IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S120/2011
No. ~~S227 of 2010~~

BETWEEN: **CUMERLONG HOLDINGS PTY LIMITED**
(ACN 008 484 875)
Appellant

AND: **DALCROSS PROPERTIES PTY LIMITED**
(ACN 083 792 054)
First Respondent

DALCROSS HOLDINGS PTY LIMITED
(ACN 083 791 931)
Second Respondent

AUSTRALASIAN CONFERENCE ASSOCIATION LIMITED
(ACN 000 003 930)
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication

1. The Appellant certifies that these submissions (or a redacted version thereof) is suitable for publication on the internet.

Part II: Issues on appeal

2. Whether, in determining the need for the Governor's approval pursuant to s.28(3) of the EP&A Act 1979, in the context of the provisions of LEP 194 (which changed the zoning of the relevant land and had the effect of suspending a restrictive covenant (being a *regulatory instrument*) *vide* clause 68(2) of KPSO):

   (a) absent an express provision in LEP 194 to the effect that a *regulatory instrument specified therein was not to apply*, s.28(3) was not engaged, such

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that the Governor's approval was not required (per the majority below) (per Tobias JA); or

(b) whether that because the operation of LEP 194 brought about the result of suspending the regulatory instrument, by effect but without expressed text (*vide* the change of zoning and the operation of clause 68(2) of KPSO) then the Governor's approval, *vide* s.28(3) was required for LEP 194 (per Handley JA).

Part III: Notice under s.78B of the *Judiciary Act*

3. The Applicant certifies that consideration has been given as to whether a notice ought be given in compliance with s.78B of the *Judiciary Act 1903*; and is of the opinion that it ought not.

Part IV: Citation of reasons below

(a) The primary court, per Smart AJ [2009] NSWSC 717.

(b) Intermediate court, [2010] NSWCA 214.

Part V: Narrative of relevant facts

4. The Applicant's land (being lot 1 in DP302605 commonly known as 9 Werona Avenue, Killara) (together with other lands) enjoys a restrictive covenant (DP834629) over the Defendant's lands (lots 102 and 103 in DP834629) which precludes the use of the Defendant's land for the use, *inter alia*, of *hospital*.

5. On 28 August 2008 Ku-ring-gai Municipal Council granted a consent for the use of the Defendants' land for an extension of its hospital onto the Defendants' land contained in lots 102 and 103, DP834629; the efficacy of that consent depends upon the suspension of the restrictive covenant (the regulatory instrument).

6. Under the Ku-ring-gai Planning Scheme Ordinance ("KPSO") (made on 1 October 1971 and subsequently repealed NSW *Local Government Act 1919*), the land of each of the Plaintiffs and the Defendants was zoned Residential 2(b).

7. Pursuant to clause 68(2) of the KPSO, the operation of restrictive covenants or instruments were suspended where they were inconsistent with a consent granted by the Council; land exempted from that suspension was land in zones specifically specified, and which included land in the Residential 2(b) zone. Whilst that zone remained, any consent *qua* the parties' land did not override or suspend the covenant/instrument.

8. Clause 68(2) of the KPSO was made pursuant to the power in s.342G of the NSW LGA 1919; s.342G reads as follows:

> "(1) A scheme shall in the prescribed manner define the land to which it applies.
>
> (2) A scheme may contain provisions for regulating and controlling the use of land and the purposes for which land may be used.
>
> (3) Without prejudice to the generality of subsection 2 of this section a scheme may contain provisions for or in relation to all or any of the following matters, that is to say –
>
> ...
>
> (m) the extinction or variation of private rights of way and other easements
>
> (4) A scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act, or of any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made, to the extent to which that provision is inconsistent with any of the provisions of the scheme.
>
> ..."

Clause 68(2) of the KPSO provided:

> "(2) In respect of any land which is comprised within any zone, other than within Zone No 2(a), 2(b), 2(c), 2(d), agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder."

9. Whilst the Plaintiff's and Defendants' land remained zoned Residential 2(b), the restrictive covenant remained in operation, and was not suspended.

10. The KPSO was made under Part XIIA of the *Local Government Act 1919*. On 1 September 1980, Part XIIA of the LGA was repealed and the *Environmental Planning and Assessment Act 1979* (EP&A Act) came into force. The KPSO continued in force as a *former planning instrument*, and was a *deemed environmental planning instrument* under the EP&A Act.

11. Upon the coming into effect of the EP&A Act on 1 September 1980, s.342G(4) was repealed and replaced with s.28 of the EP&A Act which reads as follows:

> "(1) In this section, ***regulatory instrument*** means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.
>
> (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
>
> (3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.
>
> (4) Where a Minister is responsible for the administration of a regulatory instrument referred to in subsection (2), the approval of the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.
>
> (5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence."

(Our underlining)

12. The requirement in s.28(3) for the Governor's approval was new, it not being a requirement under the previous s.342G(4). (It was common ground that the Governor had not approved LEP 194 (Tobias JA [19]).)

13. On 28 May 2004 the Development Control Table contained in clause 23 of the KPSO was amended by LEP 194 to create a new zone for the lands of the Applicant and Respondent; it changed the previous zone of Residential 2(b) to Residential 2(d3). The objective was to encourage higher residential density along the northern rail

corridor. Under both the previous zoning and the new zoning "hospital" was a permissible use, with consent.

14. The effect of the changed zoning was that, pursuant to clause 68(2) of the KPSO, the previous exemption from the suspension of covenants contained in that provision no longer protected, but rather suspended, the operation of the restrictive covenant. *Vide* the LEP 194 change of zoning of the subject land to 2(d3), clause 68(2) purportedly operated to lift or expunge the protection the land otherwise had to enjoy the benefit of the restrictive covenant. The Appellant contends that the two instruments (the KPSO and LEP 194) read together (as it is submitted they must be) contained, or "made", the provision.

Part VI: Appellant's arguments

(a) The errors complained of in the Court below

15. The submission is put on behalf of the Applicant that as the *provision* in LEP 194 changing the zoning has the effect (when combined with clause 68(2)) of allowing development of land in the 2(d3) zone in a manner that sets aside or suspends covenants which would otherwise apply, then *vide* s.28(2) of the EP&A Act, it requires the Governor's approval. The submission (accepted by Handley JA [80]) was that the effect of LEP 194 was to *provide* that restrictive covenants would not apply in land in the new zoning.

To read *provide/provision* as the plurality did, by restricting it to the requirement for express text to that effect (per Tobias JA [38], [44]) was to ignore the operation of LEP 194 in its context, and in particular in the face of the requirements of s.28 of the EP&A Act.

16. It is submitted that with the repeal of s.342G(4), the source of power for the suspension of covenants was intended by the Parliament to be confined to the procedure in s.28 of the EP&A Act.

The ambulatory operation of clause 68(2) ought not be expanded/allowed, where its putative operation and effect, *vide* LEP 194, is such as to require that operation and effect to have the Governor's approval (per s.28 of the EP&A Act).

(b) Applicable legislation, principle or rule of law relied upon

(c) Analysis of the rationale of the legislation, principle or rule

17. The Appellant contends that substance ought prevail over form.

18. Here the effect of LEP 194, coupled with the operation of clause 68(2) of the KPSO, is to suspend the operation of the restrictive covenant enjoyed by (and protecting) the Defendant's land. In doing so, it is submitted that Handley JA was correct in finding that it thereby *provided* a result which engaged the operation of s.28(2) of the EP&A Act.

19. The approach to construction by Tobias JA is to require explicit words which *provide*, such that operative words are themselves *a provision* in the instrument [34], [38]. Whilst he acknowledges the effect of the operation of LEP 194, in combination with clause 68(2), was to suspend the covenant [16], [18]; that LEP 194 did not <u>say</u> it was to operate in that manner, meant that s.28(3) was not engaged [44].

It is submitted that this approach ignores authorities which countenance an enquiry into the effect and operation of a provision. To discern and prefer the substance, effect or consequences of a provision is to apply the purposive approach – which approach is consistent both with statute[1] and common law construction.[2]

There are numerous examples of courts adopting a construction where the substance of a provision is preferred over the form of words used in a particular provision; it is the effect of the provision, rather than the form it takes, which is looked at to determine its construction.[3]

It is submitted that the purpose of s.28 of the EP&A Act, in replacing s.342G(2) of the 1990 LGA was to provide a further brake on the power to suspend the operation of covenants, by requiring the approval of the Governor, following a prior concurrence by the Minister.

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[1] See s.33 of the *Interpretation Act 1987* (NSW).
[2] See discussion of authorities referred to in *Pearce & Geddes* 6th Ed [2.34] and following.
[3] Per the decision of Tobias JA in *Agostino v Penrith CC* [2010] NSWCA 20 at [46]; (2010) 172 LGERA 380; citing the decision of Giles JA in *Strathfield MC v Poynting* (2001) 116 LGERA 319 at [93]; and also *Blue Mountains CC v Laurence Browning* [2006] 150 LGERA 130 per Ipp JA at [12] and Basten JA at [78].

It is submitted that a construction which gives effect to that purpose is to be preferred over one which does not.

(d) The application of the principle to the extant facts

20. If substance prevails over form there would be a finding that the effect of LEP 194 (in the context of clause 68(2) of the KPSO) is for it to operate as a *provision*, such that it required compliance with s.28 of the EP&A Act. It is submitted that as LEP 194 did not have the Governor's approval, it ought not be allowed to work to suspend the operation of the relevant covenant.

Part VII: Applicable statutes

21. Attached hereto:

(i) A copy of s.342G(4) of Part XIIA of the *Local Government Act 1919* (repealed).

(ii) A copy of clause 68 of KPSO (still in force).

(iii) A copy of the relevant provision of LEP 194, altering the zoning of the subject land from 2(d) to 2(d3).(still in force)

(iv) A copy of s.28 of the EP&A Act 1979 (still in force).

(v) Transitional provisions:

(a) *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* (whereby a former planning instrument in force prior to the appointed day was deemed to be a *deemed environmental planning instrument)* .

(b) Under s.4 of the EP&A Act a *deemed environmental planning instrument* included both former planning instruments and *deemed environmental planning instruments* and *local environmental plans*.

Part VIII: Orders sought

(1) A declaration that the change of zoning of the subject land *vide* LEP 194 could not work to suspend the operation of a regulatory instrument without the Governor's approval pursuant to s.28(3) of the EP&A Act.

(2) An order that the Respondent be restrained from using or permitting to be used the land contained in lots 102 and 103 in DP834629 for any hospital, medical, surgical, therapeutical, nursing, rehabilitation, physiotherapy, dental or convalescence purpose or any associated or ancillary purpose in contravention of the restriction on use created by an instrument pursuant to s.88B of the *Conveyancing Act 1919* (NSW).

(3) An order that the Respondents pay the Appellant's costs of this appeal, and below.

Dated:

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Previous editions

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D C Pearce, Butterworths, Sydney, 1974

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D C Pearce, Butterworths, Sydney, 1981

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STATUTORY INTERPRETATION IN AUSTRALIA

SIXTH EDITION

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employer who was required by law to make such deductions and who failed to do so without the worker's knowledge or authority. Martin CJ indicated at [4] that this was an example of giving words an ambulatory operation in the manner described by Spigelman CJ in *R v Young*. The same interpretive technique was identified by Mildren J at [66] and applied in *Griffiths*. There, 'land' in s 33(1)(b) and (3)(b) of the Lands Acquisition Act 2001 (NT) was interpreted as meaning 'land or an interest in land'.

In *Victorian Workcover Authority v Wilson* [2004] VSCA 161 at [27]–[30] Callaway JA, with whose interpretation Winneke P agreed at [3], held that McHugh JA's three conditions had been satisfied, so that the words 'or the entitlement to compensation' should be 'read in' after the words 'either of the assessments', in s 104B(9) of the Accident Compensation Act 1985 (Vic). Referring to the conditions and to the comments of Spigelman CJ and Greg James J in *R v Young*, Callaway JA observed at [27]: 'Those conditions are satisfied in the present case. It is unnecessary to decide whether they are necessary or necessary and sufficient or usually necessary and sufficient'.

Also see *Christie v Neaves* (2001) 113 FCR 279 at 291–4.

For a discussion of some of the issues discussed in **[2.23]–[2.33]** in the English context, see D Auchie, 'The Undignified Death of the Casus Omissus Rule' (2004) 25 *Statute Law Rev* 40.

Consequences of a particular interpretation

[2.34] There are numerous cases that show the courts approach the interpretation of legislation by taking into account the consequences of giving a particular meaning to an Act. For example, most of the cases cited in **[2.28]–[2.32]** illustrate this approach. Also see the cases discussed in **[11.19]**. In fact, it could be said that it is unusual to find a case in which the court has not taken that approach. However, as is discussed in **[2.3]–[2.5]**, **[2.8]–[2.12]** and **[2.28]–[2.32]** in particular, the language of the statute may prove so intractable that the court is unable to give effect to what it considers to be the evident purpose or object of the legislation. The case that is most frequently cited in support of this general approach is *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297; 35 ALR 151. Mason and Wilson JJ commented (at 320–1; 169–70):

> The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.
>
> The rules [of construction], as DC Pearce says in his *Statutory Interpretation*, p 14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the Legislature.
>
> On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.
>
> Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

As was mentioned in **[2.31]**, the decision in the *Cooper Brookes* case was given a few days before s 15AA of the Acts Interpretation Act 1901 (Cth) came into operation. Since then the statement of Mason and Wilson JJ has frequently been cited and relied on. See, for example, *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225 at 229–30; 111 ALR 1 at 6–7; *Blunn v Cleaver* (1993) 47 FCR 111 at 125; 119 ALR 65 at 79–80; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 635 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Richardson v Commr of Taxation* (1997) 80 FCR 58 at 73–4; 150 ALR 167 at 182; *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386 at 394–7; 151 ALR 717 at 724–7; *Lesi v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 27 at 39; 203 ALR 420 at 432. In *Australian Tea Tree Oil Institute v Industry Research & Development Board* (2002) 124 FCR 316 at 330 Stone J suggested that 'the likelihood of the absurd or unreasonable consequence actually occurring should also be a consideration'.

[2.35] Interpretation by reference to consequences is essentially a shorthand version of the purposive approach to interpretation. When a court uses one of the adjectives identified by Mason and Wilson JJ to describe a possible interpretation of a statute, it is saying, in effect, that whatever the purpose of the statute, it cannot have been intended to carry that particular meaning. In the words of Jordan CJ in *Hall v Jones* (1942) 42 SR (NSW) 203 at 208: 'a Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense'. See also *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331–2; 2 ALR 281 at 289 per Barwick CJ, with whose reasons McTiernan J concurred; *Bistricic v Rokov* (1976) 135 CLR 552 at 561; 11 ALR 129 at 136 per Jacobs J; *Le Cornu Furniture and Carpet Centre Pty Ltd v Parsons* (1990) 54 SASR 108 at 113 per White J, with whom Mohr and Millhouse JJ agreed; *Occidental Life*

Insurance Co of Australia Ltd v Life Style Planners Pty Ltd (1992) 38 FCR 444 at 449–50; 111 ALR 261 at 266–7 per Lockhart J; *Clarke v Bailey* (1993) 30 NSWLR 556 at 566 per Kirby P, with whose judgment Sheller JA agreed.

The approach is applied most obviously in those cases where one interpretation would render a section ineffectual while another would give it a field of operation. The requirement that the court endeavour to give some effect to all provisions of an Act thereby demands that the latter alternative be adopted: see **[2.22]** and compare *Pearce v Cocchiaro* (1977) 137 CLR 600 at 607; 14 ALR 440 at 445 per Gibbs J. Of much greater significance, however, are the cases in which the choice is between an interpretation that will result in inconvenience, or even injustice or absurdity, and another that avoids such a result. For example, in *Ingham v Hie Lee* (1912) 15 CLR 267, a Victorian Act was directed at limiting the hours of work of Chinese in factories, laundries, etc, as a protectionist measure for the benefit of other industries. Ah Chook was found ironing his own shirt in the respondent's laundry during the proscribed hours. The respondent was charged but acquitted. The court ruled that where the language of an enactment is susceptible of two constructions, regard must be had to the general object and purpose of the Act, and, if the act done is not within the general purview of the statute, regard may be had to the consequences of either construction.

If one construction will do manifest injustice and the other avoid it, the latter construction should be adopted. As Gibbs J in *Public Transport Commn of NSW v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350; 6 ALR 271 at 282 put it: 'where two meanings are open ... it is proper to adopt that meaning that will avoid consequences that appear irrational and unjust'. In *FCT v Smorgon* (1977) 16 ALR 721 at 729 Stephen J pursued the same line in suggesting that 'a construction of a statute which interferes with the legal rights of a subject to a lesser extent and produces the less hardship is to be preferred to another, having the opposite effect'. In *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 Windeyer J was prepared to set aside his doubts on the question whether the word 'gas' in the relevant legislation included liquefied gas in view of the great inconvenience that such a ruling would cause to local government bodies. Other cases in which this approach to interpretation has been stated include *Metropolitan Coal Company of Sydney Ltd v Australian Coal and Shale Employees' Federation* (1917) 24 CLR 85 at 99 per Isaacs and Rich JJ; *Bowtell v Goldsbrough, Mort & Co Ltd* (1906) 3 CLR 444 at 456 per Barton J; *Brunton v Acting Commr of Stamp Duties (NSW)* [1913] AC 747; *Turner v Ciappara* [1969] VR 851; *Dodd v Executive Air Services Pty Ltd* [1975] VR 668; *Regional Director of Education v International Grammar School Sydney Ltd* (1986) 7 NSWLR 302 at 314 per Kirby P; *Graham v Niness* (1985) 65 ALR 331; *Hilton v Commr of Taxation* (1992) 38 FCR 170; 110 ALR 167; *Director of Public Prosecutions (Cth) v Chan* (2001) 52 NSWLR 56 at 58 per Meagher JA,

with whom Powell JA agreed at 58 and Heydon JA agreed at 59; *Christie v Neaves* (2001) 113 FCR 279 at 290–1. See also **[11.3]**.

Limits of argument by reference to consequences

[2.36] Of course, arguments by reference to unsatisfactory consequences are on shaky ground unless a more attractive alternative interpretation of the words used in the legislation is available. See, for example, *Walker v Shire of Flinders* [1984] VR 409; *International Writing Institute Inc v Rimila Pty Ltd* (1993) AIPC 39,736 at 39,749. Another difficulty that is sometimes encountered when it is argued that the literal interpretation would produce unsatisfactory and unintended results is that this may be a matter on which opinions can differ. In *Esso Australia Resources Ltd v FCT* (1998) 83 FCR 511; 159 ALR 664, which involved the interpretation of ss 118 and 119 of the Evidence Act 1995 (Cth), Black CJ and Sundberg J expressed those concerns in these words (at 518–19; 670):

> In our opinion the plain language of the sections is confirmed by the only directly relevant extrinsic material, which shows that parliament intended the consequence that is said by the appellant to be anomalous. Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the parliament ... [W]e are unable to conclude that the operation of ss 118 and 119 on a literal reading does not conform to the legislative purpose.

Finkelstein J agreed with this conclusion at 565–6; 713–15.

In what circumstances should a court refuse to adopt an interpretation of a legislative provision that is otherwise acceptable on the basis that such an interpretation could also produce an anomalous result? In *Ganter v Whalland* [2001] NSWSC 1101 Campbell J supplied an answer to this question. At [35] he referred to the language of Mason and Wilson JJ in the *Cooper Brookes* case, quoted in **[2.34]**, and the words of Jordan CJ in *Hall v Jones* in **[2.35]** and at [36] he suggested that:

> From the strength of the language which these judges employed to describe the sort of consequences which will cause a possible construction to be rejected, it is apparent that an anomaly arising from what, on all other tests of construction, is the correct construction of legislation, it must be a very serious one, before the court is justified in using that anomaly as a reason for rejecting what otherwise seems the correct construction. Were courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature.

Interpretation permitting a person to take advantage of his or her own wrong resisted

[2.37] It is reasonably clear that the courts will resist strongly an interpretation of an Act that will permit a person to take advantage of his or her own wrong. For example, in *Holden v Nuttall* [1945] VLR 171 the court

SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)

Agostino and Another v Penrith City Council

[2010] NSWCA 20

Giles and Tobias JJA, McClellan CJ at CL

3 February, 3 March 2010

Development Standards — Breach — Local environmental plan — Development for fruit and vegetable store with specified maximum floor area permitted by environmental planning instrument — All other development prohibited — Development application to increase size of existing fruit and vegetable store exceeding maximum area — Whether words: with a maximum floor area of 150 sq m, constituted development standard or prohibition upon development — Environmental Planning and Assessment Act 1979 (NSW) — State Environmental Planning Policy No 1 – Development Standards (NSW) — Penrith Local Environmental Plan No 201 (Rural Lands) (NSW).

Words and Phrases — "Development standard" — Development for fruit and vegetable store with specified maximum floor area permitted by environmental planning instrument — All other development prohibited — Development application to increase size of existing fruit and vegetable store exceeding maximum area — Whether words with a maximum floor area of 150 sq m constituted development standard or prohibition upon development — Environmental Planning and Assessment Act 1979 (NSW) — State Environmental Planning Policy No 1 – Development Standards (NSW) — Penrith Local Environmental Plan No 201 (Rural Lands) (NSW).

The Penrith City Council (the council) refused a development application for alterations and additions to an existing fruit and vegetable store which were intended to increase its gross floor area from 150 m^2 to 765 m^2.

The land was within Zone No 1(a) (Rural "A" Zone – General) under *Penrith Local Environmental Plan No 201 (Rural Lands)* (NSW) (the LEP).

Clause 41 of the LEP applied to just one lot. Clause 41(2) defined "floor area" and "fruit and vegetable store". Clause 41(3) of the LEP provided: "Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq. m."

Development was otherwise prohibited by the plan.

The *Environmental Planning and Assessment Act 1979* (NSW) contained the following definition:

> *development standards* means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing requirements or standards in respect of:
>
> (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
>
> ...
>
> (d) the proportion or percentage of the area of a site which a building or work may occupy,
>
> ...

Held: Per Tobias JA, Giles JA agreeing: (1) What one is required to do is to identify the proposed development and then to determine whether it falls within the description of that which cl 41(3) of the LEP makes permissible with consent. In performing this exercise it is necessary to identify which criteria are essential conditions in determining whether the particular development proposed is permissible. Thus, it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing care is also to be taken to ensure that form does not govern substance.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179; *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319, applied.

(2) The definition of "development standards" is referable only to provisions of an environmental planning instrument "in relation to the carrying out of development". Thus the development standard must be one which may be carried out; that is one which is permitted or permissible. One can only determine that question by reference to the terms of the planning instrument.

Strathfield Municipal Council v Poynting (2001) 116 LGERA 319, applied.

(3) It does not follow that only those elements that are included in the zoning table of a planning instrument are to be included as the essential elements of a development. There may be other elements in a particular instrument that should properly be treated in the same way as the zoning table.

Blue Mountains City Council v Laurence Browning Pty Ltd (2006) 67 NSWLR 672; 150 LGERA 130; *North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222, applied.

(4) The criteria which are the essential considerations for determining the permissibility of the proposed development of the appellants are two-fold. First, the proposed development must be a fruit and vegetable store. Second, it must have a maximum floor area of 150 m^2. That which is proposed satisfies the first criterion but not the second. It is therefore prohibited.

Per McClellan CJ at CL dissenting:

(5) The question of whether or not a particular control on development is a development standard will depend upon whether the control falls within the definition of "development standard" in the *Environmental Planning and Assessment Act*. Accordingly, to be a development standard a provision of a planning instrument must be one "in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development."

Blue Mountains City Council v Laurence Browning Pty Ltd (2006) 67 NSWLR 672; 150 LGERA 130, applied.

(6) The relevant question is to identify the proposed development. One then asks is the relevant provision a "requirement" or "standard" in relation to an aspect of that development. If it is it will be a development standard.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263, applied.

(7) The question of whether the relevant provision comes within the definition of a development standard will not be answered by seeking to describe the provision as either a development standard or a zoning provision. That approach is productive of error.

Blue Mountains City Council v Laurence Browning Pty Ltd (2006) 67 NSWLR 672; 150 LGERA 130, applied.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179; *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319, considered.

(8) A provision in a planning instrument which specifies any numerical control of a proposed development almost certainly will be a "development standard" as defined. It will at the least be a provision fixing a requirement in respect of the identified aspect of that development. It is plain that the 150 m^2 maximum is a requirement fixed in respect of an aspect of the proposed development – ie its floor space. As such it is a provision within the meaning of development standard as defined.

North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222, applied.

Cases Cited

Agostino v Penrith City Council [2009] NSWLEC 76.

Agostino v Penrith City Council (2002) 123 LGERA 305.

Blue Mountains City Council v Laurence Browning Pty Ltd (2006) 67 NSWLR 672; 150 LGERA 130.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179.

North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222.

Residents Against Improper Development Inc v Chase Property Investments Pty Ltd (2006) 149 LGERA 360.

Strathfield Municipal Council v Poynting (2001) 116 LGERA 319.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263.

Appeal

These proceedings concerned whether a provision in a local environmental plan which forbade development otherwise than for the purposes of a fruit and vegetable store with a maximum floor area of 150 m^2. contained a development standard which was amenable to variation pursuant to *State Environmental Planning Policy No 1 – Development Standards* (NSW). The facts of the case are set out in the judgment of Tobias JA.

D Wilson, for the appellants.

A Galasso SC, for the respondent.

Cur adv vult

3 March 2010

Giles JA.

I agree with Tobias JA.

Tobias JA.

2 Antonio and Barbara Agostino (the appellants) have since at least 1992 operated a fruit and vegetable store on land being Lot 2 DP 221473 (the land) which is within Zone No 1(a) (Rural "A" Zone – General) under *Penrith Local Environmental Plan No 201 (Rural Lands)* (NSW) (the LEP) which came into force on 12 July 1991.

3 On 1 September 2008 the appellants lodged a development application with Penrith City Council (the Council) for alterations and additions to their existing fruit and vegetable store which were intended to increase its gross floor area (as that expression is defined) from its present 150m^2 to 765m^2. The respondent Council refused that application whereupon the appellants lodged a Class 1 appeal to the Land and Environment Court against that decision (the proceedings).

4 A preliminary point of law arose in the proceedings whereby the Council contended that the proposed additions and extensions were prohibited by cl 41(3) of the LEP. More particularly, the preliminary issue was stated in the following terms:

> *A preliminary point of law has arisen in these Class 1 proceedings on the Council's Notice of Motion. It requires the Court to consider:* Whether the provision in Clause 41(3) of Penrith Local Environmental Plan No 201 (Rural Lands) of a maximum floor area of 150 square metres for a fruit and vegetable store permitted by that clause, comprises a development standard or a prohibition upon development for the purposes of a fruit and vegetable store having an area greater than 150 square metres.

5 The preliminary point of law was determined by Pain J on 4 June 2009 in favour of the Council: *Agostino v Penrith City Council* [2009] NSWLEC 76. In so finding, her Honour's decision was consistent with that of Cowdroy J in *Agostino v Penrith City Council* (2002) 123 LGERA 305 at [14]-[17] that cl 41(3) was not a development standard but a prohibition on a fruit and vegetable store whose floor area exceeded 150m^2.

6 After considering the matter afresh, her Honour's formal finding (at [32]) was that the maximum floor area of 150m^2 for a fruit and vegetable store permitted by cl 41(3) of the LEP comprised a prohibition upon development for the purpose of such a store having a floor area greater than 150m^2. It is from that decision that the appellants appeal to this Court pursuant to s 57 of the *Land and Environment Court Act 1979* (NSW) (the Court Act). As her Honour's decision was interlocutory, the leave of this Court to appeal is required: see s 57(4)(d) of the Court Act. Any such appeal is confined to a question of law: see s 57(1).

A preliminary point

7 As I have indicated, the primary judge's decision was dated 4 June 2009. Under the relevant provisions of the *Uniform Civil Procedure Rules 2005* (NSW) (the UCPR), a summons for leave to appeal was required to be filed by 25 June 2009. The summons for leave in the present case was not in fact filed until 30 July 2009, being just over one month late. Accordingly, the appellants' summons included an application for an extension of time in which to seek such leave pursuant to r 51.10.2 of the UCPR. That application was opposed by the Council although, if granted, the Council did not oppose the grant of leave to appeal.

> the land on which the proposed development is to take place. That is because the particular zoning criteria are essential considerations in determining whether the development is permissible. It is clear that, had the erection of dwelling houses been proposed with respect to land on which such a development was not permitted, the decision would have been different. If the consolidation requirement were understood to be a part of the zoning of the land, on the same logic the result would have been different.

46 In the present case, what one is required to do is to identify the proposed development and then to determine whether it falls within the description of that which cl 41(3) makes permissible with consent. In performing this exercise it is necessary to identify which criteria are essential conditions in determining whether the particular development proposed is permissible. Thus as Giles JA observed in *Lowy* at [116], it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing care is also to be taken to ensure that form does not govern substance: *Poynting* at [93].

47 What are those criteria in the present case? As a matter of language, in my view the criteria, which are the essential considerations for determining the permissibility of the proposed development of the appellants, are two-fold. First, the proposed development must be a fruit and vegetable store as defined. Second, it must have a maximum floor area (as defined) of $150m^2$. That which is proposed satisfies the first criterion but not the second. It is therefore prohibited.

48 In oral argument it was suggested that given the definition of "development standards" in s 4(1) of the EP&A Act, one is only concerned to determine what is the development in respect of which requirements are specified or standards are fixed regarding an aspect of that development. Given the definition of "development" in that section as including the erection of a building, it followed, so it was suggested, that the only building proposed to be erected in the present case was an extended fruit and vegetable store so that it followed that the words "with a maximum floor area of $150m^2$" in cl 41(3) were no more than a requirement specified in respect of an aspect of that building, namely, its floor area.

49 But such a contention overlooks the fact that the definition of "development standards" is referrable only to provisions of an environmental planning instrument "in relation to the carrying out of development". Thus the development in respect of which it is asserted that the relevant provision is a development standard must be one which may be carried out; that is, one which is permitted or permissible. One can only determine that question by reference to the terms of the planning instrument.

50 In my respectful view therefore, the approach referred to in [48] above is to put the cart before the horse. Before one comes to the definition of "development standards" one is required to determine precisely what is the permissible or, as Giles JA described it in *Poynting* at [97], the "non-prohibited" development. For it is only when one determines what precisely is permissible that one can measure that which is proposed against it in order to determine whether it is permissible or prohibited: if you like, the first step described by Giles JA in *Poynting*.

51 Furthermore, controlling development by the imposition of development standards as contemplated by s 26(1)(b) in the EP&A Act is only relevant to a development that is otherwise permissible. It is an oxymoron to suggest that a development that is controlled by way of a prohibition (see the definition of "control" at [23] above) can also be controlled (regulated) by a development standard. Accordingly, it is only once one has determined what is permissible that one can then consider whether that which is proposed is permissible and, if it is, whether any other regulatory controls are development standards (as defined) for the purpose of applying SEPP No 1.

52 In effect, cl 41(3) is definitional in substance if not in form. True it is that the words "with a maximum floor area of $150m^2$" could have been inserted into the definition of a "fruit and vegetable store" in cl 41(2). But that was not the only method by which the draftsperson of cl 41 could achieve what I consider to be the result intended. Certainly, had the *Carr* approach been taken as it was with respect to cl 42, then no doubt the present litigation would not have been instituted. But the *Carr* approach is not the only way the draftsperson could set out the criteria that were to be the essential elements of that which was to be permissible.

53 Although for present purposes one can assume that the draftsperson of cl 42 had *Carr* in mind, it is to be noted, as the Council submitted, that that clause was inserted into the LEP after, and therefore with knowledge of, the decision in *Agostino No 1* that cl 41(3) prohibited the development to which it referred if its floor area (as defined) exceeded $150m^2$. Thus the fact that cl 41(3) did not adopt the *Carr* approach whereas cl 42 did, does not mandate that the former should be construed as containing a development standard with respect to floor area. As the primary judge observed at [29], cl 42 simply reflected a different drafting approach taken to the LEP at a different time.

54 The point is further illustrated, as the Council submitted, by cl 41(4) which falls into a different category to the concluding words of cl 41(3). The provision in cl 41(4) with respect to the supply of water and disposal of effluent falls within sub-paragraph (m) of the definition of "development standards", namely, "the provision of services, facilities and amenities demanded by development". It is clearly a development standard as it is a requirement specified in respect of an aspect of the development which is otherwise permissible under cl 41(3). In my view, the separation of cl 41(4) from cl 41(3) supports the conclusion that I have reached.

55 Finally, as Basten JA observed in *Lawrence Browning* at [81], it does not follow that only those elements that are included in the zoning table of a planning instrument are to be included as the essential elements of a development. There may be other elements in a particular instrument that should properly be treated in the same way as the zoning table.

56 The present, in my opinion, is such a case. As cl 41 was intended to apply only to the land, it was inappropriate to amend the zoning table in the manner exemplified at [41](f) above. But the same effect was achieved by the structure and wording of cl 41(3). Although not in the zoning table, the relevant permissible development was described and, in substance, defined in a manner essentially identical to the example referred to by Clarke JA in *Mayoh*, which I have extracted at [36] above. There is no relevant difference in my view between a permissible use defined as a residential flat building with no more than two storeys and a fruit and vegetable store with a maximum floor area of $150m^2$. Neither contains a development standard.

57 It follows that no part of cl 41(3) is a separate and independent provision

34 The council was justified in commencing the proceedings against both respondents. In the Court's view the liability of the two respondents was not a joint one in all respects. Their responsibility for complying with the terms and conditions of the development consent is arguably severable in respect of the different parts of the land. It would not be reasonable on the basis of the facts before the Court, for the first respondent to bear the burden of paying the whole of the council's costs. It is fair that the costs be apportioned between the two respondents. In that respect the decision must be an arbitrary exercise of the Court's discretion. Doing the best that it can and in an attempt to do justice between the parties the Court will make orders whereby each of the respondents pay one half of the applicant's costs. It does not follow, however, that the second respondent should bear liability for any part of the first respondent's costs. These would have been incurred in any event.

35 The Court makes the following formal orders:

(1) The first respondent is ordered to pay one half of the applicant's costs including the notices of motion.

(2) The second respondent is ordered to pay one half of the applicant's costs including the notices of motion.

(3) The first respondent's notice of motion dated 18 September 2001 is dismissed.

(4) The exhibits may be returned.

So ordered

Solicitors for the applicant: *Phillips Fox.*

Solicitors for the first respondent: *J S Pinto & Co.*

BENJAMIN POWELL

[COURT OF APPEAL OF NEW SOUTH WALES]

STRATHFIELD MUNICIPAL COUNCIL v POYNTING [2001] NSWCA 270

Giles and Heydon JJA and Young CJ in Equity

13 June, 8 November 2001

Town Planning — Development standard — Building on land with an area less than 560 m² prohibited by environmental planning instrument — Whether a development standard — Application of definition of development standards considered — Environmental Planning and Assessment Act 1979 (NSW), s 26(1)(b) — State Environmental Planning Policy No 1 – Development Standards — Strathfield Planning Scheme Ordinance 1969.

Development Standards — Building on land with an area less than 560 m² prohibited by environmental planning instrument — Whether a development standard — Application of definition of development standards considered — Environmental Planning and Assessment Act 1979 (NSW), s 26(1)(b) — State Environmental Planning Policy No 1 – Development Standards — Strathfield Planning Scheme Ordinance 1969.

State Environmental Planning Policies — Development standard — Building on land with an area less than 560 square metres prohibited by environmental planning instrument — Whether a development standard — Application of definition of development standards considered — Environmental Planning and Assessment Act 1979 (NSW), s 26(1)(b) — State Environmental Planning Policy No 1 – Development Standards — Strathfield Planning Scheme Ordinance 1969.

Words and Phrases — "Development standard" — Building on land with an area less than 560 m² prohibited by environmental planning instrument — Whether a development standard — Application of definition of development standards considered — Environmental Planning and Assessment Act 1979 (NSW), s 26(1)(b) — State Environmental Planning Policy No 1 – Development Standards — Strathfield Planning Scheme Ordinance 1969.

Clause 3 of State Environmental Planning Policy No 1 — Development Standards (SEPP No 1) made under the *Environmental Planning and Assessment Act 1979* (NSW) (the Act) provided that "This policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with development standards would, in any particular case, be unreasonable or unnecessary and tend to hinder the attainment of [the objects of the Act]".

Clause 6 of SEPP No 1 provided where development could, but for any development standard, be carried out under the Act a written objection could be tendered that compliance was unreasonable or unnecessary in the circumstances. Clause 7 of SEPP No 1 permitted a council, if it was satisfied that the objection was well founded, with the concurrence of the Director of Planning, to grant consent to the development application notwithstanding the development standard

the subject of the objection. By cl 5 of the SEPP No 1 prevailed over any inconsistency between it and any other environmental planning instrument.

Section 4 of the Act defined "development standard" to mean "provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development . . .".

Section 26(1)(b) of the Act provided that an environmental planning instrument might make provision with respect to "controlling (whether by the imposing of development standards or otherwise) development".

The respondent applied to the appellant (the council) to divide his property into two equal allotments; each allotment having an area less than 560 square metres. The subject land was zoned residential 2(a) under the *Strathfield Planning Scheme Ordinance 1969* (the Ordinance). The development application was accompanied by an objection under SEPP No 1 because cl 41(2) of the Ordinance provided that "a single dwelling . . . must not be erected on an allotment of land within Zone No 2(a) or 2(b) which has an area of less than 560 square metres . . ."

Held: (1) The evident purpose of cll 6 and 7 of SEPP No 1 was to enable the rigidity of an environmental planning instrument to be alleviated in the circumstances set out in cl 3, that is, "where strict compliance with development standards would, in any particular case, be unreasonable or unnecessary and tend to hinder the attainment of [the objects of the Act]".

(2) Those clauses applied when a provision of an environmental planning instrument had imposed a development standard as permitted by s 26(1)(b) of the Act. Consent to development might be granted in a particular case notwithstanding the development standard.

(3) In order that a provision fell within the definition as a development standard, there must be a development in respect of an aspect of which the provision specified a requirement or fixed a standard.

North Sydney Municipal Council v P D Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222, applied.

(4) Having identified the development in relation to which there was the provision, the aspects of that development must be considered in order to say whether the provision specified a requirement or fixed a standard in respect of an aspect of the development.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263, referred to.

(5) Control by complete prohibition on the development in question would not leave room for requirements or standards. But anything less than complete prohibition meant that there could be the development in question, and provided a relevant aspect of the development was identified, the control would be by imposition of a development standard.

(6) As to whether the provision specified a requirement or fixed a standard in relation to an aspect of the (non-prohibited) development, the key would be identification of a relevant aspect of the development. The list of aspects in pars (a)-(n) of the definition of "development standards" in s 4(1) of the Act showed that a broad view of what was an aspect of a development should be taken.

(7) Reading cl 41(2) as part of the Ordinance as a whole, this was not a prohibition on the erection of a building for the stated purposes on land in any circumstances. It was prohibitory so far as it precluded development in particular cases, but not prohibitory of development by erection of a building for the stated purposes on residential 2(a) land. The development was permissible in the circumstances (negatively) expressed in cl 41(2).

(8) Clause 41(2) specified a requirement (or fixed a standard) in respect of the development.

(Per Young CJ in Equity) The dichotomy between a development standard and an absolute prohibition provided a valuable guideline as long as it was remembered that a development standard might contain expressly or impliedly some sort of prohibition. However, the sort of prohibition involved in this case was a prohibition on the extent of development, not a prohibition as to whether development was possible at all.

CASES CITED

The following cases are cited in the judgment:

Bell v Shellharbour Municipal Council (1993) 78 LGERA 429
Bowen v Willoughby City Council (2000) 108 LGERA 149
Egan v Hawkesbury City Council (1993) 79 LGERA 321
Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94
Fencott Drive Pty Ltd v Lake Macquarie City Council (2000) 110 LGERA 318
Healesville Holdings Pty Ltd v Pittwater Council (1997) 97 LGERA 95
Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal (1984) 2 FCR 24
Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal (1984) 57 ALR 309
Herald-Sun TV Pty Ltd v Australian Broadcasting Tribunal (1985) 156 CLR 1
Kerridge v Girling-Butcher [1933] NZLR 646
Kruf v Warringah Shire Council (unreported, Land and Environment Court, NSW, Holland J, Nos 20027 of 1987 and 10344 of 1988, 15 December 1988)
McKay v North Sydney Council (2000) 107 LGERA 203
North Sydney Municipal Council v P D Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222
Poynting v Strathfield Municipal Council [2000] NSWLEC 147
Quinn O'Hanlon Architects Pty Ltd v Leichhardt Municipal Council (1989) 68 LGRA 114
Scott Revay & Unn v Warringah Council (1995) 88 LGERA 1
Slattery v Naylor (1888) 13 App Cas 446
Swan Hill, Shire of v Bradbury (1937) 56 LCR 746
Toronto Municipal Corporation v Virgo [1896] AC 88
Tungamah, Shire of v Merrett (1912) 15 CLR 407
Turnbull Group Pty Ltd v Hornsby Shire Council (2001) 115 LGERA 108
Vaniga Pty Ltd v South Sydney City Council (1989) 74 LGRA 86
Warringah Shire Council v KVM Investments Pty Ltd (1981) 45 LGRA 425
Woollahra Municipal Council v Carr (1985) 62 LGRA 263

APPEAL

The appellant council appealed against an adverse determination by the Land and Environment Court of some questions concerning whether a particular development standard was a prohibition or a regulation. The respondent's development application was accompanied by an objection under State Environmental Planning Policy No 1 — Development Standards. The facts of the case are set out in the judgment of Giles JA.

B J Preston SC and *S E Pritchard*, for the appellant.

W R Davison QC and *I J Hemmings*, for the respondent.

Judgment reserved

8 November 2001

1 GILES JA. The respondent appealed to the Land and Environment Court against the appellant's deemed refusal of his development application for the subdivision of land: *Poynting v Strathfield Municipal Council* [2000] NSWLEC 147. Bignold J decided three separate questions in the appeal. The answers were adverse to the appellant, which appeals to this Court. Its appeal to this Court is limited to questions of law (*Land and Environment Court Act 1979* (NSW), s 57(1)), but the separate questions are of that nature.

appears to be the high water mark of the influence of the dichotomy, Clarke JA recognised (at 238) that the 'substantial effect of particular prohibitions ... may be to impose a requirement' (constituting a development standard)."

91 His Honour concluded (at 333):

"In the present case, I have delved more deeply into the questionable utility of recourse to the 'prohibition v regulation' dichotomy, but only to the extent necessary to resolve the present question of statutory construction, being satisfied that in so doing, my reasoning is entirely supported by the decision in *Bell v Shellharbour Municipal Council*. It may be that the present case is, in any event, entirely answered by application of the decision in *Bell v Shellharbour Municipal Council*. If so, then I have travelled further than needed, in deference to the detailed submissions advanced by the council and for the purpose of fully explaining my approach to construing cl 13 of the Lake Macquarie Environmental Plan 1984."

92 With respect, it is not entirely clear what reasoning in *Fencott Drive Pty Ltd v Lake Macquarie City Council* led Bignold J to his conclusion in the present case. He did not identify the equivalent provision to cl 10 in *Fencott Drive Pty Ltd v Lake Macquarie City Council* by which development was permitted which was then regulated by requirements or standards fixed by cl 41(2). The respondent, although adopting his Honour's reasoning, did not offer enlightenment.

93 I do not think it profitable to go to further decided cases, which will only reveal how a provision has been categorised in the interpretation of the particular environmental planning instrument. It is evident that a process of construction to find regulation on the one hand or prohibition on the other hand will bring finely divided decisions. Care must be taken lest form govern rather than substance. A provision in the form, "A building may be erected on land in a particular zone if the land has an area greater than a particular area" appears regulatory, whereas a provision in the form, "A building must not be erected on land if the land has an area less than a particular area" appears prohibitory, but the substance is the same.

94 As was done in, for example, *Fencott Drive Pty Ltd v Lake Macquarie City Council*, the provision must be seen as part of the environmental planning instrument as a whole. Regulation or prohibition may depend on the governing characteristic perceived in the provision. In the second form of provision just set out, if the characteristic is land in the particular zone the area requirement may be seen as stating a permissible way or extent of development, but if the characteristic is land with the particular area no development may be carried out. I do not find the so-called dichotomy, or its expression in the two different kinds of provision, either clear or providing ready answers.

95 There must be found a distinction between a provision which is a development standard and a provision which controls development in some other way, and the guidance of the dichotomy in providing a conceptual basis for the distinction must be acknowledged. But neither the dichotomy itself nor its expression in the two different kinds of provision can replace the definition in the Act.

96 The matters in the construction of the definition discussed by Mahoney JA in *North Sydney Municipal Council v P D Mayoh Pty Ltd (No 2)* mean that, in order that a provision fall within the definition as a development standard, there

must be a development in respect of an aspect of which the provision specifies a requirement or fixes a standard. A provision prohibiting the development in question (the use of land, subdivision of land, erection of a building etc, see the definition of "development" in the Act) under any circumstances will be a provision controlling development, but it will not be a development standard. The availability of SEPP No 1 will fail at the first step.

97 Beyond this, the debate should be over the second step, whether the provision specifies a requirement or fixes a standard in relation to an aspect of the (non-prohibited) development. I consider one can profitably return to the observations of McHugh JA in *Woollahra Municipal Council v Carr*, to his Honour's reminder of the need to define the development and its aspects before it can be determined whether the provision in question is a development standard. Referring again to the definition of "development standards", there must be a provision in relation to the carrying out of development, and then the provision must specify a requirement or fix a standard in respect of an aspect of that development. Having identified the development in relation to which there is the provision, the aspects of that development must be considered in order to say whether the provision specifies a requirement or fixes a standard in respect of an aspect of the development.

98 If the provision does not prohibit the development in question under any circumstances, and the development is permissible in circumstances expressed in the provision (whether positively or negatively, see the forms of provision earlier stated), in most instances the provision will specify a requirement or fix a standard in respect of an aspect of the development. In the absence of control, and subject for example to the private law of nuisance, a landowner may develop his land as he sees fit. Control by complete prohibition on the development in question will not leave room for requirements or standards. But anything less than complete prohibition means that there can be the development in question, and provided a relevant aspect of the development is identified the control will be by imposition of a development standard.

99 In the debate over the second step, whether the provision specifies a requirement or fixes a standard in relation to an aspect of the (non-prohibited) development, the key will be identification of a relevant aspect of the development. The list of aspects in pars (a)-(n) of the definition of "development standards" in s 4(1) of the Act shows that a broad view of what is an aspect of a development should be taken. *North Sydney Municipal Council v P D Mayoh Pty Ltd (No 2)* must be regarded as a case in which the majority considered that the provision in substance prohibited the development under any circumstances, not because of something in the definition of the development (see Clarke JA's comments on the observations of McHugh JA in *Woollahra Municipal Council v Carr*) but because, as part of the environmental planning instrument as a whole, in the prohibition on erection of a residential flat building the governing characteristic was land with adjoining high buildings, so there was relevantly a prohibition on development in any circumstances. *Healesville Holding Pty Ltd v Pittwater Council* must be explained in a similar way. The other cases cited by the appellant in which provisions were held to be development standards must be regarded as cases in which the development was permitted and there was a relevant aspect of the development in respect of which a requirement was specified or a standard fixed — siting of the building (*Quinn O'Hanlon Architects Pty Ltd v Leichhardt Municipal Council*, *Bowen v Willoughby City Council*), number of

NEW SOUTH WALES COURT OF APPEAL

Blue Mountains City Council v Laurence Browning Pty Ltd

[2006] NSWCA 331

Ipp, Tobias, Basten JJA

31 October, 27 November 2006

Development Standards — Zoning — Requirement in local environmental plan for consolidation — Conveyancing Act 1919 (NSW), s 195 — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 4B, 25, 26, 76A, 79C, 85, 85A, 97, 121B, Sch 6 — Land and Environment Court Act 1979 (NSW), s 57 — State Environmental Planning Policy No 1 – Development Standards (NSW).

Statutes — Statutory construction — "Development standards" — Requirement for consolidation in local environmental plan — Application of definition to planning instruments via planning policy — Conveyancing Act 1919 (NSW), s 195 — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 4B, 25, 26, 76A, 79C, 85, 85A, 97, 121B, Sch 6 — Land and Environment Court Act 1979 (NSW), s 57 — State Environmental Planning Policy No 1 – Development Standards (NSW).

The respondent lodged a development application for the consolidation of lots and the erection of a dwelling house on each of the newly created lots on certain land. The *Blue Mountains Local Environment Plan 1994* (NSW) (the LEP) zoned the land as "Bushland Conservation". The subject land, together with some five or six additional lots, was part of a subdivision within an area of the map in the LEP which had a zone subscript referred to as a "Consolidation Requirement" (cl 29.2). The application did not comply with the consolidation requirement. The council refused the development application, one reason being that not all lots in the application were consolidated.

Section 4(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) relevantly stated:

> Development Standards means provisions of an Environmental Planning Instrument or the Regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development ...

Clause 6 of SEPP 1 provided:

> Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

Held: **By Ipp JA**

(1) According to the natural meaning of the words, a standard (used in the context of s 4(1) of the EP&A Act) was fundamentally different from a requirement. In this context, a standard was a benchmark. A requirement was a commandment. To define a standard as including a requirement according to its natural meaning (as authorities prescribed) was akin to defining a cat as including a dog.

(2) The zoning criterion test provided a beacon of certainty and simplicity in the wonderland of s 4(1) of the EP&A Act, inhabited as it was by the shifting sands of words used contrary to their ordinary meaning, indeterminate abstract concepts and vague, complex notion that were incapable of ready resolution.

(3) The consolidation requirement in cl 29.2 was a zoning criterion. Being a zoning criterion, it was not a development standard.

By Tobias JA

(4) The requirement that all adjoining lots within the relevant subscript shown edged an area within the heavy black line on the subject Map be consolidated into one lot was a characteristic of the land to which that subscript applied and which must be satisfied before any form of development was permissible with consent upon that land.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263; *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319, applied.

(5) The concept of "aspects of the development" should not be extended to a requirement which was unrelated to the development proposed but was an attribute of the whole of the land within the area shown edged with a heavy black line on the Map and which engaged more than the land the subject of the application.

By Basten JA (Ipp and Tobias JJA agreeing)

(6) The requirement in the definition of development standards that they be "in respect of any aspect of that development" under s 4(1) of the EP&A Act provided the surest foundation for distinguishing development standards from other provisions. The words "in respect of" indicated a nexus or connection between the requirement or standard and the development.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263 per McHugh JA at 269-270, applied.

(7) A prohibition on a particular kind of development would not be a development standard if the characteristic or criterion engaging its operation was an essential element of the particular development, rather than a standard or requirement in respect of an aspect of the proposed development.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179, applied.

(8) A zoning requirement was not a development standard. Thus, if an LEP prohibited a particular form of development in a particular zone, that provision would not generally be considered a development standard, whereas if a particular form of development was permitted with consent in the specified zone, but further and separately identified controls were imposed on such developments, the further controls might constitute development standards.

(9) The drafter of an LEP might be able to achieve the desired result either by a zoning provision, or by a development standard: the way in which it was done would be important because of the need to distinguish a development standard from other forms of prohibition. A legitimate concern about substance and form should not be allowed to blur the distinction between results and means.

(10) The approach required by the definition placed considerable weight on the degree of specificity with which the proposed development was defined. If the proposed development was very broadly defined, even its "essential elements" would become external standards. On the other hand, to include within the identification of the proposed development all aspects of the proposed use of the land was likely to incorporate what should properly be seen as aspects regulated by development standards, because external to the essential elements of the development. The correct approach depended on the terms of the planning instrument in the particular case.

Strathfield Municipal Council v Poynting (2001) 116 LGERA 319, applied.

(11) Classifications required for the purposes of zoning defined essential elements of the development. There might be other elements in the particular LEP which should properly be treated in the same way as the zoning table.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179, applied.

(12) Identification of the development did not help with the construction of the planning instrument: it merely allowed identification of the relevant provision in the planning instrument. Whether or not that provision constituted a development standard must be determined as a matter of construction of the definition in the EP&A Act, and its application in to the particular provision.

Strathfield Municipal Council v Poynting (2001) 116 LGERA 319, considered.

(13) The consolidation requirement was imposed as part of the zoning under the LEP which precluded all forms of development, absent compliance with its terms. It required a step to be taken which was not itself a form of development. It did not identify any aspect of a particular development and fix a standard or specify a requirement with respect to it. The consolidation requirement applied, indiscriminately, to every permissible development within the area covered. It was thus incapable of falling within the definition of "development standard" in s 4(1) of the EP&A Act.

Cases Cited

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225.

Goodrich v Paisner [1957] AC 65.

Laurence Browning Pty Ltd v Blue Mountains City Council [2006] NSWLEC 74.

Lowy v Land and Environment Court (NSW) (2002) 123 LGERA 179.

McCabe v Blue Mountains City Council (2006) 145 LGERA 86.

North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222.

Strathfield Municipal Council v Poynting (2001) 116 LGERA 319.

Warringah Shire Council v KVM Investments Pty Ltd (1981) 45 LGRA 425.

Woollahra Municipal Council v Carr (1985) 62 LGRA 263.

Appeal

These proceedings concerned whether a consolidation requirement in a local environmental plan was a development standard as defined in s 4 of the *Environmental Planning and Assessment Act 1979* (NSW) and therefore capable of variation pursuant to *State Environmental Planning Policy No 1 – Development Standards* (NSW). The facts of the case are set out in the judgments of Tobias and Basten JJA.

I Hemmings, for the appellant.

M Craig QC, for the respondent.

Cur adv vult

27 November 2006

Ipp JA.

I have had the benefit of reading the reasons to be published by Tobias JA and Basten JA. The relevant facts and circumstances and the issue for determination appear from their Honours' reasons.

Whether a particular provision of a planning instrument is a "development standard" as defined by s 4(1) of the *Environmental Planning and Assessment Act 1979* (NSW) is inevitably a difficult question. It is a question that has spawned much litigation and many judicial opinions.

The difficulty stems from the words of s 4(1). The section relevantly reads:

> Development Standards means provisions of an Environmental Planning Instrument or the Regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development ...

The problem with the definition is that, although it purports to be a definition of standards, it defines standards as including "requirements" and no guidance is given as to what is meant by a requirement.

Development standards are important in this appeal by reason of cl 6 of *State Environmental Planning Policy No 1 – Development Standards* (NSW) (SEPP No 1). Clause 6 provides:

> 6. Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

The effect of cl 6 is that, where a requirement in an environmental planning instrument (or the relevant regulations) is a development standard, and the development does not comply with the requirement, the intended developer may, subject to cl 6, still make a development application.

Section 4(1), read with cl 6 of SEPP No 1, is potentially misleading in two respects. Firstly, s 4(1) purports to be a definition of development standards and it is only on a closer reading, with knowledge of the authorities, that it becomes apparent that the section provides that standards include requirements, in the wide sense of the latter term. Secondly, s 4(1) read with cl 6 enables town-planning instruments to look as if they are laying down absolute standards and requirements (thereby affording some false comfort to uninitiated persons who desire that no changes be made) whereas in fact they can be overridden in individual cases.

These potentially misleading aspects of the section give rise to most of the problems in understanding what it means. To explain this it is necessary to focus, briefly, on the anomalies.

Uninstructed by authority, and applying the ordinary long-established canons of construction, I would have thought that "requirement" in s 4(1) would have to be construed by reference to "standard", so that a requirement under s 4(1) would mean only a requirement that applies to the maintenance or application

of a standard. Such a construction may have prevented the problems that have arisen or, at least, reduced the confusion. But the courts have long decided otherwise, and have laid down that requirement must be construed in accordance with its natural meaning and without reference to standard.

10 According to the natural meaning of the words, a standard (used in the context of s 4(1)) is fundamentally different from a requirement. A standard, in this context, is a benchmark. A requirement, according to its natural meaning in this context is a commandment. To define a standard as including a requirement according to its natural meaning (as the authorities prescribe) is akin to defining a cat as including a dog. The point being that, just as the characteristics of a cat – in such a definition – cast no light on what is meant by a dog, the characteristics of a standard – in such circumstances – cast no light on the meaning of a requirement. If one were unfortunate enough to have to construe a definition of a cat that included a dog, the fact that a particular animal looked like a dog, lifted its leg on lampposts, barked continuously, and had every other characteristic of a dog, would not mean (for the purposes of the definition) that it was not a cat.

11 The cases generally recognise that whatever "requirement" means, it cannot mean an outright prohibition. That would result in a planning instrument never being able absolutely to prohibit a particular development. It could not be inferred that the legislature would intend to tie its hands in such a way. So, some means has to be found whereby a distinction may be drawn between an outright prohibition and a requirement. The section affords no guide to this conundrum, which might confound etymologists and philosophers, let alone lawyers.

12 The difficulty is compounded by a series of cases that hold that in determining what is a requirement, one must eschew form and concentrate on substance. This means that the language used is not necessarily determinative and is seldom helpful in differentiating between an outright prohibition and a requirement. Take, for example, the admonitory statement, "No houses shall be painted purple". This looks, in form, like a prohibition. But in substance it is just as likely to be a requirement. How one is to search, by rational means, for the substance and then identify it as providing the answer (but in doing so to discount the form of the language) is a mystery the answer to which is yet to be revealed.

13 Some of the cases attempt to find a path through this enigmatic quagmire by deploying the twin concepts of "essential elements" and "aspects" of a development. Thus, if a requirement is in respect of an *essential element* but not an *aspect* of a development then the requirement is not a development standard, and *vice versa*. This approach, however, simply substitutes one puzzle for another. Instead of having to resolve the difference between an outright prohibition and a requirement, one has to distinguish between essential elements and aspects of a development. The criteria by which this distinction is to be drawn are equally obscure. As Basten JA points out, much may depend on how the development is defined and, as this case shows, that – too – is a problem to which the legislation and the cases, understandably, provide no readily comprehensible answer. It is another issue of ticklish uncertainty productive of expensive litigation.

14 Another test that sometimes has been applied is distinguishing between requirements that are external to a development and those that are internal. But

it may be difficult to decide whether a requirement is inside or outside a development. It may not infrequently be on the borderline. Moreover, yet again – as Basten JA shows – the answer will depend on the way in which the development is defined,

Yet another test, which may be described as the Development Standard Twostep, as Tobias JA points out has been applied several times. It is, however, no light fandango. The first step involves determining whether the provision being considered prohibits the proposed development. The second step is determining whether the provision specifies a requirement or a standard in relation to an *aspect* of the development.

Basten JA has drawn attention to inherent difficulties with this process. The authorities hold that, in determining whether a requirement is a development standard or a prohibition, one must first identify the development. The authorities hold, further, that a requirement relating to a development is a development standard unless it is a prohibition. If one, following this approach, identifies the development and decides that a requirement relating thereto is not a prohibition, the answer must inevitably be that the requirement is a development standard. On this scenario, there is no second step to complete.

The process also suffers from the basic problem that, once more, the way in which the development is described will determine the answer (and I have pointed out the uncertainties that this involves).

In *Goodrich v Paisner* [1957] AC 65 Lord Reid said at 88:

> No court is entitled to substitute its words for the words of the Act.
>
> But a court can and must decide what is the appropriate test in a particular case and, when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial relevant differences ... [T]hat does not mean that the words used by the Court of Appeal are to be treated as if they were words in an Act of Parliament. In substantially different circumstances they are only a guide, and not a rule.

The circumstances in this case are substantially different to those considered in the cases where the Twostep has been applied.

Another test that has found favour depends on whether zoning criteria are applicable. If the relevant provision is a zoning criterion, and if the developer's proposal contravenes that criterion (irrespective of how "development" is defined), the provision is regarded as an outright prohibition and not a standard. This, in essence, is the basis of the decision in *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 and is also the basis of the reasoning of Basten JA and (partly) that of Tobias JA in this case.

The zoning criterion test is a beacon of certainty and simplicity in the Wonderland of s 4(1), inhabited as it is by the shifting sands of words used contrary to their ordinary meaning, indeterminate abstract concepts and vague, complex notions that are incapable of ready resolution.

The zoning criterion test can easily be applied in this case. The reasoning process is brief and straightforward.

Clause 29.2 of the *Blue Mountains Local Environmental Plan 1991* (NSW) (the LEP) provides:

> 29.2 Where a Consolidation Requirement is shown on the Map, development (other than an existing use or for the purpose of bushfire hazard reduction)

principles can provide greater certainty, and minimise litigation. If a person purchases particular land, knowing it is only capable of specified developments in specified circumstances, no great injustice is done by an application of those restrictions. In any event, there is no great merit in the application of "flexible standards" when their operation is itself manifestly uncertain.

75 The list of matters which may constitute development standards, contained in paragraphs (a)-(n) of the definition provides a helpful indication of the scope of the concept being defined, but they are expressly stated not to be limiting, nor are they determinative in relation to a particular form of regulation: see *Strathfield Municipal Council v Poynting* at [56]-[58], [99] and [103] (Giles JA, Heydon JA agreeing). A second proposition which flows from the language of the definition, taken as a whole, is that the use of the word "standards" should not be given too much weight. Thus the defined term applies to provisions of an environmental planning instrument by which "requirements are specified or standards are fixed". Again, that language provides an indication of the breadth of the concept, but is unlikely to be determinative in relation to the classification of particular provisions.

76 A third aspect of the definition may carry more weight. Thus it applies to provisions "in relation to the carrying out of development", a concept which has been said to be inconsistent with a provision which prohibits development. However, as will be seen, there is little land on which no development of any kind can take place and accordingly a provision which prohibits some, even many, forms of development may be said to constitute a standard or requirement, if the particular development is identified in sufficiently imprecise terms.

77 The language of the definition which provides the surest foundation for distinguishing development standards from other provisions is found in the requirement that they be "in respect of any aspect of that development". Two important elements of the definition can be derived from that language, albeit read within its statutory context. First, the words "in respect of" indicate a nexus or connection between, on the one hand, the requirement or standard and, on the other hand, the development. As explained by McHugh JA in *Woollahra Municipal Council v Carr* at 269-270; such language not only must be premised on that dichotomy, but also, and importantly, requires the development and its aspects to be defined, before the test can be applied: see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at, eg, 242 (Dawson J). Thus a prohibition on a particular kind of development will not be a development standard if the characteristic or criterion engaging its operation is an essential element of the particular development, rather than a standard or requirement in respect of an aspect of the proposed development: see *Lowy v Land and Environment Court (NSW)* (2002) 123 LGERA 179 at [36] (Handley JA). In *Lowy*, his Honour continued at [37], discussing the facts of *Carr*:

> The number of employees who could be employed in the dental practice was not a standard external to the proposed development because development for professional consulting rooms as defined, which was permissible with consent, incorporated the restriction in the number of employees. In the language of Reynolds JA that restriction was not an external standard against which the proposed development could be measured, it was an integral part of the only permissible development. McHugh JA recognised that the distinction between a standard in the definition of permissible development, and an external standard, was one of form rather than substance, but this could not affect the result.

(The reference to the language of Reynolds JA is a reference to *Warringah Shire Council v KVM Investments Pty Ltd* (1981) 45 LGRA 425 at 432, quoted in *Lowy* at [34].)

78 In other cases, statements are to be found as to the importance of preferring substance to form. However, those statements should be read in their context, which is usually concerned with the difficulty in distinguishing conditional prohibition from regulation. Thus in *Poynting* at [93], Giles JA noted:

> Care must be taken lest form govern rather than substance. A provision in the form "A building may be erected on land in a particular zone if the land has an area greater than a particular area" appears regulatory, whereas a provision in the form "A building must not be erected on land if the land has an area less than a particular area" appears prohibitory, but the substance is the same.

79 This concern rests on attempts to distinguish a prohibition from regulation. However, in the abstract, that distinction is unhelpful in this, as in many other contexts, as recognised by Handley JA in *Lowy* at [32]-[33]. On the other hand, a particular result may be achieved in different ways and, for relevant legal purposes, the means adopted may be important. Thus, in the present context, it was not suggested that the principles espoused by McHugh JA in *Carr* were wrong, no doubt because they have been widely affirmed: see, eg, *Poynting* at [97] (Giles JA). Furthermore, those principles appear to underlie the broadly accepted distinction, not challenged by the parties in the present proceedings, that a zoning requirement was not a development standard: see *Lowy* at [58] and [62] where the term "a zoning function" was used by Handley JA. Thus, if an LEP prohibits a particular form of development in a particular zone, that provision will not generally be considered a development standard, whereas if a particular form of development is permitted with consent in the specified zone, but further and separately identified controls are imposed on such developments, the further controls may constitute development standards. Self-evidently, the drafter of an LEP may be able to achieve the desired result either by a zoning provision, or by a development standard: the way in which it is done will be important, because of the need to distinguish a development standard from other forms of prohibition. A legitimate concern about substance and form should not be allowed to blur the distinction between result and means.

80 The approach required by the definition, so understood, places considerable weight on the degree of specificity with which the proposed development is defined. If the proposed development is very broadly defined, even its essential elements will become external standards. On the other hand, to include within the identification of the proposed development all aspects of the proposed use of the land is likely to incorporate what should properly be seen as aspects regulated by development standards, because external to the essential elements of the development. The correct approach depends on the terms of the planning instrument in the particular case. Thus, if an LEP distinguishes by zoning between residential flats and dwelling houses, an application to erect a block of flats should not be treated simply as an application to erect a building, or an essential distinction between a dwelling house and a block of flats will be obscured. The reason why that distinction is important (on the present hypothesis) is that the relevant LEP distinguishes between a dwelling house and residential flats for zoning purposes.

Procedure.

Procedure.

341J. Appeals to the board shall be made and enforced in the manner prescribed.

[New section added, Act No. 21, 1958, s. 7 (2) (b).]

Appeal deemed submission to arbitration

341K. (1) Subject to this Part and to any ordinances thereunder, every appeal shall be deemed to be a submission to arbitration under the Arbitration Act, 1902, and the provisions of that Act, so far as applicable, shall, mutatis mutandis, apply accordingly:

Provided that for the purposes only of such application such provisions shall be deemed to be amended—

(a) (i) by omitting from section three of that Act the definition of "Court" and by inserting in lieu thereof the following definition:—

"Court" means the Land and Valuation Court, or a judge, deputy judge or additional judge thereof.

(ii) by omitting from the same section the definition of "Judge" and by inserting in lieu thereof the following definition:—

"Judge" means judge, deputy judge or additional judge of the Land and Valuation Court.

(b) by omitting section twenty of that Act and by inserting in lieu thereof the following section:—

20. The judge of the Land and Valuation Court may, from time to time, make general rules and orders for carrying the purposes of this Act into effect.

(2) For the purposes of this Division, the board shall be deemed to be arbitrators within the meaning of the said Act.

[New section added, Ibid.]

Powers of board

341L. (1) On any appeal under this Part the board may—

(a) if the appellant does not appear at the time appointed for the hearing of the appeal, proceed with the hearing and make its award notwithstanding the absence of any of the parties;

(b) appoint one of its members to make any inquiry or any survey which appears to it to be necessary or expedient for the purposes of the appeal;

(c) regulate its own proceedings;

(d) by its award confirm, amend, vary or disallow all or any of the decisions appealed from;

(e) determine any application in respect of which the appeal is against the disapproval of such application by a council or against the neglect or delay of a council to give a decision with respect thereto within the time prescribed.

[New paragraph added, Act No. 21, 1959, s. 9 (1) (g).]

(2) In making its award the board shall have regard to this Act, the ordinances, the circumstances of the case, and the public interest.

[New subsection added, Ibid.]

(3) When making its award, the Board, in addition to any order it may make under the Arbitration Act, 1902, as amended by subsequent Acts, for the payment of costs, may order the appellant to pay, as costs to the council concerned, such sum as to the board seems just, not exceeding the amount payable by the council under section 341D of this Act in respect of the appeal.

Any amount ordered to be paid under this subsection shall be recoverable by the council as a debt.

[New subsection, added, Act No. 27, 1965, s. 7 (c).]
[New section added, Act No. 21, 1958, s. 7 (2) (b).]

Minutes

341M. (1) The board shall—

(a) keep proper minutes of its proceedings; and

(b) lodge the same or true copies thereof certified under the hand of the chairman with the clerk of the council concerned.

(2) Every decision, adoption, or award of the board shall be in writing signed by the members of the board, and a true copy thereof certified under the hand of the chairman shall be lodged with the clerk of the council concerned and such council clerk shall cause the copy lodged with him to be filed in the office of such council.

(3) Any person on payment of the prescribed fee may inspect the copy of the decision, adoption, or award so filed in the office of the council concerned and may take copies thereof or make extracts therefrom.

(4) In any proceedings in any court or before any judge or justice a copy of a decision, adoption, or award of the board shall, if certified under the hand of the chairman, be prima facie evidence of the matters therein contained.

[New section added, Act No. 21, 1958, s. 7 (2) (b).]

DIVISION 4.—*Ordinances.*

Ordinances.

342. Ordinances may be made for carrying this Part into effect, and in particular for and with respect to—

(a) the number of copies of plans, sections, and specifications of new roads and subdivisions to be submitted with applications;

(b) the retention in the records of the council of a copy of all plans, sections, and specifications of new roads and subdivisions;

(c) any of the matters which under this Part a council shall take into consideration in respect of any application for approval of the opening of a road or the subdivision of land;

(d) the vesting in the Surveyor-General of the care, control, and maintenance of the permanent marks placed in roads under this Act, and providing for the preservation of such marks from damage or removal;

(e) authorising the board constituted under Division 3 of this Part to obtain the services of surveyors, consulting engineers, and other experts of not less than five years' standing for the purpose of assisting it in giving effect to this Part.

[Substituted paragraph, Act No. 21, 1958, s. 7 (2) (c).]

PART XIIA.

TOWN AND COUNTRY PLANNING SCHEMES.

DIVISION 1.—*Application of Part.*

[New Part added, Act No. 21, 1945, s. 3 (b).]

Application of Part XIIA.

342A. (1) Subject to the provisions of this Act—

(a) this Part shall apply to municipalities and shires;

(b) the powers authorities duties and functions conferred and imposed upon a council under this Part shall apply in respect of each area to the council of the area.

[Amended, Act No. 30, 1948, s. 26 (q) (i).]

(2) * * * * *

[Repealed, ibid. s. 26 (q) (ii).]
[New section added, Act No. 21, 1945, s. 3 (6).]

Definitions.

342B. In this Part unless the context or subject matter otherwise indicates or requires—

"Advisory Committee" * * * * *

[Repealed, Act No. 59, 1963, s. 72 (1)(a).]

"Authority" means the State Planning Authority of New South Wales constituted under the State Planning Authority Act, 1963.

[New definition added, ibid.]

"Building" includes any structure or any part thereof.

"Council" includes county council.

"Erection", "erect" and similar expressions in relation to building include any structural work or any alteration, addition or rebuilding.

"Land" includes any estate or interest in land (whether legal or equitable) and any easement, right, or privilege, in, over, or affecting, land and also includes all lands of the Crown.

[New section added, Act No. 21, 1945, s. 3 (b).]

DIVISION 2.—*Preparation of schemes by councils.*

[Amended, ibid. s. 72 (1) (b).]

Preparation of schemes.

342C. (1) (a) A council may, by resolution, decide to prepare a scheme with respect to any land within its area.

(b) Two or more councils may by resolution of the respective councils decide to join in preparing a scheme with respect to any land within their areas, and in such a case shall enter into an agreement for the purpose. The provisions of section five hundred and twenty-one of this Act shall extend to and in respect of such agreement.

(c) Any such resolution may specify the particular purposes or objects for or with respect to which the scheme shall be prepared and the scheme shall be prepared accordingly.

(2) The council or councils concerned shall within fourteen days after passing the resolution transmit a copy of the resolution to the Authority.

[Substituted subsection, Act No. 7, 1962, s. 5 (1) (a) (i).]
[Amended, Act No. 59, 1963, s. 72 (1) (c).]

(3) Where a resolution to prepare a scheme has been passed, the council or councils concerned shall, within the prescribed period, give notice of the resolution as prescribed.

Such notice shall contain a concise statement of the effect of the resolution, together with information as to the place and times at which a plan defining the land to which the resolution applies may be inspected.

[Amended, Act No. 7, 1962, s. 5 (1) (a) (ii).]

(4) Where a resolution to prepare a scheme has been passed the council or councils concerned may prepare one scheme with respect to the whole of the land to which the resolution applies or may prepare different schemes for different parts of the land.

[New section added, Act No. 21, 1945, s. 3 (b).]
[Amended, ibid. s. 5 (1) (a) (iii).]

Direction to council to prepare a scheme.

342D. (1) The Authority may from time to time, with the approval of the Minister, by notice in writing direct any council to prepare a scheme with respect to any land within its area or direct two or more councils to act together in preparing a scheme with respect to any land in their areas, and the council or councils concerned shall comply with the direction.

[Amended, Act No. 59, 1963, s. 72 (1) (d) (i).]

(2) A direction under subsection one of this section may—

(a) specify the particular purposes or objects for or with respect to which the scheme shall be prepared;

(b) fix the period of time within which the scheme shall be prepared;

and the scheme shall be prepared accordingly:

Provided that the Authority may, from time to time, upon the application of the council or councils concerned, extend such period if it appears to the Authority to be expedient so to do.

[Substituted proviso, ibid. s. 72 (1) (d) (ii).]

(3) Where a direction is given under subsection one of this section the Authority shall publish a notice of that fact in the Gazette and in a newspaper circulating in the locality in which the land to which the direction relates is situated.

Such notice shall contain a concise statement of the effect of the direction, together with information as to the place and times at which a plan defining the land to which the direction relates may be inspected.

[Amended, Act No. 59, 1963, s. 72 (1) (d) (iii).]
[New section added, Act No. 21, 1945, s. 3 (b).]

Appointment of planning committee.

342E. (1) Where any resolution referred to in subsection one of section 342C of this Act has been passed or any direction referred to in section 342D of this Act has been given, the council or councils concerned shall as soon as practicable prepare a scheme in pursuance of such resolution or direction.

The scheme shall be in the form of a draft ordinance and shall embody such matters and incorporate or refer to such maps, plans, specifications and particulars as the Authority in writing may require in any particular case.

The scheme may adopt wholly or partially or by reference any of the provisions contained in a set of standard or model provisions adopted by the Authority.

[Substituted subsection, Act No. 7, 1962, s. 5 (1) (b) (i).]
[Amended, Act No. 59, 1963, s. 72 (1) (e) (i) (ii).]

(2) The council or councils concerned shall appoint or employ some person who possesses the prescribed qualifications in town planning or country planning to assist in the preparation of the scheme:

Provided that where the Authority so approves—

(a) * * * * *

(b) having regard to the restricted nature or limited extent of the scheme, the council or councils concerned may appoint or employ an officer or employee of the Crown referred to in subsection three of this section or a servant of the council to assist in the preparation of the scheme,

notwithstanding that such officer, employee or servant does not possess the prescribed qualifications in town planning or country planning.

[Substituted subsection, Act No. 7, 1962, s. 5 (1) (b) (i).]
[Amended, Act No. 59, 1963, s. 72 (1) (e) (iii) (iv) (v).]

(3) The Minister may arrange for the services of any officer or employee of the Crown who is skilled in any matter relating to town planning or country planning to be made available to assist the council or councils concerned under such conditions, including conditions for payment of remuneration, as may be agreed upon with the council or councils.

(4) The council or councils concerned may arrange, through the Minister, for the making or preparation by any officer or employee of the Crown of any survey or plan required for or in connection with the preparation of the scheme.

(5) The council or councils concerned in preparing a scheme may accept, with or without modifications, a scheme proposed with respect to the whole or part of the land to which the resolution of the council or councils applies or the direction of the Authority relates, by or on behalf of all or any of the owners of that land.

[Amended, Act No. 7, 1962, s. 5 (1) (b) (ii); Act No. 59, 1963, s. 72 (1) (e) (vi).]
[New section added, Act No. 21, 1945, s. 3 (b).]

Notice of scheme.

342F. (1) The council or councils concerned shall submit to the Authority the scheme prepared by it or them in accordance with the provisions of this Part.

[Amended, Act No. 59, 1963, s. 72 (1) (f) (i).]

(2) The Minister may, after considering a report of the Authority, certify that the scheme so submitted to the Authority is adequate and sufficient and that the planning principles contained in the scheme so submitted appear to the Minister to be suitable for implementation.

[Amended, Ibid. s. 72 (1) (f) (ii) (iii).]

(3) Where the Minister has so certified, the council or councils concerned—

(a) shall give notice as prescribed that the scheme has been prepared and shall in such notice—
  (i) specify the address of the place or places at which copies of the draft ordinance and the maps, plans, specifications and other particulars relating to the scheme may be inspected and the times and dates when they may be inspected;
  (ii) specify the address of the council, or the addresses of the councils, concerned to which objections against the scheme or any part of it may be forwarded;
(b) shall forward particulars and a map or plan indicating in general terms the extent or nature of the scheme to all Departmetns of the Crown in right of the State or of the Commonwealth, all statutory bodies representing the Crown and all councils which appear to it or them to be affected by the scheme;
(c) shall arrange for copies of such ordinance and maps, plans, specifications and other particulars to be made available for public inspection without charge at the places and times and on the dates referred to in subparagraph (i) of paragraph (a) of this subsection.

(4) Any person who has an estate or interest in any land affected by the scheme and any Department, statutory body or council may object in the manner prescribed to the council or councils concerned against the scheme or any part of it and shall state the grounds of the objection.

(5) Any such objection may only be made—

(a) within a period of three months; or
(b) if the Minister in the prescribed manner so directs in respect of a varying scheme, within such period not exceeding three months but not less than one week as may be specified in the direction

after the publication of the notice referred to in paragraph (a) of subsection three of this section (or where the notice is published more than once, after the first publication thereof) or within such further period as the council or councils concerned may, with the approval of the Minister, allow.

(6) The council or councils concerned shall consider all objections to the scheme made under this section and shall decide what recommendations thereon shall be made to the Authority.

Before deciding what recommendations shall be made to the Authority, the council or councils concerned shall afford each objector an opportunity to appear personally, or by counsel, solicitor or agent, before and to be heard by the council or councils concerned in support of his objection.

[Amended, Ibid. s. 72 (1) (f) (iv) (v).]
[New section added, Act No. 21, 1945, s. 3 (b).]
[Substituted section, Act No. 7, 1962, s. 5 (1) (c).]

Contents of scheme.

342G. (1) A scheme shall in the prescribed manner define the land to which it applies.

(2) A scheme may contain provisions for regulating and controlling the use of land and the purposes for which land may be used.

(3) Without prejudice to the generality of subsection two of this section a scheme may contain provisions for or in relation to all or any of the following matters, that is to say—

(a) the situation, opening, widening, deviating, classifying, and providing of roads;
(b) the restriction of ribbon development of land fronting adjoining or adjacent to a road by regulating all or any of the following matters, that is to say, the construction, forming or laying out of any means of access to or from the road, the erecting or making on the land of any building or permanent excavation which is within a specified distance from the road, or restricting or prohibiting the erection of any building intended for use for any purpose which is likely to cause increased vehicular traffic along the road, or traffic congestion on the road.

  In this paragraph "building" includes neither fences, gates, posts, masts, ornaments or other similar structures or erections required for the purposes of farming or grazing or of any dwelling house or garden occupied with a dwelling house nor greenhouses or summerhouses required in connection with any such garden, nor temporary tents or scaffolding required for any purpose, but save as aforesaid includes any structure or erection of whatsoever material and in whatsoever manner constructed and any part of a building;
(c) the minimum standards of construction of roads of different classes and of drains, culverts and bridges in or upon roads;
(d) the provision of water, gas, electricity and other public services;

(e) the reservation of sites for places of religious worship, the residences of ministers of religion and buildings for religious purposes;

(f) the reservation of sites for educational and hospital establishments and community centres for promotion of physical, mental, moral and cultural welfare;

(g) the reservation of sites for ambulance stations, fire brigade stations, police stations, court houses and buildings for the use of Government Departments and of statutory bodies representing the Crown and for residences for the officers of any such Department or statutory body;

(h) the reservation of sites for water reservoirs;

(i) the regulation of building and of matters relating thereto;

(j) the reservation or provision of land for afforestation purposes or for recreation grounds, ornamental gardens, children's playgrounds, green belts, green wedges, and other open spaces;

(k) the planning of localities and the design and protection of buildings and structural elements so as to reduce the risk of fire and limit the spread of fire;

(l) the zoning of land and the prohibition in any zone of the erection, construction, carrying out or use of any structure or work upon the land or the use in any zone of any land for any specified purpose or for any purpose other than a specified purpose;

(m) the extinction or variation of private rights of way and other easements;

(n) the removal, alteration, or demolition of obstructions or obstructive works;

(o) the preservation or acquisition for public access use and enjoyment of the foreshores or banks of the ocean, harbours, rivers, lakes, lagoons, and the like, and the conservation of the natural beauty thereof;

(p) the preservation of places or objects of historical or scientific interest or natural beauty or advantage;

(q) the provision of amenities;

(r) securing the safety of persons and property from hostile attack;

(s) the location of public utility undertakings, shipping facilities, railways, tramways, canals, and sites for air ports, aerodromes, bridges, jetties, wharves and ferries, and works and matters ancillary thereto;

(t) securing co-operation between the council or councils concerned and the Government, or any person or body of persons;

(u) the acquisition of land for any purpose of the scheme;

(v) the apportionment between the responsible authorities specified in the scheme of any costs, expenses and disbursements incurred in carrying into effect and enforcing a scheme, and the recovery from any council of its share or proportion of the same;

[Amended, Act No. 59, 1963, s. 72 (1) (g) (i).]

(w) the recovery of betterment in accordance with Division 10 of this Part;

(x) any matter necessary or convenient for carrying out the scheme.

(4) A scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act, or of any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made, to the extent to which that provision is inconsistent with any of the provisions of the scheme.

(5) (a) A scheme shall contain provisions specifying the responsible authority or responsible authorities which shall be charged with the functions of carrying into effect and enforcing the provisions of the scheme or such of those provisions as relate to any particular portion or portions of the land included in the scheme, or such of those provisions as are directed to particular objects or purposes.

Any responsible authority so specified shall be a council, or two or more councils acting together as prescribed, or the Authority.

[Amended, Act No. 59, 1963, s. 72 (1) (g) (ii).]

(b) A scheme may contain provision for the appointment of a special committee, constituted as prescribed, to assist the responsible authority in carrying into effect and enforcing the scheme.

[Repealed, Act No. 7, 1962, s. 5 (1) (d).]
[New paragraph added, Act No. 59, 1963, s. 72 (1) (g) (iii).]

Such committee may include as members persons who are not members of the body which is the responsible authority.

[New section added, Act No. 21, 1945, s. 3 (b).]

DIVISION 2A.—*Preparation of schemes by the Authority.*

[New Division added, Act No. 59, 1963, s. 72 (1) (h).]

Preparation of schemes by the Authority.

342GA. (1) The Minister may direct the Authority to prepare a scheme with respect to any land. Any such direction may be general or limited to purposes specified in the direction.

(2) The Authority shall as soon as practicable prepare a scheme in pursuance of such direction, whether or not any other scheme has been or is being prepared affecting such land.

(3) The scheme shall be in the form of a draft ordinance, shall refer to such maps, plans, specifications and particulars as the Authority thinks fit and may adopt wholly or partially or by reference any of the provisions contained in a set of standard or model provisions adopted by the Authority.

[New section added, ibid.]

Notice of scheme.

342GB. (1) The Authority shall submit to the Minister the scheme prepared by it in accordance with any direction given under section 342GA of this Act.

(2) The Minister may, after considering a report of the Authority, certify that the scheme so submitted to the Minister is adequate and sufficient and that the planning principles contained in the scheme so submitted appear to the Minister to be suitable for implementation.

(3) Where the Minister has so certified, the Authority—

(a) shall give notice as prescribed that the scheme has been prepared and shall in such notice—

(i) specify the address of the place or places at which copies of the draft ordinance and the maps, plans, specifications and other particulars relating to the scheme may be inspected and the times and dates when they may be inspected;

(ii) notify that objections against the scheme or any part of it may be forwarded to the Authority;

(b) shall forward particulars and a map or plan indicating in general terms the extent or nature of the scheme to all Departments of the Crown in right of the State or of the Commonwealth, all statutory bodies representing the Crown and all councils which appear to it to be affected by the scheme;

PLANNING SCHEME ORDINANCE

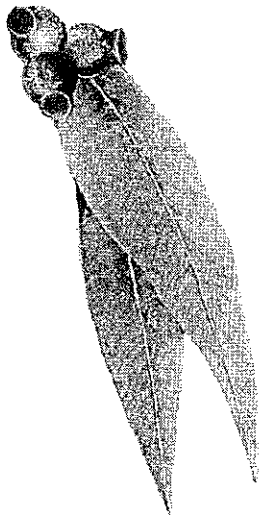
Price - $57.50

Ku-ring-gai

PLANNING SCHEME ORDINANCE

As amended 31 October 2008

This document represents a compilation of planning instruments. Reference should be made to the specific government gazettes as referenced in this document.



KU-RING-GAI PLANNING

SCHEME ORDINANCE

AS AMENDED TO

31 October 2008

THIS DOCUMENT REPRESENTS A COMPILATION OF PLANNING INSTRUMENTS, REFERENCE SHOULD BE MADE TO THE SPECIFIC GOVERNMENT GAZETTES AS REFERENCED IN THIS DOCUMENT

PRICE - $52.50

KU-RING-GAI PLANNING SCHEME ORDINANCE

TABLE OF CONTENTS

Introduction

What is the Ku-ring-gai Planning Scheme Ordinance ?

The Ku-ring-gai Planning Scheme Ordinance (also referred to as "the Ordinance" or KPSO) is an environmental planning instrument used to manage development and conservation in Ku-ring-gai. In the hierarchy of Council's environmental planning documents it stands at the top, providing broad direction. Further detail is added to the Ordinance through other planning tools such as development control plans and Council codes and policies.

What are the components of this Ordinance ?

The Ordinance comprises this document (often described as "the written instrument") and the Ku-ring-gai Planning Scheme "Map".

What does the Ordinance do ?

The Ordinance aims to guide the future development and conservation of Ku-ring-gai.

The Planning Scheme Map classifies land into a number of "zones" (such as residential, business, open space, etc) and "reservations" (such as roads). The written instrument of the Ordinance describes how land in these zones and reservations may be used, developed and conserved. This is achieved through the Land Use Table, along with general clauses applying to different types of development as well as specific clauses that apply to selected sites.

The Ordinance defines many types of developments (such as service stations, shops, dwelling houses) to assist in more precisely classifying and grouping particular uses and activities in order to assist in guiding future development.

The Ordinance also identifies heritage items and details matters for consideration by Council if the owner wishes to develop the heritage item.

Can Council approve development that is prohibited by the Ordinance ?
No, Council cannot legally approve development that is prohibited by the Ordinance unless this is permitted by state legislation which over-rides the Ordinance.

Can the content of the Ordinance be varied or amended ?

Yes, it is possible to amend both the zoning and reservations shown on the Planning Scheme Map and the content of the written instrument of the Ordinance. However, this is a lengthy process that must be carried out in accordance with the requirements of the Environmental Planning & Assessment Act and involves consultation with the public and state government departments.

KU-RING-GAI PLANNING SCHEME ORDINANCE

1971 - No 246

O R D I N A N C E

LOCAL GOVERNMENT ACT 1919

(Published in Government Gazette No 108 of 1st October 1971)

(As amended to 31 October 2008)

PROCLAMATION

A R CUTLER, *Governor* 29 September 1971.

The Ku-ring-gai Planning Scheme Ordinance is hereby proclaimed as set out in the Schedule hereto. (106 L 1/5)

By His Excellency's Command,

P H MORTON

GOD SAVE THE QUEEN!

SCHEDULE

TOWN AND COUNTRY PLANNING - KU-RING-GAI PLANNING SCHEME ORDINANCE

Local Government Act 1919: Part XIIa

PART I

Preliminary

Citation

1. (1) This Ordinance may be cited as the "Ku-ring-gai Planning Scheme Ordinance".

(2) The Planning Scheme prepared by the State Planning Authority of New South Wales in respect of all land within the Municipality of Ku-ring-gai, in pursuance of a direction of the Minister dated 21st September 1967, is embodied in this Ordinance.

(Clause 1B added by Local Environmental Plan No 72 vide Government Gazette No 64 of 26 May 1989)

(Clause 1B amended by Ku-ring-gai (Heritage Conservation) Local Environmental Plan No 2 vide Government Gazette No 37 of 1 March 1991)

Aims and objectives for residential zones

1B. The aims and objectives of this Ordinance in relation to land within Zones Nos 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g) and 2(h) are set out in Schedule 9.

Variation of County of Cumberland Planning Scheme

2. The planning scheme referred to in subclause (2) of clause 1 varies in certain respects the County of Cumberland Planning Scheme and incorporates all such provisions of that Scheme relating to land within the Municipality of Ku-ring-gai as are not inconsistent with the provisions of the Scheme so referred to.

Division into Parts

3. This Ordinance is divided into Parts as follows:

PART I. - ***Preliminary*** - cll. 1-6.

PART II. - ***Reservation and Restriction on Use of Land*** - ccl. 7-22.

PART III. - ***Restrictions on Building and Use of Land*** - cll. 23-25.

PART IV. - ***Business Centre Provisions*** - cll. 26-30D.

PART V. - ***Consents*** - cll. 31-38.

PART VI. - ***General Amenity and Convenience*** - cll. 39-42.

PART VII. - ***Special Provisions*** - cll. 43-61.

PART VIII. - ***General*** - cll. 62-72.

SCHEDULES.

Suspension of Acts, covenants, etc

68. (1) The operation of section 309 of the Act and of the proclamations made thereunder declaring residential districts is hereby suspended to the extent to which such section and such proclamations are inconsistent with any of the provisions of this Ordinance or with any consent given thereunder.

(Subclause 68(1A) added by Sydney Regional Environmental Plan No 1 *vide Government Gazette No 191 of 19 December 1980)*

(Subclause 68(1A) deleted by Local Environmental Plan No 33 vide Government Gazette No 108 of 26 July 1985)

(1A)

(Subclause 68(2) amended by Local Environmental Plan No 74 vide Government Gazette No 35 of 9 March 1990)

(2) In respect of any land which is comprised within any zone, other than within Zone No 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g) or 2(h) the operation of any covenant agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder.

(3) Nothing in subclause (2) of this clause shall affect the rights or interests of any statutory authority under any registered instrument.

Plans of subdivision

69. The Council shall retain and catalogue a copy of every plan of subdivision approved by it and upon registration of such plan in the office of the Registrar General, shall clearly mark on a copy of a map of its area the location of the land to which each such plan relates with a reference to the catalogued copy.

Register

(Miscellaneous (Planning) Repeal and Amendment Act 1979 - Order Clause 70(1) deleted vide Government Gazette No 139 of 26 September 1980)

70. (1)

(Miscellaneous (Planning) Repeal and Amendment Act 1979 - Order Clause 70(2) deleted vide Government Gazette No 33 of 5 March 1982)

(2)

New South Wales

Ku-ring-gai Local Environmental Plan No 194

under the

Environmental Planning and Assessment Act 1979

I, the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration), make the following local environmental plan under the *Environmental Planning and Assessment Act 1979*. (S95/01707/PC)

DIANE BEAMER, M.P.,
Minister Assisting the Minister for Infrastructure
and Planning (Planning Administration)

Schedule 1 Amendments

(Clause 4 (a))

[1] Clause 4 Definitions

Insert at the end of the definition of ***Scheme map*** in clause 4 (1):

Ku-ring-gai Local Environmental Plan No 194—Zoning Map

[2] Clause 23 Development control table

Insert after the matter relating to Zone No 2 (c) in the Table to the clause:

(c1)	**Residential "C1"** Light scarlet with dark red edging and lettered 2 (c1)	Exempt development referred to in clause 24 of this Ordinance and Schedule 1 to DCP 46.	Demolition of a building or work (being demolition that is not exempt development). Development (other than exempt development) for the purpose of: boarding-houses; drainage; dwelling-houses; educational establishments; family flats; home occupations; hospitals; open space; places of public worship; professional consulting rooms; roads; utility installations (other than generating works or gas holders). Subdivision of land.	Any development other than that permitted by Column 2 or 3.

Ku-ring-gai Local Environmental Plan No 194

under the

Environmental Planning and Assessment Act 1979

1 Name of plan

This plan is *Ku-ring-gai Local Environmental Plan No 194*.

2 Aim of plan

This plan aims to rezone land to facilitate the development of multi-unit housing and increase housing choice.

3 Land to which plan applies

This plan applies to the land in the vicinity of the Railway/Pacific Highway corridor and the St Ives Centre, being the land shown edged heavy red on the map marked "Ku-ring-gai Local Environmental Plan No 194—Zoning Map" held at the office of Ku-ring-gai Council.

4 Relationship to other environmental planning instruments

This plan amends:

(a) the *Ku-ring-gai Planning Scheme Ordinance* as set out in Schedule 1, and

(b) *State Environmental Planning Policy No 53—Metropolitan Residential Development* by inserting at the end of clause 4:

(2) However, this Policy does not apply to the land within the area of Ku-ring-gai shown edged heavy red on the map marked "Ku-ring-gai Local Environmental Plan No 194—Zoning Map" held in the office of Ku-ring-gai Council.

[3] Clause 23, Table

Insert after the matter relating to Zone No 2 (d):

(d3)	**Residential "D3"** Light scarlet with dark red edging and lettered 2 (d3)	Exempt development referred to in clause 24 of this Ordinance and Schedule 1 to DCP 46.	Demolition of a building or work (being demolition that is not exempt development). Development (other than exempt development) for the purpose of: attached dual occupancies; boarding-houses; detached dual occupancies; drainage; dwelling-houses; educational establishments; family flats; home occupations; hospitals; open space; places of public worship; professional consulting rooms; residential flat buildings; roads; townhouses; utility installations (other than generating works or gas holders); villas. Subdivision of land.	Any development other than that permitted by Column 2 or 3.

Environmental Planning and Assessment Act 1979 No 203

28 Suspension of laws etc by environmental planning instruments

(1) In this section, ***regulatory instrument*** means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.

(2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.

(4) Where a Minister is responsible for the administration of a regulatory instrument referred to in subsection (2), the approval of the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.

(5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence.

(6) The provisions of this section have effect despite anything contained in section 42 of the *Real Property Act 1900*.

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A A

Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 No 205

New South Wales

Status Information

Currency of version
Current version for 7 January 2011 to date (accessed 7 April 2011 at 19:05).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
The provisions displayed in this version of the legislation have all commenced. See Historical notes

Proposed repeal:
The Act is to be repealed on the commencement of sec 4 of the Environmental Planning and Assessment Amendment Act 2008 No 36.

Authorisation: This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the Interpretation Act 1987.

File last modified 7 January 2011.

Contents

New South Wales

An Act to repeal certain Acts and amend certain other Acts, consequent on the enactment of the *Environmental Planning and Assessment Act 1979*, and the *Land and Environment Court Act 1979*, and to enact savings, transitional and other provisions consequent on and in connection with the enactment of those Acts.

1 Name of Act

This Act may be cited as the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979*.

2 Commencement

(1) This section and section 1 shall commence on the date of assent to this Act.

(2) Section 5, in its application to a provision of Schedule 2, shall commence on the day on which that provision commences.

(3) Part 2 of Schedule 2 shall commence on:

(a) the day referred to in section 2 (2) of the *Supreme Court (Summary Jurisdiction) Bail (Amendment) Act 1978*, or

(b) the day appointed and notified under section 2 (2) of the *Environmental Planning and Assessment Act 1979*,

whichever is the later, or, if those days are the same, shall commence on that day.

(4) Except as provided in this section, this Act shall commence on the day appointed and notified under section 2 (2) of the *Environmental Planning and Assessment Act 1979*.

3 Schedules

This Act contains the following Schedules:

SCHEDULE 1—REPEALS

SCHEDULE 2—AMENDMENTS

SCHEDULE 3—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS

4, 5 (Repealed)

6 Savings, transitional and other provisions

Schedule 3 has effect.

Schedules 1, 2 (Repealed)

Schedule 3 Savings, transitional and other provisions

(Section 6)

1 Interpretation

(1) In this Schedule, except in so far as the context or subject-matter otherwise indicates or requires:

appointed day means the day appointed and notified under section 2 (2) of the *Environmental Planning and Assessment Act 1979*.

Authority means the State Planning Authority of New South Wales as constituted under the *State Planning Authority Act 1963*.

Commission means the New South Wales Planning and Environment Commission as constituted under the *New South Wales Planning and Environment Commission Act 1974*.

former planning instrument means a prescribed scheme or an interim development order or *The Town and Country Planning (General Interim Development) Ordinance*.

former tribunal means the Land and Valuation Court, the Local Government Appeals Tribunal, a Valuation Board of Review or the Clean Waters Appeals Board.

interim development order means an interim development order within the meaning of Part 12A.

new Court means the Land and Environment Court.

Part 12A means Part 12A of the *Local Government Act 1919* as in force at any time.

prescribed scheme means a prescribed scheme within the meaning of Part 12A.

regulations means regulations under clause 38.

(2) Except in so far as the context or subject-matter otherwise indicates or requires, expressions used in this Schedule have the same meanings as in the *Environmental Planning and Assessment Act 1979*.

(3) In this Schedule, a reference to a subclause is, unless a contrary intention appears, a reference to a subclause of the clause in which the reference occurs.

2 Former planning instruments

(1) A former planning instrument, as in force immediately before the appointed day, shall, subject to this Act have full force and effect

according to its tenor and shall be deemed to be a deemed environmental planning instrument.

(2) Where, in the opinion of the Minister administering the *Environmental Planning and Assessment Act 1979*, a provision of a former planning instrument is inconsistent with or contains a provision that deals with the same or like matter which is dealt with by any provision of the *Environmental Planning and Assessment Act 1979*, or the regulations thereunder, the Minister administering the *Environmental Planning and Assessment Act 1979* may, by order published in the Gazette, amend the former planning instrument in such a manner as, in his opinion, will remove the inconsistency or the provision dealing with the same or like matter, as the case may be, but no such order shall take effect before the appointed day.

3 Schemes in preparation

(1) Where, immediately before the appointed day, a scheme under Part 12A has reached a stage of preparation which, in the opinion of the Minister administering the *Environmental Planning and Assessment Act 1979*, warrants completion in accordance with this clause, the Minister administering the *Environmental Planning and Assessment Act 1979* may, by order published in the Gazette, direct that further preparation of that scheme be continued in accordance with such of the provisions of Part 3 of the *Environmental Planning and Assessment Act 1979*, as are specified in that order as if that scheme were a draft environmental planning instrument.

(2) A scheme prepared in accordance with directions given pursuant to subclause (1) shall, if made by the Minister administering the *Environmental Planning and Assessment Act 1979*, be deemed to be an environmental planning instrument notwithstanding any failure to comply with the provisions of Part 3 of the *Environmental Planning and Assessment Act 1979*, with respect to the making of such an instrument.

(3) A scheme, the subject of an order made under subclause (1), which has received a certificate under section 342F (2) or 342GB (2) of the *Local Government Act 1919*, shall be deemed to be a draft environmental planning instrument within the meaning of section 90 (1) (a) (ii) of the *Environmental Planning and Assessment Act 1979*.

(4) In subclauses (1) and (2), a reference to a scheme includes a reference to:

(a) an interim development order, and

(b) an instrument prepared or in the course of preparation by the Commission or by a regional planning committee constituted under Part 4 of the *State Planning Authority Act 1963*, and declared by the Minister administering the *Environmental Planning and Assessment Act 1979* to be an instrument to which this clause applies.

4 Model provisions

The provisions of any standard or model provisions, adopted wholly or partially by reference by a former planning instrument, in accordance with section 342U (3) of

the *Local Government Act 1919* shall be deemed, for the purposes of that instrument, to be a set of model provisions made under section 33 of the *Environmental Planning and Assessment Act 1979* and may be amended or revoked accordingly.

5 Applications

(1) Where, immediately before the appointed day, an application for consent, approval or permission under a former planning instrument has not been finally determined, the application shall, subject to this clause, be determined as if this Act and the *Environmental Planning and Assessment Act 1979* had not been enacted.

(2) For the purposes of subclause (1), an application is not finally determined unless:

(a) consent, approval or permission is granted or refused in respect of that application and no appeal is lodged within a period of 12 months from the date of granting or refusing the application, or

(b) where an appeal is lodged within the period of 12 months referred to in paragraph (a)—that appeal is finally disposed of.

(3) An appeal that would, but for this subclause, be made on or after the appointed day to a former tribunal in relation to any matter referred to in this clause shall be made to the new Court, and shall, for the purposes of the *Land and Environment Court Act 1979*, be treated as an appeal under section 97 of the *Environmental Planning and Assessment Act 1979*.

6 Development prohibited except with consent

A provision of a former planning instrument to the effect that development may not be carried out except with a specified consent, approval or permission shall be deemed to be a provision to the effect that that development may not be carried out except with consent under the *Environmental Planning and Assessment Act 1979* being obtained therefor.

7 Consents, approvals and permissions

(1) Any consent, approval or permission granted in respect of an application made under a former planning instrument, and in force immediately before the appointed day, shall, subject to subclause (2), continue in full force and effect subject to:

(a) the operation of any provision of that instrument or any term or condition of that consent, approval or permission governing or relating to the currency, duration or continuing legal effect of that consent, approval or permission, and

(b) the operation of any condition (other than that referred to in paragraph (a)), restriction or limitation, subject to which that consent, approval or permission was granted.

(2) Where no provision or term or condition of the type referred to in subclause (1) (a) operates in respect of a consent, approval or permission therein mentioned, the provisions of section 99 of the *Environmental Planning and Assessment Act 1979* shall apply to that consent, approval or

permission as if it were a consent referred to in that section which had taken effect on the appointed day.

(3) The provisions of section 103 of the *Environmental Planning and Assessment Act 1979* shall apply to a consent referred to in subclause (1) as if that consent were a consent referred to in that section.

(4) A consent, approval or permission referred to in subclause (1) is taken to be a development consent within the meaning of the *Environmental Planning and Assessment Act 1979*.

8 Directions under s 342V (3) of Local Government Act 1919

A direction given under section 342V (3) of the *Local Government Act 1919*, and in force immediately before the appointed day shall be deemed to be a direction given in the same terms under section 101 of the *Environmental Planning and Assessment Act 1979*.

9 Proclamations under s 313 (j) of Local Government Act 1919

A proclamation under section 313 (j) of the *Local Government Act 1919* and in force immediately before the appointed day shall be deemed to have been made under section 313 (2) (b) of that Act, as amended by this Act.

10, 11 (Repealed)

12 Resumptions and appropriations

(1) Land reserved or zoned for a public purpose by a deemed environmental planning instrument shall be deemed for the purposes of section 116 of the *Environmental Planning and Assessment Act 1979* to be land reserved for that purpose pursuant to section 26 (c) of that Act.

(2) Upon the resumption or appropriation of land referred to in subclause (1):

(a) any compensation recovered under section 342AC of the *Local Government Act 1919* in respect of the reservation or zoning shall be deducted from the compensation otherwise payable by virtue of the resumption or appropriation, and

(b) no compensation under that section is payable in respect of a claim referred to in clause 13.

13 Compensation

Where a claim for compensation under section 342AC of the *Local Government Act 1919* was made before the appointed day, but proceedings to enforce that claim have not been instituted or completed as at that day, that claim may, subject to clause 12, be enforced as if this Act and the *Environmental Planning and Assessment Act 1979* had not been enacted.

14 Construction of references to Part 12A, schemes, etc

(1) On and from the appointed day, a reference in any other Act or in any regulation, by-law or other statutory instrument, or in any other document, whether of the same or of a different kind:

(a) to Part 12A shall be read and construed as a reference to the *Environmental Planning and Assessment Act 1979*,

(b) to any provision of that Part shall be read and construed as a reference to the corresponding provision, if any, of the *Environmental Planning and Assessment Act 1979*,

(c) to a specified prescribed scheme or an interim development order made under that Part shall be read and construed as a reference to the deemed environmental planning instrument that that prescribed scheme or interim development order is deemed by this Schedule to be,

(d) to a prescribed scheme or an interim development order made under that Part, that is not identified by the reference, shall be read and construed as a reference to an environmental planning instrument,

(e) except as provided in paragraph (d), to a planning scheme prepared under that Part shall be read and construed as a reference to a draft local environmental plan in respect of which a certificate has been issued under section 65 of the *Environmental Planning and Assessment Act 1979*, and

(f) to prescribed qualifications with respect to town or country planning shall be read and construed as a reference to qualifications in environmental planning prescribed under the *Environmental Planning and Assessment Act 1979*,

subject to the regulations and except in so far as the context or subject-matter otherwise indicates or requires.

(2) Subclause (1) does not apply to references in section 254A of the *Crown Lands Consolidation Act 1913*, the *Land Development Contribution Management Act 1970*, or any other prescribed enactments, instruments or documents.

15 Agreements under s 342AN of Local Government Act 1919

Notwithstanding the repeal of Part 12A, any agreement entered into in accordance with section 342AN of the *Local Government Act 1919* continues in force as if that Part had not been repealed, but any such agreement may be amended, varied or cancelled.

16 Certain full-time commissioners entitled to re-appointment in former employment

(1) In this clause:

officer or employee of a prescribed authority does not include a commissioner or a member of any prescribed body.

prescribed body means a statutory body (other than the Commission) declared under section 4 (2) of the *New South Wales Planning and Environment Commission Act 1974* to be a statutory body for the purposes of that Act.

retiring age means:

(a) in relation to a person who was, immediately before his appointment as a commissioner, an officer of the Public Service—the age of 60 years, and

(b) in relation to a person who was, immediately before his appointment as a commissioner, an officer or employee of a prescribed authority—the age at which officers or employees, as the case may be (being officers or employees of the class to which that person belonged immediately before his appointment as a commissioner), of that prescribed authority are entitled to retire.

(2) A person holding office at the appointed day under section 6 (2) (a) of the *New South Wales Planning and Environment Commission Act 1974* not being a person who has attained the retiring age, is, unless appointed as the Director, entitled to be appointed, where, immediately before his appointment as a commissioner, he was:

(a) an officer of the Public Service—to some position in the Public Service, or

(b) an officer or employee of some prescribed authority—to some office in the service of that prescribed authority,

not lower in classification and salary than that which he held immediately before his appointment as a commissioner.

17 Full-time members of Commission, other than as referred to in clause 16

(1) This clause does not apply to a person entitled to an appointment under clause 16.

(2) A person holding office at the appointed day under section 6 (2) (a) of the *New South Wales Planning and Environmental Commission Act 1974* is, unless appointed as the Director, entitled:

(a) to be appointed by the Governor to a position in the service of the Crown for the balance of his term of office under section 6 of that Act, at a salary (not less than that payable to him immediately before the appointed day) determined by the Governor, and

(b) to retain all other rights and privileges conferred upon him by that Act other than the right to appointment under that section.

(3) Notwithstanding the repeal by this Act of the *New South Wales Planning and Environment Commission Act 1974* the provisions of section 10 (1) of that Act (paragraphs (d), (i), (j) and (k) excepted), apply to a person referred to in subclause (2) of this clause as if the repeal had not been

effected, and so apply as if a reference therein to a full-time commissioner were a reference to that person.

(4) The provisions of the *Public Service Act 1979* do not apply to or in respect of the appointment of a person under this clause and such a person is not, in his capacity as such an appointee, subject to the provisions of that Act.

18 Officers and employees of Commission

(1) The persons who, immediately before the appointed day, were officers and temporary employees of the Commission shall, at that date, become officers and temporary employees of the Department.

(2) Notwithstanding the repeal by this Act of the *New South Wales Planning and Environment Commission Act 1974* the provisions of section 16 of that Act continue to apply in relation to the persons referred to in subclause (1) as if the repeal had not been effected.

19 Transfer of property, rights, obligations, etc

(1) On and from the appointed day:

(a) all real and personal property and all right and interest therein and all management and control thereof that, immediately before that day, was vested in or belonged to the Commission shall vest in and belong to the corporation,

(b) all money and liquidated and unliquidated claims that, immediately before that day, were payable to or recoverable by the Commission shall be money and liquidated and unliquidated claims payable to or recoverable by the corporation,

(c) all proceedings commenced before that day by the Commission and pending immediately before that day shall be deemed to be proceedings pending on that day by the corporation and all proceedings so commenced by any person against the Commission and pending immediately before that day shall be deemed to be proceedings pending on that day by that person against the corporation,

(d) all contracts, agreements, arrangements and undertakings entered into with, and all securities lawfully given to or by, the Commission and in force immediately before that day shall be deemed to be contracts, agreements, arrangements and undertakings entered into with and securities given to or by the corporation,

(e) the corporation may, in addition to pursuing any other remedies or exercising any other powers that may be available to it, pursue the same remedies for the recovery of money and claims referred to in this clause and for the prosecution of actions and proceedings so referred to as the Commission might have done but for the enactment of this Act,

(f) the corporation may enforce and realise any security or charge existing immediately before that day in favour of the Commission and may exercise any powers thereby conferred on

the Commission as if the security or charge were a security or charge in favour of the corporation,

(g) all debts, money and claims, liquidated and unliquidated, that, immediately before that day, were due or payable by, or recoverable against, the Commission shall be debts due by, money payable by and claims recoverable against, the corporation, and

(h) all liquidated and unliquidated claims for which the Commission would, but for the enactment of this Act, have been liable shall be liquidated and unliquidated claims for which the corporation shall be liable.

(2) No attornment to the corporation by a lessee from the Commission shall be required.

20 Construction of references to Authority or Commission

(1) On and from the appointed day, a reference in any other Act or in any regulation, by-law or other statutory instrument or in any other document, whether of the same or of a different kind, to the Authority or the Commission or the Chairman or a member thereof shall, subject to the regulations, be read and construed as a reference to the corporation, Director or Department, whichever is appropriate.

(2) Subclause (1) does not apply to references in the *Environmental Planning and Assessment Act 1979*, the *Chipping Norton Lake Authority Act 1977* or any other prescribed enactments, instruments or documents.

21 Development funds

(1) All fixed assets and fixed liabilities comprised in the Cumberland Development Fund established under the *State Planning Authority Act 1963* and transferred to the corporation in pursuance of this Schedule shall:

(a) except as provided in paragraph (b)—form part of the Development Fund for the Sydney Region, or

(b) where those assets and liabilities relate to the City of Greater Wollongong—form part of the Development Fund for the Illawarra Region to the extent determined by the Minister administering the *Environmental Planning and Assessment Act 1979*.

(2) All fixed assets and fixed liabilities comprised in the Northumberland Development Fund established under the *State Planning Authority Act 1963* and transferred to the corporation in pursuance of this Schedule shall form part of the Development Fund for the Hunter Region.

22 Loans

(1) The due repayment of any money borrowed after 26 May 1972 by the authority or the Commission and of the interest thereon is hereby guaranteed by the Government.

(2) Any liability arising from such a guarantee shall be payable out of money provided by Parliament.

(3) A reference, in Part 7 of or Schedule 6 to the *Environmental Planning and Assessment Act 1979*, to a loan or renewal loan raised by the corporation includes a reference to a loan or renewal loan raised by the Authority or the Commission.

23 Development areas

(1) The following areas shall be deemed to have been constituted under section 132 of the *Environmental Planning and Assessment Act 1979* as a development area, to be known as the Sydney Region Development Area, namely:

Cities of Sydney, Blacktown, Fairfield, Liverpool, Parramatta, Penrith and Campbelltown.

Municipalities of Ashfield, Auburn, Bankstown, Botany, Burwood, Camden, Canterbury, Concord, Drummoyne, Holroyd, Hunter's Hill, Hurstville, Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, Manly, Marrickville, Mosman, North Sydney, Randwick, Rockdale, Ryde, South Sydney, Strathfield, Waverley, Willoughby, Windsor and Woollahra.

Shires of Baulkham Hills, Gosford, Hornsby, Sutherland, Warringah and Wyong.

(2) The following areas shall be deemed to have been constituted under section 132 of the *Environmental Planning and Assessment Act 1979* as a development area, to be known as the Hunter Region Development Area, namely:

Cities of Newcastle, Greater Cessnock and Maitland.

Municipality of Lake Macquarie.

Shire of Port Stephens.

(3) The following areas shall be deemed to have been constituted under section 132 of the *Environmental Planning and Assessment Act 1979* as a development area, to be known as the Illawarra Region Development Area, namely:

Cities of Wollongong and Shoalhaven.

Municipalities of Bowral, Kiama and Shellharbour.

Shires of Mittagong and Wingecarribee.

(4) A development area referred to in this clause may be altered or abolished under section 133 of the *Environmental Planning and Assessment Act 1979*.

(5) Section 135 of the *Environmental Planning and Assessment Act 1979* does not apply to a development area as deemed to have been constituted under this clause.

24 Amendments made by repealed Act

The amendments made by section 22 of and the Schedule to the *New South Wales Planning and Environment Commission Act 1974*, except the amendment of section 342B of the *Local Government Act 1919*, continue to have force and effect as if the *New South Wales Planning and Environment Commission Act 1974* had not been repealed by this Act.

25 Activity under s 519C (7) or Div 3A of Pt 24 of Local Government Act 1919

Any act, matter or thing done or omitted by the Commission under or for the purposes of section 519C (7) or Division 3A of Part 24 of the *Local Government Act 1919* shall be deemed to have been done or omitted by the Director under or for the purposes of that subsection or Division as in force after the appointed day.

26 Appointment of Director before appointed day

A person may be appointed before the appointed day as Director, but his term of office as such shall not commence before the appointed day.

27 Unexpended funds appropriated in connection with the Commission

The sums authorised by the *Appropriation Act 1979* to be appropriated out of the Consolidated Revenue Fund and to be issued and applied for or towards expenditure under the heading "Minister for Planning and Environment" in connection with the Commission shall be deemed, to the extent that, at the appointed day, they have not been so issued or applied, to be sums authorised by that Act to be appropriated out of that Fund and to be issued and applied for or towards expenditure in connection with the corporation, Director and the Department.

28 Proceedings pending in former tribunals

(1) Any proceedings (other than proceedings referred to in subclause (2)):

(a) pending in a former tribunal immediately before the appointed day, or

(b) pending in the Supreme Court immediately before that day and that would, but for this Act, be required thereafter to be remitted to the Land and Valuation Court, otherwise than on an appeal from that Court to the Supreme Court,

shall be deemed to be proceedings pending in the new Court, and shall be continued in and disposed of by the new Court accordingly.

(2) Any proceedings pending in the Supreme Court or the Land and Valuation Court under section 10 of the *Growth Centres (Land Acquisition) Act 1974* immediately before the appointed day shall be deemed to be proceedings pending in the new Court, and shall be continued in and disposed of by the new Court accordingly, as if that section had not been amended by this Act, but as if:

(a) references in that section to the Supreme Court and the Land and Valuation Court were references to the new Court, and

(b) subsection (5) of that section were amended by omitting the words "Upon remission to the Land and Valuation Court of proceedings instituted under subsection (2) in respect of a resumption, that Court" and by inserting instead the words "In proceedings instituted under subsection (2) in respect of a resumption, the Land and Environment Court".

(3) The person who was the registrar or other officer having the custody of any records of a former tribunal or the Supreme Court immediately before the appointed day shall, as soon as practicable after that day, forward to the new Court all documents held by him and relating to any proceedings referred to in subclause (1) or (2).

29 Other pending proceedings

Any proceedings pending in the Supreme Court or the District Court or before any other body or person immediately before the appointed day (being proceedings which, on or after that day, may only be commenced in the new Court, but excluding proceedings referred to in clause 28) shall be continued and disposed of as if this Act, the *Environmental Planning and Assessment Act 1979* and the *Land and Environment Court Act 1979* had not been enacted.

30 Construction of references to former tribunals

(1) On and from the appointed day, a reference in any other Act, or in any regulation, by-law or other statutory instrument or in any other document, whether of the same or of a different kind, to:

(a) a former tribunal, or

(b) a valuation court constituted under the *Valuation of Land Act 1916*,

shall be read and construed as a reference to the new Court.

(2) On and from the appointed day, a reference in the *Local Government Act 1919*, or in any instrument under that Act, to the "Tribunal" shall, unless a contrary intention appears, be read and construed as a reference to the new Court.

(3) Subclause (1) does not apply to references in section 5 of the *Land Development Contribution Management Act 1970* or in any other prescribed enactments, instruments or documents.

31 Construction of references to Private Irrigation Districts and Water (Amendment) Act 1973

On and from the appointed day, a reference in any other Act, or in any regulation, by -law or other statutory instrument, or in any other document, whether of the same or of a different kind, to the "*Private Irrigation Districts and Water (Amendment) Act, 1973*" shall be read and construed as a reference to the "*Private Irrigation Districts Act, 1973*".

32 Appeals expressed to be under sec 341 of Local Government Act 1919

(cf 1958, No 21, s 7 (8))

Where by or under any Act a right of appeal to the new Court in accordance with the provisions of section 341 of the *Local Government Act 1919* is expressly conferred upon any person in respect of any matter arising out of or with respect to the carrying into effect or enforcing of an environmental planning instrument, a reference in any such Act to that section shall be read and construed as a reference to section 97 of the *Environmental Planning and Assessment Act 1979*.

33 Land Agents

A person whose registration in the Land and Valuation Court pursuant to the *Land Agents Act 1927* as a land agent was in force immediately before the appointed day shall be deemed to have been registered as such in the new Court on that day.

34 Schedule 2 to Public Service Act 1979

The amendments by this Act of Schedule 2 to the *Public Service Act 1979* do not affect any power under that Act to amend that Schedule.

35 Delegations

A delegation in force under section 69 of the *State Planning Authority Act 1963*, or section 71 of the *Land Development Contribution Management Act 1970*, immediately before the appointed day shall be deemed to be a delegation made under section 23 of the *Environmental Planning and Assessment Act 1979*.

36 Assessments under State Planning Authority Act 1963

An assessment made under section 47 of the *State Planning Authority Act 1963* shall be deemed to be an assessment made under section 143 of the *Environmental Planning and Assessment Act 1979*.

37 Requirements for easements

For the purposes of section 327 of the *Local Government Act 1919*, as amended by this Act, a requirement made under section 342BG of the *Local Government Act 1919* shall be deemed to be a requirement made by the Land and Environment Court under section 40 of the *Land and Environment Court Act 1979*.

38 Regulations

(1) The Governor may make regulations containing other provisions of a savings or transitional nature consequent on the enactment of this Act, the *Environmental Planning and Assessment Act 1979* or the *Land and Environment Court Act 1979*.

(2) A provision made under subclause (1) may take effect as from the appointed day or a later day.

(3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or a public authority), the rights of that person existing before the date of its publication therein, or

(b) to impose liabilities on any person (other than the State or a public authority) in respect of anything done or omitted to be done before the date of its publication therein.

(4) A provision made under subclause (1) shall, if the regulations expressly so provide, have effect notwithstanding the foregoing clauses of this Schedule (clauses 16, 17, 18, 24 and 27 excepted).

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
Cll	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

This Act is reprinted with the omission of certain amending provisions authorised to be omitted under sec 6 of the Reprints Act 1972.

Table of amending instruments

Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 No 205. Assented to 21.12.1979. Date of commencement, secs 1 and 2 excepted, 1.9.1980, sec 2 and GG No 91 of 4.7.1980, p 3366. This Act has been amended as follows:

1980 No 74 — Local Government (Amendment) Act 1980. Assented to 29.4.1980.
Date of commencement of Sch 8, 1.9.1980, sec 2 (4) and GG No 91 of 4.7.1980, p 3366.

No 103 — Transport Authorities Act 1980. Assented to 1.5.1980.
Date of commencement of Sch 7, 1.7.1980, sec 2 (2).

1982 No 148 — Liquor (Repeals and Savings) Act 1982. Assented to 21.12.1982.
Date of commencement of Sch 1, 1.7.1983, sec 2 (3) and GG No 74 of 20.5.1983, p 2181.

1983 No 174 — Local Government (Regulation of Flats) Amendment Act 1983. Assented to 31.12.1983.
Date of commencement of Sch 1, 19.12.1986, sec 5 and GG No 195 of 19.12.1986, p 6189.
Amended by Miscellaneous Acts (Residential Flat Buildings) Repeal and Amendment Act 1986 No 132.

1984 No 153 — Statute Law (Miscellaneous Amendments) Act 1984. Assented to 10.12.1984.
Date of commencement of the provision of Sch 16 relating to the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979, assent, sec 2 (1).

1985 No 231 — Statute Law (Miscellaneous Provisions) Act 1985. Assented to 18.12.1985.
Date of commencement of Sch 31, assent, sec 2 (1).

1986 No 85 — State Roads Act 1986. Assented to 21.5.1986.

No 132 — Miscellaneous Acts (Residential Flat Buildings) Repeal and Amendment Act 1986. Assented to 4.12.1986.
Date of commencement of Sch 1, 19.12.1986, sec 2 (2) and GG No 195 of 19.12.1986, p 6189.

No 218 — Statute Law (Miscellaneous Provisions) Act (No 2) 1986. Assented to 23.12.1986.
Date of commencement of sec 4, assent, sec 2 (1).

1987 No 63 — Miscellaneous Acts (Education and Public Instruction) Repeal and Amendment Act 1987. Assented to 3.6.1987.
Date of commencement of Sch 1, 17.8.1987, sec 2 (2) and GG No 126 of 31.7.1987, p 4254.

No 143 — Water Legislation (Repeal, Amendment and Savings) Act 1987. Assented to 16.6.1987.
Date of commencement of Sch 1, 3.7.1987, sec 2 (2) and GG No 115 of 3.7.1987, p 3785.

1995	No 90	Environmental Planning Legislation Amendment Act 1995. Assented to 21.12.1995. Date of commencement, 1.9.1980, sec 2.
2010	No 119	Statute Law (Miscellaneous Provisions) Act (No 2) 2010. Assented to 29.11.2010. Date of commencement of Sch 4, 7.1.2011, sec 2 (2).

Table of amendments

Secs 4, 5	Rep 2010 No 119, Sch 4.
Sch 1	Am 1980 No 103, Sch 7. Rep 2010 No 119, Sch 4.
Sch 2	Am 1980 No 74, Sch 8; 1982 No 148, Sch 1; 1983 No 174, Sch 1; 1984 No 153, Sch 16; 1986 No 85, Sch 1; 1986 No 218, sec 4 (2) (d); 1987 No 63, Sch 1; 1987 No 143, Sch 1. Rep 2010 No 119, Sch 4.
Sch 3	Am 1985 No 231, Sch 31; 1986 No 132, Sch 1; 1995 No 90, sec 3.

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Environmental Planning and Assessment Act 1979 No 203

4 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

accredited certifier, in relation to matters of a particular kind, means the holder of a certificate of accreditation as an accredited certifier under the *Building Professionals Act 2005* in relation to those matters.

advertised development means development, other than designated development, that is identified as advertised development by the regulations, an environmental planning instrument or a development control plan.
Advertised development includes any development for the purposes of a scheduled activity at any premises under the *Protection of the Environment Operations Act 1997* that is not designated development.

advertisement means a sign, notice, device or representation in the nature of an advertisement visible from any public place or public reserve or from any navigable water.

advertising structure means a structure used or to be used principally for the display of an advertisement.

affordable housing means housing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument.

alignment means the boundary line between any public place and any land abutting that place.

area has the same meaning as it has in the *Local Government Act 1993*.

associated structure has the same meaning as in the *Local Government Act 1993*.

brothel means a brothel within the meaning of the *Restricted Premises Act 1943*, other than premises used or likely to be used for the purposes of prostitution by no more than one prostitute.

building includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure or part of a manufactured home, moveable dwelling or associated structure.

Building Code of Australia means the document, published by or on behalf of the Australian Building Codes Board, that is prescribed for purposes of this definition by the regulations, together with:

(a) such amendments made by the Board, and

(b) such variations approved by the Board in relation to New South Wales,

as are prescribed by the regulations.

Building Professionals Board means the Building Professionals Board constituted under the *Building Professionals Act 2005*.

building work means any physical activity involved in the erection of a building.

bush fire prone land, in relation to an area, means land recorded for the time being as bush fire prone land on a bush fire prone land map for the area.

bush fire prone land map for an area means a map for the area certified as referred to in section 146 (2).

certifying authority means a person who:

(a) is authorised by or under section 85A to issue complying development certificates, or

(b) is authorised by or under section 109D to issue Part 4A certificates.

change of building use means a change of use of a building from a use that the *Building Code of Australia* recognises as appropriate to one class of building to a use that the *Building Code of Australia* recognises as appropriate to a different class of building.

compliance certificate means a certificate referred to in section 109C (1) (a).

complying development is development for which provision is made as referred to in section 76A (5).

complying development certificate means a complying development certificate referred to in section 85.

consent authority, in relation to a development application or an application for a complying development certificate, means:

(a) the council having the function to determine the application, or

(b) if a provision of this Act, the regulations or an environmental planning instrument specifies a Minister, the Planning Assessment Commission, a joint regional planning panel or public authority (other than a council) as having the function to determine the application—that Minister, Commission, panel or authority, as the case may be.

construction certificate means a certificate referred to in section 109C (1) (b).

control, in relation to development or any other act, matter or thing, means:

(a) consent to, permit, regulate, restrict or prohibit that development or that other act, matter or thing, either unconditionally or subject to conditions, or

(b) confer or impose on a consent authority functions with respect to consenting to, permitting, regulating, restricting or prohibiting that development or that other act, matter or thing, either unconditionally or subject to conditions.

corporation means the corporation constituted by section 8 (1).

council has the same meaning as it has in the *Local Government Act 1993*.

Court means the Land and Environment Court.

critical habitat has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

critical stage inspections means the inspections prescribed by the regulations for the purposes of section 109E (3) (d).

Crown land has the same meaning as in the *Crown Lands Act 1989*.

Department means the Department of Planning.

designated development has the meaning given by section 77A.

development means:

(a) the use of land, and

(b) the subdivision of land, and

(c) the erection of a building, and

(d) the carrying out of a work, and

(e) the demolition of a building or work, and

(f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

development application means an application for consent under Part 4 to carry out development but does not include an application for a complying development certificate.

development area means land constituted as a development area in accordance with Division 1 of Part 7.

development consent means consent under Part 4 to carry out development and includes, unless expressly excluded, a complying development certificate.

development control plan (or ***DCP***) means a development control plan made, or taken to have been made, under Division 6 of Part 3 and in force.

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

(i) road patterns,

(j) drainage,

(k) the carrying out of earthworks,

(l) the effects of development on patterns of wind, sunlight, daylight or shadows,

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed.

Director-General means the Director-General of the Department.

ecological community has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

ecologically sustainable development has the same meaning it has in section 6 (2) of the *Protection of the Environment Administration Act 1991*.

endangered ecological community means an endangered ecological community within the meaning of the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

endangered population means an endangered population within the meaning of the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

endangered species means an endangered species within the meaning of the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

environment includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

environmental planning instrument means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force.

exempt development is development for which provision is made as referred to in section 76 (2).

functions includes powers, authorities and duties.

habitat has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

independent hearing and assessment panel means a panel constituted under section 23I.

integrated development has the meaning given by section 91.

joint regional planning panel (or ***regional panel***) means a joint regional planning panel constituted under section 23G.

land includes:

(a) the sea or an arm of the sea,

(b) a bay, inlet, lagoon, lake or body of water, whether inland or not and whether tidal or non-tidal, and

(c) a river, stream or watercourse, whether tidal or non-tidal, and

(d) a building erected on the land.

local environmental plan (or ***LEP***)—see section 24 (2).

manufactured home has the same meaning as in the *Local Government Act 1993*.

moveable dwelling has the same meaning as in the *Local Government Act 1993*.

objector means a person who has made a submission under section 79 (5) by way of objection to a development application for consent to carry out designated development.

occupation certificate means a certificate referred to in section 109C (1) (c).

occupier includes a tenant or other lawful occupant of premises, not being the owner.

officer of the Department means an officer or employee of the Department, and includes the Director-General.

owner has the same meaning as in the *Local Government Act 1993* and includes, in Division 2A of Part 6, in relation to a building, the owner of the building or the owner of the land on which the building is erected.

owner-builder has the same meaning as in the *Home Building Act 1989*.

Part 4A certificate means a certificate referred to in section 109C (1) (a), (b), (c) or (d).

person includes an unincorporated group of persons or a person authorised to represent that group.

place of shared accommodation includes a boarding house, a common lodging house, a house let in lodgings and a backpackers hostel.

Planning Assessment Commission means the Planning Assessment Commission constituted under section 23B.

planning assessment panel means a panel listed in Schedule 5B.

population has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

premises means any of the following:

(a) a building of any description or any part of it and the appurtenances to it,

(b) a manufactured home, moveable dwelling and associated structure,

(c) land, whether built on or not,

(d) a tent,

(e) a swimming pool,

(f) a ship or vessel of any description (including a houseboat).

principal certifying authority means a principal certifying authority appointed under section 109E.

principal contractor for building work means the person responsible for the overall co-ordination and control of the carrying out of the building work.

Note. If any residential building work is involved, the principal contractor must be the holder of a contractor licence under the *Home Building Act 1989*.

prohibited development means:

(a) development the carrying out of which is prohibited on land by the provisions of an environmental planning instrument that apply to the land, or

(b) development that cannot be carried out on land with or without development consent.

provision for fire safety means provision for any or all of the following:

(a) the safety of persons in the event of fire,

(b) the prevention of fire,

(c) the detection of fire,

(d) the suppression of fire,

(e) the prevention of the spread of fire.

public authority means:

(a) a public or local authority constituted by or under an Act, or

(b) a government Department, or

(c) a statutory body representing the Crown, or

(d) a chief executive officer within the meaning of the *Public Sector Management Act 1988* (including the Director-General), or

(e) a statutory State owned corporation (and its subsidiaries) within the meaning of the *State Owned Corporations Act 1989*, or

(f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or

(g) a person prescribed by the regulations for the purposes of this definition.

public place has the same meaning as in the *Local Government Act 1993*.

public reserve has the same meaning as in the *Local Government Act 1993*.

public road has the same meaning as in the *Roads Act 1993*.

recovery plan has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

region means any land that the Minister, under subsection (6), declares to be a region, except as provided by subsection (6A).

regulation means a regulation made under this Act.

relevant planning authority:

(a) in relation to environmental planning instruments—see section 54, or

(b) in relation to development control plans—see section 74B.

residential building work has the same meaning as in the *Home Building Act 1989*.

species has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

species impact statement has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

State environmental planning policy (or ***SEPP***)—see section 24 (2).

subdivision certificate means a certificate referred to in section 109C (1) (d).

subdivision of land has the meaning given by section 4B.

subdivision work means any physical activity authorised to be carried out under the conditions of a development consent for the subdivision of land, as referred to in section 81A (3).

temporary structure includes a booth, tent or other temporary enclosure (whether or not part of the booth, tent or enclosure is permanent), and also includes a mobile structure.

threat abatement plan has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

threatened species has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

threatened species, populations and ecological communities and ***threatened species, population or ecological community*** have the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*, except as provided by section 5D.

Note. Section 5D excludes vulnerable ecological communities from this expression.

threatening process has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

vulnerable ecological community has the same meaning as in the *Threatened Species Conservation Act 1995*.

vulnerable species has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

(2) A reference in this Act to:

(a) the use of land includes a reference to a change of building use, and

(b) the erection of a building includes a reference to:

(i) the rebuilding of, the making of alterations to, or the enlargement or extension of, a building, or

(ii) the placing or relocating of a building on land, or

(iii) enclosing a public place in connection with the construction of a building, or

(iv) erecting an advertising structure over a public road, or

(v) extending a balcony, awning, sunshade or similar structure or an essential service pipe beyond the alignment of a public road, and

(c) the carrying out of a work includes a reference to:

(i) the rebuilding of, the making of alterations to, or the enlargement or extension of, a work, or

(ii) enclosing a public place in connection with the carrying out of a work, and

(d) a work includes a reference to any physical activity in relation to land that is specified by a regulation to be a work for the purposes of this Act but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act, and

(e) the demolition of a building or work includes a reference to enclosing a public place in connection with the demolition of a building or work, and

(f) the carrying out of development includes a reference to the use of land or a building, the subdivision of land, the erection of a building, the carrying out of a work, the demolition of a building or work or the doing of any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument.

(3) Where functions are conferred or imposed by or under this Act on a council:

(a) except as provided in paragraph (b), those functions may be exercised in respect of an area by the council of that area, or

(b) if the functions are conferred or imposed in respect of part of an area, those functions may be exercised in respect of that part by the council of that area.

(3A) Where functions are conferred or imposed by or under this Act on a public authority, being a government Department or some other unincorporated group of persons, those functions may be exercised by a person who is authorised to exercise those functions on behalf of the public authority.

(4) A reference in this Act to the exercise of a function includes, where that function is a duty, a reference to the performance of that duty.

(5) A reference in this Act to an authority or person preparing a document includes a reference to the authority or person causing the document to be prepared on the authority's or person's behalf.

(6) The Minister may, by order published in the Gazette, declare any land, whether or not consisting of areas or parts of areas, to be a region for the purposes of this Act.

Editorial note. For orders pursuant to this subsection see Gazettes of 13.11.1981, p 5819; 11.12.1981, p 6381 and the declaration of the Shire of Snowy River as a Region and Gazettes No 46 of 26.3.1982, p 1334; No 85 of 25.6.1982; No 142 of 5.10.1984; No 40 of 15.2.1985, p 729; No 88 of 31.5.1985, p 2430; No 60 of 11.4.1986, p 1593; No 81 of 16.5.1986, pp 2186, 2193; No 60 of 27.3.1987, p 1666; No 199 of 31.12.1987, p 7354; No 38 of 7.4.1989, p 1841; No 142 of 11.10.1991, p 8758; No 60 of 15.5.1992, p 3337; No 65 of 6.5.1994, p 2081; No 5 of 20.1.1995, p 418; No 57 of 10.5.1996, p 2166; No 115 of 11.10.1996, p 6927; No 175 of 16.11.2001, p 9268; No 137 of 5.9.2003, p 9146; No 174 of 31.10.2003, p 10329 and No 83 of 23.6.2010, p 2899.

(6A) However, for the purposes of sections 5A, 79B (5) and 112D, a region has the same meaning as in the *Threatened Species Conservation Act 1995* or (subject to section 5C) Part 7A of the *Fisheries Management Act 1994*.

(7) A reference in this Act to a direction is a reference to a direction in writing.

(7A) A power, express or implied, of the Minister to make a declaration under this Act includes a power to revoke or amend the declaration.

(8) A power, express or implied, to give a direction under this Act includes a power to revoke or amend the direction.

(8A) If an environmental planning instrument confers a power on any person or body to make an order (whether or not the order must be in writing), the power includes a power to amend or repeal an order made in the exercise of the power.

(9) A reference in this Act to a prescribed form includes a reference to a form that is to the effect of that prescribed form.

(10) A reference in this Act to any act, matter or thing as specified in an environmental planning instrument includes a reference to any act, matter or thing that is of a class or description as specified in such an instrument.

(11) A reference in this Act to the granting of consent includes a reference to the granting of consent subject to conditions.

(12) Without affecting the generality of section 8 (b) of the *Interpretation Act 1987*, a reference in this Act to the owner or lessee of land includes a reference to joint or multiple owners or lessees of land.

(13) Notes in this Act are explanatory notes and do not form part of this Act.

(14) A reference in this Act to an original document, map or plan includes a reference to a document, map or plan created, or a copy of which is kept, in electronic form.

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