The Commissioner erred by answering compliance with the PBP by reference to whether the Council land was 'managed land' pursuant to the Rural Fires Act, whereas the PBP sets a performance criterion that an APZ must be provided in perpetuity. For publicly owned land, this can be provided by an adopted plan of management.

2. A generic community land plan of management was not sufficient as a plan of management under s 3.2.6 of the PBP.

3. The Commissioner misdirected herself as to the requirements of s 3.2.5 of the PBP in finding the Respondent's proposed conditions were sufficient and preferable to the Appellant's proposed conditions (including the proposed easement).

Appeal upheld with costs. Decision and orders of the Commissioner set aside and remitted.

Reporter: Rainer Gaunt

(25-150) Eskander v Georges River Council [No 2] [2024] NSWLEC 1707

Gray C – 1 November 2024

Keywords: remitted s 56A appeal – essential services - registration of easement –- deferred commencement condition

In *Eskander v Georges River Council* [2024] NSWLEC 98, Robson J found the Commissioner had erroneously applied the ***Georges River Local Environmental Plan 2021*** when forming the view that arrangements for suitable vehicular access had "been made".

In subsequent separate Class 3 proceedings, pursuant to s 40 of the LEC Act, the applicant obtained orders for the imposition of an easement in favour of the Applicant's proposed development. The Applicant had lodged a request with NSW Land Registry Services for the registration of the easement, however, the registration had not yet been effected. A notation on title referred to the plan of the proposed easement.

HELD:

1. The requirements of cl 6.9 of the GRLEP were satisfied by the orders obtained in the Class 3 Proceedings as, as adequate arrangements in relation to vehicular access had "been made" to make vehicular access available when required.

2. It was appropriate to retain the previously imposed deferred commencement condition requiring the imposition of the easement as the consent should not become operative until the easement was actually in place, and it was lawful to access one of the dwellings forming part of the proposed development.

Appeal upheld. Development consent granted.

Reporter: Lia Bradley

(25-151) Maurici v Kaldor [2025] NSWLEC 20

Robson J – 14 March 2025

Keywords: Costs – tree dispute – applicant partially successful in substantive proceedings – application of no discouragement principle – insufficient grounds to award costs

The Applicant brought proceedings brought under the ***Trees (Disputes Between Neighbours) Act 2006*** against the Respondents. The First and Second respondents were the Applicant's neighbours. The Third Respondent was Transport for NSW, who leased a parcel of land to the First and Second Respondents. The Applicant was partially successful in the proceedings and subsequently filed a notice of motion seeking his costs (Costs Motion).

The Applicant made the following submissions in support of the Costs Motion:

- Certain questions of law in dispute, which occupied a significant part of the hearing time, were decided in the Applicant's favour.
- The First and Second Respondents acted unreasonably in the lead up to the commencement of proceedings, including by ignoring the Applicant's requests for the subject trees to be pruned or removed and by failing to engage in settlement discussions the Applicant had attempted to initiate.
- TfNSW acted unreasonably prior to the commencement of the proceedings by failing to exert contractual powers in respect of trees placed on its land.
- The First and Second Respondents acted unreasonably by putting into issue each element of the Applicant's claim and defending the proceedings for improper purposes associated with historical grievances between the parties.
- The Respondents "escalated" the proceedings by engaging lawyers in circumstances where the applicant was intending to proceed unrepresented.

The Court noted the relationship between the parties was unfortunate and there was significant disaffection, hostility, and animus from earlier dealings unrelated to the litigation. However, in determining costs for Class 2 Trees Act proceedings, the Court emphasised the importance of "no discouragement principle" in r 3.7(2)

of the ***Land and Environment Court Rules 2007*** that a person generally should not be discouraged from making or defending an application by the prospect of an adverse costs order.

HELD:

1. Despite the Applicant's success and the deteriorated relationship between the parties, the matters raised by the Respondents had reasonable prospects of success.

2. The Respondents did not act unreasonably in the circumstances, both in the lead up to and during the proceedings.

3. There were insufficient matters of weight before the Court to overcome the "no discouragement principle".

The Applicant's notice of motion was dismissed. No order was made as to costs.

Reporter: Rainer Gaunt

(25-152) Billyard Ave Developments Pty Limited v The Council of the City of Sydney [2025] NSWLEC 22

Preston CJ– 20 March 2025

Keywords: s. 56A Appeal – statutory interpretation - zone objectives – procedural fairness – consent orders - exclusionary remitter order

The Appellant brought an appeal, under s 56A(1) of the Court Act, against Commissioner Walsh's decision to refuse to give effect to consent orders granting development consent for the demolition of an existing building and construction of a new residential flat building. The application relied on a cl.4.6 variation request to vary the height standard prescribed by cl.4.3 of the Sydney Local Environmental Plan 2012 (SLEP 2012).

The primary reason that the Commissioner gave for refusing the development application was that he was could not grant development consent under cl 4.6(4)(a)(ii) of SLEP 2012 as he was not satisfied that the proposed development was consistent with the objectives of the R1 General Residential zone in which the proposed development was located.

The Appellant advanced four grounds of appeal raising two questions of law:

1. that the Commissioner misconstrued the objectives of the R1 General residential zone, especially the first objective "to provide for the housing needs of the community"; and

2. that the Commissioner denied the Appellant procedural fairness by raising and deciding issues (concerning the social impacts and negative environmental effects of the proposal) that were not in dispute between the parties and without giving the parties notice or an opportunity to be heard.

HELD:

1. The Commissioner erred by misconstruing the first objective of the R1 General Residential zone in the following ways:

   a) the Commissioner sought to construe the zone objectives by reference to the evidence rather than applying the settled principles of statutory interpretation [33];

   b) the Commissioner conflated the steps of construction with the subsequent step of application [36];

   c) the Commissioner's approach of deriving alternative interpretations then testing which was correct by reference to the text, context and mischief inverted and subverted the proper process of statutory interpretation [52];

   d) the Commissioner's analysis of the text was contrary to the orthodox statutory interpretation because it failed to have regard to the words use, treated words in isolation and used the dictionary definitions inappropriately [54] –[60];

   e) the Commissioner's analysis of the context of the first objective was erroneous and framed by the earlier finding of alternative interpretations [63]; and

f) the manner in which the Commissioner sought to have regard to "mischief" being "deep-seated problems with providing levels of housing to meet essential community needs" was erroneous and could not be derived from the text [65] and [72].

2. There will be a denial of procedural fairness where a court determines a matter on a basis that was not in issue or argued in the proceedings and the information is used by a decision-maker in a way that could not reasonably be expected by one party and that party is not given an opportunity to respond to that use [76].

3. The Commissioner should have notified the parties and given them an opportunity to be heard [79]. The Commissioner denied the Appellant natural justice in deciding the appeal on issues not raised by the parties and using information in a way that could not reasonably be expected by the parties [91].

4. On appeal, the Court could not make orders granting development consent as its power under s. 56A(2)(b) of the Court Act was limited by reference to the subject matter of the appeal being a question of law [93] and the Commissioner had not made all factual findings necessary to grant development consent. The appropriate course was to remit the matter for rehearing.

5. An exclusionary remitter order was appropriate because of the interrelationship between the errors of law and merit determination and the reasonable apprehension that the Commissioner had pre-determined issues of fact [103].

Appeal upheld. Decision and orders of Court below set aside. Exclusionary remitter order made. No order as to costs.

Reporter: Joanna Ling

(25-153) The Owners-Strata Plan 934 v T&P Chimes Development Pty Ltd (No 2) [2025] NSWLEC 28

Pritchard J - 02 April 2025

Keywords: Strata title - strata renewal plan - redevelopment - *Strata Schemes Development Act 2015 (NSW)* – single dissenting owner - compensation - good faith - procedural requirements

In this Class 3 application, the Applicant sought an order under s 182(1) of the *Strata Schemes Development Act 2015* (the **SSD Act**) to give effect to a strata renewal plan for the redevelopment of Strata Plan 934, prepared for a residential complex comprising 107 lots (80 residential lots and 27 utility lots) and common property at 45–53 Macleay Street, Potts Point.

The Applicant sought to implement the strata renewal plan prepared and supported in accordance with the statutory framework under the SSD Act. The first respondent, T&P Chimes Development Pty Ltd, owned the majority of the lots. The strata renewal plan had been previously varied by Court orders on 25 February 2025 (see *The Owners–Strata Plan 934 v T&P Chimes Development Pty Ltd* [2025] NSWLEC 9), including to provide for an increase in the purchase price of Lot 19, being the single dissenting owner.

At issue was whether the Court should give effect to the amended plan, which now included updated financial arrangements, support notices received after the original filing of the Class 3 application, and the resolution of outstanding procedural matters, including the display of committee meeting minutes and evidence of sufficient financing.

The Court reviewed the requirements of ss 179 and 182 of the SSD Act, as well as the relevant provisions of the *Strata Schemes Development Regulation 2016* and *Strata Schemes Management Act 2015*.

The Court was satisfied that:

1. The application complied with all documentary and procedural requirements under s 179, including the provision of support notices, details of dissenting owners, financial disclosures by the developer, and valuation reports.

2. The single remaining dissenting owner (Lot 19) had been accounted for in the plan, and the proposed acquisition price exceeded its compensation value.

3. The commercial relationship between the owners and the developer did not prevent the plan from being prepared in good faith, there being no evidence of undue influence or impropriety.

4. Any minor procedural irregularities, such as non-posting of certain minutes on the noticeboard, did not cause substantial injustice and were excused under s 182(4A) of the SSD Act.

5. The amended plan was supported by sufficient and secure financing arrangements, evidenced by affidavits and financial documentation from Metrics Credit Partners Pty Ltd and NPACT Point Investments Pty Ltd.

HELD:

1. Leave granted to amend the Class 3 application to include the affidavits of Timothy John Price (25 March 2025), Maysaa Parrino (24 March 2025) with Exhibit MP-2, and Gregory John Turton (25 March 2025).

2. The strata renewal plan complied with s 179 of the Strata Schemes Development Act 2015.

3. Pursuant to ss 182(1) and (2) of the SSD Act, the Court ordered that the strata renewal plan, as varied, be given effect.

4. Pursuant to s 185(2) of the SSD Act, the owner of Lot 19, must sell her lot to the first respondent in accordance with the strata renewal plan and for the price of $1,400,000.

5. Pursuant to ss 183(1) and 185(3) of the SSD Act, Strata Plan No 934 is terminated on the date the first respondent becomes the registered proprietor of all lots.

6. Upon termination, and in accordance with ss 183(1) and 185(4) of the SSD Act:

7. The procedural steps taken in accordance with the SSD Act, including service of notices and obtaining support, were validly completed or excused under s 182(4A).

8. The amount offered to the dissenting owner (Lot 19) exceeded both the compensation value and the proportional share of proceeds.

9. The settlement terms under the plan were just and equitable in the circumstances.

Orders giving effect to the strata renewal plan made.

Reporter: Bamidele Emmanuel Akinyemi

(25-154) UPG 72 Pty Ltd v Blacktown City Council [2025] NSWLEC 29

Pepper J - 1 April 2025

Keywords: Compulsory acquisition - characterisation of public purpose - underlying hypothetical zoning - betterment - costs

The Respondent compulsorily acquired a 7000sqm portion of the Applicant's land pursuant to s 186(1) of the *Local Government Act 1993*. On the date of acquisition, the acquired land was zoned SP2 Local Drainage under the Growth Centres SEPP. The applicant objected to the amount of compensation offered by the Respondent (as determined by the Valuer-General in the amount of approximately $2.5 million) and commenced Class 3 proceedings pursuant to s 66 of the Just Terms Act.

While the Applicant sought compensation in the amount of over $7 million, Council contended for nil compensation.

The Applicant contended that in disregarding any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired pursuant to s 56(1)(a) of the Just Terms Act, the land would have been zoned R2 - Low Density Residential, resulting in a significant uplift in the market value of the acquired land. Council contended that the underlying zoning of the acquired land absent the public purpose would have been Rural or E2 Environmental Conservation. Providing drainage on the acquired land as part of the 'public purpose' would increase the development potential and value of the applicant's remaining land, entirely

offsetting any compensation otherwise payable under the Just Terms Act.

In determining the amount of compensation payable to the Applicant, the Court was required to consider:

1. What, specifically, was the 'public purpose' for which the land was acquired?

2. In the absence of the 'public purpose', was the acquired land's underlying zoning R2 (as contended by the Applicant) or E2 or Rural (as contended by the Respondent)?

3. Did the issue of 'betterment' under s 55(f) of the Just Terms Act arise in determining the market value of the acquired land.

The finalisation of the decision was delayed pending the Court of Appeal's decision in ***Goldmate Property Luddenham No 1 Pty Ltd v Transport for New South Wales*** **[2024] NSWCA 292** (*Goldmate*).

HELD:

1. Applying the Court's reasoning in *Goldmate*, the public purpose was limited to the particular drainage and Green and Golden Bell Frog habitat protection works being carried out on the acquired land and the two allotments to the west of the land, as depicted in the 2010 Riverstone DCP. The land was not acquired for the public purpose of the rezoning of the precincts identified in the Growth Centres SEPP or as part of the urban release of land in Western Sydney in 2004 and continuing, as contended for by the Respondent.

2. But for the public purpose, the acquired land would have been zoned E2 as alternatively contended for by Council.

3. Betterment under s 55(f) of the Just Terms Act did not arise on the facts in respect of the onsite stormwater detention works on Lot 30 (being land adjoining the acquired land that was also owned by UPG as at the date of acquisition). Accepting the Applicant's narrower formulation of the public purpose, the Riverstone Precinct would have been released with trunk drainage located on and adjacent to First Ponds Creek and Lot 30 would remain a temporary OSD basin with no increase in its value.

The Court determined compensation in the sum of $1,235,521.20 (comprised of $1,200,000 in market value and an agreed figure of $35,521.20 in disturbance), which was approximately $1 million less than the Valuer General's determination. However, because the amount of compensation determined was above that contended for by the Respondent during the proceedings, the Respondent was ordered to pay the Applicant's costs (subject to further submissions to the contrary).

Reporter: Chris Laksana

(25-155) Freemo Enterprises Pty Ltd v Hawkesbury City Council [2025] NSWLEC 36

Beasley J – 8 April 2025

Keywords: Development Control Order – right of appeal under s 8.18 of the EP&A Act – summary dismissal

The Hawkesbury City Council issued a Development Control Order (**DCO**) to Good Az Gold Pty Ltd, a tenant on premises owned by Freemo Enterprises Pty Ltd. The DCO comprised a Stop Use Order and a Restore Works Order, directing Good Az Gold to cease using the premises as a transport depot—a prohibited activity—and to restore the site to its prior condition after removing unauthorised landfill material.

Freemo, as the landowner, lodged a Class 1 appeal against the DCO under s 8.18 of the *Environmental Planning and Assessment Act 1979*, arguing that the order impacted its property rights and was ultra vires, among other things. The Council sought summary dismissal of the appeal under r 13.4 of the *Uniform Civil Procedure Rules 2005* (***UCPR***) which relates to frivolous and vexatious proceedings. Council contended that only the person "given" the DCO—in this case, Good Az Gold—had a statutory right of appeal under s 8.18.

Freemo acknowledged that the DCO was addressed to Good Az Gold but maintained it had standing as an affected party – the DCO on its face providing for an appeal right by "any other person affected by the Order". It further argued that the Council's DCO was ultra vires

and, in the alternative, sought that the proceedings be transferred to the Supreme Court pursuant to s 149B of the *Civil Procedure Act 2005*.

HELD:

1. Section 8.18 of the *EPA Act* limits the right of appeal to the person who is given the Development Control Order.

2. The DCO was given to Good Az Gold Pty Ltd, not Freemo Enterprises Pty Ltd, as confirmed by the order's wording and clause 4 of Part 4 of Schedule 5 of the *EPA Act*.

3. Freemo Enterprises Pty Ltd, as a non-recipient, lacked standing to appeal the order under s 8.18.

4. The proceedings were dismissed under r 13.4 of the *Uniform Civil Procedure Rules 2005* for disclosing no reasonable cause of action.

5. The proceedings having been dismissed, there was nothing to transfer. In any event, it would not have been appropriate to transfer these Class 1 proceedings to the Supreme Court.

Appeal dismissed with costs.

Reporter: Bamidele Emmanuel Akinyemi

(25-156) Hayward v Hornsby Shire Council (No 2) [2025] NSWLEC 37

Pain J – 16 April 2025

Keywords: Judicial Review – stop work order – class 4 proceedings – extension to commence proceedings – represented by Agent – amended summons – onus of proof

These Class 4 judicial review proceedings concerned a challenge to the validity of a stop work order issued by the Respondent on 4 December 2020 (SWO).

The originating summons was filed on 14 June 2024, more than three years outside the three-month time limit specified in r 59.10(1) of the UCPR. Accordingly, the Applicant sought an extension of time to rely on an amended summons.

The Applicant raised one ground of appeal challenging the validity of the SWO which comprised three parts:

1. that the Respondent did not have the factual foundation to issue the SWO as work was being carried out in accordance with an existing development consent;

2. the alleged contravention of the EPA Act could not be made out and the Respondent did not establish what work was being carried out outside the scope of the existing development consent;

3. a compliance order rather than a SWO should have been issued in circumstances where building work in contravention of a development consent is being carried out

HELD:

1. An extension of time to file the judicial review proceedings was warranted having regard to the Applicant's evidence that he was not aware he could seek judicial review proceedings until consulting with a duty lawyer at Court on an unspecified date and the accepted lack of prejudice to the Respondent.

2. The plain terms of the SWO were clear and could be determined objectively. The Applicant bears bore the onus of establishing the SWO lacks a factual or lawful basis which he did not discharge.

3. Events which pre-date the issue of the notice of intention to issue an order are irrelevant to consider in terms of UCPR r 59.10. The Respondent complied with the procedural requirements in Schedule 5 of the EPA Act.

4. A contravention of the EPA Act referenced in Schedule 5 includes the carrying out of a development for which consent has been obtained but which is carried out otherwise in accordance with the consent as referred to in s. 4.2(1)(b).

Leave granted to file amended summons out of time, appeal dismissed, costs reserved.

Reporter: Isabelle Alder

(25-157) Secretary, Department of Planning, Industry and Environment v Balmoral Farms Pty Ltd [2025] NSWLEC 40

Pritchard J – 2 May 2025

Keywords: Procedural ruling on admissibility of evidence – objection to certificate issued under s 60F(5) of the *Local Land Services Act 2013* – validity and delegation for issue of certificate

These Class 5 proceedings concern six separate offences brought by the Secretary, Department of Planning, Industry and Environment in relation to alleged unlawful clearing of native vegetation at properties known as "Corombie" and "Balmoral", near Walgett in the central north of NSW. Five offences were under s 12 of the *Native Vegetation Act 2003*, and one under s 60N of the *Local Land Services Act 2013* (**LLS Act**).

The Prosecutor sought to adduce evidence in the form of a s 60F(5) certificate (**Certificate**) issued by a director of the Environment Protection Agency in 2020 (**Director**). The Defendant objected to the admissibility of the Certificate on two bases; firstly, the director who issued the Certificate did not have the required delegation to issue it; and secondly, the Certificate was invalidly issued.

The Defendant argued that, in relation to the first ground, the Certificate had been issued without evidence of the Director's delegation authorising him to do so being expressly included within the Certificate itself. In relation to the second ground, the Defendant argued that on the proper construction of relevant provisions in the LSS Act concerning the content of such a Certificate, it had been issued without the Director having the reasonable belief about the presence of certain mapped native vegetation on the subject properties. On that basis, the Defendant argued that the Certificate had been invalidly issued.

HELD:

1. The subsequent tender of an instrument of delegation concerning the Director's powers led the Defendant to concede that the first ground could not be maintained. The Court agreed that this concession was appropriate and that the Director did have delegation to issue the Certificate.
2. None of the matters raised by the Defendant concerning the reasons and conclusions of the Certificate, the authorship and timing of the review referred to in the Certificate, the timing and authorship of the maps attached to the Certificate, or any other alleged conventional judicial review elements established a basis to impugn the validity of the Certificate. Accordingly, the Certificate was validly issued.

The Defendant's objection was dismissed. No order was made regarding costs.

Reporter: Peter Clarke

(25-158) Burwood Council v Dai [2025] NSWLEC 43

Beasley J – 7 May 2025

Keywords: Class 4 application - failure to comply with Development Control Orders (DCO) – failure to obtain development consent for the erection of a dwelling – heritage listed property – demolition order

The Applicant commenced Class 4 civil enforcement proceedings seeking a declaration that the Respondent failed to comply with a DCO, thereby in breach of s 9.37 of the *Environmental Planning and Assessment Act 1979*. A consequential order was also sought under s 9.46(2)(b) of the EPA Act for the demolition of a "shed-like" structure located on the north-eastern boundary of the Respondent's at 36 Oxford Street, Burwood (the **Property**).

The Applicant sought the following relief:

1. a declaration that the Respondent had failed to comply with DCO No.3 (provided 29 March 2023), which required the demolition of the "shed-like" structure;
2. an order to demolish the said building as required by the DCO (within 56 days of the date of the order);
3. an order for the Respondent to engage a suitably qualified person to demolish the structure at the north-eastern boundary, remove the roof sheeting and screening that was fixed to the boundary fence

and ensure that all demolished materials were removed and lawfully disposed of;

4. an order requiring the Respondent to provide written notice of the suitably qualified person to undertake the removal works; and

5. an order requiring proof of disposal of the material through receipts of tipping fees.

The Property had been owned by the Respondent and Wen Jian Zhang since 2002. The building the subject of the DCO was used for residential purposes.

The Respondent failed to appear before the Court on multiple occasions. The proceedings were ultimately listed for hearing on 5 May 2025. On 26 April 2025, the Court received correspondence from the Respondent indicating that he was "sick" and would be unable to attend the hearing, with a purported "medical certificate" verifying "multiple medical conditions".

Beasley J ultimately rejected the request to vacate the hearing date of 5 May 2025. Subsequently, the Respondent did not appear at the final hearing. The Applicant tendered expert evidence from a structural engineer which identified several structural deficiencies in the additions to the building carried out by the Respondent. The Applicant also relied on affidavit evidence from a building surveyor and a community safety officer to the effect that the unlawful building additions were dangerous and posed safety risks.

HELD:

1. Beasley J was satisfied that:

   a) the building was development requiring development consent and that no such consent had been sought or obtained in breach of s 4.2(1) of the EPA Act;

   b) there was no compliance with the DCO, constituting a breach of s 9.35(1) of the EPA Act.

2. Beasley J granted the relief identified at (1)-(5) above and ordered the Respondent to pay the Applicant's costs. Beasley J agreed that the building itself represented a "serious threat to the safety of occupants" and to the occupants of the adjoining land.

Reporter: William Hadwen

(25-159) Malass v Strathfield Municipal Council [2025] NSWLEC 44

Pain J – 9 May 2025

Keywords: notice of motion seeking dismissal of Class 1 application for abuse of process – similar development application to refused application

The Respondent filed a notice of motion seeking to have Class 1 proceedings dismissed as an abuse of process because the refused development application that was the subject of the Class 1 appeal was virtually the same as an earlier development application which had been refused by the Court.

The parties agreed that the quantitative differences between the present application and the earlier application were minor.

The Respondent contended an abuse of process as the development applications were virtually the same, there were no factual or statutory change in circumstances to justify relitigation, and the Respondent would suffer prejudice and loss in dealing with the same application again.

The Applicant contended that the Respondent bore a heavy onus to establish an abuse of process and that the issues in dispute could be distinguished from the earlier proceedings.

HELD:

1. The Respondent bears a heavy onus of establishing an abuse of process and the Court's powers to grant a permanent stay of proceedings are only to be exercised in exceptional circumstances.

2. The earlier Class 1 appeal was refused on the basis of the clause 4.6 variation. The new development did not require a clause 4.6 variation. As a result, there were potential or different issues not already considered that could arise in the new proceedings.

3. The overall history of litigation was not a relevant factor for enlivening the statutory right of appeal of the refusal of a development application.

4. The Class 1 appeal was not an abuse of process.

Notice of Motion dismissed. Costs reserved.

Reporter: Serafina Carrington and Nina Whatmough

(25-160) Edwards Pension Fund Pty Ltd v Wingecarribee Shire Council [2025] NSWLEC 46

Pritchard J – 13 May 2025

Keywords: s 56A Appeal– characterisation – purpose of development – water storage and use – light industry

This s.56A LEC Act appeal was brought against the decision of Gray C in the Court below to refuse a development application which sought consent for the extraction, piping, filtration, storage and transport of groundwater.

The primary issue in the Court at first instance was the characterisation of the proposed development. The Appellants submitted that the development was for the permissible purpose of a 'water reticulation system', pursuant to s. 2.161 of the Infrastructure SEPP or a 'water storage facility' which was a nominated permissible use under the applicable LEP. The Commissioner, agreeing with the Respondent, found that the proposal was for the purposes of light industry, which was a prohibited use.

The Appellants raised seven grounds of appeal relating to the proper characterisation of the development, errors in relation to the characterisation process, and procedural fairness.

In terms of characterisation, the Appellants argued that the Commissioner incorrectly found that the development was not for a water reticulation system, because it was not the end purpose of the system. The Appellant contended such a use fell within the permissible LEP definition of 'water supply system', or within the paramount definition in the Infrastructure SEPP. The Respondent submitted that the Appellant's real complaint was simply that the Commissioner did not characterise the proposed development as a 'water reticulation system'.

The Appellants contended that the Commissioner erred in characterising the development as 'light industry' by determining it included the production of extracted groundwater that can be made suitable for consumption. However, the nominated ancillary uses were not separated sufficiently to conclude otherwise.

In terms of transient storage, the Commissioner found that the storage of water was so transient that it formed a different purpose (than water storage). The Commissioner did not explain how 'transient' differed from 'temporary', or how that was contemplated by the definition of 'water storage facility'. There was no time specified as to 'temporary'. The Appellants also contended that there was no evidence specifically provided in relation to how long the water would be stored, but it could be inferred that it was stored for blocks of time. The Respondent contended that no error was raised.

In relation to procedural fairness, the Appellant contended that the Commissioner did not raise the issue of extraction and transportation as an aspect of characterisation of the development. They ought to have been provided with an opportunity to address this. The Respondent contended that it had been raised.

HELD:

1. The effect of s 2.161 of the Infrastructure SEPP was to permit development for the purpose of a 'water reticulation system' in prescribed zones, despite what the applicable LEP provided. A 'water reticulation system' was a specific use, and its definition did not render otherwise prohibited development permissible for other uses (such as industry or for a water treatment facility).

2. The Appellants did not identify any error of law in relation to the Commissioner's findings that the development exceeded what would be a 'water reticulation system.' In any event, the site was not in a prescribed zone as required by s.2.161 of the Infrastructure SEPP, and therefore the 'water reticulation system' use was not permissible on the land where the development was proposed.

3. The Commissioner determined that the transient nature of water storage related to a different purpose (not storage), namely, extraction and production of water. The appellants failed to raise any error of law in relation to the duration of storage of water on site.

4. The Commissioner did not make any error of law in finding that whilst the development included water reticulation, the scope of the definition of 'water reticulation system' did not extend to the export of water from site.

5. The proposed use of the extracted water, which was to be subject to filtration and disinfection on site and transported, falls within the definition of 'industrial activity.' The use of the water for commercial purposes, following transportation off site, was relevant to characterisation of the proposed development.

6. There was no requirement in the definition of 'industrial activity' that the product produced on site have no further alteration or process. There was no error of law in finding the development prohibited in the applicable zone.

7. The written and oral submissions did in fact raise the matters to which the Appellant says it was not afforded an opportunity to respond to.

Appeal dismissed with costs.

Reporter: Serafina Carrington

(25-161) Secretary, Department of Planning, Industry and Environment v JP & LR Harris Pty Ltd; Secretary, Department of Planning, Industry and Environment v Woolondoon Pty Ltd [2025] NSWLEC 47

Pritchard J – 14 May 2025

Keywords: Procedural ruling – hearsay rule – consent of defendants – dispending with hearsay rule

This judgment set out the reasons for a procedural ruling in Class 5 criminal proceedings concerning two offences under section 60N of the ***Local Land Services Act 2013*** (**LLS Act**) for the clearing of native vegetation. Relevantly, case management orders had been made in two related sets of proceedings concerning 14 related offences for the clearing of native vegetation under the ***LLS Act*** and the ***Native Vegetation Act 2003*** to be set down for three separate and consecutive hearings.

The Prosecutor sought orders pursuant to section 190 of the ***Evidence Act 1995*** to dispense with the hearsay rule to allow evidence heard in the first set of proceedings to become evidence in these second set of proceedings. Specifically, the Prosecutor sought to rely on the evidence (oral and affidavit) of five witnesses. The majority of the affidavit evidence had been admitted in the first set of proceedings without objection, however there were limitations on the admission of one affidavit. Subject to the transcripts of cross-examination of the relevant witnesses also being tendered, the Defendant consented to orders being made dispensing with the hearsay rule on the advice of its legal representatives, as required by section 190(2) of the ***Evidence Act 1995***.

HELD:

1. The phrase "not admissible" in section 59 of the ***Evidence Act 1995*** should be understood to be "not admissible over objection". In circumstances where the Defendant's consent to dispensing with the hearsay rule had been provided in accordance with advice from their legal practitioners, it was open and appropriate for the Court to make an order in accordance with section 190 of the ***Evidence Act 1995***.

2. It was appropriate to make rulings in relation to objections made in the first set of proceedings on the same terms in this set of proceedings.

Orders made in accordance with section 190 of the ***Evidence Act 1995***.

Reporter: Phoebe Saxon

(25-162) Secretary, Department of Planning, Industry and Environment v JP & LR Harris Pty Ltd; Secretary, Department of Planning, Industry and Environment v Woolondoon Pty Ltd (No 2) [2025] NSWLEC 49

Pritchard J – 20 May 2025

Keywords: Procedural ruling – objection to admissibility of certificate under s 60F(5) of the *Local Land Services Act 2013* – following expiry of notice periods under ss 247K and 247N of the Criminal Procedure Act 1986 – application for voir dire

A relevant element of the charges in this proceeding under section 60N of the ***Local Land Services Act 2013*** (**LLS Act**) was that the alleged clearing was in a "regulated rural area". Here, the Defendant objected to the Prosecution tendering a certificate under section

60F(5) of the LLS Act which sought to establish the status of the relevant land (**60F Certificate**) and sought a voir dire under section 189 of the ***Evidence Act 1995***. In support of the Defendant's application for a voir dire, the Defendant filed an affidavit exhibiting an expert report after hours on the penultimate day of the Prosecution's case, after all of the Prosecution's witnesses had been called, cross-examined and excused.

The Court was required to determine whether there was sufficient basis to hold a voir dire and whether the 60F Certificate was admissible, considering it was filed during the hearing and no notice had been provided under section 247K or 247N of the ***Criminal Procedure Act 1986*** prior to the hearing.

HELD:

1. The basis for holding a voir dire in relation to the admissibility of the expert evidence is misconceived. The application of section 189 of the ***Evidence Act 1995*** turns on whether the determination of a question as to whether evidence should be admitted and depends on the court finding the existence of a "particular fact". Section 60F(5) of the ***LLS Act*** deems a certificate to be "prima facie evidence of the category of the land during the transitional period" and so there is no requirement for the Court to make a finding that a preliminary or "particular fact exists".

2. A defendant's right to a voir dire is not an unqualified right. There is a general requirement for counsel to articulate the grounds that form the basis of an objection or to seek some other procedural or discretionary ruling, acknowledging the right to a fair trial according to law.

3. The refusal to read the affidavit and exhibited expert report in this proceeding would not result in any relevant unfairness to the Defendant. The Defendant would not be prevented from seeking to adduce evidence in their own case relating to the relevant categorisation of land.

Defendant's application for a voir dire in relation to the admissibility of evidence refused.

Reporter: Phoebe Saxon

(25-163) Secretary, Department of Planning, Industry and Environment v JP & LR Harris Pty Ltd; Secretary, Department of Planning, Industry and Environment v Woolondoon Pty Ltd (No 3) [2025] NSWLEC 50

Pritchard J – 20 May 2025

Keywords: Procedural ruling – application to tender expert evidence – application to waive requirements for preliminary disclosure and case management

Following the delivery of judgment in *Secretary, **Department of Planning, Industry and Environment v JP & LR Harris Pty Ltd; Secretary, Department of Planning, Industry and Environment v Woolondoon Pty Ltd (No 2)*** **[2025] NSWLEC 49 (JP & LR Harris No 2**) dismissing the Defendant's application for a voir dire on the admissibility of an affidavit and expert report exhibited to that affidavit, the Defendant sought leave pursuant to section 247P of the ***Criminal Procedure Act 1986*** to waive requirements for preliminary disclosure and case management measures and read the affidavit and tender the expert report exhibited to the affidavit as evidence in its case. Relevantly, the affidavit and expert report for which the Defendant sought leave addressed the validity of a certificate under section 60F of the ***Local Land Services Act 2013*** (**60F Certificate**) which was tendered by the Prosecution.

As outlined in the judgment in ***JP & Harris No 2***, despite the Prosecution having filed notice pursuant to section 247E of the ***Criminal Procedure Act 1986*** stating its reliance on the certificate under 60F Certificate four years prior to the hearing, the Defendant instructed the relevant expert on the first day of the hearing and sought to tender the affidavit and exhibit after hours on the penultimate day of the Prosecution concluding its case.

HELD:

1. In the absence of disclosure or notice being provided by the Defendant in accordance with section 247K of the ***Criminal Procedure Act 1986***, it was not in the interests of justice for leave to be granted to rely on the affidavit and expert report served in circumstances where the Prosecutor's expert evidence had already been led and cross-examined upon.

2. Case management provisions in Division 2A of the ***Criminal Procedure Act 1986*** ensure that both the Prosecutor and Defendant have sufficient opportunity to consider the other party's intention to adduce expert evidence at the hearing. The serving of evidence at this stage of the hearing would deny the Prosecutor the opportunity to respond to it.

3. Any potential prejudice to the Defendant resulting from denying the opportunity to tender expert evidence was lessened in circumstances where the Defendant's cross-examination of the Prosecution's witnesses adduced concessions or admissions in relation to the reliability of the 60F Certificate the subject of the objection.

Leave not granted. Defendant's application unsuccessful.

Reporter: Phoebe Saxon

(25-164) Secretary, Department of Planning and Environment v Aerotropolis Pty Ltd [2025] NSWLEC 48

Robson J – 19 May 2025

Keywords: Environmental offences – prosecution where defendant did not appear in Court – defendant in liquidation - 20 charges concerning clearing of native vegetation – offences of harming or picking plants and damaging habitat of threatened species, endangered species or endangered ecological communities – required development consent not obtained

The Defendant was charged with 20 offences against the ***National Parks and Wildlife Act 1974*** (NPW Act) and the ***Biodiversity Conservation Act 2016*** (BC Act) relating to alleged clearing of native vegetation from a property in Bringelly. The offending was alleged to have occurred across seven charge periods between 10 April 2016 and 28 May 2020.

The charges fell into three broad categories:

1. Harming or picking plants, namely the critically endangered ecological community (EEC) Cumberland Plain Woodland in the Sydney Basin Bioregion (CPW);

2. Damaging the habitat of an EEC, namely CPW;

3. Damaging the habitat of a threatened species, the Cumberland Plain land snail, by destruction of its primary habitat, CPW.

The Prosecutor alleged that 36.8ha of CPW was cleared by an employee of the Defendant, Mr Amjah, under direction from a director of the Defendant, Mr Varghese. The subject property was owned by another subsidiary company of the parent company of the Defendant. The evidence showed that Mr Varghese (who was also a director of the parent company) sought to develop the property as a "World Trade Centre" and was pursuing a State significant development application.

The Defendant had taken an active role in the proceedings, including filing a notice of motion in the LEC seeking orders that each of the proceedings were commenced out of time (which was dismissed); appealing to the Court of Criminal Appeal (appeal dismissed); and seeking special leave to appeal to the High Court (leave refused).

On 19 August 2024, a liquidator was appointed as part of voluntary winding up of the Defendant, due to the Defendant being unable to pay its creditors in full. The liquidator did not take further part in the proceedings or defend the charges on the Defendant's behalf at the hearing on 17 December 2024.

The Court heard the charges together, given their factual commonality, before considering each charge separately with regard to the relevant statutory framework, elements and evidence.

The Prosecutor relied upon extensive expert and lay evidence, including expert remote sensing and ecological evidence establishing the timing, amount and kind of vegetation cleared and the impacts. Lengthy email correspondence, primarily between Mr Varghese and Mr Amjah, was adduced to demonstrate the directions given regularly by the former to the latter to conduct the clearing by tractor, bulldozer and/or by slashing native groundcover. Admissions were made by Mr Amjah in one of multiple directed records of interview conducted under the BC Act with Mr Amjah and Mr Varghese. Mr Varghese visited the property from time to time and viewed the clearing progress.

The Court considered possible defences under the NPW Act and BC Act in the Defendant's absence, including whether any defence could arise from the Defendant's various responses to the investigator.

HELD:

1. Leave not required to continue a criminal prosecution against a company that is being wound up voluntarily (citing various first-instance decisions).

2. Leave was granted to amend three of the charge dates in line with expert evidence interpreting aerial imagery.

3. The Defendant was found guilty of all 20 offences as charged, by either direct or vicarious liability. The Defendant undertook clearing of an EEC, namely CPW, over a total period of more than four years, causing damage to the habitat of the CPW and the land snail. The evidence established the factual background as set out in detail in the judgement.

4. In addition to deemed knowledge under the statutory provisions, the Defendant had actual knowledge, through the knowledge of either its director, Mr Amjah, or its employee, Mr Varghese, that the vegetation to be cleared was native vegetation.

5. The clearing was not authorised by any licence, certificate, development consent or relevant legislation.

6. No defence was, nor could have been, made out under the NPW Act or BC Act, based on the records of interview, email communications and written responses to investigators.

Proceedings stood over to 23 May 2025 for directions in relation to sentencing.

Reporter: Georgie Cooper

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