NEW SOUTH WALES LAND AND ENVIRONMENT COURT

Aldous v Greater Taree City Council and Another

[2009] NSWLEC 17

Biscoe J

8-10 December 2008, 19 February 2009

Development Consent — Delegated authority — Indivisibility of function to determine development application — Validity of development consent — Limited instrument of delegation — Assessment by delegate except for applications to which objections received and which, in delegate's view significant — Development consent and notice of determination issued by council officer — Council officer lacking authority to do so — Local Government Act 1993 (NSW), ss 377, 378 — Environmental Planning and Assessment Act 1979 (NSW), s 80.

Development Consent — Uncertainty — Finality — Validity — Distinction between uncertainty and lack of finality — Development consent subject to "appropriate" conditions approved by council resolution — Development consent and notice of determination issued by council officer — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 80, 80A, 81 — Environmental Planning and Assessment Regulation 2000 (NSW), cl 8B.

Development Consent — Conditions — Validity — Deferred essential conditions — Development consent subject to "appropriate" conditions approved by council resolution — Development consent and notice of determination issued by council officer — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 80, 80A, 81 — Environmental Planning and Assessment Regulation 2000 (NSW), cl 8B.

Ecologically Sustainable Development — Development consent — Validity — Principles of ecologically sustainable development — Mandatory public interest consideration — Relevance of mandatory consideration to development proposed — Effect of climate change induced coastal erosion on beachfront development — Environmental Planning and Assessment Act 1979 (NSW), Pt 4, s 79C — State Environmental Planning Policy No 71 – Coastal Protection (NSW), cll 2(1)(l), 7(b), 8.

Development Consent — Validity — Invalid development consent — Imposition by court of validating term — Circumstances — Land and Environment Court Act 1979 (NSW), s 25B.

Greater Taree City Council (the council) granted development consent to Australian Equity Investments Pty Ltd (the second respondent) to construct a new dwelling on a beachfront property near Taree (the property). A report prepared for council several years before referred to the soil erosion rate expected in the area.

The proposed dwelling was to be at the rear of the property behind the council's 100 year coastal impact line and was to replace an existing dwelling that was forward of that line. A report prepared for council by the council's Manager Building Control acknowledged that this would be in accordance with the council's coastal management plan.

The proposed dwelling had two storeys, with car parking level below. The car parking level was not considered to be a storey because its ceiling was less than one metre above natural ground level. The applicant was the owner of, and resided in a three storey house located immediately behind the property. He objected to the development application on the basis that it would block views of the ocean from the first and second storeys of his house.

Council resolved to approve the development application subject to "appropriate" conditions to address specified subject matters. It did not resolve that anyone other than council itself should decide the content of those conditions. Absent further consideration by council and beyond the scope of any standing delegation, a staff assessor signed and issued a notice of determination stating that consent was granted on the date of the notice subject to conditions therein set out that he had drafted after consultations with other council officers.

A council could, by resolution, delegate to its general manager the function of determining development applications and the general manager could, in turn, sub-delegate that function to a council employee: ss 377 and 378 of the *Local Government Act 1993* (NSW).

Section 80(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) relevantly provided:

> 80 Determination
>
> (1) *General*
>
> A consent authority is to determine a development application by:
>
> (a) granting consent to the application, either unconditionally or subject to conditions, or
>
> (b) refusing consent to the application.

Section 81 of the EPA Act required a consent authority, in accordance with the regulations, to notify its determination to the applicant and other prescribed persons.

Section 80A of the EPA Act provided in part:

> 1) *Conditions – generally*
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> A condition of development consent may be imposed if:
>
> (a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or
>
> (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or
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> (c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or

(d) it limits the period during which development may be carried out in accordance with the consent so granted, or

(e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or

(f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or

(g) it modifies details of the development the subject of the development application, or

(h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)-(9) of this section or section 94, 94A, 94EF or 94F.

(2) *Ancillary aspects of development*

A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority.

(3) A consent authority that has not determined a request to indicate whether a specified aspect of development has been carried out to the satisfaction of the consent authority, or a person specified by the consent authority, within the relevant period, prescribed by the regulations, applicable to the aspect or the development is, for the purpose only of section 97, taken to have determined the request by indicating that it, or the person, is not satisfied as to the specified aspect.

(4) *Conditions expressed in terms of outcomes or objectives*

A consent may be granted subject to a condition expressed in a manner that identifies both of the following:

(a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve,

(b) clear criteria against which achievement of the outcome or objective must be assessed.

Section 79C of the EPA Act mandated that a council took into account the public interest when determining whether to grant development consent as well as the provisions of any development control plan and the likely impacts of the development.

Section 25B of the *Land and Environment Court Act 1979* (NSW) (Court Act) provided that the Court, instead of declaring or determining that a development consent was invalid, whether in whole or in part, could make an order "(b) specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations)".

The relevant Development Control Plan provided that while quality views were not entitlements, they were the basis for the desirability of certain locations and every effort should be made to ensure that they were not built out.

Held: (1) The council resolution is not a consent within the meaning of s 80(1) of the EPA Act and the purported development consent and Notice of Determination is invalid.

(2) Under the EPA Act, it is the s 80(1) development consent, not the s 80A Notice of Determination, that is the consent authority's determination.

(3) That the date of consent notified was the date of the Notice, not the date of the resolution, supported a conclusion that the resolution was not a consent but rather, a step towards determining the application. To have any effect, the resolution had to be one that envisaged future council approval of appropriate conditions before any final consent.

(4) Construed as a purported immediate consent, the resolution would be invalid for lacking finality and certainty. As such, it would not be saved by falling within s 80A(4) of the EPA Act.

Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277, applied.

Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349; *Walker v Minister for Planning* (2007) 157 LGERA 124, considered.

(5) A delegate must act within the delegation. Delegated authority can only be exercised if the conditions for its exercise are satisfied.

Lyons v Sutherland Shire Council (2001) 117 LGERA 334, applied.

(6) If the assessor's actions had been within delegated authority, then the consent would have been granted partly by council and partly by him. That would have offended the principle that the function of determining a development application under s 80(1) of the EPA Act is indivisible.

Belmorgan Property Development Pty Ltd v GPT Re Ltd (2007) 153 LGERA 450, considered.

(7) In the context of Pt 4 of the EPA Act, the public interest is a mandatory consideration which includes the principles of ecologically sustainable development (ESD) and, in particular, climate change induced coastal erosion. The evidence has not established that the council failed to do so.

Minister for Planning v Walker (2008) 161 LGERA 423, discussed.

(8) Section 25B(1)(b) of the Court Act only permits an order specifying terms compliance with which "will" validate an earlier consent. Such terms should identify steps which have not been taken, which could appropriately be taken, and which, if taken, "will" result in validity.

(9) If a council, in granting development consent, fails to consider a mandatory relevant matter under s 79C of the EPA Act when purporting to grant development consent, it can not be said that an order that it now do so "will" validate that consent because, on consideration of that matter, which must then be weighed and balanced against all other matters relevant to the council's consideration, the council may decide to refuse consent.

(10) An order under s 25B of the Court Act purporting to impose a validating term that a council consider a relevant matter under s 79C of the EPA Act requires the matter to be taken into consideration not at the earlier time that the consent referred to in s 25B has been purportedly but invalidly granted but later, pursuant to the order. That does not meet the requirement of s 79C of the EPA Act that the consent authority take into consideration the relevant matters specified therein "in" determining the development application.

(11) It is inappropriate to make an order under s 25B of the Court Act in cases of failure to consider a matter under s 79C of the EPA Act.

Centro Properties Ltd v Hurstville City Council (2004) 135 LGERA 257; *Belmore Residents' Action Group Inc v Canterbury City Council* (2006) 147 LGERA 226; *Bungendore Residents Group Inc v Palerang Council (No 4)* [2007] NSWLEC 536; *Hastings Point Progress Associaion Inc v Tweed Shire Council* [2008] NSWLEC 219; *Clark v Wollongong City Council (No 2)* [2008] NSWLEC 226; *Mid Western Community Action Group Inc v Mid-Western Regional Council* [2007] NSWLEC 411; *Mid Western Community Action Group Incorporated v Mid-Western Regional Council (No 2)* [2008] NSWLEC 143, referred to.

(12) On any view of the extent of the power in s 25B of the Court Act, it does not extend to permitting an order for conditional validity of a development consent where there has been a complete absence of power to grant it.

GPT Re Ltd v Wollongong City Council (No 2) (2006) 151 LGERA 158, applied.

Discussion of distinction between incomplete development consent and uncertain development consent.

Cases Cited

Anderson v Director General, Department of Environmental and Climate Change (2008) 163 LGERA 400.

Belmore Residents' Action Group Inc v Canterbury City Council (2006) 147 LGERA 226.

Belmorgan Property Development Pty Ltd v GPT Re Ltd (2007) 153 LGERA 450.

Broad Henry v Director-General, Department of Environment and Conservation (2007) 159 LGERA 172.

Bruce v Cole (1998) 45 NSWLR 163.

Bungendore Residents Group Inc v Palerang Council (No 4) [2007] NSWLEC 536.

Centro Properties Ltd v Hurstville City Council (2004) 135 LGERA 257.

Charles & Howard Pty Ltd v Redland Shire Council (2007) 159 LGERA 349.

Clark v Wollongong City Council (No 2) [2008] NSWLEC 226.

F & D Bonaccorso Pty Ltd v Canada Bay Council (No 5) [2008] NSWLEC 235.

Gippsland Coastal Board v South Gippsland Shire Council (No 2) [2008] VCAT 1545.

GPT RE Ltd v Belmorgan Property Development Pty Ltd [2008] NSWCA 256.

GPT Re Ltd v Wollongong City Council (No 2) (2006) 151 LGERA 158.

Gray v Minister for Planning (2006) 152 LGERA 258.

Hastings Point Progress Associaion Inc v Tweed Shire Council [2008] NSWLEC 219.

Kindimindi Investments Pty Ltd v Lane Cove Council (2007) 150 LGERA 333.

Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277.

Lend Lease Management Pty Ltd v Sydney City Council (1986) 68 LGRA 61.

Lyons v Sutherland Shire Council (2001) 117 LGERA 334.

Mid Western Community Action Group Inc v Mid-Western Regional Council [2007] NSWLEC 411.

Mid Western Community Action Group Incorporated v Mid-Western Regional Council (No 2) [2008] NSWLEC 143.

Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349.

Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2008] SASC 57.

Notaras v Waverley Council (2007) 161 LGERA 230.

Parramatta City Council v Hale (1982) 47 LGRA 319.

Planning, Minister for v Walker (2008) 161 LGERA 423.

Sharples v Minister for Local Government (2008) 166 LGERA 302.

Walker v Minister for Planning (2007) 157 LGERA 124.

Winn v Director-General of National Parks and Wildlife (2001) 130 LGERA 508.

Zhang v Canterbury City Council (2001) 51 NSWLR 589; 115 LGERA 373.

Application

The applicant challenged the validity of a development consent granted by Greater Taree City Council to Australian Equity Investments Pty Ltd to construct a new dwelling on a beachfront property near Taree. The facts of the case are set out in the judgment.

M Baird, for the applicant.

M Fraser, for the first respondent.

Cur adv vult

19 February 2009

Biscoe J.

1 The applicant, Mr Adrian Aldous, challenges the validity of a development consent granted by Greater Taree City Council (the first respondent) to Australian Equity Investments Pty Ltd (the second respondent) to construct a new dwelling on a beachfront property at 4/40 Lewis Street, Old Bar, near Taree (the Property).

2 There are six challenges:

(a) the council resolution to grant development consent is void for uncertainty and because it deferred essential conditions;

(b) the Notice of Determination of the development application is invalid because it was not issued by the council and was not in accordance with the council resolution;

(c) the council failed to take into account the principles of ecologically sustainable development (ESD), in particular the council failed to take into account or assess climate change induced coastal erosion;

(d) the council failed to take into account the requirements of cl 8 of *State Environmental Planning Policy No 71 – Coastal Protection* (NSW) (SEPP 71);

(e) the council failed to take into account the view loss from 3/40 Lewis Street, Old Bar (Mr Aldous' home);

(f) the development consent was manifestly unreasonable.

3 The proposed dwelling is to be at the rear of the Property behind the council's 100 year coastal impact line and is to replace an existing dwelling that is forward of that line. The proposed dwelling has two storeys, with a car parking level below, which is not considered to be a storey because its ceiling is less than one metre above natural ground level. Mr Aldous is the owner of, and resides in a three storey house at 3/40 Lewis Street, Old Bar, located immediately behind the Property. He objected to the development application.

First and second challenges: council resolution and Notice of Determination

4 The council received the development application in May 2007. The council's Manager Building Control, Mr James Boyce, was appointed the

assessing officer. A council may by resolution delegate to its general manager the function of determining development applications and the general manager may in turn sub-delegate that function to a council employee: ss 377 and 378 *Local Government Act 1993* (NSW). In the present case, the council delegated functions to the general manager who sub-delegated certain functions to Mr Boyce under an instrument of delegation, which relevantly provided:

> B 1. Granting, modification or extension of consent/approval (either unconditionally or subject to conditions) for development applications which comply with the Council's codes and policies or where they vary from Council's codes and policies, which in the Manager Building Control's view, do not compromise the Council's Planning and Development objectives, other than;
>
> (a) applications to which objections have been received and which, in the Manager Building Control's view are significant …

5 Council received two objections following the notification period. One was from Mr Aldous. Mr Boyce formed the view that the development application was significant having regard to the subjective nature of some of the concerns outlined in the objections, including the use of the building, the impact on views and climate change/dunal erosion. Consequently, as he appreciated, the exclusion in cl B1(a) of the instrument of delegation applied and he had no delegated authority in relation to the development application.

6 On 12 December 2007 the Council Planning Committee conducted an on-site inspection and resolved that the matter be referred to a council meeting on 19 December 2007 and that a further report be prepared to council with respect to certain matters.

7 Mr Boyce prepared this further report to council in which he recommended that:

> Council approve development application … subject to appropriate conditions, including
>
> - Removal of the ground floor paving that encroaches beyond the coastal impact line
> - Landscaping
> - Survey Certificate
> - Footing design
> - Stormwater drainage
> - Basement drainage
> - Bushfire requirements
> - Demolition of the existing building

8 The council at its meeting on 19 December 2007 adopted the recommendation. The minutes of the meeting record the following:

> (This matter was referred by CM.75 of the Planning Committee meeting on 12 December 2007.)
>
> *MOVED* Cr West/Hogan (*as per recommendation*)
>
> That Council approve development application (802/2007D) subject to appropriate conditions including:
>
> - removal of the ground floor paving that encroaches beyond the coastal impact line,
> - landscaping,
> - survey certificate,
> - footing design,

- stormwater drainage,
- basement drainage,
- bushfire requirements,
- demolition of the existing building.

An *AMENDMENT* was *MOVED* Cr Hannah/Richardson

That consideration of this application be further deferred for report regarding the impact of climate change on the coastal impact line at Old Bar.

The *AMENDMENT* was *LOST*

A *FURTHER AMENDMENT* was *MOVED* Cr Tickle/Wilson

That consideration of this application be further deferred pending an inquiry of the Department of Lands and Water Conservation as to whether their advice of 1996 remains current.

The *FURTHER AMENDMENT* was *LOST*

The *MOTION* was *CARRIED*

(Emphasis in original.)

9 Following the meeting, Mr Boyce proceeded to formulate the conditions of consent. Although he gave evidence that he readily understood what the council was seeking, it is clear that he exercised his independent judgment as to the conditions that would be imposed and their content, subject to including conditions relating to the eight subjects required by the council resolution. He did so after consultation with three other council officers: the Manager Development Control, the Senior Development Planner and the Manager Investigation and Design. He referred to a council document called "Conditions for Class 1 & 10 buildings" with numerous boxes on it under various headings. Although the content of the boxes was not explored in evidence, the inference is that they represented alternative precedent conditions relating to the headings. Mr Boyce ticked some of the boxes to call up precedent conditions to which those boxes related. Other conditions were hand drafted by him on the document, as follows:

NOTE: The structural engineering design of the dwelling shall enable the completed building to withstand the effects of continued coastal erosion for the full life cycle of the building.

D/A Condition 202, 401, 409, 410, 411, 412, 413, 414

The ground floor terrace pavers are not to encroach over the one hundred year coastal impact line.

A landscaping plan designed in accordance with council's landscape is to be deposited with and approved by council prior to the release of the construction certificate. The landscaping plan must indicate:—

[a printed list of matters then appeared on the document]

Revegetation details for the site of the existing dwelling which is to be demolished. In this regard the proponent should seek to extend the coastal vegetation corridor from the property that adjoins the development site's southern boundary.

Full details of the proposed fencing are to be deposited with and approved by council prior to the issue of a construction certificate.

All demolition works (including removal of waste) associated with the existing dwelling and garage are to be completed to the satisfaction of council prior to the commencement of the construction of the new dwelling.

There then appeared on the document printed terms relating to excavation work.

10 On 21 January 2008 Mr Boyce signed and issued a Notice of Determination of the development application which stated that consent was granted subject to the conditions attached, that the date of determination was 21 January 2008, and that the consent operated from that date. Forty four conditions were attached covering some nine pages. They were not limited to the specific matters enumerated in the non-exhaustive list of matters in the council resolution. Their number exceeds the number of boxes ticked and conditions drafted by Mr Boyce on the form referred to at [9] above.

11 The applicant submits that the council resolution is void for uncertainty and because it deferred essential conditions; and that the Notice of Determination is invalid because it was not issued by the council and was not in accordance with the council resolution.

12 The council submits that (a) the resolution approving the development application must be construed in a practical way to the effect that the consent was upon the council's "usual and regular" conditions for a dwelling house, but subject to the additional conditions specified in the resolution; and (b) that in the particular circumstances, the formulation of the terms of the conditions was not done as an act of delegated power but as an act of administration of the council which required no delegation of power to be lawfully undertaken.

13 I uphold the applicant's submissions and reject the council's submissions for the following reasons.

14 Section 80(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) provides:

> 80 Determination
>
> (1) *General*
>
> A consent authority is to determine a development application by:
>
> (a) granting consent to the application, either unconditionally or subject to conditions, or
>
> (b) refusing consent to the application.

15 Section 81 of the EPA Act requires a consent authority, in accordance with the regulations, to notify its determination to the applicant and other prescribed persons. It is the development consent, not the notice of determination, that is the consent authority's determination: *Kindimindi Investments Pty Ltd v Lane Cove Council* (2007) 150 LGERA 333 at [12], [17] (*Kindimindi No 2*).

16 The council resolved to approve the development application subject to "appropriate" conditions including those relating to a non-exhaustive list of subjects. There was no resolution that anyone other than the council itself should determine the content of appropriate conditions. Mr Boyce in fact undertook that task in consultation with others and without further reference to the council. The Notice of Determination which he signed stated that the application had been determined on the date of that Notice, 21 January 2008, not on the date of the resolution. That is understandable because the council resolution of 19 December 2007 was subject to "appropriate" conditions and they were apparently not finalised by Mr Boyce until 21 January. The date of determination of the application stated in the Notice supports my conclusion that the council resolution was not the development consent but was a step towards the finalisation of the determination of the application. Plainly, the council intended to achieve something by the resolution, and it should be construed if possible to give effect to that intention. I construe it to mean that

the council approved the development application subject to future approval of appropriate conditions, including conditions relating to the matters listed in the resolution, whereupon there would be a final development consent.

17 Even if the council resolution were construed as a purported immediate development consent, it would be invalid because it lacked finality and certainty in relation to its generally undefined or ill-defined conditions and they fall outside the class of conditions permitted by the EPA Act: *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; 73 LGRA 349; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at [24]-[29], [57] (*Kindimindi No 1*); *Walker v Minister for Planning* (2007) 157 LGERA 124 at [178]-[183].

18 In *Mison* the Court of Appeal held invalid a development consent for a dwelling-house because it included the condition: "Overall height of the dwelling-house being reduced to the satisfaction of Council's chief town planner": at 736; 350. The approved height remained to be determined and might fall at any point within an undefined range. *Mison* decided, in terms of s 90(1) – now s 80(1) – of the EPA Act, that the condition there under consideration was not a "consent" because of the significance of the issue left for further determination, and the consent was not a "consent to the application" because it left open the possibility that the further determination would significantly alter the development for which the application was made: see the analysis in *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at [16] per Spigelman CJ. More generally, *Mison* decided that there are two potentially overlapping categories of conditions which may invalidate a development consent. First, a final and certain condition that significantly alters the development in respect of which the application is made. The consent is invalid because it is not a consent to the development for which approval was sought. Second, a condition which lacks finality or is uncertain so that, in substance, there is no effective consent to the application. The second category includes a condition that is final in that it does not foreshadow any further judgement but is in terms that are uncertain: *Kindimindi No 1* at [24]-[28] and [54]-[55].

19 However, following *Mison*, s 80A of the EPA Act was introduced. It modifies the *Mison* principles including, by s 80A(4), allowing an initial level of uncertainty and lack of finality for a condition of a development consent. Consequently, categorisation of a condition as invalid is not merely because it lacks finality or is uncertain but because it also falls outside the class of conditions permitted by the EPA Act. That question is answered primarily by reference to the terms of s 80A: *Kindimindi No 1* at [57]. Nevertheless, a consent must still answer the description of "a consent to the application" as required by s 80(1)(a): *Winn* at [13]. Section 80A provides in part:

> 1) *Conditions – generally*
>
> A condition of development consent may be imposed if:
>
> (a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or
>
> (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or
>
> (c) it requires the modification or cessation of development (including

the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or

(d) it limits the period during which development may be carried out in accordance with the consent so granted, or

(e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or

(f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or

(g) it modifies details of the development the subject of the development application, or

(h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)-(9) of this section or section 94, 94A, 94EF or 94F.

(2) *Ancillary aspects of development*

A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority.

(3) A consent authority that has not determined a request to indicate whether a specified aspect of development has been carried out to the satisfaction of the consent authority, or a person specified by the consent authority, within the relevant period, prescribed by the regulations, applicable to the aspect or the development is, for the purpose only of section 97, taken to have determined the request by indicating that it, or the person, is not satisfied as to the specified aspect.

(4) *Conditions expressed in terms of outcomes or objectives*

A consent may be granted subject to a condition expressed in a manner that identifies both of the following:

(a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve,

(b) clear criteria against which achievement of the outcome or objective must be assessed.

20 An example of a case in which a purported consent was held not to be final is to be found in *Lend Lease Management Pty Ltd v Sydney City Council* (1986) 68 LGRA 61, approved in *Mison* at 740; 354. In *Lend Lease*, the council resolved to grant development consent for a city building subject to "standard conditions" that were not specified, and several other conditions that were specified. The latter included a condition that the floor space ratio be determined by adding various bonuses to a basic ratio 5.5:1 up to a total limit of 12.4:1 but subject to approval of the city planner. Cripps J held that the development consent was void because (inter alia) (a) it deferred an essential topic of consideration for future determination by the city planner, namely the floor space ratio; and (b) it was subject to "standard conditions" which had not been specified or identified. In the present case, if at the time of the resolution there existed standard conditions of council for a dwelling house which were objectively and readily ascertainable – for example, that had been adopted in an earlier council resolution – then if the council had determined to grant consent on its standard conditions, it would have been merely an administrative act for a council officer to draw up the Notice of Determination incorporating those

conditions. That is not what happened in this case. The council did not purport to grant consent on standard conditions, there is no evidence of standard conditions, and Mr Boyce did not set about his task of drafting the conditions – which took him several weeks in consultation with others – by merely adopting standard conditions.

21 The council resolution did not authorise anyone to approve the appropriate conditions. Mr Boyce had no delegated authority to do so. Such delegated authority as he had was excluded by cl B1 of the instrument of delegation: see [5] above. A delegate must act within the delegation. Delegated authority can only be exercised if the conditions for its exercise are satisfied: *Lyons v Sutherland Shire Council* (2001) 117 LGERA 334 at [16], [40], [51]. Since the council itself did not grant final development consent and approve appropriate conditions and since Mr Boyce had no authority to do so, there has been no valid development consent and the statement in the Notice of Determination of 21 January 2008 that consent was granted on that day was wrong. If Mr Boyce had been given delegated authority to determine appropriate conditions left unresolved by the council resolution, then the development consent would have been granted in part by the council and in part by him. In my opinion, that would have offended the principle of indivisibility of the function to determine a development application under s 80(1) of the EPA Act: *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450 at [12]-[15], [30], [56], [59], [73]-[75]; see also *Lend Lease Management Pty Ltd v Sydney City Council* at 84.

22 In my opinion, for these reasons, the council resolution of 19 December 2007 was not a consent within the meaning of s 80(1) and the purported development consent and Notice of Determination of 21 January 2008 are invalid.

Third challenge: climate change and coastal erosion

23 The applicant submits that the development consent is invalid because the council failed to take into consideration the principles of ESD, in particular the principles of intergenerational equity and the precautionary principle. More particularly, the applicant submits that the council failed to take into account or assess climate change induced coastal erosion. The applicant submits that the council made findings in that regard without any evidence or probative evidence to support them. The applicant submits that it was mandatory for the council to consider, but the council did not consider properly or at all, certain documents that indicated that the rate of coastal erosion had increased to about five metres [T 10/12/08 p 27.33] per annum from less than one metre [As subs say 0.3m at [90], T 10/12/08 at 29.3 say 0.66m] per annum on which the council's 100 year coastal impact line, behind which the proposed dwelling is to be built, was based. The applicant submits that the council was bound either to refuse the development application or to defer consideration of the application until receipt of the coastal impact study that the council was in the process of commissioning. This submission seeks to invoke the exception to the general rule that a decision maker is not obliged to obtain further information unless it is obvious to the decision maker at the time of making the decision that there is further information which is readily available and centrally relevant: *Broad Henry v Director-General, Department of Environment and Conservation* (2007) 159 LGERA 172 at [111] per Preston J.

24 The present case concerns a purported development consent under Part 4 of the EPA Act. In that context, s 79C mandates that a council take into account the

public interest when determining whether to grant development consent. The public interest includes the principles of ESD: *Walker v Minister for Planning* at [77] where the authorities are collected; on appeal *Minister for Planning v Walker* (2008) 161 LGERA 423 at [42]-[43].

25 In *Walker* I held that a 2006 Ministerial concept plan approval, under s 75O of the EPA Act, for a project on a flood constrained coastal plain was invalid because the Minister failed to consider climate change flood risk. Section 75O is in Part 3A of the EPA Act, which applies to the carrying out of certain major infrastructure and other projects in NSW. I reasoned to the following conclusion, at [166]:

> In my opinion, having regard to the subject matter, scope and purpose of the *EPA Act* and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function.

26 The Court of Appeal disagreed and reversed my decision: *Minister for Planning v Walker*. The Court of Appeal held that:

(a) it is mandatory, that is, it is a condition of validity, that a consent authority consider the public interest when determining a development application under Part 4 of the EPA Act in accordance with s 79C, and the public interest embraces ESD: at [42]-[43];

(b) it is mandatory, that is, it is a condition of validity, that the Minister consider the public interest when determining a concept plan approval application under Part 3A: at [39]-[40]. That is because it is so central to the task of a Minister fulfilling functions under a statute like the EPA Act, and there is some confirmation of this from cl 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW), s 79C of the EPA Act, and s 39(4) of the *Land and Environment Court Act 1979* (NSW) which requires this Court to have regard to the public interest when dealing with appeals under ss 75L and 75Q of the EPA Act. However, the Court of Appeal held that the public interest here does not embrace ESD because encouragement of ESD is only one of the objectives of the EPA Act: at [52]-[56]. Although "good decision-making" would involve the Minister taking into account whether any objects of the EPA Act were relevant and taking into account those that were relevant, failure to do so would not make the decision void: at [55]. Consequently, my decision and the similar decision in relation to Part 3A in *Gray v Minister for Planning* (2006) 152 LGERA 258 were wrong: at [51]-[55].

27 The majority (Hodgson JA, Campbell JA agreeing, Bell JA expressing no view) then held, at [56]:

> However, I do suggest that the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act *bona fide* in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions. It was not suggested that

> this was already the situation at the time when the Minister's decision was made in this case, so that the decision in this case could be avoided on that basis; and I would not so conclude.

28 This is a timing point. As I understand it, if the concept plan approval in *Walker* had not been given in 2006 but at some later time, there would be a strong prospect that failure to consider the principles of ESD would avoid the decision because of a growing public perception that ESD is plainly an element of the public interest. It appears that the burgeoning global ESD and climate change scientific and legal developments prior to the 2006 concept plan approval, which I surveyed in my judgment in *Walker*, were insufficient to persuade the majority of the Court of Appeal, as they had persuaded me, that that time was at hand when the 2006 concept plan approval was given. Earlier Preston J, the Chief Judge of this Court, had said in his article, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9 Asia Pacific Journal of Environmental Law 109 at 211: "It is clear that the time for sustainable development has come, and it is essential that individual judges and national judiciaries seize the opportunity."

29 The majority in *Walker* agreed that the Minister had failed to consider the principles of ESD: at [59]-[60]. They spelt out what that consideration would require, at [60]:

> … I agree with the primary judge that consideration of these matters in relation to this project would have required consideration of long-term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and that this almost inevitably would have involved consideration of the effect of climate change flood risk …

30 The majority said that they were surprised and disturbed that the report of the Director-General to the Minister did not address those aspects of ESD and that the Minister did not postpone his decision until he had a report that did: at [61]. The majority held, at [62]-[63]:

> 62 Since these aspects of ESD were not addressed by the Minister in giving his approval to the concept plan, in my opinion they will need to be addressed when development approval is sought, whether this is sought from a consent authority (in relation to stages with a capital investment value of less than $5 million), or from the Minister (in relation to stages with a capital investment value of $5 million or more). I do not think approval of the concept plan should be considered as resolving these matters in favour of the development.
>
> 63 Because of the approval of the concept plan, there will be no objector appeal available from the development approval; so in my opinion it is particularly important that the consent authority and/or the Minister conscientiously address the principles of ESD in dealing with any development application, and not regard the approval of the concept plan as carrying any weight in this consideration. It may be that failure to do so could, having regard to the content of this judgment, be considered evidence of failure to take into account the public interest.

31 This means, as I understand it, that where the Minister does not consider the effect of climate change flood risk on a flood constrained coastal development at the concept plan approval stage, the Minister is bound to do so at the later stage when a Part 3A development approval is sought. However, that may never happen because if the Minister, when giving approval for a concept plan,

determines that no further environmental assessment is required for the project, the Minister may approve or disapprove of the carrying out of the project without further application, environmental assessment or report: s 75P(1)(c). This point tends to support the construction that the Minister is bound to consider ESD when considering a concept plan approval application, for otherwise the Minister, in such cases, will never do so. A further point supportive of that construction, is the legislative intention that concept plan approvals should provide "up-front certainty", be like "bankable security" and "reduce environmental and investment risks and costs". That intention was expressed in the Second Reading Speech for the Bill that introduced Part 3A of the EPA Act, the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, (Hansard 27 May 2005 p16332): "Concept approvals will have statutory force and are designed to provide up-front certainty for those projects or programs which are either long term or complex, or where overarching strategies require statutory endorsement so their component parts can proceed with bankable security … Concept approvals will increase certainty up front and reduce environmental and investment risks and costs."

32 Paradoxically, since 25 October 2007 (i.e. since after the conclusion of the *Walker* trial but before judgment and throughout the period that the Minister for Planning pursued the appeal in which he contended that he was not obliged to consider the impact of climate change flood risk on a flood constrained coastal development), another arm of the NSW government, the Department of Environment and Climate Change, has had in place guidelines entitled "Practical Consideration of Climate Change". These guidelines aim to assist councils in the preparation and implementation of floodplain risk management plans, and state that: "The impacts of climate change and the associated ramifications … cannot be ignored in decision making today." The summary section of the guidelines includes the following:

> Summary
>
> Climate change is expected to have adverse impacts upon sea levels and rainfall intensities, both of which may have significant influence on flood behaviour at specific locations.
>
> IPCC 2007 trends indicate that average global sea level rise (ignoring ice flow melt) may be between 0.18m to 0.59m by between 2090 and 2100. Add to this the ice flow melt uncertainty of up to 0.2m gives an adjusted global range of 0.18 to 0.79m. IPCC 2007 (0.1m) and recent CSIRO modelling (up to 0.12m) by McInnes et al indicate that mean sea level along the NSW coast is expected to rise by more than the global mean. Combining the relevant global and local information indicates that sea level rise on the NSW coast is expected to be in the range of 0.18 to 0.91m by between 2090 and 2100.
>
> In addition, climate change impacts on flood producing rainfall events show a trend for larger scale storms (rainfall totals for the 40 year average recurrence interval (ARI) 1 day storm events) tend to increase by 2030 and 2070 as shown in *Table 1* …
>
> Climate Change Impacts and their Ramifications
>
> *The impacts of climate change and the associated ramifications upon the vulnerability of floodplain risk management (FRM) mitigation options and development decisions can be significant and therefore cannot be ignored in decision making today.* The climate change factors affecting flood behaviour and their degree of influence vary with location and therefore it is essential that studies

for specific locations consider these impacts and their ramifications. McLuckie et al provides examples of the ramifications of potential impacts including:

- Sea level rise. For example, annual average damage (AAD) to a house built at the flood planning level (FPL) in an area where flood levels are directly controlled by ocean levels could increase by more than 1000% due to a high sea level rise scenario by 2090 to 2100.
- Increased frequencies of events due to increased rainfall intensities (*Figure 1*). For example, in a particular town not influenced by sea level rise, a 30% increase in rainfall could increase AAD by 300% …

This guideline provides the following advice to assist in considering climate change in managing flood risk:

Section 1.	Assessing climate change impacts through modelling sensitivity analyses.
Section 2.	Determining whether climate change is a key issue at a particular location. This depends upon the impacts on flood damages and increased frequency of exposure of people to flood hazard.
Section 3.	Incorporating climate change in floodplain risk management plan development considerations, and in new and current works projects and planning strategies.
Section 4.	Outlining some potential climate change management strategies for existing and future development and associated practical issues.

Recommendation

It is recommended that this guideline be used as the basis for examining climate change in projects undertaken under the State Floodplain Management Program and the 2005 Floodplain Development Manual.

All associated reports are to have a section that specifically addresses climate change. The scope of reporting should reflect the scope of the particular study and as a minimum include an outline of the modelling and analyses undertaken and their limitations, discuss the impacts of climate change on flood behaviour and outline any associated conclusions and recommendations. Where the study also looks at ramifications of flooding and examine management options these issues should also be addressed in the climate change section of the report.

(Emphasis added.)

33 The burgeoning case law accepting that administrative decision makers must take into account ESD or climate change in particular, was reviewed by me in *Walker* and by Preston J in his article referred to at [28] above. His Honour, after reviewing cases in Australia, the United States, India, Pakistan and Sri Lanka, concluded at [210]: "It is clear that the law on sustainable development is gaining momentum at local, national, regional, and international levels."

34 The momentum has continued. Several Australian climate change cases since those reviews may be mentioned. In *Charles & Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349 the Queensland Court of Appeal upheld a decision of the Planning and Environment Court of Queensland that the impact of climate change on sea levels on flood prone land proposed to be filled for residential development justified a condition requiring a proposed dwelling to be relocated to an area less vulnerable to tidal inundation. In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 the Supreme Court of South Australia upheld a decision of the Environment, Resources and Development Court of South Australia that changes in flood

patterns and sea levels by global warming would erode a buffer zone and prevent public access to the coast, making coastal land subdivision unacceptable. In *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545 the Victorian Civil and Administrative Tribunal held that the likely increase in severity of storm events and sea level rise due to climate change created a reasonably foreseeable risk of inundation of the land and proposed dwellings which was unacceptable.

35 The case law has developed against a background of well-known international and national governmental reports and agreements to which I referred in *Walker*. I would add the following observations. In 2006 the UK Stern Review Report on The Economics of Climate Change, relying heavily on the Intergovernmental Panel on Climate Change's (IPCC) Third Assessment Report of 2001, stated that climate change is a serious global threat demanding an urgent global response and that Australia is particularly vulnerable (pp xv and 147). Stern accepted that: "Sea level rise will increase coastal flooding, raise costs of coastal protection, lead to loss of wetlands and coastal erosion, and increase saltwater intrusion into surface and groundwater … The homes of tens of millions more people are likely to be affected by flooding from coastal storm surges with rising sea levels" (p 90).

36 The IPCC's Fourth Assessment Report released progressively during, and up to November 2007, represents the best available scientific evidence on global climate change. The IPCC was established in 1988 by two United Nations organisations, the World Meteorological Organisation and the United Nations Environment Program, to provide an authoritative statement of scientific understanding of climate change. The IPCC does not conduct new research. Its mandate is to make policy and relevance assessments of the existing world wide literature on the scientific, technical and socio-economic aspects of climate change. IPCC reports are written and reviewed by hundreds of leading climate change scientists from many countries. In 1989 the United Nations General Assembly requested the IPCC to prepare a report as a basis for negotiating a framework convention on climate change. The IPCC First Assessment Report 1990 concluded that human activities are substantially increasing the concentrations of greenhouse gases and enhancing the greenhouse effect. This led the UN General Assembly to launch the United Nations Framework Convention on Climate Change, which came into force in 1994. The IPCC Second Assessment Report: Climate Change 1995 addressed the ultimate objective of that Convention, to stabilise greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system. This report provided input to negotiations for the Convention's *Kyoto Protocol* of 1997. The IPCC Third Assessment Report: Climate Change 2001 placed climate change in the context of sustainable development and provided policy advice to governments.

37 The IPCC Fourth Assessment Report: Climate Change 2007 comprises four volumes released in stages during 2007. Working Group I contributed the first volume, The Physical Science Basis, released in February 2007. It provides a comprehensive assessment of the physical science of climate change, focusing on those aspects judged to be most relevant to policy makers. Working Group II contributed the second volume, Impacts, Adaptation and Vulnerability, released in April 2007. It considers climate change impacts, vulnerabilities and adaptation options. Working Group III contributed the third volume, Mitigation

of Climate Change, released in May 2007. It analyses the costs and benefits of different approaches to mitigating and avoiding climate change. In particular, it analyses the costs, policies and technologies that could be used to limit or prevent emissions of greenhouse gases and activities to remove those gases from the atmosphere. The fourth volume, the AR4 Synthesis Report, published in November 2007, represents the Fourth Assessment Report more generally.

38 The first volume's Summary for Policymakers (at 13-14) estimated sea level rises by 2100 in a no-mitigation case at 26-59 centimetres. This did not include the potential for rapid dynamic change in ice flow which could add 10 to 20 centimetres to the upper bound. Rises above 79 centimetres by 2100 could not be excluded. Chapter 11 of the second volume, relating to Australia and New Zealand, detailed the potential vulnerability of Australia to climate change caused by global warming, including increasing coastal vulnerability to storm surges and sea level rises. Relevantly to coastal vulnerability, it included the following (at 509-528):

> Regional climate change has occurred (very high confidence).
>
> Since 1950, there has been 0.4 to 0.7C warming, with more heatwaves, fewer frosts, more rain in north-west Australia and south-west New Zealand, less rain in southern and eastern Australia and north-eastern New Zealand, an increase in the intensity of Australian droughts, and a rise in sea level of about 70mm [11.2.1] …
>
> Potential impacts of climate change are likely to be substantial without further adaptation
>
> …
>
> 11.1.1 Summary of knowledge from the Third Assessment Report (TAR)
>
> In the IPCC Third Assessment Report (TAR; Pittock and Wratt, 2001), the following impacts were assessed as important for Australia and New Zealand.
>
> …
>
> • Increasing coastal vulnerability to tropical cyclones, storm surges and sea-level rise
>
> …
>
> The overall conclusions of the TAR were that … Australia has significant vulnerability to climate change expected over the next 100 years …
>
> 11.1.2 New findings of this Fourth Assessment Report (AR4)
>
> The scientific literature published since 2001 supports the TAR findings. Key differences from the TAR include (i) more extensive documentation of observed changes in natural systems consistent with global warming, (ii) significant advances in understanding potential future impacts on water, natural ecosystems, agriculture, coasts, Indigenous people and health, (iii) more attention to the role of adaptation, and (iv) identification of the most vulnerable sectors and hotspots. Vulnerability is given more attention – it is dependent on the exposure to climate change, the sensitivity of sectors to this exposure, and their capacity to adapt.
>
> …
>
> 11.4.5 Coasts
>
> Over 80% of the Australian population lives in the coastal zone, with significant recent non-metropolitan population growth (Harvey and Caton, 2003). About 711,000 addresses (from the National Geo-coded Address File) are within 3 km of the coast and less than 6 m above sea level, with more than 60% located in Queensland and NSW (Chen and McAneney, 2006). These are potentially at risk from long-term sea-level rise and large storm surges.

> Rises in sea level, together with changes to weather patterns, ocean currents, ocean temperature and storm surges are very likely to create differences in regional exposure …
>
> Sea-level rise is virtually certain to cause greater coastal inundation, erosion, loss of wetlands and salt-water intrusion into freshwater sources (MfE, 2004a), with impacts on infrastructure, coastal resources and existing coastal management programmes … At Collaroy/Narrabeen beach (NSW), a sea-level rise of 0.2 m by 2050 combined with a 50-year storm event leads to coastal recession exceeding 110 m and causing losses of US$184 million (Hennecke et al., 2004) … Uncertainties in projected impacts can be managed through a risk-based approach involving stochastic simulation (Cowell et al., 2006) … Mid-range sea-level rise projections for 2005 to 2025 are likely to increase the cost of sand replenishment on the Adelaide metropolitan coast by at least US $0.94 million/yr (DEH, 2005) … In the next 50 to 100 years, 21% of the Tasmanian coast is at risk of erosion and significant recession from predicted sea-level rise (Sharples, 2004).
>
> Box 11.4. Climate change adaptation in coastal areas
>
> Australia and New Zealand have very long coastlines with ongoing development and large and rapidly growing populations in the coastal zone. This situation is placing intense pressure on land and water resources and is increasing vulnerability to climatic variations, including storm surges, droughts and floods. A major challenge facing both countries is how to adapt to changes in climate, reduce vulnerability, and yet achieve sustainable development …

39 The Garnaut Climate Change Review published in September 2008, commissioned by the governments of all the States and Territories of Australia and the Commonwealth Government, examined the impacts of climate change upon the Australian economy. The Review placed reliance upon the IPCC's Fourth Assessment Report. It stated that, without mitigation, the impacts of climate change on coastal regions are likely to be substantial (par 6.3.2). It estimated that the magnitude of impacts of climate change on buildings in coastal settlements in NSW in a no-mitigation case as medium by 2030 and high by 2100 (Table 6.8).

40 In the present case, in my opinion, by reason of the council's mandatory obligation under s 79C of the EPA Act to take into consideration the public interest, the council was obliged to take into account the principles of ESD and, in particular, climate change induced coastal erosion. However, in my opinion, it has not been established that the council failed to do so. It is necessary to consider the evidence in some detail.

41 In October 1990 the council adopted a Coastline Management Plan, which included statements to the following effect. Over a period of many years the dunes south of Racecourse Creek at Old Bar have been converted from a natural vegetated coastal system to a cleared residential area. Some development built in this area in the past is likely to be threatened in the foreseeable future by the coastal processes. Storms and weather conditions during 1989 and early 1990 were such that virtually all beaches in the council's area experienced erosion. Old Bar Beach for practically its full length was subject to loss of substantial sand reserves, loss of incipient dunes and recession of frontal dune escarpments in places. For the period 1940 to 1989 recession trends indicated a wear of approximately 0.2 metres per annum with a maximum up to 0.3 metres per annum at individual localities. In 1990, at the request of the council's Coastline Management Committee, the Public Works Department determined 50 and

100 year coastal impact lines, which were depicted on a map. The Plan stated in paragraph 6.4 that council would not permit new development within the 100 year coastal impact line.

42 On 14 February 1996 the Department of Land and Water Conservation wrote to the council indicating that the coastline hazard of climate change due to a greenhouse induced sea level rise had been reviewed to take into account the findings of the IPCC's Second Assessment Synthesis ratified in December 2005. The letter set out coastline hazard lines for 50 and 100 years. The latter totalled 47-52 metres.

43 On 8 May 1996 a council report recommended that the 100 and 50 year coastal impact lines be amended to positions identified by the Department of Land and Water Conservation.

44 In 1996 the Minister for Land and Water Conservation wrote to a Mr Allan Willan in relation to coastal erosion at Old Bar, noting that since the 1990 Plan was adopted there had been some revision of predictions of possible sea level rise resulting from the greenhouse effect. The results were supplied to council in February 1996. The letter continued: "The recent analysis took account of the latest scientific advice on sea level rise prepared by the Intergovernmental Panel on Climate Change and contains an allowance for recession of the coast likely to result."

45 On 25 August 2005 the council's Director of Engineering wrote to the Department of Infrastructure Planning and Natural Resources as follows:

> Coastal Erosion – Old Bar
>
> At the meeting in your offices in Newcastle on the 23rd August, 2005, the issue of coastal erosion in the vicinity of Lewis Street, Old Bar was discussed. It was noted that a Coastline Management Plan had been completed for this area, which was adopted by Council on October, 1990. This plan has subsequently been used by Council when considering development proposals in the area. It was also noted that significant erosion of the dune area in front of properties at Lewis Street had occurred during recent storm events.
>
> During the mid 1990's the State Government's then Department of Land & Water Conservation undertook a photogrammetric analysis of the coastline of Greater Taree City Council from Wallabi Point in the south, and northwards to include the beach area on Mitchells Island. My recollection of the interpretation of the results was that these beaches were eroding at a rate of around 0.5 m per year for the previous 50 years. There is some question now as to whether this rate has increased in recent times. These issues have recently been discussed in Council's Estuary and Coastline Management Committee, and it is requested that your Department update the photogrammetric work such that the Committee can consider current, and future rates of erosion, and make a determination on whether the 1990 Coastline Management Plan needs to be reviewed. Member of the Committee have also taken a keen interest in the coastal erosion that is occurring on Mitchells Island, and would request that the updated photogrammetric analysis include this area, particularly considering the existing development at Manning Point and the sewage treatment works that are located behind the dune in this area.

46 On 11 August 2006 a Mr Ross Keys wrote to the council general manager, about the rate of erosion at Old Bar [Ex A tab 20]:

> I am writing to you to try and gain some help with the erosion that is taking place in front of my homes at 34-36 Lewis St Old Bar. Since my purchase in 2000 no less than 16 metres of my front lawn has disappeared into the ocean with as of today's date only approx 7 metres left to the front of one of the homes. My

> neighbour to the south Mr J. Conklin has only 5m to his home. Something needs to be done now. At high tide the public has to trespass onto my property just to walk from Wallabi Pt to Old Bar. The water is so close to the homes it has effectively cut the beach in 2 with private property on both sides of me having front boundaries that extend down onto the beach into the surf. It is now a critical matter to have remedial works undertaken and I believe council should accept responsibility for the protection of the coastline and properties that front the ocean. I have tried on several occasions to have council and Dept Lands allow certain measures to be undertaken to prevent further loss of sand but I seem to be fighting against opposition who does not want the problem solved. I known council has implemented a 100yr impact line policy but what happens if the ocean doesn't agree with it and decides to attack homes built behind the line in 1, 2, 5 or 50 years? Do you do nothing just like now?

47 On 27 September 2006 the council lodged an application with the Department of Natural Resources expressing interest in financial assistance for a review of its coastal management program.

48 The minutes of the council meeting of 18 October 2006 contained a report by the council's Director Engineering of an onsite meeting in relation to coastal erosion at Old Bar. The report noted that there had been an estimated 15 metres of dune eroded over the preceding three years. It stated:

> During recent months there have been a number of coastal storms that have impacted on the coastline in the area of Lewis Street, Old Bar, and have eroded the dunal system, causing concerns for residents of the Meridian Development, and three residences to the south.
>
> Purpose/Objective
>
> The purpose of this report is to inform councillors of an onsite meeting that was held with affected residents of Lewis Street, Old Bar on 15 September, 2006.
>
> Discussion
>
> The onsite inspection comprised two separate meetings, one with representatives of the Meridian development Elaine Pearce, Ron Carlyle and Greg Barrass, and a second meeting with the property owner to the south of the Meridian, Ross Keys.
>
> The Director Engineering Greg Blaze represented Greater Taree City Council at the meeting and the State Government was represented by their coastal "expert" from the Department of Natural Resources Phil Watson, and other DNR staff Rick Slatter and Luke Ryan.
>
> The onsite inspection showed that there had been considerable erosion of the foredune at both sites*, with an estimated 15 metres of dune eroded over the most recent three year period*. It was noted that in the last few weeks since the last significant storm event that around one to one and a half metres depth of sand had been deposited on the beach.
>
> …
>
> A number of concerns were raised by the property owners at the meetings, including the following:
>
> …
>
> (iv) Update of Coastal Management Plan – this Plan was produced in 1990, and development such as the Meridian has been located such that it is behind the 100 year Coastal Impact Line. It was noted by PW [of the Department of Natural Resources] that there have been significant advances in information and technological thinking since the development of the Plan (including further information on the effects of climate change

on ocean levels). He suggested that it would be appropriate for a review to be carried out on the Coastal Hazard Assessment and that this information be used to review the Coastal Management Plan.

Recommendations from Existing Plan

The current Coastal Management Plan was adopted by Council on the 17th October, 1990. The Plan was developed using the data that was available at the time which was subject to engineering and photogrammetric analysis. A number of options were considered specifically regarding the open section of coastline, which is the subject of this report, including the provision of seawalls and groynes (with sand nourishment), construction of an off-shore breakwater, purchase of effected properties, and the "do-nothing" approach …

There are three existing residences that are on the seaward side of the 50 year Coastal Impact Line. The recommendations in the Plan indicate that there is the potential for the property owners to relocate/rebuild these residences on the existing lots. However, the Plan does not provide management proposals to deal with the issue of the existing residences being threatened prior to their relocation/rebuilding. Any review of the Plan should consider the issue of erosion that would compromise the structural integrity of the buildings and the safety concerns for persons using these structures.

…

Update of Coastal Management Plan

The Coastal Management Plan for this area was developed in 1990. The Department of Natural Resources representatives indicated that the information on which the Plan was based had been dated, and that further data had been collected such as general climate change and sea level rise data, as well as further photogrammetry for the specific section of open coast. It was noted that this information could be used to fine-tune the existing coastal hazard lines, and assist in the updating of the Coastal Management Plan. Other issues that could be considered in the Plan may include consideration of how to address the existing buildings, development of modular/relocatable structures, legal issues over responsibility of the beachscape, fencing and public safety.

The DNR representatives stated that they would be prepared to assist in the development of a technical brief for the above work, and indicated that it would be appropriate for the project to be undertaken in two stages:

Stage 1 – Updated Hazard Assessment

Stage 2 – Review Coastal Management Plan

…

Budget

There are no immediate budget implications based on the information in this report. Should Council receive approval for grant funding from the State Government to undertake works to update the Coastal Management Plan, then a further report would be presented to Council.

(Emphasis added.)

49 The minutes of the council meeting of 18 October 2006 recorded the following resolution:

(i) That Council receive the information regarding coastal erosion at Lewis Street, Old Bar.

(ii) That Council upgrade current signage at public entrances to Old Bar beach to include information regarding instability of sand dunes.

(iii) That Council endorse the application for grant funding to the State Government to undertake a review of the current Coastal Management Plan.

50 By a letter dated 16 May 2007 the Department of Environment and Climate Change invited the council to submit projects for consideration of financial assistance under the NSW Estuary and Coastal Management Programs for the 2007/2008 financial year. The program was for, inter alia, preparation and implementation of coastal management plans to achieve the ecologically sustainable development of the State's coastal zone.

51 On 25 May 2007 the subject development application was lodged with the council.

52 On 6 July 2007 the Department of Environment and Climate Change again wrote to the council referring to its letter of 29 June 2007 and stating:

> As you would be aware recent storm events and erosion along the NSW coastline have highlighted the importance of developing and implementing coastal zone management plans to strategically address coastal hazards including coastal erosion, inundation and sea level rise … If you have already lodged a grant application with the Department of Environment and Climate Change, you may wish to request additional assistance to address coastal hazards identified following the recent storm events … Accordingly, the closing date of the 2007/2008 Coastal Management Program has been extended to 16 July 2007 …

53 On 9 August 2007 Mr Aldous sent a lengthy written submission to the council with a number of attachments including photographs and newspaper cuttings concerning global warming induced beach erosion and rising sea levels. On one photo he marked a substantial area lost through erosion in the last three years. He expressed "serious concerns" about the development application. He made a number of legal submissions; stated that the council was bound to have regard to the risks of erosion and climate change; asserted that the proposed development breached cll 2(1)(l) and 8(p)(i) of SEPP 71 in that it would result in adverse cumulative impact in the area and did not encourage a strategic approach to coastal management; and said that the potential view loss to his home was totally unreasonable.

54 On 29 November 2007 the proponent's design consultant wrote to the council stating that the roof profile was deliberately chosen as a shallow skillion to ensure minimum impact to the amenity and to present as low a structure as possible.

55 On 12 December 2007 council officers prepared a consultancy brief for a coastline hazard definition study, coastline management study, and coastal zone management plan for Old Bar. It included the following:

> Coastal processes have threatened sections of coast within the city boundary, impacting upon assets such as residential properties along the coast in the Old Bar area and affecting the recreational amenity of the beaches. These issues are likely to be exacerbated into the future as a result of postulated climate change impacts and projected rises in mean sea-level. Pressures on the natural resources along the coast are significant. These include population growth and growing residential development needs, coastal development and tourism. The increased usage of the coastal zone is having an increased impact on the natural resources and the environments associated with the effects from Racecourse Creek flood flows, tides, winds, ocean swells, and weather events.
>
> In recognition of these pressures on the City's natural resources, Council, through its Estuary and Coastal Management Committee, has resolved to prepare a specific Coastal Zone Management Plan for the Old Bar area. This Plan will be prepared in accordance with the procedure adopted in the NSW Government's

Coastline Management Manual (1990) and accord with both the NSW Coastal Policy 1997 and provisions of Part 4A *Coastal Protection Act 1979*.

The current engagement involves three stages. The first is the development of an integrated coastal process and hazard understanding for the beach areas of Old Bar. The second stage involves the preparation of a Coastline Management Study, and the third is a Coastal Zone Management Plan to provide amongst other things, a strategic policy framework for co-ordinated, integrated and ecologically sustainable development of sections of coastline effected [sic] by the identified hazards, and the protection of fragile coastal environments into the future. It is intended that these three stages together will provide the basis for future planning and management of the coastal zone at Old Bar.

…

A number of coastal storms have impacted on the coastline in Old Bar, particularly in the area along Lewis Street. The coastal storms have eroded the dunal system causing concerns for residents situated close to this coastal strip of Old Bar.

Onsite inspection conducted in late 2006 showed that there had been a considerable erosion of the foredune, with an estimated 15 metres of dune eroded over the most recent three year period. It was also noted that the current beach berm is already forming a quite steep batter with localised slumping of the dune face. In some locations, this coastal recession already pose a threat to a few existing residential properties along the coast.

The following photographs show the extent of the hazard in some portions along this coast. See map of the extent of study area for approximate locations.

…

The steps involved in preparing a Coastline Management Plan are:

1. Establish a Coastline Management Committee;
2. Undertake a Coastline Hazard Definition Study to specifically identify and quantify hazards affecting the coast under study;
3. Conduct a Coastline Management Study to develop management objectives and consider all feasible management options whilst also assessing the social, economic, aesthetic, recreational and ecological issues associated with land uses of the area;
4. Prepare a Draft Coastal Zone Management Plan consisting of the best combination of options to achieve the plan objectives;
5. Review the Draft Coastal Zone Management Plan through public exhibition and consultation, including the preparation of a strategy to implement the Plan;
6. Council adoption of the Coastal Zone Management Plan;
7. Submit Plan to Minister for Natural Resources for approval in accordance with Part 4A of the *Coastal Protection Act 1979*; and
8. Implement approved Coastal Zone Management Plan.

…

The objective of the Project is to develop a comprehensive Coastal Zone Management Plan for the open coast areas of Old Bar, Taree. The Plan will provide for growth and development without putting at risk the natural, cultural and heritage features of the coast.

1. The Plan will recognise and accommodate natural coastal processes and hazards. It will develop strategies to deal with threats to existing development and to ensure that new development is not exposed to such threats;
2. The effects of climate change, including the projected effects of sea level rise and changes to storm intensity and frequency, shall form part of the coastal hazard assessment. Because of the uncertainty associated with

> climate change prediction, a sensitivity analysis will be undertaken to assess the relative risk to the coast from varied climate change scenario and planning periods. For example, the impact of the upper and lower bound scenario for sea level rise will be assessed in addition to the more commonly recommended mid-range scenario.
>
> …
>
> 6.3 Climate Change
>
> The effect of projected sea level rise on future beach behaviour should be quantified using current best practice techniques. The consultant is expected to use a number of techniques to estimate the extent of the active profile and thereby produce a range of shoreline recession outcomes. Likewise, the consultant should examine the effects of adopting various IPCC sea level rise scenarios. The combined results should be presented in a risk-sensitivity form.
>
> In addition to sea level rise, climate change may result in significant changes in storm intensity and frequency. Whilst Council recognises that it is not yet possible to reliably quantify the effects of these phenomena, the consultant is expected to at least make qualitative allowances when considering the management response to long-term coastline hazards.

56 Mr Boyce organised a site inspection and meeting for the council Planning Committee on 12 December 2007. In his report of that date to the Planning Committee he recommended that the development application be refused. Mr Boyce's report included the following:

> *Coastal Dunal Impact/Erosion* – This issue has been the major concern for both objectors and has been the subject of detailed submission from one of the objectors, and has been the main subject of a counter submission received from the owner's legal representative.
>
> From Council's prospective [sic: perspective] the main planning documents referenced in considering this issue is Council's Local Environmental Plan 1995 and Council's Coastline Management Plan for Racecourse Creek/Lewis Street (CMP).
>
> Section 6.4 and 6.5 of Council's CMP are relevant to this particular application, and in particular the requirement that "Council will not permit new development within the one hundred year coastal impact line". The one hundred year coastal impact line was reviewed again by the then Department of Land and Water Conservation in February 1996 and the current line includes a best estimate provision for climate change. In a telephone conversation with a representative of the Department of Natural Resources the writer was advised that in the absence of any further scientific data that the 1996 advice was still applicable, however this verbal advice this has not been confirmed in writing.
>
> In relation to the proposal it would appear that the development encroaches into the one hundred year coastal impact line with both the ground floor pavers and the first floor deck encroaching into this space.
>
> In reviewing the CMP it would appear that one of the principles was to remove any existing development forward of the one hundred year coastal impact line. This development seeks to do that if this application is approved. The existing dwelling forward of the one hundred year coastal impact line is to be demolished and removed.

57 On 12 December 2007 the council Planning Committee inspected the Property and then met to consider the development application. They were armed with a report from Mr Boyce and other documents which he had provided to them, including a copy of the development application, maps, plans, objections and submissions. At the site inspection Mr Aldous and his planning

consultant, Mr Tony Fish, were present and addressed the councillors. Those present inspected the plans and elevations of the proposed development. Councillors asked questions about the height and layout. Mr Boyce said that the proposed height was RL 12.5AHD, which is approximately 7.5 metres above natural ground level and that the maximum height allowed by the development control plan was 8.5 metres. Mr Boyce spoke for approximately 10 minutes outlining his report, including addressing the topics of coastal dune impact/erosion, views and other issues under the development control plan. On the question of view impacts, Mr Boyce said that the objection of Mr Aldous was comprehensive and predominantly dealt with his concerns regarding continuing coastal erosion, but also with potential view loss. He pointed to Mr Aldous' property. Mr Aldous spoke on the topic of coastal erosion and noted that he had spent a great deal of time preparing his submission on coastal erosion. Mr Aldous asked whether his submission and the view loss mentioned in his submission had been considered. The Mayor said councillors read all submissions and consider all issues raised in them.

58 Mr Fish and Mr Aldous also addressed the Planning Committee meeting. Mr Aldous said, among other things, that he had seen 20 to 30 metres of land disappear in the five years that he had lived there. Mr Fish's address to the meeting included the following:

> A significant 60 per cent of dwellings located in Queensland and New South Wales were potentially at risk from long-term sea level rise and large storm surges.
>
> The situation is that no-one really knows and understands the extent to which sea level rise is going to impact the coastline. It is quite obvious from the site inspection today that that is already occurring at this particular site to a substantial degree.
>
> Our point is that, whilst the 1996 line has been put in place and is the best information which council has available to it at this point of time, and we also understand that discussions with the department have suggested that they still believe that 1996 line is relevant, we would suggest that the department should at least be providing that advice to council in writing.
>
> In the absence of that in writing, it is questionable as to whether that is in fact the case, given the amount of research and evidence that is around to suggest that coastal erosion is a significant issue.
>
> The consequence for this development is that, as you would see from the plans, the development abuts right up against the line. If the line is in fact wrong and needs to be moved back then it will have an impact of being located within the proposed development. There is no area for movement on this. There is no distance between the lines that currently sits on the proposed dwelling and we would ask that council be sure that the 1996 line is in fact the correct one and upon which it should be basing its decision.

59 The Planning Committee resolved to recommend that: "Consideration of this item be deferred to the Council meeting on 19 December 2007 and a further report be prepared to Council with respect to level to natural ground height of basement of construction and compliance with DCP No 40".

60 Mr Boyce prepared that further report in which he recommended that council approve the development application subject to appropriate conditions, some of which he specified, including demolition of the existing building: see [7] above.

61 Mr Boyce had been concerned in his first report to the Planning Committee that the ground floor pavers and the first floor deck to the proposed dwelling

encroached over the 100 year coastal impact line. As a result of the proponent amending the development application, (inter alia,) to remove the encroachment, Mr Boyce's second report to the council recommended that the development application be approved, as described above. The front of the proposed dwelling is to be erected almost in line with the front edge of the home unit development on an adjoining beach front lot.

62 On 13 December 2007 the applicant faxed a letter to the council requesting that consideration be given to removing the existing building on the subject land "which will be destroyed by ocean erosion processes in the very near future". The letter stated that; "The building originally built in the late 1960s at the time had approximately fifty metres of seaward land in front of the home. Of this fifty (50) metres of land loss, approximately twenty five (25) had been lost in the past three years. I supplied a photograph to the Mayor and his councillors at this site on 12 December, 2007 …".

63 By email dated 13 December 2007 (incorporating a letter wrongly dated 13 January 2008), council requested consultants submit a quotation for the proposed coastal study and management plan as per the consultancy brief, by 11 January.

64 On 11 January 2008 WorleyParsons, one of the consultants who responded to the council's request to submit a quotation, provided the council with a study proposal entitled "Old Bar Coastline Hazard Definition, Coastline Management Studies and Coastal Zone Management Plan". The document included the statement:

> With regard to sea level rise, assuming a Bruun Rule methodology is adopted to predict long term recession due to sea level rise, the key parameter requiring estimation which is subject to debate is the depth of closure. We have closely followed recent research on this issue and can make an informed estimate. We would also consider the merits of a risk based approach to the prediction of climate change impacts based on the work of Cowell et al (2006).

65 In the meantime, on 18 December 2007 the council's Estuary and Coastline Management Committee met. Several councillors were present who were also present at the council meeting next day. Climate change and rising sea levels were considered, as the minutes record:

> Climate Change – issue not included in draft Plan
>
> Need to consider sea level rise – implications for Harrington, Manning Point and parts of Old Bar. Median level increase of 200mm by 2050 and 500mm by 2100. Sea level rise could be anything from 90-800mm increase. Other changes could include increased rainfall or lower rainfall.
>
> Planning for that may include a levee, increases on freeboard for building levels, changes to moorings.
>
> Mapping should be prepared for the estimate increases in sea level, which has already begun by Council.

66 The minutes of the council meeting of 19 December 2007 have been set out at [8] above.

67 In addition to Mr Boyce's two reports, a number of documents were before the council at its meeting of 19 December 2007, including objectors' letters, letters of response from the proponent's planning consultant (Eastern Solar Design) and lawyers, a newspaper article on global warming induced rising sea levels and erosion, a newspaper article on the erosion problem at Old Bar

Beach, and photographs supplied by Mr Aldous. Two of the objectors' letters were from Mr Aldous. One stated that: "50-60 metres of beach erosion had occurred on the land since 1976, with 25-30 metres of this occurring in the past few years or at the very least, since the 1996 induced 1 in 100 year line. Ongoing erosion is occurring every day". Another letter from Mr Aldous before the council was very similar to his letter referred to at [62] above, although it omitted reference to the land lost in the last three years and the statement that the existing home should be vacated immediately.

68 At the council meeting on 19 December 2007 all councillors who attended the site inspection and the Planning Committee meeting were present, as well as two other councillors. Mr Aldous and his planning consultant, Mr Fish, spoke in opposition to the development and said (among other things) that the council should consider the impact of climate change and sea level rises on the coastline. Mr Fish said they understood that council discussions with the government department suggested that they still believed that the 1996 coastal impact line was relevant, and Mr Fish suggested that the department should put that advice in writing.

69 By letter written on 3 January 2008, but erroneously dated 3 January 2007, addressed to the Department of Environment Conservation and Climate, the council's Director Planning and Building stated:

> I am writing in regard to a Council policy which has previously been developed based on the advice of relevant government agencies to identify appropriate planning controls for development in the Old Bar area. Council has recently considered new development in the area affected by coastal recession and is concerned about the potential impacts of climate change on beach recession rates. We are therefore keen to obtain a current opinion from the Government in regard to the suitability or otherwise of our development policies in this locality.
>
> Council has an adopted Coastline Management Plan (CMP) to guide development in this area, a copy of this which is attached. The significant development standard in regard to coastal recession is a setback limitation from the ocean front which is shown on the map included in the Plan. This line was adopted by Council based on the advice of the relevant State agency. The current scientific knowledge in regard to global warming is indicating an elevated impact from rising sea levels. Recent storm events have resulted in significant erosion along this beachfront and Council is uncertain as to what the impact of this recent event will be over the 50 year planning period embraced in the ocean setback requirement of the DMP. I have included photographs to indicate the significant impact of this recent erosion.
>
> Council would appreciate your advice, based on whatever scientific knowledge you may have regarding the impact of climate change on this particular locality. I would be happy to provide any other information that may assist you in considering this matter and would be happy to facilitate an inspection of the locality should you wish. I look forward to your advice in due course.

70 The Department replied by letter dated 22 February 2008, as follows:

> I have been advised that Council, through the Estuary and Coastal Management Committee, has recently called for proposals from consultants to undertake a number of studies that will result in a Coastline Management Plan for the Old Bar area.
>
> The initial phase of the consultancy will be the preparation of a Coastline Hazard Definition Study. A component of this study will be to consider the potential impacts of climate change, from both sea level rise and storm intensity changes. The following Management Study phase will examine the adequacy of

> the existing planning lines in conjunction with a range of alternative longer-term strategic management strategies to address the defined hazards (including climate change).
>
> Officers from DECC's Coastal Unit would be happy to meet with Council to discuss the issue of climate change and its impact on Old Bar and how these issues will be considered in the context of the preparation of the management plan …

71 The applicant took me to documents post-dating the notified development consent of 21 January 2008 but I do not think they are relevant or significant.

72 The applicant submits that the council, in making its 19 December 2007 determination, failed to consider the following five documents (none of which were before the council at that time) which would have indicated that the rate of coastal erosion had increased by 2006 to three or four metres per annum: (i) the 2006 letter from Mr Keys to the council referred to at [46] above which asserted that 16 metres of his front lawn at Old Bar had disappeared into the ocean since 2000; (ii) the October 2006 report to council referred to at [48] above which indicated there had been 15 metres of erosion over the preceding three years; (iii) the council's financial grant application of September 2006 referred to at [47] above; (iv) the second volume of the IPCC Fourth Assessment Report quoted at [38] above; and (v) the council's consultancy brief for the coastline hazard definition study of 12 December 2007, referred to at [55] above. The applicant's submissions also seek to rely on the principle expressed in *Bruce v Cole* (1998) 45 NSWLR 163 at 187-188 per Spigelman CJ that although there is no error of law in a decision-maker making a wrong finding of fact, the making of findings and drawing of inferences without any evidence to support them is an error of law and acting without probative evidence is the equivalent of acting with no evidence. In my view, the council did not make a finding of fact which enlivens this principle.

73 In any case, the council considered the October 2006 report, which indicated the rate of erosion, when the report was presented to council at that time. In oral submissions the applicant conceded that the council had considered the October 2006 report and limited his submission to the effect that the consideration was not proper, genuine and realistic. It used to be conventional to say that a mandatory consideration had to be proper, genuine and realistic, but that those epithets had to be applied cautiously lest they encourage a slide into impermissible merits review. However, recently the Court of Appeal has held that it is preferable to avoid using the formula "proper, genuine and realistic" or similar descriptive formulae, but that the relevant matter must be more than merely adverted to or given mere lip service: *Anderson v Director General, Department of Environmental and Climate Change* (2008) 163 LGERA 400 at [57]-[58]; discussed in *Sharples v Minister for Local Government* (2008) 166 LGERA 302 at [108]-[111].

74 It has not been established that the council merely adverted to the October 2006 report or gave it mere lip service. The applicant conceded in oral submissions that if the council had been seized of the fact that the rate of coastal erosion was of the order indicated in the 2006 council report of about four metres per annum, compared with the substantially lower rate per annum on which the 100 year coastal impact line is said to have been based, then given that the proposed development was around 40 to 60 metres behind the current dune, the council would have properly considered the impact of coastal erosion.

75 When it passed the resolution of 19 December 2007, the council was seized of the accelerated erosion rate information not only through the October 2006 report but through a letter from Mr Aldous (referred to at [67] above) which was before the council, the knowledge of councillors who attended the Planning Committee meeting on 12 December 2007 where Mr Aldous gave information as to the rate of erosion (see [58] above), and the knowledge of the councillors who attended the Estuary and Coastline Management Committee meeting on 18 December 2007 when the climate change issue and increase in sea level rise were addressed: (see [65] above).

76 Mr Boyce's first report of 12 December 2007, informed the council that the Department of Natural Resources had advised him orally that, in the absence of any further scientific data, the 1996 advice of the Department of Land and Water Conservation was still applicable and that the current 100 year coastal impact line included a best estimate provision for climate change: see [56] above. The council specifically considered whether to have that advice confirmed in writing but resolved not to do so: see [8] above. It was open to the council to take that course.

77 In order to put this matter into perspective, it is helpful to focus on the precise development application proposal before the council. It is implicit in the development application and explicit in the conditions that the council resolution inevitably required, that the existing dwelling well seaward of the 100 year coastal impact line was to be demolished. The development application proposal was for a "dwelling", not for a "dual occupancy" which the printed form of application referred to as one of the examples of a description of a proposal. Further, the proposal was to place the new dwelling about as far away from the sea as was possible on the Property. Refusal of the development consent would leave the existing building in a vulnerable position and sterilise the land. The council took the issue of coastal erosion and its inducement by climate change seriously as evidenced by, among other things, the steps taken to prepare a coastal zone management plan for the Old Bar area and the briefing of a consultant to prepare the necessary study: see [55] above.

78 For these reasons, I do not accept this challenge.

Fourth challenge: SEPP 71

79 In determining a development application, it is mandatory for a consent authority to take into consideration a relevant environmental planning instrument, which is defined to include a State Environmental Planning Policy: s 79C (1)(a)(i) and s 4 EPA Act. The Property is located in the council's coastal zone. SEPP 71 applies to a development application for land located in the coastal zone. Under cl 7(b) of SEPP 71 a council is required to take into account the matters for consideration in cl 8 when it determines a development application to carry out development on land to which the Policy applies. The applicant pleads that the council failed to take into consideration the matters referred to in cl 8 because there was no reference to SEPP 71 in the reports prepared by council. Although the applicant's pleadings and written submissions were wider, as ultimately refined in oral submissions the applicant submission is that the council failed to consider the matters referred to in cl 8(b), (d) and (j) of SEPP 71, which provided:

> 8 Matters for consideration
>
> The matters for consideration are the following:
>
> …
>
> (b) existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,
>
> …
>
> (d) the suitability of development given its type, location and design and its relationship with the surrounding area,
>
> …
>
> (j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards …

80 As regards cl 8(b), the applicant points to the fact that the seaward boundary of the Property is on the beach and there is evidence to suggest that the public walking on the beach at high tide would have to pass over part of the Property. The submission, as I understand it, is that the council did not consider improvement of public access along the foreshore. This overlooks that cl 8(b) contains the qualification "where possible". There is no submission as to how it might have been possible to relevantly improve public access along the foreshore. Indeed, given that the existing dwelling to be removed was almost on the beach, with further erosion its removal may be regarded as improving public access along the foreshore.

81 As regards cl 8(d), the applicant relies on the fact that SEPP 71 was not referred to in either of Mr Boyce's reports before the council. I do not think that, in itself, is sufficient to prove that the council did not consider "the suitability of the development given its type, location and design and its relationship with the surrounding area". On the contrary, I think it is reasonably clear from the whole of the evidence that that was very much under consideration by the council.

82 As regards cl 8(j), the applicant again relies on the absence of reference to SEPP 71 in Mr Boyce's reports. Again, I am not satisfied that this establishes that any relevant matter referred to in cl 8(j) was not considered. On the contrary, the effect of coastal erosion on the development was under consideration by the council.

83 In my opinion, for these reasons, the SEPP 71 ground of challenge is without substance.

Fifth challenge: view loss

84 In determining a development application, a consent authority must take into consideration the provisions of any development control plan and the likely impacts of the development: s 79C(1)(a)(iii) and (b) EPA Act. The proposed two storey dwelling will block views of the ocean from the first and second storeys but not the third storey of Mr Aldous' three storey house immediately behind the Property. The applicant submits that the council failed to assess the potential view loss from Mr Aldous' house by reference to cl 3.15 of council's Residential Development Control Plan 40 (DCP 40) and failed to consider the impact of the loss of views enjoyed from the applicant's house.

85 The applicant points out that the development application did not include any elevation plans showing the relationship between the subject land and the adjoining land nor a site analysis plan. The applicant relies on the dictum in *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; 115 LGERA 373 at [75] per Spigelman CJ that a development control plan has "to be considered as a 'fundamental element' in or a 'focal point' of the decision making process". His Honour added that a particularly pertinent provision of a DCP "was entitled to significant weight in the decision making process but was not, of course, determinative". The applicant submits that this principle was offended because DCP 40 was not referred to in any report or document before the council. That is inaccurate. DCP 40 was referred to in both of Mr Boyce's reports and in the second report he stated that compliance with DCP 40 had been achieved. However, cl 3.15 was not expressly referred to.

86 DCP 40 is entitled "Guidelines for Residential Development". It states that it is a discretionary document (cl 1.1). Clause 3.15 of DCP 40 provides:

> 3.15 Views
>
> Quality views are not entitlements. However, where they are the basis for the desirability of certain locations, every effort should be made to ensure that they are not built out.

Objectives	*Acceptable solutions*
• Where possible, to avoid compromising available quality views	A1 Provision of a View Analysis as a component of a Site Analysis would indicate that a proposed development reflects the desirability of protecting known views. The View Analysis of surrounding development is required to indicate the position of the proposal on its site, the location of adjoining buildings and the degree of view loss, if any, resulting from the proposal.
• To avoid development of a form which will substantially compromise views available from public thoroughfares and from private living areas.	Council may require the erection of a height profile structure certified by a registered surveyor on the site prior to determining an application.

87 The views from Mr Aldous' house are "quality views" within the meaning of cl 3.15. However, in order to locate any building behind the 100 year line there was only one place on the land that any building could go and such a position would inevitably block some views from Mr Aldous' property. In order to locate the proposed dwelling behind the 100 year coastal impact line, it was not possible to preserve the views from the first and second storeys of Mr Aldous' house.

88 Although the issue of view loss from Mr Aldous' property was not specifically referred to in the body of Mr Boyce's reports, it was referred to in

documents the council had before it comprising Mr Aldous' submissions and responses from the proponent's consultant designers and lawyers. The designers advised that "the roof profile of the proposed dwelling was deliberately chosen as a shallow skillion" and that "the neighbour to the north [Aldous] will enjoy some direct ocean views over the proposed roof structure from their third level". View loss was discussed before the Planning Committee on 12 December 2007 and at the council meeting on 19 December. The Planning Committee's on-site inspection was a method of assessing view loss. The Planning Committee did not enter Mr Aldous' house, but I accept the evidence of Mr Loftus, the chair of the Planning Committee, that they had expert advice from the proponent's architect and could clearly see that there was good viewing from the third storey of Mr Aldous' house. Mr Loftus understood that the first and second storeys would lose their views across the subject land but nevertheless decided to vote to approve the development. At the site inspection, although Mr Aldous mostly spoke about coastal erosion, he also outlined his concerns regarding view loss, which sharpened Mr Loftus' focus on this issue. Mr Loftus thought nobody owns a view, you have to buy the last block to get a 100 percent view although the council tried to preserve as much views for everybody. Mr Loftus thought that Mr Aldous had not thought about his neighbours' views when he lodged his application for a three storey dwelling. At the site inspection Mr Aldous showed councillors the photos which had been attached to his lengthy submission of 6 August 2007. They included views from the top storey of his house.

89 It was said in evidence by Mr Fish, Mr Aldous' planning consultant, that view loss should have been assessed by erecting height poles and inspection from Mr Aldous' property. However, that was not legally essential in the circumstances.

90 Although cl 3.15 of DCP 40 was not expressly referred to in any document before council, I am satisfied that the council considered the substance of the matters in cl 3.15 and considered and understood the impact of the loss of views from Mr Aldous' house.

91 For these reasons, I reject the view loss challenge.

Sixth challenge: manifest unreasonableness

92 The applicant pleads that because of its other complaints about the council (as discussed above) the decision to approve the development application was manifestly unreasonable. As I have not accepted any of those complaints, except the complaints in relation to the council resolution and Notice of Determination which are incapable of supporting the submission, it is unnecessary to consider further the application of the well established and stringent principles of manifest unreasonableness invalidating an administrative decision. These principles were reviewed in *Notaras v Waverley Council* (2007) 161 LGERA 230 at [121]-[125] per Tobias JA.

Section 25B *Land and Environment Court Act*

93 The council submits that, instead of declaring or determining that the development consent is invalid, the Court should make an order for its conditional validity under s 25B of the *Land and Environment Court Act*. Division 3 of Part 3 (ss 25A to 25E) of that Act and ss 103 and 104 of the EPA Act constitute a Court supervised scheme for the validation of development consents that would otherwise be declared invalid. They were introduced in 1997: *Environmental Planning and Assessment Amendment Act 1997* (NSW)

(No 152 of 1997), *Environmental Planning and Assessment Legislation Amendment Act 1997* (NSW) (No 81 of 1997). It is the duty of the Court to consider making an order under Division 3 instead of determining that a development consent to which it applies is invalid in whole or in part: s 25E. The Division applies to a development consent "granted or purported to be granted" under the EPA Act by a consent authority: s 25A. Sections 25B and 25C of the *Land and Environment Court Act* provide:

> 25B Orders for conditional validity of development consents
>
> (1) The Court may, instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part, make an order:
>
> (a) suspending the operation of the consent in whole or in part, and
>
> (b) specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations).
>
> (2) Terms may include (without limitation):
>
> (a) terms requiring the carrying out again of steps already carried out, or
>
> (b) terms requiring the carrying out of steps not already commenced or carried out, or
>
> (c) terms requiring acts, matters or things to be done or omitted that are different from acts, matters or things required to be done or omitted by or under this Act or any other Act.
>
> 25C Orders for validity of development consents
>
> (1) On application by the Minister or any other consent authority for an order under this subsection on the grounds that the terms specified under section 25B have been substantially complied with and that it is not proposed that the relevant development consent be regranted with alterations, the Court may make an order:
>
> (a) declaring that the terms have been substantially complied with, and
>
> (b) declaring that the consent is valid, and
>
> (c) revoking the order of suspension.
>
> (2) On application by the Minister or any other consent authority for an order under this subsection on the ground that the terms specified under section 25B have been substantially complied with and that the development consent has been regranted with alterations as referred to in section 103 of the *Environmental Planning and Assessment Act 1979*, the Court may make an order:
>
> (a) declaring that the terms have been complied with, and
>
> (b) declaring that the development consent has been validly regranted, and
>
> (c) declaring that the suspended development consent has been revoked, and
>
> (d) revoking the order of suspension.

94 Sections 103 and 104 of the EPA Act provide:

> 103 Revocation or regrant of development consents after order of Court
>
> (1) This section applies to a development consent granted, or purporting to be granted, by a consent authority, to which an order of suspension applies under section 25B of the *Land and Environment Court Act 1979*.

(2) The consent authority may revoke a development consent to which this section applies, whether or not the terms imposed by the Court under section 25B of the *Land and Environment Court Act 1979* have been complied with.

(3) However, if the terms imposed by the Court have been substantially complied with, the consent authority may revoke the development consent to which this section applies and grant a new development consent with such alterations to the revoked consent as the consent authority thinks appropriate having regard to the terms themselves and to any matters arising in the course of complying with the terms. Such a grant of a development consent is referred to as a *regrant* of the consent.

(4) No preliminary steps need be taken with regard to the regrant of a development consent under this section, other than those that are required to secure compliance with those terms.

(5) Section 81 and such other provisions of this Act as may be prescribed by the regulations apply to development consents regranted under this section.

104 Appeals and other provisions relating to development consents after order of Court

(1) A development consent declared to be valid under section 25C of the *Land and Environment Court Act 1979*:

(a) is final and the provisions of sections 97 and 98 do not apply to or in respect of it, and

(b) is operative as from the date the development consent originally took effect or purported to take effect, unless the Court otherwise orders.

(2) A development consent declared under section 25C of the *Land and Environment Court Act 1979* to be validly regranted:

(a) is final and the provisions of sections 97 and 98 do not apply to or in respect of it, and

(b) takes effect from the date of the declaration or another date specified by the Court.

95 In *Mid Western Community Action Group Incorporated v Mid-Western Regional Council (No 2)* [2008] NSWLEC 143 at [16] Jagot J summarised this statutory scheme as follows:

> It is apparent that the scheme commences with a single consent affected by some defect. Instead of declaring that consent invalid, it may be suspended on terms imposed by the Court. Once the terms have been satisfied the consent authority may decide whether: — (i) to revoke the suspended consent (s 103(2)), or (ii) any alteration to the consent is required having regard to the terms and matters arising in the course of complying with the terms (s 103(3)). If the consent authority does not revoke the consent or consider any alteration is required then the consent may become operative only by the making of orders and declaration under s 25C(1). Such a consent operates from the date of the original grant of consent unless the Court otherwise orders (s 104(1)). If the consent authority does not revoke the consent but does consider an alteration is required then the consent may be revoked and a new consent regranted in accordance with s 103(3). Such a regrant is protected from any requirement for preliminary steps to be taken other than steps required to comply with the terms of the orders under s 25B. The language of s 25B(1)(b) (which refers to validating the consent whether without alterations or on being regranted with alterations), the cumulative declarations and order in s 25C(2), and the provisions of s 104(2) disclose that a regranted consent takes effect as a consequence of the Court exercising its functions under s 25C(2). As

> Stockland submitted, the scheme treats suspended and regranted consents the same. Differences in descriptions apparent from comparing s 25C(1)(b) and s 25C(2)(b) and s 104(1) and s 104(2) are not material to this issue. It would be odd if a consent authority would be able to avoid the Court's supervisory role merely by making some alteration to the consent. Section 104(2)(b), moreover, is clear and must be taken to mean what it says. These considerations also confirm the difficulty with an alternative submission made on behalf of the Action Group that a declaration under s 25C(2)(a) (that the terms have been complied with) would be sufficient of itself to render the regranted consent operative.

96 The only determination which leads me to contemplate a declaration of invalidity is that in relation to the council resolution and the Notice of Determination (the first and second challenges) on which the applicant has succeeded. The council submits that a s 25B order is appropriate because (a) the nature of the conditions intended to be imposed is now clear and certain from the Notice of Determination; (b) the only procedural glitch was not having those conditions prepared prior to the council's final determination; and (c) the simple expedient may be adopted of requiring the council to examine those conditions and adopt them formally by further resolution.

97 There is a preliminary question whether s 25B has any application in the present case. In *Mison v Randwick Municipal Council*, discussed at [18] above, the Court of Appeal did not make a declaration of invalidity but instead made a declaration that the purported consent was not a consent to the development application within the meaning of the former s 91(1)(a) of the EPA Act: at 739. In the present case a declaration could be couched in equivalent terms in relation to the council resolution, by reference to s 80(1)(a) (the equivalent of the former s 91(1)(a)). Since such a declaration would not speak of invalidity, the question is whether s 25B could apply given that it is only concerned with an alternative to a declaration or determination of invalidity. The better view, I think, is that this is not a reason for excluding the application of s 25B. The Court of Appeal in *Mison* described the question in the appeal as whether a condition attached to a development consent resolved upon by the council was "invalid" and, if so, whether the development consent was "invalid": at 735; 349, see also 739; 353. Thus, notwithstanding the form of relief, the Court of Appeal regarded the question as one of validity. In other analogous cases the Court of Appeal has also spoken of the invalidity of a development consent. For example, in *GPT RE Ltd v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256 at [102] it was held that: "[T]he exercise of the power on the part of the Council having miscarried in a substantial way, so that even the underlying intention of particular conditions is unclear, it would seem to be inevitable that there be a declaration of invalidity."

98 The Court of Appeal has held that s 25B is not limited to invalidity arising from preliminary steps: *Kindimindi No 2*. Hodgson JA considered that s 25B was intended to allow rectification of "technical" breaches: at [21]. Tobias JA agreed but went further, obiter, and considered s 25B capable of relating to failure to consider a matter required to be considered by s 79C of the EPA Act: at [32] and [36]. Tobias JA held at [32]-[33]:

> 32 It seems to me that s 25B(2)(c), for instance, would authorise the imposition of a term requiring a consent authority to reconsider if it has already considered the matter, or to consider for the first time if it has failed to consider the matter, any one or more of the matters required to be considered by, for instance, s 79C of the *Environmental Planning and*

> *Assessment Act*. That, of course, does not mean that in every case where a purported consent is invalid upon the basis that s 79C has not been complied with, that the court will exercise its discretion to suspend the consent and to require the consideration or reconsideration of a s 79C matter.
>
> 33 On the contrary, there would be those cases of which, for instance, the decision of McClellan J, then Chief Judge of the Land and Environment Court, in *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 (referred to in [47] of Biscoe J's judgment in *GPT*) is an example where his Honour, without determining whether s 25A(2) limited the type of invalidity in respect of which the court's discretion under s 25B(1) could be exercised, nonetheless refused to exercise his discretion under that provision in circumstances where the ground of invalidity was the failure of the council to consider a noise impact when granting development consent. That failure involved a breach of s 79C. However, as the council had already determined to grant consent, his Honour considered that it would be insufficient to simply require the council to consider a noise report and then to decide whether to confirm its original decision. Rather, it would be more appropriate in those circumstances if the council considered the whole of the relevant material, including information relating to the issue of noise impact afresh.

99 I would respectfully raise two difficulties with that construction in relation to s 79C, which may suggest that Hodgson JA's construction that s 25B is concerned with rectification of technical breaches is preferable, or, alternatively, that as a matter of discretion it is generally inappropriate to make a s 25B order that a council consider a s 79C matter. First, s 25B(1)(b) only permits an order specifying terms compliance with which "will" validate the earlier consent. Such terms should, I think, identify steps which have not been taken, which could appropriately be taken, and which, if taken, "will" result in validity. If a council, in granting development consent, has failed to consider a mandatory relevant s 79C matter when purporting to grant development consent, it cannot be said that an order that it now do so "will" validate that consent because, on consideration of that matter, which must then be weighed and balanced against all other matters relevant to the council's consideration, the council might decide to refuse consent. Secondly, the construction that s 25B authorises a term requiring consideration of a s 79C matter seems to conflict with the requirement of s 79C that "in" determining a development application a consent authority shall take into consideration the relevant matters specified therein. There is longstanding authority in relation to the former provision equivalent to s 79C (s 90(1)) that: "The legislative policy is to require, as a condition of validity of the decision, that the environmental questions be taken into consideration at the time the development is approved": *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 344 per Moffitt J. A s 25B order purporting to impose a validating term that a council consider a relevant s 79C matter, would require the matter to be taken into consideration not at the earlier time that the consent referred to in s 25B had been purportedly but invalidly granted but later, pursuant to the order. That does not meet the requirement of s 79C that the consent authority take into consideration the relevant matters specified therein "in" determining the development application.

100 Alternatively, if s 25B is capable of applying to a case of failure to consider a s 79C matter, it seems to me to be generally inappropriate to exercise the discretion by ordering the council to consider that matter. The reason is that

consideration of a particular s 79C matter is not discrete but necessitates a reopening of the whole process, weighing and balancing consideration of that matter against all other relevant matters, and may lead to refusal of the application. This Court, both before and after *Kindimindi No 2*, has generally held that it is inappropriate to make a s 25B order in cases of failure to consider a s 79C matter: *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 at [85] (approved in *Kindimindi No 2* at [33]); *Belmore Residents' Action Group Inc v Canterbury City Council* (2006) 147 LGERA 226 at [33]; *Bungendore Residents Group Inc v Palerang Council (No 4)* [2007] NSWLEC 536; *Hastings Point Progress Associaion Inc v Tweed Shire Council* [2008] NSWLEC 219; *Clark v Wollongong City Council (No 2)* [2008] NSWLEC 226 at [26]. Contrast those cases with *Mid Western Community Action Group Inc v Mid-Western Regional Council* [2007] NSWLEC 411 at [48] and its sequel *Mid Western Community Action Group Incorporated v Mid-Western Regional Council (No 2)* [2008] NSWLEC 143 at [129] where, in a difficult attempt to apply the construction of Tobias JA, the proposed s 25B order required reopening of the entire process.

101 The basis on which the applicant has succeeded essentially involves the absence of power in Mr Boyce to grant the development consent as he purported to do on 21 January 2008. In my opinion, on any view of the extent of the power in s 25B, it does not extend to permitting an order for conditional validity of a development consent where there has been a complete absence of power to grant it. That was my decision in *GPT Re Ltd v Wollongong City Council (No 2)* (2006) 151 LGERA 158 at [53], which was not disturbed on the unsuccessful appeal *Belmorgan Property Development Pty Ltd v GPT Re Ltd*. Assuming, however, that I am in error and that s 25B has application, I decline to exercise my discretion under it. In my opinion, it is inappropriate (if not impossible) to make an order that "will" validate the earlier development consent. The council has not determined for itself what the appropriate conditions of approval should be. The council's submission in these proceedings is that a s 25B order should be made requiring it to examine Mr Boyce's conditions and adopt them formally by further resolution. In my view, that is inappropriate. It is a matter for the council, upon consideration, to decide what the conditions should be. It is preferable that the council consider the development application afresh.

Conclusion

102 The applicant has succeeded but only on two of the six ground of challenge. This should be reflected in an apportionment of costs in accordance with the principles discussed in *F & D Bonaccorso Pty Ltd v Canada Bay Council (No 5)* [2008] NSWLEC 235. In apportioning costs, mathematical precision may be illusory, the discretion may depend upon matters of impression and evaluation, and a broad brush approach may be appropriate. On that approach, which seems to be appropriate in the present case, I propose that the council pay two thirds of the applicant's costs. The second respondent filed a submitting appearance except as to costs and did not participate in the trial.

103 I propose the following orders:

(1) The first respondent's purported consent on 19 December 2007 to the second respondent's development application in relation to the property

at 4/40 Lewis Street, Old Bar was not a consent to that application within s 80(1)(a) of the *Environmental Planning and Assessment Act 1979*.

(2) The first respondent's purported consent of 21 January 2008 to that application and its Notice of Determination dated 21 January 2008, are invalid.

(3) The first respondent is to pay two thirds of the applicant's costs.

104 The parties are to bring in agreed or competing short minutes of orders within seven days. I will hear the parties on costs if they are not agreed. The exhibits may be returned.

So ordered

Solicitors for the applicant: *Woolf Associates*.

Solicitors for the first respondent: *PJ Donnellan & Co Pty Ltd*.

J VENEZIANO