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Capital Airport Group Pty Ltd v Director-General of the Department of Planning [2010] NSWLEC 5 (13 January 2010)

Last Updated: 14 January 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Capital Airport Group Pty Ltd v Director-General of the Department of Planning [\[2010\] NSWLEC 5](#)

PARTIES: Capital Airport Group Pty Ltd ACN 080 711
191(Applicant)Director-General of the Department of Planning (First Respondent)Queanbeyan City Council (Second Respondent)Canberra Estates Consortium No 4 Pty Ltd (Third Respondent)

FILE NUMBER(S): 40854 of 2009

CATCHWORDS: JUDICIAL REVIEW :- making of environmental planning instruments - repealed provisions - transitional provisions - availability of proceeding under the old framework - legislative intent - decision made without power

CONSTRUCTION AND INTERPRETATION: - making of environmental planning instruments - repealed provisions - transitional provisions - construction - legislative intent - incorrect reference to statutory provision

LEGISLATION CITED: [Environmental Planning and Assessment Act](#)

[1979 Pt 3 Div 4](#) (as unamended by the [Environmental Planning and Assessment Amendment Act 2008](#)) ss 53 - 70 [Environmental Planning and Assessment Regulation 2000](#) cl 9, cl 12

CASES CITED: [A & M Short Pty Ltd v Prestige Residential Marketing Pty Ltd \[2005\] NSWSC 872](#); [\(2005\) 194 FLR 32](#) [Australian Boot Trade Employee's Federation v Whybrow & Co \[1910\] HCA 53](#); [\(1910\) 11 CLR 311](#) [Broken Hill South Ltd v Commissioner of Taxation \(NSW\) \[1937\] HCA 4](#); [\(1937\) 56 CLR 337](#) [Cooper Brookes \(Wollongong\) Pty Ltd v Federal Commissioner of Taxation \[1981\] HCA 26](#); [\(1981\) 147 CLR 297](#) [Director of Public Prosecutions \(Nauru\) v Fowler \[1984\] HCA 48](#); [\(1984\) 154 CLR 627](#) [Dome Resources NL v Silver \[2008\] NSWCA 322](#); [\(2008\) 72 NSWLR 693](#) [Envy Trading v State of Queensland \[1998\] 1 Qd R 413](#) [Graves v Daft \(1996\) 89 A Crim 452](#) [Green v Minister for Climate Change, Environment and Water \[2008\] NSWLEC 48](#) [Kingston v Ke prose Pty Ltd \(1987\) 11 NSWLR 404](#) [Lindner v Wright \(1976\) 14 ALR 105](#) [Michael Realty Pty Ltd v Carr \[1975\] 2 NSWLR 812](#) [New South Wales Crime Commission v Kelly \[2003\] NSWCA 245](#); [\(2003\) 58 NSWLR 71](#) [Peninsula Group Pty Ltd v Registrar-General \(NT\) \(1996\) 136 FCR 8](#) [Pongrass Group Operations Pty Ltd v Minister for Planning \[2007\] NSWLEC 638](#); [\(2007\) 156 LGERA 250](#) [Q & R Developments Pty Ltd v Sutherland Shire Council \[2001\] NSWLEC 250](#); [\(2001\) 117 LGERA 438](#) [Sandvik Australia Pty Ltd v The Commonwealth \(1989\) 89 ALR 213](#) [Walshe v Prest \[2004\] NSWCA 94](#)

CORAM: Lloyd J

DATES OF HEARING: 14 December 2009

JUDGMENT DATE: 13 January 2010

LEGAL REPRESENTATIVES

APPLICANT: A Robertson SC, M N Allars (barrister) and A Stafford (barrister)
SOLICITORS: Mallesons Stephen Jaques

FIRST RESPONDENT: S A Duggan (barrister)
SOLICITOR: C Hanson
Director, Legal Services Branch
Department of Planning

SECOND RESPONDENT:T T-W To (barrister)SOLICITORS:Williams
Love & Nicol

THIRD RESPONDENT:J E Robson SCSOLICITORS:Blake Dawson

JUDGMENT:

- 22 -

**IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Lloyd J

Wednesday, 13 January 2010

LEC No. 40854 of 2009

**CAPITAL AIRPORT GROUP PTY LTD v DIRECTOR-GENERAL
OF THE DEPARTMENT OF PLANNING & ORS [\[2010\] NSWLEC 5](#)**

JUDGMENT

1. **HIS HONOUR:** The applicant, Capital Airport Group Pty Ltd, seeks declarations that:
 - (a) a decision made by the Director-General of the New South Wales Department of Planning to issue to the second respondent, Queanbeyan City Council, on or about 6 November 2009, a certificate under s 65 of the *Environmental Planning and Assessment Act 1979* (as unamended by the [Environmental Planning and Assessment Amendment Act 2008](#)) that a draft local environmental plan for South Tralee may be publicly exhibited, was made in excess of power;
 - (b) the certificate is invalid.

1. On 1 July 2009, the procedures for the making of environmental planning instruments contained in [Pt 3 Div 4](#) of the Act were repealed and replaced by a new raft of provisions: [Environmental Planning and Assessment Amendment Act 2008](#). The certificate which was issued by the Director-General in the present case was issued under s 65 of the repealed provisions. The question for determination is whether the relevant transitional provisions enabled the Director-General to issue the certificate under the repealed provisions, or whether the newly enacted provisions applied. If the former provisions did not apply, but the latter provision did, then the issuing of the certificate was made without power and the certificate is invalid.
2. The relevant facts may be briefly described. On 18 February 2009, the Council sent a letter to the Director-General “*pursuant to section 54(4)*” of the Act in regard to “*a proposed draft local environmental plan*” applying to land at South Tralee. The letter states: “*The draft LEP (South Tralee) proposes to rezone land from Zone No. 1(a) (Rural “A” zone) and Zone No. 7(b) (Environmental Protection) under Queanbeyan Local Environmental Plan 1988 to enable uses such as residential, business, educational, recreation, a transport interchange, environment protection or other appropriate uses*”.
3. On 12 March 2009, the Director-General responded by stating that the Council may continue with the preparation of the draft LEP, and (pursuant to s 74(2)(b) of the Act) directed the Council to comply with ss 57 and 61 (which required the preparation of an environmental study and the preparation of the draft LEP having regard to the study). The Council then prepared the draft LEP pursuant to s 54(5) of the Act.
4. On 10 September 2009, the Council submitted the draft LEP to the Department of Planning “*pursuant to s 64*” and requested that “*the Department issue a certificate under the provisions of s 65 of the Act to enable the public exhibition of the draft local environmental plan*”.
5. By an instrument dated 29 October 2009 the delegate of the Director-General signed a certificate under s 65(1) of the Act, which was sent to the Council on 6 November 2009.

The legislation is changed

1. As noted above, the provisions of Pt 3 Div 4 of the Act (ss 53-70) were repealed with effect on and from 1 July 2009 and replaced by a new raft of provisions (ss 53-60). The steps taken in the present case up to and including the issuing of the certificate under the former s 65 were taken under the repealed (or unamended) Act.
2. It becomes necessary to consider the former provisions and the transitional provisions which were made in connection with the new provisions which govern the making of local environmental plans.
3. Prior to their repeal on 1 July 2009, the provisions of the Act governing the preparation of local environmental plans were relevantly as follows.
4. Section 54 was as follows:

“54 Decision to prepare draft local environmental plan

(1) A council may decide to prepare a draft local environmental plan in respect of the whole or any part of the land within its area.

(2) Two or more councils may decide to join in the preparation of a draft local environmental plan in respect of the whole or any part of the land within their areas.

(3) Where 2 or more councils decide to join in the preparation of a draft local environmental plan under subsection (2), they shall enter into an agreement for the purpose of preparing that draft local environmental plan.

(4) A council or councils, as the case may be, shall inform the Director-General of the decision to prepare a draft local environmental plan and of the land to which it is intended to apply.

(5) Following the decision to prepare a draft local environmental plan, the council or councils may, subject to and in accordance with this Division, prepare the plan.”

1. Section 55 enabled the Minister to direct councils to prepare a draft LEP. Section 56 had been previously repealed. Section 57 enabled the Minister to direct a council preparing a draft LEP to prepare an environmental study of the land to which the draft LEP is intended to

apply. Sections 58 to 60 had been previously repealed. Section 61 required a council to prepare a draft LEP having regard to the environmental study prepared by the council under s 57. Section 62 required a council to consult with certain public authorities or bodies in the preparation of an environmental study and s 63 required a public authority, if requested to do so by a council, to furnish the council with such information and assistance as it deemed proper.

2. Section 64 and 65 were as follows:

“64 Submission of copy of draft local environmental plan to Department

When a draft local environmental plan has been prepared, the council shall submit a copy of the draft plan to the Director-General, together with a statement specifying the names of the public authorities, bodies and other persons the council has consulted with pursuant to section 62.

65 Certificate of Director-General

(1) Where the Director-General receives a copy of a draft local environmental plan from a council under section 64, the Director-General may cause to be issued to the council a certificate certifying that the draft plan may be publicly exhibited in accordance with section 66.

(1A) A certificate is not to be issued under this section unless the Director-General is satisfied that the draft local environmental plan has been prepared in accordance with any applicable standard instrument under section 33A. This subsection does not limit the grounds on which a certificate may be refused or the draft plan may be required to be amended under this section.

Note. Section 117 also empowers the Minister to give directions as to the principles to be observed in the preparation of, or the provisions to be included in, draft local environmental plans.

(2) A certificate issued under this section may be granted subject to the condition that the draft local environmental plan be amended in the manner specified in the certificate before it is publicly exhibited in accordance with section 66.

(3) Where a certificate is not issued under this section, the Director-General shall return the draft plan to the council, giving the reasons why the certificate was not issued, and directing the council to amend the draft plan in such a manner as to enable a certificate to be issued, or to take such other action as is appropriate.

(4) The council shall comply with a direction given under subsection (3).”

1. Section 66 stated that where a council received a certificate under s 65 with respect to a draft LEP, it should publicly exhibit the draft LEP. Section 67 permitted persons to make submissions on the draft LEP. Section 68 required the council to consider the submissions and then forward the draft LEP together with the submissions and other material to the Director-General. The Director-General was then required to furnish a report to the Minister under s 69 and s 70 then enabled the Minister to make the LEP.
2. The [Environmental Planning and Assessment Regulation 2000](#) contained a provision as to the information required to be given by a council to the Director-General under s 54(4) of the Act. Clause 9 of the Regulation was as follows:

“9 Notice to Director-General

(1) As soon as practicable after resolving to prepare a draft local environmental plan, a council is to give notice of that fact to the Director-General.

(2) The notice must contain:

(a) the terms of the resolution passed by the council, and

(b) such information as the Director-General may require for the purpose of determining:

(i) the effect of the proposed plan in relation to matters of State or regional significance,

(ii) the adequacy of the consultation procedures to be adopted by the council in the preparation of the proposed plan, and

(iii) the adequacy of any environmental study to be prepared by the council in relation to the proposed plan.”

1. The question of whether the process under the Act as unamended or as amended applies turns on the construction of the transitional provisions contained in the Environmental Planning and Assessment (Plan Making) Regulation 2009. Clause 12(1) of that Regulation defines “*amending LEP*” as meaning one that contains only direct amendments to other environmental planning instruments. The clause also defines “*former LEP plan-making provisions*” as including Pt 3 of the Act and the regulations under the Act (which are relevantly the provisions that I have described at pars [10] to [14] above). The clause defines “*pending LEP*” as follows:

“(a) a draft principal LEP received by the Director-General from the council under section 54 of the Act before 1 July 2009, or

(b) a draft amending LEP received by the Director-General from the council under section 54 of the Act before 1 July 2009, but only until 1 July 2010 (or if the Director-General had not issued a certificate under section 65 for public exhibition of the draft before 1 July 2009, until 1 January 2011).”

1. Clause 12(2) states:

“(2) The former LEP plan-making provisions continue to apply to the making of a pending LEP unless the Director-General notifies the council that they cease to apply. In that case, the Minister may, under clause 122 (2) of Schedule 6 to the Act, dispense with any conditions precedent to the making of the LEP (subject to compliance with such other requirements, if any, as are imposed by the Minister).”

The applicant’s submissions

1. The applicant submits that the draft LEP in the present case contains provisions for the repeal of all LEPs and deemed environmental planning instruments applying only to the land at South Tralee, so that the draft LEP can only be a draft “*principal LEP*”. Accordingly,

it follows that in the definition of “*pending LEP*” in cl 12(1), it is only paragraph (a) that is potentially applicable to the draft LEP in the present case. In my opinion, however, it is immaterial whether paragraph (a) or paragraph (b) of the definition applies. The crucial component of both paragraphs is that the draft document be “*received by the Director-General from the council under section 54 of the Act before 1 July 2009*”.

2. The applicant submits that: (a) a literal construction of the definition of “*pending LEP*” is not possible; (b) read literally it does not make sense; (c) the number “54” is a mistake, the actual legislative intention being to refer to “*section 64*”, so that “*section 54*” should be read as “*section 64*”.
3. The submission is based on the fact that s 65(1) of the unamended Act contemplated the receipt by the Director-General of a draft LEP from the council. The submission of the draft LEP to the Director-General is provided for in the immediately preceding provision, s 64. Section 54, however, is concerned with the earliest stage of the process of making an LEP under the unamended Act. Section 54 required no more than a council to inform the Director-General of a decision. Even more obviously, s 54 contains no provision for the Director-General to receive a draft LEP from the council. Section 54 proceeds on the assumption that the draft LEP does not yet exist, and in preparing the draft LEP the council must comply with a number of express statutory duties, including the preparation of an environmental study and consultation with public authorities. Compliance with the duty to consult must be demonstrated by the council including with the draft LEP a statement specifying the names of the public authorities and other persons and bodies consulted: s 64.
4. The applicant identifies by way of contrast the words “*a draft principal LEP received by the Director-General from the council*” in cl 12(1)(a) of the Regulation. I note the similarly worded “*a draft amending LEP received by the Director-General from the council*” in cl 12(1)(b) of the Regulation. These words are apt to refer to the process described in ss 64 and 65(1) of the unamended Act. As already noted, s 64 stated that a council shall submit to the Director-General a copy of the draft LEP, together with a statement specifying the consultation program it has undertaken. Section 65(1) described

the receipt by the Director-General of the draft LEP submitted to him or her under s 64. The receipt by the Director-General of the draft LEP is an event which enlivens the discretionary power vested in the Director-General by s 65(1) to issue a certificate certifying that the draft LEP may be publicly exhibited under s 66. Clause 12(1) of the Regulation is best reconciled with its statutory context if the reference to “*section 54*” is construed as a reference to “*section 64*”.

The applicant’s submissions should be accepted

1. In my opinion, the applicant’s submissions are compelling and should be accepted.
2. The language used in cl 12(1) of the Regulation in the definition of “*pending LEP*” is the language employed in s 64 and not s 54. The Director-General does not receive a draft LEP under s 54 - only notice of an intention on the part of the council to prepare an LEP. Moreover, cl 9 of the unamended Regulation, noted at par [14] above, stated that the notice to be given by a council under s 54(4) must contain information about the effect of the “*proposed*” plan, the adequacy of the consultation procedure “*to be*” adopted and the adequacy of any environmental study “*to be*” prepared. All of these are steps to be taken *before* a draft LEP is to be prepared and submitted to the Director-General.
3. The authorities confirm that where a literal construction leads to an absurdity or some repugnance or inconsistency with the rest of the statute, the literal and ordinary sense of the language may be modified so as to avoid that absurdity or inconsistency, but no further than necessary: *Australian Boot Trade Employee’s Federation v Whybrow & Co* [1910] HCA 53; (1910) 11 CLR 311 at 341-342, *Broken Hill South Ltd v Commissioner of Taxation (NSW)* [1937] HCA 4; (1937) 56 CLR 337 at 371, *New South Wales Crime Commission v Kelly* [2003] NSWCA 245; (2003) 58 NSWLR 71 at [20].
4. The principle is further explained in the well-known case of *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297. In that case Gibbs CJ said (at 304):
“It is only by considering the meaning of the words used by the legislature

that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say: cf *Cody v J H Nelson Pty Ltd* [(1947) [\[1947\] HCA 17](#); [74 CLR 629](#) at 648]. Of course, no part of a statute can be considered in isolation from its context — the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking ‘nothing remains but to give effect to the unqualified words’: *Metropolitan Gas Co v Federated Gas Employees’ Industrial Union* [(1925) [\[1925\] HCA 5](#); [35 CLR 449](#) at 455]. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* [[1965] 1 WLR 892 at 899; [\[1965\] 2 All ER 382](#) at 386].”

1. Mason and Wilson JJ said (at 320) that departure from the ordinary grammatical sense cannot be restricted to cases of absurdity or inconsistency. Their Honours further said (at 321) that the propriety of departing from the literal interpretation “*extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy to be discerned from those provisions.*”. Their Honours also said (at 320) that:

“...there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.”

1. There are many other examples identified by counsel for the applicant where the courts have departed from the literal meaning of a statute, inserting a word, correcting a drafting error or correcting typographical errors. The examples include *Peninsula Group Pty Ltd v Registrar-General (NT)* ([1996](#)) [136 FLR 8](#) (Kearney J), *Sandvik*

Australia Pty Ltd v The Commonwealth (1989) 89 ALR 213 (French J), *New South Wales Crime Commission v Kelly* (Sheller, Santow and Tobias JJA), *A & M Short Pty Ltd v Prestige Residential Marketing Pty Ltd* [2005] NSWSC 872; (2005) 194 FLR 32 (Young CJ in Eq), *Green v Minister for Climate Change, Environment and Water* [2008] NSWLEC 48 (Jagot J), *Director of Public Prosecutions (Nauru) v Fowler* [1984] HCA 48; (1984) 154 CLR 627 (the Court), *Lindner v Wright* (1976) 14 ALR 105 (Muirhead J), *Envy Trading v State of Queensland* [1998] 1 Qd R 413 (Davies and McPherson JJA, Mackenzie J), *Walshe v Prest* [2004] NSWCA 94 (McColl JA, Sheller and Santow JJA concurring), *Graves v Daft* (1996) 89 A Crim 452 (Underwood J), and *Dome Resources NL v Silver* [2008] NSWCA 322; (2008) 72 NSWLR 693 (Basten and Bell JJA, Beazley JA concurring). Several of these cases involved the court accepting an incorrect reference to a statutory provision as a typographical error which should be regarded as a reference to the correct statutory provision.

2. Moreover, as pointed out by counsel for the applicant, a construction that would promote the purpose or object underlying a statutory provision should be preferred to a construction that would not promote that purpose or object: *Interpretation Act 1987, s 33*, *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421 - 424 per McHugh JA.
3. The explanatory note for the Environmental Planning and Assessment Bill 2008, which became the amending Act with the new provisions relating to the making of local environmental plans, states that the reforms in the Bill “*seek to simplify and provide flexibility to the plan-making process, while retaining community and related consultation procedures*”. Clause 12 of the Regulation was inserted into the Regulation by the Environmental Planning and Assessment (Plan-Making) Regulation 2009. The explanatory note for the 2009 Regulation states:
“The object of this Regulation is to amend the [Environmental Planning and Assessment Regulation 2000](#) to make provision relating to the commencement, on 1 July 2009, of the environmental plan-making reforms in Schedule 1 to the Environmental Planning and Assessment Act 2008.”

1. The respondents rely upon a Planning Circular issued by the Department of Planning on 1 July 2009 in support of their construction of cl 12(1) of the Regulation. The Planning Circular is not, however, something to which regard may be had in determining the meaning of a statutory provision, either at general law or under [s 34\(2\)](#) of the [Interpretation Act](#). It is nothing more than a policy document which may contain an erroneous understanding of a statutory provision.
2. It is clear that the purpose of cl 12 of the Regulation was to provide transitional arrangements in the move to a new and more flexible plan-making process, in circumstances where the process of making a draft LEP had already been commenced before 1 July 2009 when the new procedures came into force.
3. Again, as noted by counsel for the applicant, if the purpose is to secure the benefit of the new plan-making procedures for a greater number of plans, then that purpose is more effectively achieved by minimising the number of steps that continue under the unamended Act. That purpose is promoted by selection of a step later in the process which must be reached prior to 1 July 2009 in order for the process to continue under the unamended Act. The selection of a decision under s 54 to prepare a plan allows a larger number of steps to be continued under the unamended Act. The selection of a step at an earlier stage of the process does not serve the purpose of saving a council from having to take all the steps required under the unamended Act and the benefit of the new simplified plan-making process would be withheld where a council had taken only the most preliminary of steps in the process.
4. On the other hand, the selection of a step later in the process allows a council that has already prepared a draft LEP to continue under the unamended Act. That is, where a significant amount of work has been undertaken to the point where a draft LEP has been submitted to the Director-General, the time and cost of further work under the new framework would be outweighed by the benefit of proceeding under the old framework. This would not undermine the object of having the availability of the more desirable and flexible process under the new provisions to the plan-making which is at a very early state, before a draft LEP had been prepared.

5. These considerations persuade me that the purpose of the transitional provisions in cl 12 is more likely to be achieved by adopting the construction of cl 12 (1) which is advanced by the applicant.

The respondents' submissions should not be accepted

1. The Director-General notes that the term “*draft LEP*” is not defined and submits that a draft LEP exists from the moment a council makes a resolution under s 54 of the unamended Act to prepare a draft LEP, that section being the first reference in the unamended Act to the concept of “*a draft local environmental plan*”. The submission also relies upon the notification of the council’s decision under s 54 containing the information specified in cl 9 of the Regulation (noted at par [14] above), so that it is properly described as not only a notification under s 54 but is also a draft LEP.
2. I do not accept the submission. The Council had no power to make a draft LEP until it had made a resolution under s 54(1). That resolution was a necessary preliminary step. The fact that the first reference to a draft LEP appears in s 54 does not mean that the draft LEP exists - the section refers to a decision “*to prepare*” a draft LEP - that is, it is a document yet *to be* prepared. Similarly, cl 9 of the Regulation, which states what the notice to the Director-General under s 54(4) must contain, refers to “*the proposed*” plan (pars (2)(b)(i), 2(b)(ii) and 2(b)(iii)), and to the consultation procedures “*to be*” adopted and the environmental study “*to be prepared*”.
3. It follows that the reference in cl 12(1) of the Regulation to “*a draft principal LEP received by the Director-General*” (par (a)) and to “*a draft amending LEP received by the Director-General*” (par (b)) can only be a reference to a draft local environmental plan received by the Director-General from a council under section 64, as described in s 65(1) of the unamended Act.
4. In so finding, I reject the submission of the third respondent, Canberra Estates Consortium No. 4 Pty Ltd, that there is a distinction between the concept of a draft local environmental plan in the Act and a “*draft principal LEP*” or a “*draft amending LEP*” in cl 12 of the Regulation. There is no reason why they should not all have the same meaning and I reject the suggestion that a draft LEP under the Regulation is something less than a draft local environmental plan

for the purpose of s 64 of the unamended Act.

5. The Council and the third respondent submit that a draft principal LEP in cl 12 of the Regulation is capable of referring to what was required to be submitted to the Director-General under 54(4) of the unamended Act. I do not accept the submission. As pointed out by counsel for the applicant, s 54(4) does not require a council to submit anything to the Director-General - it only required the council to inform the Director-General of its decision to prepare a draft LEP. A duty to inform a person of a decision that has been made to prepare a document is quite different from a duty to actually submit the document once prepared. Neither can a duty to “inform” be seriously understood as a duty to “submit”.
6. The second and third respondents also rely upon cl 9 of the Regulation as unamended, noted in par [14] above, and the Departmental Planning Circular of 16 February 2006 in order to amplify the duty under s 54(4). Clause 9 of the Regulation does not, however, assist in amplifying the duty under s 54(4) - it simply provides that the mode of communicating the information that the council had made a decision under s 54(4) was to be by a notice complying with cl 9. The Planning Circular does not assist the respondents’ submission and it is not capable of being used to construe the language of either s 54(4) of the Act or of cl 12(1) of the Regulation defining “*pending LEP*”.
7. The respondents next rely upon a sentence in the judgment of Jagot J in *Pongrass Group Operations Pty Ltd v Minister for Planning* [[2007\] NSWLEC 638](#); [[2007\] 156 LGERA 250](#) at [42], that “*a draft local environmental plan exists from a council’s resolution under s 54 until the plan is made or the process is otherwise exhausted under s 70*”. The statement of her Honour was made, however, in a case in which she was construing a direction given by the Minister under s 117, and in particular, the words in s 117(2)(a), which state that the Minister may direct a council “*to exercise its functions under Division 4 or 5 of Part 3 in relation to the preparation of a draft local environmental plan in accordance with such principles, not inconsistent with this Act, as are specified in the direction, ...*”. The full statement of her Honour at [42] of the judgment is:
“[42] First, a draft local environmental plan exists from a council’s resolution under s 54 until the plan is made or the process is otherwise

exhausted under s 70. Section 117 does not preclude the Minister from identifying the circumstances in which a direction applies to a draft local environmental plan by reference to stages in the statutory process.”

1. Two observations may be made about this. *Firstly*, even if a draft LEP exists from the date of a council’s resolution under s 54(1), the language of the definition of “*pending LEP*” in cl 12 would not be engaged. *Secondly*, no reasons are given by her Honour for the statement made in the first sentence of par [42], presumably because the point was not argued or not fully argued. There is no rule of law which binds a judge of first instance to follow the decision of a judge of co-ordinate jurisdiction, although considerations of judicial comity suggest that a judge of first instance will usually follow a decision of another judge of first instance in the same jurisdiction, unless convinced that the judgment was wrong: *Michael Realty Pty Ltd v Carr* [\[1975\] 2 NSWLR 812](#) at 820, *Q & R Developments Pty Ltd v Sutherland Shire Council* [\[2001\] NSWLEC 250](#); [\(2001\) 117 LGERA 438](#) at [\[23\]](#) - [\[24\]](#). In a case in which it appears that the point was not fully argued or developed before or by her Honour - whereas this is what the present case is all about - then I respectfully decline to follow her Honour’s dictum.
2. The Council submits that the phrase “*draft principal LEP*” in the definition of “*pending LEP*” in cl 12(1) is capable of including the substance of what will ultimately be contained in a draft instrument later submitted to the Director-General under s 64. That is, according to the submission, such a meaning is entirely consistent with the reference to s 54 in the definition of “*pending LEP*”. The Council submits that there is a textual indication that such a meaning was intended, namely, sub-cl (5) of cl 12:
“(5) In any Act or instrument, a reference in relation to a pending LEP:
 - (a) to a planning proposal includes a reference to a draft local environmental plan, and
 - (b) to community consultation includes a reference to the public exhibition of any such draft plan.”

1. The Council submits that “the equivalence is significant”: Under the amended Act a “*planning proposal*” is an early step in the planning process, before gateway determination (s 56) and well before the actual draft instrument (under s 59(1)); and it follows that the obvious intention of cl 12 was to employ “*draft local environmental plan*” or “*draft LEP*”, as encompassing more than just the actual draft instrument.
2. I am unable to accept the submission. Clause 12(5) is not a definition of draft LEP. It is a deeming provision. Under cl 12(5)(a) any reference in Acts or instruments to the preparation of “*planning proposals*” are deemed, in the context of a draft LEP which continues to be prepared by a council under the unamended Act, to include a reference to such a draft LEP. Under cl 12(5)(b) references in Acts or instruments to “*community consultation*” are deemed, in the context of a draft LEP which continued to be prepared by a council under the unamended Act, to include a reference to public exhibition. That is, cl 12(5) has nothing to do with the definition of “*pending LEP*” in cl 12(1). It appears to be directed to the amending Act, in which the term “*planning proposal*” is used as a term of art in relation to the new procedures for the making of local environmental plans: ss 55 to 60 of the Act as amended where the term “*planning proposal*” is used instead of “*draft local environmental plan*”.
3. Although the first respondent, the Director-General, accepts that the draft LEP in these proceedings is, in the context of cl 12(1) of the Regulation, a draft principal LEP, the Director-General relies upon par (b) of the definition of an additional period of twelve months from 1 July 2009 (if as at that date a s 65 certificate had been issued) or until 1 January 2011 (if a s 65 certificate had not been issued by 1 July 2009). The Director-General contends that if the applicant’s submissions are correct there would be no reason to extend the period for a further twelve months as, on the applicant’s argument, the draft LEP would have been prepared and submitted to the Director-General. That is, as I understand the submission, if “54” in par (b) is also a typographical error then par (b) appears to provide for time limits which are not required.
4. I am not persuaded by the Director-General’s contention. It seems to me that the explanation provided by the applicant is more plausible. Draft amending LEPs are defined as containing only direct

amendments to other environmental planning instruments. Paragraph (b) of the definition of “*pending LEP*” allows them to be pending LEPs and thus able to continue to follow the procedure under the unamended Act only if the draft amending LEP was received by the Director-General under ss 64 and 65(1) before July 2009 and allows them to continue to have the status of pending LEPs until 1 July 2010. As the applicant notes, this effectively sets a time limit for completing the procedure under the unamended Act. Once 1 July 2010 is reached, irrespective of whether the process has been completed, such as by a final decision made by the Minister under s 70(1) of the unamended Act, the procedure under the unamended Act may no longer be followed. On 1 July 2010 the draft amending LEP would lose its transitional status as a pending LEP and could not continue to be processed under the unamended Act.

5. Moreover, as the applicant points out, in the bracketed part of par (b) of the definition of “*pending LEP*”, a different approach is taken to a draft amending LEP received by the Director-General under ss 64 and 65(1) prior to 1 July 2009 where the Director-General has not issued a certificate under s 65 prior to 1 July 2009. In that event, the draft amending LEP has the status of a pending LEP for a longer period of time - until 1 January 2011. Once that date is reached, irrespective of whether the process has been completed, such as by a final decision of the Minister under s 70(1) of the unamended Act, the procedure under the unamended Act may no longer be followed.
6. The clear objective of par (b) of the definition is simply to allow more time for the completion of a draft amending LEP under the unamended Act in cases where a s 65 certificate had not been issued before 1 July 2009; that is, the time for processing the draft under the unamended Act is extended to 1 January 2011. It does not assist the Director-General’s construction of the definition at all. Indeed, the express reference in the bracketed part of par (b) to s 65 suggests that the immediately preceding reference in par (b) is to the step immediately before the step of issuing a certificate, namely submission to and receipt by the Director-General of the draft LEP under s 64.
7. The Council submits that the discretionary power of the Director-General under cl 12(2) of the Regulation to notify a council that the provisions of the unamended Act do not apply to the making of a

pending LEP is more consistent with the selection of an early step in the process, such as a decision under s 54 as the relevant trigger point for the application of the transitional provision. The Council submits that, by way of illustration, the discretion would allow the Director-General to allow a substantially advanced plan-making process (even prior to the actual draft instrument) to continue under the unamended Act, given the obvious benefit of so doing in terms of avoiding repetition of steps already undertaken,

8. There is, however, no inconsistency needing to be addressed. By exercising the power the Director-General stops the application of the unamended Act and the amended provisions apply. The illustration given by the Council describes the reverse of what may occur if the discretion is exercised. The conferral of the discretion shows that there is no intention to preserve absolutely the application of the unamended Act, even where the process had reached an advanced stage by 1 July 2009.

9. The Director-General relies upon cl 122(2) in Sch 6 of the amended Act:

“The Minister may dispense with any conditions precedent to the making of an environmental instrument under that Division if satisfied that the instrument was in the course of preparation prior to the commencement of this clause.”

1. The Director-General submits that this provision makes it plain that it is the totality of the course of preparation that is intended to be covered by the dispensing power and not merely the conditions precedent which only flow up to the receipt of a draft LEP as it was under the unamended Act. That is, according to the submission, it is open to the Minister to dispense with any condition precedent either before or after the formulation of a final draft by the Council.

2. It is clear to me, however, that the words “*under that Division*” in cl 122(2) are a reference to Div 4 in Pt 3 of the Act as amended. The conditions precedent which the Minister may dispense with are the conditions precedent under the Act as amended and not those under the unamended Act.

3. The Council submits that the availability of the dispensing power in cl 122(2) does not support s 64 as being the trigger point for the

application of the transitional provision. Clause 122(2) does not, however, support any particular step as the trigger point. And, as noted above, the dispensing power relates to conditions precedent under the Act as amended.

4. The Council relies upon the fact that the only criterion for the exercise of the Minister's discretion in cl 122(2) is satisfaction that "*the instrument was in the course of preparation*", which is apt to include even the early step of notification under s 54(4) of the unamended Act. I am unable to agree. The words support a construction where something more has been done than the making of a decision under s 54. The preparation of an LEP occurs only *after* that decision has been made. That is, the Minister's satisfaction that a draft LEP was in the course of preparation could only be reached if the preparation had commenced, which must be after the decision under s 54 had been made.
5. The Council also submits that cl 122(2) of Sch 6 and cl 12 of the Regulation are complementary provisions and should be construed harmoniously. They are not, however, necessarily complementary. Clause 122(2) is not expressed to be limited in its application to a "*pending LEP*" as defined in cl 12(1) of the Regulation.
6. The third respondent submits that there is further textual support for reading the plain words of cl 12(1) as they are written: the express preservation of the repealed Pt 5 of the *Heritage Act* 1977 (preserved by cl 12) would be to an extent meaningless if "*section 54*" were to be replaced by "*section 64*" in cl 12(1). This is said to be because [s 84](#) of the *Heritage Act* provides guidelines for the preparation of LEPs by councils and is clearly intended to have most work to do in guiding the early stages of a council's draft LEP preparation process in ss 54 to [63](#) - the sections preceding [s 64](#) - not to the post [s 65](#) processing of the draft LEP.
7. The third respondent's submission is based on the argument that these provisions were relevant to the steps from s 54 to [s 63](#) in the preparation of a draft LEP. This has no greater significance, however, than the fact that the steps from s 54 to [s 63](#) of the unamended Act were required prior to the submission of the draft LEP under s 64. The third respondent's submission does not point to the construction which it has advanced.
8. The Director-General submits that the purpose of the amending Act

was to simplify the planning regime with consequential savings in time and money for the council; and it would be contrary to this objective to require the council to set everything at nought and proceed under the new regime because of timing.

9. However, contrary to the Director-General's submission, the purpose of the amending Act is promoted by construing cl 12 of the Regulation so that "*pending LEP*" has a narrower ambit rather than a broader ambit. With a narrower ambit, more draft LEPs in preparation are required to be completed under the simplified and flexible provisions of the amended Act. The object of the amended Act is to replace the existing procedure with a new one preferred by the legislature. The Council and the third respondent submit that there is an object of saving time and expense for the council. However, no support for this object is found in the amended Act, the Regulation, or in any extraneous material.
10. Moreover, as noted by the applicant, there is no evidence that the Council would need to repeat anything that it has done between making its decision under s 54(1) on 28 January 2009, and 1 July 2009. The Council complains that it will have to repeat work done over seven years preceding 1 July 2009. It offers no explanation, however, as to why this work would have no utility, or have to be repeated.

Conclusion

1. None of the respondents' submissions displace the compelling reasons at pars [17] to [32] above. The declarations sought by the applicant should be made. The respondents must pay the applicant's costs.
2. I make the following declarations and orders
 - (1) A declaration that the decision made on or about 6 November 2009 by the first respondent, the Director-General of the New South Wales Department of Planning, to issue to the second respondent, Queanbeyan City Council, a certificate pursuant to [s 65](#) of the [Environmental Planning and Assessment Act 1979](#) (NSW) as unamended by the [Environmental Planning and Assessment Amendment Act 2008](#) (NSW) that a draft local environmental plan for South Tralee may be publicly exhibited, was made in excess of power.

(2) A declaration that the certificate issued by the delegate of the first respondent under [s 65\(1\)](#) of the *[Environmental Planning and Assessment Act 1979](#)* (NSW) dated 29 October 2009 and issued to the second respondent on or about 6 November 2009 is invalid.

(3) An order that the respondents pay the applicant's costs.

(4) The exhibit may be returned.

I hereby certify that the preceding 63 paragraphs are a true copy of the reasons for judgment herein of the Honourable Mr Justice D H Lloyd.

Associate

Dated: 13 January 2010

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