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Homeworld Ballina Pty Limited v Ballina Shire Council & Anor [2009] NSWLEC 172 (9 October 2009)

Last Updated: 9 October 2009

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Homeworld Ballina Pty Limited v Ballina Shire Council &
Anor [2009] NSWLEC 172

PARTIES: APPLICANT Homeworld Ballina Pty Limited FIRST
RESPONDENT Ballina Shire Council SECOND RESPONDENT Minister
for Planning

FILE NUMBER(S): 40098 of 2009

CATCHWORDS: INJUNCTIONS AND DECLARATIONS :- Exhibition
of draft amendments to environmental planning instruments - allegation
that exhibiton and subsequent amendments invalidated by misleading
information - test to be applied

LEGISLATION CITED: [Local Government Act 1993](#) [Environmental
Planning and Assessment Act 1979](#) Ballina Local Environmental Plan 1987

CASES CITED: Canterbury District Residents and Ratepayers Association
Inc v Canterbury Municipal Council [\(1991\) 73 LGRA 317](#) Castle

Constructions Pty Limited v North Sydney Council & Anor ([2008](#))
[NSWLEC 137](#) Coles Supermarkets Australia Pty Ltd v Minister for Urban
Affairs and Planning ([1996](#)) [90 LGERA 341](#) El Cheikh v Hurstville City
Council [[2002](#)] [NSWCA 173](#); ([2002](#)) [121 LGERA 293](#) Gales Holdings Pty
Ltd v Minister for Infrastructure and Planning [[2006](#)] [NSWCA 388](#);
[\(2006\) 69 NSWLR 156](#) Litevale Pty Ltd v Lismore City Council ([1997](#)) [96](#)
[LGERA 91](#) Smith v Wyong Shire Council [[2003](#)] [NSWCA 322](#); ([2003](#))
[132 LGERA 148](#) Vanmeld Pty Ltd v Fairfield City Council [[1999](#)]
[NSWCA 6](#); ([1999](#)) [46 NSWLR 78](#)

CORAM: Sheahan J

DATES OF HEARING: 26 and 27 May 2009

JUDGMENT DATE: 9 October 2009

LEGAL REPRESENTATIVES

APPLICANT Mr C J Leggat SC SOLICITOR S Shaw Reynolds Bowen &
Gerathy

FIRST RESPONDENT Mr Malcolm Craig QC SOLICITORS Allens Arthur
Robinson

SECOND RESPONDENTS Submitting appearance filed

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Sheahan J

9 October 2009

**40098 of 2009 Homeworld Ballina Pty Limited v Ballina Shire Council
and Minister for Planning**

JUDGMENT

Introduction

1 **His Honour:** These Class 4 proceedings seek declarations that the December 2004 draft of Amendment No.95 to the Ballina Local Environmental Plan 1987 (“LEP”), as exhibited, was misleading and is, therefore, invalid; and that the amended plan, as made, is void and of no effect.

2 The proceedings were commenced against both the Council and the Minister, but the Minister has filed a submitting appearance save as to costs.

3 From 18 December 2004 until 28 January 2005 the Council exhibited the draft of Amendment No.95, along with other relevant documents and information. The applicant’s case is that the exhibited documents and information were misleading in that they presented a false description of the effect of the proposed amendment, which was the rezoning of some land zoned 1(b) Rural (Secondary Agricultural Land) in the “*Southern Cross Industrial Estate*”.

4 The subject land was freehold, owned by Council, and classified under the [Local Government Act 1993](#) as “*operational*”, and the Council says that, properly read and understood, the exhibited materials made clear that 15.7ha of the land affected by the amendment would be rezoned Zone 4 Industrial, and approx 11ha Zone 7(a) Environmental Protection (wetlands).

5 This matter concerns the possible uses of the area of land rezoned “4 – *Industrial*”. The “*misleading*” alleged by the applicant is said to arise by an “*omission*” from the exhibited materials, in that they essentially said (only) that the amendment aimed “*to rezone land for industrial purposes and environmental protection*”, whereas the true effect of the amendment was that it would rezone the affected land for those two purposes **plus** bulky goods retailing.

6 It is common ground that five substantial documents were placed on exhibition. What I shall call the “*primary document*”, containing draft

Amendment No.95 and a proposed related amendment (Amendment No.76) to Draft Ballina Development Control Plan No.1 – Urban Land (“the DCP”), is a document of 36 pages (*Exhibit H1*, tab 1) of which the amendments comprised two pages and one page respectively (pp17-18, and 29). Its cover page bore the following markings:

“PUBLIC EXHIBITION

Expires 28 January 2005

(logo of Ballina Shire Council)

Draft

Ballina Local Environmental Plan 1987

(Amendment No. 95)

Draft

Ballina Development Control Plan No.1 – Urban Land

(Amendment No. 76)

Expansion of Southern Cross Industrial Estate,

North Creek Road, Ballina”

7 The second document exhibited (*Exhibit H1*, tab 2) bore the Council logo and was clearly identified as a “*draft*” of a document entitled “*Industrial land in Ballina Shire 2003*” and as “*Part of the PUBLIC EXHIBITION material*” for the two Draft Amendments. The cover page also bore the subtitle “*Expansion of Southern Cross Industrial Estate, North Creek Road, Ballina*”. It comprised 47 pages. (The “*land audit*”).

8 The third document (much of which is in *Exhibit H1*, tab 3) is known as the Maunsell report on “*Southern Cross Industrial Estate*” (“*the Maunsell Report*”). Its cover page bears the same endorsement as “*Part of the PUBLIC EXHIBITION Material*” for the amendments. (The last of 121 pages in tab 3 of the exhibit is the cover page for “*Appendix D: Strategic*”).

Cost Estimates”, but the court assumes the whole report was exhibited).

9 The fourth and fifth exhibited documents were respectively the Ballina LEP 1987, (as it also stood in December 2004), and the Ballina DCP No.1 (as it stood in December 2004). (See tabs 8 & 9 of *Exhibit H1*).

10 On 20 November 2006, the Council resolved (inter alia):

(a) to adopt draft Amendment 95 of the LEP as exhibited, with minor adjustments to the western and southern boundaries of the proposed Environmental Protection Zone,

(b) to request the Department to finalise the draft amending LEP for the Minister’s approval, and

(c) to amend the DCP by designating the area to be rezoned as “*category I 2 – general industry*”, and

(d) that that amendment to the DCP would take effect upon notification of the amended LEP in the Government Gazette.

11 The Minister made the amending plan on 20 July 2007. The applicant complains that the effect of this was to enable the subject land to be used for bulky good retailing purposes, and that this outcome was at variance with the exhibited documents, as presented.

12 These proceedings were not commenced until 16 February 2009.

The dispute

13 The applicant contends that the Council failed to follow the requirements of s66(1) of the *Environmental Planning and Assessment Act* 1979 (“*EPA Act*”) as it then stood, and that Council’s breach of that provision means the Minister had no power to make the amendment he made. *El Cheikh v Hurstville City Council* (“*El Cheikh*”) [\[2002\] NSWCA 173](#); [\(2002\) 121 LGERA 293](#), at [3].

14 Section 66(1) of the *EPA Act* then relevantly provided as follows:

“*Public exhibition of draft local environmental plan*

(1) Where a council receives a certificate under section 65 with respect to a draft local environmental plan, it shall, after complying with any condition subject to which the certificate was granted and subject to the regulations:

(a) give public notice, in a form and manner determined by the council, of the place at which, the dates on which, and the times during which, the environmental study prepared by the council under section 57 of the land to which the draft local environmental plan applies and the draft local environmental plan may be inspected by the public,

(b) publicly exhibit at the place, on the dates and during the times set out in the notice:

(i) a copy of that environmental study and draft local environmental plan,

(ii) a copy of any standard instrument, environmental planning instrument or direction under section 117 that substantially governs the content and operation of the draft local environmental plan (or provide for access to such a copy), and

(iii) a statement to the effect that any such standard instrument, environmental planning instrument or direction substantially governs the content and operation of the draft local environmental plan and that any submissions made pursuant to section 67 should be made having regard to that fact,

(c) specify, in the notice, the period (being a period which is or includes the period referred to in subsection (2)) during which submissions may be made to the council in accordance with section 67, and

*(d) **publicly exhibit such other matter as it considers appropriate or necessary to better enable the draft plan and its implications to be understood.***” (my emphasis).

15 At the hearing the applicant’s challenge to the exhibition process focussed only on s66(1)(d), the adequacy of the exhibited materials to satisfy the purpose of the provision, notably enabling a proper understanding of the “*draft plan and its implications*”. Clearly, it is

conceded that proper public notice was given, in compliance with subsections (1)(a), (b) and (c). Many of the leading authorities deal with alleged breaches of (a) or (b), rather than of (c) or (d).

16 The Council denies that the effect of the amendment was at variance with the exhibited documents, and/or that any part of the exhibition process was misleading. At the hearing the Council, through its counsel, Mr M Craig QC, abandoned those of its Points of Defence which relied on s35 of the *EPA Act* (which requires proceedings like these to be commenced within three months of the amendment), and/or on laches, delay, or discretion. (T26.5.09, p6, LL30-45).

17 Mr Craig relied heavily on the Court of Appeal decision in *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* (“*Gales*”) (2006) 69 NSWCA 156, in which Beazley and Basten JJA concurred in all relevant respects with Tobias JA, who adopted the concept of the “*reasonable*” reader of exhibited documents, a concept which had earlier found favour, for example, with Pearlman ChJ and Stein J. See *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning* (“*Coles*”) ([1996](#)) [90 LGERA 341](#), at 357, and *Canterbury District Residents and Ratepayers Association Inc v Canterbury Municipal Council* (“*Canterbury*”) ([1991](#)) [73 LGRA 317](#) (at 321). That reader would be interested enough to attend the exhibition, but cannot be presumed to have any real, prior knowledge of planning law or the relevant provisions of the LEP. In *Gales*, Tobias JA (at [107]) stated the relevant question as:

“*Would a reasonable reader, without knowledge of planning law or an understanding of the rules of statutory interpretation, have been confused and possibly misled by*” what appears in the exhibited materials?

18 Mr C Leggat SC, for the applicant in this matter, pinned his case most closely on the judgment of Lloyd J in *Castle Constructions Pty Limited v North Sydney Council & Anor* (“*Castle Constructions*”) ([2008](#)) [NSWLEC 137](#), rather than on *Gales*. Mr Leggat submitted that the appropriate test is whether “*there is any possibility that somebody might have been misled*” (per Lloyd J at [105], my emphasis), rather than a “*reasonable reader*”.

19 I shall now turn my attention to the relevant documents, and the arguments put to the court during its examination of them.

What did the LEP provide before amendment?

20 The LEP as amended up to 26 November 2004 was on exhibition with the draft amendment (*Exhibit H1*, tab 8). It contains a lengthy, explanatory chart setting out the history of all amendments made to it up to and including number “96 *Expansion of Southern Cross Industrial Estate*”. Amendment No.84 in the chart refers to “*Permit bulky goods retailing on expended (sic) Super A-Mart site*”.

21 Mr Leggat points out that this chart, unlike the exhibited amendment, specifically informs the public that the Council intended to accommodate bulky goods retailing, but, on Mr Leggat’s own argument, the court should not expect the reasonable reader to dig into the LEP to that degree of depth, to draw such a conclusion.

22 The relevant provisions of the LEP regarding Zone 4 are set out at p28 (fol 255):

“1 *Objectives of zone*

A The primary objectives are:

(a) to regulate the subdivision and use of land to permit its use for industrial purposes and other uses specified in clause 27 and Schedule 3,

(b) to allow detailed provision to be made, by means of a development control plan, to set aside specific areas within the zone for different industry types and intensities of development, and

(c) to ensure industrial development creates areas which are pleasant to work in, safe and efficient in terms of transportation, land utilization and service distribution.

B The exception to these objectives is development of land within the zone for public works and services, outside the parameters specified in the primary objectives.

2 *Without development consent*

Nil.

3 Only with development consent

Any purpose other than a purpose specified in item 4.

4 Advertised development—only with development consent

Advertising structures; caravan parks; commercial premises (other than those used in conjunction with an industry and situated on the same land as the industry or referred to in clause 27 or Schedule 3); mineral sand mining; mines; offensive or hazardous industries; recreation vehicle areas; residential buildings (other than those used in conjunction with an industry and situated on the same land as the industry); shops (other than those referred to in clause 27 or Schedule 3); stock and saleyards.

5 Prohibited development

Nil.”

23 The provision for “*Advertised development*” draws attention to cl 27 and Schedule 3 of the LEP.

24 Clause 27 is one of the “*special provisions*” which appear in Part 3 of the LEP (commencing at p40/fo1 267). Clause 27 (p47/fo1 274) is headed “*Retailing of bulky goods within Zone No. 4 and on land referred to in Schedule 4*” and provides as follows:

“(1) This clause applies to land within Zone No 4 and land referred to in Schedule 4.

(2) In this clause, ‘bulky goods’ means large goods which are, in the opinion of the council, of such a size and shape as to require:

(a) a large area for handling, storage or display, and

(b) easy and direct vehicular access to enable the goods to be collected by customers after sale.

(3) Subject to subclauses (4) and (5), nothing in this plan shall prevent a person, with the consent of the council, from carrying out development for the purposes of the retail sale of bulky goods on land to which this clause

applies.

(4) The council shall not consent to an application to carry out development referred to in subclause (3) unless it is satisfied that:

(a) suitable land for the development is not available in any nearby business centre,

(b) to grant consent would not, by reason of the number of retail outlets which exist or are proposed on land within Zone No 4, alter the predominantly industrial nature of the zone, and

(c) the proposed development will not detrimentally affect the viability of any business centre.

(5) This clause does not apply to development for the purposes of shops selling food or clothing or development for the purposes of produce stores.”

25 Schedule 3 appears at p58/fol 285, and specifies the following uses:

“Newsagency.

Shops used for the sale of:

Hardware,

Medical and surgical supplies and equipment,

Smallgoods and sandwiches.

Other premises used for:

Banking facilities,

Brothels,

Accounting and computing facilities,

Refreshment rooms.

Any other use which closely resembles a use identified above.”

26 Schedule 4 is called up by the provisions of cl 27, and lists only the following land (p58./fol 285):

“Lots 4–6, DP 419544, Lots 6–9, DP 608693 and Lots 4, 5 and 8, DP 239023, being adjacent to Bentinck Street, Kerr Street or Burnet Street, Ballina.”

What did the DCP provide before amendment?

27 The relevant part (Part 3) of the DCP was also exhibited (*Exhibit H1*, tab 9). It is a compilation of “*Control Plan Areas (Summary Tables)*” as they occurred under the DCP (fols 288-307). Control Plan Area “I 2” appears at p16 (fol 303).

28 The preferred land uses for “I 2” land are listed as: “*Light industry, general industry, showrooms and other businesses which require relatively large indoor or outdoor display and sales areas*”.

29 The objectives stated for the control plan area “I 2” are as follows:

“To encourage the establishment and expansion of general industries, service trades and selected retail and commercial activities in accessible locations reasonably separated from existing and proposed living areas.

To provide a range of allotment sizes within Industrial Estates to accommodate different industrial needs”.

30 Mr Leggat points out that there is no reference, in terms, to “*bulky goods*”. He also points out the limited provision for parking in respect of warehouses and factories compared to Control Plan Area C2, which had preferred land uses of “*retail, commercial, community and residential activities of a district scale*” – 1.3 spaces per 100 square metres compared with 4.4 spaces.

The draft amendments exhibited and explained

31 The primary document exhibited (*Exhibit H1*, tab 1 – see also [6] above) begins (on p2) with an index, which indicates, as noted above, that

the draft amendments to the LEP and the DCP appear, respectively, at pp17-18 and 29.

32 On p3 of the document, under the heading “1.0 Background”, the first section, entitled “1.1 Rezoning Context”, states:

“Ballina Shire Council has been the main supplier of industrial land in the Shire through the incremental development of the Southern Cross Industrial Estate in Ballina and the Russellton Industrial Estate in Alstonville. While these estates still have substantial supplies of undeveloped zoned industrial land available, it has been recognised that there needs to be long term planning undertaken for the provision of additional industrial land.

Council undertook the Ballina Shire Industrial Land Audit in 2003 that examined existing industrial land supplies, demand and expansion constraints and opportunities. This audit demonstrated the need to plan for further industrial land releases. It also identified the expansion of Southern Cross Industrial Estate, to the north east between the North Creek Road and the Airport, as the most suitable location for the provision of such additional industrial land. This land is physically suitable, generally isolated from non-industrial uses, can be economically serviced and further contributes to the financial viability of the Southern Cross Industrial Estate.

There is presently an undeveloped area of 13 hectares zoned for industrial use on the north eastern side of the Southern Cross Industrial Estate. It was seen as essential that the development of this land be planned in conjunction with the adjoining area that is proposed to be rezoned for industry purposes and which will satisfy demand in the longer term. Such a strategy will:

- Facilitate the efficient planning of services· Ensure that long term expansion options are not compromised· Ensure that supplies of industrial land are available to meet demand recognising the significant lead times in development.*

With this in mind, Council engaged Maunsell Pty Ltd to undertake a structure plan and concept design for the identified expansion area based

on detailed studies of physical, environmental, engineering and legal constraints. The draft plan is based on the work emanating from the Maunsell Report.”

33 Mr Leggat points out that bulky goods are not referred to at all in s 1.1, but Mr Craig draws attention to the economicality point (at the end of par 2 of s1.1), and to the reference to the Maunsell study.

34 At p5 of the primary document there is a short section (s1.3) on bulky goods retailing in the following terms:

“The recently adopted Ballina Shire Retail strategy identifies Southern Cross Industrial Estate as an option for the establishment of a bulky goods retail precinct. A more recent study suggests the long term land needed for such a use could be between 10 and 16 hectares. Further investigations and consideration will, however, need to be given to the suitability of such a precinct in Southern Cross Industrial Estate.”

35 Mr Leggat submits that s1.3 establishes that bulky goods is an option for “*further thought*” in the future (written submissions, par 17), not as a subject matter of the exhibition process and/or of the proposal exhibited.

36 Section 1.4 (on p6) deals with the Maunsell Report in the following terms:

“Building on the Industrial Land Audit, Council’s Land development Committee engaged Maunsell Australia Pty Ltd to prepare a report on the options and constraints for the development and expansion of the Southern Cross Industrial Estate on adjoining land in Council’s ownership. The aim was to provide a short term development plan for the existing zoned land in the context of a longer term expansion plan. It was seen as important that development of the existing industrial zoned land be designed so it does not compromise future expansion options. This report was finalised in March 2004 and contains 4 lot layout options for the same general study area comprising an area of some 45 hectares.

The preferred Option 4 of the Maunsell Report recommends that the 10 hectare area of dense natural vegetation fronting Southern Cross Drive adjacent to the Airport be zoned for environmental protection. A further

8.2 hectares area to the north east, that contains areas of native vegetation interspersed with grazing land, is acknowledged as appearing to have some potential for industrial use. It is considered that this area would need to be further investigated at some point in the future when industrial land supplies become depleted to ascertain this potential.

The remaining land within the study area is identified as being generally suitable for industrial use.”

37 Mr Craig relies on the section following s1.4, namely s1.5, and particularly the following comments:

“Council’s Civil Services Group has made some slight modifications to Maunsell’s Option 4 proposal in respect of the lot layout for the existing industrial zoned area. This modified option, which will be referred to as Option 5 for convenience, essentially comprises the Maunsell Option 2 lot layout for the existing industrial Zoned Area and the Option 4 lot layout for proposed industrial land.

...

The layout for the existing Industrial zoned land (Area 1) will yield 39 industrial lots from an area of 10.6 hectares. Approximately 15.7 hectares (Area 2) has been identified as being suitable for rezoning to industrial, potentially resulting in an additional 71 lots under Option 5.

It should be recognised that the lot layout can be changed if necessary to meet developer requirements. The underlying purpose of generating and adopting a lot layout is so that the en globo area can be identified and rezoned with some certainty in relation to servicing, yields and the impact on demand.”

38 It is Mr Leggat’s case that, as bulky goods is still not referred to as a possibility in ss1.4 and 1.5, the reasonable reader interested in that subject would put the document down at that point, despite s1.3.

39 After the lot layout at p7, there is set out at p8 a “*Land Budget*” for the expansion of Southern Cross Industrial Estate. The area most relevant for the current case is Area 2 which is earmarked for Long Term Industrial

Development yielding 71 industrial lots, 1 Drainage Reserve and some residue land comprising 2 lots, which may be set aside for drainage and/or open space, depending upon need.

40 Mr Craig submits that no-one interested in the area would stop reading at that point when, pursuant to ss66(1)(d), other documents are exhibited to “*better enable*” an understanding of what is proposed.

41 Section 1.6 (at p9) records that the Council asked the Department to waive the requirement of a local environmental study, given the detailed investigation carried out for the Maunsell report. The Department acceded to that request on 23 November 2004, subject to requiring Council to address a few matters. Council took the view that the Maunsell report dealt comprehensively with those matters.

42 Section 1.9 (at p10) draws attention to the exhibition of the draft amendment to the DCP, and to the designation of the area proposed to be rezoned as “I 2”. Mr Leggat speculates that DCP to be beyond the reasonable reader (T26.5.09, p20, LL32-33).

43 In s2.3 (p14) Council notes that the rezoning would multiply its value from \$10,000 per hectare to \$40,000 per hectare. Council anticipated that, once rezoned, it would be developed and subdivided for the establishment of “*industrial buildings, warehouses and the like, with some possibility of buildings for bulky goods retail*”. Mr Leggat believes that these remarks occur too far down into the documents for the reasonable reader, but Mr Craig relies upon the fact that bulky goods retailing is a potential use of any land zoned industrial in the Council area.

44 In ss 4.1-4.2 (p17-18) the reader would find the brief terms of the actual draft LEP amendment itself. The Aims and Objectives stated in proposed cl 2 are limited to “*industrial purposes and environmental protection*”. The proposed Zone 4 land and the proposed Zone 7(a) land are both clearly marked on the map (at p18). Mr Leggat does not accept that the reasonable reader would know that bulky goods retail was permissible in the industrial 4 zone, albeit that an expert planner or lawyer may foresee it as a possible use.

45 Section 5.3 (on p21) deals with the relevant emphasis of the North

Coast Regional Environmental Plan (“REP”) on adequate supply of appropriate land as an objective, cl 47(1) of the REP setting out some relevant principles to be considered before draft plans for industrial development are exhibited and acted upon. The exhibited document points out to the reader how a full copy of the REP can be accessed.

46 At p29 the reader would find the draft DCP amendment (No.76), a plan which shows as “I 2” the same area of land as is marked “4” on p18.

The Council Report appended

47 Appendix 1 to the primary document (commencing at p30 of tab 1), is the Council report of 28 October 2004 regarding the proposal to amend the LEP. At p32 the Council report deals with “*Bulky Goods Retailing*” in the following terms:

“Council is aware that the adopted Ballina Retail Strategy identifies Southern Cross Industrial Estate as an option for the establishment of a bulky goods retail precinct. A more recent study suggests the long term land needed for such a use could be between 10 and 16 hectares. Further investigations and consideration will, however, need to be given to the suitability of such a precinct in Southern Cross Industrial Estate”.

48 The Council report then goes on to deal with the Maunsell report in terms relevantly similar to those in the exhibition document itself (p6). I note the reference to “*precinct*” as part of a “*zone*”.

49 At p33 under the heading “*Development Control Plan*” the Council report says as follows:

“It is considered that a development control plan should be prepared once the subject land is rezoned to determine the location of precincts for general industry, bulky goods retailing, community uses etc. Council will recall that previously there has been some concerns about the ad hoc establishment of community uses, such as schools and churches through the existing industrial estate. Some work has already been undertaken in respect of the existing developed part of Southern Cross Industrial Estate that can be married in with a DCP for the expansion area”.

50 Mr Leggat says that on the reading of the exhibited documents to this point, the reasonable reader would not see bulky goods retailing as a part of the Council's proposal, whereas Mr Craig submits that those documents make plain that a broad range of uses are possible.

51 Relevantly the Council's report of 28 October 2004 concludes as follows, immediately after the section on the DCP (pp 33-34):

“Having regard to the content of this report, it is considered that Council should prepare a draft local environmental plan to rezone additional land for industrial use. Southern Cross Industrial Estate will continue to supply the bulk of industrial land within the Shire. The development of 39 lots within the existing industrial zoned land is likely to substantially satisfy demand for some 7 years based on the 5.6 lots per annum average development and sale of lots between 1987 and 2002. The 71 lots proposed in the area to be rezoned will satisfy demand at this rate for an additional 13 years. These projections may well be conservative and do not take into account active promotion, the establishment of a bulky goods retailing precinct, or the availability of industrial land supplies in other locations.

The Maunsell Report demonstrates that Area 2 identified in Option 5 is suitable to be rezoned from 1(b) Rural (Secondary Agriculture) to 4 – Industrial. The Maunsell Report also demonstrates that Area 4 has high environmental values and on this basis warrants rezoning for environmental protection purposes.

It is also suggested that a local environmental study is not required to accompany the draft plan given the detailed investigations undertaken for the Maunsell Report and Council should convey this view to the Director-General of DIPNR.”

52 Again, Mr Leggat submits that, at this point, bulky goods retailing would not be seen as part of the exhibited proposal, nor as part of either the Council's conclusion or recommendation. Fundamentally he does not see the reasonable reader going beyond the early parts of the document in tab 1, but he certainly does not see it as likely that the reasonable reader would go beyond tab 1.

The Land Audit

53 The second document in the “*public exhibition material*”, the draft industrial land “*audit*” dated March 2003, appears at tab 2 of *Exhibit H1*. One can only speculate as to how relevant a reader may regard a March 2003 document to a December 2004 exhibition, but, as already noted, it is clearly marked on its cover to be a part of the “*public exhibition material*” for the draft amendments of both LEP and DCP. Even Mr Leggat conceded that the reasonable reader might glance at the first few pages of the document.

54 On the first page of text (p5/fol 40), the audit document, by way of “*Introduction*”, says as follows:

“This report is intended to provide baseline data on the supply, use and potential for the provision of further industrial land in Ballina Shire.

...

This report attempts to make an assessment of the future demand for industrial land and review opportunities to satisfy this demand.”

55 According to Mr Leggat, the first reference to retail occurs at p26 of the audit (fol 61) where in 2.6.8, under the heading “*Draft Ballina Retail Strategy*”, the document says as follows:

“The Draft Ballina Retail Strategy acknowledges that in recent years there has been an increasing number of non-industrial activities which have established throughout the Estate. The Strategy considers that it is appropriate, to mitigate against this trend, to establish a bulky-goods retailing precinct as part of the future expansion of the Estate. A detailed site selection process is however considered necessary.”

56 Section 2.6.9, under the heading “*Specialisation of Industrial Uses*” (pp26-27/fols 61-62), makes clear that control area “*I 2 – General Industry*” “*allows the full range of industrial uses permitted in the zone*”.

57 The map at p35 (fol 70) suggests a staged development of the relevant land. Mr Leggat points out that there is again no reference to the prospect of bulky goods retailing. He also drew attention to some comments at pp46-47 (fols 81-82) of the audit document, but p46 (fol 81) of the report

deals with the Smiths Drive Industrial Estate, as distinct from the Southern Cross Industrial Estate (and/or Russellton Industrial Estate). However, the audit notes (p46/fol 81) the “*extensive land stocks available at Southern Cross Industrial Estate*”.

58 There is at p47 (fol 82) a relevant summary of the audit report in the following terms:

“To date there has been a demand for industrial land of approximately 7 and 10 lots per annum that equates to between 1.6 and 2.4 hectares per annum. Discounting locational preferences and a change in the type of industrial land required, there is sufficient industrial zoned land in the Shire to satisfy the demand for some 10-12 years.

...

Southern Cross Industrial Estate in Ballina will continue to be the major supply of industrial land in the Shire, and planning should be undertaken to secure an appropriate development strategy for this area in the short term. It is likely that industrial land in this location will continue to be attractive to prospective industrialists wishing to relocated (sic) to the area, if only for lifestyle reasons. Southern Cross Industrial Estate is likely to continue to be attractive because of the population growth, good access adjoining the Pacific Highway and access to markets....”

The Maunsell Report

59 The third publicly exhibited document is the Maunsell report on the “*Expansion of Southern Cross Industrial Estate*”, dated March 2004 and subtitled “*Structure Plan and Concept Design. Final Report*” (Exhibit H1, tab 3, commencing at folio 83).

60 The first two paragraphs of the Executive Summary introduce the report in these terms (fol 89):

“Maunsell Australia Pty Ltd (Maunsell) was commissioned by Ballina Shire Council (Council) to prepare a structure plan to confirm the development potential for expanding the Southern Cross Industrial Estate in Ballina. This Structure Plan considers the context set by the existing

industrial zoned land and recommends a framework for future industrial development (and other complimentary land uses) on adjacent industrial zoned land and rural land and other nearby rural zoned land.

The structure plan has been developed to provide sufficient detail for a concept plan to be developed for future development on existing industrial zoned land. This Structure Plan and Concept Design will be the basis for the preparation and submission of a development application for future development on the zoned land”.

61 On its fourth page, under the heading “*Opportunities and Constraints*”, the Executive Summary notes (fol 92) as follows:

“Encouraging mixed-use development – there is an increasing demand for warehouse and bulky goods retail in the region and the current industrial zoning is flexible enough to meet such demand. There may also be a demand for food shops, other retail related land uses and community facilities”.

62 Mr Leggat points out that this comment refers to the “*region*”, not merely the area covered by the LEP. He submits that this comment would not clarify the alleged misrepresentation. Mr Craig says the comment should not be read in isolation, as the Executive Summary goes on to deal with roads, open space, engineering and environmental issues before dealing with development options in broad terms, given the wide range of possibilities created by the exhibited LEP amendment.

63 Mr Leggat contends that the reasonable reader, even if introduced to the Maunsell report by reading the early parts of the exhibited documents, would not feel the need to go to the report itself. He notes that prior to encountering the Executive Summary, the reader would find in the index (at fol 86) reference to a retail strategy (item 3.2.7) which would be found at p25 of the report (fol 118).

64 The study area is described in more detail in s2.0 (commencing at fol 99/p8 of the document). That page makes clear that the study is limited to the Southern Cross Industrial Estate, described (in s2.1) as “*a purpose built industrial estate developed by Council on the northern outskirts of Ballina*”.

65 The report notes in s2.1.1, at the foot of fol 99 (p6 of the report):

“Development to date is typified by warehouses, factories and commercial buildings in medium density surrounds. This area contains a variety of land uses including factories and transport-related industry, manufacturing, storage and warehousing, light industrial, commercial, bulk retail, and community uses including a church and youth club”.

66 Roads and transport matters are dealt with at pp11-15 (fols 104-108). Mr Leggat relies on the traffic numbers at fol 105 as being too low to be consistent with any use of the subject land for bulky goods retail. On the other hand, Mr Craig says that the report looks at the existing position in respect of which there is some bulky retail already established. Mr Craig also points out that, at p47 of Maunsell (fol 140), the figures are explained in the following terms:

“Assumptions for traffic generation include a floor area ratio of 70% (high-end) or 1170m² GFA (70% of 1678m² average lot size) and a landuse breakdown of 50% warehouse and 35% factory, and 15% ancillary uses including bulk retail and potential commercial activities. These figures assume 100% occupancy rates and constant rates of landuse demand over time. The figures presented in Table 7.1 are considered to be conservative figures as a result of the high occupancy rates and relatively high percentage of commercial/retail land use. Comparatively, these rates are significantly higher than apparent for the level of traffic generated by the existing industrial estate.

...

Table 7.1 shows that the developable area under Option 4 can be expected to generate approximately 7,900 daily trips or 1,300 peak hour trips. These figures are significantly higher relative to the existing industrial estate within the study area which generates approximately 3000 daily vehicle trips (for approximately 85 developed lots within the study area). This disparity can be explained by the expected increase in bulk retail and commercial activities which generally generate a higher level of traffic. In the event retail activity is not realised within this area, traffic generation levels will be lower.”

67 Industrial Zone 4 is dealt with at pp17ff (fol 110ff). Again, the text calls up consideration of cl 27 of the LEP concerning bulky goods retailing. Mr Craig drew attention to fol 111 (p18). The list of “*advertised development*” includes “*shops (other than those referred to in Clause 27 or Schedule 3)*”, and the study points out that preferred land uses within the “I 2” designated area include “*light industry, general industry, showrooms and other businesses, which require relatively large indoor or outdoor display and sales areas*”.

68 The specific aims of the DCP (s3.2.2 on p18/fol111) include making efficient use of urban land, but minimising land use conflicts so as to create a desirable urban environment. Section 3.2.7 (p25/fol118) provides:

“Draft Ballina Retail Strategy

This strategy acknowledges that an increasing number of non-industrial activities have been established throughout the estate in recent time including a number of bulky goods retail activities. The strategy considers that it may be appropriate to establish a bulky-goods retailing precinct as part of the future expansion of the estate, although the location of a bulgy [sic] good precinct has not been identified”.

69 Chapter 5.0 of the study deals with “*Opportunities and Constraints*” (commencing p33/fol 126). In s 5.2 headed “*Mixed Use Development Flexibility*” the study says:

“Ballina Shire Council’s industrial development context encourages a mix of development and planning flexibility to take advantage of current economic conditions. In particular, it is evident that there is an increasing demand for warehouse and bulky goods retail in the region and the current industrial zoning is flexible enough to meet such demand. Opportunities to locate these uses within the industrial estate can be provided by maintaining lot size flexibility to cater for the large lot size usually required by these types of development, however, can also be catered for by offering the bulk purchase of lots to perspective developers. This method is thought to be preferable in this case as it can be triggered by market demand rather than by planning for larger lot sizes which may never eventuate.

The potential increase in employment numbers in the industrial estate will facilitate towards an increasing demand for service related land uses such as food shops and other retail related land uses. These can either be located centrally or ancillary to particular land uses. Either way, the location of such services can be catered for a Development application stage.

Community facilities may also continue to play an important role within the Estate as the land available is of relatively less cost than land closer to the town centre. However, priority should be given to facilitating industrial related land first and foremost and demand may eventually outweigh supply if other uses continue to take advantage of the relatively inexpensive land.”

70 It is important in this context to remember the distinction between the functions of zoning and those of development control.

71 At fol 135 the study turns to consideration of the preferred Maunsell option (No.4 of 4, described in s6.4 and fig 6.4, at fols 133-4). The third paragraph of s 6.6 says as follows:

“With regard to proposed landuse it is difficult to prescribe or encourage specific activities beyond those agreed acceptable by the zoning controls of the LEP and Industrial DCP. Proposed lot size averaging 1600m² is considered to be acceptable to these landuses. Council can further control the location of appropriate activities by consolidating areas according to market demand. It is noted that ‘landuse precincts’ such as bulk retail/retail activities should be grouped together to provide viability.”

72 The conclusion to the Maunsell report appears at p56 (fol 149 – followed by more than 60 pages of annexures exhibited), and says:

“It is recommended that Option 4 offers the most viable subdivision layout in terms of the road network, environmental, stormwater, drainage and other planning related constraints and opportunities. Subsequently, Option 4 will be taken to the Stage 1 Subdivision DA stage of development in order to fulfil an expected 5 years of industrial lot demand.

It is also recommended that Council rezone the remaining area of land

investigated in the structure plan and determined as suitable process for future industrial development. The information included in this report is expected to facilitate this process as a progression towards the development potential shown in Option 4.

Overall, the future development of the Southern Cross Industrial Estate is expected to cater for industrial lot demand over a 15 year period. It is considered that options for development beyond the 15 year period can be achieved by further extending the estate to the northeast.”

Other documents before the Court

73 Having now dealt at some length with the exhibited documents (in tabs 1, 2, 3, 8 and 9 of *Exhibit H1*), I should briefly record what else is before the court in the agreed bundle of documents.

74 At tab 4 is the Council Report (parts of which have already been referred to above). Tab 5 contains the Council resolution to prepare the draft LEP. Tab 6 contains the s65 certificate.

75 Tab 7 contains copies of newspaper advertisements in respect of the exhibition. According to the exhibit the advertisement appeared in the *Northern Star* on Saturday 18 December 2004, and in the *Advocate* on Thursday 23 December 2004, and again on Thursday 20 January 2005.

76 The relevant heading on the advertisement is “*Rezoning & DCP Amendment Proposal. Expansion of Southern Cross Industrial Estate, Ballina. Draft Ballina Local Environmental Plan 1987 (Amendment No.95)*”. The advertisement explains the proposal, defines the affected land, very specifically, and goes on to invite submissions. Attention is drawn to the relevant State Environmental Planning policies, the REP, s117 directions, etc, which “*will be available for perusal in conjunction with this public exhibition*”. The role to be played by the proposed DCP is spelt out, and details of inspection arrangements are also clearly set out.

77 At tab 10 one finds the relevant Council minute adopted on 23 November 2006 – the resolution to ask that the Minister make the amendment. Tab 11 is the Gazette Notice 20 July 2007 making Amendment No.95. Tab 12 is the extract from the plan clearly delineating

the areas of Zone 4 and Zone 7(a) land according to the plan, and tab 13 is a notification that the amendment to the DCP came into effect on 20 July 2007 pursuant to Council's resolution of 23 November 2006. The area "4" land at tab 12 becomes "I 2" at tab 13.

Consideration

78 The statutory scheme for exhibition and amendment must be strictly complied with, and there is no further obligation on Council, flowing from any duty to accord members of the public possibly affected by implementation of the proposed amendment/instrument any additional elements of procedural fairness, *Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6; (1999) 46 NSWLR 78.

79 The purpose of s66 is "*the enhancement of public involvement and participation in the plan-making process*", an object which "*cannot be achieved if documents relevant to better informing the public in that regard are withheld (whether intentionally or unintentionally) from the public domain ...*", *Smith v Wyong Shire Council* [2003] NSWCA 322; (2003) 132 LGERA 148, per Tobias JA, at 183 [171].

80 When the exhibition process works as intended, documents are placed on exhibition to "*better enable the draft plan and its implications to be understood*". As Tobias JA noted in *Gales* (at [123]), any false sense of security should be dispelled, and any confusion resolved, by readers having recourse to the exhibited materials.

81 Rolfe AJA observed in *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91 (at 101) that:

"...if the notice pursuant to s 66 does attempt an explanation of what is proposed it must be accurate and complete, either particularly or generally. The problem of seeking to give an explanation in a relatively short document is that there is a real possibility that it will be neither accurate nor complete. The inaccuracy is likely to result from the omission of information."

82 In *El Cheikh Ipp* AJA (with whom Sheller JA and Davies AJA agreed) noted (at [31]) that the exhibiting authority is not required to provide in the

notice “*any information ... about the purpose of the draft plan being exhibited. However, once having provided an explanation, that explanation [needs] to be accurate and complete*”. The reader should not be expected to conduct research beyond the exhibited material and where it leads him/her.

83 In *Canterbury* and *Coles* the exhibited plans were found to be unintelligible, and, at least in *Canterbury*, the additional information unhelpful and misleading. In *Castle Constructions*, Lloyd J found in the exhibited material three materially misleading statements or misrepresentations. In *Gales* there was an error in the exhibited document, but it was an error arguably cured by the “*unambiguous content of the supplementary materials*” made available on the exhibition ([103]). In *El Cheikh*, the applicant contended that a statement that residential density would not be reduced was inaccurate and misleading because a reasonable person concerned about the matter would assume that a review of the actual provisions was unnecessary. The Council in *El Cheikh* contended that the mixed use land would have to have been zoned residential in the first place.

84 In the present case the public advertisement was clear, comprehensive, and informative. Readers of that notice would know that clearly identified lands were to be rezoned, some of them for “*industrial*” uses. They would also know that a wide range of official and other documents were thought by Council to be relevant, and would be either formally exhibited or made available at the exhibition.

85 The court has to conclude what material the reasonable reader would read, as impressions are gleaned from the wording, focus or emphasis of particular materials.

86 Persons attending the exhibition would encounter at least the five exhibited documents – the primary document (35 pages), the audit document (47 pages), the Maunsell document (at least 121 pages), plus the LEP (60 pages) and relevant parts of the DCP (at least 20 pages) – not to mention their being given access to the other materials mentioned in the notice. The primary document clearly leads a reader to the other four, and puts their detailed contents in context. There are several mentions in those documents of “*bulky goods retailing*” as a potential use of land, yet to be

specified, within Southern Cross Industrial Estate.

87 If those persons attending the exhibition were interested in the land to be rezoned “4” they would easily identify its location by looking at the maps in the two proposed amendments (at pp18 and 29 of the primary document). If they went to p29 they would be on notice of the proposed “I 2” designation of that rezoned land.

88 I accept Mr Craig’s submission that the correct test to apply is that laid down by the Court of Appeal in *Gales* ([17] above), and that a reasonable reader seeking to understand the impact of the draft amendment would then consult the LEP, also on exhibition, to identify what uses were permitted within Zone 4 Industrial (in accordance with the relevant development control table in cl 9 of the LEP). Such checking would disclose that in Zone 4 all uses were permissible, and none prohibited, but that development for any purpose would require development consent, and that applications in respect of certain types of “*advertised development*” must be accompanied by an environmental impact report. Attention would be drawn to cl 27 of the LEP which regulates the grant of consent to any application to carry out bulky goods development in Zone 4. It specifically confirms that such development is permissible with consent in that zone.

89 Essentially, Mr Leggat’s case is that the reasonable reader would go no further than reading in the exhibited materials the briefly and very generally stated purposes of the amendments, namely rezoning for environmental and industrial purposes. For him to succeed, the court would need to be satisfied that the reasonable reader would go no further because he/she would “*know*” that bulky goods retailing (and a host of other uses) would never occur on land zoned “*industrial*”. Any interested person would know from the advertisement in this case that what was exhibited included a draft instrument seeking to amend an existing instrument. I do not accept that the reasonable reader would skip completely over the first 16 pages of explanatory text in the primary document to find and read only the draft amendment itself, which, viewed alone, would not make clear what uses could occur on the rezoned land.

90 There is no need to impute to the reader any advance knowledge of the LEP. One cannot get a “*meaning*” for Zone 4 without going to the LEP itself, but even a cursory reading of this particular LEP would lead a

reader to a realisation that all uses are permissible in the relevant zone, but any use requires consent. If the reader's concern involved the "risk" that some of the rezoned land could be used for "*bulky goods retailing*", attention is clearly drawn by the development control table to cl 27 of the LEP. In addition, "*bulky goods retailing*" features (as noted above) in several sections of the primary exhibition document, and (by clear implication) in the draft DCP amendment, as well as in the appended Council report.

91 The reasonable reader need not go beyond the primary document and the inquiries it would stimulate, but if he/she ventured past the primary document into the land audit and/or the Maunsell report, there are almost overwhelming indications that bulky goods retailing could occur on the rezoned industrial land.

92 Accepting that the reader had recourse to the LEP itself, the court does not accept Mr Leggat's submission that noticing Amendment No.84 in the "*History of Amendments*" would lead him/her to the conclusion that bulky goods retailing would always, and necessarily, be specified, in terms, if it were intended. Amendment No.84 clearly records only the need for Council to rezone a particular area of land to accommodate a particular proposal for such a purpose.

Orders

93 I conclude that the Respondent Council complied with the requirements of s66(1), and that the application should be dismissed with costs.

94 The orders of the court will be:

1. The application is dismissed.
2. The Applicant should pay the First Respondent's costs³.
3. The exhibit may be returned, together with the filed bundle of documents upon which agreement was not reached.

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