This decision has been amended. Please see the end of the decision for a list of the amendments.

Land and Environment Court

New South Wales

Medium Neutral Citation
Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No 2) [2011] NSWLEC 83
Hearing Dates
7-10 March 2011, 17 March 2011 (written submissions)
Decision Date
20/05/2011
Before
Biscoe J
Decision
1. Proceedings dismissed. 2. Applicant to pay respondents' costs.

Catchwords
JUDICIAL REVIEW:- validity of decisions made at intermediate stages of a process for making a local environmental plan (LEP) under the Environmental Planning and Assessment Act 1979 - whether Council failed to prepare an environmental study of the land (LES) as required by s 57(1) because the purported LES was not an objective, disinterested study of the land - whether

Council failed to prepare a LES as required by s 57(1) because it was uncertain in its operation - whether Council failed to have regard to a LES as required by s 61 - whether Council failed to consult in the preparation of the LES and the draft LEP as required by s 62 - whether Council failed to comply with implied obligation to take account of submissions made in response to consultations under s 62 - whether Council failed to take into account mandatory relevant considerations - whether in submitting under s 64 draft LEP and LES to Director-General of Department of Planning the Council's General Manager acted in excess of delegated power - whether Council's decision to submit was infected by apprehended bias - whether power of Director-General to issue certificate under s 65 was enlivened - whether Director-General failed to take into account mandatory relevant consideration.

Legislation Cited

Environmental Planning and Assessment Act 1979 ss 5, 24, 53-70, 79C
Environmental Planning and Assessment Amendment Act 2008 cll 12, 12A, 15
Environmental Planning and Assessment Regulation 2000 cl 12A
Local Government Act 1993 s 377(1)
Queanbeyan Local Environmental Plan 1998

Cases Cited

Anderson v Director-General Department of Environment and Climate Change [2008] NSWCA 337, 163 LGERA 400
Anderson v Minister for Infrastructure Planning and Natural Resources [2006] NSWLEC 725, 151 LGERA 229
Anderton v Auckland City Council [1978] 1 NZLR 657
Associated Provincial Picture Houses Ltd v Wednesdbury Corporation [1948] 1 KB 223
Bell v Minister for Urban Affairs and Planning (1997) 95 LGERA 86
Burns Philp Trustee Co Ltd v Wollongong City Council (1983) 49 LGRA 420
Cann's Pty Ltd v Commonwealth (1946) 71 CLR 210
Capital Airport Group Pty Ltd v Director-General of the Department of Planning [2010] NSWLEC 5, 171 LGERA 440
Charalambous v Ku-ring-gai Council [2007] NSWLEC 510, 155 LGERA 352
Courtney Hill Pty Ltd v Gawler Town Corporation (1988) 66 LGRA 1
Devon v New World Properties (NSW) Pty Ltd (Land and Environment Court of New South Wales, McClelland CJ, 27 July 1984, unreported)
Ebner v Official Trustee in Bankruptcy [2000] HCA 63, 205 CLR 337
F & D Bonaccorso Pty Ltd v Canada Bay Council (No 2) [2007] NSWLEC 537, 158 LGERA 250
Gales Holdings Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 617
Gales Holdings Pty Ltd v Minister for Infrastructure and Planning [2006]

NSWCA 388, 69 NSWLR 156
GPT Re Ltd v Belmorgan Property Development Pty Ltd [2008] NSWCA 256, 72 NSWLR 647
Gwandalan Summerland Point Action Group Inc v Minister for Planning [2009] NSWLEC 140, 75 NSWLR 269
Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal [1985] HCA 32, 156 CLR 1
Hot Holdings Pty Ltd v Creasy [2002] HCA 51, 210 CLR 438
Khan v Minister for Immigration and Ethnic Affairs [1987] FCA 457, 14 ALD 291
King Gee Clothing Co Pty Ltd v Commonwealth (1945) 71 CLR 184
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
Leichhardt Municipal Council v Minister for Planning (1992) 78 LGERA 306
McGovern v Ku-ring-gai Council [2008] NSWCA 209, 72 NSWLR 504
Mid Western Community Action Group Inc v Mid-Western Regional Council (No 2) [2008] NSWLEC 143
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40, 162 CLR 24
Minister for Immigration and Citizenship v SZJSS [2010] HCA 48, 85 ALJR 306
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6, 185 CLR 259
Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA 17, 205 CLR 507
Minister for Immigration v SZGUR [2011] HCA 1, 273 ALR 233
Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189
Minister for Planning v Walker [2008] NSWCA 224, 161 LGERA 423
Mison v Randwick Municipal Council (1991) 23 NSWLR 734
Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council [2009] NSWCA 300, 170 LGERA 162
Nikac v Minister for Immigration and Ethnic Affairs (1988) 20 FCR 65
Oshlack v Richmond River Council [1998] HCA 11, 193 CLR 72
Prineas v Forestry Commission of New South Wales (1983) 49 LGRA 402
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, 194 CLR 355
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld) [1979] HCA 50, 142 CLR 460
Swift v SAS Trustee Corporation [2010] NSWCA 182
Television Corporation Ltd v Commonwealth (1963) 109 CLR 59

Telstra Corporation Ltd v Australian Competition and Consumer Commission (No 2) [2007] FCA 493, 240 ALR 135
Tickner v Chapman (1995) 57 FCR 451
Transport Action Group Against Motorways Inc v Roads and Traffic Authority [1999] NSWCA 196, 46 NSWLR 598
Vakauta v Kelly (1989) 167 CLR 568
Walsh v Parramatta City Council [2007] NSWLEC 255, 161 LGERA 118
Webb v R [1994] HCA 30, 181 CLR 41
Zhang v Canterbury City Council [2001] NSWCA 167, 51 NSWLR 589

Category

Principal judgment

Parties

Capital Airport Group Pty Ltd (Applicant)
Director-General of the NSW Department of Planning (First Respondent)
Queanbeyan City Council (Second Respondent)
The Village Building Company Pty Ltd (Third Respondent)

Representation

Mallesons Stephen Jacques (Applicant)
Department of Planning (First Respondent)
Williams Love and Nicol Lawyers (Second Respondent)
Blake Dawson (Third Respondent)

Mr A Robertson SC with Ms M Allars (Applicant)
Ms K Richardson (First Respondent)
Mr J Kirk with Ms F Ramsay (Second Respondent)
Mr J Robson SC with Mr C Ireland (Third Respondent)

File Number(s)

40915/10

JUDGMENT

CONTENTS **Paragrap**

INTRODUCTION

1

The applicant, Capital Airport Group Pty Ltd, challenges the validity of two decisions made at intermediate stages of a process for the making of a local environmental plan (**LEP**) by the Minister for Planning under Division 4 (ss 53-70) of Part 3 of the *Environmental Planning and Assessment Act* 1979 (**Unamended Act**), which has since been amended by the *Environmental Planning and Assessment Amendment Act* 2008 (**Amending Act**):

(a)

the first decision was made pursuant to s 64 by the second respondent, Queanbeyan City Council, on 5 August 2010 to submit to the first respondent, the Director-General of the NSW Department of Planning, a draft LEP for South Tralee in the Queanbeyan local government area with a request to the Director-General to issue to the Council a certificate under s 65 certifying that the draft LEP may be publicly exhibited (**Submission Decision**);

(b)

the second decision was made pursuant to s 65 by the Director-General on 15 September 2010 to

issue a certificate (**Certificate Decision**).

2

The Certificate Decision was the stage that had been reached in the process of making a LEP under Division 4 of Part 3 when the applicant commenced these proceedings. The later stages under Part 3 are yet to take place.

3

The draft LEP provides for the rezoning of South Tralee for residential and other purposes.

4

The third respondent, the Village Building Company Pty Ltd (**Village**), is the majority owner (as tenant in common) of the land at Tralee. The applicant is associated with the nearby Canberra Airport and for some years has been opposed to the rezoning of South Tralee for residential purposes.

5

New procedures for the making of environmental planning instruments, introduced by the Amending Act, came into force on 1 July 2009. Division 4 of Part 3 was replaced. The new procedures differ significantly from those under the Unamended Act. However, pursuant to cll 12 and 12A of the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**), which were introduced in 2010, Division 4 of Part 3 continues to apply to the proposed LEP for South Tralee.

6

The current proceedings are the second legal challenge by the applicant to the Council's preparation of a draft LEP for South Tralee. The first challenge was successful. On 13 January 2010 this Court declared that the Director-General's decision under s 65 of the Unamended Act to issue a certificate certifying that the draft LEP may be publicly exhibited in accordance with s 66 was made in

excess of power and that the certificate was invalid: *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* [2010] NSWLEC 5, 171 LGERA 440 .

7

The challenges to validity are on an unusually large number of grounds - 13 of which 12 are pressed - although some are related, as follows:

Re Submission Decision

Ground 1	The Council failed to prepare "an environmental study of the land" (**LE** 57(1) of the Unamended Act, because the purported LES prepared for th disinterested study of the land but merely a "preconceived response" tha subject to conditions.
Ground 2	The Council failed to prepare a LES as required by s 57(1), because the
	The Council failed to have regard to a LES when preparing the draft LE
	(a)
Ground 3	by reason of Grounds 1 and 2, the purported LES 2010 was not a LES;
	(b)
	if it was a LES, the Council prepared the draft LEP without having rega
Ground 4	The Council failed to consult in the preparation of the LES 2010 and the
Ground 5	The Council failed to comply with its implied obligation to take accoun under s 62.
Ground 6	The Council failed to take into account a relevant consideration it was b Strategy as amended by the 2031 Addendum.
Ground 7	The Council failed to take into account a relevant consideration it was b to implement the 2031 Strategy as amended by the 2031 Addendum and Staging Map so that it was generally consistent with the 2031 Strategy a
Ground 8	In submitting the draft LEP and the LES 2010 to the Director-General, t power because the Submission Decision was inconsistent with a policy
Ground 9	is not pressed.

Ground 10	The Council's Submission Decision was infected by apprehended bias.
Ground 11	The Council failed to take into account a relevant consideration it was b agreements to which the State of NSW is a party and which are policies

Re Certificate Decision

Ground 12	By reason of the invalidity of the Submission Decision, the power of the enlivened because a precondition to the exercise of the power was recei was made in excess of power.
Ground 13	Even if the Submission Decision is valid and the Director-General's pov Director-General failed to take into account the relevant consideration o

8

The applicant claims declaratory and injunctive relief. The Council raises discretionary considerations against the grant of relief.

9

Grounds 5, 6, 7, 11 and 13 are said to be based on the common law principle in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, 162 CLR 24 at 39-42 that a decision-maker, by reason of the subject matter, scope and purpose of the statute conferring the power exercised, may be impliedly bound to take into account a relevant consideration. More specifically, the applicant says that:

- Ground 5 relies upon the construction of Division 4 of Part 3, especially ss 62-64, as well as s 5 (the objects section picked up by s 24).
- Ground 6, 11 and 13 rely upon the construction of Division 4 of Part 3, and s 5.
- Ground 7 does not rely upon any particular statutory provision.

STATUTORY CONTEXT

10

The challenged decisions were made at stages 3 and 4 of a seven stage process for the preparation and making of LEPs under the Unamended Act.

11

Stage 1 (ss 54-55) concerned a council decision to prepare a LEP. Section 54 provided:

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.

12

Stage 2 (ss 57 and 61-63) concerned the preparation of an "environmental study of the land" (LES), a council's responsibilities in preparing a draft LEP, and consultation with and information from public authorities and others. Sections 57 and 61-33 provided:

57 Preparation of environmental study

(1) Where a council decides to prepare a draft local environmental plan or is directed to do so by the Minister under section 55, it shall prepare an environmental study of the land to which the draft local environmental plan is intended to apply.
(2) A council shall prepare an environmental study in accordance with such specifications, if any, relating to the form, content and preparation of the study as have been notified to the council by the Director-General and are then applicable.
(3) (Repealed)
(4) The environmental study referred to in subsection (1) shall be prepared with regard to such matters, relating to the environment of the area to which the draft local environmental plan is intended to apply, as the council, subject to the specifications, determines.
(5) Where, in relation to a request or submission made by or on behalf of a person to a council, an environmental study referred to in subsection (1) of particular land is prepared by the council for the purposes of a draft local environmental plan to enable the carrying out of development on the land, the council may, subject to and in accordance with the regulations, recover the costs and expenses, determined in accordance with the

regulations, incurred in the preparation of the environmental study, from the person.

61 Council's responsibilities in preparing draft local environmental plan

The council shall prepare a draft local environmental plan having regard to the environmental study prepared by the council under section 57.

62 Consultation

In the preparation of an environmental study or a draft local environmental plan, the council shall consult with:

(a) such public authorities or bodies (including authorities of the Commonwealth or other States) as, in its opinion, will or may be affected by that draft local environmental plan,
(b) where the draft local environmental plan applies to land adjoining a boundary between the council's area and another area-the council of that other area, and
(c) such other persons as the council determines.

63 Information from public authorities

To facilitate the preparation of an environmental study or a draft local environmental plan, a public authority:

(a) shall, if requested in writing to do so by the council, furnish such information and provide such assistance as it deems proper to assist the council in the preparation of the study or plan, and
(b) shall notify the council of any information or any actual or proposed activity or work that, in its opinion, is relevant to the study or plan,
and a public authority is hereby empowered to the extent necessary to comply with the provisions of this section.

13

Clause 15 of the EPA Regulation provided that, for the purposes of s 57(5), the recovery of costs and expenses of the environmental study from a person was subject to the person agreeing to pay those costs and expenses and the terms of the agreement.

14

Stage 3 (s 64) concerned submission by a Council of a copy of a draft LEP to the Director-General of the Department of Planning. Although it was

mandatory for the Council to prepare a LES, have regard to it and consult in the preparation of it with those whom it determined to consult, there was no requirement that the LES be submitted to the Director-General. Section 64 provided:

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.

15

Stage 4 (s 65) concerned the issue of a certificate by the Director-General to the Council certifying that the draft LEP may be publicly exhibited. Section 65 provided:

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).

16

Stage 5 (ss 66-67) concerned public exhibition of the LES and the draft LEP and the making of public submissions. Sections 66 and 67 provided:

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.
(2) A draft local environmental plan shall be publicly exhibited for a period being not less than the prescribed period.
(3) Where, for the purposes of informing the public generally, a council decides to publicly exhibit a draft local environmental plan otherwise than in accordance with subsection (1), or to publicly exhibit any other matter which could be construed or represented as having a similar purpose to a draft local environmental plan, it shall at the same time publicly exhibit a statement to the effect that the exhibition is not to be regarded as an exhibition for the purposes of this Act.

67 Making of submissions

Any person may, during the period referred to in section 66(1)(c), make submissions in writing to the council with respect to the provisions of a draft local environmental plan publicly exhibited under section 66(1)(b).

Stage 6 (s 68) concerned a council's consideration of such public submissions, any subsequent alterations to the draft LEP, and submission of any draft altered LEP, details of submissions and other information to the Director-

General. Section 68 provided:

Consideration of submissions

(1) Where:

(a) a person making a submission so requests, and
(b) the council considers that the issues raised in a submission are of such significance that they should be the subject of a hearing before the council decides whether and, if so, what alterations should be made,

the council shall, in the prescribed manner, arrange a public hearing in respect of the submission.

(2) A report of the public hearing shall be furnished to the council and the council shall make public the report.
(3) The council shall consider the submission and the report furnished pursuant to subsection (2) and may make any alterations it considers are necessary to the draft local environmental plan arising from its consideration of submissions or matters raised at any public hearing.
(3A) An alteration made by a council pursuant to subsection (3) need not relate to a submission.
(3B) The council may (but need not) give public notice of and publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to subsection (3). The provisions of this section and sections 66 and 67, with any necessary adaptations, apply to any such exhibition of a draft plan, but not so as to require a further certificate under section 65.
(4) The council shall, subject to and except as may be provided by the regulations, submit to the Director-General:
(a) details of all submissions,
(b) the report of any public hearing,
(c) the draft local environmental plan and the reasons for any alterations made to the plan pursuant to subsection (3), and
(d) a statement:
(i) to the effect that the provisions of sections 66 and 67 and this section relating to public involvement in the preparation of the draft plan have been complied with,
(ii) specifying the environmental planning instruments and directions under section 117 that have been taken into consideration,
(iii) giving details of any inconsistency between the draft plan and any instrument or direction referred to in subparagraph (ii) and the reasons justifying the inconsistency, and
(iv) giving details of the reasons justifying the exclusion of provisions of the draft plan under subsection (5) or the exclusion from the application of the draft plan of any land under that subsection.
(5) In submitting the draft local environmental plan, the council may exclude certain provisions of the draft plan or exclude part of the land from the draft plan, or both (in this section referred to as the deferred matter) which, in its opinion, require or requires further consideration but which should not prejudice the consideration by the Director-General and the Minister of the draft plan as submitted.
(6) The council may subsequently take action under this section in respect of the deferred

matter, without having to publicly re-exhibit that deferred matter, as if it were a draft local environmental plan.
(7) More than one public hearing may be held in respect of any submissions, and one hearing may be held in respect of more than one submission.
(8) The regulations may make provision for or with respect to the conduct of a public hearing.
(9) After a draft local environmental plan has been submitted to the Director-General under this section:
(a) the council and the Director-General may (on one or more occasions) agree to the council making changes to the draft plan and resubmitting it under this section, or
(b) the Director-General may (on one or more occasions) return the draft plan so that the council can make changes to accord with any applicable standard instrument under section 33A or to take into account any directions under section 117.
This subsection applies whether or not a report under section 69 has been furnished in respect of the draft plan.

18

Stage 7 (s 69) mandated that the Director-General furnish a report to the Minister as to prescribed matters, which did not include the LES. A copy of the LES did not have to be given to the Minister. This follows naturally enough from the fact that the Council at no point had to give a copy to the Director-General. Section 69 provided:

Report by Director-General

(1) The Director-General shall furnish a report to the Minister as to:
(a) whether the draft local environmental plan submitted under section 68(4) is inconsistent with any State environmental planning policy, regional environmental plan, or relevant direction under section 117, applying to the land to which the draft plan applies,
(b) if there is such an inconsistency-whether the inconsistency is justifiable in the circumstances,
(c) whether the provisions of sections 66, 67 and 68 relating to public involvement in the preparation of the draft plan have been complied with,
(d) the relationship between the draft plan, and other proposed and any existing environmental planning instruments, and any relevant directions under section 117, applying to the land to which the draft plan applies, and
(e) such other matters (if any) relating to the draft plan as the Director-General thinks appropriate.

(2) The Director-General is not to furnish a report to the Minister 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 matters that the Director-General is required to consider for the purposes of a report.

Stage 8 (s 70) empowered the Minister, after considering the Director-General's report, to make a LEP. Section 70 provided:

Making of local environmental plan

(1) After considering the Director-General's report made under section 69, the Minister may:
(a) make a local environmental plan:
(i) in accordance with the draft local environmental plan as submitted by the council under section 68(4), or
(ii) in accordance with that draft plan with such alterations as the Minister thinks fit relating to any matter which in the opinion of the Minister is of significance for State or regional environmental planning,
(b) direct that action be taken in accordance with subsection (3), or
(c) decide not to proceed with the draft local environmental plan.
(1A) Without limiting subsection (1)(a)(ii), the alterations that may be made by the Minister relating to any matters which in the opinion of the Minister are of significance for State or regional environmental planning may comprise changes of substance to the draft local environmental plan and may arise from submissions or otherwise from the Minister's consideration of the matters in the draft plan.
(2) A local environmental plan shall apply to such area or part of such area as is described in that plan.
(3) The Minister may (but need not) direct the council to publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to this section or section 68, and the provisions of this section and sections 66, 67, 68 and 69 shall, with any necessary adaptations, apply to that plan.
(4) Where the Minister decides to make a plan in accordance with subsection (1), the Minister may exclude certain provisions of the draft plan or exclude part of the land from the draft plan, or both (in this section referred to as the deferred matter) which, in his or her opinion, require or requires further consideration but which should not prejudice the making of the local environmental plan.
(5) The Minister may subsequently take action in accordance with this section in respect of the deferred matter as if it were a draft local environmental plan submitted under section 68(4).
(6) Where the Minister decides not to proceed with a draft local environmental plan under subsection (1)(c), the Minister shall give such directions to the council as the Minister considers necessary in relation to that decision.
(7) The Minister shall inform the council of his or her decision under subsection (1) and, except where the Minister decides to make a local environmental plan in accordance with the draft local environmental plan as submitted by the council under section 68(4), the reasons therefore (sic), and may at the same time give directions to the council as to the procedure to be followed in connection with making his or her decision known to the public.
(8) Notwithstanding anything in this section and without affecting the power to make alterations pursuant to subsection (1), the Minister may make a local environmental plan with such alterations as the Minister thinks fit, being alterations that do not affect the substance of the provisions of the plan as submitted by the council or as altered pursuant to subsection (1).

20

Thus, the powers of the Minister were not limited to making or refusing the draft LEP as submitted by the Council to the Director-General under s 68(4): s 70(1)(a)(ii).

BACKGROUND

21

Tralee is rural land located about 6 kilometres south-west of Queanbeyan, within the boundaries of the Queanbeyan local government area and approximately 16 kilometres from Canberra. Tralee consists of two separate sites, South Tralee and North Tralee, that lie approximately 800 metres apart at their closest point. The area of South Tralee is 174 hectares. The area of North Tralee is 55.64 hectares. The ACT/NSW border runs along the western boundary of North and South Tralee. Just across the border is the Hume Industrial Estate. To the north, beyond Queanbeyan, is Canberra Airport. Tralee is within the greater area of Lower Jerrabomberra.

22

South Tralee is zoned partly 1(a) Rural and partly 7(b) Environmental Protection under the Queanbeyan Local Environmental Plan 1998. North Tralee is zoned 1(a) Rural. The objectives of Zone 1(a) Rural are: (a) to enable the continuation of restricted forms of agricultural land use and occupancy, and (b) to ensure that the type and intensity of development will not prejudice the likely future uses of the land for either environmental protection, open space or urban purposes. Thus, the potential for future urban purposes was recognised.

23

There is a long history relating to consideration of proposals for the residential

expansion of Queanbeyan. The Queanbeyan Structure Plan 1994 proposed urban rezoning for an area which included Tralee. The 1998 ACT and Sub-Region Planning Strategy adopted by the Commonwealth, NSW and ACT governments, identified Lower Jerrabomberra as an area with potential for future urban development. The Council's Residential and Economic Strategy 2031 (**2031 Strategy**), which was produced in 2006, displayed a similar vision for the area: see [29] below.

24

On 18 July 2001 the Council resolved that South Tralee should be investigated for future use for industrial purposes.

25

On 1 July 2002, by written application lodged with the Council, Village requested that its newly acquired land at South Tralee be re-zoned from its current zone of General Rural and Environmental Protection under the Queanbeyan Local Environmental Plan 1998 to residential, to enable Village to subdivide and develop it.

26

In response, on 17 July 2002 the Council resolved:

(a)
under s 54 to prepare a draft LEP in order to rezone Tralee residential and other appropriate zones (**s 54 Decision**);
(b)
to inform Planning New South Wales of the s 54 Decision as well its view that a LES was required;
(c)
that Village:
be requested to contribute a maximum of $20,000 towards the cost of employing an extra part-time staff member to assist in the administration of the application, as well as be requested to contribute towards the cost and/or provide, in kind, support for the other support documents and actions necessary to support residential development on Tralee. This is in addition to meeting the costs of a local environmental study.
(d)

that the project of a draft LEP and LES be inserted in the planned outcomes for the year for land use planning in the current management plan.

27

In 2005, a LES for South Tralee was produced for the Council pursuant to s 57 (**LES 2005**).

28

In 2006, the Minister for Planning constituted a panel to inquire into the residential development options available to Queanbeyan. The panel provided its report to the Minister in August 2006. The Minister requested the Council to use the panel's findings and planning principles to prepare a 25 year residential and employment lands strategy for Queanbeyan.

29

As requested, in November 2006 the Council provided the Minister with its 2031 Strategy. The 2031 Strategy stated that it had been prepared at a macro level and that more detailed work was required in background local environmental plans for the areas nominated on two maps, which included Tralee. The two maps designated a range of development types including residential, employment and environmental conservation .

30

The Council sent the 2031 Strategy to the Department of Planning for approval. It was endorsed by the Minister for Planning in April 2007.

31

The Department of Planning reviewed the 2031 Strategy twice: in April 2007 and in December 2008. I will refer to the latter as the **2031 Addendum** .

32

The 2031 Addendum stated that the Department would prefer it if rezoning of

the land in Stage 1 of the 2031 Strategy were prioritised. The Department's reasons were that: (a) the 2031 Strategy identified a need for 10,000 dwellings over the next 25 years, which equated to 400 dwellings annually; (b) housing affordability remained a priority for the government; and (c) the Department strongly supported at least two simultaneous land releases in Queanbeyan to provide sufficient housing to achieve that target, provided other factors did not further reduce housing affordability.

33

The 2031 Addendum recommendations included the following. Its attached map should be endorsed as a new Strategy Map for the 2031 Strategy and be used to guide the rezoning process for urban land in Queanbeyan required to meet the projected demand for housing and associated land use. Land identified as "Residential" on the map (especially on the eastern side of South Jerrabomberra) would be subject to more detailed investigations that would be undertaken in conjunction with subsequent rezoning processes. Prior to finalisation of any rezonings in the Strategy Map, the Council should finalise a transport strategy to service the new residential and employment areas.

34

A Council staff report of 28 January 2009 to the Council stated that a draft LEP was required to respond to the 2031 Strategy and the 2031 Addendum; that a background LES should be prepared to address matters as authorised in the 2031 Strategy and 2031 Addendum and pursuant to s 57 of the EPA Act ; and that it may also have regard to the extensive studies previously undertaken.

35

On 28 January 2009 the Council resolved as follows (**2009 Resolution**):

1. Council implement the endorsed amended Queanbeyan Residential and Economic Strategy 2031 (November 2008) and Addendum Report (December 2008) by:

(a) progressing, as a priority, draft local environmental plans for those lands located within

Stage 1 of Map 2 of the Strategy that had been subject to Environmental Studies previously as shown coloured on R&E Strategy Stage 1 Implementation Map, and

(b) addressing those remaining lands in Stage 1 that had not yet been subject to background Environmental Studies and lands located outside Stage 1, as part of a future report to Council on the lands investigation and sequencing.

2. The applicants and owners of the subject land shown coloured on the R&E Strategy Stage 1 Implementation Map, be advised that Council is prepared to support applications for draft local environmental plans subject to:

(a) background Local Environmental Studies being undertaken and/or commissioned by Council which address the requirements of section 57 of the Environmental Planning and Assessment Act 1979.
(b) the background Local Environmental Studies being paid for by the applicants, and
(c) payment of fees in accordance with Council's Management Plan for consideration of the rezoning application(s).

3. The applicants and owners of the subject land shown coloured on the R&E Strategy Stage 1 Implementation Map, be advised that prior to the development of the South Jerrabomberra release areas that Council will require:

(a) an agreed Master Plan which clearly sets out the spatial arrangements of development, the principles and the staging sequence as well as other relevant matters; and
(b) the Master Plan be prepared concurrently with the draft local environmental plan process.

4. ...pursuant to s 54 of the Environmental Planning and Assessment Act 1979 to prepare draft Local Environmental Plans in respect of land generally shown coloured on the R&E Strategy Stage 1 Implementation Map of this report to rezone the land from its current Rural and Environmental Protection zonings to the various zones generally consistent with the [endorsed 2031 Strategy and 2031 Addendum].

5. Pursuant to s 54(4) of the Environmental Planning and Assessment Act 1979, Council advise the Department [of] Planning of the Council's decision and further advise that Environmental Studies pursuant to Section 57 of the Environmental Planning and Assessment Act 1979 are required.

6. Following the preparation of the draft Local Environmental Plans, Council prepare the necessary plans and documentation and forward the relevant documentation to the Department of Planning requesting certification of the draft plans pursuant to Sections 65 and 66 of the Environmental Planning and Assessment Act 1979.

7. Subject to no submissions being received or submissions received being in support of the draft Local Environmental Plans, pursuant to section 67 of the Environmental Planning

and Assessment Act 1979, then pursuant to section 68 of the Act, Council forward the draft Local Environmental Plans to the Department of Planning and request that the Minister make the plans pursuant to section 70 of the Act with the advice that all environmental planning instruments and Section 117 directions have been taken into consideration and that Council finds no inconsistencies therewith.

36

In summary, the 2009 Resolution was (among other things) (a) to implement the 2031 Strategy and 2031 Addendum by prioritising draft LEPs for certain land located within Stage 1 of the 2031 Strategy, which included part of Tralee; (b) to address the remaining lands within Stage 1 and lands outside Stage 1 in a report; and (c) to prepare a draft LEP in respect of land generally shown in Stage 1 to rezone the land from its current zoning to various zones "generally consistent" with the 2031 Strategy as amended by the 2031 Addendum.

37

On 1 September 2009 the Council by a consultant, Eco Logical Australia, produced a supplementary LES for South Tralee (**LES 2009**) to update the LES 2005 and to consider any submissions made during the s 62 consultation process.

38

In 2009 the Council submitted the LES 2005 supplemented by the LES 2009 with a draft LEP 2009 to the Director-General pursuant to s 64.

39

On 15 September 2010 the Director-General issued a certificate under s 65.

40

On 13 January 2010 this Court made a declaration that the decision to issue the certificate was made in excess of power and that the certificate was invalid: *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* [2010] NSWLEC 5, 171 LGERA 440 . The s 54 decision to

prepare a draft LEP was not affected by that decision. The process following the s 54 decision could be continued.

41

As a result of the Court's decision, from March 2010 the Council embarked on a new round of consultation under s 62, including with the applicant .

42

On 7 May 2010 the Council wrote to its consultant, Eco Logical Australia, concerning the issues to be addressed in a supplementary LES. Under the heading "Preliminary" the letter stated :

Council's general view is that the issues dealt with in the September 2009 supplementary report and raised again in subsequent submissions will need to be reconsidered and often will need expanded responses in the revised supplementary report to those previously made, as well in some cases needs further work. The revised supplementary report to the LES also needs to refer to all actions/plans/commitments that have occurred since September 2009 which are relevant to the issues raised in submissions. It also needs to take into account that much of the detailed work will be done at another stage in a DCP/ Master Plan as well that other parallel but complementary processes are currently occurring eg a Part 3A application for a South Jerrabomberra STP and western road parallel to the border....

43

On 4 August 2010 the Council received from its consultant, Eco Logical Australia, the final version of a supplementary LES for South Tralee (**LES 2010**) which updated the LES 2005. It substantially superseded the LES 2009. In these proceedings the applicant contends that the LES 2010 did not fulfil the requirements of s 57(1) of the Unamended Act: see [7] above.

44

Under cover of a letter dated 5 August 2010, pursuant to s 64, the Council submitted to the Director-General a draft LEP for South Tralee, with a request that the Director-General issue a certificate under s 65. This is the Submission Decision challenged in these proceedings: see [1] and [7] above. At the same time the Council submitted to the Director-General a copy of the LES 2010.

45

The draft LEP proposed to rezone the land to enable uses such as residential, business, recreation and environment protection generally in accordance with the 2031 Strategy.

46

On 15 September 2010 the Director-General issued a certificate pursuant to s 65. This is the Certificate Decision challenged in these proceedings: see [1] and [7] above.

GROUND 1

47

Ground 1 is that the Council failed to prepare the LES as required by s 57(1) because the purported LES 2010 was not an objective, disinterested, study of the land but merely a study of Village's specific proposal for residential development.

48

It is convenient to repeat s 57:

Preparation of environmental study

(1) Where a council decides to prepare a draft local environmental plan or is directed to do so by the Minister under section 55, it shall prepare an environmental study of the land to which the draft local environmental plan is intended to apply.
(2) A council shall prepare an environmental study in accordance with such specifications, if any, relating to the form, content and preparation of the study as have been notified to the council by the Director-General and are then applicable.
(3) (Repealed)
(4) The environmental study referred to in subsection (1) shall be prepared with regard to such matters, relating to the environment of the area to which the draft local environmental plan is intended to apply, as the council, subject to the specifications, determines.
(5) Where, in relation to a request or submission made by or on behalf of a person to a council, an environmental study referred to in subsection (1) of particular land is prepared by the council for the purposes of a draft local environmental plan to enable the carrying out of development on the land, the council may, subject to and in accordance with the regulations, recover the costs and expenses, determined in accordance with the

regulations, incurred in the preparation of the environmental study, from the person.

49

Under s 57 there are three express requirements as to the contents of a LES. First, it has to be, at a minimum, an environmental study of the land to which the draft LEP is intended to apply: s 57(1). Secondly, if there are specifications by the Director-General, it has to comply with them: s 57(2) (there were no such specifications in the present case). Thirdly, otherwise the LES should look at anything that the Council in its discretion thinks fit relating to the environment of the area to which the draft LEP is intended to apply: s 57(4). The "environment" includes all aspects of the surroundings of humans whether affecting any human as an individual or in his or her social groups: s 5.

50

The requirements of s 57 have been considered in two cases in this Court, both decided by McClelland CJ: *Burns Philp Trustee Co Ltd v Wollongong City Council* (1983) 49 LGRA 420 and *Devon v New World Properties (NSW) Pty Ltd* (Land and Environment Court of New South Wales, McClelland CJ, 27 July 1984, unreported).

51

Burns Philp and *Devon* have to be read in light of the statutory amendments made in 1985, apparently in response to those decisions. These amendments form part of the statutory scheme with which the present case is concerned. The amendments included a new s 57(5) and the repeal of ss 56, 57(3), 58, 59 and 60. Previously, a draft LEP could only be prepared after the exhibition and submission of the LES under the former s 61. Under the amended s 61 the only temporal requirement is that the Council shall prepare the draft LEP "having regard to" a LES: *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 617 at [171] - [172] (not disturbed on the successful appeal *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388, 69 NSWLR 156). Under the

Unamended Act there must be a decision to prepare a draft LEP before a LES is prepared otherwise s 57(1) could not operate.

52

Burns Philp and *Devon* establish the following, which have not been affected by the 1985 amendments:

(a)

The LES required by s 57(1) must be an objective, disinterested study of the land not restricted to the merits of a particular rezoning proposal: *Burns Philp* at 434, 435; *Devon* at 23.

(b)

A LES may examine a specific rezoning application.

(c)

The obligation to prepare a LES does not impose a standard of absolute perfection and imports a concept of reasonableness: *Devon* at 21-22, following *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402 .

53

Prineas concerned an environmental impact statement under Part 5 of the Act rather than a LES. Cripps CJ held that the fact that an environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and regulations: at 417. That principle applies equally in my view to a LES. As with an environmental impact statement, the contents of a LES will not be subject to a fine tooth comb review. In *Prineas* the environmental impact statement was found to have substantially complied with the Act, even though it may have been better if certain omitted matters were considered: at 418. Applying *Prineas* , in *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 109 Bignold J found that an environmental impact statement had wrongly omitted significant matters, but these omissions were not so significant as to invalidate it.

54

In *Burns Philp* the purported LES was held not to be a LES required by the statute because the Council had merely adopted a study of a particular development proposal prepared for the developer and had not given it any independent consideration. That was a breach of ss 56 and 57 (see at 426, 427, 434, 443).

55

In *Devon* , a developer applied to a council to alter an industrial zoning of land so as to allow development of a shopping centre. The Council responded by resolving to support the concept of a commercial centre, to prepare a draft LEP accordingly, and to prepare a LES. After following the statutory procedure, a new LEP was gazetted which permitted this development. There was a challenge to its validity. One of the grounds was that the Council's decision to proceed with the draft LEP was initiated by a preconceived view that retail development should be permitted on the site. The submission was that the Council did not say, as it should have, "we shall investigate whether there should be a shopping centre at Glendale" but rather "we agree with the developer that there should be a shopping centre at Glendale and we shall investigate what form it should take during the course of making the LEP." McClelland CJ rejected the submission as "an excessively purist view of the way re-zoning should occur in the real world": at 14. His Honour said that "a study which includes an examination of the desirability and feasibility of a specific development" does not thereby acquire the taint of pre-conception: at 26.

56

It was said in *Burns Philp* that the Council must set in motion an objective, disinterested LES "before" it undertakes a consideration of the merits of a specific proposal. This temporal sequence was correct based upon the original provisions of the Act still then in force which required a LES as a prelude to a LEP. But it is incorrect under the amended provisions introduced in 1985, which were in force at the time relevant to the present proceedings, because

they did away with that prelude: see [51] above. The amended provisions included a new s 57(5), which envisaged that the LES may be prepared for the purposes of a draft LEP "to enable the carrying out of development on the land". Section 57(5) indicated that a specific development proposal may be part of what is considered in the LES. This is understandable because the decision under s 54 to prepare a LES, which kicks off the whole process, is likely to commence with a particular idea in mind, against the backdrop of an existing LEP; and that idea may be as a result of a particular development proposal which requires a rezoning.

57

The reality is that a trigger for major rezoning is frequently a specific development proposal: *Devon* at 26. This was reflected in s 57(5), which empowered a council to recover costs and expenses, determined in accordance with the regulations, incurred in the preparation of a LES, from a person. Clause 15 of the EPA Regulation provided that, for the purposes of s 57(5), such recovery was subject to the person agreeing to pay those costs and expenses and the terms of the agreement.

58

The applicant submits that Ground 1 is made out because where a draft LEP involves rezoning it is a mandatory requirement that a LES consider alternative uses other than that being proposed. The applicant submits that the LES 2010 failed to do so. The applicant had difficulty in answering the question: how many alternative uses? The applicant appeared to accept that it did not have to be all possible uses. The submission is a partial gloss on s 57, which in my view is not supported by its text or purpose nor by the authorities that have construed it (*Burns Philp* and *Devon*).

59

Even before the 1985 amendments, *Burns Philp* and *Devon* did not hold that such a consideration was mandatory, even though alternative uses were

considered on the facts in *Devon* . There was dicta in *Devon* , which the applicant cites, that the author of the LES in issue indicated that he considered other possible land uses: at 25. That was a summary of his evidence, not a decision that a LES necessarily has to consider other possible land uses. Nor was such a decision constituted by other dicta that a study which treats a specific proposal honestly and openly as one of the uses to be made possible by a re-zoning does not merely on that account offend the *Burns Philp* principle: at 26. On the contrary, McClelland CJ dismissed as "excessively purist" a submission that the Council did not say as it should have that "we shall investigate whether there should be a shopping centre at Glendale" rather than "we agree with the developer that there should be a shopping centre at Glendale": at 14. Thus, the LES was entitled to focus on a particular proposed use, whether or not its conclusion was expressed as agreement with the developer.

60

For the applicant to succeed on Ground 1 it must establish, in the language of s 57(1), that the LES 2010 was not "an environmental study of the land to which the draft local environmental plan is intended to apply".

61

I do not accept the Council's primary submission that s 57(1) merely required a study of the land and that the study did not have to consider any use of the land.

62

Section 57(1) required not just a "study" of the land but an "environmental" study. The term "environmental study" is not defined. Its meaning is informed by the definition of "environment", which includes "all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings": s 4(1) EPA Act. Self-evidently, the purpose of an environmental study of land required by s 57(1) is to inform the Council and

the public about the land to which a draft LEP may apply. Inform them of what? In my opinion the text of s 57(1), the purpose and context of the term "environmental study" and the definition of "environment" indicate that an environmental study may inform them of the environmental implications of making a particular draft LEP involving a particular rezoning.

63

A LES necessarily is prepared after a decision has been made to prepare a draft LEP which may affect rezoning. The LES may relate to a request by a person to the Council for a LEP which, through rezoning, enables the carrying out of development for a particular use of the land. Control is given to the Council to determine the matters that the LES is to address: s 57(4). Overriding power is given to the Director-General to specify the content of the LES: s 57(2). These factors indicate that the LES need not be an amorphous or generalised investigation into the environmental qualities of the land but a focussed examination of the environmental suitability of the land for the rezoning envisaged by the proposed draft LEP. The Council's discretion to determine the matters the LES is to address and the Director-General's discretion as to the contents of any specifications may be influenced by the particular use or uses under consideration.

64

I do not accept the applicant's submission that the LES 2010 merely addressed what conditions should be imposed on Village's residential proposal such that its content was directed to a "predestined conclusion" that that rezoning should be granted subject to conditions. The Council's 2009 Resolution recorded that the decision to prioritise LEPs for certain land was in order to implement the 2031 Strategy as amended by the 2031 Addendum, which had been endorsed by the Department of Planning: see [35] above. The LES 2010 stated that as a result of all investigations, the planning outcomes endorsed by the Department of Planning in the 2031 Strategy were recognised as appropriate.

65

The LES 2010 is far away from the unusual situation in *Burns Philp* where the Council merely adopted a study prepared for the developer without any independent assessment.

66

The applicant's case focuses on the LES 2010. However, the main LES was the LES 2005, which the LES 2010 supplemented. There is no complaint about the LES 2005. In fact the LES 2005 and the LES 2010 discussed a range of possible uses.

67

The LES 2005 was undoubtedly an environmental study of the land required by s 57(1). Its Executive Summary listed about a dozen environmental planning constraints and opportunities that influenced urban capability of the Tralee area. The LES 2005 stated that it provided the necessary background information for the Council to evaluate and make a decision on the Tralee site in relation to its role in meeting the future residential needs of the local government area. It stated that no recommendation had been made on the final form of development. These were issues for Council to resolve following consultations. However, it recognised that substantial areas within Tralee were suitable for residential development.

68

The Introduction to the LES 2005 observed that an essential requirement of the LES was to clearly present the results of a land use suitability assessment in order to provide a framework within which the competing requirements for various land uses throughout the site could be evaluated: at 330. The LES 2005 noted that an objective of the current zoning was to ensure that the type and intensity of development did not prejudice likely future uses for environmental, open space and urban purposes: see [22] above. Thus, it had always been foreseen that land zoned rural would likely be required for other

uses including urban uses.

69

The LES 2005 stated under the heading "Likely Development Types" that, based on information supplied by the Council and Village (the applicant for rezoning), it was likely that a combination of urban residential development and ancillary facilities would be proposed for the site. It then listed four types of residential development of different densities. Thus, the LES 2005 directly considered a range of possible uses.

70

Later chapters in the LES 2005 considered the existing environment including existing land uses, the geophysical environment, landscape and visual assessment, climate and air quality, cultural heritage, ecology, hydrology and water management, noise, bushfire assessment, contaminated land, economic considerations, traffic and access, and infrastructure services. There was also a chapter on evaluation and planning strategy. The LES 2005 stated that a key component of the LES was the site suitability assessment, the results of which provided the Council with a clear basis upon which to address land use planning and environmental management of the future proposal to rezone the land for urban development. Photos show that much of the land appeared to be cleared pasture land. Plainly, the LES 2005 studied the land and the environment in some detail.

71

The LES 2010, some 450 pages in length, concerned the South Tralee site and updated the LES 2005. It responded to the March 2010 s 62 comments and additional specialist technical studies. It described the land and its natural features in detail. It identified key issues arising including aircraft noise, noise impacts, infrastructure needs and funding and traffic and transport impacts. It recommended a 250 metre buffer to be designed to provide a visual acoustic barrier to the adjacent Hume Industrial Estate. It stated that it provided the

necessary background information for the Council to evaluate and make a decision on the South Tralee site in relation to its role in meeting a proportion of the future residential needs of the local government area. It stated:

No recommendation has been made on the final form of development on the Site. Recommendations are provided in this Supplementary Report for consideration by QCC in its decision-making process with regard to any subsequent master planning, and assessment of development applications. This report finds that, subject to the implementation of the recommendations at Chapter 10, the land is generally suitable for residential rezoning in accordance with the [2031 Strategy].

72

In its Introduction, the LES 2010 noted that the LES 2009 recognised that substantial areas within the site could support recreational, conservation, business and residential land uses if rezoning is approved. The conclusions were to make recommendations on which land use options should be pursued. The applicants' alternative proposal of a land use for employment purposes was addressed. The Conclusion chapter indicated that the study engaged with the question whether the land should be rezoned for predominantly residential use, or not.

73

Thus, the LES 2010, like the LES 2005, discussed the suitability of the land for various uses. The culmination of this process was that large swathes of land were set aside for environmental protection.

74

The applicant goes so far as to submit that the Council requested its consultant Eco Logical to prepare a study that could be used to endorse the proposed rezoning. According to the applicant, the evidence supporting this submission includes: (a) the fact that the only uses of the land considered in the LES 2010 were different types of residential use and zoning which were an adjunct to residential use; (b) the LES 2010 did not address infrastructure needs; and (c) Village paid for reports relied upon in the LES 2010.

75

If, as the Council submits, this is an attack on the integrity of the Council in seeking to benefit a particular developer, Village, the attack is unsustainable. The Council's 2009 Resolution prioritising the preparation of a LEP for certain land was not confined to land owned by Village and was a decision to implement the 2031 Strategy, as amended by the Department of Planning's 2031 Addendum. The Council's letter to its planning consultant to prepare the LES 2010 is also against the submission: see [42] above.

76

For these reasons, I do not accept Ground 1.

GROUND 2

77

Ground 2 is that there was a failure to comply with s 57(1) because the LES 2010 was uncertain in its operation.

78

The submission raises the question: what is the scope and nature of the operation of LES 2010? The question is not really answered by the applicant.

79

The applicant relies on the principle that an instrument, decision or condition may be invalid for uncertainty in its operation if it leaves undecided some matter of estimation, assessment, discretionary allocation or apportionment requiring judgment or further determination.

80

This principle has been applied to a power to fix prices (*King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 ; *Cann's Pty Ltd v*

Commonwealth (1946) 71 CLR 210; *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* [1979] HCA 50, 142 CLR 460 , at 481); a condition imposed upon a license or approval (*Television Corporation Ltd v Commonwealth* (1963) 109 CLR 59, 70); and a variety of decisions including determinations stating standards with regard to the quality or nature of broadcasting programs (eg *Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal* [1985] HCA 32, 156 CLR 1). In *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 the Court of Appeal held that a condition that the overall height of a building be reduced to the satisfaction of the Council's chief town planner was void for uncertainty because it "[left] for later decisions an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect ": at 740. The applicant also cites *Charalambous v Ku-ring-gai Council* [2007] NSWLEC 510, 155 LGERA 352 (where a condition of a development consent was held to be invalid for uncertainty); *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* [1999] NSWCA 196, 46 NSWLR 598 ; and *GPT Re Ltd v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256, 72 NSWLR 647 at [44] - [74].

81

Principles relating to uncertainty were summarised in *Telstra Corporation Ltd v Australian Competition and Consumer Commission (No 2)* [2007] FCA 493, 240 ALR 135 at [36] - [37] by Bennett J as follows (omitting citations):

36 There is no general principle that uncertainty in an executive instrument spells invalidity. The question is whether what has been done in fact answers the description of what the statute permits to be done in law. A statutory notice such as a s 151AKA(10) notice or a Part A competition notice (together, 'the Statutory Notices') must not be so vaguely expressed that its meaning of application is a matter of real uncertainty. The Statutory Notices must convey, with reasonable and sufficient clarity and certainty, the subject matter with which they deal and enable the recipient to know what is required if their issue is to be a valid exercise of statutory power. Where different kinds of subject matter are dealt with by different statutory provisions, the Statutory Notices should specify or make clear which particular aspects of the statutory regime are referred to and/or relied upon.

37 The severity of prospective penalties or consequences of failure to comply with a statutory notice that flow from the subject matter and the impact of the characterisation of

the conduct are relevant factors in identifying the requisite degree of certainty. Account is to be taken of the statutory context in which the issue of a statutory notice arises and of the relevant interests of third parties. To take an example relevant to a Part A competition notice, a third party may contemplate bringing an action for damages in reliance on that notice and has an interest in knowing with clarity the ambit and scope of the notice.

82

Thus, "the question is whether what has been done in fact answers the description of what the statute permits to be done in law". That requires close consideration of the statutory scheme.

83

The cases cited were concerned with very different statutory provisions concerning "decisions", "instruments", "conditions" and "statutory notices" with operative legal effect. They are not analogous to a "study" such as a LES. Unlike, for example, a condition of a development consent, a LES has no direct legal effect on rights, interests or duties. The statutory role of the LES is that it is a preliminary step to assist the process of producing a LEP, to which a council must have regard. The scheme does not require complete precision. The words in *Prineas* at 417 apply by analogy to a LES:

The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem. There will be always some expert prepared to deny adequacy of treatment to it and to point to its shortcomings or deficiencies.

84

In my opinion:

(a)

The uncertainty principle on which the applicant relies is inapplicable to a LES.

(b)

In any event the LES 2005 supplemented by the LES 2010 is not uncertain in its operation. It answers the description of what s 57 permits.

(c)

The applicant's complaints under Ground 2 are to a large extent an attempt to engage in

impermissible merits review.

Relationship between LESs

85

The applicant submits that findings in the LES 2010 are uncertain in their operation because of the uncertainty of the relationship between LES 2005, LES 2009 and LES 2010. In my view, there is nothing uncertain about the relationship between the three documents. LES 2010:

(a)
states that it is to be read in conjunction with the LES 2005 and supplements the LES 2005;
(b)
sets out its limited scope;
(c)
sets out the new planning information since the Tralee LES was first commenced in 2003;
(d)
sets out its purpose; and
(e)
sets out its recommendations.

86

The applicant submits that it is uncertain what recommendations remain relevant from LES 2005. I do not think that is a fair reading. LES 2005 clearly distinguishes between investigations in relation to North Tralee and South Tralee and makes recommendations in relation to each. It is clear that LES 2005 supplemented by LES 2010 is the s 57 LES on which the draft LEP 2010 is based. The Executive Summary in LES 2010 emphasises that the LES 2010 must be read in conjunction with LES 2005. It can readily be inferred that LES 2009 has been superseded save where it is expressed to be still relevant. The "Executive Summary" and "Introduction" in the LES 2010 set out the way in which the LES 2009 remains relevant.

87

The applicant submits that the LES 2010 treatment of "sewage, water and services" and "hydrology" are examples of uncertainty as to whether the LES 2005 recommendations remain relevant or have been superseded. In my view, this is indicative of an eye too keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, 185 CLR 259 at 271-2.

Dunns Creek Road

88

The applicant submits that findings and recommendations in the LES 2010 in relation to the alignment of the proposed Dunns Creek Road and traffic and transport assessment are incomplete or not in final form. Three specific matters are referenced: the findings rely on a draft GHD report; the findings rely on a report not appended to LES 2010 but on a draft appended to the LES 2009; and the findings rely upon the Gabites Porter Review 2010 which is said to be deficient for various reasons.

89

The Dunns Creek Road traverses South Tralee. The LES 2010 states that it is subject to further ecological investigations before the final alignment can be determined. The Council was not obliged to resolve the specific alignment of Dunns Creek Road or other issues in relation to that road for the purposes of s 57. In any case, the failure to do so was not of sufficient significance to invalidate the LES.

LES 2010

90

The applicant submits that the LES 2010 findings are incomplete because certain reports referred to therein were "not disclosed to the public". I do not

see why this should make the LES uncertain.

91

I do not accept the applicant's submission that the LES had to address but did not address major project applications made under Part 3A of the EPA Act in relation to traffic, transportation, infrastructure and sewage in the way the applicant contends. In any case, the LES did consider Part 3A applications that had then been made in respect of the site.

Conclusion

92

In my view this discussion demonstrates that Ground 2 is largely an attempt to engage in impermissible merits review.

93

For these reasons, I do not accept Ground 2.

GROUND 3

94

Ground 3 is that the Council failed to have regard to a LES as required by s 61 because:

(a)
by reason of Grounds 1 and 2, the purported LES 2010 was not a LES; or
(b)
if it was a LES, the Council prepared the draft LEP without having regard to it.

95

Section 61 provided:

Council's responsibilities in preparing draft local environmental plan

The council shall prepare a draft local environmental plan having regard to the environmental study prepared by the council under section 57.

96

I have rejected Grounds 1 and 2, holding that the LES 2010 fulfilled the requirements of s 57. Accordingly, the first part of Ground 3 must fail.

97

I turn to whether the Council had regard to the LES 2010.

98

The content of a statutory duty to "have regard to" or "to consider" something has been expressed in various ways. In *Tickner v Chapman* (1995) 57 FCR 451 at 462 Black CJ said that a duty to "consider" required an "active intellectual process" directed at the matter required to be considered. In *Tobacco Institute of Australia Ltd v National Health and Medical Research Council* (1996) 71 FCR 265 at 277 Finn J said:

...the "have regard to" formula has been interpreted consistently as requiring that the decision-maker subject to the formula must "take into account" the matter or consideration to which regard is to be had, and must "give weight to" that matter or consideration "as a fundamental element in making his determination": *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 328-330 per Mason J; see also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333, 338; Queensland Medical *Laboratory v Blewett* (1988) 84 ALR 615 at 623.

99

In *Zhang v Canterbury City Council* [2001] NSWCA 167, 51 NSWLR 589 Spigelman CJ, who delivered the leading judgment, held that a matter which a statute required the decision-maker "to take into consideration" must be considered as a fundamental element in, or focal point of his deliberatons. A "mere formalistic reference" does not satisfy a statutory requirement to have regard to a matter: *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (No 2) [2007] FCA 493, 240 ALR 135 per Lindgren J at [29].

100

The High Court in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48, 85 ALJR 306 at [26] approved the formula of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 457, 14 ALD 291 that the statutory duty to "consider" means to "give proper, genuine and realistic consideration to the merits of the case", whilst noting the caution in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45] that those words should not be permitted to encourage a slide into impermissible merits review. No reference was made to a view earlier expressed by the Court of Appeal that it is preferable to avoid using that formula or similar descriptive formulae, but that the relevant matter must be more than merely adverted to or given mere lip-service: *Anderson v Director-General Department of Environment and Climate Change* [2008] NSWCA 337, 163 LGERA 400 at [51] - [58]. For an earlier review of the authorities relating to the use of this formula see my judgment in *Anderson v Minister for Infrastructure Planning and Natural Resources* [2006] NSWLEC 725, 151 LGERA 229 at [52].

101

At 4.22pm on 5 August 2010, the Council received by email the final version of the LES 2010 from its consultant Eco Logical. A letter dated 5 August 2010 from the Council to the Department of Planning stated that the Council had prepared the draft LEP 2010 which was now submitted to the Director-General pursuant to s 64. The letter requested the Director-General to issue a certificate under s 65 certifying that the draft LEP may be publicly exhibited in accordance with s 66. The letter said that pursuant to s 61 the Council had prepared a LES and a supplementary report to the LES (copies of which were included on an enclosed USB). At 8.09am on 6 August 2010 a Council officer sent an email stating that he intended to lodge the s 64 application including the Council's letter (semble of 5 August 2010) and the draft LEP that day. It appears that the Council's letter of 5 August 2010 was delivered to the Department later on 6 August 2010.

102

The applicant submits that within such a short time frame the Council could not have directed an active intellectual process to the LES or made it a fundamental element in its determination of the content of the draft LEP.

103

If the evidence were confined to the fact that the Council purportedly reviewed this 450 page study from scratch in such a short time frame, that arguably might be sufficient, in the absence of competing evidence, to support the inference that it failed properly to have regard to it. A public authority must allow sufficient time to properly consider a study that it is under a statutory obligation to consider.

104

However, from June 2010 the Council was closely involved in the preparation of the LES 2010 through comment and review of various drafts. It also had a comprehensive knowledge of the environmental issues arising from its consideration of the LES 2005 and the LES 2009. Little reading was probably required by the responsible Council officers to update themselves on 5 August 2010 as to the final changes to LES 2010. It can be inferred that the Council had been drafting the LEP 2010 in conjunction with its review of the various drafts of LES 2010. That was permissible in my view.

105

On balance, I am not satisfied, on the evidence, that the applicant has discharged its onus of proving that the Council did not have regard to the LES 2010 as required by s 61.

106

Accordingly, I do not accept Ground 3.

GROUND 4

107

Ground 4 is that the Council failed to consult in the preparation of the LES 2010 and the draft LEP as required by s 62. Section 62 relevantly provided:

Consultation

In the preparation of an environmental study or a draft local environmental plan, the council shall consult with:
(a) such public authorities or bodies (including authorities of the Commonwealth or other States) as, in its opinion, will or may be affected by that draft local environmental plan,
...
(c) such other persons as the council determines.

108

Ground 4 focuses on the timing of a standard letter the Council wrote on or about 12 March 2010 to a number of public authorities including the applicant, informing them that the Council was embarking on a new round of consultation under s 62: see [41] above. The letter was written about three months before commencement of the drafting of the LES 2010. The letter provided to them for comment a copy of the LES 2005, the LES 2009 and the draft LEP 2009 for South Tralee. The letter was relevantly in the following terms:

RE: DRAFT QUEANBEYAN LOCAL ENVIRONMENTAL PLAN (SOUTH TRALEE) 2009 - CONSULTATION UNDER (FORMER) SECTION 62

As a result of the decision of the Land and Environment Court in *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* [2010] NSWLEC 5, the Council is embarking on a new round of consultation under the former section 62 of the *Environmental Planning and Assessment Act 1979* in relation to the above draft plan.

To facilitate the preparation of the draft plan you are requested to:

(a) furnish such information and provide such assistance as you deem proper to assist the council in the preparation of the plan; and
(b) notify the council of any information or any actual or proposed activity or work that, in your opinion, is relevant to the plan.

If you have previously provided information to the Council in relation to the draft plan and would like the Council to take this into account in the preparation of the plan, could you please confirm this in writing addressed to the General Manager, Queanbeyan City Council by 2 April 2010. Any additional information you would like the Council to take into account should also be provided by that date.

If no comments are received by 2 April 2010 it will be assumed that you do not wish to make comment/further comment.

Comments are specifically sought in relation to the following documents included on the attached disk:

South Tralee Supplementary Report to the original Tralee Local Environmental Study (March 2005)
Tralee Local Environmental Study (March 2005)
Draft Queanbeyan Local Environmental Plan (South Tralee) 2009

109

The content of a similar statutory consultation requirement was considered in *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306 (NSW Court of Appeal). In that case there was a challenge to the validity of a regional environmental plan on the ground that the prescribed process of consultation had not occurred as required under a statutory provision similar to s 62(a) and (c). The Director of Planning wrote a letter to persons to be consulted which spoke in general terms of "principles" and "criteria", of the State Government taking responsibility for rezoning of sites of regional significance, and of the provision of a "mechanism" for rezoning and of amendments to LEPs. But it did not state what those principles, criteria, mechanisms or amendments would be. Sheller JA (Priestley and Meagher JJA agreeing) held that consultation required these questions to be addressed either at a meeting or by correspondence: at 337. His Honour said at 338:

The parliament must be taken to have chosen the word "consultation" conscious of its use historically in this type of legislation. In this case proper consultation pursuant to s 45 required that the Council know what was proposed before it was expected to give its views and that the Council be given a reasonable opportunity to state its views. I see nothing unreasonable in the questions raised by the Council. When they were not dealt with the process of consultation broke down. Accordingly, contrary to the requirements of s 45, the Director did not ensure that consultations were held with the Council.

His Honour concluded at 340:

In this case the public duty which has not been performed is not related to the grant to a citizen of a right but to the Minister of a power. It is a stage in a process which may and in this case did effect the Council and residents of a municipality. Nor is the consultation envisaged private. The duty to consult is not only a public one but one which the legislature itself recognises as of importance to the bodies to be consulted. That is the very reason for consultation. Further as I have indicated, the language here is unusual. It fortifies my conclusion that consultation in accordance with s 45 is a precondition to the validity of a regional environmental plan. In the present case it did not take place with the consequence that Greater Metropolitan Regional Environmental Plan No 1 was not validly made.

110

The applicant fastens on the dicta that the person consulted "know what is proposed before they can be expected to give their views" and that the party consulted "must be given a reasonable opportunity to state their views": at 336. On that basis, the applicant submits that the standard letter did not meet the s 52 consultation requirement because:

(a)
it did not include a summary or copy of the LES 2010 the preparation of which had not yet commenced;

(b)
the Council did not provide the authorities with any of the reports on which the LES 2010 was ultimately based;

(c)
no meaningful opportunity was given to the authorities to present their views.

111

This overlooks that the LES 2005, of which no criticism is made, was the main LES and one of the enclosures to the letter, and that the LES 2010 was described as supplementary to the LES 2005.

112

Contrary to the applicant's submission, s 62 does not, in my opinion, require consultation to occur after the form and content of the LES has crystallised.

113

The temporal element in s 62 is that the consultation is to take place "in the preparation" of the LES or the draft LEP. There are two logical corollaries. First, if consultation occurs "in the preparation of" the LES, then necessarily the LES and the draft LEP will not be finalised, and may not even have been commenced. Secondly if consultation occurs in the preparation of the draft LEP, then necessarily the draft LEP will not be finalised.

114

Parliament would have intended consultation to operate in a practical and sensible way. Here, in the language of s 62(a), the Council had consulted with public authorities that, in its opinion, would or may be affected by the proposed draft LEP the previous year. But that process needed to be replaced because of the decision in the *Capital Airports Group* case. The Council then provided public authorities with which it consulted with two comprehensive environmental studies (the LES 2005 and the LES 2009) and the draft LEP which had been adopted on the basis of those studies. This was sufficient material for public authorities to be apprised of what was proposed (rezoning) and the environmental implications of the proposals for consultation purposes.

115

In my opinion, therefore, s 62 was fulfilled. Accordingly, I do not accept Ground 4.

GROUND 5

116

Ground 5 is that the Council failed to comply with its duty to take into account the submissions made in response to consultations under s 62 because it gave merely perfunctory reference to those submissions. The applicant says that the duty is implied by the statutory scheme in Division 4 of Part 3 of the

Unamended Act, especially ss 62-64, as well as s 5 (the objects section picked up by section 24).

117

The Council had a duty under s 62 to consult with such public authorities or bodies as, in its opinion, may be affected by the LEP and such other persons as it determined.

118

I accept that it is implicit in s 62 that the Council had to take into account submissions received from those with whom it consulted.

119

Appendix J to the LES 2010 is a summary of the s 62 submissions received and the Council's response to them.

120

The applicant's submission is not that any specific s 62 submission was not referred to or was overlooked by the Council. Rather, the applicant submits that because the Council used the terms "noted" and/or referred to sections of the LES 2010 against some of the submissions, those submissions were not taken into account and the references to them were merely "perfunctory".

121

I do not accept the applicant's submission. Prima facie, the word "noted" and reference to sections of the LES 2010 indicate that the Council considered the particular submission. The Council may not have considered it in the way the applicant thinks it should have been considered, but the weight to be given to a particular submission is for the decision-maker: *SZJSS* ; *Peko-Wallsend* at 40. In *SZJSS* the Refugee Review Tribunal stated that it gave "no weight" to certain letters. The High Court held no error was disclosed, as "the weighing of various pieces of evidence is a matter for the Tribunal": at [33]

122

Even if a reference to a section of the report did not deal with the substance of a submission or dealt with a different aspect of the submission, this does not mean that the submission was not considered in its entirely. In *Minister for Immigration v SZGUR* [2011] HCA 1, 273 ALR 233 the High Court rejected the respondents' argument that because a particular part of a letter - a requirement that the Refugee Review Tribunal arrange a medical assessment of the respondents - was not referred to in the Tribunal's reasons, this meant the Tribunal had not considered that part of the letter. The Court held that no inference should be drawn that it had not. The Tribunal had referred to the letter in its reasons and to other aspects of it and that was sufficient to infer that the Tribunal had considered all of the letter. French CJ and Kiefel J said at [33]:

In any event, the Tribunal's reasons were sufficient unto the day for what they disclosed about its approach to the agent's letter. The Tribunal made express reference to the letter and its contents so far as they went to SZGUR's forgetfulness, depression and Bipolar Mood Disorder. It referred to the psychiatrist's report and the statutory declarations which were provided with the letter. The absence of a reference to the agent's request in this context provides no support for an inference that the request was overlooked. The Tribunal having read the letter must have read the agent's request. It is difficult to see by what mental process the Tribunal could be said not to have considered that request.

123

A similar conclusion may be drawn in the current context. The fact that Council's replies addressed specific elements of a particular submission do not warrant an assumption that the Council considered only those discrete elements which where were responded to. Rather, the natural inference to be drawn is that the Council read and considered the whole of the document of which those discrete elements were a part.

124

Furthermore, the onus is on the moving party to establish a basis for drawing the necessary inference. There is no burden of proof on the responding party to demonstrate the positive proposition that the decision-maker did consider the

particular submission: *SZGUR* per Gummow J at [67].

125

The three examples selected by the applicant exemplify the errors in approach criticised by the High Court in *SZJSS* and *SZGUR* .

126

The first example is that the Council responded to the submission that "LES documents should provide a detailed assessment of the infrastructure needs and costs for the Stage 1 areas, and the regional/catchment impacts of such infrastructure" with the words "Noted. This is beyond the scope of the Supplementary Report". The following may be said of this example:

(a)

Clearly, the Council considered the submission. The submission was summarised and a response given by the Council.

(b)

It was for the Council to consider what weight to give to the submission. If the Council wished, it could give no weight to the points raised. The contrary could not plausibly be argued, for it is possible that submissions by different public authorities might make contradictory points, and the Council could not then rationally accept both submissions.

(c)

Pursuant to s 57(4), it is for a council to determine the matters to which an environmental study is to have regard.

(d)

In any case, infrastructure issues were considered: LES 2010 at Chapter 8 and Appendix C; and LES 2005 at Chapter 10 and Appendix C.

127

The second example suffers from the same defect as the first. It also highlights another defect in the applicant's complaint about the Council's use of the word "Noted". The submission to the Council in question was that, "it is incongruous to refer to the MOUs as a way to decide matters when those MOUs are not being complied with by the parties relying upon them". ("MOUs" was a reference to the governmental Memorandum of

Understanding on Australian Capital Territory and NSW Cross-Border Regional Settlement). The Council's response was "Noted. This is beyond the scope of this Supplementary Report and Tralee LES (2005)". It is difficult to see how the Council could reply to this type of submission in any other way given that it was directed at an issue - whether the parties are complying with MOUs - which fell outside the Council's domain.

128

The third example is of a different sort. The submission in question was "Economic opportunities associated with the railway line between Queanbeyan and Royalla, serving Hume and the ability for rail dependent uses to establish in this area should be protected and not undermined by residential, educational and local centre uses". The Council response was "Noted. See section 7.1.7 and 7.1.10". The applicant complains that the sections 7.1.7 and 7.1.10 of LES 2010 only consider noise impacts and nothing broader. Again, the Council did not have to consider a submission in any prescriptive way. It cannot be inferred that the Council did not consider all of the submission, even if a look at these sections were to disclose a narrowing of the range of issues which the Council considered. In any event, sections 7.1.7 and 7.1.10 of the LES 2010 considered these issues by considering that there should be a buffer between the rail line and residential, educational and local centre uses. Section 7.1.10 mentions the possibility that the line may be reinstated and that setback distances for dwellings and/or building treatment have been recommended.

129

These three examples suggest that the applicant is in the impermissible realm of the merits of the consideration of these issues.

130

Finally, on this ground, if there was any error in consideration of the submissions of public authorities, that error occurred at a stage of the process prior to public exhibition. If any public authority felt that its submissions had

not been given due consideration, then it had another chance to raise relevant issues with the Council and seek to persuade it of its case. In these circumstances, a question would arise, which it is unnecessary to answer, whether any error could be of such significance as to lead to invalidity.

131

For these reasons, I do not accept Ground 5.

GROUND 6

132

Ground 6 is that the Council failed to take into account a relevant consideration it was bound to take into account, being the 2031 Strategy as amended by the 2031 Addendum.

133

The applicant relies on the two categories referred to in *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208 per French and Drummond JJ :

> Where the existence and content of such a policy is to be regarded as a relevant fact which the Tribunal is **bound** to consider, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant factor and for that reason may result in an improper exercise of the statutory power. If a decision-maker, **not bound** to apply policy, purports to apply it as a proper basis for disposing of the case in hand but misconstrues or misunderstands it so that what is applied is not the policy but something else, then there may be reviewable error. In a limiting case a policy may be so broadly stated as to cover all considerations properly brought to bear on the exercise of the discretion. In such a case misconstruction of the policy may reduce to misconstruction of the statute or misunderstanding of its purpose. In so saying, the Court accepts that the limits within which its jurisdiction to review decisions of the Tribunal is conferred require that it be exercised with restraint.

(emphasis added)

134

To "take into account" does not, of course, mean "agree with" (a court, for example, must take into account parties' submissions). In my view, it is synonymous with "consider". The meaning of "consider" is addressed at [100] above. A decision-maker may take account of or consider a matter in a range of ways. They might consider it to be so insignificant that it is not worth exploring in any detail. They might consider it to be of some significance but find it is outweighed by other considerations. They might think it to be of such importance that it warrants thorough investigation.

135

The steps in the applicant's argument, as refined in its reply submissions, are as follows:

(a)

The Council's 2009 Resolution made the 2031 Strategy as amended by the 2031 Addendum a policy of the Council: see [34] above.

(b)

Whether or not the Council was bound to apply that policy, it was a relevant consideration and the Council purported to apply it but misunderstood it so as to give rise to a reviewable error: *Minister v Gray* .

(c)

The 2031 Addendum stipulated two preconditions to, or requirements for, the finalisation of rezoning. First, that a "transport analysis...be completed". Secondly, that "infrastructure delivery plans be completed".

(d)

A letter of 17 May 2010 from the Department of Planning to the Council referred to the two requirements, and stated that the Gabites Porter traffic study obtained by the Council in 2009 met the first, a transport and traffic analysis. The LES 2010 quotes that letter, indicating the Council's reliance on it (at 8-6). That statement demonstrates a misunderstanding of what constitutes a transport and traffic analysis. The officer of the Department who signed the letter "had no authority to change the Minister's policy".

(e)

The LES 2010 states that the Gabites Porter 2009 traffic study satisfied first requirement.

(f)

The LES 2010 says the second requirement is satisfied by the fact that the ACT government has requested that the Department fund roads for the proposed development, and that the Council by resolution had decided to prepare a broader Queanbeyan Transport Strategy in the future. The draft LEP 2010 contains a clause stating that before land is subdivided in an urban release area,

satisfactory arrangements are to be made for provision of State and Territory infrastructure and for contribution to its provision. The opinion in the 17 May 2010 letter, the statement in the LES 2010 and the clause in the draft LEP 2010 purport to satisfy, but manifestly do not satisfy, the second requirement and evidence a serious misunderstanding of the policy.

(g)

The misunderstanding of the policy constitutes a failure to take into account a relevant consideration.

136

I do not accept the applicant's submission. The heart of the submission here (and for Grounds 7 and 8) is that a proper transport and traffic study was not prepared. The submission trespasses into the merits of the Council's consideration of the 2031 Strategy even though it is presented as though there was a prescriptive way the Council was required to consider it.

137

The 2009 Resolution adopted the 2031 Strategy and 2031 Addendum as policy to the extent necessary to implement it, as stated in the 2009 Resolution. Merely because the Department indicated in the letter of 17 May 2010 that it considered that what had been provided was good enough to meet its requirement does not establish a misunderstanding. At its highest, it merely gives rise to a disputed issue of fact. As Preston CJ said in *Walsh v Parramatta City Council* [2007] NSWLEC 255, 161 LGERA 118 at [62] - [63], approved in *Minister for Planning v Walker* [2008] NSWCA 224, 161 LGERA 423 at [35] (omitting citations):

62 An applicant who undertakes to establish that an administrative decision maker improperly exercised power should not be permitted under colour of doing so to enter upon an examination of the correctness of the decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or the regularity or irregularity of the manner in which the decision maker has proceeded. The correctness or incorrectness of the conclusion reached by the decision maker is entirely beside the question.

63 Proper consideration of a relevant matter does not demand factual correctness. It is wrong to equate relevancy with factual correctness. A wrong assessment of the consideration the decision maker takes into account is not a reviewable error of law.

138

In the absence of a claim of *Wednesbury* perversity, it was a matter for the Department whether the material provided satisfied the 2031 Addendum.

139

Further, the principle in *Minister v Gray* quoted at [133] above, emphasises that a misunderstanding of a policy "may" be a reviewable error if it reduces "to misconstruction of the statute". No such misconstruction of a statute is alleged here.

140

Even if it were to be inferred that the Department misunderstood its own 2031 Addendum, there would be no invalidating consequences. As was explained in *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65 at 78 per Wilcox J:

..In a situation where the Minister is free deliberately to depart from his own policy, it is difficult to see that a decision by the Minister could be rendered invalid because, in making it, he misinterpreted the policy and thus accidentally departed from it.

141

In any case, in my view, the Council did take into account the 2031 Strategy and the 2031 Addendum. LES 2010 is replete with references to and consideration of the 2031 Strategy. One of the stated purposes of the 2031 Strategy is to determine the capability and suitability of the land at South Tralee for the land uses endorsed by the 2031 Strategy. The conclusion of the LES 2010 is that consideration has been given to the "high level scrutiny, consultation and investigation relevant to the proposed rezoning and development at South Tralee, and supporting investigations", including the 2031 Strategy and Department reviews of it. In addition to many other requirements to the 2031 Strategy in the LES 2010, as set out in Ground 2, Council considered the 2031 Strategy in relation to traffic infrastructure. The fact that the 2031 Strategy was referred to, particularly so regularly, suggests that all of it was considered.

142
For these reasons, I do not accept Ground 6.

GROUND 7

143
Ground 7 is failure to take into account a relevant consideration, namely, the Council's 2009 Resolution to implement the 2031 Strategy as amended by the 2031 Addendum.

144
This is a slight variant of Ground 6. I do not accept Ground 7 for the same reason that I did not accept Ground 6.

GROUND 8

145
Ground 8 is that in submitting the draft LEP 2010 and the LES 2010 to the Director-General, the Council's General manager acted in excess of his delegated power because the Submission Decision was inconsistent with the Council's policy adopted in its 2009 Resolution. This "policy" is said to be the 2031 Strategy as amended by the 2031 Addendum. Ground 8 is a variant on Grounds 6 and 7.

146
A council may delegate its functions to its general manager: s 377(1) *Local Government Act* 1993. In this case, by a delegation instrument executed on 17 December 2008, the Council delegated to its general manager specified powers, including any of its functions, powers, duties and authorities under the unamended Act, subject to the limitations in Schedule 1 to the instrument.

Schedule 1 provided that the general manager must not exercise any function delegated if the exercise of the function would be inconsistent with, or contrary to, "any adopted code, policy resolution of Council as at the time when it is proposed to exercise the function".

147
The applicant's submissions are unclear as to why the general manager's decision is inconsistent with the "policy" adopted in its 2009 Resolution.

148
Assuming that the 2009 Resolution was a "policy" resolution adopting the 2031 Strategy and Addendum Report, I cannot see any inconsistency between it and the Submission Decision.

149
Accordingly, I do not accept Ground 8.

GROUND 10

150
Ground 10 is that the Council's decision to submit the draft LEP to the Director-General under s 64 was infected by apprehended bias.

151
The applicant makes four claims of an appearance of bias:

(1)
Disqualification by Village's interest: Village was the proponent for, and had a financial interest in, the rezoning and also acted as a "decision-maker";
(2)
Disqualification by association: Village had "an association" with Council;

(3)

Disqualification by Council's interest: the Council had a "financial interest" in the outcome of the process; and

(4)

Disqualification by conduct: the Council "prejudged' the issue of rezoning, having formed a concluded view on matters central to the preparation of the LES 2010 and the draft LEP 2010.

Legal principles

152

The test for apprehended bias is whether a fair minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the matter: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, 205 CLR 337 at [6] - [7] per Gleeson CJ, McHugh, Gummow and Hayne JJ. There is attributed to the fair minded lay observer knowledge of the actual circumstances of the case: *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87. However, there should not be attributed to the fair minded lay observer a detailed knowledge of the law and the judicial process: *Webb v R* [1994] HCA 30, 181 CLR 41 at 51.

153

There are a number of further points that need to be made where a council is the decision-maker .

154

First, the *Ebner* test was developed in the context of a judicial decision-maker. While the test for reasonable apprehension of bias is the same for judicial and administrative decision-makers, its content may often be different: *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51, 210 CLR 438. A fair minded lay observer does not necessarily have the same expectations of an administrative

decision-maker, such as a council or council officer, as of a judicial or quasi-judicial decision-maker. If a lay person did have those expectations, they may not be reasonable: *Mid Western Community Action Group Inc v Mid-Western Regional Council* (No 2) [2008] NSWLEC 143 per Jagot J at [26]. As Basten JA stated in *McGovern v Ku-ring-gai Council* [2008] NSWCA 209, 72 NSWLR 504 at [80]:

...The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councillor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.

155

As to apprehended bias by prejudgment, Spigelman CJ said in *McGovern* at [22] - [23] (omitting citations):

...a "fair and unprejudiced" mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.

The "open to persuasion" test is an appropriate formulation for bias by prejudgment, to which the dual "might" test of apprehended bias must be applied; that is, that an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion.

156

Secondly, the different roles performed by different persons need to be taken into account, such as where the allegation of bias is directed at a staff member and is said to taint the ultimate decision of the Council or relevant authorised officer. The precise role of the staff member needs to be taken into account, particularly including whether that staff member has "a central role" in the decision-making process: *Hot Holdings* at [22] -[24], [72].

157

Thirdly, context may eradicate an apprehension of bias which has arisen. This is well-known in the judicial setting where subsequent statements or directions

by a judge can operate to eradicate an apprehension of bias: *Vakauta v Kelly* (1989) 167 CLR 568 ; *Webb* at 53, 92. This applies equally to councils: *Mid Western* at [45] - [46]. Time also may eradicate an apprehension of bias. In *Mid Western* at [47] Jagot J found that the "sheer passage of time" and the events occurring between the impugned conduct and the actual decision said to be infected by bias removed any real connection between them. The remoteness of the impugned conduct to the apprehended bias is another relevant factor going to context.

Claims 1 and 2 - Disqualification by Village's association and interest

158

The springboard of these claims in effect restates one of the complaints at Ground 1 that the trigger for the draft LEP was Village's ownership of the land and application for rezoning. This should be viewed in context:

(a)
since 2002, before Village purchased land at South Tralee, the Council had considered that the land at South Tralee was potentially suitable for urban uses;

(b)
the Council acted in the wider strategic environment of the 2031 Strategy and the Department of Planning's reviews of the 2031 Strategy;

(c)
it is common and permissible for a council to decide to prepare a draft LEP because of a rezoning application, see [57] above;

(d)
in its 2009 Resolution the Council resolved to prepare more than one draft LEP; the choice of the land to which the draft LEPs were to apply was based on the staging in the Staging Map; and the draft LEP for South Tralee was prioritised because of previous environmental investigations and studies.

159

The applicant's complaints are that Village had a central role in Council's

preparation of the draft LEP 2010 and the LES 2010 and that:

(a)
Village paid for, and commissioned, a number of reports which were considered in the LES 2010;
(b)
Village paid the salary of Mr Glenn Allen (and later Mr Matthew Laurence) who was one of four Council officers who made decisions relating to the draft LEP 2010 and the LES 2010; and
(c)
Village was a member of the Technical Working Group whose recommendations were taken into account in the Gabites Porter Traffic Study 2009 commissioned by the Council which influenced the LES 2010.

Studies paid for and commissioned by Village were peer reviewed

160
As discussed at Ground 1, McClelland CJ in *Burns Philp* saw no necessary difficulty with a developer paying for an environmental study. The "important point" was not "who pays for the study but for whom it is prepared": *Burns Philp* at 433. This is consistent with s 57(5) of the EPA Act.

161
In *Burns Philp* s 56 of the EPA Act (a provision that was repealed before 2009) required that a LES be prepared by or on behalf of a council. In *Burns Philp* the Council had mistakenly believed that the developer could prepare the LES and furnish the Council with a copy. When the Council realised its mistake, it simply commissioned the same consultant to prepare the report that the developer had already commissioned and the report was already well advanced. In these circumstances McClelland CJ held that the report could not have been a disinterested creature of Council: *Burns Philp* at 432. In *Devon* McClelland CJ clarified his position in *Burns Philp*. His Honour said that the council in *Burns Philp* had merely adopted the developer's study without giving the study independent consideration. Presumably, if the Council had

exercised its independent judgment and reviewed the LES no error would have been disclosed: *Devon* at 23.

162

In the present case it was the Council that commissioned its consultant Eco Logical Australia to prepare LES 2010 to supplement LES 2005; and it was the Council that ultimately determined, in accordance with s 57(4), the content of the LES 2010.

163

There is no issue in principle with a council's consultant, officer or employee drawing on and using material or studies that a developer supplies. The study does not stop being a creature of a council so long as the ultimate LES under s 57 is independently considered and adopted by the council. A similar issue arose for consideration in *Devon* . It was claimed that the LES comprised directly the work of consultants to the applicant for the development, including a report that was fundamental to the analysis of the impact on retailers in the LES: *Devon* at p 22. McClelland CJ said at 23-24:

In the *Burns Philp* case the council had simply adopted a study prepared for the developer without itself giving it any independent consideration.

In the present case... when the council determined that a study should be prepared it appointed its own principal planning officer to undertake the task and it did so, in terms of the resolution already cited, in order to achieve objectivity and independence in the preparation of the study...Neither the Act nor the principles to be deduced from the *Burns Philp* decision dictate that in the preparation of a study the author cannot refer to and analyse material from a number of sources including material brought into existence by the applicant.

...

On no proper basis could it be suggested that the study "in part comprises directly of the work of consultants to the applicant". Such material as was supplied by any such consultant was critically analysed and the conclusions drawn from such material were the conclusions of Mr Caldwell and not of those who provided the resource material...the study is in the sense required by the statements of principle in *Burns Philp* a disinterested study embodying as it does the analysis and conclusions of the person appointed by council to prepare it.

164

It is not uncommon for studies supplied by proponents to be used in relation to Division 4 of Part 3 processes, as recognised in the Department of Planning's Circular 06-013 (to which the applicant otherwise refers):

The key focus and rationale of a local environmental study is to ensure that the information supporting the proposed rezoning is balanced and forms a sound basis for decision-making. While independently prepared studies by the council can achieve this, it is also the Department's experience that this can be achieved through proponent-prepared studies provided they are properly managed and reviewed prior to the adoption by the council.

Councils can use a number of strategies to appropriately manage or review local environmental studies prepared by proponents, including:

oversight of consultants work by a council officer or an independent council engaged contractor
periodic reviews of the supporting and background work of the consultants by a council officer or council employed contractor
utilisation of peer reviewers (at the expense of the proponent) when the local environmental study is submitted
review of draft studies by state or federal government agencies.

165

In fact the Council (or its consultant Eco Logical Australia) undertook a peer review of reports that the LES 2010 referred to or relied upon, either in the LES 2010 or separately. For example, the draft traffic review by Gabites Porter at appendix I of the LES 2010 describes the model used by Village as a "reasonable but simplistic approach" and criticisms are made of assumptions in the Village analysis.

166

Thus, this case is nothing like *Burns Philp* , where the report commissioned by the developer was adopted by the Council without its own consideration of the matter. In my view consideration of studies supplied by Village did not give rise to an apprehension of bias.

Payment of contractor with no Council delegations or decision-making power

167

The reasoning in *Burns Philp* and *Devon* also extends to the employment of a consultant or contractor that assists in the preparation of a report, for or on the behalf of a council, though paid for by the applicant for rezoning.

168

That is especially so in light of s 57(5), which provides:

> Where, in relation to a request or submission made by or on behalf of a person to a council, an environmental study referred to in subsection (1) of particular land is prepared by the council for the purposes of a draft local environmental plan to enable the carrying out of development on the land, the council may, subject to and in accordance with the regulations, recover the costs and expenses, determined in accordance with the regulations, incurred in the preparation of the environmental study, from the person.

169

The nature of a statutory task is a critical consideration in considering whether conduct is infected by apprehended bias: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, 205 CLR 507 at [73] - [74] and [189] - [192]. As Spigelman CJ discussed in *McGovern* at [6], "the statute must be part of the assessment from the outset and not treated as some kind of qualification of a prima facie approach".

170

In the present case, the services of Mr Allen were provided under a contract between the Council and a corporation. That was a cost to the Council within the meaning of the term "costs and expenses" in s 57(5). The natural and purposive reading of those words would also include the salary of a council employee. It would serve no particular purpose to say if the council contracts out it can recover the cost under s 57(5) but if it does the work in-house it cannot.

171

The applicant submits that the word "recover" in s 57(5) means that the

council must pay the costs and expenses first and then get them back from the proponent; therefore s 57(5) does not apply because Village paid Mr Allen's remuneration directly. I do not accept the submission. In this context the word "recover" suggests that payment cannot be received from a developer for costs and expenses not in fact incurred eg for work not done. If that were to occur, there might be another word for such a payment. Provided payment is made for work done, even if it were paid in advance and drawn down, it is hard to see that it can make any difference.

172

I accept that some of the work Mr Allen did went beyond the LES, most notably work on the draft LEP 2010, and therefore that proportion (whatever it is) would not be supported by s 57(5). That, however, is not the end of the argument. Apprehended bias still needs to be established in accordance with general principle.

173

I start with what was said in *Burns Philp* at 433: "The important point is not who pays for the study but for whom it is prepared". What his Honour was talking about was the LES in the days prior to the introduction of s 57(5). But what is good for the LES is good for the draft LEP. The well informed lay observer, who knew that the Council was making the developer pay for assistance, would not be concerned so long as the integrity of the process was maintained. However, they would be concerned if the developer's man was inserted into the Council as some kind of agent.The question then becomes: what was the relationship between the Council, Mr Allen and Village?

174

Mr Allen was engaged after a public tender process and it was the Council that had the contract for the provision of his services. The Council advertised for expressions of interest for suitably qualified persons to provide professional services as a project officer to finalise the Tralee draft LEP project and

possibly the first stage of a subsequent subdivision along with some adjoining projects. Thus, to begin with, Mr Allen was the Council's man, not the developer's.

175

A deed was then entered into between Council and Village pertaining to payment of the cost of Council to engage a contractor to assist Council to prepared the draft LEP. Under the deed, Village agreed to pay the sum of $160,000 or to provide a bank guarantee for meeting the costs associated with the engagement of the contractor in the performance of the services. The deed included a number of important provisions setting out that the contractor was answerable to the Council only. Village agreed not to make contact with the contractor except with the prior consent of the Council (cl 6.1). Prior to appointing the contractor, the Council had to notify Village who the Council proposed to appoint. That was because Village was required to disclose any prior association within the last five years that it had with the contractor, if relevant (cl 6.2). Village had no right of veto over who the Council appointed: it was the Council's choice, not Village's. Village was not entitled to any additional access to confidential information, Council staff or councillors (cl 6.3). Village acknowledged and agreed that the Council had obligations and responsibilities under the EPA Act in relation to the preparation of local environmental studies and local environmental plans and the consideration of development applications. Village acknowledged that neither the Deed nor the payment of the Agreed Sum would be taken into consideration by the Council in performing its statutory functions and duties under the Act (cl 6.4).

176

The contractual prohibition against Village contacting Mr Allen was policed by the Council. Village breached that term once, was reprimanded by the Council and apologised.

177

Two further countervailing factors militate against a reasonable apprehension of bias:

(a)
Mr Allen (and after 1 July 2010 Mr Lawrence) had no delegations and, therefore, no decision-making capacity within the Council. His decisions were provided by a corporate contractor and he was not a Council officer. The applicant simply assumes because he was one of four persons involved that he must have had a role in the draft LEP "decision-making" process. The observations in *Hot Holdings* and *McGovern* are apposite here: see [154] above. It was David Carswell, a Council officer, and not Mr Allen who signed the 5 August 2010 letter that accompanied the submission of the draft LEP to the Director-General and who was the ultimate and independent decision-maker in relation to s 64.

(b)
It was Mr Carswell and not Mr Allen (or Mr Lawrence) who was the last Council officer to review and provide comments on the draft LES 2010 before the final report was issued.

The Technical Working Group

178
The applicant contends for a perception that Village used the Technical Working Group as a way to influence the LES 2010 and draft LEP 2010 process.

179
The applicant relies on *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300, 170 LGERA 162 as authority that participation of Village's representative on the Technical Working Group constitutes an association which may found apprehended bias. *Murlan* was a case in which a commissioner of this Court had personal associations with the council in question. The Court of Appeal held that this breached the test of apprehended bias. However, the standard applicable to judges and commissioners is very different to the standard applicable to local councils in dealing with developers lobbying for a particular proposal. Self-evidently, any form of personal association above perhaps mere friendship between a judge or a commissioner

and a party is going to raise an issue of apprehended bias. That was the situation in *Murlan* .

180

The 2031 Strategy and the two Department of Planning reviews envisaged that the Council would have a traffic and transport study for the whole of the Queanbeyan local government area. The Council retained Gabites Porter to conduct the study. That was in the context where the 2031 Strategy indicated that there was to be further residential development if possible in Googong and South Jerrabomberra, which included Tralee. In order to conduct the study, Gabites Porter needed to be informed of what was proposed in terms of number of residences, type of development, where construction would occur first, proposed location of roads and so on. Therefore, in April 2010, for the purposes of the Gabites Porter study, a Technical Working Group was formed to address deficiencies in the existing and future Queanbyean road networks and to address the equitable division of developer contributions needed to address those deficiencies. The group comprised representatives of the Council, the Roads and Traffic Authority, Gabites Porter, Village (as the proposed developer of Tralee) and Canberra Investment Corporation (as the developer of Googong). It made recommendations.

181

In June 2009 the Council resolved that the Gabites Porter draft Queanbeyan Strategic Traffic Plan be placed on public exhibition for 28 days. The exhibited document disclosed that the Technical Working Group had been formed and its membership. It stated that that in determining the successful option for Queanbeyan's future traffic needs 12 possible options had been considered. It stated that the transportation model used in the study took into account the expected population growth arising from the Googong and Tralee subdivisions and subsequent traffic movements that arise. It stated that the construction of Dunns Creek Road between the Tralee and Googong developments was seen by the Technical Working Group as a useful inclusion

in a future Queanbeyan network but would not likely be required in the current 2031 plan horizon.

182

On 26 August 2009, post public exhibition, the Council resolved in effect that the draft Queanbeyan Strategic Traffic Study be downgraded and be known as the Googong and Tralee Traffic Study 2009. There was also a resolution that submitters be provided with a copy of that resolution and the resulting resolution wherein Council determined to enter into an agreement urgently with the Federal and New South Wales governments regarding the balance of funding required for Dunns Creek Road.

183

These facts indicate that the community consultation process was transparent.

184

As to the working of the Technical Working Group, the minutes of its first meeting in February 2008 included an agenda which indicated that if the study was to be worth anything it had to take account of the proposed land development.

185

The last meeting of the Technical Working Group on 10 June 2009 records that Village was never happy with the removal of Dunns Creek Road. This was in the context where Gabites Porter concluded that Dunns Creek Road was not needed until after 2031.

186

The roles and responsibilities of the respective members of the Technical Working Group are set out in the minutes of its meeting on 29 May 2008:

A. Confirmation of the study of roles and responsibilities:
i. Client - the study was confirmed as being Council's study, therefore QCC is the client of the modellers.

ii. Funding - jointly, and equally, funded by the two proponents CIC and VBC.
iii. Reporting - BNC to finalise the modelling report and then GHD to prepare and finalise the cover report.
iv. Reporting and sign-off/decision making:
a. Decision making rests with QCC (GF)
b. QCC to cc proponent into correspondence with modellers.
c. Proponents to communicate with BNC and GHD though QCC (GF).

187

BNC was the predecessor to Gabites Porter. The minutes make clear that although modelling was to be done jointly for the reasons discussed earlier, the consultants were the Council's consultants, the decision vested with the Council, and the developers were never to communicate with the consultants except through the Council.

188

In the circumstances to which I have referred, I do not consider that Village's membership of the Technical Working Group infected the Council's s 64 Submission Decision with apprehended bias.

Claim 3: Disqualification by Council's "financial interest"

189

The applicant claims that the Council had a "financial interest" in the outcome of the rezoning under the draft LEP 2010 which gave rise to an appearance of bias by reason of:

(a)
the "benefits received" or expected to be received from Village pursuant to a draft voluntary planning agreement (**VPA**);

(b)
the funding of a Council officer's salary; and

(c)
the funding of reports for LES 2010.

190

In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 , 205 CLR 337 the High Court rejected the notion that there was a separate and free-standing rule of automatic disqualification where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding: at [54]. Instead, the fair minded observer test applies. Automatic disqualification without consideration of that test applies only where the judge is a party to the case they are deciding: at [59] - [63].

191

In *Courtney Hill Pty Ltd v Gawler Town Corporation* (1988) 66 LGRA it was held that a council's acceptance of a developer's contribution to its car parking fund gave an appearance of bias to the council's subsequent decision to reverse its refusal of the developer's application for consent to build a supermarket.

192

I turn to the applicant's claim about the draft VPA. By letter dated 16 July 2009 to the Council, Village stated that it was willing to provide further contributions under a VPA for South Jerrabomberra to facilitate land acquisition for, and design of, Dunns Creek Road between two points, with some contribution to its construction.

193

On 22 July 2009 the Council resolved to accept the offer and to enter into an agreement with Village in which Village would fund the acquisition of land for Dunns Creek Road and 50 per cent of the cost of its construction. From about mid 2009 Village and the Council were negotiating the terms of a draft VPA and the terms of a development contribution plan by Village to infrastructure in South Tralee.

194

On 8 September 2009 the Council received a draft VPA from Village's agent. Clause 2.2(b) provides that the "council must use its best endeavours to

achieve the Making of the LEP as soon as practicable." Clause 2.3(a) provides for termination of the VPA if the LEP is not gazetted within stated time periods. Clause 4.1 provides for Village to lodge its Stage 1 development application (**DA**) within 12 months of gazettal; and that if the Stage 1 DA is consistent with the design in the schedule to the VPA the Council must provide its consent under cl 49(1)(b) of the EPA Regulation in respect of any of the Council's land. Clause 4.2(c) provides that cl 4.1 is not intended to fetter the Council's discretion in exercising its statutory powers.

195

In a later version of the draft VPA, dated 13 October 2009, the Council's comments refer to the possibility of the draft VPA being entered into before or after gazettal of the LEP: at [a3].

196

Two factors militate against the draft VPA giving rise to a reasonable apprehension of bias by reason of the Council's "financial interest" or otherwise.

197

First, the VPA was in draft and the Council made no commitment to anything contained within it.

198

The email from Glenn Allen attaching the draft VPA states: "It is noted that Council will require legal advice". Council's review comment at [a1] of the draft also states "QCC legal advice to be obtained on draft VPA". All the clauses of the draft VPA to which the applicant refers were commented on in Council's review.

199

Secondly, in this context (in contrast to the Part 3A EPA Act case considered

in *Gwandalan Summerland Point Action Group Inc v Minister for Plannin* g [2009] NSWLEC 140, 75 NSWLR 269) a VPA is expressly permitted by s 93F of the EPA Act . Section 93F(1) provides:

(1) A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or two or more planning authorities) and a person the developer):

(a) who sought a change to an environmental planning instrument, or
(b) who has made, or proposes to make, a development application, or
(c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,

under which the developer is required to dedicate land free of cost with, pay a monetary contribution, or provide any other material public benefit, or any contribution of them, to be used for or applied towards a public purpose.

200

Section 93F(1) expressly allows a planning agreement to be entered into when a change is "sought" to an environmental planning instrument ie before the environmental planning instrument is made. The nature of a statutory task is a critical consideration in whether conduct is infected by apprehended bias. It cannot be that Council's submission of the draft LEP 2010 under s 64 was infected with apprehended bias because Council and Village had started negotiations of a kind which were expressly permitted. In addition, Council could not, in this respect, be said to have a "financial interest" because s 93F prescribes that the developer's contribution under a VPA is to be applied towards a "public purpose": s 93F(1) and (2).

Claim 4: Disqualification by Conduct: "Prejudgment"

201

The applicant claims that a number of indicia support a finding that the Council prejudged the decision to submit the draft LEP 2010 under s 64.

202

A case of prejudgment lies within the parameters of the double "might" test of apprehended bias: see [152] - [157] above. Prejudgment has been described in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, 205 CLR 507 by Gleeson CJ and Gummow J (Hayne J agreeing) at [72] as follows:

...The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

203

Where a council has entered into a contractual obligation, prejudgment may be more readily established. In *Anderton v Auckland City Council* [1978] 1 NZLR 657 the Supreme Court of New Zealand held that a council was infected by apprehended bias because it had become so closely associated with a developer's attempts to secure planning permission that it had completely surrendered its power of independent judgment. As a result of the six year association the council had determined in advance to allow the application for rezoning and development consent.

204

In *F & D Bonaccorso Pty Ltd v Canada Bay Council* (No 2) [2007] NSWLEC 537, 158 LGERA 250 at [123], [136] - [141] I decided that a council's contractual commitment to exercise its power to grant development consent in only one way gave rise to an appearance of bias. I held that the fair-minded observer would be attributed with knowledge of the contractual obligation but not with knowledge that in law the commitment could not fetter the council's discretion: at [138].

205

In *Gwandalan* Lloyd J held that a decision made by the Minister under part 3A of the EPA Act to re-zone the proponent's land as residential land available for subdivision, gave rise to apprehended bias. The Minister granted the Part 3A

applications after having entered into a memorandum of understanding and a deed with the proponent which obliged him to use reasonable endeavours to approve the application in exchange for transfer by the proponent of part of the land as a reserve. The following matters gave rise to a finding of prejudgment: although the MOU and deed stated that they did not fetter the Minister's discretion, the Minister took a lead role in the negotiations with the proponent; the Minister publicly committed himself to the outcome; the transfer of the land for reserve was conditional upon the rezoning; and the Minister made his determination before receiving the Director-General's report. Lloyd J held that by attaching himself to the incentive of the transfer of the land, the Minister limited his freedom to determine the Part 3A applications on the merits, and the feared deviation from the course of deciding the applications on their merits was realised.

206

The applicant submits that the 2009 Resolution in paragraph 6 constituted prejudgment because it purported to fetter the Council's "discretion to determine that the draft LEP was satisfactory and appropriate to be submitted under s 64". Paragraph 6 of the 2009 Resolution relevantly states:

Following the preparation of the draft Local Environmental Plans, Council prepare the necessary plans and documentation and forward the relevant documentation to the Department of Planning requesting certification of the draft plans pursuant to Sections 65 and 66 of the Environmental Planning and Assessment Act, 1979.

207

I do not accept the submission. In the first place, the 2009 Resolution merely stated the effect of s 64 ("When a draft local environmental plan has been prepared the council shall submit a copy of the plan to the Director-General"). Secondly, the mandatory language of s 64 ("shall submit") did not confer a discretion. But an obligation to submit. Thirdly, Council's general manager had delegated authority to submit the draft LEP to the Director-General (see Ground 8 above). There was no statutory requirement that it come back before the Council itself to check whether it was "satisfactory and appropriate" to be

submitted under s 64.

208
Beyond these arguments Claim 4 restates the same factual matters dealt with under other its other apprehended bias claims, the response to which need not be repeated.

Conclusion

209
For these reasons, I do not accept Ground 10.

GROUND 11

210
Ground 11 is that the Council failed to take into account a relevant consideration it was bound to take into account, namely, two inter-governmental agreements to which the State of NSW is a party and which are policies of the Minister applying to the preparation of a LEP.

211
The first is an agreement entitled "Memorandum of Understanding Between Australian Capital Territory Government and New South Wales Government on Australian Capital Territory and New South Wales Cross Border Regional Settlement" (**MOU**) which sets out "Settlement Principles for the Southern Subregion" (**Settlement Principles**). Pursuant to the MOU, in 2008 the State, through the Department of Planning, issued the Sydney - Canberra Corridor Regional Strategy (**Corridor Regional Strategy**), which provides that LEPs for the Queanbeyan local government area are to be consistent with (inter-alia) the Corridor Regional Strategy, and the Settlement Principles.

212

The LES 2010 refers to the Corridor Regional Strategy and states, in the context of the Queanbeyan Water Supply Agreement, that the Settlement Principles are satisfied. That statement is based upon a similar statement in the Department's review of the 2031 Strategy.

213

The applicant's criticisms relate to the Settlement Principles, as follows:

(a)

Principle 1 of the Settlement Principles requires that future development minimise the need for additional infrastructure and services by the use of integrated economic, social and environmentally sustainable planning.

(b)

Principle 2 requires that any proposed development bordering the ACT and NSW minimise land use conflict on either side of the border, and be supported by compatibility of land use, road, connections and service.

(c)

Principle 5 requires that the regional value of key infrastructure assets be supported by limiting activities that may diminish their function or ability to contribute to the region.

(d)

Without taking into account Principles 1 or 5, the LES 2010 concludes that the consideration of the Dunn's Road Creek Link or other infrastructure requirements in the region may be deferred.

(e)

Without taking into account Principle 2, the LES 2010 determines to zone a large area residential close to the Hume Industrial Estate on the ACT border.

(f)

Without taking into account Principle 5, the LES 2010 determines to zone a large area as residential close to, and under the flight path of, Canberra Airport.

214

The second alleged inter-governmental "agreement" is a communique of 7 December 2009 issued by the Council of Australian Governments (**COAG Communique**). The COAG Communique is a political statement of intent. It concerns a range of unrelated issues including capital city strategic planning systems. In that regard, COAG agreed that by 2012 all states would have in place plans that meet new national criteria. The national objective and criteria

for the future strategic planning of Australia's capital cities are set out in appendix B. The objective is to ensure Australian cities are globally competitive, productive, sustainable, liveable and socially inclusive and are well placed to meet future challenges and growth. Capital city strategic planning systems should include specified criteria, of which the applicant focuses on the following as applicable to NSW: (a) the systems are to be integrated (eg between NSW and the national capital) across functions including land-use and transport planning, economic and infrastructure development, environmental assessment and urban development; (b) they are to provide for nationally significant transport corridors and major utilities communications and infrastructure; (c) they are to address nationally significant policy issues of efficient development and use of existing and new infrastructure and other public assets; and (d) they are to provide for planned, sequenced and evidence-based land release and an appropriate balance of infill and greenfields development.

215

The applicant submits that, without taking into account the COAG Communique or referring to it, the LES 2010 and the Draft LEP 2010 constitute a plan of release of land for residential development adjacent to the national capital and beneath the flight path of Canberra Airport. The applicant submits that the references in the LES 2010 to the MOU and the Settlement Principles do not constitute an engagement with those instruments.

216

In fact, the Council expressly took into account the MOU in the LES 2010 by considering the 2031 Strategy which considered and incorporated the MOU; and by considering the Sydney-Canberra Regional Strategy 2006-2031 (**Regional Strategy**), the development of which was a stated outcome of the MOU.

217

Near the commencement of the LES 2010, under the heading "New Information", the following is stated:

> A number of key planning outcomes have been advanced since the Tralee LES was first commenced in 2003, including:
>
> ACT-NSW Cross Border Region Settlement MOU (2006)
> ...
> Sydney-Canberra Corridor Regional Strategy 2006-2031 - Department of Planning (2008).
> ...
> Queanbeyan Residential and Economic Strategy 2031 - QCC (2006 and addendum in 2008) - endorsed by the NSW Minister for Planning April 2007 and December 2008.
> ...
> The relevant outcomes of these planning exercises provide the framework for decision making at South Tralee and are considered by this Supplementary Report.

218

The Settlement Principles, which the applicant highlights as central to the MOU, were considered in the 2031 Strategy and an appendix to that Strategy. Every chapter in the 2031 Strategy begins with a consideration of the MOU principles relevant to the particular issue discussed in the chapter and are incorporated in the 2031 Strategy.

219

Thus it is clear that the MOU, and its Settlement Principles, were considered, That would be so merely given the reference to the MOU in the discussion under "New Information". But the point is put beyond doubt by the further consideration then given in the LES.

220

The LES 2010 is replete with references to and consideration of the 2031 Strategy. As noted, the 2031 Strategy itself considered and incorporated the MOU. One of the stated purposes of the LES 2010 was to:

> Determine both the capability and suitability of the land at South Tralee for the land uses endorsed by the Queanbeyan Residential and Economic Strategy 2031.

221

The Regional Strategy is also new information that was considered by the LES

2010. The development of the Regional Strategy was an outcome of the MOU. Again, the LES 2010 is replete with references to and consideration of the Regional Strategy.

222

The specific complaints of the applicant are prescriptive, requiring the Council to take these matters into account in a certain way. However, the decision-maker has discretion as to the weight given to a document. The applicant's complaints, in this regard, trespass well into the merits.

223

As for the COAG Communique, I do not accept that it ever became a mandatory consideration for the second respondent, a local council.

224

For these reasons I do not accept Ground 11.

GROUND 12

225

Grounds 12 and 13 challenge the validity of the Director-General's Certificate Decision: see [1], [47] above. That is, the decision under s 65 of the Unamended Act that the draft LEP may be exhibited in accordance with s 66.

226

Ground 12 is that by reason of the invalidity of the Submission Decision, the power of the Director-General to issue a certificate under s 65 was not enlivened because a precondition to the exercise of the power was receipt of a valid draft LEP. Consequently, the Certificate Decision was made in excess of power.

227

The power of the Director-General to issue a certificate under s 65 of the Unamended Act is enlivened where the Director-General receives a copy of a draft LEP from a council under section 64. The applicant's argument is that if the Council's Submission Decision is infected by legal error, on any of Grounds 1 to 8, 10 or 11, that precondition in s 65 to the power of the Director-General is not satisfied because a valid draft LEP has not been received under s 64.

228

As I have found that the Grounds relating to the Submission Decision have not been made out, I do not accept Ground 12.

GROUND 13

229

Ground 13 is that even if the Director-General's power was enlivened, the Director-General failed to take into account three mandatory considerations:

(a)
the 2031 Strategy as amended by the 2031 Addendum;
(b)
the MOU and the Settlement Principles;
(c)
the COAG Communique.

230

These are said to be implied mandatory considerations on the principle expressed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, 162 CLR 24 . The Director-General disputes that they were mandatory considerations.

231

In *Peko-Wallsend* at 39-40 Mason J said (omitting citations):

If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider -are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has 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 in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act.

232

In *Minister for Planning v Walker* [2008] NSWCA 224, 161 LGERA 423 the Court of Appeal at [34] and [120] applied *Peko-Wallsend* and approved the following summary of the principles governing failure to consider mandatory considerations in *Walsh v Parramatta City Council* [2007] NSWLEC 255, 161 LGERA 118 at [58] - [59] per Preston CJ (omitting citations):

It is not for a party affected by a decision, or a reviewing court to make an exhaustive list of the matters which a decision maker might conceivably regard as relevant then attack the decision on the ground that a particular one of them was not specifically taken into account.

The considerations that are relevant are to be identified "primarily, perhaps even entirely", by reference to the statute imposing the power on the decision maker rather than the particular facts of the case that the decision maker is called on to consider.

233

In making a decision whether to issue a certificate under s 65 it was mandatory, in my opinion, for the Director-General to consider the documents submitted by the Council to the Director-General under s 64, which enlivened the Director-General's power under s 65. The submitted documents included the draft LEP and the statement specifying the names of the public authorities, bodies and other persons that the Council had consulted with under s 62. There is no question that the Director-General considered these documents.

234

I do not think that it was mandatory for the Director-General to consider the matters referred to in Ground 13, at least at this stage of the process of making a LEP. A number of stages in the Part 3 plan-making process were yet to take place. During the later stages the applicant and others have an opportunity to make submissions on each of the Ground 13 matters. Specifically, the applicant may make submissions about those matters under s 67; the applicant may request a public hearing about those matters under s 68(1); and a copy of the submissions under s 67 and the report of any public hearing under s 68 must be provided by the Council to the Director-General under s 69(4). This statutory scheme buttresses the conclusion that none of the Ground 13 matters can be said to be a mandatory relevant consideration by the Director-General before certifying under s 65 whether the draft LEP may be publicly exhibited in accordance with s 66.

235

In any event, the 2031 Strategy as amended by the 2031 Addendum, the MOU and the Settlement Principles were considered by the delegate of the Director-General before making the Certificate Decision.

236

A direction issued by the Minister under s 117 of the Unamended Act requires the Council to comply with the Corridor Regional Strategy when preparing a draft LEP. The Corridor Regional Strategy provides that :

Local environmental plans for the...Queanbeyan City local government area are to be consistent with the Sydney-Canberra Corridor Regional Strategy, the agreed cross-border settlement strategy and accompanying settlement principles in the ACT-NSW Cross-Border Region Settlement Agreement [ie consistent with the Settlement Principles in the MOU].

237

Appendix 3 to the Corridor Regional Strategy set out the settlement principles in the MOU.

238

The s 65 report dated 30 August 2010 from the Department of Planning for the delegate of the Director-General recommended that the s 65 certificate be issued. It stated that "Council has provided an analysis of relevant s 117 Directions against the draft plan (tagged L). Tag L to the s 65 report is the analysis provided by the Council to the Director-General in its s 64 submission (as Attachment 3 to that submission). That analysis stated that "The draft LEP intends to rezone rural land for the purposes of residential, environmental conservation, business and other uses consistent with the endorsed Queanbeyan Residential and Economic strategy 2031, and the Sydney-Canberra Corridor Regional Strategy 2006-2031. "

239

The s 65 report noted that the Sydney-Canberra Corridor Regional Strategy is relevant to the Queanbeyan local government area. The view was then expressed that the Draft LEP 2010 is consistent with the Sydney-Canberra Corridor Regional Strategy.

240

On the basis set out at [236] - [238] above, that view necessarily also encompassed the view that the Draft LEP 2010 was consistent with the MOU and the Settlement Principles. The MOU and settlement principles were therefore considered.

241

The s 65 report also noted that the 2031 Strategy as endorsed by the Minister in 2008 is relevant. The view was then expressed that the proposed rezoning was consistent with the endorsed 2031 Strategy Report. Tag A to the s 65 report was the 2031 Strategy and Addendum Reports. Tag B to the s 65 report was the s 54 submission from the Council to the Director-General. The s 54 submission stated that it was proposed to rezone the land consistently with the revised 2031 Strategy Report and that the decision to prepare the draft LEP

was consistent with the Sydney-Canberra Corridor Regional Strategy. Thus, the 2031 Strategy and 2031 Addendum were considered.

242

The s 65 report then stated "it is considered that the draft plan submitted by Queanbeyan City Council is suitable for public exhibition under s 65 [of the Unamended Act], subject to amendments."

243

The delegate of the Director-General "endorsed" the contents of the s 65 report by signing the report in an endorsement signature block located on the last page of the report. The delegate then issued the s 65 certificate the same day 15 September 2010.

244

Given that the contents of the s 65 report were endorsed by the delegate, it is to be inferred that the delegate made the decision to issue the s 65 certificate on the basis that the Draft LEP 2010 is consistent with the 2031 Strategy (as amended) and the Corridor Regional Strategy. Consequently the draft LEP 2010 is also consistent with the MOU and Settlement Principles; and is suitable for public exhibition under s 65, subject to relevant amendments.

245

Accordingly, even if the 2031 Strategy Report (as amended) and the MOU and Settlement Principles were mandatory relevant considerations, the delegate took them into account in determining to issue the s 65 certificate.

246

I consider that the COAG Communique could not on any view be taken to be a mandatory relevant consideration.

247

For these reasons, I do not accept Ground 13.

INVALIDITY AND DISCRETION

248

The Director-General submitted that in the event that any of the applicant's grounds were to be upheld they would not vitiate the process mandated by Part 3 of the Unamended Act (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355). This submission was adopted by Village. The Council submitted that relief should be declined on discretionary grounds. As I have not accepted any of the grounds of challenge, it is unnecessary to consider these alternative submissions.

THE ACTIVE ROLE OF THE COUNCIL IN THE PROCEEDINGS

249

The applicant submits that the Council should not have taken an active role in the proceedings because the third respondent, Village, is a proper contradictor and that this is also relevant to costs if the applicant is unsuccessful: *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 . In *Hardiman* a decision of the Australian Broadcasting Tribunal was challenged. The High Court said that the presentation of a case by the Australian Broadcasting Tribunal should be regarded as exceptional and that where it occurs the presentation should be limited to submissions going to the powers and practices of the Tribunal. The underlying principle was that the Tribunal should not be endangered in its impartiality. The *Hardiman Principle* was touched upon in *Oshlack v Richmond River Council* [1998] HCA 11, 193 CLR 72 , where the validity of a development consent was in issue. Gaudron and Gummow JJ said at [12]:

The Council is the authority which had granted the consent upon which the developer

relied. In those circumstances, and also having regard to the earlier litigation, it might have been expected that the Council would submit to such order as the Court might make and that it would not become a protagonist, lest by doing so it endanger the impartiality it would be expected to maintain upon any subsequent applications to it which might ensue were relief granted to the appellant.

250

In *Murlan* the validity of a development consent was also in issue. Basten JA said at [81]:

In relation to matters arising in the Land and Environment Court, it will usually be a local council which, as consent authority, is required to determine whether it will take an active part in proceedings, and if so in what manner. However, where there is an issue as to the regularity of the administration of justice in a court or tribunal, the appropriate contravener may well be the Attorney-General and not the consent authority. If the Attorney does not wish to intervene, the Court may be left without a contravener. That, however, is not an obvious reason why the consent authority should take up that role in the absence of the Attorney-General.

251

Oshlack and *Murlan* inform the role of a council in development appeals in this Court. I would respectfully observe that development consents are subject to consideration of a range of mandatory matters, including the public interest and environmental impacts: s 79C EPA Act. This may raise for further consideration whether a developer, with an eye to its commercial interests, is necessarily the proper contradictor and whether it is necessarily appropriate for the Council to submit to such order as the Court might make, at least where considerations such as the public interest and environmental impact are involved.

252

In the present case, some of the applicant's grounds of challenge go to the power of the Council and to alleged ostensible bias by the Council and to that extent, in my view, there is no conflict with the *Hardiman* principle. Otherwise, I think that *Hardiman* is distinguishable. I leave aside the fact that Village was not initially joined in the proceedings. The public interest at stake in the case of the making of a LEP does not necessarily correspond with the commercial interests of a developer and is generally broader than where a

development consent by a council is under challenge. It is a council's role to balance a wide range of competing interests when addressing the matter of a LEP. In such a case, I consider that the *Hardiman* principle is generally inapplicable.

ORDERS

253

The applicant has been unsuccessful. The orders of the Court are as follows:

1. The proceedings are dismissed.
2. The applicant is to pay the respondents' costs.
3. The exhibits may be returned.

Amendments

- 15 Jun 2011 typographical error in the word "communique" Paragraphs: 214, 215, 223, 229, 246