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# Supreme Court of New South Wales – Court of Appeal

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## Meriton Apartments Pty Ltd v Council of the City of Sydney [2011] NSWCA 17 (18 February 2011)

Last Updated: 25 May 2011

Court of Appeal

New South Wales

Case Title: Meriton Apartments Pty Ltd v Council of the City  
of Sydney

Medium Neutral Citation: [2011] NSWCA 17

Hearing Date(s): Monday 31 January 2011

Decision Date: 18 February 2011

Jurisdiction:

Before: Tobias JA at [1]  
Campbell JA at [71]

Macfarlan JA at [72]

Decision:

- (a) Grant leave to appeal.
- (b) Appeal allowed.
- (c) Set aside the orders made by Pain J on 30 April 2010 and the order made by Senior Commissioner Moore on 9 October 2009 and in lieu thereof order that Development Consent D/2007/2330/D for residential units at 5 Hutchinson Walk, Zetland be modified by inserting at the end of Condition 5, a credit of \$467,462.28 for past workforce contributions.
- (d) The respondent to pay the appellant's costs of the proceedings before Pain J and of the summons for leave to appeal and the appeal.

Catchwords:

LAND AND ENVIRONMENT - ability to amend monetary condition for Council's consent to development for providing public amenities and services - whether condition is unreasonable in particular circumstances - whether rateability of relevant land is relevant for the net demand for public amenities and public services generated by development under construction - whether net demand for public amenities is dependent upon whether the previous landowner paid rates at any time - [Environmental Planning and Assessment Act 1979](#) (NSW), [ss 94](#), [94B](#)

PROCEDURE - judgments and orders - whether matter should be remitted for determination or Court make appropriate orders - no purpose remitting matter for further consideration on basis of Court's decision with respect to sole basis upon which Senior Commissioner determined to discount credit the developer was found to be entitled to

|                    |   |
|--------------------|---|
| Legislation Cited: | <a href="#">Environmental Planning and Assessment Act 1979</a><br><a href="#">Environmental Planning and Assessment Regulation 2000</a><br><a href="#">Land and Environment Court Act 1979</a><br>Local Government Act 1919<br><a href="#">Local Government Act 1993</a>  |
| Cases Cited:       | Botany Bay City Council v Premier Customs Services Pty Ltd <a href="#">[2009] NSWCA 226</a> ; <a href="#">(2009) 172 LGERA 338</a><br>Goldie v Commonwealth of Australia <a href="#">[2002] FCA 261</a><br>Maitland City Council v Anambah Homes Pty Ltd <a href="#">[2005] NSWCA 455</a> ; <a href="#">(2005) 64 NSWLR 695</a><br>Meriton Apartments Pty Ltd v South Sydney City Council <a href="#">[2009] NSWLEC 1336</a><br>Meriton Apartments Pty Ltd v Council of the City of Sydney <a href="#">[2010] NSWLEC 64</a><br>Meriton Apartments Pty Ltd v South Sydney Council, 12 September 2001, unreported<br>Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) <a href="#">162 CLR 24</a><br>Rose Consulting Group v Baulkham Hills Shire Council <a href="#">[2003] NSWCA 266</a> , <a href="#">(2003) 58 NSWLR 159</a> |
| Texts Cited:       | Development Contributions, Practice Notes<br>Department of Infrastructure, Planning and Natural Resources 2005  |
| Category:          | Principal judgment  |
| Parties:           | Meriton Apartments Pty Limited (Applicant)<br>Council of the City of Sydney (Respondent)  |
| Representation     |   |

- Counsel: Counsel:  
D Russell QC / M Seymour (Applicant)  
M J Leeming SC / L Byrne (Respondent)
- Solicitors: Solicitors:  
Katerina Mihail - Meriton Group (Applicant)  
Legal & Corporate Governance Department, City  
of Sydney Council (Respondent)
- File number(s): CA 2010/126676
- Decision Under Appeal
- Court / Tribunal:
- Before: Pain J
- Date of Decision: 30 April 2010
- Citation: Meriton Apartments Pty Ltd v Council of the City  
of Sydney [\[2010\] NSWLEC 64](#)
- Court File Number(s) L&E 2009/10860

Publication Restriction:

## **Judgment**

1. **TOBIAS JA** : In April 2008 Meriton Apartments Pty Ltd (Meriton) was granted development consent (the consent) by the Council of the City of Sydney (the Council) to construct (as a consequence of various amendments) 319 apartments and a limited amount of commercial/retail space at 5 Hutchinson Walk, Zetland (the Site). Pursuant to [s 94](#) of the [Environmental Planning and Assessment Act 1979](#) (the EP&A Act) and the Council's Development Contributions Plan 2006 (the Contribution Plan), the Council imposed a condition (Condition 5) upon the consent which required Meriton to pay

certain monetary contributions towards to the cost of providing identified public amenities and services and which amounted in total to \$5,018,529.47.

2. On 26 February 2009 during construction of the development the subject of the consent, Meriton made application to the Council to modify Condition 5 by reducing the total amount thereof by \$467,462.28. The Council refused that application whereupon Meriton commenced Class 1 proceedings in the Land and Environment Court. The appeal was heard by Senior Commissioner Moore who, on 9 October 2009, allowed Meriton's appeal but discounted its claim for a reduction from \$467,462.28 by \$186,984.91 to \$4,831,554.56: *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 1336.
3. Pursuant to s 56A of the *Land and Environment Court Act 1979* (the Court Act), Meriton appealed the Senior Commissioner's decision. That appeal, which was restricted to a question of law only (s 56A(1)), was heard by Pain J who, on 30 April 2010, dismissed it: *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 64.
4. Meriton now seeks the leave of this Court to appeal against the decision of Pain J. Pursuant to s 57(4)(c) of the Court Act an appeal to this Court from a decision of a judge of the Land and Environment Court made pursuant to s 56A lies only by way of leave. Furthermore, if leave is granted, the appeal is confined to questions of law: see s 57(1). The summons for leave to appeal and the appeal were heard concurrently.

### **The relevant statutory provisions**

1. It is now well established that the only source of power authorising the imposition of a condition on a development consent requiring the payment of a monetary contribution is to be found in s 94 of the EP&A Act: *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455; (2005) 64 NSWLR 695 at [132]. For present purposes s 94(1) and (2) are relevant and I set them out hereunder:

"(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the

area, the consent authority may grant the development consent subject to a condition requiring:

(a) the dedication of land free of cost, or

(b) the payment of a monetary contribution,

or both.

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

1. Section 94B(1) provides, relevantly, that a consent authority (in this case the Council) may impose a condition under s 94 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan. In the present case it was common ground that Condition 5 complied with s 94B(1) in that it was of a kind allowed by, and determined in accordance with, the Contributions Plan.
2. Although Meriton's s 56A appeal to the Senior Commissioner was against the refusal of the Council to modify the consent pursuant to s 96 of the EP&A Act, it appears to have been common ground that the power exercised by him (which had the effect of amending Condition 5 by reducing the total amount of the monetary contributions payable thereunder by the sum of \$186,984.91) was exercised pursuant to the provisions of s 94B(3) of the EP&A Act which was in the following terms:

"(3) A condition under section 94 that is of a kind allowed by a contributions plan (or a direction of the Minister under this Division) may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan (or direction). This subsection does not authorise the Court to disallow or

amend the contributions plan or direction. "

1. It is apparent that s 94B(3) empowers the Court on appeal to amend a condition imposed pursuant to s 94(1) " *because it is unreasonable in the particular circumstances of [the] case* ". It was therefore submitted by the Council, in particular in opposing the grant of leave, that the decision of the Senior Commissioner was discretionary and involved only questions or matters of fact in respect of which no appeal lay either pursuant to s 56A to the Land and Environment Court, or to this Court pursuant to s 57(1) of the Court Act. I shall return to this issue later in these reasons.

### **The terms of Condition 5 and the relevant provision of the Contributions Plan**

1. Condition 5 at the time that Meriton lodged its s 96 application relevantly provided:

"i. SECTION 94 SOUTHERN PRECINCT CITY OF SYDNEY DEVELOPMENT CONTRIBUTIONS PLAN 2006

As a consequence of this development, Council has identified an additional demand for public amenities and facilities. Pursuant to [Section 94](#) of the [Environmental Planning and Assessment Act, 1979](#) (as amended), and City of Sydney [Section 94](#) contributions Plan 2006 the following monetary contributions towards the cost of providing facilities and amenities are required.

| <u>Contribution Category</u> | <u>Amount</u>  |
|------------------------------|----------------|
| Community Facilities         | \$710,844.98   |
| Public Domain                | \$393,701.94   |
| New Open Space               | \$3,067,636.56 |
| New Roads                    | \$779,093.03   |
| Accessibility                | \$32,314.32    |
| Management                   | \$34,938.54    |
| Sub-total                    | \$5,018,529.47 |

1. The Contributions Plan relevant to the precinct within which the Site was located contained a table of rates in the following form:

| Contribution Type    | Per Resident | Per Worker | Bedsits & one bedroom dwellings | Two bedroom dwellings | Three or more bedroom dwellings | Residents of a non-private dwelling |
|----------------------|--------------|------------|---------------------------------|-----------------------|---------------------------------|-------------------------------------|
| Community Facilities | \$1,351.36   | \$270.27   | \$1,756.76                      | \$2,567.58            | \$3,513.52                      | \$1,101.87                          |
| Public Domain        | \$748.45     | \$149.69   | \$972.98                        | \$1,422.05            | \$1,945.96                      | \$748.45                            |
| New Open Space       | \$5,831.75   | \$1,166.35 | \$7,581.27                      | \$11,080.32           | \$15,162.54                     | \$5,831.75                          |
| New Roads            | \$1,481.10   | \$296.22   | \$1,925.43                      | \$2,814.09            | \$3,850.87                      | \$1,481.10                          |
| Accessibility        | \$61.43      | \$12.29    | \$79.86                         | \$116.72              | \$159.72                        | \$61.43                             |
| Management           | \$66.42      | \$13.28    | \$86.35                         | \$126.20              | \$172.69                        | \$66.42                             |
| Total                | \$9,540.51   | \$1,908.10 | \$12,402.65                     | \$18,126.96           | \$24,805.30                     | \$9,291.02                          |

1. The total of each category as shown in the table had been increased since the Council adopted the Contributions Plan in 2006 in accordance with the Consumer Price Index. It was common ground that the amounts of the various contributions referred to in Condition 5 had been determined in accordance with the rates shown in the table referred to at [10] as indexed.
2. It was also common ground that the policy adopted by the Contributions Plan was that a condition should be imposed pursuant to [s 94\(1\)](#) on all development in the area covered by the Plan which created the potential for a net increase in the population of the development site and, therefore, the potential demand for the use of the public amenities, facilities and services which the Council had provided or was intending to provide in the future. This included not only the resident population but also the workforce population.
3. The point of the foregoing was, therefore, that the Contributions Plan was intended only to require a [s 94](#) contribution in relation to the demand for public amenities and services generated by the **net**

increase in the population of the particular development site.

4. Thus, paragraph 2.15 of the Contributions Plan which was headed "**Policy for Existing Development**" stated:

"These provisions describe the approach for determining the [net] increase in demand for the purposes of levying only the [net] additional population. There has been considerable debate in recent years as to what constitutes an existing level of demand (which is entitled to due credit) for the purpose of calculating development contributions."

1. The paragraph then dealt with the situation, relevant to the present case, where a particular development site was vacant at the time that development consent was granted but had been populated historically. Thus, the Contributions Plan provided that credit for the population of past development would be determined to exist for the purpose of granting a credit only, relevantly,

"[f]or the population that has vacated the site for the purposes of redevelopment and/or as a result of changing the economic trends *since* the most recent census on which the Contributions Plan is based. For the purposes of this plan, that means the *2001 Census*."

1. The operation of this limitation was explained in the following terms: "If a site the subject of development application, notwithstanding the presence or otherwise of vacant buildings on the site, was vacated at the time of the most recent census on which the Contributions Plan is based and, therefore no population from that site was counted as part of the *2001 Census* population cited in this Contributions Plan, then no part of that former population can be construed as 'present' or 'deemed to exist' for the purposes of securing a credit under this plan."

1. Clause 4.16 of the Contributions Plan was entitled "**Workforce Occupancy Rates**" and relevantly stated:

"It is the preference of the City of Sydney that actual worker numbers, both historic (for the purpose of calculating any past credit due to a development site) and proposed (where known) are used for the purposes of calculating the [net] contribution applicable to any development proposal. Actual demand is generated by actual people - therefore actual, documented, numbers best reflect both past and future demand. Where the number of workers is known with reasonable certainty and is provided as part of the Development Application and is deemed to be reasonable on

assessment, then that number of workers will be accepted for the purpose of assessing the total contribution for that particular development.

It is recognised, however, that actual figures may not always be reasonably possible to obtain. Accordingly these industry or statistical standards are provided as a safety net allowing a reasonable estimate to be made of past and future demand in the absence of actual data."

1. There then followed a table that was to be used for the purpose of estimating this historical population where the actual population was unknown. Thus, in respect of older style industrial buildings erected pre-1960 and used for manufacturing, the table provided a gross floor area for one employee of 72.1m .
2. Thus, if the actual population of an industrial site was unknown but it was known that an industrial building used for manufacturing had been located upon the land and had had a gross floor area of, say, 7,210m , then the assumed population of that building was determined by dividing its gross floor area by 72.1m resulting in an assumed workforce population of 100.
3. The credit to which the developer would then be entitled was calculated by reference to the third column of the table which I have set out at [10] which provided, relevantly, for a net credit of \$1,908.10 (subject to indexation) per worker. Thus in the example that I have given, the credit would be \$190,810 for an assumed population of 100 workers.

### **Past use of the Site**

1. The Site forms part of a much larger area and has had a variety of industrial uses since the 19 th Century. In 1952 that area was acquired by the British Motor Corporation, subsequently known as British Leyland, initially for automobile importation and from the late 1950s onwards, for automotive manufacture. The Senior Commissioner accepted that the automotive manufacturing workforce on the larger site peaked at about 7,000 workers in 1964 (at [10]).
2. In 1975 the Commonwealth Government acquired the area including the Site for use as a naval stores depot. This use continued until 1996 when the area was acquired by LandCom and subsequently transferred to the Roads & Traffic Authority. In 2002 the State

Government disposed of the Site to a private developer and it was then acquired from that developer by Meriton.

3. As at 2002 when the Government first disposed of the Site it had been vacant for some years. Relevantly to the Council's case, it was vacant at the date of the 2001 Census. The Senior Commissioner (at [15] of his reasons) concluded that the Site had been in public ownership for 27 out of 45 years.

### **The decision and reasons of the Senior Commissioner**

1. At [16] the Senior Commissioner accepted that the Contributions Plan made provision for the circumstances under which a credit might be granted for past occupation of the Site, whether for residential or industrial purposes, when assessing the monetary contributions to be levied on a new development. This credit was designed to reflect the extent to which the past population would have created a demand for public amenities and further services. It ensured that the contributions levied on new development merely compensated the Council for the cost of meeting the increased demand for public amenities and services generated by the anticipated population of the new development.
2. At [19] the Senior Commissioner stated that there were two issues before him. The first was whether a credit should be granted for past industrial commercial occupation of the Site in light of the provision in the Contributions Plan (to which I referred at [15]) which provided that if the Site had no population counted as part of the 2001 Census, then no part of any former population could be taken into account for the purpose of securing a credit under the Plan.
3. The second issue was the extent to which a credit should be granted as a matter of discretion if he was otherwise satisfied that there was some appropriate basis upon which to grant at least some credit. The Senior Commissioner acknowledged at [21] that it was common ground between the parties that he was not obliged to follow the precise terms of the Contributions Plan: *Rose Consulting Group v Baulkham Hills Shire Council* [2003] NSWCA 266; (2003) 58 NSWLR 159 at [35].
4. As to the first issue, the Senior Commissioner determined that it was not appropriate given the history of the Site to adopt the cut-off date for being populated as being that at 2001 as reflected in the 2001

Census. Furthermore, he determined (at [56]) that it was appropriate to have regard to what might have been the workforce demands for public amenities and services in 1964 at the peak of the manufacturing workforce on the Site. At [57] he stated that the assumed workforce for the Site based on a peak manufacturing workforce for the larger area in 1964 was 7,000 workers, should be determined by a simple arithmetic approach based on the area of the Site as a proportion of the area of the larger site. On this basis he adopted a workforce calculation of 229 workers.

5. Accordingly, it followed that, prima facie, the claimed credit by Meriton of \$467,462.28 should be adopted. This figure was arrived at by multiplying the amount per worker set out in the third column of the table (\$1,908.10) reproduced at [10] after indexation by 229.
6. It is the second issue determined by the Senior Commissioner that gives rise to the present appeal. At [60] the Senior Commissioner observed that the mathematical calculation referred to was not a complete answer in all the circumstances to the determination of the appropriate credit. The Senior Commissioner maintained, correctly, that he had a discretion that enabled him to take account of other relevant matters in considering whether the prima facie credit amount should be adopted or discounted.
7. I have already made reference to the Senior Commissioner's observation that in respect of the last 45 years, the Site had been in government ownership for 27 of those years. During that time the Site was exempt from rates due to its public ownership. The Senior Commissioner concluded that as the Site was non-rateable for that period of time he should adopt a discount rate that reflected the total number of rateable years as a proportion of the total number of years since the workforce had peaked on the Site in 1964. Applying that ratio, he concluded that the appropriate offset amount in favour of Meriton was \$186,984.91.
8. The Senior Commissioner's reasoning for his approach to the discounting process had its source in a decision of Commissioner Brown in *Meriton Apartments Pty Ltd v South Sydney City Council* , 12 September 2001, unreported. In that case the Commissioner noted that during the occupation of the site the subject of the litigation by Australian Consolidated Industries (ACI), contributions had been made to the South Sydney Council through land rates. Those rates

would have been distributed to areas thought by the council at the time to require the provision of additional expenditure on new public amenities and services. In Commissioner Brown's view it was sufficient that ACI had provided funds to the council for a credit to be granted.

9. At [62] of his reasons, the Senior Commissioner considered that Commissioner Brown's analysis of the fairness of having regard to rateability was appropriate to be considered and adopted in the present proceedings but on the basis of the period when rates were not paid. The Senior Commissioner's reasoning process was, therefore, as follows:

"63. Just as Brown C considered that it was appropriate to have regard to the fact that rate income had been provided to the council for the whole of the period while the site was being used for industrial purposes, I consider it equally appropriate to take into account the fact that, for a considerable period of time during the period since the peak British Motor Corporation workforce I have adopted as the appropriate year for the contributions offset calculation, the site was in commonwealth or state public ownership and thus not rateable.

64. Just as Brown C took into account the fact that, within the discretionary budget of the council, payment of rates could be used to subsidise or contribute towards the costs of community facilities utilised by industrial workers as an entitling factor for a credit, accepting the logic of his approach, as I do, it is then appropriate to accept that periods of non-rateability constitutes a period where there was no revenue from the site to subsidise or contribute towards the costs of community facilities utilised by industrial workers. As a consequence, in my opinion, to take account of this, a discounting factor is required."

1. It may be observed, and the Senior Commissioner acknowledged, that the issue of rateability or non-rateability as an appropriate criteria for discounting, was not one considered appropriate by the planning experts called by each of the parties. The Senior Commissioner himself raised the issue and, certainly, the parties were given the opportunity to make submissions to him with respect to it. Thus Meriton in its written submissions to the Senior Commissioner (no written submissions were made by the Council),

contended that it was not appropriate to allow any discount for the period of non-rateability as the legislative intent of [s 94\(1\)](#) was to identify the cost of any *additional* requirement for infrastructure caused by the relevant development. The submission continued (at [50]):

"It is immaterial for that purpose whether the existing infrastructure meets community needs or is grossly deficient, or **who paid for it** ." (Emphasis added)

### **The decision and reasons of the primary judge**

1. The primary judge noted (at [6]) Meriton's submission that the Senior Commissioner erred in law as he took into account a legally irrelevant matter when he discounted the credit calculated on the number of workers at the Site on the basis of whether rates had been paid for the land in the past. In this respect it was common ground that the taking into account of an irrelevant matter involved an error of law.
2. It was also submitted that neither of the two planning experts retained by the parties adopted the Senior Commissioner's approach, which was a powerful factor in favour of the proposition that the non-payment of rates was an irrelevant consideration in the exercise of the discretion to determine a reasonable monetary contribution. It was submitted that in the absence of any evidence conceding that the non-payment of rates had a relationship to any measurement of demand, it was not open to the Senior Commissioner to ask himself what off-set against the discount would be appropriate to reflect the years during which the Site was in public ownership.
3. The Council submitted that the appeal did not raise a question of law as the Senior Commissioner's finding that there should be a discount of the credit which would have been otherwise allowable, was purely one of fact. The Council repeated this submission on the appeal. It was contended that the Contributions Plan provided for a credit for existing workforce numbers and that the rationale for doing so was to acknowledge and take into account contributions made by way of rates for existing/past public amenities and services. It was not the existing workforce who made the contributions but the owner of the land who paid the rates.

4. It was further submitted that while the Contributions Plan was written in terms of existing demand and existing workforce, in acknowledging the rationale of giving credit for "*past contributions*", reasonableness required that an allowance be given for the fact that in the intervening 45 years, rates had not been paid and the Council did not receive any contribution towards the provision or maintenance of infrastructure for 27 of those years.
5. It was also submitted that the discretion vested in the Senior Commissioner by [s 94B\(3\)](#) to disallow or amend Condition 5 where it was considered that the contributions required to be paid pursuant to that condition were "*unreasonable in the particular circumstances of [the] case*", involved factual findings which were unappealable. The Senior Commissioner's finding that the amount of the monetary contributions imposed by Condition 5 should be reduced because otherwise it would be unreasonable in the particular circumstances of the case, was a finding of fact and this was so notwithstanding that the basis for the determination of the appropriate amount of the reduction was based on the non-rateability of the Site for a lengthy period.
6. At [27] her Honour first referred to the decision of the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [\[1986\] HCA 40](#); [\[1986\] HCA 40](#); [\(1986\) 162 CLR 24](#) at 40 where Mason J stated that in order for a challenge to succeed on the basis that an irrelevant matter had been taken into account by the decision-maker, that matter must be expressly or by implication a matter which the decision-maker must ignore. Accordingly, it was incumbent upon Meriton to establish that the fact or matter that it maintained was irrelevant was required to be ignored as a matter of statutory interpretation in light of the objects and purposes of the EP&A Act in the context in particular of the determination of s 94 contributions.
7. Her Honour then referred to the publication of the Department of Infrastructure, Planning and Natural Resources in July 2005 entitled "*Development contributions, Practice Notes*". Pursuant to clause 26(1) of the [Environmental Planning and Assessment Regulation 2000](#) (the Regulation) a contribution plan must be prepared by a council having regard to those Practice Notes.
8. At [25] her Honour observed that a cursory reading of that document suggested that there were many factors that could be considered as

relevant to calculating existing and future demand for the purposes of determining a [s 94](#) contribution. She exemplified that part of the Notes that referred to discounting contributions and credit for existing development and noted that reasonableness was the guiding principle identified in the Practice Notes underlying the calculation of development contributions in any particular case.

9. Her Honour noted (at [29]) that after referring to the decision in *Meriton v South Sydney*, the Senior Commissioner considered it relevant to take into account that no rates were paid on the Site for a considerable period. Her Honour then noted that the Senior Commissioner at [64] identified the reason why he considered that the discount was relevant. After observing that he had a discretion under s 94B(3), she accepted Meriton's submission that the Senior Commissioner was not wholly free to formulate any conceivable contribution condition based solely upon the nebulous concept of reasonableness, but she considered at [30] that that submission did not fairly characterise the Senior Commissioner's reasoning and approach.
10. At [31] her Honour referred to Meriton's submission that the Senior Commissioner's error in the present case was indistinguishable from that identified by this Court in *Botany Bay City Council v Premier Customs Services Pty Ltd* [\[2009\] NSWCA 226](#); [\(2009\) 172 LGERA 338](#). She agreed with the Council's submission that that decision was distinguishable from the present if only because it dealt with a different statutory provision.
11. Her Honour's conclusion was confined to the following remarks (at [31]):

"Here the Court has specific power to amend a condition of a development consent based on a [s 94](#) plan, as conferred in s 94B(3), where the Court considers it reasonable to do so. The Senior Commissioner in making a discount for the credit given for past demand was not dealing with general policy considerations but rather the specific facts before him. This appeal must fail as there is no relevant error of law namely the taking into account of a legally irrelevant matter identified in the Senior Commissioner's approach contrary to the submissions of [Meriton]."
1. With respect, her Honour's reasoning supporting the conclusion that the Senior Commissioner did not err in law is unpersuasive for two

reasons. The first is that it is simply an assertion that there was no such error rather than a reasoned consideration of why that was so. Second, her Honour did not, at least directly, address the real issue, namely, whether the fact that the Site was non-rateable for a period of time was a relevant consideration as a matter of construction of [s 94\(3\)](#) taking into account the subject matter, scope and purpose of the provisions of the EP&A Act relating to the imposition of a condition under s 94(1) for the payment of a monetary contribution.

### **The submissions of the parties on the appeal**

1. Meriton submitted that her Honour found that the range of relevant matters that might be considered by the Court in imposing (or modifying) a condition imposed under s 94(1) of the EP&A Act were numerous and not confined to s 94 itself. It was submitted that that finding was based on a wrong construction of the Act. It was further submitted that her Honour had erroneously found that a condition formulated by the Court having regard to the "*reasonableness*" requirement in s 94B(3) of the EP&A Act may be determined without having regard to the limits imposed on the power expressly stated in s 94(1).
2. Further when one considered the terms of s 94(1) and its purpose and objective, there was no warrant to imply that the reasonableness of a condition requiring a monetary contribution could depend upon whether the relevant land was or was not rateable under the [Local Government Act 1993](#) (NSW) or its 1919 predecessor. To do so was to take into account a matter that was wholly unrelated to the question of whether, and how, a proposed development is or is likely to increase the demand for public services and amenities.
3. It was further submitted that the effect of the primary judge's decision was that the discretion conferred by s 94B(3) was essentially without limits. It was submitted that it was well established that, at least in the context of judicial review on the ground that the decision-maker took into account an irrelevant consideration, the High Court had held that where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined except insofar as there may be found in the subject matter, scope and purpose of the statute an implied limitation on the

factors to which the decision-maker may legitimately have regard:  
*Peko-Wallsend* at 40.

4. This principle has been applied on numerous occasions and was pithily referred to by French J (as he then was) in *Goldie v Commonwealth of Australia* [\[2002\] FCA 261](#) at [45] in the following terms:

"There is, of course, no such thing as an absolute discretion in the literal sense. A statutory discretion must be exercised by reference to the subject matter, the scope and the purpose of the legislation which creates it."

1. In the present case, so it was submitted, the subject matter, scope and purpose of the imposition of a condition requiring the payment of a monetary contribution pursuant to [s 94\(1\)](#) indicated that the determination whether or not such a condition was unreasonable in the particular circumstances of the case, did not permit a reference to whether the land in question was rateable or unrateable but, rather, was concerned with the net demand for public amenities and public services generated by the development in respect of which consent was to be granted.
2. Importantly, there was nothing in the Contributions Plan which expressly or impliedly suggested that the credit provisions in respect of past populations, and the amount of the credit to be determined as a consequence, was in any way dependent upon or related to whether a prior owner had paid rates. Such a factor was simply extraneous to the credit exercise to which the Contributions Plan referred. If this be so, then it was appropriate to infer that the scope and purpose of the relevant statutory provisions in the present case should be construed so as to exclude such an extraneous consideration which had no relationship or nexus to the demand for public amenities and services generated by the past population of the relevant land.
3. The Council submitted that the power to be exercised by the Court pursuant to s 94B(3) was broader than that which a council could exercise pursuant to [s 94](#). This is so insofar as the Court may (but a council cannot) disallow or amend a [s 94\(1\)](#) condition as unreasonable in the particular circumstances of the case notwithstanding that the council had determined that condition in accordance with its contribution plan as it was required to do.
4. It was further submitted that the particular factors underlying the

identification of what was a " *reasonable* " contribution within the meaning of [s 94\(2\)](#) were not identified: nor were the factors underlying the identification of what was " *unreasonable in the particular circumstances of [the] case* " for the purpose of s 94B(3). There was no reason to impliedly circumscribe the factors to which regard might be had in determining what was a " *reasonable* " or " *unreasonable* " condition. True it is that one could have a factual debate about whether a credit should be given and in the determination of the appropriate past workforce; one could also have a factual debate about whether the best measure of reducing the credit was the proportion of time that the land was in public ownership.

5. Plainly, so it was submitted, the non-payment of rates was linked to the considerable reduction in demand for public amenities and services that occurred when the British Leyland workforce left the Site; equally plainly, there might be other (contestable) bases on which a proxy for the reduction for demand might be measured. All are questions of fact.

### **The appeal should be allowed**

1. In my view Meriton's submissions should be accepted and those of the Council rejected. The underlying basis of the Senior Commissioner's reasoning particularly at [64], was that notwithstanding his determination of the appropriate workforce to be taken into account for the purposes of calculating the relevant credit, there should be a discount of that credit because there were periods of non-rateability when there was no revenue from the Site to subsidise or contribute towards the cost of community facilities presumably utilised by that workforce from time to time.
2. In my view, a consideration of the subject matter, scope and purpose of the relevant provisions of Subdivision 3 of Part 4 of the EP&A Act (which contains ss 94 and 94B), does not provide any basis, whether express or implied, which is capable of linking the rateability of the relevant land to the net demand for public amenities and public services generated by the development under consideration.
3. As Meriton submitted, so much was recognised by the Contributions Plan itself. In the table to paragraph 4.16, assumed employee density

was acknowledged and provided for community and recreational uses such as schools, TAFE colleges and hospitals, all of which would be exempt from rates. In other words, it was not suggested in the Contributions Plan that rateability of the land at any relevant time was a matter that could or should be taken into account in determining workforce occupancy rates, let alone contribution rates. Nor is there any reference in the Practice Notes issued by the Department and which were required by cl 26(1) of the Regulation to be taken into account by the Council in preparing the Contributions Plan to rateability being relevant to the determination of the credit or allowance which a council was required to make for existing development when determining the net demand generated by new development for public services and amenities.

4. As Meriton submitted, the relevant provisions of the statute are concerned with that demand. The developer was entitled to a credit for the demand created by the existing population, however determined. That demand could be in no way dependant upon whether the landowner in question who created the demand did or did not pay rates at any material time. True it is that before the EP&A Act came into force in 1980 a council may have depended upon rates (whether general or special) to provide public amenities and services to meet the needs of the existing population. But how it met those needs and out of what funds was not the subject of evidence before the Senior Commissioner and, therefore, could not be the subject of any justifiable factual findings.
5. The simple point is that the relevant provisions of the statute are concerned with the net demand for public amenities and services generated by the development in question. Although the relevant exercise requires a determination of the existing demand for such services in order to reach the net demand, the former is based purely on the actual or deemed resident or workforce population of the relevant land at the time of the development application for it is only the future population that generates the demand in respect of which a monetary contribution can be required. That determination cannot be dependant upon whether the demand of the historical population was ever met by the council or, if it was, out of what source of revenue.
6. If the Senior Commissioner's approach was to be adopted, then enquiries might need to be made to identify the public amenities and

services, if any, which the council provided to meet the existing demand and the source of the funds used for that purpose which would not necessarily be from the proceeds of the general rate. It might be sourced from government grants. Such historical enquiries, often lost in the mists of time, would be not only difficult but also unhelpful. Critically, they would tell the inquirer nothing that would assist in determining the issue posed by s 94(1).

7. Thus the present provisions of the statute neither expressly nor impliedly relate to the manner in which a council provides public amenities and services to meet the needs of past populations: rather, they are only concerned with ensuring that the present developer not be required to meet the needs that are not generated by the development in respect of which consent is being sought.
8. It follows from the foregoing that in my opinion the Senior Commissioner took into account an irrelevant consideration and in so doing erred in law. Once the Court was satisfied that the non-rateability approach involved an irrelevant consideration as a matter of construction of the statute, it was not in contest that that involved an error of law. It follows that the Senior Commissioner's decision should be set aside.

### **The appropriate orders**

1. Section 57(2) of the Court Act provides that this Court, upon hearing an appeal under s 57(1), may either remit the matter to the Land and Environment Court for determination in accordance with this Court's decision or make such other order in relation to the appeal as seems fit.
2. Meriton submitted that this Court should not remit the matter for further consideration by the Land and Environment Court, but should modify Condition 5 by providing for the full credit of \$467,462.28. The Council submitted that the matter should be remitted unless there could only be one outcome of the remitter, namely, that contended for by Meriton.
3. I have already referred at [25] and [26] to the issues that the Senior Commissioner considered required his decision. The first issue involved the determination of the appropriate workforce population to be factored into the credit calculation. That population was

determined at 229 and there is no contest with respect to that finding. In fact it would appear that the only contest at trial related to the determination of the relevant historical workforce. The Council submitted that it should be determined at nil as there were no workers on site counted in the 2001 Census. The Senior Commissioner rejected this submission.

4. The second issue was one raised by the Senior Commissioner rather than by the parties. It involved what was referred to as a regression analysis basis for credit calculation. At [44] of his reasons the Senior Commissioner observed that he had raised the question of whether or not it might be appropriate to apply a regression analysis to the contribution rates set out in the table to the Contributions Plan (reproduced at [10] above). In other words, instead of indexing those figures forward, a regression analysis should be applied to calculate what might have been the relevant contribution rate for each contribution category at the time of the peak workforce in 1964.
5. Upon the matter being raised it would appear that each of the parties provided such an analysis, which was then admitted into evidence without objection. However, the Commissioner noted that neither party pressed that he should have regard to such calculations and as a consequence he did not. After those documents were tendered the Senior Commissioner asked both parties whether they wished to make any further submissions thereon and both declined.
6. Although on the hearing of the appeal it was suggested that the Senior Commissioner was wrong to state that neither pressed that analysis, I see no reason in the circumstances to which I have referred to query the Senior Commissioner's memory of how this issue was conducted.
7. Finally, it was neither suggested to the Senior Commissioner nor on the appeal that there should be a discount of the historical workforce population of 229 or to the rates of contribution applicable to that workforce other than as was advanced to the Senior Commissioner and rejected by him. In these circumstances it seems to me that no purpose would be served by remitting the matter for further consideration in the light of this Court's decision with respect to the sole basis upon which the Senior Commissioner determined to discount the credit to which Meriton was otherwise found to be prima facie entitled.

8. Accordingly, I would propose the following orders:
  - (a) Grant leave to appeal.
  - (b) Appeal allowed.
  - (c) Set aside the orders made by Pain J on 30 April 2010 and the order made by Senior Commissioner Moore on 9 October 2009 and in lieu thereof order that Development Consent D/2007/2330/D for residential units at 5 Hutchinson Walk, Zetland be modified by inserting at the end of Condition 5, a credit of \$467,462.28 for past workforce contributions.
  - (d) The respondent to pay the appellant's costs of the proceedings before Pain J and of the summons for leave to appeal and the appeal.
9. **CAMPBELL JA:** I agree with Tobias JA.
10. **MACFARLAN JA :** I agree with Tobias JA.

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