Land and Environment Court of New South Wales

Judicial Newsletter

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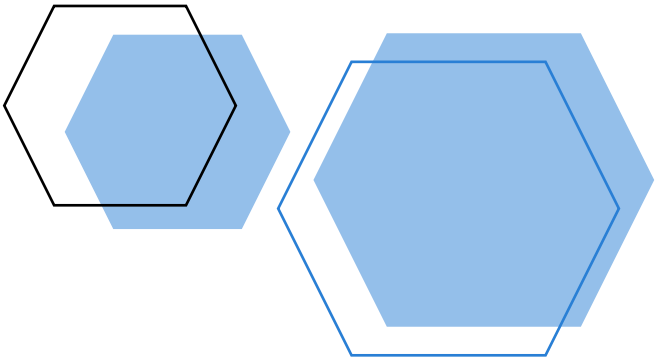
COURT NEWS

THE HON JUSTICE PRESTON SC, CHIEF JUDGE OF THE LAND AND ENVIRONMENT COURT OF NSW AWARDED MEDAL OF HONOUR

On 13 April 2023, his Honour Justice Preston CJ of LEC was awarded the World Jurist Association Medal of Honour at the World Law Congress 2023 Opening Session, United Nations Headquarters, New York.

The World Jurist Association is an NGO in special consultative status with the United Nations. The Medal of Honour is awarded to jurists and personalities for their distinguished efforts in the promotion and defence of the rule of law.



JUDGMENTS

SUPREME COURT OF QUEENSLAND

Development Watch Inc v Sunshine Coast Regional Council & Anor **[2022] QCA 6** (Burns J, Morrison and McMurdo JJA)

(Decision under review: *Development Watch Inc v Sunshine Coast Regional Council* [2020] QPEC 25 (Kefford DCJ))

Facts: The applicant sought leave to appeal against a decision of the Queensland Planning and Environment Court which dismissed a submitter appeal brought by the applicant and approved an application to develop land on the Sunshine Coast (**Proposed Development**). During the public notification period, a considerable number of submissions were made in opposition to the height of the Proposed Development, which exceeded height limits imposed by the Sunshine Coast Planning Scheme 2014 (**Planning Scheme**).

In hearing the appeal, the primary judge was required to assess the Proposed Development against the assessment benchmarks in the Planning Scheme in force at the date the development application was lodged (**Version 8**) as required by s 45 of the *Planning Act 2016* (Qld) (**Planning Act**). Section 45 of the Planning Act also gave the primary judge discretion to give weight to the Planning Scheme current at the time of the appeal (**Version 18**). The primary judge determined that the proposed development complied with the Planning Scheme, including that the height of the Proposed Development was consistent with the reasonable expectations of the community, and there was a planning need for the Proposed Development. The applicant contended that the primary judge's conclusions were affected by errors of law.

Issues:

(1) Whether the primary judge erred in law when determining the reasonable expectations of the local community under the Planning Scheme;
(2) Whether the primary judge failed to pay proper regard to the community submissions opposing the development;
(3) Whether the primary judge erred in law by failing to take into account and give significant weight to Version 18 of the Planning Scheme; and
(4) Whether the primary judge erred by finding that there was a planning need for the development.

Held: Appeal allowed (per Burns J, Morrison and McMurdo JJA agreeing):

(1) To determine whether the height of building and structures of the Proposed Development were consistent with the reasonable expectations of the local community the primary judge was required to (1) determine what the reasonable expectations of the local community were about height; (2) assess the reasonableness of those expectations in light of the relevant planning provisions; and (3) determine the extent to which the expectations were consistent with the Proposed Development: at [43]. However, no finding was made as to the local community's expectations and that failure amounted to an error of law: at [45];
(2) The primary judge failed to pay proper regard to the community submissions opposing the development, instead regarded any opposition to the Proposed Development as trumped by the Planning Scheme. Such failure amounted to an error of law: at [47];
(3) The primary judge was not free to ignore Version 18 of the Planning Scheme, and ought to have at least considered it for its contextual value as the most current indicator of what was considered to constitute, in the public interest, the appropriate development of the land. The change to the Planning Scheme by Version 18 was a relevant consideration and ought to have been accorded significant weight. The failure to do so was an error of law: at [51];
(4) The primary judge correctly found that the question of planning need was a question of fact to be determined having regard to all the relevant evidence. The feature that the primary judge preferred one body of opinion over another was unremarkable: at [56]; and

Per McMurdo JJA

(5) More was required than an assessment of whether any development with a building or structure in excess of the height limit would be beyond the reasonable expectations of the local community. Instead, the primary judge was required to assess whether the buildings and structures within the Proposed Development were within the reasonable expectations of the local community: at [6].

SOUTH AUSTRALIAN COURT OF APPEAL

Khabbaz v State Planning Commission **[2023] SASCA 10** (Doyle, Bleby and David JJA)

(Decision under review: *Khabbaz v State Planning Commission* [2022] SASC 11 (Parker J))

Facts: The third and fourth respondents (**RPA**) were developers of a proposed apartment building in Adelaide (**Proposed Development**). The appellants (**RJK**) owned and occupied a house near the Proposed Development. The Proposed Development's height was 53.9 metres and was located within the Capital City Zone (**CCZ**) as established by the Adelaide (City) Development Plan (**Development Plan**). This zone had a maximum building height of 22 metres.

The Proposed Development was assessed by the State Commission Assessment Panel (**SCAP**) under the *Development Act 1993* (SA) (**Development Act**). SCAP determined that the Proposed Development was not seriously at variance with the Development Plan as it stood at the relevant time within the meaning of s 35(2) of the Development Act (**variance decision**). SCAP further resolved to grant development consent for the Proposed Development (**consent**).

RJK brought an application for judicial review, seeking orders in the nature of certiorari quashing the variance decision and consent. RJK further sought declarations to the effect that the consent was unlawful and invalid, and that no reasonable relevant authority, acting reasonably, could form an opinion under s 35(2) that the proposed development was not seriously at variance with the Development Plan. The primary judge dismissed the application. RJK appealed from that decision.

Issues:

(1) Whether on the proper construction of the Development Plan it could never be permissible to approve a building exceeding the maximum height limit;
(2) Whether, on the proper construction of the Development Plan, it was open to SCAP to assess that the proposed development was not seriously at variance with the development plan and to grant consent for the Proposed Development; and
(3) Whether SCAP merely applied the reasoning set out in a planning report commissioned by it for the purpose of its deliberations and did not have regard to the other material placed before it and the considerations mandated by the development plan.

Held: Appeal dismissed (per Bleby JA, Doyle and David JJA agreeing):

(1) The planning authority was given broad scope to make evaluative judgments. RJK did not establish that, on a proper construction of the Development Plan, it could never be permissible to approve a 53.9 metre building in a 22-metre maximum height area: at [159];
(2) RJK did not establish that it was not reasonably open to SCAP to conclude that the proposed development was not seriously at variance with the Development Plan, and that the consent lacked an evident and intelligible justification when assessed against the whole of the Development Plan: at [170], [172]; and
(3) There was no basis to infer that SCAP simply adopted the Agenda Report without having regard to the other material placed before it and the considerations mandated by the Development Plan: at [191].

SUPREME COURT OF TASMANIA

Blue Derby Wild Inc v Forest Practices Authority **[2022] TASSC 67** (Pearce J)

Facts: The applicant challenged the certification of Sustainable Timber Tasmania's (**second respondent**) forest practices plans (**plans**) on the grounds that: the persons who certified the plans were not validly delegated the power to do so; or that the decisions to certify were invalidated by apprehended bias. The applicant sought relief in the nature of certiorari to quash the certifications, and to quash or set aside the certifications under s 17(2)(a) of the *Judicial*

Review Act 2000 (Tas) (**Judicial Review Act**) for breach of the rules of natural justice.

The Forest Practices Authority (**first respondent**) was part of the State Forest system, whose objectives are set out at Sch 7 of the *Forest Practices Act 1985* (Tas) (**Forest Practices Act**). In Tasmania, a delegate of the first respondent certifies forest practices plans for the harvesting of timber and clearing of trees within the State. Without certified plans, harvesting and clearing are unlawful by operation of the Forest Practices Act.

Delegates of the first respondent certified plans for the second respondent in early 2022. The delegates were also employees of the second respondent. The second respondent subsequently commenced harvesting trees under these plans. Due to concerns raised by officers of the applicant, the first respondent revoked and made new instruments of delegation. Section 43 of the Forest Practices Act relevantly provided that delegations may be subject to conditions, and the new delegations were made subject to "any direction of the Chief Forest Practices Officer…". The second respondent's plans were then recertified.

Issues:

(1) Whether the new delegations were invalid by reason of the condition purporting to subject the delegates to the direction of the Chief Forest Practices Officer; and
(2) Whether the decisions to certify and recertify the plans were unlawful by reason of being affected by an apprehension of bias.

Held: Application dismissed:

(1) There was no evidence before the Court that the power to certify the plans was in fact the subject of any direction from the Chief Forest Practices Officer, or any other person. Therefore, the applicant's challenge to the validity of the delegation failed: at [43]. In any case, the delegation would not have been invalid as s 49(2) was inserted into the Forest Practices Act to provide that delegations by the first respondent under s 43 "to always have been, validly made on the relevant day": at [44]; and
(2) The emphasis in the objects of the Forest Practices Act of self-regulation and delegated and decentralised approvals recognises and assumes the possibility of the conflict between the power of a delegate and their employment: at [75]-[78]. When viewed in the context and considering the purpose of the Forest Practices Act and legislative scheme, it would be artificial and unnecessary for a person exercising the delegated power to avoid being in a position, or acting in a way, which creates the appearance of bias. There was no statutory implication or condition on the exercise of the delegated power that the decision maker not be subject to an apprehension of bias: at [79].

NSW COURT OF APPEAL

Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd **[2023] NSWCA 44** (Kirk JA, Simpson and Griffiths AJA)

(Decision under review: *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 430 (Ward CJ in Eq))

Facts: In the original proceedings, the respondent, a business involving the breeding, sale and racing of thoroughbred racehorses, applied to the Supreme Court for a review of decisions made by the Chief Commissioner of State Revenue (**appellant**) to refuse to apply the exemption for land used for primary production when assessing the respondent's liability for land tax. It was not in dispute that every single use that occurred on the land involved maintenance of animals. The question for the primary judge was whether or not the dominant use of the land for the assessment of land tax from 2014 to 2019 could be characterised as for the maintenance of animals for the purpose of selling them, their progeny or their bodily produce (**sales purpose**) under s 10AA(3)(b) of the *Land Tax Management Act* (NSW). The alternative characterisation was that the dominant use of the land was for the purpose of racing (**racing purpose**). The primary judge upheld the appeal and revoked the land tax assessments, finding that the land was used as part of an integrated operation in which the preparation of horses for racing was with the overall or dominant purpose of increasing or maximising the revenue from the nomination fees and from the sale of progeny produced by the broodmares. The appellant appealed from that decision.

By a notice of contention on the construction of s 10AA(3)(b), the respondent asserted that the requirement of dominance attached only to the use made of the land, and not the purpose of the use. In other words, the sale purpose did not

have to be dominant over the racing purpose. The appellant disagreed and submitted that use could not be separated from purpose in the manner asserted by the respondent. The appellant argued that the appropriate way of framing the issue was to ask whether or not the dominant use for the purpose of the land was for maintaining animals for the sales purpose.

Issues:

(1) The proper construction of s 10AA(3)(b); and
(2) Whether the dominant use of the land in the relevant tax years was animal maintenance for the sales purpose.

Held: Appeal upheld (per Kirk JA and Simpson AJA, Griffiths AJA dissenting):

Per Kirk JA

(1) Use and purpose with respect to land are concepts that are distinct but commonly linked. Use is what is done on the land, and purpose is why, or to what end, those things are done. It is not appropriate to separate out the notions of use and purpose in the manner suggested by the respondent. The dominant use must be for one of the identified purposes. The proper question is whether the use of maintenance of animals can be characterised as having the character of a dominant use for the sales purpose: at [27]-[32];
(2) The racing purpose was not merely incidental and subservient to the sales purpose. The racing purpose constituted the dominant use of land in the relevant tax years: at [125];

Per Simpson AJA

(3) In previous decisions, the Court had steered away from separating the concepts of use and purpose, such that the requirement of dominance applied to both use and purpose: at [132]. To construe s 10AA(3)(b) in the manner contended for by the respondent would render any purpose, no matter how insignificant in the overall use of the land, sufficient to attract the exemption provided by s 10AA(3), which was not indicated by either the terms of the provision or by its statutory purpose: at [159];
(4) A landowner seeking to establish that one use or purpose of the land was dominant over another, or others, must establish more than that two or more uses or purposes of the land were of equal importance. The respondent had to establish that the sales purpose predominated over the racing purpose. It did not do so: at [154]; and

Per Griffiths AJA (dissenting on the second issue)

(5) The primary judge correctly characterised the respondent's business as an integrated operation in which the preparation of horses for racing was with the overall or dominant purpose or objective of increasing or maximising the revenue from the sales purpose: at [223].

Valuer-General v Sydney Fish Market Pty Ltd **[2023] NSWCA 52** (Leeming, Mitchelmore and Kirk JJA)

(Decision under review: *Sydney Fish Market Pty Ltd v Valuer-General of New South Wales* [2022] NSWLEC 71 (Pepper J))

Facts: In 1994, a 50 year lease (**Lease**) was granted over 56-60 Pyrmont Bridge Road, Pyrmont (**Land**) in favour of the respondent (**Sydney Fish Market**). Sydney Fish Market received two valuations of the Land prepared by the appellant (**Valuer-General**) for the years 2019 and 2020. Both valuations were prepared on the basis that the Land was not "Crown lease restricted" for the purposes of s 14I of the *Valuation of Land Act 1916* (NSW). That characterisation was contested in an appeal in the form of a separate question brought by Sydney Fish Market. In the original proceedings, the primary judge was tasked with determining whether the Land was "Crown lease restricted" as at the valuation dates. The separate question was determined in favour of Sydney Fish Market. The Valuer-General appealed from that decision.

Whether the Land was "Crown lease restricted" turned on the operation of the transitional provisions of the *Crown Land Management Act 2016* (NSW) (**Crown Land Management Act**), notably cl 26(1) of Div 7 of Sch 7. The Valuer-General submitted that when the Land was transferred from the Crown to the State Property Authority, the Lease ceased to be a lease under the *Crown Lands Act 1989* (NSW) (**Crown Lands Act**) or the *Crown Land Management Act*.

Issues:

(1) Whether the Lease was in force under the *Fish Marketing Act 1994* (NSW) (**Fish Marketing Act**) or the Crown Lands Act; and
(2) Whether the vesting of the Land from the Crown to the State Property Authority in 2007 altered the position in

that the consequence was the Land ceased to be Crown land.

Held: Appeal dismissed (per Leeming JA, Mitchelmore and Kirk JJA agreeing):

(1) Section 9(1) identifies the intention that a lease be granted to an approved purchaser but does not identify the donee of the power to grant a lease: at [62]-[71], [83]. There was not an exercise of power under s 9(1) of the Fish Marketing Act because that section did not confer power to grant a lease. In 2016, the Lease was in force under the Crown Lands Act for the purposes of cl 26(1), where that statute was the source of the power to grant the lease and continued to govern the parties' rights. The consequence of which was that the Lease was a "holding" within the meaning of the Crown Land Management Act for the purposes of s 14I: at [94]-[95]; and
(2) A change in the identity of the lessor does not without more change the nature of the lease. Clause 26 is directed to the character of the lease, not the character of land. If in 2005 the lease was in force under the *Crown Lands Act* for the purposes of cl 26(1), that remained the case in 2007: at [98].

***El Khouri v Gemaveld Pty Ltd* [2023] NSWCA 78** (Gleeson, Leeming and Adamson JJA)

(Decision under review: *Gemaveld Pty Ltd v Georges River Council* [2022] NSWLEC 1182 (Horton C). Related decision: *El Khouri v Gemaveld Pty Ltd* [2023] NSWSC 25 (White JA))

Facts: Mr Peter and Ms Goumana El Khouri (**first** and **second applicant**), and Ms Effi Theodorakopoulos (**third applicant**) filed a summons for judicial review in the New South Wales Court of Appeal (**Court of Appeal**) against the decision of a commissioner of the Land and Environment Court (**original proceedings**). The respondents to the summons were Gemaveld Pty Ltd (**first respondent**), the Land and Environment Court (**second respondent**), and Georges River Council (**third respondent**). The applicants were not parties to the original proceedings. The summons raised questions of fact that were determined by White JA as separate questions. Relevantly, his Honour held that the height control of 9 metres in cl 4.3 of the Kogarah Local Environmental Plan 2012 (**Kogarah LEP**) was exceeded, but that evidence was not before the commissioner in the original proceedings.

The original proceedings were commenced in the Land and Environment Court in relation to the third respondent's refusal of the first respondent's development application. The first and third respondents attended a conciliation conference conducted by the commissioner and reached an agreement to approve the development application. The first and third respondents signed a jurisdictional statement in which they agreed the proposed development satisfied the 9 metre height control in the Kogarah LEP. Consequently, the commissioner satisfied himself that the agreed decision was one that the Court could have made in the proper exercise of its functions and made orders granting consent pursuant to s 34(3) of the *Land and Environment Court Act 1979* (NSW). Relevantly, the evidence before the Court of Appeal demonstrated a breach of cl 4.3 of the Kogarah LEP, and that there had been no application for a cl 4.6 variation of the height control.

Issue: Whether compliance with the height control was a jurisdictional fact which could be reviewed by the Court of Appeal on the basis of evidence not before the Land and Environment Court.

Held: Summons dismissed (per Leeming JA, Gleeson and Adamson JJA agreeing):

(1) No material difference exists between development consent granted "on the merits" whether by the consent authority or the Land and Environment Court after hearing an appeal, or a development consent granted under s 34(3) following a successful conciliation conference: at [74];
(2) Compliance with cl 4.3 of the Kogarah LEP was not a jurisdictional fact. Rather, it was a mandatory consideration pursuant to s 4.15(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW), to which the commissioner plainly had regard: at [74];
(3) The commissioner formed the only view that was open to him on the evidence, namely, that there was compliance with the height requirement: at [75]; and
(4) The commissioner's decision was not vitiated merely because the applicants established on evidence not available to the commissioner that there was non-compliance: at [75].

NSW COURT OF CRIMINAL APPEAL

Harris v Natural Resources Access Regulator; Timmins v Natural Resources Access Regulator **[2023] NSWCCA 16** (Beech-Jones CJ at CL, Price J and Garling J)

(Decision under review: *Natural Resources Access Regulator v Harris; Natural Resources Access Regulator v Timmins (No 2)* [2021] NSWLEC 18 (Pain J). Related decision: *Natural Resources Access Regulator v Harris; Natural Resources Access Regulator v Timmins* [2020] NSWLEC 104 (Pain J))

Facts: Peter Harris and Justin Timmins (**appellants**) were prosecuted by the Natural Resource Access Regulator (**respondent**) for three offences under s 91I(2) of the *Water Management Act 2000* (NSW) for taking water when metering equipment was not working in a specified period. The primary judge dismissed the charges in light of evidence adduced during the hearing that operating digital engine hour meters (**digital meters**) were attached to three pumps when the appellants took the water. The appellants applied for costs under s 257C of the *Criminal Procedure Act 1986* (NSW) submitting that officers from WaterNSW knew of the digital meters at the time of the alleged offences or became aware of the digital meters during another investigation of the appellants. The costs application was dismissed. The primary judge made findings as reflected in issues (1)-(4) below. The appellants appealed against the refusal to award costs.

Issues: Whether the primary judge erred in:

(1) Finding the respondent was not aware of the deficiency in its case being the existence of operating digital meters in the charge period (**Ground 1**);
(2) Having regard to the appellants' failure to alert the respondent to the existence of the digital meters prior to the close of the prosecution case (**Ground 2**);
(3) Determining that there was no failure by the respondent in its prosecutorial duty to disclose relevant evidence (**Ground 3**); and
(4) Determining there had been no unreasonable delay in the commencement of proceedings by having regard only to the date on which the proceedings were commenced (**Ground 4**).

Held: Appeal dismissed (per Beech-Jones CJ at CL, Price and Garling JJ agreeing):

(1) The primary judge's positive finding was not erroneous as the conduct of the prosecution was consistent with the respondent's witnesses not being aware of the existence of digital meters. The appellants also did not indicate the existence of digital meters in response to statutory notices, nor did they cross-examine the respondent's witness about their existence (**Ground 1**): at [39], [44]-[47];
(2) The appellant's failure to alert the respondent to the existence of the digital meters was a relevant consideration in exercising discretion on whether to award costs (**Ground 2**): at [54]-[60];
(3) The primary judge's finding was not erroneous as the evidence was unknown to the prosecutor, the degree of any departure from a duty, reason for the departure and significance of the departure to disclose relevant evidence must be considered (**Ground 3**): at [67]-[69]; and
(4) No error in the primary judge relying on the proceedings commencing within the statutory limitation period to reject the contention there had been unreasonable delay (**Ground 4**): at [76].

SUPREME COURT OF NSW

Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council **[2023] NSWSC 262** (Basten AJ)

(Related decisions: *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2019] NSWLEC 28 (Sheahan J); *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2020] NSWLEC 66 (Moore J); *Mangoola Coal Operations Pty Limited v Muswellbrook Shire Council* [2021] NSWCA 46 (Bell P at [1]; Macfarlan JA at [2]; Brereton JA at [68]); and *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council (No 2)* [2022] NSWLEC 129 (Moore J))

Facts: Muswellbrook Shire Council (**Council**) assessed rates on land surrounding an open-cut coal mine owned by Mangoola Coal Operations Pty Ltd (**plaintiff**) over five financial years from 2016/17 to 2020/21. The rates were assessed by reference to the categorisation of that land as "mining". On 7 August 2018, the plaintiff commenced proceedings in the Land and Environment Court seeking to review the categorisation of the land during that period. That application was dismissed. The plaintiff successfully appealed to the Court of Appeal. The matter was remitted

to the Land and Environment Court, where consent orders upholding the plaintiff's appeal were filed and made.

On 27 May 2020, the plaintiff commenced separate proceedings in the Supreme Court (**common law proceeding**) and the Land and Environment Court (**class 4 proceeding**) seeking to recover the difference between the rates it had paid assessed on mining land, and the rates which should have been assessed had the land been categorised as "farmland". The pleadings with respect to the operation of the *Recovery of Imposts Act 1963* (NSW) (**Imposts Act**) were identical to those raised in relation to the class 4 proceeding. The class 4 proceeding was later transferred to the Supreme Court of New South Wales pursuant to s 149B of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**). The sum of money sought to be recovered by the plaintiff for the common law proceeding amounted to $3.7 million.

Issues:

(1) Whether the commencement of separate proceedings should be dismissed as an abuse of process;
(2) Whether the claim brought under the class 4 proceeding was barred from attaining restitutionary relief because it was a statutory claim;
(3) Whether s 2(2) of the Imposts Act disengaged s 2(1) of that same Act because a provision in the *Local Government Act 1993* (NSW) (**Local Government Act**) provided a mode for challenging the validity of the impost, and that provision provided a limitation period other than 12 months; and
(4) Whether the limitation period of 12 months imposed by the Local Government Act to recover the difference in rates applied.

Held: Class 4 proceeding transferred from the Land and Environment Court dismissed with costs, including costs incurred in that Court; defendant pay the plaintiff an amount based on the last of the sixteen payments made by the plaintiff between 6 September 2017 and 27 May 2021, including interest (the sum total of all sixteen payments amounting to $3,071,518.00); common law proceeding dismissed with costs:

(1) The commencement of separate proceedings was not an abuse of process because there existed a real doubt as to the correct court in which to proceed for the recovery of overpaid rates: at [79];
(2) Statutes may limit or create circumstances where principles of restitution operate: at [43]. It would be inconsistent with the legislative scheme to treat the phase "on restitutionary grounds" as excluding claims made under statute: at [44];
(3) The 12-month limitation period imposed by s 2(1) of the Imposts Act will not be displaced by a privative clause that fails to specify a time limit within which proceedings for recovery of payment must be made: at [57];
(4) Section 527 of the Local Government Act was concerned with the adjustment of rates following a change in category: at [66]. It was not concerned with the recovery of unpaid rates which were payable, nor was it concerned with any possible refund of overpaid rates: at [66]-[71];
(5) The class 4 proceeding was based on a misconception as to the operation of s 527 of the Local Government Act: at [105];
(6) Even if there was no misconception, the 12-month limitation period would have applied: at [75]. The plaintiff's attempt to obtain a refund by alleging a breach of Council's obligation under s 527 was dismissed with costs: at [74]; and
(7) These findings were also sufficient to dispose of the plaintiff's common law proceedings: at [76], [107].

***Piety Developments Pty Ltd v Cumberland City Council* [2023] NSWSC 480** (Parker J)

Facts: Piety Developments Pty Ltd (**plaintiff**) filed a claim seeking specific performance of a contract with Cumberland City Council (**defendant**) to purchase the land at Lidcombe (**the Subject Land**). By cross-claim, the defendant contended that it was prohibited by statute from selling the Subject Land to the plaintiff as it was "community land" for the purposes of the *Local Government Act 1993* (NSW) (**1993 Act**). Relevantly, s 45(1) provided that "[a] council has no power to sell, exchange or otherwise dispose of community land". The cross-claim was determined separately.

In 1965, the Subject Land was resumed by the defendant pursuant to ss 532 and 249(cc) of the *Local Government Act 1919* (NSW) (**1919 Act**) for the purpose of a carpark. The 1919 Act was repealed and replaced by the 1993 Act. Under ss 25 and 26 of the 1993 Act the Subject Land could be classified either as community land or operational land. In addition, cl 6(2)(b) of Sch 7 provided that any "land subject to a trust for a public purpose" that was "vested in or under the control of a council" was taken to have been classified as community land. In 1994, consistent with cl 6(3), the

defendant purported to classify the Subject Land as operational and was treated as such for more than 25 years.

Bathurst City Council v PWC Properties (1998) 195 CLR 566 (***Bathurst City Council***) was considered in detail to aid in the proper construction of cl 6(2)(b) of Sch 7 of the 1993 Act. In that case, the High Court held that that the council's acceptance of the land for an identified town planning purpose gave rise to a statutory trust.

Issues: Whether the Subject Land was "subject to a trust for a public purpose" so as to fall within cl 6(2)(b) of Sch 7 to the 1993 Act.

Held: Cross-claim dismissed:

(1) Although not expressly stated in *Bathurst City Council*, it was clear from the High Court's reasoning that the elements of a statutory trust had some analogy to the elements of a charitable trust, including:

   (a) Specific statutory provisions governing the way in which the property was to be used, or a conferral of a power of oversight on some other person or body, or both;
   (b) The need for a mechanism to ensure that the trustees used the trust property in accordance with the specified purposes and complied with the terms of the trust. In a statutory trust this could be the Attorney General's exercise of an administrative law jurisdiction; and
   (c) Some way of dealing with a situation where it was impossible or impracticable to carry out the original purpose. For example, a provision in statute allowing for the assets to be redeployed for other purposes: at [104]-[108];

(2) It was clear from the High Court's decision in *Bathurst City Council* that the council's stated objective for the land was not sufficient to give rise to a statutory trust, nor was the subsequent use of the land as a carpark. There had to be something more. In that case, the additional element was the acceptance of property pursuant to development conditions imposed by the council in fulfillment of a town planning purpose: at [122];

(3) It would create practical difficulties to conclude that land was impressed with a statutory trust and could not validly be classified as operational land if it had originally been resumed for specified purposes. As a matter of statutory construction, it would be difficult to construe that it was Parliament's intention to require complex historical enquiries into the purpose for which the land was originally resumed: at [126]; and

(4) The acquisition of the Subject Land by resumption pursuant to s 532 of the 1919 Act did not give rise to a statutory trust in the sense used by the High Court in *Bathurst City Council.* Accordingly, the land so acquired was not the subject of a "trust for public purposes" within the meaning of that phrase in cl 6(2)(b) of sch 7 to the 1993 Act: at [133].

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Robert Beltrame **[2023] NSWLEC 18** (Pritchard J)

(Related decision: *Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Salvestro* [2023] NSWLEC 34 (Pepper J))

Facts: Mr Robert Beltrame (**defendant**) was prosecuted by the Natural Resources Access Regulator (**prosecutor**) for using a water bore pursuant to an approval, as a person other than the approval holder, in contravention of a term or condition of the approval contrary to s 91G(1) of the *Water Management Act 2000* (NSW) (**WM Act**). The defendant pleaded guilty to the offence. The defendant operated a farming business in Warrawidgee, near Griffith, NSW with his wife Mrs Kate Beltrame, on a property owned by Mrs Beltrame's parents, Mr and Mrs Salvestro. During the 2019/2020 water year, the defendant extracted 1,197ML of groundwater from a bore on the property licensed by Mr and Mrs Salvestro, in contravention of the 1,100ML annual limit condition of the approval.

Issues:

(1) The appropriate sentence to be imposed on the defendant; and
(2) Whether the penalty imposed should exceed the jurisdictional limit of the Local Court, as the offence could have been prosecuted in the Local Court with a lower maximum penalty.

Held: The defendant was convicted and fined $26,500 for the offence against s 91G(1) of the WM Act; the defendant

was ordered to pay the prosecutor's costs in the agreed amount of $20,000; a half share of the fine imposed was to be paid to the prosecutor; and a publication order was made:

(1) The offence committed by the defendant was of low to medium objective seriousness: at [87];
(2) The contravention of the extraction limits posed an increased risk of harm to the environment, a risk which was reasonably foreseeable, and in posing this risk the defendant subverted the objectives of the statutory water management regime: at [32], [76], [81];
(3) The defendant's over-extraction impacted other persons' water rights: at [63];
(4) The objective seriousness of the offence was increased by the fact that the water was unlawfully taken during a period of severe drought: at [86];
(5) The defendant's breach of s 91G(1) of the WM Act was inadvertent and not deliberate, and was not committed for financial gain. However, the defendant had control over the causes that gave rise to the offence, and practical measures could have been taken by the defendant to understand and seek advice on the operation of the approval: at [44], [51], [80], [83];
(6) The defendant expressed genuine remorse for the offence, accepted responsibility for his actions, took action to address the causes of the offence, lacked previous convictions, and was unlikely to reoffend: at [96], [109];
(7) The defendant was entitled to a 25% discount for his early plea: at [98]; and
(8) The fact that the matter could have been prosecuted in the Local Court, where the maximum penalty for the offence is lower, did not render it inappropriate in the circumstances of this case that the prosecution brought the matter in the Land and Environment Court, a specialist court, for the purpose of sending a message of general deterrence: at [144].

Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Commins **[2023] NSWLEC 43** (Pepper J)

Facts: Timothy Commins (**Commins**) was prosecuted by the Natural Resources Access Regulator (**NRAR**) for one offence of taking water from a water supply work in contravention of the terms and conditions of a water supply work approval between 1 July 2017 and 30 June 2019, contrary to s 91G(2) of the *Water Management Act 2000* (NSW) (**WM Act**). Commins was the director of Commins Enterprises, which operated a farming business in Witton, NSW. Commins and other relevant persons were the holders of two Water Access Licences which held an annual use limits of 2,586 ML and 1,000 ML, respectively, and a maximum carry-over limit of 2,586 ML and 1,000 of water from the previous water year respectively. However, there was also a Bore Extraction Limit (BEL) of 2,630 ML placed on the relevant water supply work approval that Commins, and other holders of that approval, were informed by the NSW Office of Water in 2009 by correspondence. The NRAR conducted an audit of Commins's water account statements in late 2020 and found that for the 2017-2018 water year the meter readings showed an over-extraction of 117.87 ML more than the BEL of 2,630 ML, and for the 2018-2019 water year, the meter readings showed an over-extraction of 1,233.78 ML more than the BEL.

Issue: The appropriate sentence to be imposed on Commins.

Held: Commins was convicted and fined $56,000 for the water offence; a publication order was made; a moiety of 50% of the fine was ordered to be paid to the NRAR; and he was ordered to pay the NRAR's costs fixed in the sum of $70,000:

(1) The offence subverted the regulatory scheme which relies on water users adhering to the conditions of their approvals. However, his behaviour could not be characterised as that of a "rapacious profit merchant": at [52];
(2) Commins was found to have committed the offence inadvertently because he failed to review correspondence from WaterNSW between 2009 and 2020 and he was not aware of the BEL: at [58];
(3) The over-extraction, which was 1,351 ML or 25,69% of the extraction cap, caused likely environmental harm: at [66];
(4) The market value of the water taken was $253,460.70, but in the absence of evidence demonstrating that the offence was committed with the intention of irrigating more crops for profit or for trading the water on the market, it was not established that the commission of the offence was motivated by financial gain: at [70] and [90];
(5) Commins was entitled to a discount of 20% for his early guilty plea: at [98];
(6) The parity principle was inapplicable. The fact that another approval holder had received two penalty infringement notices in relation to the same conduct did not mean that they were co-offenders: at [119];

(7) Limited weight was placed on the fact that the offence could have been prosecuted in the Local Court: at [126];
(8) Specific deterrence was relevant because Commins continued to operate his farming enterprise: at [138]; and
(9) A publication order naming Commins was made: at [155].

Environment Protection Authority v Mouawad (No 3) **[2023] NSWLEC 44** (Duggan J)

(Related decision: *Environment Protection Authority v Mouawad (also known as Boulos Isaac) (No 2)* [2023] NSWLEC 38 (Pritchard J))

Facts: By notice of motion, the defendant raised his fitness to be tried in relation to three charges alleged by the prosecutor for breach of the *Protection of the Environment Operations Act 1997* (NSW). The defendant argued that his mental illness resulted in his being unfit for trial. It was not in dispute that the defendant suffered from severe depression. For the reasons set out in *Environment Protection Authority v Mouawad (also known as Boulous Isaac) (No 2)* (***Mouawad No 2***), Pritchard J fixed the matter for an inquiry into the defendant's fitness to stand trial before a separate judge (**fitness hearing**).

The defendant and the prosecutor both submitted psychological evidence as to the impact of the defendant's mental illness on his fitness for trial.

Issues: Whether the defendant's mental illness resulted in him being unable to participate in a fair trial having regard to the factors in the common law *Presser Test*, including whether the defendant would:

(a) understand the nature of the charge;
(b) be able to plead to the charge;
(c) understand generally the nature of the proceedings, namely, that it is an inquiry into whether the defendant committed the offence charged;
(d) be able to follow the course of the proceedings so as to understand what is going on in court in a general sense;
(e) understand the substantial effect of any evidence given in support of the prosecution; and
(f) be able to decide what defence to rely upon and make that defence known to the court.

Held: Notice of motion dismissed:

(1) The question of fitness in class 5 of the Land and Environment Court's jurisdiction is determined by reference to the common law, rather than statute: at [8]-[9]. Therefore, having regard to the factors in the *Presser Test*, the defendant was found fit to stand trial: at [42]; and
(2) The opinion of the prosecutor's neuropsychologist was accepted and was further confirmed by the defendant's interactions with the Court. The defendant was able to understand the directions given, respond to specific questions, respond in a focused manner to the evidence and submission put by senior counsel for the prosecutor, and cross-examine a witness to a standard comparable to most self-represented litigants: at [36]-[37].

Georges River Council v SAF Developments **[2023] NSWLEC 50** (Pepper J)

Facts: SAF Developments Pty Ltd (**SAF Developments**) was prosecuted by Georges River Council for two offences in respect of conduct committed between 1 July 2019 and 27 August 2019. It pleaded guilty to one count of carrying out development not in accordance with consent, contrary to s 4.2(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act)**, and one count of unlawful transporting or depositing of waste, contrary to s 143 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). SAF Developments was the principal contractor carrying out development of 93 Connells Point, South Hurstville (**93 Connells Point**), and was subject to a Complying Development Certificate (**CDC**) and waste management plan that mandated waste materials (including excavation, demolition and construction waste materials) to be disposed of at a waste management facility. The Project Manager of the development entered into an agreement with a third party to fill a pool with clean building material free of charge. From 3 July and 27 August 2019, SAF Developments transported approximately 27 tonnes of building and demolition waste and soil from 93 Connells Point to the land of the third party and deposited the material into the pool. There was no development consent authorising this activity. Georges River Council subsequently issued development control orders which relevantly required the removal of the waste from the pool. On 25 August 2021, proceedings were commenced against SAF Developments, and in September 2021, SAF Developments removed all of the building and demolition waste in accordance with the orders.

Issue: The appropriate sentence to be imposed on SAF Developments.

Held: SAF Developments was convicted and fined $16,000 for the offence under the EPA Act and $10,000 for the offence under the POEO Act; a publication order was made; and it was ordered to pay Georges River Council's costs fixed in the sum of $70,000:

(1) The offence subverted the integrity of the planning system, including the proper construction of buildings under the EPA Act, and thwarted the objective of enhancing the quality of the environment and integrated waste management under the POEO Act: at [45] and [48];
(2) Georges River Council did not discharge its onus of proving that SAF Developments committed the offences intentionally or recklessly, and the Project Manager could not be considered the directing mind or will of the company: at [63]-[64], [67];
(3) The environmental harm occasioned by the offences was minor and temporary in the form of limited noise and visual amenity impact: at [73] and [77];
(4) Georges River Council did not discharge the onus of proving that the offences were committed for financial gain, that is, to reduce the total cost for transporting the waste to a licensed waste facility: at [83];
(5) There was insufficient evidence to conclude that the third party was a "victim" or "vulnerable" for the purposes of the aggravating factor of s 21A(2)(l) of the *Crimes Sentencing Procedure Act 1999* (NSW): at [86];
(6) SAF Developments received a 20% discount for the utilitarian value of its guilty pleas because of the delayed entry: at [98];
(7) SAF Developments had four prior convictions for carrying out development not in accordance with conditions of consent, which increased its likelihood of re-offending and spoke against a favourable assessment of its character and its prospects of rehabilitation: at [107]-[108];
(8) A publication order was made notwithstanding its unique circumstances of the third party requesting the waste to be deposited in her pool: at [144]; and
(9) The totality principle was applied: at [135].

JUDICIAL REVIEW

Ogilvie v Rovest Holdings Pty Ltd **[2023] NSWLEC 17** (Moore J)

Facts: Mr Ogilvie (**applicant**) challenged the validity of an approval granted by Blayney Shire Council (**Council**) pursuant to s 68 of the *Local Government Act 1993* (NSW) (**Local Government Act**) for the installation of 25 prefabricated modular units to be operated as motel accommodation facilities on the site of the former Blayney Bowling Club. The modular units, proposed by Rovest Holdings Pty Ltd (**Respondent**), were arranged to be installed on footings, tied to the ground securely and connected to a host of necessary services, including the Blayney town sewerage system. The Applicant challenged the validity of the approved development on five grounds. The first (and primary) ground raised by the applicant advanced that the modular units ought to have been characterised as "buildings" rather than "moveable dwellings"; that such "buildings" required approval subject to an assessment process pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**); and that any approval subject to the Local Government Act was, in effect, a nullity. The second and third grounds alleged a failure on the part of the Council to form and reach requisite states of satisfaction pursuant to both cl 6.2(3) and cl 6.8 of the Blayney Local Environmental Plan 2012 (**BLEP 2012**). The fourth and fifth grounds, advanced in the alternative, alleged separate breaches in relation to the bathroom floor area and the minimum enclosed floor area of the dwellings pursuant to the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (NSW) (**Local Government Regulation**). As at the date of the hearing, installation and construction activities on the site were substantially advanced.

Issues:

(1) Whether the proposed modular units were "buildings" for the purpose of the EPA Act; and
(2) Whether Council formed the requisite states of satisfaction relating to either stormwater management or the availability of sewerage services pursuant to cl 6.2(3) and cl 6.8 of the BLEP 2012, respectively.

Held: Development consent invalid; supplementary hearing on discretion be held; costs be dealt with at hearing on discretion:

(1) Portability was held by Sackville AJA in *Jambrecina v Blacktown City Council* [2009] NSWCA 228 to refer to an item that is "specifically designed to be readily and frequently moved from place-to-place": at [80]. This definition was relevant to the facts and circumstances of the Respondent's development: at [78];
(2) The modular units were not designed to be readily and frequently moved from place-to-place: at [82];
(3) The transportation of the modular units was only possible by way of disconnection from necessary services and disassembly by removal of the verandah structures affixed to them: at [83]. Because the modules required disassembly before they were capable of being moved, the modules could not be regarded as "other portable device(s)" within the definition of "moveable dwelling" as contained in the Dictionary to the Local Government Act: at [83], [89];
(4) There was no valid basis upon which the Council could have approved installation of the modular units pursuant to s 68 of the Local Government Act: at [90]. These structures were "buildings" as defined in the EPA Act and required assessment and approval under that legislation: at [90];
(5) Complete absence of evidence of consideration of relevant mandatory matters (or absence of evidence of reaching the necessary state or states of satisfaction concerning such matters) creates an error capable of rendering a decision invalid: at [105];
(6) Under cl 6.2 of the BLEP 2012, the Council was required to be satisfied that the development was designed to maximise the use of water-permeable surfaces on the site, that it included on-site stormwater retention, and that it avoided (or in the alternative, minimised and mitigated) the impact of stormwater runoff on adjoining properties, native bushland and receiving waters: at [105];
(7) None of the proposed conditions addressed these states of satisfaction: at [112]; and
(8) Failure to consider these states of satisfaction pursuant to cl 6.2 of the BLEP 2012 was an error of law rendering the development consent invalid: at [113].

***Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulburn Mulwaree Council* [2023] NSWLEC 45** (Robson J)

(Related decision: *Filetron Pty Ltd v Innovate Partners Pty Ltd ACN 131 941 145 atf Banton Family Trust 2* [2022] NSWLEC 98 (Pain J))

Facts: Filetron Pty Ltd (**Filetron**) commenced judicial review proceedings challenging the validity of a development consent granted by Mr Hedges (**delegate**), on behalf of Goulburn Mulwaree Council (**Council**), to Innovate Partners Pty Ltd (**Innovate**). The delegate determined the development application pursuant to an instrument of sub-delegation which empowered him to carry out Council's functions associated with the determination of development applications subject to various limitations, including where a "submission by way of objection" had been made and remained unresolved.

Issues:

(1) Whether the delegate failed to consider mandatory matters when determining the development application? If so, whether the delegate constructively failed to determine the development application? (**Ground 1**)
(2) Whether Mr Hedges had delegated authority to determine the development application? (**Ground 2**)

Held: First ground of appeal upheld; orders for conditional validity of the development consent made under s 25B of the *Land and Environment Court Act 1979* (NSW):

In relation to Ground 1

(1) In assessing the development application, the delegate considered Filetron's letter of objection and the issues it raised in relation to the suitability of the site for development, and on this basis identified conditions that he considered were necessary for consent to be granted. The delegate's subsequent failure to incorporate these conditions in the consent when determining the development application under s 4.16 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) was therefore indicative of a failure to take into account matters mandated for consideration under s 4.15(1) of the EPA Act: at [123]-[127];
(2) In circumstances where the development application was found to raise issues on matters relevant under s 4.15(1) of the EPA Act, failure to impose conditions in the consent to remedy these issues constituted a constructive failure on the part of the delegate to exercise his statutory power to determine the application subject to conditions under s 4.16 of the EPA Act: at [129]-[134];

In relation to Ground 2

(3) The expression "unresolved submissions by way of objection" in the Instrument of Sub-Delegation was to be construed, in accordance with the processes for community participation contemplated under the EPA Act, as meaning a submission received within the statutorily directed public exhibition period: at [79];
(4) The extension of time granted by Council to Filetron to lodge its objection to the development application did not entail an extension of the public exhibition period in circumstances where there had not been a concurrent extension of the period during which the development application and accompanying information were made available for inspection on Council's website: at [89]-[91]; and
(5) Filetron's objection, which was not lodged within the applicable public exhibition period, did not constitute a "submission" capable of limiting the delegate's authority to determine the development application: at [75].

Boydtown Pty Ltd v Minister for Planning and Public Spaces **[2023] NSWLEC 47** (Pritchard J)

Facts: The applicants sought judicial review of three separate decisions arising from a planning proposal to amend the Bega Valley Local Environmental Plan 2013 (NSW) (**BVLEP 2013**) to include, zone and apply minimum lot size standards to land at Boydtown, New South Wales. The first decision was the "Gateway Determination" of the Minister for Planning and Public Spaces (**Minister**) on 31 August 2017 pursuant to s 56(2) (as of the former numbering) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), containing various conditions including that Bega Valley Shire Council (**Council**) update its planning proposal with further information about the environmental and rural zones, and refer the amended planning proposal to the Department of Planning and Environment (**DPE**) for endorsement. The second decision under review was the "Endorsement Decision" of the Secretary, DPE (**Secretary**) on 19 May 2021 pursuant to a condition in the Gateway Determination. The third decision under review was Council's "approval decision" by way of resolution on 18 August 2021 to support the amendment to the BVLEP 2013, and request that the Minister make the plan.

Issues:

(1) Whether leave should be granted to the applicants to extend the time for filing the summons for judicial review under r 59.10(2) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) in relation to the Minister's Gateway Determination;
(2) If such leave was granted, whether the Minister's Gateway Determination was *ultra vires* by way of:
    (a) the planning proposal's failure to comply with s 55(2) of the EPA Act, with the consequence that the Minister's power to make the determination was not enlivened, or
    (b) the Minister impermissibly making the Gateway Determination due to its imposition of conditions on Council;
(3) Whether the Secretary was required to take certain mandatory considerations into account in making the Endorsement Decision, and if so, whether the Secretary took those matters into account;
(4) Whether Council was required to take certain mandatory considerations into account in making its approval decision, and if so, whether Council took those matters into account;
(5) Whether Council's approval decision was *ultra vires* by reason that the time for compliance with the requirements of the Gateway Determination had expired; and
(6) Whether Council owed the applicants a duty of procedural fairness, and if so, whether it denied the applicants procedural fairness by failing to provide the applicants' biodiversity report to the Secretary.

Held: The applicants' summons was dismissed:

(1) Leave was not granted to extend the time to review the Minister's Gateway Determination. There was insufficient evidence explaining the applicants' delay of over three years, such evidence being in their capacity to adduce: at [136];
(2) While the Court was not compelled to deal with the substantive grounds against the Minister, it observed that had leave been granted pursuant to r 59.10 of the UCPR, the Minister's decision would not have been found to be *ultra vires*. The planning proposal contained the required justification under s 55(2) of the EPA Act, and the imposition of conditions on Council did not make the Gateway Decision impermissible: at [144], [157], [164];

(3) In making the Endorsement Decision, the Secretary was only required to take into account the "amended Planning Proposal and any supporting maps and studies" referred to the Secretary, which were considered. However, even if the matters alleged by the applicants were mandatory considerations, the Secretary's delegate was found to also have considered those matters: at [176], [179];
(4) Council took the matters particularised in the applicants' summons into account in making its approval decision, but was not required to consider the biodiversity report as contended by the applicants. In any event, the effect of s 56(8) (as of the former numbering) of the EPA Act was that failure to comply with a requirement of a gateway determination would not invalidate the instrument: at [191], [192];
(5) Similarly, s 56(8) of the EPA Act cured any procedural defect so that that the "expiry" of the planning proposal's time for compliance did not invalidate the instrument: at [196]; and
(6) Council complied with its statutory obligation to notify and consult with the applicants. Any duty of procedural fairness arising under common law, if existent, did not extend so far as to providing the biodiversity report to the Secretary: at [216], [224].

Perry Properties Pty Limited v Georges River Council **[2023] NSWLEC 51** (Pritchard J)

Facts: The first applicant is the owner of land at Carlton (**property**); the only privately-owned parcel of land within the Jubilee Oval Precinct containing the Jubilee Oval Stadium and Kogarah Park. The first respondent, Georges River Council (**Council**) resolved to compulsorily acquire the property for the purpose of providing a "public recreation space" including a sports and recreation facility at the Jubilee Oval Precinct. Council issued proposed acquisition notices (**PANs**) to the first applicant, as registered proprietor of the property, to the second to sixth applicants, as caveators, to the third respondent, as mortgagee, and to the fourth respondent, as lessee. The applicants sought judicial review of Council's decision to issue the PANs.

Issues:

(1) Whether Council breached ss 186 and/or 188 of the *Local Government Act 1993* (NSW) (**LGA**) on the basis that Council was not acquiring the property for an authorised purpose and/or was acquiring for resale;
(2) Whether Council breached s 187 of the LGA on the basis that Council did not obtain a valid approval of the Minister for Local Government (**Minister**) because the Minister was misled as to the purpose of the acquisition and as to whether there were objections from the public of Council's resolution of the proposed acquisition being held in closed session; and
(3) Whether Council breached s 187 of the LGA insofar as the proposed acquisition was not in accordance with s 10A(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) in that the caveators were not afforded the required six-month negotiation period prior to the issue of the PANs.

Held: The applicants' summons was dismissed:

(1) The applicants did not establish that Council at any relevant time had as its purpose the acquisition of the property for re-sale: at [81];
(2) The applicants did not establish that any use of the property for the purpose of a licensed venue would be contrary to its classification as community land under the LGA. Nor did the evidence establish that the purpose of the acquisition was to ultimately lease the property to a private operator as a pub/bar or licensed restaurant: at [92], [95];
(3) Council's description of the public purpose of the proposed acquisition was not a "bare statement" as the applicants alleged: at [106];
(4) Generally, the applicants did not establish that Council proposed to acquire the property for a purpose outside the lawful purpose of public recreation: at [110];
(5) Council did not mislead the Minister for the purposes of s 187 of the LGA by failing to notify the Minister of the first applicant's "objection" to Council dealing with the proposed acquisition in closed session. The first applicant's representation was not in the approved form according to Council's code of meeting practice, and the applicants did not identify any statutory basis upon which Council was obliged to notify the Minister of an objection to the closing of a council meeting: at [129], [131]; and
(6) Council satisfied its obligation under s 10A(2) of the Just Terms Act by making a genuine attempt to acquire the land by agreement with the first applicant, the owner of the land, for at least six months before giving the PAN. It could not be that every owner of every "interest in land", including the caveators, would be entitled to the six-month negotiation period in s 10A(2). In any event,

non-compliance with s 10A would not affect the lawfulness of Council giving the PANs: at [150], [152].

Wollondilly Shire Council v Kennedy **[2023] NSWLEC 53** (Pain J)

Facts: Wollondilly Shire Council (**applicant**) sought a declaration that the complying development certificate (**CDC**) issued to Mr Kennedy (**first respondent**) by the certifier authorised under s 4.26 of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**) (**fourth respondent**) was invalid under s 4.31 of the EPA Act. The land subject of the CDC was zoned RU1 primary production. The second and third respondents were owners of the land as tenants in common with the first respondent. The second, third and fourth respondents filed submitting appearances save as to costs. The CDC purported to authorise the construction of a shed 22.3m wide and 60m long with a total area of 1,392m². The first respondent's evidence was that the purpose of the shed was to store a large historic vehicle collection. This purpose was not identified in the CDC or the application. Section 4.31 provides that the Court may declare a CDC invalid if proceedings are brought within 3 months after the CDC is issued and the CDC authorises the carrying out of development for which the Court determines a CDC is not authorised to be issued.

Issues:

Construction questions

(1) What principles applied to construction of a CDC and therefore what evidence was relevant;
(2) Given the scope of s 4.31 what evidence could the Court consider relevant to whether a CDC was authorised to be issued;

Section 4.31 grounds

(3) Whether the CDC identified a purpose of use for the shed to inform whether the shed was permissible under cl 1.18(b) of the Codes SEPP (**Ground 1**);
(4) Whether the shed was for the purpose of a car park as defined in the Wollondilly Local Environment Plan 2011 (NSW) (**WLEP**) and therefore impermissible under the Codes SEPP (**Ground 3**);
(5) Whether the shed was not ancillary to a dwelling house by reason of size, scale and storage capacity and therefore not complying development under the Codes SEPP (**Ground 4**);
(6) Whether the shed was an outbuilding for the purposes of cl 1.5 of the Codes SEPP by reason of its classification under the National Construction Code (NCC) and therefore complying development under the Codes SEPP(**Ground 5**);

Judicial review grounds

(7) Whether the fourth respondent's determination that the development was complying development was unreasonable (**Ground 2**);
(8) Whether the CDC was invalid as it was not issued subject to conditions specified in Sch 6 of the Codes SEPP as required by cl 3A.39 (**Ground 6**);
(9) Whether the CDC was uncertain and lacked finality due to discrepancies in the CDC plans (**Ground 7**); and
(10) Relief.

Held: CDC declared invalid. Costs reserved:

(1) CDC operates in rem, the principles applicable to a development consent apply given that a CDC is a similar instrument. Only the CDC and application could be relied on to construe the CDC based on principles of construction whereby a CDC should be clear on its face. Extrinsic communications before the CDC was issued between various people not including the fourth respondent were not relevant to its construction and the first respondent could not prove the fourth respondent was aware of the purpose of the shed: at [52];
(2) The Court was determining for itself whether the development which a CDC purported to authorise was development for which a CDC was authorised to be issued. For grounds 3 to 5 the Court was not limited to considering only the material before a certifier given the breadth of its evaluative task under s 4.31 of the EPA Act. Material produced and events which occurred after a CDC was issued may be considered: at [88], [90];
(3) As no planning purpose was identified in the CDC and application the permissibility of the shed could not be determined as required by cl 1.18(b) and therefore the shed was not able to be determined to be complying development (**Ground 1**): at [71], [74];
(4) The shed was intended to be a car park which was prohibited in RU1 zone under the WLEP and therefore was not complying development (**Ground 3**): at [119];
(5) The size of the shed meant it had an independent use that was not ancillary to a dwelling house and therefore was not complying development (**Ground 4**): at [118]-[119];
(6) The development was not an outbuilding for the purposes of the Codes SEPP as the use of the shed fitted

the definition of car park in the NCC and was not complying development (**Ground 5**): at [135]-[138];

Judicial review grounds

(7) The certifier unreasonably concluded the development was permissible in the RU1 zone in the absence of evidence of a purpose of the shed in the CDC and application and therefore the shed was not complying development (**Ground 2**): at [83];
(8) Failure of the fourth respondent to impose the conditions in Sch 6 of the Codes SEPP, a mandatory obligation under cl 3A.39, gave rise to invalidity (**Ground 6**): at [143]-[145];
(9) A substantial height discrepancy in the CDC plans rendered the CDC uncertain and gave rise to invalidity (**Ground 7**): at [167]-[170]; and
(10) As grounds 1-5 gave rise to invalidity the declaration of invalidity sought by the applicant was warranted: at [172].

Compulsory Acquisition

G&J Drivas Pty Ltd v Sydney Metro **[2023] NSWLEC 20** (Duggan J)

Facts: On 19 March 2021 (**Date of Acquisition**), the respondent compulsorily acquired the applicants' interest in land situated within the Parramatta CBD (**Acquired Land**) for the Sydney Metro West Project (**Public Purpose**). The applicant had received a telephone call from the respondent some 18 months prior to acquisition, advising that the whole of the land was to be acquired. The acquiring authority subsequently issued its compensation notice for the Acquired Land, which consisted of an amount for market value and disturbance pursuant to ss 55(a) and (d) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**). The applicants commenced class 3 proceedings objecting to the amount of compensation offered by the respondent.

At the Date of Acquisition, the Acquired Land was improved by a two-story mixed-use office and retail complex, and parts were leased to and occupied by tenants. In addition, development consent had been granted for the demolition of the existing building and erection of a new building. The applicants contended that but for the Public Purpose, the development would have progressed, which would have resulted in an increase in market value at the Date of Acquisition. Therefore, the decision to discontinue and stop work on the development should be disregarded by operation of s 5.56(1)(a) for the purpose of determining market value. The respondent contended that s 56(1)(a) of the Just Terms Act only permitted a consideration of the impact on value of physical work actually undertaken as at the Date of Acquisition.

Issues:

(1) Whether proper construction of s 56(1)(a) of the Just Terms Act permitted actions not undertaken and physically manifested on the Acquired Land to be disregarded for the purpose of determining market value;
(2) Whether the decisions to discontinue and stop work were caused by the proposal to carry out the Public Purpose;
(3) Whether there was a decrease in the value of the Acquired Land as at the Date of Acquisition; and
(4) Whether the applicants' use of the Acquired Land was an actual use of land for the purposes of s 59(1)(f), which entitled the applicants to a claim for disturbance for the purchase of replacement land.

Held:

(1) The relevant provisions of the Just Terms Act did not preclude a claim for a decrease in the value of the Acquired Land caused by the carrying out of the public purpose where such decrease related to actions not undertaken where the undertaking of such actions would have produced an increase in the value of the Acquired Land as at the Date of Acquisition: at [92]. From the provisions of s 56 of the Just Terms Act, it was plain that what was not intended by the legislation was that the words of s 55 fixed a limitation on the determination of compensation to a factually accurate state of affairs as at the date of acquisition: at [96];
(2) The issue of whether there had been an increase or decrease in the value of the land caused by the public purpose was a matter of fact to be determined on the evidence adduced: at [116]-[117];
(3) The decisions to discontinue and stop work were caused by the proposal to carry out the Public Purpose. Further, the decision to stop work was taken as a direct and natural consequence of the telephone call from the respondent advising the whole of the land was to be acquired: at [161], [169]-[170];
(4) The decisions to discontinue and stop work caused a decrease in the value of the Acquired Land. Therefore,

the decrease was to be disregarded for the purpose of determining the market value of the Acquired Land: at [162], [171]-[172]; and

(5) The Applicants held the Acquired Land as part of stock in trade of the business. As such the applicants were entitled to their claim for disturbance pursuant to s 59(1)(f) for stamp duty on replacement land; legal fees on purchase of replacement land; and loan establishment fees: at [414]-[418].

SECTION 56A APPEALS

Randwick Council v Fusion Developments Pty Ltd **[2023] NSWLEC 19** (Moore J)

(Decision under review: *Fusion Development Pty Ltd v Randwick City Council* [2022] NSWLEC 1255 (Dickson C))

Facts: Randwick Council (**appellant**) appealed under s 56A of the *Land and Environment Court Act 1979* (NSW) against the decision to grant development consent to Fusion Development Pty Ltd (**respondent**) for a mixed-use development in Kingsford. The proposed development contained commercial tenancies and 141 boarding rooms over a single level of basement carparking. The Appellant raised two grounds of appeal. The first ground challenged the sufficiency of the finding of design excellence pursuant to cl 6.21(3) of the Randwick Local Environmental Plan 2012 (NSW) (**RLEP 2012**). The second ground claimed that the expression "in the circumstances of that development", found in cl 6.21(6) of the RLEP 2012, ought to have been construed so as to be confined to the physical and statutory planning context of the site the subject of the proposed development.

Issues:

(1) Whether the Commissioner's finding that the proposed development exhibited design excellence was sufficient of itself for the Court to be satisfied that a competitive design process was unnecessary or unreasonable in the circumstances of that development (**Ground 1**); and

(2) Whether the proper construction of the words "in the circumstances of that development" is confined only to physical circumstances and thus precludes design excellence as a circumstance capable of rendering the holding of a competitive design process unnecessary or unreasonable (**Ground 2**).

Held: Appeal dismissed; Appellant to pay Respondent's costs of appeal as agreed or assessed:

In relation to Ground 1

(1) The decision-making process under cl 6.21(6) of the RLEP 2012 is a classically evaluative one: at [106]. The process required the Commissioner to consider and weigh relevant factors to determine whether the discretion to dispense with the requirement for a competitive design process should be exercised: at [106];

(2) The Commissioner did not conclude that Fusion Developments Pty Ltd (the applicant in that matter) should be given the benefit of cl 6.21(6) simply and wholly on the basis that she had concluded that cl 6.21(3) had been satisfied: at [105]. Relevantly, the Commissioner also engaged in the material tending to other factors, for example, an alternative design process: at [110];

(3) The alternative design process involved the undertaking of an independent review of the design proposal by an urban and architectural design panel consisting of expert representatives: at [95]-[103];

(4) The alternative design process constituted appropriate and relevant information to be considered as part of the Commissioner's discretionary weighing of whether or not to dispense with the requirement for a competitive design process: at [124]. It follows that it was open to the Commissioner to conclude that the alternative design process comprised a proper merit basis upon which to dispense with the requirement for a competitive design process: at [111];

In relation to Ground 2

(5) The choice of how to interpret the words "in the circumstances of that development" under cl 6.21(6) of the RLEP 2012 was clearly one to be approached on the basis of conventional statutory interpretation: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28: at [127]. There was no need to read additional words into the provision as might otherwise have been permitted if necessary: *Taylor v The Owners of Strata Plan 11564 and Others* [2014] HCA 9: at [127]; and

(6) There was nothing to suggest that the conclusion reached by the Commissioner was legally unreasonable or one that was not available: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2004] HCA 63: at [128].

***The Council of the City of Sydney v Emag Apartments Pty Limited* [2023] NSWLEC 23** (Duggan J)

(Decisions under review: *Emag Apartments Pty Ltd v The Council of the City of Sydney* [2022] NSWLEC 1110 (Dickson C); and *Emag Apartments Pty Ltd v The Council of the City of Sydney (No 2)* [2022] NSWLEC 1317 (Dickson C))

Facts: The appellant appealed against the whole of two decisions of the Land and Environment Court, in which a commissioner approved the development application (**DA**) submitted by the respondent for alterations and additions to an existing building on the subject land (**Proposed Development**). In the first judgment, having regard to the mandatory considerations, the commissioner made a finding that the Proposed Development exhibited design excellence consistent with cl 6.21 of the Sydney Local Environmental Plan 2012 (**SLEP 2012**). On the principal basis that such considerations were limited to the external design of the building the commissioner maintained this finding in the second judgment. Of contention was the commissioner's acceptance of a submission that the provisions of cl 6.21 were limited to consideration of the external features of the Proposed Development. The Commissioner adjourned the proceedings to allow amendments to be made to the DA. The second judgment related to a determination to approve based on the amendments to the DA.

Issues:

(1) Whether the commissioner erred in her construction of the terms of cl 6.21 of SLEP 2012 and subsequently misdirected herself as to the assessment she was required to make and failed to take into account the mandatory relevant considerations;
(2) Whether the commissioner erred in finding that the appellant had consented to amending the DA. If so, whether the decision to grant development consent was made outside of the commissioner's power; and
(3) Whether the commissioner failed to give reasons in relation to the amendments made to the DA by the respondent.

Held: Appeal upheld:

(1) There is no warrant in the text of cl 6.21 of SLEP 2012 to limit the consideration required to the external urban design of the Proposed Development, rather than the internal amenity: at [49]. The commissioner failed to take into account a mandatory requirement to have regard to all of the matters as required by cl 6.21(4) by limiting the matters she had regard to in connection with the internal assessment to cl 6.21(4)(d): at [51];
(2) Where the amendment to a DA relied upon consent to the amendment being given by the consent authority, such consent must be given in a positive way. The asserted inaction, or silence by the Council was insufficient to constitute the necessary consent. Absent amendment to the DA the commissioner had no power to approve the unamended DA which proposed works on adjoining land without the adjoining owner's consent having been obtained: at [87]-[88]; and
(3) The commissioner erred in that she failed to give adequate reasons relating to the satisfaction on merit of the amendments insofar as such satisfaction resulted in a maintenance of her earlier findings: at [112].

EASEMENTS

***Rouse Hill Custodian Corporation Pty Ltd v Prisma Rouse Hill Development Pty Ltd* [2023] NSWLEC 48** (Pain J)

(Related decisions: *Terry Rd Development Pty Ltd v Blacktown City Council* [2018] NSWLEC 1226 (Gray C); and *Celesteem Rouse Hill Development v Blacktown City Council* [2020] NSWLEC 1137 (Smithson C))

Facts: Rouse Hill Custodian Corporation Pty Ltd (**applicant**) sought orders to impose an easement under s 40 of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**) for the drainage of its stormwater over land owned by Prisma Rouse Hill Development Pty Ltd (**respondent**) in order to give effect to the applicant's development consent. The respondent opposed the imposition of the easement. The applicant intended to convey its stormwater through a pipe under a public road to the respondent's land. The proposed easement was situated on part of the respondent's land identified for road construction and dedication to Blacktown City Council in the respondent's development consent and the Blacktown City Council Growth Centre Precincts Development Control Plan 2010 (NSW) inter alia. The respondent did not intend to act on its development consent at the present time. In the hearing the applicant stated that it wished to dispose of less stormwater than authorised by its development consent through the easement sought, necessitating modification of the development consent or a new development consent in the future. The applicant's development consent granted to

drain neighbouring land and the Council's public road stormwater.

Issues:
Under the LEC Act:

(1) Whether Section 40(1)(a) could be relied on in circumstances of the applicant needing to modify or seek a new development consent; and
(2) Whether the proceedings should be dismissed in circumstances where the applicant failed to join other persons with an estate or interest in the land (s 40(3)).

Considerations under s 40(4) of the LEC Act relating to s 88K of the *Conveyancing Act 1919* (NSW):

(3) Whether the applicant's land would have the benefit of the proposed easement given conveyance of stormwater through a pipe under the public road (s 88K(1));
(4) Whether the proposed easement was reasonably necessary for effective use or development of the applicant's land (s 88K(1));
(5) Whether the use of the applicant's land would not be inconsistent with the public interest (s 88K(2)(a));
(6) Whether the respondent could be adequately compensated for any loss or other disadvantage that will arise from imposition of the proposed easement (s 88K(2)(b)); and
(7) Whether the Court would exercise its discretion to impose the proposed easement and the nature and terms of that easement if imposed (s 88K(3)).

The parties agreed and the Court accepted that the applicant made all reasonable attempts to obtain the easement (s 88K(2)(c)).

Held: Amended easement would be imposed:

(1) Section 40(1)(a) could be relied on as the easement sought enabled the implementation of applicant's consent granted in proceedings on appeal under the *Environment Planning and Assessment Act 1979* (NSW) broadly in the manner contemplated by the consent: at [62]-[63];
(2) Proceedings were not dismissed for failure to join parties as the Court had a wide discretion in applying s 40(3). The significant number of interest holders would have the opportunity to object to any development application regarding the easement in the future: at [83], [85];
(3) Applicant's land had the benefit of the easement as it would convey only the applicant's stormwater: at [139];
(4) Easement was reasonably necessary for development of the applicant's land in accordance with its consent. There were no practical alternatives to dispose of the applicant's stormwater: at [272], [277], [285], [287];
(5) Use of applicant's land for the purpose for which it had development consent was not inconsistent with the public interest: at [295];
(6) Respondent could be adequately compensated. Appropriate quantum of compensation was $882,000 based on loss of value of easement land, loss of value of R3 zoned land outside the easement and setback area, and removal of easement infrastructure costs: at [364], [381]; and
(7) Easement would be imposed subject to revised terms as the easement was reasonably necessary. The burden on the respondent's land warranted amendment of the terms of easement: at [394]-[401].

Review of Registrar's Decisions

Bennett v Ku-ring-gai Council **[2023] NSWLEC 6** (Robson J)

(Related decision: *Bennett v Ku-ring-gai Council* [2023] NSWLEC 1195 (Washington AC))

Facts: By notice of motion, Ku-ring-gai Council (**Council**) sought review of a decision of the Registrar of this Court refusing Council's application for leave to adduce expert town planning evidence in Class 1 proceedings commenced by Alex Bennett and Ingrid Johanna King against Council's refusal of a modification application (**appeal proceedings**).

Issue: Whether the Court, in its discretion, should vary the Registrar's decision and grant leave for Council to adduce town planning evidence in the appeal proceedings?

Held: Motion granted; Order 4(a) of the Registrar's decision varied:

(1) Council tendered uncontested evidence that had not been before the Registrar that the experts retained for the appeal proceedings did not have the expertise to address the contentions it wished to raise. Such new evidence displayed a material change in circumstances since the hearing before the Registrar. As such, it was in the interest of justice for the Court to exercise its

discretion under r 49.19 of the Uniform Civil Procedure Rules 2005 (NSW) to vary the Registrar's decision: at [15]; [29]-[30]; and

(2) Considering the mandate for a speedy resolution of the proceedings in s 56 of the *Civil Procedure Act 2005* (NSW) and s 38 of the *Land and Environment Court Act 1979* (NSW), it was appropriate to order that town planning evidence be given by a single party expert: at [31]-[33].

Merit Decisions (Commissioners)

***Sung v City of Canada Bay Council* [2023] NSWLEC 1087** (Gray C)

Facts: Mr Sung (**Applicant**) appealed against the refusal of a development application (**DA**) for the construction of a boarding house. The provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP ARH**) applied to the development application. Clause 29 of the SEPP ARH set out the grounds upon which consent could not be refused if certain criteria were met, cl 30 set out a number of standards for boarding houses, and cl 30A required the design to be compatible with the character of the local area. The Council contended that the proposed development breached the height development standard, and did not comply with the criteria in cl 29 concerning the floor space ratio (**FSR**), solar access and accommodation size. The Council argued that an onsite detention (**OSD**) tank, a garbage room and areas of horizontal circulation enclosed by steel mesh described as breezeways, should all be included in the FSR calculation. It also argued that the floor area of the boarding rooms should be calculated by excluding areas around the kitchen, and excluding areas where the ceiling height was less than 2.4m. The Council also contended that the design is not compatible with the character of the local area and the boarding rooms did not have adequate amenity. The applicant relied on cl 8 of the SEPP ARH, which concerns inconsistency between instruments, to argue that a request under cl 4.6 of the Canada Bay Local Environmental Plan 2013 (**CBLEP**) was not required where there is a breach of a height or FSR development standard on a development to which the SEPP ARH applies.

Issues:

(1) Whether a cl 4.6 request was required concerning the breach of the height development standard;

(2) Whether the FSR of the proposed development exceeded the 'must not refuse' criteria in cl 29(1)(c)(i) of the SEPP ARH, which is a FSR of 1:1;

(3) Whether the design of the proposed development was compatible with the character of the local area;

(4) Whether the floor areas of the rooms met the 'must not refuse' criteria for accommodation size;

(5) Whether the boarding house had adequate solar access; and

(6) Whether the amenity of the boarding rooms was adequate.

Held: Allowing the appeal and granting development consent:

(1) For cl 8 of the SEPP ARH to operate, there must be an inconsistency between the planning instruments, not just an inconsistency between individual provisions in each of the instruments: at [30]. Under both instruments, consent can be granted to development that breaches the height of buildings and floor space ratio development standards. In the CBLEP, there were additional requirements to be met prior to such consent being granted, which were outlined in cl 4.6, but these additional requirements did not create an inconsistency with the SEPP ARH: at [34]. Accordingly, where the 'must not refuse' criteria concerning FSR and height in cl 29 are not met, both cl 29(4) of the SEPP ARH and cl 4.6 of the CBLEP continue to apply and a cl 4.6 request is required: at [34]-[35];

(2) The cl 4.6 request adequately addressed the matters in cl 4.6(3) of the CBLEP, and the other matters in cl 4.6(4) were also satisfied, such that there was power to grant consent pursuant to cl 4.6(4) despite the contravention of the height development standard: at [36]-[54];

(3) The gross floor area must be calculated by reference to its definition, and the proposed development complied with the 'must not refuse' criteria for FSR on the basis that: the area of the breezeways were not floor area within "an internal face of external walls" and were therefore not gross floor area (at: [62]); the water and OSD tank were excluded from gross floor area on the basis that it was either a "plant room" or an area used for services, and the garbage room was within an area that meet the definition of basement and was therefore excluded as basement garbage: at [61];

(4) The question of compatibility with local character in accordance with cl 30A of the SEPP ARH related to the design of the development itself, and the Council did not adduce evidence that the design was incompatible

with the local character: at [66]. Instead, the evidence was that in the context, the form and scale of the building was compatible with the character of buildings in the visual catchment: at [67];

(5) To calculate the area of the boarding rooms under cl 29(2)(f) of the SEPP ARH, the term 'gross floor area' was used, which had the same meaning as the defined term in the standard instrument (cl 4(2) of the SEPP ARH) with obvious adjustments so that the references to walls were construed as the walls of the boarding room: at [83]. The gross floor area was the floor measured from the internal face of the boarding room wall, measured at a height of 1.4m above the floor, was not calculated by reference to the national construction code, and did not require the exclusion of an arbitrary area in front of each kitchen: at [84]-[86]. In meeting the "must not refuse" criteria in cl 29(2)(f) of the SEPP ARH for the gross floor area of each of the single rooms and the double rooms proposed, the proposed development cannot be refused on the basis of accommodation size: at [86];

(6) Whilst the Council contended that there was inadequate solar access to the boarding rooms, manager's room, and the accessible room, and the communal room did not receive good sunlight, cl 29(2)(c) of the SEPP ARH prevents the refusal of the development on the basis of solar access if it provides at least one communal living room and "if at least one of those rooms receives a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter". The diagrams demonstrated that this requirement was met. Therefore, the proposed development could not be refused on the basis of solar access, including any suggestion of inadequate solar access to boarding rooms: at [88]; and

(7) Whilst the Council contended that inadequate rooms had natural ventilation, neither the SEPP ARH nor the development control plan set any controls requiring natural ventilation, and so this contention did not warrant refusal: at [89]-[90].

The Trustee for Giggs and Learn Trust v Canterbury-Bankstown Council **[2023] NSWLEC 1214** (Bradbury AC)

Facts: In September 2022 the applicant applied to the Council to modify a development consent which had been granted in 2017 for a centre-based child care facility in Belmore. The modification application sought approval to increase the number of children who could be cared for at the facility from 38 to 42. The application also proposed some consequential changes to the existing facility, including an increase in the number of staff from six to seven and an increase in the total area of outdoor play space.

The increase in the area of outdoor play space was required by s 3.22 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (**Transport SEPP**). That section applied to a development application for a centre-based child care facility if the outdoor space requirements for the facility did not comply with reg 108 (Space requirements – outdoor space) of the Education and Care Services National Regulations (**National Regulations**). Section 3.22(2) of the Transport SEPP provided that a consent authority must not grant development consent to development to which the section applied except with the concurrence of the Regulatory Authority. That section also applied to a modification application by virtue of s 3.3(5) of the Transport SEPP.

Regulation 108 of the National Regulations required a child care facility to provide at least 7 m^2 of unencumbered outdoor space for each child being educated at the facility. If the modification application were to be approved, there would be 42 children being educated and cared for at the child care centre and, for this number of children, reg 108 would require the provision of 294 m^2 of unencumbered outdoor space (42 x 7).

In calculating the area of unencumbered outdoor space, reg 108(3) required certain areas to be excluded, such as pathways or thoroughfares not used by children as part of their education and care program, and any other space that is "not suitable for children".

Section 3.23 of the Transport SEPP also applied to the modification application and required the consent authority to take into consideration the Child Care Planning Guideline published in the New South Wales Government Gazette, No 501, 1 October 2021 (**Guideline**). The Guideline provided the following design guidance:

> "Calculating unencumbered space for outdoor areas should not include areas of dense hedges or plantings along boundaries which are designed for landscaping purposes and not for children's play (refer to Figure 9 and 10).
>
> When new equipment or storage areas are added to existing services, the potential impact on unencumbered space calculations and service approvals must be considered."

The modification application indicated that the development, as proposed to be modified, would provide 297.04 m^2 of outdoor play area. This area comprised the 14.5 m^2 of additional outdoor play area proposed by the modification application as well as the existing outdoor play areas which were said to contain a total area of 282.54 m^2. This made a total of 297.04 m^2 which, on its face, satisfied the requirements of reg 108.

However, evidence was given by the council's planning expert that, in its calculation of the area of unencumbered outdoor space, the applicant had included areas that reg 108 required, and the design guidance in the Guideline advised, should be excluded from the calculation. These included areas occupied by brick piers forming part of the front fence, the ramp to provide access to the new outdoor play area and various areas of plantings and hedging.

Issues:

(1) Whether the development to which the consent as proposed to be modified related, would provide the area of unencumbered outdoor play area required by reg 108 of the National Regulations; and
(2) If not, whether the modification application was capable of being approved in the absence of concurrence from the Regulatory Authority.

Held: Appeal dismissed; modification application refused:

(1) The applicant's calculation of unencumbered outdoor play area included the ramp which would provide access to the proposed new outdoor play area. That ramp was no more than a thoroughfare joining the new play area to the existing play area and could not be considered to be an area forming part of the education and care program at the facility: at [24];
(2) The ramp had an area of 6.6 m^2. When that area was excluded from the calculation the development as proposed to be modified did not meet the minimum requirements of reg 108: at [25];
(3) There were other areas of plantings and hedges that should also have been excluded from the calculation of unencumbered outdoor play area, either because they comprised "other space that is not suitable for children" and therefore excluded from the calculation by reg 108(3)(d) of the National Regulations or because they were areas of "dense hedges or plantings along boundaries which are designed for landscaping purposes and not for children's play" and should therefore not be included having regard to the design guidance contained in the Guideline (which the Court is required to take into consideration pursuant to s 2.23 of the Transport SEPP): at [26]; and
(4) As the modification application did not comply with reg 108 of the National Regulations, s 3.22 of the Transport SEPP applied and the Court could not approve the modification application except with the concurrence of the Regulatory Authority. As that concurrence had not been given, the modification application must be refused: at [32].

Tree Decisions

Welsh v Radford **[2023] NSWLEC 1095** (Douglas AC)

(Related decision: *Steber v Job* [2019] NSWLEC 1308 (Galwey AC))

Facts: The applicants applied under s 14B of Pt 2A of the *Trees (Disputes Between Neighbours) Act 2006* (**Trees Act**), proposing orders for pruning of bamboo in a neighbouring property in Batehaven to remedy an alleged severe obstruction of sunlight to a window, and severe obstruction of views from a dwelling. Bamboo was prescribed as a tree under s 4 of the Trees (Disputes Between Neighbours) Regulation 2019.

The respondent had occupied her property from 2008, while the applicants had occupied their two-storey dwelling higher up the hillside from 2010. At occupation, and until at least 2015, the respondents enjoyed broad views of the Pacific Ocean, islands, and land/ water interface, gained across the respondent's land. Soon after occupation, and with Council approval, the applicants modified a balustrade and a window on their dwelling's east side upper storey, which provided enhanced views for the applicants, but reduced privacy for the respondent in the rear yard.

In May 2012, the respondent planted one Slender Weavers Bamboo, west of and adjacent to the rear balcony. At some unspecified later date, the respondent planted one Slender Weavers Bamboo and one King Bamboo, parallel and adjacent to the west side boundary and about four metres from the bamboo planted next to the balcony.

By 2019, the bamboo along the boundary had melded into a tall, broad, dense screen which blocked the applicants' ocean views from upstairs living areas, and sunlight to

windows, particularly on the ground floor. In July 2019, the respondent refused the applicants' initial request to prune the bamboo's height to remedy these obstructions. Another pruning request in March 2022 was also refused, thus an application was made under the Trees Act, and served on the respondent in September 2022. In October 2022, prior to the onsite hearing, the two boundary bamboo clumps were pruned to near ground level.

Issues:

(1) Whether all three bamboo clumps formed a hedge in satisfaction of s 14A(1) of the Trees Act;
(2) What is the appropriate date on which to determine the impacts of the trees; and
(3) If s 14A(1) was satisfied for all or some of the bamboo, whether the resulting obstruction of views and/or sunlight was severe such that s 14E(2)(a) was satisfied; and, if so, whether s 14E(2)(b) was also satisfied.

Held:

(1) Section 14A(1) applies only to groups of 2 or more trees that: (a) are planted (whether in the ground or otherwise) so as to form a hedge, and: (b) rise to a height of at least 2.5 metres above existing ground level. Based on the word "rise" in s 14A(1)(b) being in the present tense, and on *Wisdom v Payn* [2011] NSWLEC 1012: at [53]-[59], engagement of 14A(1)(b) had consistently required a hedge to be at least 2.5 metres tall at the onsite hearing. When hedge trees were pruned below 2.5 metres tall prior to a final hearing, applications have thus been refused.

    In *Steber v Job* [2019] NSWLEC 1308 (***Steber***): at [10]-[12], Galwey AC found an alternative interpretation of "rise" that may apply when trees, prior to being pruned before the hearing, had been taller than 2.5 metres, and, where this state is likely to recur. Galwey AC considered the refusal of such applications, which to date had all involve bamboo, was contrary to the "objective of the Trees Act, quoted in both reviews, (which) is to provide 'a simple, inexpensive and accessible process for the resolution of disputes about trees between neighbours"; *Steber*: at [39].

    As the respondent's boundary bamboo had reached almost 10 metres tall prior to the October 2022 pruning and had the potential to rapidly regrow to a height of 10 - 20 metres, the interpretation from "*Steber*" for the 2 boundary bamboo trees was applied, which thus engaged s 14A(1)(b): at [26];
(2) Section 14A(1)(a) was not engaged for the bamboo adjacent to the respondent's veranda as this single bamboo was planted prior to the hedge planting, and, that its planting lacked the intention by the respondent "to form a hedge", as required by s 14A(1)(a): at [30]-[38];
(3) Severe obstruction of sunlight to a window and of views from the applicants' dwelling was established. Therefore, s 14E(2)(a)(ii) was engaged: at [46], and s 14E(2)(a)(i) was engaged: at [49]. Section 14E(2)(b) was also satisfied: at [52]; and
(4) The severity and nature of the hedge was such that remedying the hedge's obstruction of views and sunlight outweighed the significance of privacy lost by the respondent. Orders were made: at [69], for the removal of the boundary bamboo only, with conditions of no bamboo, and maintenance at a maximum height, imposed for any replacement planting.