Land and Environment Court
New South Wales

Medium Neutral Citation:	**GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143**
Hearing dates:	15/05/2012; 16/05/2012
Decision date:	28 June 2012
Jurisdiction:	Class 4
Before:	Lloyd AJ
Decision:	1. Application dismissed. 2. The applicant must pay the respondents' costs. 3. Exhibits returned.
Catchwords:	JUDICIAL REVIEW: - development consent - classification of proposed development - "residential buildings" - deferred commencement condition - whether failure to consider a fundamental matter WORDS & PHRASES: - "residential buildings"
Legislation Cited:	Environmental Planning and Assessment Act 1979, s 79C, s 80(3), s 94A Local Government Act 1993, s 64, s 68 Parry Local Environmental Plan 1987 Water Management Act 2000, s 306
Cases Cited:	Abret v Wingecarribee Shire Council [2011] NSWCA 107, 180 LGERA 343 Azriel v NSW Land & Housing Corporation [2006] NSWCA 372 Commissioner of Taxation (Cth) v Miller (1946) 73 CLR 93 Derring Lane Pty Ltd v Port Phillip City Council (No 2) [1999] VSC 269; 108 LGERA 129 Dooralong Residents Action Group Pty Ltd v Wyong Shire Council [2011] NSWLEC 251; 186 LGERA 274 Enfield City Corporation v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135 Farah v Warringah Council [2006] NSWLEC 191 House of Peace v Bankstown City Council [2000] NSWCA 44; (2000) 48 NSWLR 498; 106 LGERA 440

	KJD York Management Services Pty Ltd v Sydney City Council [2006] NSWLEC 218; 148 LGERA 117 Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349 North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 21 NSWLR 532; 71 LGRA 432 Sydney City Council v Waldorf Apartment Hotel Sydney Pty Ltd [2008] NSWLEC 97; 158 LGERA 67 Warehouse Group (Australia) Pty Ltd v Woolworths Ltd [2005] NSWCA 269; (2005) 141 LGERA 376 Weal v Bathurst City Council [2000] NSWCA 88; 111 LGERA 181 Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422; (2004) 61 NSWLR 707; 136 LGERA 288
Category:	Principal judgment
Parties:	GrainCorp Operations Limited (Applicant) Liverpool Plains Shire Council (First Respondent) The MAC Services Group Limited (Second Respondent) Northern Joint Regional Planning Panel (Third Respondent)
Representation:	SA Duggan SC/ MD Seymour (Applicant) AE Galasso SC/ AC Hemmings (Second Respondent) Mills Oakley Lawyers (Applicant) Everingham Solomons Solicitors (First Respondent - submitting appearance) Corrs Chambers Westgarth (Second Respondent) Christine Hanson (Third Respondent - submitting appearance)
File Number(s):	41214 of 2011
Publication restriction:	Nil

JUDGMENT

1 The growing extractive mining industry in the Liverpool Plains and surrounding regions creates a demand for thousands of workers. The mines, however, are often located in areas remote from where those workers live. The region's accommodation capacity to support the mines is said to be weak. The second respondent, the MAC Services Group Pty Ltd ("MAC"), meets this need by providing workforce accommodation to the mining industry generally. It does so by providing accommodation and associated facilities for miners in self-contained "village style" facilities.

2 There is a number of large mining operations proximate to Werris Creek. On 14 July 2011 MAC submitted a development application to Liverpool Plains Shire Council for a "Workforce Accommodation Facility for 1,500 occupants" on land just outside the small town of Werris Creek. The land is within the 1(b) General Agricultural Zone under the *Parry Local Environmental Plan* 1987("the LEP") which was then in force. Under the zoning table for this zone "residential buildings (other than dwelling houses and units for aged persons)" are prohibited. On 17 November 2011 the third respondent, the Northern Joint Regional Planning Panel, exercising the functions of the first respondent, Liverpool Plains Shire Council, granted consent to the development application. In doing so it accepted that the proposal was an innominate use rather than "residential buildings" and was thus permissible with development consent.

3 The question for determination is the proper characterisation of the proposal. Is it "residential buildings", as contended by the applicant GrainCorp Operations Ltd, and thus prohibited, or is it an innominate use and thus permissible, as contended by MAC? Since the answer to the question determines whether the Planning Panel had the power to grant consent, it is a jurisdictional fact which the Court must now determine for itself: *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707; 136 LGERA 288; *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* [2005] NSWCA 269; (2005) 141 LGERA 376 at [130] - [131].

4 A subsidiary question arises from the terms of the consent itself. The consent contains a deferred commencement matter, requiring " a detailed Infrastructure Servicing Strategy" to be endorsed by the Council before the consent can become operational. The question for determination is whether the Northern Joint Regional Planning Panel, exercising the functions of the Council, deferred consideration of a fundamental matter required to be determined before granting consent, in which case the consent, even if otherwise lawful, would be invalid.

A question of classification

5 As noted at [3] above, the classification of the proposal determines whether it is permissible development. The plans of the proposal show rows of accommodation units, ranging from three to six in each row, with each unit comprising a single room with an en-suite shower, toilet and hand basin and a small external deck. The units are grouped around a central precinct containing a main facilities and administration building, an outdoor recreation area, tennis courts, a pool, a gymnasium, an indoor recreation facility and a training and function building. A common laundry is provided for each group of accommodation units. Car parking spaces are provided, generally around

the perimeter of the facility. The main facilities and administration building contains a manager's office, a reception and retail area, a large dining room, a large commercial kitchen and a crib room. The plans also show a caravan precinct containing 17 caravan sites, together with an associated recreation pavilion, an amenities building and a common laundry.

6 The statement of environmental effects which accompanied the development application states that the proposed facility will consist of up to 1,500 rooms, each with en-suite, suitable for accommodating one person per room. The development application is further described as follows:

> The development will ultimately feature an extensive suite of amenities and facilities, such as:
>
> 1. commercial kitchen and restaurant with seating for up to 250 persons at any given time;
>
> 2. 'crib' room for the self-preparation and consumption of meals;
>
> 3. indoor recreation facilities in the form of a TV room and gymnasium etc; and
>
> 4. dedicated green space for outdoor pursuits, sports and recreation.
>
> The rooms will be grouped together in 'pods' of three to four rooms each under a common roof, with an estimated floor area of 16 square metres and estimated roof area of 25 square metres. Each of the pods will feature dedicated verandah and/or patio areas. The pods are fully demountable.
>
> The facility will be serviced by an internal bitumen sealed road system which will feature car parking on a one car park per 1.3 units ratio with extra parking provided for visitors and staff. A bus terminal will also be provided in order to facilitate group transport to various mine sites across the region.

7 An assessment report was prepared by the Council's Director of Environmental Services for the Joint Regional Planning Panel. The report states that the development is an innominate use for the purpose of the LEP and is consistent with the objectives of the relevant zone. The report includes a statement that "a range of services will be available within the accommodation village for use by the short-terms occupants". Under the heading "Access, Transport and Traffic" the report states:

> The proponent has identified that client guest arrivals/ departures are anticipated from a wide variety of transportation types and modes including rail, bus and air combinations. The business operating footprint for transport to shifts will remain the same for other MAC villages with transport to job sites being primarily by shuttle bus.

After assessing the development against other relevant considerations, the report recommends that the proposal be granted conditional development consent. The Planning Panel meeting on 17 November 2011 approved the development subject to conditions, and on 18 November 2011 the formal notice of determination was issued.

8 In coming to the view that the development was an innominate use and was thus permissible, the Planning Panel had before it three legal opinions: an opinion from Gadens Lawyers, on behalf of the applicant GrainCorp, that the proposed

development is for a number of residential buildings (and thus prohibited); an opinion from Corrs Chambers Westgarth Lawyers obtained by MAC that the purpose of the proposed development is to provide temporary accommodation for workers, that as all of the workers would stay there temporarily while on shift and all would have their own permanent residential address, it would be incorrect to describe it as a "residential building" and it was permissible as an innominate use; and an opinion, obtained by the Council from Everingham Solomons Solicitors that the development is clearly not intended to be used for permanent residential accommodation as the dominant purpose is to provide temporary workers' accommodation, that the ordinary meaning of "residential" requires there to be some element of permanency and it would be incorrect to characterise it as the construction of a "residential building". The Planning Panel also had before it a letter from MAC referring to its "temporary guests" and the capacity of the manager of the facility, as is normal in any accommodation facility, to reallocate guests to other rooms.

9 The compound term "residential buildings" is not defined in the LEP. Nevertheless, weight may be given to the opinion of the consent authority: *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 154 [45] - [50]; *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707 at [88]. The Panel considered the parties' respective legal opinions together with the Council's own advice and came to a considered conclusion in the context of the LEP that the development was an innominate use which was permissible in the relevant zone. That is, it came within item 3 of the table to the relevant zone, which I set out at [11] below.

10 Clause 9 of the LEP is in a familiar form and is as follows:

> **9 Zone objectives and development control table**
>
> (1) The objectives of a zone are set out in the Table to this clause under the heading 'Objectives of zone' appearing in the matter relating to the zone.
>
> (2) Except as otherwise provided by this plan, in relation to land within a zone specified in the Table to this clause, the purposes (if any):
>
> (a) for which development may be carried out without development consent,
>
> (b) for which development may be carried out only with development consent,
>
> (c) for which development may be carried out only with development consent and which must be advertised in the same manner as designated development, and
>
> (d) for which development is prohibited,
>
> are specified under the headings 'Without development consent', 'Only with development consent', 'Advertised development - only with development consent' and 'Prohibited', respectively, appearing in the matter relating to the zone.

(3) Except as otherwise provided by this plan, the Council may consent to the carrying out of development on land to which this plan applies only where the Council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out.

11 The table to cl 9 sets out the following under Zone No 1(b) (General Agriculture Zone):

1 Objectives of zone

The objectives of this zone are:

(a) to enable the continuation of traditional forms of rural land use and occupation and encourage consolidation of existing undersized allotments and their conversion into productive commercial farmholdings,

(b) to conserve prime crop and pasture land in units or holdings which may be efficiently used for forms of agriculture common in the locality,

(c) to discourage fragmentation of landholdings into holdings which are inadequate to support commercial farming practices,

(d) to enable other forms of development which are associated with rural activities and which require an isolated location or which support tourism, and recreational activities to be accommodated in an environmentally acceptable manner,

(e) to ensure that the type and intensity of development is appropriate, having regard to the characteristics of the land, the rural environment, and the cost of providing public services and amenities,

(f) to permit the development in an environmentally acceptable manner of mines and offensive and hazardous industries where required, and

(g) to permit the development of intensive commercial horticulture and specialised agriculture where fertile land and a reliable water supply are available.

2 Without development consent

Agriculture (other than animal boarding, breeding or training establishments, pig keeping, feed lots or poultry farming establishments).

3 Only with development consent

Any purpose other than a purpose included in item 2, 4 or 5.

4 Advertised development - only with development consent

Aerodromes; animal boarding establishments; bulk stores; bus depots; car repair stations; child care centres; clubs; cluster developments; commercial premises; commercial veterinary establishments; education establishments; forestry; garbage disposal areas; general stores; generating works; helipads; heliports; hospitals; hotels; industries (including light industries and offensive and hazardous industries, but not rural industries or home industries); institutions; intensive livestock keeping establishments; junk yards; liquid fuel depots; mines; motels; multiple occupancy; places of assembly; places of public worship; plant depots (machinery); professional consulting rooms; public buildings; racecourses; recreation establishments; recreation facilities; retail plant nurseries; roadside stalls; sawmills; service stations; taverns; timber yards; tourist facilities; transport terminals; units for aged persons; warehouses.

5 Prohibited

Motor showrooms; residential buildings (other than dwelling-houses and units for aged persons); shops (other than general stores).

12 GrainCorp made the following submissions in support of its contention that the

development is properly characterised as "residential buildings":

(a) the objectives of the zone show that the intention of the instrument is to retain its rural character, particularly since cl 17 prescribes a minimum area of 200 hectares for the erection of a dwelling house;

(b) in applying a purposive construction to the instrument it is incongruous to suggest that this kind of development is permissible in a rural zone;

(c) the development has a residential purpose - it entitles persons to reside there;

(d) it is irrelevant that the occupant may have a residence somewhere else - persons may have more than one place where they reside;

(e) the dictionary definitions define "resident" as "1. one who resides in a place. 2. residing, Dwelling in a place" and "reside" is defined as "1. to dwell permanently or for a considerable time; have one's abode for a time" (Macquarie Dictionary, revised 3rd edition); and

(f) the table prohibits residential buildings of all forms and creates only two exceptions - "dwelling houses" and "units for aged persons". The table has nominated a genus (residential buildings) as prohibited and created an exception for only two species of that genus. As worker accommodation is another species of the genus "residential buildings" it is prohibited.

13 In passing I observe that the submission noted at 12(f) above cannot be correct. Listed amongst the kinds of development which are permissible with consent and nominated as "advertised development" under item 4 of the table are "cluster developments", "hospitals', "hotels", "motels", "multiple occupancy" and "tourist facilities", all of which have a residential component. In particular, "tourist facility" is defined as "an establishment providing: (a) holiday accommodation, (b) permanent accommodation, (c) timeshare accommodation, or (d) recreational activities".

14 GrainCorp's reliance on the objectives of the zone are by no means conclusive of the question now before the Court. In *Abret v Wingecarribee Shire Council* [2011] NSWCA 107, 180 LGERA 343 a submission was made that a proposed development could not be the subject of a grant of consent because it was inconsistent with various objectives of the particular zone that would prohibit development. Beazley JA (Campbell JA and Handley AJA concurring) said at [42]:

> I do not agree with the Council's submissions on this point. In my opinion, the trial judge erred in his approach and conclusions at [35] and [36]. Dealing first with [35], it is apparent that his Honour's reasoning is directed to the objectives of the zoning table. They are not provisions of the LEP that control development. Rather, they set the framework in which the LEP operates. The objectives themselves are not necessarily consistent, but reflect the conflicting demands upon development within the particular Local Government Area.

15 GrainCorp relies upon the judgments in *Abret*, however, for the principle that even if the proposed development is permissible (as an innominate use), if it also falls within the description of any prohibited use - in this case "residential buildings" - then it would nevertheless be a proscribed activity: *Abret* at [57] - [62], applying *Egan v Hawkesbury City Council* (1993) 79 LGERA 321. Accepting this principle, as I am bound to do, the question still remains whether the proposed development can be described as "residential buildings".

16 In *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* (1990) 21 NSWLR 532; 71 LGRA 432, the Court of Appeal considered the definition of "residential building" in the County of Cumberland Planning Scheme Ordinance which was defined in the following terms:

> 'Residential building' means a building, other than a dwelling-house, designed for use for human habitation together with such outbuildings as are ordinarily used therewith, a residential flat building, a hostel, an hotel designed primarily for residential purposes and a residential club, but does not include any building mentioned, whether by inclusion or exclusion, in the definitions of 'places of instruction' and 'institution'.

17 Notwithstanding the fact that this definition required nothing more than use for human habitation, Mahoney JA (Priestley and Handley JJA concurring) held (at 537 - 538) that it envisaged a significant degree of permanency of habitation or occupancy. The facts in that case were that a number of units in a building containing residential units (Blues Point Tower) were let as serviced apartments. The most common period of stay was eight to thirteen days and some 67 per cent of occupiers stayed for two weeks or less. The Court held that this use did not have that degree of permanence and since the consent was for a residential flat building within the definition of "residential building" the use in question was not a permitted use.

18 The above case was applied by Pain J in *Dooralong Residents Action Group Pty Ltd v Wyong Shire Council* [2011] NSWLEC 251; 186 LGERA 274. In that case the Salvation Army sought approval for a "hospital", being a Salvation Army Recovery Centre. The applicant challenged the validity of the consent on the ground that, if properly characterised, the proposed use was not for the purpose of a "hospital" but for use of the prohibited purposes of "housing for ... people with a disability" or a "boarding house" or "commercial premises". The applicant's primary contention was that the proposed use was for "housing for people with a disability, which was relevantly defined in the planning instrument as meaning "residential accommodation ...". At [110] Pain J said:

> Accepting that residential accommodation can be broadly defined and adopting the Court of Appeal in *Sydney Serviced Apartments* as requiring a certain degree of permanency, I do not consider inpatient accommodation of up to six to ten months duration suggests sufficient permanency to satisfy the requirement of residential accommodation.

19 In *KJD York Management Services Pty Ltd v Sydney City Council*[2006] NSWLEC 218; 148 LGERA 117 the question was whether the use of a residential flat building as serviced apartments was authorised by the original consent. The relevant definition of "residential flat building" when the original consent was granted was as follows:

> 'Residential flat building' means a building containing two or more flats, but does not include a row or two or more dwellings attached to each other, such as are commonly known as semi-detached or terrace buildings and 'Flat' means a room or suite of rooms occupied or used or so constructed, designed or adapted as to be capable of being occupied or used as a separate domicile.

20 In addition to applying the Court of Appeal's decision in *Sydney Serviced Apartments*, the Court noted that the ordinary meaning of "domicile" as referred to in the definition of "Flat" is one which implies a degree of permanence. The dictionary definitions define "domicile" thus:

> 1. a place of residence; an abode; a house or home - 2.*Law* a permanent legal residence
>
> (Macquarie Dictionary)

> 1. A place of residence or ordinary habitation; a dwelling-place, abode; a house or home. 2. *Law.* The place where one has his home or permanent residence, to which, if absent, he has the intention of returning
>
> (Oxford English Dictionary)

21 GrainCorp correctly points out that, in determining that serviced apartments were not within the definition of residential flat building, the Court relied upon the use of the word "domicile" in the definition and the case is thus distinguishable from the facts in the present case. Nevertheless, the Court had also relied upon the decision in *Sydney Serviced Apartments* in reaching its decision.

22 In *Sydney City Council v Waldorf Apartment Hotel Sydney Pty Ltd*[2008] NSWLEC 97; 158 LGERA 67, Pain J considered a similar issue in which a building which had been approved as "flats" was also used as serviced apartments, and in which the relevant definition of "flat" was the same as that in *KJD York Management.* Her Honour did not see anything to distinguish the case from *Blues Point Tower* and *KJD York Management* and so held that the development consent did not authorise the use of the premises for serviced apartments. Moreover, her Honour found further support for this approach in *Derring Lane Pty Ltd v Port Phillip City Council (No 2)*[1999] VSC 269; 108 LGERA 129.

23 *Derring Lane* was an appeal against a decision made by the Victorian Civil and Administrative Tribunal which had found that a "motel" was not a residential building within the meaning of the Port Phillip Planning Scheme. Balmford J held that "residential building" must be taken to refer to a building constructed for the purpose of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode and dismissed the appeal. In so deciding, her Honour referred, at 134, to Wilcox J in *Hafza v Director-General of Social Security* (1985) 6 FLR 444 at 449:

> There is a plethora of decisions, arising in various contexts but predominantly matrimonial causes and revenue cases, relating to the legal concept of residence. As a general concept residence includes two elements: physical presence in a particular place and the intention to treat that place as home; at least for the time being, not necessarily for ever.

24 Balmford J also referred to Latham CJ in *Commissioner of Taxation (Cth) v Miller* (1946) 73 CLR 93 at 99, who adopted the words of Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] AC 217 at 222 as to the meaning of the word "reside". Latham CJ said:

> I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word 'reside' by the courts which makes it impossible to apply the ordinary meaning of the word 'reside' in the present case. In *Levene v Inland Revenue Commissioners* (1928) AC 217 at 222 Viscount Cave LC said:
>
> > ... the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.' No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'. In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

25 Balmford J then held at [16]:

> On that basis the phrase 'residential building' must be taken to refer to a building constructed for the purpose of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode.

26 Mindful of the caution with which dictionaries may be used in statutory interpretation as noted by Mason P in *House of Peace v Bankstown City Council* [2000] NSWCA 44; (2000) 48 NSWLR 498; 106 LGERA 440 at [25] - [29], their use is nevertheless not entirely irrelevant. In particular, the Macquarie Dictionary (online edition) contains the following relevant definitions:

> "residential" - of or relating to residence or residences; adapted or used for residence; (of a hotel etc) catering for guests who stay permanently or for extended periods

"residence" - the place, especially the house, in which one resides

"reside" - to dwell permanently or for a considerable time

27 I am persuaded by the authorities mentioned above together with the dictionary meanings. I accept that the decisions in *KJD York* and in *Waldorf Apartment Hotel* turned, at least in part, on the use of the word "domicile" in the definition of "flat". However, the reasons of Mahoney JA in *Sydney Serviced Apartments*, of Balmford J in *Derring Lane* together with the authorities upon which her Honour relied, noted at [23] and [24] above, together with the dictionary definitions - particularly the word "residential" - all lead to the conclusion that there must be an element of permanence or residence for a considerable time, or having the character of a person's settled or usual abode.

28 I thus conclude that the proposed development is not within the meaning of the compound term "residential buildings". In addition to the considerations noted above, the following factors lead me to the same conclusion. The facility is intended to accommodate a transient population. It does not have the physical characteristics of a residence, having a communal kitchen, a restaurant, a retail area, a manager's office, and the absence of any facilities in the individual units other than an en-suite bathroom. There is nothing in the evidence to suggest that returning occupants are allotted the same unit on a recurring basis. On the contrary, the management has the right to allot individuals to any unit. There is nothing to suggest that a lease would be entered into with each individual occupant. Would any of the occupiers of this facility call it their residence? I suspect not - they would regard their residences as being elsewhere. They would not regard this facility as their settled or usual abode, or the place where they lived.

29 Finally, I note that MAC relies upon an alternative source of power, namely, that the development also falls within the definition of a "motel" which is a permissible use. A "motel" is relevantly defined as follows:

> Motel means a building, or buildings (other than a hotel, boarding-house or residential flat building) substantially used for the overnight accommodation of travellers and the vehicles used by them whether or not the building or buildings are also used in the provision of meals to those travellers or the general public.

30 The proposed development is not a motel. A motel as defined is something that is "substantially used for the overnight accommodation of travellers ...". That is, it is available to members of the public generally. This development is restricted to persons employed by mining companies. That is, as I understand it, the facility will not be available to travellers or the general public in the manner of a motel.

31 I find, therefore, that the proposed development is an innominate use which falls within item 3 of the table to Zone No 1(b) (General Agriculture Zone) in the LEP and thus may be carried out with development consent.

Deferral of consideration of a fundamental matter

32 Section 80(3) of the *Environmental Planning and Assessment Act 1979* allows the consent authority to issue a consent subject to a condition that it is not to operate until the applicant satisfies it as to any matter specified in the conditions.

33 The consent in the present case has such a deferred commencement condition, which reads as follows:

> **Deferred Commencement Matter**
>
> Prior to this consent becoming operational, and as provided for by section 80(3) of the *Environmental Planning and Assessment Act* 1979, the consent shall not operate until a detailed ***Infrastructure Servicing Strategy*** is endorsed by Liverpool Plains Shire Council. Such a Strategy shall address all infrastructure servicing requirements for the site and be prepared in accordance with Best Practice Guidelines. Such a Plan shall include, but not be limited to the following matters:
>
> (i) Hydraulic analysis;
>
> (ii) Nutrient and salt balance modelling;
>
> (iii) Compliance with applicable Australian Standards;
>
> (iv) An assessment of the implications on the Werris Creek Water and Sewerage Infrasctructure;
>
> (v) Provision of gas, electricity and telecommunications services;
>
> (vi) Compliance with Council's *Engineering Guidelines and Specification for Subdivisons and Development Works;* and
>
> (vii) Compliance with section 68 of the Local Government Act 1993;
>
> (viii) Provision of details of proposed staging of works.
>
> In accordance with clause 95(3) of the Regulation, a period of two (2) years from the date of the development consent is allowed for the satisfaction of the "deferred commencement" matters.

(The reference to s 68 of the *Local Government Act* 1993 is to a requirement for an application under that Act for works of water supply, sewerage, stormwater drainage and management of wastes *inter alia*.)

34 GrainCorp contends that in granting consent with the deferred commencement condition, the Planning Panel deferred consideration of a fundamental matter that it was required to determine before granting consent. That is, as I understand it, it alleges that the Panel failed to take into consideration matters which it was required to do under s 79C of the Act. Although GrainCorp did not expressly identify the relevant matters in s 79C, I infer that the relevant matters are "the likely impacts of that development, including

environmental impacts on both the natural and built environments" (sub-s (1)(b)) and "the suitability of the site for the development" (sub-s (1)(c)).

35 GrainCorp relies upon part of the assessment report prepared for the Planning Panel by the Council's Director of Environmental Services. The report identifies three options for the provision of sewage - option 1 being an on-site system, option 2 being delivery to the existing Werris Creek sewerage treatment plant and option 3 being delivery to the existing town sewer main in Werris Creek. The report then states:

> The submitted preliminary servicing strategy report recommends that further hydraulic analysis be conducted to ascertain water supply infrastructure upgrade requirements to ensure the provision of an adequate water supply.

36 In relation to stormwater the report states:

> The final design of the stormwater system is dependent on which sewer servicing option is ultimately pursued.

The report then relevantly states:

> ***Planning Commentary:***
>
> It is apparent from the information provided in support of the SEE via the submitted preliminary Site Servicing strategy that detailed additional analysis of the servicing requirements of the development is required. It is noted that Option 1 detailed in the preceding section is preferred by the proponent in terms of the management of sewage generated from the site. However, the Office of Environment and Heritage (OEH) and Council's Works Department has raised concerns that insufficient information has been provided in the SEE to sufficiently demonstrate that the increased hydraulic, nutrient and salt loadings associated with on-site reuse can be sustainably and effectively managed onsite without creating groundwater contamination (via runoff or leaching), or over-accumulation of nutrients or salt in the site soils.
>
> Whilst Council is of the opinion that suitable mechanisms are available to the proponent for the effective management of sewage, the provision of water supply to the site and the corresponding management of stormwater, additional detailed analysis needs to be undertaken in this regard. Such issues are, however, not considered to be insurmountable. Consequently, a detailed Site Servicing Strategy will be required to be undertaken by the proponent which is underpinned by detailed hydraulic analysis, details compliance with s 68 of the Local Government Act 1993, demonstrates compliance with applicable Australian Standards, Council's Engineering Guidelines, an assessment of implications on existing Werris Creek Water and Sewer Infrastructure and nutrient and salt balance modelling.
>
> It is therefore considered appropriate that a 'Deferred Commencement' condition be imposed requiring the submission of a detailed Servicing Strategy for the site. Such a Strategy must be prepared in conjunction with Council's Works Department, to the satisfaction of Council and at the full cost of the proponent.

37 GrainCorp submits that the condition leaves for later consideration *all* issues concerning infrastructure servicing, including the need to provide details of gas, electricity and telecommunications services. GrainCorp submits that this includes whether these services could be provided and not just how they were to be provided, which was not known to the Panel when it granted the consent.

38 In reviewing the evidence, however, I find that it does not support GrainCorp's contentions. In relation to electricity, telecommunications and gas the assessment report notes that all those services are available, apart from gas which will require the installation of an LPG gas tank, the physical siting of which "will need to be identified and clearly delineated on the final construction drawings prior to the issue of the Construction Certificate".

39 The Planning Commentary, noted above, shows that the provision of sewerage was considered and that the Council "is of the opinion that suitable mechanisms are available to the proponent for the effective management of sewage". That is, the issue is identified and a conclusion follows the assessment of the issue - that the matter can be dealt with as a matter of detail in a specific design. However, the "final design" of the stormwater system is noted as being dependent on which sewer servicing option is ultimately pursued. All of this demonstrates consideration of a relevant matter.

40 It is not uncommon for conditions of consent to refer to the need to obtain further consents under other statutes. Thus, condition 7 states:

> Pursuant to section 68 of the Local Government Act 1993, the following approvals must be obtained from Council prior to the issue of a Construction Certificate:
>
> (i) Carry out water supply works;
>
> (ii) Carry out sewerage works (if applicable);
>
> (iii) Carry out onsite sewage management works (if applicable);
>
> (iv) Carry out stormwater drainage work; and
>
> (v) Dispose of trade waste into a sewer of the Council (if applicable).
>
> Reason: To ensure compliance with statutory requirements.

41 Similarly, condition 9 states that a compliance certificate under s 306 of the *Water Management Act* 2000 will be obtained prior to the issue of a construction certificate. Condition 10 states that prior to the release of the construction certificate there must be the payment by the developer of water supply headworks contributions, calculated on an equivalent tenement basis pursuant to s 68 of the *Local Government Act* and Chapter 6 of the *Water Management Act*. Condition 11 requires the payment, prior to the release of the construction certificate, of sewer services headworks contributions, calculated on an equivalent tenement basis pursuant to s 64 of the Local Government Act and chapter 6 of the *Water Management Act*.

42 Accordingly, I accept that in those circumstances it was both within power and a proper exercise of power to impose the deferred commencement condition.

43 It is not as if there was no material in the development application to support those conclusions. The statement of environmental effects was accompanied by supplementary reports including a traffic assessment report (by TPK &

Associates), a Flora and Fauna Study (by Mitchel Hanlon Consulting) and a series of Infrastructure Servicing Strategies for sewerage, storm water and water (by Bath Stewart & Associates). The latter report describes the various options for those services which the report states "are either available or can be made available to service the proposed development". The purpose of a hydraulic study and a sewer capacity study is explained in the concluding paragraph of the report:

> These studies should then enable calculation of associated costs resulting from, but not limited to, the upfront infrastructure costs, construction costs, headwork charges, maintenance costs and recurring annual charges, thereby enabling comparisons to be made between the proposed options. These comparisons will provide a much clearer direction in the selection of the preferred servicing options.

44 In addition to the statement of environmental effects and its accompanying reports there was submitted a series of plans dealing with the infrastructure components of each of the options showing the layout of the various services and their components.

45 The evidence shows that there was a "MAC DA Assessment Meeting" at the Council on 28 August 2011 by officers of the Council. The record of the meeting shows that various aspects of the development were considered, including the infrastructure servicing such as storm water treatment, section 94A contributions, water and sewage, and which concludes with a final comment:

> Can handle issues with conditions and deferred commencement.

This meeting was then followed by the assessment report noted above.

46 I conclude, therefore, that the evidence shows that the decision maker in this case did not fail to take into consideration any relevant matters, neither did it defer any such matter for later consideration. Rather, it was satisfied that the relevant infrastructure could be provided and would and should be dealt with by way of a deferred commencement condition. As the report of Bath Stewart & Associates noted above shows, the further studies were necessary to enable calculation of associated costs of the provision of the infrastructure, thereby enabling comparisons to be made between the proposed options which would in turn provide a much clearer direction in the selection of the preferred options.

47 GrainCorp relies upon a number of authorities in support of its contention that there has been in this case a deferral of consideration of an essential or fundamental matter. The difficulty with this is that the facts in each case are different and the cases cited turn on their own facts. The real question is whether the deferred matter will have the effect of altering the manner in which the consent operates. This was the reason behind the Court of Appeal's

decision in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; 73 LGRA 349. In that case the Council granted development consent for a house subject to a condition that the overall height of the house be reduced to the satisfaction of the Council's Chief Town Planner. Priestley JA held, at 351, that if the effect of the imposed condition left open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application is made then the consent has not be granted to the application made. Clarke JA held, at 354, that where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how that consent is final. That is, his Honour rested his decision on the lack of finality in the consent. Meagher JA held, at 355, that the consent granted was to a development which was actually or potentially significantly different from that for which application was made and it was also lacking in finality or certainty.

48 By way of further example, in *Farah v Warringah Council* [2006] NSWLEC 191 the Council had granted a deferred commencement consent which was not to operate until a traffic management plan was prepared. Talbot J found, at [61], that access arrangements were critical in that case and that a final determination of some satisfactory means of controlling access to the land was outstanding. In particular, the matters to be included in the traffic management plan could have the effect of changing the manner in which the development operates.

49 The facts in these cases may be distinguished from the present case. The deferred commencement condition here will not result in a development which is significantly different from the development for which the application is made, it will not alter the development in a fundamental respect, and it will not have the effect of changing the manner in which the consent operates.

50 The leading authority in this issue is that of the Court of Appeal in *Weal v Bathurst City Council* [2000] NSWCA 88; 111 LGERA 181. In that case the Council had granted a deferred commencement consent for an inter-modal transport terminal subject to certain conditions. One of the conditions which had to be satisfied before the consent could operate related to the noise impact of the development, relevantly:

> This consent shall not operate until the applicant satisfies the Council that the relevant approvals by the Environment Protection Authority have been obtained.

Mason P held that this did not constitute a failure to take noise into consideration. Giles JA (Priestley JA concurring) held that the Council did not take the noise impact into consideration, which his Honour found to be a critical issue. His Honour said at [95]:

> The Council had to weigh up all relevant matters calling for consideration and, having done so, determine the development application.

51 Again, the essential facts in the present case differ from those in *Weal.* Giles JA accepted the proposition that it was open to the consent authority to impose a condition that necessary approvals be obtained from another authority (such as the Environment Protection Authority) provided that the consent authority itself gave proper consideration to the relevant environmental impact. That was not done in *Weal*, but as the evidence shows, this was done in the present case.

52 The onus is, of course, on GrainCorp to show that there was a failure to consider a relevant matter. Moreover, as Basten JA observed in *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [51]:

> As Spigelman CJ noted in *Bruce v Cole* (1998) 45 NSWLR 163 at 186D-E, the scope for assessing whether the decision-maker has given proper, genuine and realistic consideration to a mandatory matter must be approached with caution, so as to avoid the Court impermissibly reconsidering the merits of the decision.

53 I conclude that on this issue GrainCorp has not established that the consent authority either failed to consider or deferred consideration of a fundamental matter that it was required to determine before granting consent.

Orders

1. The application is dismissed.

2. The applicant must pay the respondents' costs.

3. The exhibits may be returned.

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Decision last updated: 28 June 2012