

Dougherty Bros v Outline Planning Consultants - [2016] NSWLEC 72

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Land and Environment Court

New South Wales

Medium Neutral Citation: **Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd [2016] NSWLEC 72**

Hearing dates: 16-18 May 2016

Date of orders: 16 June 2016

Decision date: 16 June 2016

Jurisdiction: Class 4

Before: Pain J

Decision:

- (1) The Amended Summons dated 16 May 2016 is dismissed
- (2) The Applicants must pay the Second Respondent's costs within 14 days unless a Notice of Motion seeking other orders is filed prior
- (3) The exhibits may be returned

Catchwords: JUDICIAL REVIEW – applicants bear onus of proof of establishing breaches of [EPA Act](#) by JRPP in approving large subdivision – failure to form required state of satisfaction under clause in LEP not established - no impermissible deferral of aspects of development in conditions imposed –no failure to consider mandatory relevant considerations – no failure to consider development control plan as focal point of consideration – summons dismissed

Legislation Cited: Clarence Valley Local Environmental Plan 2011, cll 6.3, 7.3, 7.4
[Environmental Planning and Assessment Act 1979](#), Pts 3A, 4, ss 23G, 79C, 80, 80A

[Environmental Planning and Assessment Regulation 2000](#), cl 100.

[Uniform Civil Procedure Rules 2005](#), r 59.9.

Cases Cited:

[Alexander v Yass Valley Council](#) [2011] NSWLEC 148; (2011) 184 LGERA 123.

[Anderson v Director General of the Department of Environmental and Climate Change](#) [2008] NSWCA 337; (2008) 163 LGERA 400.

[Associated Provincial Picture Houses Ltd v Wednesbury Corporation](#) [1947] EWCA Civ 1.

[Attorney-General \(NSW\) v Quin](#) [1990] HCA 21; (1990) 170 CLR 1.

[Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure](#) [2012] NSWLEC 197; (2012) 194 LGERA 113.

[Bat Advocacy NSW v Minister for Environment Protection, Heritage and the Arts](#) [2011] FCAFC 59; (2011) 180 LGERA 99.

[Bechara v Plan Urban Services Pty Ltd](#) [2006] NSWLEC 594; (2006) 149 LGERA 41.

[Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd \(No 2\)](#) [2010] NSWLEC 1; (2010) 172 LGERA 25.

[Currey v Sutherland Shire Council](#) [2003] NSWCA 300; (2003) 129 LGERA 223.

[Franklins Pty Ltd v Penrith City Council](#) [1999] NSWCA 134.

[Gilbank v Bloore \(No 2\)](#) [2012] NSWLEC 273.

[Hill v Woollahra Municipal Council](#) [2003] NSWCA 106; (2003) 127 LGERA 7.

[Hoxton Park Residents Action Group Inc v Liverpool City Council](#) [2010] NSWLEC 242.

[Kindimindi Investments Pty Ltd v Lane Cove Council](#) [2006] NSWCA 23; (2006) 143 LGERA 277.

[Lesnewski v Mosman Municipal Council](#) [2005] NSWCA 99; (2005) 138 LGERA 207.

[MCC Energy Pty Ltd v Wyong Shire Council](#) [2006] NSWLEC 581; (2006) 149 LGERA 59.

[Minister for Aboriginal Affairs v Peko-Wallsend Ltd](#) [1986] HCA 40, (1986) 162 CLR 24.

[Minister for Immigration and Citizenship v Li](#) [2013] HCA 18; (2013) 249 CLR 332.

[Minister for Natural Resources v NSW Aboriginal Land Council](#) (1987) 9 NSWLR 154; 62 LGRA 409.

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

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

[Pittwater Council v Minister for Planning](#) [2011] NSWLEC 162; (2011) 184 LGERA 419.

Roden v Bandora Holdings Pty Ltd [2015] NSWLEC 191;
(2015) 213 LGERA 103
South East Forest Rescue Inc v Bega Valley Shire Council
[2011] NSWLEC 250; (2011) 211 LGERA 1
Telstra Corporation Ltd v Hurstville City Council [2002]
FCAFC 92; (2002) 118 FCR 198
Transport Action Group Against Motorways Inc v Roads
and Traffic Authority (NSW) [1999] NSWCA 196; (1999) 46
NSWLR 598
Ulan Coal Mines Ltd v Minister for Planning [2008]
NSWLEC 185; (2008) 160 LGERA 20
Walsh v Parramatta City Council [2007] NSWLEC 255;
(2007) 161 LGERA 118
Weal v Bathurst City Council [2000] NSWCA 88; (2000)
111 LGERA 181
Winn v Director-General of National Parks and Wildlife [2
001] NSWCA 17; (2001) 130 LGERA 508
Zhang v Canterbury City Council [2001] NSWCA 167;
(2001) 51 NSWLR 589

Category: Principal judgment

Parties: Dougherty Bros Pty Ltd (First Applicant)
Kahuna No 1 Pty Ltd (Second Applicant)
Outline Planning Consultants Pty Ltd (First Respondent)
Yamba Residential Subdivision Pty Ltd (Second
Respondent)
Clarence Valley Council (Third Respondent)
Joint Regional Planning Panel (Northern) (Fourth
Respondent)

Representation: COUNSEL:
C Ireland (Applicants)
Submitting appearance (First Respondent)
P Tomasetti SC and A Hemmings (Second Respondent)
Submitting appearance (Third Respondent)
Submitting appearance (Fourth Respondent)

SOLICITORS:
N J Papallo (Applicants)
Pikes & Verekers (First & Second Respondents)
Marsdens Law Group (Third Respondent)
Department of Planning and Infrastructure (Fourth
Respondent)

File Number(s): 2016/00155533

Judgment

Judicial review challenge to approval of subdivision

1. In these judicial review proceedings the Applicants challenge a determination of the Joint Regional Planning Panel (Northern) (“JRPP”) to grant development consent to Yamba Residential Subdivision Pty Ltd the Second Respondent for a 161 lot subdivision in the West Yamba Urban Release Area (“WYURA”) at 22 Carrs Drive Yamba on 24 July 2015. The JRPP was exercising, pursuant to s 23G(2)(a) of the *Environmental Planning and Assessment Act 1979 (NSW)* (“EPA Act”), the functions of the Clarence Valley Council (“Council”) as consent authority. The WYURA has a total area of 127.4ha. The Second Respondent’s development consent relates to 32.74ha of land within the WYURA to the west of Carrs Drive Yamba. The Applicants are the owners of a substantial land area also within the WYURA to the east of Carrs Drive Yamba. The First, Third and Fourth Respondents filed submitting appearances.
2. The Second Respondent’s development consent (“the DA”) is for the staged development of the site to create 161 residential lots across three sub-stages, public roads and residue lots for conservation purposes. The development will involve the design and construction of proposed subdivision roads, including landscaping, services and stormwater drainage infrastructure, as well as external works including connection to services infrastructure and upgrading Carrs Drive. The DA also includes bulk earthworks and filling of land, associated tree removal, earthworks and landscaping and plantings on one of the component lots to offset the removal of an area of Endangered Ecological Community. Approximately 300,000m³ of fill will be required for the overall development.
3. There are now five grounds of appeal identified in the Amended Summons handed up on the first day of the hearing with one ground no longer pressed. The grounds assert numerous failures to comply with the EPA Act in determining to grant development consent to the Second Respondent.

Environmental Planning and Assessment Act

4. The EPA Act provides:

79C Evaluation

- (1) **Matters for consideration—general**

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:

- (i) any environmental planning instrument, and
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the

making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

(v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

...

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.

(2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.

...

80A Imposition of conditions

(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

...

(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

...

(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.

...

5. Clause 100(1)(c) of the Environmental Planning and Assessment Regulation 2000 (NSW) (“EPA Regulation”) provides:

100 Notice of determination

(1) For the purposes of section 81 (1) of the Act, a notice of the determination of a development application must contain the following information:

...

(c) if the application has been refused, or granted subject to conditions (other than conditions prescribed under section 80A (11) of the Act), the consent authority’s reasons for the refusal or for the imposition of those conditions,

...

6. The relevant environmental planning instrument is the Clarence Valley Local Environmental Plan 2011 (“LEP”). It is not necessary to refer to the land use tables and zoning provisions in the LEP. Clauses 6.3 and 7.3 provide:

6.3 Development control plan

- (1) The objective of this clause is to ensure that development on land in an urban release area occurs in a logical and cost-effective manner, in accordance with a staging plan and only after a development control plan that includes specific controls has been prepared for the land.
- (2) Development consent must not be granted for development on land in an urban release area unless a development control plan that provides for the matters specified in this clause has been prepared for the land.
- (3) A development control plan must provide for all of the following:
 - (a) a staging plan for the timely and efficient release of urban land making provision for necessary infrastructure and sequencing,
 - (b) an overall transport movement hierarchy showing the major circulation routes and connections to achieve a simple and safe movement system for private vehicles, public transport, pedestrians and cyclists,
 - (c) an overall landscaping strategy for the protection and enhancement of riparian areas, remnant vegetation, wildlife corridors and native flora and fauna habitats, including visually prominent locations, and detailed landscaping requirements for both the public and private domain,
 - (d) a network of passive and active recreational areas,
 - (e) stormwater and water quality management controls,
 - (f) amelioration of natural and environmental hazards, including bush fire, flooding and site contamination and impacts on adjoining agricultural land, and, in relation to natural hazards, the safe occupation of, and the evacuation from, any land so affected,
 - (g) detailed urban design controls for significant development sites,
 - (h) measures to encourage higher density living around transport, open space and service nodes,
 - (i) measures to accommodate and control appropriate neighbourhood commercial uses,
 - (j) suitably located public facilities and services, including provision for appropriate traffic management facilities and parking,

(k) measures to conserve Aboriginal cultural heritage on the land.

...

(6) A development control plan for land identified as “West Yamba Urban Release Area” on the Urban Release Area Map must also provide for all of the following:

(a) measures to ensure adequate setback from the overhead electricity lines located in the vicinity of Miles Street,

(b) in relation to any proposed business centre:

(i) details of the scale and location of the centre, and

(ii) controls to ensure the centre is located on an accessible site in close proximity to the existing school in Carrs Drive, and

(iii) controls to ensure the size of the centre does not compromise the commercial hierarchy of Yamba and will result in a commercial area of a size proportional to residential demands.

...

7.3 Flood planning

(1) The objectives of this clause are as follows:

(a) to minimise the flood risk to life and property associated with the use of land,

(b) to allow development on land that is compatible with the land’s flood hazard, taking into account projected changes as a result of climate change,

(c) to avoid significant adverse impacts on flood behaviour and the environment.

(2) This clause applies to:

(a) land that is shown as “Flood planning area” on the Flood Planning Map, and

(b) other land at or below the flood planning level.

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

(a) is compatible with the flood hazard of the land, and

(b) is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and

(c) incorporates appropriate measures to manage risk to life from flood, and

(d) is not likely to significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and

(e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.

(4) A word or expression used in this clause has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0), published in 2005 by the NSW Government, unless it is otherwise defined in this clause.

7.4 Floodplain risk management

(1) The objectives of this clause are as follows:

(a) in relation to development with particular evacuation or emergency response issues, to enable evacuation of land subject to flooding in events exceeding the flood planning level,

(b) to protect the operational capacity of emergency response facilities and critical infrastructure during extreme flood events.

(2) This clause applies to:

(a) land between the flood planning area and the line indicating the level of the probable maximum flood as shown on the Flood Planning Map, and

(b) land surrounded by the flood planning area,

but does not apply to land subject to the discharge of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metre freeboard.

...

(4) In this clause:

probable maximum flood has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0), published in 2005 by the NSW Government.

Note.

The *probable maximum flood* is the largest flood that could conceivably occur at a particular location, usually estimated from probable maximum precipitation.

7. The Clarence Valley Residential Zones Development Control Plan 2011 (“RDCP”) is a lengthy document comprising 25 parts over a total of 263 pages. The parts apply either generally to residential zone developments or to specific areas. Each part contains detailed provisions and several performance criteria and prescriptive controls. Parts D and X were raised by the Applicants in particular and extracts of these parts follow.

Dictionary

...

Flood Storage Areas means those parts of the floodplain that are important for the temporary storage of floodwater or stormwater during a flood.

...

PART D FLOODPLAIN MANAGEMENT CONTROLS

D1. What are the aims of the Floodplain Management Controls?

This plan aims to:-

...

(d) Provide detailed controls for the assessment of applications lodged in accordance with the [Environmental Planning and Assessment Act 1979](#) on land affected by potential floods.

...

D3. What Development Controls Apply?

D3.1 Performance Criteria

All development requiring Council consent must comply with the following performance criteria:

...

(c) The proposal should only be permitted where effective warning time and reliable access is available for evacuation from an area potentially affected by floods to an area free of risk from flooding. Evacuation should be consistent with any relevant flood evacuation strategy.

(d) Development should not detrimentally increase the potential flood effects on other development or properties either individually or in combination with the cumulative impact of development that is likely to occur in the same floodplain.

...

(f) Procedures would be in place, if necessary, (such as warning systems, signage or evacuation drills) so that people are aware of the need to evacuate and relocate motor vehicles during a flood and are capable of identifying an appropriate evacuation route.

...

D3.2 Prescriptive Controls

Schedules D3 and D4 outline the controls relevant to each of the floodplains to which this Plan applies.

Compliance with the prescriptive controls as defined in Schedules D3 and D4 is deemed to comply with the performance criteria specified in Clause D3.1 unless, in Council's opinion, particular circumstances apply that require a variation in light of D3.1.

Proposals seeking a variation to the prescriptive controls specified in Schedules D3 or D4 will need to be justified in terms of the performance criteria under D3.1.

...

D5. Are There Special Controls for Filling of Flood Liable Land?

D5.1

Development involving filling of flood liable land must comply with the following criteria:

- (a) The filling of flood liable land must not increase the flood risk on other land within the floodplain.
- (b) Filling and associated works must not have any unacceptable associated environmental impacts such as detrimental affects [sic] on the ecology of riparian corridors.

D5.2 Prescriptive controls

The following development controls apply to development involving filling on flood liable land.

D5.2.1 The flood impact of the development to be considered to ensure that the development will not increase flood affects elsewhere, having regard to:

- (i) loss of flood storage;
- (ii) changes in flood levels and velocities caused by alterations to the flood conveyance; and
- (iii) the cumulative impact of multiple potential developments in the floodplain. An engineer's report may be required to address potential impacts.

...

D7. What information is Required with an Application for Development on Flood Liable Land?

...

D7.5 For large scale developments, or developments in critical situations, particularly where an existing catchment based flood study is not available, a flood study using a fully dynamic one or two dimensional computer model may be required.

For smaller developments the existing flood study may be used if available and suitable (eg it contains sufficient local detail), or otherwise a flood study prepared in a manner consistent with the “Australian Rainfall and Runoff” publication, any relevant Council Drainage Design Code and the Floodplain Development Manual, will be required. From this study, the following information shall be submitted in plan form:

- (a) water surface contours (including the 100 year flood and PMF extents)
- (b) velocity vectors;
- (c) velocity and depth produce contours;
- (d) delineation of Flood Management Areas relevant to individual floodplains;

...

SCHEDULE D4

LOWER CLARENCE RIVER FLOODPLAIN, YAMBA FLOODPLAIN & OTHER FLOODPLAINS

Prescriptive Controls (Refer to clause D3.2)

...

Floor & Pad Levels

...

5 *Habitable floor levels* to be no lower than the 100 year flood level plus freeboard

6 *Habitable floor levels* to be no lower than the PMF level. *Non-habitable floor levels* to be no lower than the PMF level unless justified by a site specific assessment.

...

Flood Effects

Engineer’s report required to certify that the development will not increase flood effects elsewhere, having regard to: (i) loss of flood

- 1 storage; (ii) changes in flood levels and velocities caused by alterations to the flood *conveyancing*; and (iii) the cumulative impact of multiple potential developments in the floodplain.

2 The flood impact of the development to be considered to ensure that the development will not increase flood effects elsewhere, having regard to: (i) loss of flood storage; (ii) changes in flood levels and velocities caused by alterations to the flood *conveyancing*; and (iii) the cumulative impact of multiple potential developments in the floodplain. An engineer's report may be required.

Evacuation

- 1 Reliable access for pedestrians or vehicles required during a 100 year flood to a publicly accessible location above the PMF.

2 Reliable access for pedestrians or vehicles is required from the building, commencing at a minimum level equal to the lowest *habitable floor* level to an area of refuge above the *PMF level*, or a minimum of 20% of the gross floor area of the dwelling to be above the *PMF* level.

- 3 The development is to be consistent with any relevant *flood evacuation strategy, Flood Plan adopted by Council* or similar plan.

4 The evacuation requirements of the development are to be considered. An engineer's report will be required if circumstances are possible where the evacuation of persons might not be achieved with the *effective warning time*.

5 Safe and orderly evacuation of the site (in any size flood) has been demonstrated in a regional evacuation capability assessment prepared to the satisfaction of Council and the SES. Where such an assessment has not been prepared, development will only be permitted where, in the opinion of Council, safe and orderly evacuation can occur (in any size flood).

6 Adequate flood warning is available to allow safe and orderly evacuation (in any size flood) without increased reliance upon the SES or other authorised emergency services personnel.

...

PART X URBAN RELEASE AREA CONTROLS

8. Part X of the RDCP deals specifically with urban release area controls.

X6. Relationship with This DCP and other plans

This Part of the DCP should also be read in conjunction with:

- Parts A - D and Parts H – J in particular of the Clarence Valley Residential Zones DCP 2011 (CVRZDCP 2011);
- Councils CVLEP 2011 in relation to controls for retail land-use;
- Council Policies in particular NR Design Manuals, Bike Plan and Pedestrian access and Mobility Plans and Biodiversity Draft DCP.

In the event of any inconsistency between this Part and any other part of CVRZDCP 2011 or any other plan or policy of Council, this part will prevail to the extent of the inconsistency.

...

X8. Compliance with Objectives and Controls in this Plan

Clauses in this plan contain objectives and controls relating to various aspects of development.

The Objectives enable Council and applicants to consider whether a particular proposal will achieve the development outcomes established for West Yamba.

The Controls establish standards, which if met, mean that development should be consistent with the objectives. However, in some circumstances, strict compliance with the controls may not be necessary, or may be difficult to achieve because of the particular characteristics of a development site. In these situations, Council may grant consent to a proposal that does not comply with the Controls in this plan, providing the intent (i.e. the Objective/s) of the Controls is achieved.

...

SCHEDULE XI – WEST YAMBA URBAN RELEASE AREA

...

2. Staging and Servicing

Background

...

The landowner group known as West Yamba Landowners Consortium which collectively own land parcels east of Carrs Drive has broadly indicated that the majority of its collective holdings would form part of an extensive Stage 1 development. A development application (DA) for the residential subdivision part Lot 1722, DP 1035524, 22 Carrs Drive Yamba into 161 residential lots was lodged on 20 October 2014. This DA was also accompanied by a site specific development control plan which indicates a 3 stage staging plan for the residential subdivision of part Lot 1722. This parcel in conjunction with the West Yamba Landowners Consortium holdings can form part of a large Stage 1 in a broad West Yamba staging plan.

...

Controls

...

C2. A Servicing Strategy to the satisfaction of the consent authority to be lodged prior to consent being granted for a DA to subdivide land within the WYURA.

C3. The Servicing Strategy should address but not necessarily be limited to:

- (a) The provision of hydraulic, telecommunication and electricity services.
- (b) Proposed utilities networks and their relationship to adjacent properties, including links to adjacent properties.

...

6. Natural and environmental hazards - Flood and Fill Management

Background

...

Objectives:

01. Ensure that flood and drainage impacts are considered for the development of the entire WYURA and not just in relation to the development of individual land parcels within the WYURA.

02. Minimise flood and drainage impacts of the development in the WYURA on adjoining residential neighbourhoods and property including ensuring that there is no net increase in the number of existing dwellings whose habitable floor levels become inundated by the ultimate filling and development of the entire WYURA.

03. Ensure that the future development of WYURA is undertaken in accordance with the "Lower Clarence Flood Model Update 2013 – September 2013", adopted by Council in March 2014 or any subsequent model update that Council may adopt.

04. Ensure that any stage of the overall WYURA development is successfully integrated and does not prejudice or detrimentally impact overland flow path/s, existing watercourses and stormwater management network.

05. Ensure that Acid Sulphate Soil impacts are assessed and appropriately managed.

Note: Clause C27 of this DCP and clause 7.1 Acid Sulphate Soils CVLEP 2011 must also be complied with.

Controls:

C1. The consent authority must not grant consent to the commencement of land fill or other earthworks associated therewith unless an Earthworks Management Plan (EMP) is prepared to ensure that level of finished lots are is at least at the level of the 1 in 100 year flood event, whilst also maintaining an effective drainage network, overland flow path/s and meeting other development standards of Council.

...

C3. A EMP must include the following:

...

(c) Staging Plans and detail of finished survey levels for fill.

...

(e) dredge location/s and proposed pipe routes to WYURA.

...

(h) Overland flow paths to reach local estuaries/waterways (including Oyster channel) and the URA drainage reserve/floodways.

...

2005 Floodplain development manual

9. "Hazard" is defined in the Glossary of the 2005 Floodplain Development Manual as:

A source of potential harm or a situation with a potential to cause loss. In relation to this manual the hazard is flooding which has the potential to cause damage to the community. Definitions of high and low hazard categories are provided in Appendix L

Chronology

10. The parties provided the following chronology which has been reduced to refer to key dates only as follows:

1. 18 March 2013 – council adopted the Lower Clarence Flood Model Update Study;
2. 17 June 2014 – flood report prepared by Paterson Consultants Pty Limited;
3. August 2014 – Paterson Additional Flood Information;
4. 15 October 2014 – Statement of Environmental Effects;
5. 20 October 2014 – Development Application lodged;
6. Precise date not known – public exhibition and notification of the development application in accordance with Part B of the Residential Zones DCP and 51 submissions were received during the exhibition period; 28 objections and 23 supporting;
7. 27 January 2015 – Dr G O’Loughlin independent assessment of the flood modelling of BMT;
8. June 2015 – BMT WBM amended West Yamba Flood Impact Assessment (Land West of Carrs Drive) Final Report;
9. 9 July 2015 – the Assessment Report prepared by Council’s development planner;
10. 17 July 2015 – Council memorandum recommending changes to a number of draft conditions of development consent;
11. 21 July 2015 – Council adopts Draft Amendment to Council’s Residential Zones DCP – Urban Release Area Controls (including West Yamba);
12. 24 July 2015 – Site Inspection by JRPP; and
13. 24 July 2015 – JRPP Meeting, verbal submissions at the Panel meeting and determination made to conditionally grant development consent to the development application.

Evidence

II.

The Applicants tendered a bundle of documents as Exhibit A. The bundle contained the relevant planning instruments extracted above in par [6](#), development control plan extracted above in pars [7](#) and [8](#), the JRPP Report, the documents before the JRPP at the time of its decision, the DA documents, the Flood Plain Development Manual and the Northern Rivers Development and Design Manual. The Applicants read the affidavit of Mr D Papallo (the Applicants’ solicitor) in the proceedings. Annexed to the affidavit are two email chains between Lisa Foley Project Assistant at the Regional Panels Secretariat and Carmen Landers Development Planner at Clarence Valley Council dating from March to June 2015. The Second Respondent tendered several A1 and A2 sized site plans as Exhibit I and the minutes of a council meeting from 21 July

2015 as Exhibit 2. The Urban Release Area map was tendered as Exhibit 3 and the chronology prepared by the Second Respondent and incorporating the chronology prepared by the Applicants was tendered as Exhibit 4.

12. A summary of the key documents referred to by the parties follows.

Paterson Report June 2014

13. Paterson Consultants Pty Ltd prepared a Flood Impact Investigations Report for the Second Respondent dated June 2014 ("Paterson Report"). The report outlines the Clarence Valley Council policies relevant to flooding, including cl 7.3 of the LEP and Part D of the RDCP. The existing flood behaviour of the site is discussed using the Council's model of the Clarence River to identify the mode of flooding on the site. The report records that the flood model indicated that the flow velocities over the subject site during both the rise and fall of the design flood are low with values of approximately 0.1m/s. The report states that it can be expected that filling of the development site would cause a slight reduction in flood levels east of Carrs Drive, a slightly more rapid rise of the flood waters in the initial part of the flood, and a slightly slower fall in the flood levels. In conclusion the report states:

In general it is concluded that the proposed development, including the drainage swales north of the development, will have no measureable effect on flooding on the property surrounding the development site.

...

The flood model indicates that the proposed development will not significantly impact on flood levels, nor will it significantly impact on flood drainage times of land sited east of Carr's Drive.

The flood model results are viewed as indicating the efficiency of the drainage swale as proposed in maintaining existing drainage times during the recession of flood waters.

Paterson Additional Flood Information August 2014

14. After the Paterson Report was prepared in June 2014, a meeting of the Development Management Unit between the Second Respondent and the Council raised a number of issues relating to flooding. Paterson Consultants prepared an additional report to provide additional information to address the issues raised by the Council. Parts are extracted as follows:

I. INTRODUCTION

...

The issues raised by Clarence Valley Council relate to:

- design flood levels at the site,

- the existing drainage beneath Carrs Drive flowing onto the site from east of Carrs Drive,
- conformance with Council's existing floodplain management plans for the area.

...

6. ST JAMES PRIMARY SCHOOL

St James Primary School is located immediately north east of the Carrs Drive Miles Street intersection.

The ALS ground data available indicates the ground levels on the driveway into the school reaches RL 2.5 m AHD, Given that the school was built, presumably, using a design flood level for the 100 year ARI flood of RL 2.35 m AHD, it would appear that the floor level of the school is above RL 2.5 m AHD.

Figures 7 and 9 of the Paterson "Flood Impact Investigations Report" show the predicted change in once in 100 year ARI flood levels at the school site lies between 0 and 5 mm. Changes in flood level of this magnitude are simply not measurable. Accordingly, it is concluded that the school will not be affected by the proposed development in the design once in 100 year event.

The school will receive a better level of flood access given that Carrs Drive is to be raised to the once in 20 year ARI flood level (RL 1.7 m AHD) or above.

7. CONFORMANCE WITH FLOODPLAIN RISK MANAGEMENT PLANS

...

Carrs Drive is to be raised RL 1.7 metres AHD (minimum) which provides access to Yamba Road for up to the 20 year ARI event. For flood events ranging between the once in 20 year ARI and once in 100 year ARI floods, the most likely community response will be to remain on-site and reliance on the specified flood planning levels to provide protection to the future buildings.

In flood events ranging between the designed 20 year ARI flood and the PMF, an emergency management decision will need to be made whether to allow residents to "remain in place" or to evacuate. Evacuation would involve large parts of Yamba (not only lot 1722) and this development of lot 1722 is not seen as creating a significant additional evacuation effort.

Statement of Environmental Effects October 2014 (extracts)

15. Relevant extracts from the SEE are as follows.

2.4.2 Drainage, Filling of Land

The Proposal responds to the drainage and flooding issues affecting the site and surrounding lands. It is proposed that the Project Site is to be filled to between RL 2.1m

AHD (1:100 year flood level) to a minimum of RL 2.7m AHD, the latter being the underside of each building site on each allotment, with a residential floor level or Flood Planning level of RL 3.0m AHD applying. Approximately 300,000 cubic metres (or approximately 480,000 tonnes) of fill will be required for the overall development, with approximately 100,000 cubic metres (or about 160,000 tonnes) of fill required for each stage.

This extent of imported fill will take the level of the land within the subdivision to well above the current estimated 1:100 year flood level as currently set by Council, with some sections filled to well in excess of the design PMF flood event. Carrs Drive is to be raised to RL 1.7 m AHD, in accordance with Clarence Valley Council requirements. RL1.7mAHD is Council's 1 in 20 year flood level for Carrs Drive, to facilitate emergency access to the area during times of flooding. The depth of filling will vary across the site. Generally the fill depths will exceed 1.6 m of imported clean fill. In so doing, the proposal will achieve the following flood planning objectives:

- To minimise the flood risk to life and property.
- To allow development that is compatible with the land's flood hazard and to account for climate change
- To avoid significant adverse impacts on flood behaviour and the environment.

...

3.2.11 Flooding

All of the site is affected by the 1:100 year flood event. It comprises land that is shown as "Flood planning area" on Clarence Valley Council's LEP Flood Planning Map. The Yamba Floodplain Risk Management Study determined that the majority of Yamba, including West Yamba, would be classified as flood storage, that is, an area subject to the temporary storage of floodwaters, and not a floodway.

Revised flood mapping of the site in 2014 reveals a 1:100 year flood level for the site of RL 2.1m AHD-refer also to *Annexure 3* for further details. The flood mapping shows that, like for the site, most of the surrounding developed urban area of Yamba is also flood prone.

...

Part 7 of the LEP contains addition [sic] provisions, addressed in the accompanying Table 5-4

Table 5.4: Additional Local Provisions of the LEP and the Project

Rel eva nt par t of DCP	Assessment
--	-------------------

...

7.3 Flood Planning development

(i) The
objectives of
this clause
are as follows:

(a) to
minimise the
flood risk to
life and
property
associated
with the use
of land,

(b) to allow
development
on land that
is compatible
with the land'
s flood
hazard
taking into
account
projected
changes as a
result of
climate
change,

(c) to avoid
significant
adverse
impacts on
flood
behaviour
and the
environment.

(3)
Development consent must
not be The proposal complies with this control.

granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

(a) is compatible with the flood hazard of the land, and

(b) is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and

(c) incorporates appropriate measures to manage risk to life from flood, and

(d) is not likely to significantly adversely

Flood modelling by Paterson Consulting shows that the objectives of clause 7.3(1)(a)-(c) can be satisfied.

Flood modelling by Paterson Consulting shows that (3)(a)-(e) can be satisfied. The flood-prone nature of the West Yamba Urban Release Area has been extensively flood modelled prior to its release for residential development. The social and economic costs of developing this locality for development were factored in prior to rezoning this area for large-scale urban development.

Flood modelling by Paterson Consulting shows that that the proposed development will not significantly impact on flood levels, nor will it significantly impact on flood drainage times of land sited east of Carrs Drive.

The flood modelling indicates that there will be a slight reduction in flood levels for the properties east of Carr's Drive as a result of the proposed development. The modelling indicates that flooding arising from the filling of the site will create slightly more rapid rise of the flood waters in the initial part of the flood. However, the rise of the flood level affected is below the proposed level of Carr's Drive. Moreover, given that the time of travel of floodwaters from Grafton to Yamba is greater than 24 hours, and thus a long period of flood warning is available, the slight change in the rise of the flood level is viewed as "not significant". This feature will also enable the safe evacuation of persons from this area during any peak flood event.

It also shows the efficiency of the drainage swale as proposed in maintaining existing drainage times during the recession of flood waters.

No environmental or related impacts are likely to arise from filling and developing the site.

affect the
environment
or cause
avoidable
erosion,
siltation,
destruction
of riparian
vegetation or
a reduction
in the
stability of
river banks
or
watercourses,
and

(e) is not
likely to
result in
unsustainable
social and
economic
costs to the
community
as a
consequence
of flooding.

...

...

5.2.6 Section 79C(1)(b) : Likely Environmental Impacts

...

Flooding Impacts:

...

- The upgrading of Carrs Drive will enable flood evacuation during flood events up to and including the 1:20 year flood event. This is a Council requirement. Within the site, all lands are to be filled above the 1:100 year flood level, with sections well above even the PMF flood level– a flood refuge for those who may not have evacuated in accordance with the existing flood evacuation strategy currently applicable to Yamba township.

- Flood engineers Paterson Consulting Pty Ltd conclude that for flood events ranging between the 1:20 year floods and 1:100 year floods, the most likely community response will be to remain on-site and reliance on the specified flood planning levels to provide protection to the future buildings. In flood events ranging between the design 20 year ARI flood and the PMF, an emergency management decision will need to be made whether to allow residents to “remain in place” or to evacuate. Evacuation would involve large parts of Yamba (not only Lot 1722) and thus the development of Lot 1722 is not seen as creating any significant additional evacuation effort. On this issue, it is also noteworthy that there is already in place a flood evacuation plan for Yamba, jointly prepared by and approved by Council and the SES, dated July 2012. This plan would have equal applicability to the site as to the currently developed sections of West Yamba, to the north of the site, including lands to the north of Yamba Road, as well as to Yamba township as a whole.

West Yamba Flood Impact Assessment (Land west of Carrs Drive) Final Report June 2015 (“BMT WBM Report”)

16. The BMT WBM Report documents the outcomes of the flood impact assessment undertaken by BMT WBM Pty Ltd for Siteplus Pty Ltd on behalf of the Second Respondent. The report was prepared to assess the existing riverine and tidal surge flood risk and potential changes to the flood risk resulting from the development of the whole of the WYURA. The baseline assessment of flood behaviour (prior to any development or filling works) showed that the subject site is inundated by the 1:20 and 1:100 year ARI flood events but not the 1:5 year ARI flood event. Peak flood elevations across the WYURA were approximately 1.7m AHD and 2.1m AHD for the 1:20 and 1:100 year ARI flood events respectively.
17. The assessment of flood impacts after the proposed development and filling works is based on a developed case model in which the entire WYURA is filled above the 1:100 year ARI flood level with the exception of the main roads through the site. The report includes several maps that show the peak level of inundation in different flood events. Due to the proposed filling, figure 5-1 shows that the areas of the site which were formerly inundated in the 1:20 year ARI flood scenario are now dry. Figure 5-2 shows that for the 1:100 year ARI flood event, areas that were previously inundated are now also dry. There will be increased flood levels along the northern perimeter of the site. These increases in peak flood level are up to 0.12m but are generally confined to within 100m of the site perimeter and do not impact on existing dwellings. Figure 5-3 of the report models the 1:100 year ARI riverine flood only scenario and shows that the majority of the WYURA was wet but now dry, with the exception an area of the offset lot to the far east of the site. The riverine-only event was modelled as impact maps are generally based on the maximum flood level, which at West Yamba results from storm surges, meaning that any potential impacts from the riverine flood component are ‘masked’. Figure 5-4 models the 1:100 year ARI flood incident in the scenario that the development site only has been filled (not the entire WYURA). That figure shows that the entirety of the site which was previously inundated is now dry.
18. Extracts of the report follow:

6 Conclusions and Recommendations

6.1 Conclusions

The following key conclusions are drawn from this study:

- The site and WYURA are shown to be inundated by the 20 and 100 year ARI events but not the 5 year ARI event under baseline (existing) conditions.
- Peak flood elevations at West Yamba area approximately 1.7mAHD and 2.1mAHD for the 20 and 100 year ARI events respectively.
- Peak baseline inundation levels at West Yamba are lower (typically by 0.4m) than corresponding levels on the northern side of Yamba Road. This is due to the elevated Yamba Road constraining overtopping.
- Peak design flood levels at West Yamba occur as a result of storm surge (as opposed to riverine / catchment flooding) based on Council's adopted design scenarios.
- Mitigation of the WYURA relies principally on a large floodway located outside of the site area.
- No notable flood level impacts are predicted for the 5 and 20 year ARI events.
- The mitigated 100 year ARI event shows some impacts (increases in peak flood level) greater than 0.03m limited to the perimeter of the WYURA. These are not predicted to affect existing dwellings or other receptors within the tolerances shown.
- No flood level impacts to dwellings are predicted for a 100 year ARI riverine only flood, ie a flood with no total/storm surge component. Peak level increases were observed along the channel between Deering Street and Yamba Road as a result of additional conveyance of floodwater by the floodway.
- Modelling of the site only, ie without the remainder of the WYURA, shows no significant impacts on peak flood levels.

6.2 Recommendations

- (1) The design of the proposed floodway should be refined and reassessed at the detailed design stage following any proposed modifications. If design events and their underlying assumptions, such as allowances for storm surge, are updated then the development should be assessed with the updated design events.
- (2) Local stormwater features such as culverts under the main internal roads should be determined based on sizing for local stormwater events. During storm surge and / or riverine flood events the roads convey floodwater and sizing of local drainage culverts will not have a significant effect on regional flood behaviour.
- (3) The PMF (Probable Maximum Flood) event has not been included in this assessment. Interrogation of Council's flood model indicates that peak PMF levels are in the order of 3.7mAHD. This would inundate the West Yamba site and the wider area apart from Yamba Hill. A Flood Emergency Management Plan should therefore be prepared including a safe evacuation plan and / or provision of an area of safe refuge above the PMF level.

19. The report's conclusions in section 6.1 were included in the Assessment Report.

The Council's Assessment Report 9 July 2015

20. Extracts of the Council's Assessment Report ("Assessment Report") of 9 July 2015 follow, including the table below containing a list of all relevant s 79C(1)(a) matters:

List of All Relevant s
79C(1)(a) Matters

- State Environmental Planning Policy No 14 – Coastal Wetlands
- State Environmental Planning Policy No 55 – Remediation of Land
- State Environmental Planning Policy No 62 – Sustainable Aquaculture
- State Environmental Planning Policy No 71 – Coastal Protection
- Clarence Valley Local Environmental Plan 2011
- Development Control Plan for Development in Residential Zones
- Development Control Plan for Development in Environmental Protection, Recreation and Special Use Zones
- Clarence Estuary Management Plan
- NSW Coastal Policy 1997: A Sustainable Future for the New South Wales Coast,

...

SECTION 79C EVALUATION FOR SUB2014/0016

Lot 51 DP 861895, Lot 1722 DP 1035524 and Lot 8 DP 1062514

22 Carrs Drive YAMBA NSW 2464

Proposal: 161 Lot Residential Subdivision

(1) Matters for consideration – General

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

...

Clarence Valley Local Environmental Plan 2011

...

Clause 6.3 Development Control Plan

Clause 6.3 of the LEP requires the preparation of development control plan (DCP) for development on land within an urban release area. The objective of the clause is to ensure that development on land in the WYURA occurs in a logical and cost effective manner.

The matters to be considered under Clause 6.3 are as follows:

(3) A development control plan must provide for all of the following:

(a) a staging plan for the timely and efficient release of urban land making provision for necessary infrastructure and sequencing,

(b) an overall transport movement hierarchy showing the major circulation routes and connections to achieve a simple and safe movement system for private vehicles, public transport, pedestrians and cyclists,

(c) an overall landscaping strategy for the protection and enhancement of riparian areas, remnant vegetation, wildlife corridors and native flora and fauna habitats, including visually prominent locations, and detailed landscaping requirements for both the public and private domain,

(d) a network of passive and active recreational areas,

(e) stormwater and water quality management controls,

(f) amelioration of natural and environmental hazards, including bush fire, flooding and site contamination and impacts on adjoining agricultural land, and, in relation to natural hazards, the safe occupation of, and the evacuation from, any land so affected,

(g) detailed urban design controls for significant development sites,

(h) measures to encourage higher density living around transport, open space and service nodes,

(i) measures to accommodate and control appropriate neighbourhood commercial uses,

(j) suitably located public facilities and services, including provision for appropriate traffic management facilities and parking,

(k) measures to conserve Aboriginal cultural heritage on the land.

Furthermore, Clause 6.3(7) requires that a DCP for the WYURA must also provide for the following:

(a) *measures to ensure adequate setback from the overhead electricity lines located in the vicinity of Miles Street,*

(b) *in relation to any proposed business centre:*

(i) *details of the scale and location of the centre, and*

(ii) controls to ensure the centre is located on an accessible site in close proximity to the existing school in Carrs Drive, and

(iii) controls to ensure the size of the centre does not compromise the commercial hierarchy of Yamba and will result in a commercial area of a size proportional to residential demands.

Comment

The applicant prepared a DCP for the development site as part of the application, however this was unacceptable in its current format. Due to section 74C(2) of the *Environmental Planning and Assessment Act 1979* (herein referred to as the Act) the DCP would have to either:

- form an amendment to Council's existing "Clarence Valley Residential Zones Development Control Plan 2011" (CVRZDCP 2011) in the correct format (eg a new Part /chapter to existing DCP); or,
- be proposed as a stand alone DCP for the land addressing a range of other factors or alternatively call up provisions of the existing DCP and be accompanied by a corresponding amendment to remove land from the existing DCP.

In the case of a stand alone DCP for the land being prepared, it would need to incorporate other parts of the existing Residential Zones DCP. Of the two alternatives, an amendment to incorporate Urban Release Area controls into the existing DCP was preferred to minimise the number of potential stand alone DCP's [sic] and to ensure coordination of key planning matters such as infrastructure provision, drainage, filling and traffic management.

A report to Council (Item No 13.094/15) recommending adoption of the Draft DCP is to be considered at the July 2015 Council Meeting. The Draft DCP incorporates information provided with the application and where information has not been provided, suitable conditions have been placed within the Draft Schedule to ensure compliance with the provisions of the DCP. Therefore, it is considered that the development has met the provisions of Clause 6.3 of the LEP. A copy of the Draft DCP (as reported to Council's Meeting 21 July 2015) is contained within the attachments.

...

Clause 7.3 Flood Planning

Detailed flood modelling has been undertaken by BMT WBM Pty Ltd and as stated above that consultant is responsible for developing the “Lower Clarence Flood Model Update 2013” and previous flood modelling. They are also the flood modelling consultant for other WYURA developers. The report concluded that:

- The site and WYURA are shown to be inundated by the 20 and 100 year ARI events but not the 5 year ARI event under baseline (existing) conditions.
- Peak flood elevations at West Yamba are approximately 1.7m AHD and 2.1m AHD for the 20 and 100 year ARI events respectively.
- Peak baseline inundation levels at West Yamba area lower (typically by 0.4m) than corresponding levels of the northern side of the Yamba Road. This is due to the elevated Yamba Road constraining overtopping.
- Peak design flood levels at West Yamba occur as a result of storm surge (as opposed to riverine/catchment flooding) based on Council’s adopted design scenarios.
- Mitigation of the WYURA relies principally on a large floodway located outside of the site area.
- No notable flood level impacts are predicted for the 5 and 20 year ARI events.
- The mitigated 100 year ARI event shows some impacts (increases in peak flood level) greater than 0.03m limited to the perimeter of the WYURA. These are not predicted to affect existing dwellings or other receptors within the tolerance shown.
- No flood level impacts to dwellings are predicted for a 100 year ARI riverine only flood, ie a flood with no tidal/storm surge component. Peak level increases were observed along the channel between Deering Street and Yamba Road as a result of additional conveyance of floodwater by the floodway.
- Modelling of the site only, ie without the remainder of the WYURA, shows no significant impacts on peak flood levels.

In consideration of the above, it can be concluded that the modelling demonstrated that the proposed development provides flood and drainage systems for the WYURA and the development, mitigating the impact on surrounding property and infrastructure due to the development. Therefore, the proposed development is not inconsistent with the objectives of Clause 7.3 of the LEP.

...

Residential Zones DCP

...

Part D Floodplain Management Controls

The proposed development is not inconsistent with the controls as set out within Part D of the DCP. As discussed in detail in other sections of this report a detailed Flood Impact

Assessment was undertaken by BMT WBM Pty Ltd and the flood modelling demonstrated that the proposed development provides flood and drainage systems for the WYURA and the development, mitigating the impact on surrounding property and infrastructure due to the development.

...

(i) any submissions made in accordance with this Act or the regulations,

The proposed development was advertised and notified in accordance with the provisions of Part B of the Residential Zones DCP. Fifty one (51) submissions were received during the exhibition period; 23 in support and 28 objections. The issues raised in the submissions are discussed below:

...

7. Flood modelling

Concerns were raised within the one of the submissions regarding the submitted Flood Report.

Comment

The initial flood modelling provided with the application relied on differing assumptions and criteria to the “Lower Clarence Flood Model Update 2013 Report” by Council’s consultants. Thus, the modelling reports were reviewed by an independent expert, Dr G O’Loughlin who identified issues that required resolution. Further modelling was undertaken by BMT WBM Pty Ltd that have addressed the issues identified by the independent consultant and those raised within the objections. The amended flood report has satisfied the concerns in regard to this development. In summary, the amended report has demonstrated that the filling of the proposed development does not impact on any existing property or infrastructure in the vicinity of the development.

...

Council memorandum dated 17 July 2015

21. On 17 July 2015 Council’s development planner sent a memorandum to the JRPP members as follows:

Dear Panel Members,

Please be advised that an amendment to the Schedule of Conditions for the abovementioned Development Application has been undertaken to rectify minor errors and further clarify staging of development.

The amendments are as follows:

...

Condition 37

Flood levels have been amended to reflect Flood Impact Assessment by BMT WBM Pty Ltd.

...

Minutes of Council meeting held 21 July 2015 (Exhibit 2).

22. At this meeting the Council adopted the Draft DCP (also called Part X).

SUMMARY

This report brings back to Council the outcomes of the recent public exhibition of a draft amendment to Council's Residential Zones Development Control Plan which are intended to insert general urban release area provisions into the DCP as well as introducing specific DCP controls for the West Yamba Urban Release Area.

It recommends that Council adopt the proposed amendment to the Residential Zones Development Control Plan with a minor amendment only.

...

3. Flood & Fill Management

One submission noted that the draft DCP amendment did not acknowledge the West Yamba Flood Impact Assessment prepared by BMT WBM, dated December, 2014 which was submitted by Johnson [sic] Enterprises with the West Yamba landowners Group draft controls given that this assessment refined the 2013 hydraulic model with a higher resolution terrain model.

That submission also indicated that the adopted 2013 model might be updated/amended in the not too distant future for a reduced storm surge component which would significantly affect the 20 year and 100 year ARI flood events.

It further questioned whether the objectives should include a conditional statement that recognizes a possible future adopted study that creates lower 20 year and 100 year flood events, given that these levels directly impact on Flood Planning levels.

Comment

There is not mention of the consortia's comprehensive URA – wide flood modelling /assessment work undertaken prior to preparation of a draft DCP amendment due mainly to the consortiums [sic] desire to not have other parties benefiting from work/intellectual property that those parties had not financially contributed to at that time.

Draft Objective 6.03 of Schedule XI could be amended to read as follows:

03. Ensure that the future development WYURA is undertaken in accordance with the "Lower Clarence Flood Model Update 2013 –

September 2013”, adopted by Council in March 2014 or any subsequent model update that Council may adopt.

...

JRPP file

23. Attached to the Assessment Report and provided to the JRPP were the following documents:

1. 29 plans of the site prepared by Siteplus dated 24 September 2014;
2. Part X of the RDCP;
3. Preliminary Contamination Assessment and attachments prepared by Environmental Engineering Solutions dated April 2015;
4. Aboriginal Heritage Information Management System searches conducted by the NSW Office of Environment and Heritage at the request of Council’s development planner dated 8 July 2015;
5. Staging site plan prepared by Siteplus 7 July 2014;
6. Office of Water’s General Terms of Approval for the works dated 28 October 2014;
7. Traffic Impact Assessment for Carrs Drive West Yamba prepared by Bitzios Consulting on 5 June 2015;
8. BMT WBM Report;
9. Submissions received by Council;
10. In total 51 submissions were received, 28 objecting and 23 supporting the Second Respondent’s DA. Amongst the submissions received was an objection from Mr Johnston of Johnston Enterprises Australia Pty Ltd in which he outlined the statutory framework for the development and raised issues with respect to flooding. Mr Johnston objected to the proposal on a number of grounds, including that the designed road works on Carrs Drive would lead to the creation of flood impacts through the elevation of the road, location and design of swales and culverts and lead to the continued remoteness of the site from the WYURA development generally. The appendix to that objection is a document prepared by A Fletcher & Associates Pty Ltd Land and Engineering Surveyors and Development Consultants. The document outlines concerns with respect to the proposed development including with respect to drainage of land to the east of Carrs Drive and the lack of modelling of the cumulative filling of the other residentially zoned lots in the WYURA.
11. Email from the JRPP Regional Secretariat to the JRPP members dated 26 June 2015 advising that the DA had been referred to the JRPP;

12. Plans of the site prepared by Bothamley and Donohue Pty Ltd and Siteplus dated September 2014;
13. Draft Planning Agreement between Council and the Second Respondent and Rex Phillip Tory;
14. Music-Link Report;
15. Response to Development Management Unit Meeting Minutes 29 July 2014 by Outline Planning Consultants Pty Ltd (the First Respondent) dated 26 September 2014 attaching the meeting record of Council's Development Management Unit dated 2 July 2013;
16. Development Control Plan prepared for Yamba Residential Subdivision Pty Limited by Outline Planning Consultants October 2014;
17. DA and attachments submitted 16 October 2014;
18. SEE dated October 2014 and annexures;
19. Public and landholder notification documents dated 8 July 2015; and
20. Memorandum from Council's development planner to the JRPP members dated 17 July 2015 advising of amendments to the schedule of conditions.

Other information before the JRPP

24. In addition to the documents listed in par 23, the JRPP also had a site visit on 24 July 2015. Verbal submissions were made at the JRPP meeting on 24 July 2015 prior to its determination from Council staff, including Carmen Landers (the development planner), Cheryl Sisson (the development services co-ordinator), Ian Dodd (development engineer), Renan Sultan (development engineer), Des Schroder (Director, Planning and Environment) and speakers for and against the development.

JRPP Notice of Determination 24 July 2015

25. The JRPP issued its determination and statement of reasons approving the Second Respondent's DA on 24 July 2015. Extracts from the JRPP's report follow, including certain draft conditions of particular relevance in these proceedings:

Determination and statement of reasons

2014NTH019 Clarence Valley SUB2014/0016 [at 22 Carrs Drive Yamba] as described in Schedule 1.

Date of determination: 24 July 2015

Decision:

The panel determined to approve the development application as described in Schedule 1 pursuant to section 80 of the *Environmental Planning and Assessment Act 1979*.

Panel consideration:

The panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and the matters observed at site inspections listed at item 8 in Schedule 1.

Reasons for the panel decision:

The development does not conflict with the requirements of the following SEPP's [sic] – 55 & 62

The panel adopted the assessment of those matters in the Council Assessment Report.

The principal reason for the panel decision was that the proposed development will have a positive outcome for the area through increased employment opportunities during construction works and once the subdivision is completed, positive economic benefits will arise from the construction of individual dwellings.

Other reasons for the panel decision were:

- 1) The clearing of EEC's [sic] will be offset through compensatory plantings together with the combining of all the E3 Environmental Management and E2 Environmental Conservation zones into one allotment with no dwelling entitlement and protected in perpetuity;
- 2) Detailed flood modelling has been undertaken demonstrating that the proposed development provides flood and drainage systems for the WYURA and the development, mitigating the impact on surrounding property and infrastructure;
- 3) The developer be liable to pay the full cost of construction of a rising main to the sewerage treatment plant unless other parties in the development of West Yamba can negotiate cost sharing arrangements; and
- 4) Upgrade works/contributions to the Yamba road network as a result of the increase in traffic have been appropriately conditioned.

Conditions: The development application was approved subject to the conditions in Appendix A of the council Assessment Report as amended by Council's Memorandum of 17 July and as further amended at the meeting. Approved conditions are in Schedule B.

SCHEDULE 1

...

6 Relevant mandatory considerations

- State Environmental Planning Policy No 14 – Coastal Wetlands

- State Environmental Planning Policy No 55 – Remediation of Land
- State Environmental Planning Policy No 62 – Sustainable Aquaculture
- State Environmental Planning Policy No 71 – Coast Protection
- Clarence Valley Local Environmental Plan 2011
- Development Control Plan for Development in Residential Zones
- Development Control Plan for Development in Environmental Protection, Recreation and Special Use Zones
- Clarence Estuary Management Plan
- NSW Coastal Policy 1997: A sustainable Future for the New South Wales Coast
- The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality.
- The suitability of the site for the development.
- Any submissions made in accordance with the [EPA Act](#) or [EPA Regulation](#) .
- The public interest.

7. Material considered by the panel:

Council Assessment Report Dated: 9 July 2015

Council Memorandum dated 17 July 2015

Council Meeting Minutes of 21 July 2015

Written submissions during public exhibition: 51 (28 objecting and 23 supporting)

Verbal submission at the panel meeting: Council Staff: - Carmen Landers, Development Planner; Cheryl Sisson, Development Services Coordinator; Ian Dodd, Development Engineer; Renan Soltan, Development Engineer; Des Schroder, Director, Planning & Environment. Support- Nil; Against- Norman Johnston, on behalf of West Yamba Consortia; On behalf of the applicant-Gary Peacock, outline Planning Consultants.

Meetings and site inspections by the panel: Site Visit on 24 July 2015.

...

10. Draft conditions: Attached to council assessment report as amended by Council's Memorandum of 17 July 2015 and further amended at the meeting.

SCHEDULE 2

Draft Advices and Conditions of Consent for SUB 2014/0016

Advices

...

10. The Earthworks Management Plan for each and every stage must include an initial site inspection report. This report should include;

a Inspection and verification of an appropriate preparation of the foundation for placement of fill, including the provision of surface drainage arrangements and a geotechnical assessment of factors that can influence the site. This is to be provided by a competent Geotechnical Authority.

b Certification that the land created by the development will be suitable for its intended purpose (eg residential, commercial or industrial buildings) including any parts of the land that will be left in its natural state or modified by the development.

c Identify any problem areas on or adjacent to the development land (eg potential land slip areas, hanging swamps, very high water tables, salt affected land, highly eroded sites etc) and advise if engineering solutions, acceptable to Council, are available to enable structures to be built on the affected parts of the land.

...

Conditions of development consent imposed by JRPP

1. The development being completed in conformity with the *Environmental Planning & Assessment Act 1979*, the Regulations thereunder, the Building Code of Australia (BCA) and being generally in accordance with the following:

- Plan numbered 14140.DA1.P01 dated 29 June 2015 Revision E drawn by Siteplus;
- The Statement of Environmental Effects prepared by Outline Planning Consultants Pty Ltd on behalf of Yamba Residential Subdivision Pty Ltd and Mr Rex Tory dated 15 October 2014 as modified by Outline Planning Consultants Pty Ltd advice to Council dated 19 June 2015; and
- Plans numbered 14140.DA.CO1 – C29 (29 Sheets) dated 29 June 2015 Revision E drawn by Siteplus

...

16. A servicing strategy or a Developer Servicing Plan (DSP) must be completed by the applicant before urban development can be connected to the upgraded Yamba Sewerage Treatment Plant. The DSP must consider the total contributing catchment from the West Yamba Urban Release Area and the capacity of the existing sewerage reticulation system. The DSP, the design reticulation system and proposed connection point must be approved by Council.

...

28. Prior to the issue of any civil Construction Certificate engineering calculations must be provided which clearly indicate the capacity of table/swale drains, the maximum flow

velocities and their resistance to scour. Where table/swale drains are used they must be designed to minimise velocity of flow to that necessary to achieve draining of the table /swale minimising ponding and must be treated to minimise scour.

Table/Swale drains within the road reservation must be designed to protect the road pavement from infiltration of ponded water.

Batters on table/swale drains must be suitable for mowing with a maximum grade of 1v in 4h.

...

Stormwater Drainage and Flooding

36. All stormwater falling on the property is to be collected within the property and discharged in accordance with the relevant parts of the applicable Clarence Valley Council Development Control Plans and NRDC. A Stormwater Management Plan (SWMP) that demonstrates NorBe must be prepared in accordance with NRDC.

The SWMP must consider any adjacent property or infrastructure affected by the development. Design details for the drainage system and point of discharge must be submitted for approval by Council and/or accredited private certifier prior to issue of the Civil Construction Certificate for each and every stage.

The SWMP must include a specific management plan for any WSUD systems. Construction and operational phases must be considered.

All inter-allotment and Council owned stormwater drainage systems on private property must be located within drainage easements.

37. The property is flood affected. All works are to minimise the adverse effects of flooding in accordance with the relevant parts of the Council Development Control Plans and NRDC. The "Lower Clarence Flood Model Update 2013" was adopted by Council Resolution 13.043/14 on 18 March 2014. The 1% Annual Exceedence Probability (AEP) water level in the vicinity of the site is RL 2.1 m AHD and the Extreme Flood Level is RL 3.7 m AHD. Development on the site must be undertaken in compliance with the flood plain management controls listed in the Council DCP for the relevant land use zone.

38. A drainage easement is required over the whole of Lot 8 DP1062514, burdening Lot 8 DP1062514 in favour of Clarence Valley Council. An easement is to be created to provide for conveyance of interallotment drainage through the subject land. The easements shall be provided for as follows:

- a. Where there is no Council infrastructure contributing to the drainage scheme the easements shall be in favour of the properties requiring the benefit and not the Council.
- b. Where there is water draining off roads, Council land or Council drainage infrastructure in the upstream drainage system then the easement must benefit Council only. This easement must be an easement in gross.

c. Where there is water draining off roads, Council land or Council drainage infrastructure in the upstream drainage system and there are properties draining directly to the drainage system then the easement must benefit Council and these properties.

The right to release, vary or modify the easement to be assigned to Clarence Valley Council where Council has a benefit.

39. The developer shall construct the proposed 2 x 3600mm x 650mm reinforced concrete box culvert's [sic] for the West Yamba Urban Release Area flood and drainage system across Carrs Drive, as part of the Stage 1 works, at the developers [sic] cost. Transitional and/or temporary works may be required for the existing section of Carrs Drive. This condition should be read in conjunction with Condition 40 Voluntary Planning Agreement Alternative.

...

Earthworks

46. Detailed plans of earthworks including an Earthworks Management Plan must be submitted to Council or accredited private certifier for assessment and approval prior to the issue of a Civil Construction Certificate.

The earthworks Management Plan is to be prepared in accordance with Council's guidelines. The guidelines are listed in the Advices section of this Notice.

...

Framing the JRPP's decision

26. Following paragraph cited by:

Geoffrey John Lomman v Windbelt Pty Limited (13 March 2018) (Robson J)

41. Windbelt submitted that the Lommans' approach to challenging the requisite state of mind was flawed for a number of reasons:

1. First, the Lommans conducted a minute examination of the Assessment Report, using an approach finely attuned to the perception of error. In any case the approach was flawed as the decision under review is that of Council, not the assessment of the Council's officers: *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 ('Rossi') at [268]-[269];
2. Second, the fact that Council adopted a recommendation in the Assessment Report does not support an inference that this was the totality of matters considered by Council in determining the development application: *Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd* [2016] NSWLEC 72; (2016) 216 LGERA 144 ('*Dougherty Bros*') at [26];

3. Third, the Lommans erroneously and selectively relied on the Benbow Report and the Assessment Report to discharge their onus that the state of satisfaction was not reached, and further suggested a list of considerations which should have been taken into account. Windbelt submitted that this constituted an “impermissible shopping list approach”, which could not discharge the Lommans’ onus. Further, Windbelt submitted that the Lommans’ reliance on the Benbow Report was irrelevant to the question for determination, and represented no more than a submission on the merits of the decision; and
4. Fourth, the Lommans’ case omitted any reference to the vast body of evidence that was before Council, which, when examined fairly and as a whole, rendered impossible the inference that Council was not satisfied of the matters in cl 2.8(3)(b). Relevantly, Windbelt submitted that Council had before it and was informed by:
 1. the SEE;
 2. the Benbow Report;
 3. many submissions that addressed noise with some people expressing no objection or conditional support, and only 12 people expressing objection;
 4. a report by Mr Boulevine, Council’s Environmental Health Officer, dated 21 July 2016, who at the time advised that noise levels were unacceptably high and intrusive at two noise receptors;
 5. a response to that report by Mr Benbow dated 21 September 2016;
 6. a further response to the Benbow Report by Mr Boulevine dated 6 October 2016;
 7. a set of draft conditions prepared by Mr Boulevine dated 18 November 2016 which were advised to be fair and properly acceptable to Windbelt;
 8. a more prescriptive set of conditions prepared by Mr Boulevine on 28 November 2016;
 9. an acoustic report prepared by Wilkinson Murray dated January 2017, and submitted on behalf of the Lommans;
 10. oral submissions made to councillors at Council meetings where the decision was made, including by Mr Bilinsky (solicitor for the Lommans), Mr Murray from Wilkinson Murray, and on behalf of Windbelt, Mr Large;

- ii. a report to the Committee of the Whole by Council's town planner which recommended the approval of the development application subject to a number of conditions addressing the amenity of the neighbourhood. It also made recommendations for management of noise and traffic; and stated, inter alia, "it is considered that the proposed events are unlikely to have an adverse impact on the environment"; and
12. condition 29, which contained more prescriptive measures than those advocated by Mr Benbow.

The parties made conflicting submissions on what the Court should consider as informing the JRPP's decision. The Applicants submitted that the JRPP expressly adopted the Assessment Report as the JRPP Notice of Determination records that "[t]he panel adopted the assessment of those matters in the Council Assessment Report". Consequently this document provides clear evidence of what considerations were before the JRPP and what it can be inferred to have taken into account per *Telstra Corporation Ltd v Hurstville City Council* [2002] FCAFC 92; (2002) 118 FCR 198 at [50] (Sundberg and Finklestein JJ). The Applicants also submitted that an inference may properly be drawn that the Assessment Report reflects the matters considered by the JRPP relying on *MCC Energy Pty Ltd v Wyong Shire Council* [2006] NSWLEC 581; (2006) 149 LGERA 59 at [49]. That citation of authority does not support the Applicants' case. If anything *MCC Energy* at [49] supports the Second Respondent by inference. Justice Jagot did not accept that the adoption of the relevant report by the delegate of the council was by inference the sole basis for a decision. The recommendation of the report referred to other matters such as s 79C which the decision maker must also consider. The case highlights the necessity to closely consider the material before a decision maker.

27. The Second Respondent submitted that the JRPP is not required by the *EPA Act* or *EPA Regulation* to give reasons beyond cl 100(1)(c) of the *EPA Regulation* in relation to the imposition of conditions. Such reasons were provided by the JRPP. As the Second Respondent submitted the documentary record in its entirety must be considered in addition to the Notice of Determination with reasons published by the JRPP and the Assessment Report.

Onus of proof in judicial review proceedings

28. As the moving party the Applicants bear the onus of proof of establishing a breach of the *EPA Act* on the balance of probabilities in these proceedings. This onus may be discharged "by reference to the documentary material evidencing the decision making process if that material is sufficient to allow the Court to draw the inference" that the JRPP did not comply with the statute per *Caroon a Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 2)* [2010] NSWLEC 1; (2010) 172 LGERA 25 at [69]. Mechanisms were available to the Applicants to meet the onus beyond the documentary materials, such as administering interrogatories or service of an order for the giving of a statement of reasons pursuant to r 59.9(2) of the *Uniform Civil Procedure Rules 2005 (NSW)*. The Applicants submitted it was unnecessary to avail themselves of such mechanisms because the JRPP provided written reasons in its Notice of Determination dated 24 July 2015.

29. I must record at the outset difficulty in considering much of the Applicants' case as presented. On numerous occasions merit submissions were made which are beyond the scope of judicial review proceedings, see *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35-36 (Brennan J) and *Alexander v Yass Valley Council* [2011] NSWLEC 148; (2011) 184 LGERA 123 at [114].
30. The Applicants' counsel made very detailed criticisms about specific aspects of the technical material in the evidence such as the flood impact assessment reports (of Paterson and BMT WBM) but not in a way that enabled the context for that detail to be assessed. That led to the Second Respondent taking the Court more comprehensively through the same reports and other material before the JRPP in order to provide the necessary context. This resulted in extensive evidence about technical issues related to flood impact assessment being before the Court much of it extracted in the evidence section above. The nature of that evidence was more suited to a merits appeal. It was also necessary to consider the statutory context in considerable detail, as also reflected in the extensive extracts of the RDCP in particular above in pars 7 and 8.
31. As identified in *Walsh v Parramatta City Council* [2007] NSWLEC 255; (2007) 161 LGERA 118 at [58] it is not permissible in judicial review proceedings to compile a list of matters that in a party's view should have been better considered by a decision maker and allege a failure to consider these as mandatory relevant considerations. The statutory context informs the determination of what is a mandatory relevant consideration. An alleged failure referred to several times by the Applicants was an absence of modelling of the flood impacts of stages of filling across the WYURA on the Applicants' land, the land east of Carrs Drive. Quite how the second Respondent's experts could be expected to know what that staging might be in the future given that it is knowledge peculiar to the Applicants was not clear to the Court. In any event, as part of the assessment process and following submissions from objectors including a surveyor writing on behalf of the Applicants stating the modelling of filling only the Second Respondent's land in the 2014 Paterson Report was inadequate, the Council required further flood modelling. The 2015 BMT WBM Report modelled filling of the whole of the WYURA. Both reports were before the JRPP. No further criticism on the basis of inadequate modelling of stages of filling is now available in the context of judicial review proceedings as that is a submission which goes to the merits of the JRPP decision and the adequacy of the modelling undertaken by the Second Respondent in support of the DA. That is beyond the permissible scope of these judicial review proceedings.

Ground 1 failure to consider cl 7.3(3) Clarence Valley LEP 2011

32. Ground 1 as pleaded is set out below.

Ground 1

1 Clause 7.3(3) of the Clarence Valley Local Environmental Plan 2011 (LEP) applies to the Land as the Land is in both in [sic] the "Flood Planning Area" on the Flood Planning Map and is at or below the flood planning level.

2 Clause 7.3(3) of the LEP provides that development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

- (a) is compatible with the flood hazard of the land, and
- (b) is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and
- (c) incorporates appropriate measures to manage risk to life from flood, and
- (d) is not likely to significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and
- (e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.

3 None of these matters were considered by the Fourth Respondent, or in the alternative, (a) - (e) inclusive all of these matters were not considered.

4 There was a complete failure to consider clause 7.3(3) of the LEP as it was not addressed in the Assessment Report prepared by Council dated 9 July 2015, and was not otherwise before the Fourth Respondent.

5 The Consent is as a result vitiated by a failure to consider clause 7.3(3) and the matters (a) - (e) in it contrary to s. 79C(1)(a)(i) of the EP & A Act, which made a consideration of clause 7.3(3) a mandatory relevant consideration.

6 In the alternative, the Consent is vitiated by jurisdictional error as it was granted contrary to clause 7.3(3) of the LEP and in the absence of jurisdiction due to the failure of the Fourth Respondent to satisfy itself of all the matters required by clause 7.3(3) (a)-(e).

Particulars

The Assessment Report prepared by Council dated 9 July 2015 considers the Objectives of clause 7.3, but not the specific matters of which the consent authority was required to satisfy itself in clause 7.3(3).

33. Clause 7.3 is set out above in par [6](#) and is also set out in par 2 of Ground 1 of the summons extracted above in par [32](#). The SEE and the Assessment Report include references to cl 7.3(3) as identified above in pars 15 and 20.

Applicants' submissions

34. Clause 7.3(3) is not referred to at all in the Assessment Report. The Assessment Report failed to direct the JRPP to the requirement to form the mandatory states of satisfaction in cl 7.3(3). There is absolutely no evidence that the states of satisfaction required to be formed were in fact formed by the JRPP, including in the conditions of consent. The only reference to cl 7.3(3) on one page in the

SEE does not deal with all the listed matters, and does not support an inference that the relevant states of satisfaction were formed. Clause 7.3(3) creates a jurisdictional fact of a particular subjective kind per *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2005) 138 LGERA 207 at [83]-[88].

35. In issue is whether the subjective states of satisfaction existed or were made by the JRPP, or not, on the evidence before the Court per *Bechara v Plan Urban Services Pty Ltd* [2006] NSWLEC 594; (2006) 149 LGERA 41 at [42]. The documents before the JRPP as at 24 July 2015 disclose no trace of the formation of any of these five states of satisfaction. Neither does the statement of reasons. Neither does the consent. Secondly, the JRPP failed to consider cl 7.3 which was a mandatory relevant consideration under s 79C.
36. All that is considered in the Assessment Report is whether, based on the BMT WBM Report, the development was “inconsistent with the objectives of clause 7.3”. Consideration of the objectives in cl 7.3(1) is not the same as the formation of the cl 7.3(3) states of satisfaction. This is a self-evident truth.
37. The BMT WBM Report also assumes filling to the same level of the adjoining land in the surrounding WYURA to the east (which includes the Applicants' land) and contains no analysis of the change in flood flows or velocities due to the filling of the subject land on the adjoining land and property in either its “developed” or undeveloped state. This is important as cl 7.3(3)(b) directs attention to impact on other development or properties. The level of fill to be stipulated on adjoining properties by any development consent applying to those properties after any appropriate assessment is unknown, the sequencing of development on adjoining developments is unknown and the extent to which the adjoining part of the WYURA may be developed (and filled) in part or in whole is unknown. It follows that the impact on flood heights, flood flows and velocities in relation to the adjoining property both as it exists and as it may be developed in part or in whole in the future are things that have not been considered. The earlier Paterson Report (dated June 2014), also before the JRPP did not assume any filling on the adjoining land to the east of the subject land in the WYURA. It similarly contained no assessment of the impact of the proposed development on the subject land on flood flows and velocities or flood storage, which is a matter that cl 7.3(3)(b) requires the formation of a state of satisfaction in relation to having regard to its reference to “flood affectation”.
38. The statement of reasons referring to the mitigation of flood impacts does not address flood hazard or compatibility with flood hazard, a matter required by cl 7.3(3)(a). There may be measures in place to mitigate impacts but that leaves open the required question of whether the impacts could be highly significant. There is no reason to indicate that the JRPP concluded that the development incorporated appropriate measures to manage the risk to life from flood, (cl 7.3(3)(c)).
39. The Paterson Additional Flood Information of August 2014 in substance concedes that flood evacuation requirements have not been properly considered as Carrs Drive is noted as being blocked beyond a 1:20 year ARI flood event.

40. The safe and orderly evacuation criteria in Schedule D₄ of the RDCP have not been addressed. No regional evacuation capability assessment was before the JRPP and no documentation of the JRPP forming the opinion that safe and orderly evacuation could occur in any particular size or state of flood was before the JRPP as required by Schedule D₄. There is no consideration of evacuation in the Paterson Report.
41. There is also no indication of the formation of the state of satisfaction in relation to a significant adverse effect on the environment by reference to specific matters such as erosion, siltation or destruction of riparian vegetation, (cl 7.3(3)(d)).
42. The JRPP's reason regarding the positive economic benefits to the community does not represent the formation of the required state of satisfaction that the development was not likely to result in unsustainable social, as well as economic, costs to the community as a consequence of flooding, (cl 7.3(3)(e)). In accordance with *Currey v Sutherland Shire Council* [2003] NSWCA 300; (2003) 129 LGERA 223 a mere reference to cl 7.3 would not provide the court with a sufficient basis for concluding that the states of satisfaction were formed. There is ample authority to indicate that a documentary approach to those matters is entirely acceptable in relation to proof that states of satisfaction required to be formed under local environmental plans were not formed. The documentary evidence including the statement of reasons from the JRPP is sufficient to establish the inference in this case that the states of satisfaction were not formed. The presumption of regularity is a rebuttable presumption of fact and on all the evidence before the Court it is comfortably rebutted.

Second Respondent's submissions

43. The Applicants' approach fails to consider the evidence as a whole, has an eye attuned to error in reading the Assessment Report and is impermissible in judicial review proceedings. Contrary to the Applicants' submissions, the presumption of regularity does apply in this case, following authorities such as *Hill v Woollahra Municipal Council* [2003] NSWCA 106; (2003) 127 LGERA 7, *Western Stores Ltd v Orange City Council* [1973] 1 NSWLR 19; (1973) 26 LGRA 17 and *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154; 62 LGRA 409. There is no distinction to be drawn when the presumption is to be applied to the formation of states of satisfaction, per *N SW Aboriginal Land Council* at 419 (McHugh JA). The JRPP had a job to do, for which they were being paid, and it can be assumed that in the ordinary course of business that they would at least read the material that was briefed to them. To assume this is not stretching the presumption of regularity to any great distance.

Ground 1 not proven by Applicants

44. Following paragraph cited by:

Coastal Ecology Protection Group Inc v City of Charles Sturt (21 September 2017)
(Judgment of The Honourable Justice Blue)

597. This passage has been cited and applied by New South Wales Court of Appeal in *Notaras v Waverley Council* [103] and *Oshlack v Rous Water* [104] but in neither does it appear to have been decisive (as in *Schroders v Shoalhaven City Council* itself). This passage has been applied at first instance by the New South Wales Land and Environment Court in various cases, three of which are cited by the Council. [105]

via

[105] *Gillbank v Bloore (No 2)* [2012] NSWLEC 273 at [53]-[54] per Pain J; *Roden v Bandora Holdings Pty Ltd* [2015] NSWLEC 191, (2015) 213 LGERA 103 at [88] per Pain J; *Dougherty Bros Pty Ltd v Outline Planning Consultants* [2016] NSWLEC 72, (2016) 216 LGERA 144 at [44] per Pain J.

I accept that cl 7.3(3) requires the JRPP to form the requisite state of satisfaction in relation to matters specified in sub-cll (a)-(e) (where relevant) before development consent can be granted. Many cases in this Court outline the principles relating to the onus of proof in judicial review proceedings in relation to a ground which alleges a failure to take into account a condition precedent where an applicant's case relies on documentary evidence. The Applicants focussed on Stein JA in *Currey* and *Franklins Pty Ltd v Penrith City Council* [1999] NSWCA 134, cases where the Court of Appeal held that the required state of satisfaction was not achieved. I recently considered similar authorities and submissions in relation to a similar provision in another local environmental plan in *Roden v Bandora Holdings Pty Ltd* [2015] NSWLEC 191; (2015) 213 LGERA 103 at [87]-[89] where I held:

87 *Hortis* considered earlier decisions of *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 and *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 in relation to the drawing of inferences where no specific reference was made to the mandatory precondition in the relevant LEP in the material before elected councillors. In *Currey* the Court of Appeal held that the inference of satisfaction should not be drawn where the officer's report to the council simply referred to the relevant clause without further discussion in the context of the particular DA. In *Franklins* also in the Court of Appeal none of the material before the elected councillors made reference to the relevant clause compliance with which was required before consent could be granted. That gave rise to a conclusion that the council failed to form the requisite opinion of satisfaction in the absence of any evidence to the contrary. In *Hortis* the Court of Appeal did not overturn the Land and Environment Court finding that the council had failed to form the necessary satisfaction about a required precondition to the grant of consent, namely that the council was satisfied the development would not have a detrimental effect on the foreshore scenic protection area. The absence of express reference to the effect of the relevant clause gave rise to the inference that the council did not consider the clause. These cases required a close consideration of what documents were before the elected councillors and what inferences if any could be drawn from any absence of reference to the effect of a clause which was a mandatory precondition to the granting of development consent.

88 A council's file is taken to be within the constructive knowledge of council officers unless evidence to the contrary is adduced, per *Schroders v Shoalhaven City Council* [1999]

NSWLEC 251; (1999) 110 LGERA 130 at [7(c)] and [24]. In *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 at [67] the Court of Appeal in affirming the Court below also held that material in the possession of a council will generally be treated as being in the possession of individual councillors, citing *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 31. These principles have been applied since, for instance in *Eurobodalla Fluoride Issues Inc v Eurobodalla Shire Council* [2014] NSWLEC 182 at [109] and *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 at [126]. I disagree with the Applicant's assertion that the Court must look at the Assessment Report only and no other material on the Council's file. No authority supporting that approach has been provided. That assertion is contrary to the authorities referred to immediately above which require that evidence must be brought forward by a party which is asking for an inference to be drawn that the Council's file was not considered by a decision maker. No such evidence has been brought by the Applicant.

89 An example of where the negative inference was drawn is *South East Forest Rescue*. Preston CJ held there was a failure by an elected council to consider a clause which was a precondition to the exercise of the power to grant development consent. The collegiate body failed to take into consideration relevant zone objectives or form the required mental state of satisfaction that the development was consistent with those objectives. There was evidence that no councillor had read the council's file.

45. As I stated at the end of par [87] in the extract from *Roden* above, each case requires a close consideration of the documentary record in order to determine whether the inference of satisfaction arises or not. In *South East Forest Rescue Inc v Bega Valley Shire Council* [2011] NSWLEC 250; (2011) 211 LGERA 1 the Court had before it affidavit evidence about particular steps in the council's deliberation on a development application including what occurred at the relevant council meetings giving rise to an inference that no councillor had read the file or formed the necessary state of satisfaction required by the planning instrument. *South East Forest Rescue* is distinguishable as the evidence the Applicants have chosen to rely on in this case is the JRPP documentary file.
46. In *Caroona* which both parties relied on Preston J held at [59] that the Minister's mental state of satisfaction under the relevant provision that special circumstances existed to justify the renewal of the exploration licence over a larger number of units was a precondition or an essential preliminary to the exercise of the power. Referring to *Currey* at 372, 374 and *Franklins* at [18], [28], his Honour stated at [59] that unless that state of satisfaction had been formed, the prohibition on the renewal of the exploration licence over that number of units would remain in place. The onus is on the applicant to establish that the requisite state of satisfaction has not been formed, at [60], [69]. This onus can be discharged on the documentary evidence if that material is sufficient to allow the Court to draw the inference, at [69]. For the reasons I give below I do not consider the Applicants have discharged the onus of proof they bear given the documentary evidence.
47. Assessment of the JRPP's consideration of cl 7.3(3) requires regard to all the relevant material on the JRPP file the contents of which are outlined above in par 23 and with the awareness that the JRPP went on a site visit and heard oral presentations at its meeting on 24 July 2015. The ground as particularised in the summons refers to the Assessment Report alone and states the clause was

not otherwise before the JRPP. In submissions the Applicants wished to restrict consideration to the Assessment Report and the JRPP Notice of Determination. No authority supports that approach. There was a great deal of material relevant to cl 7.3(3) before the JRPP as summarised and extracted above in pars 13-18 which I refer to below.

48. The Applicants' onus of proving the JRPP's failure to form states of satisfaction of relevant matters in cl 7.3(3) cannot be met by relying on the lack of specific reference to cl 7.3(3) in the JRPP's Notice of Determination. The JRPP gave the principal reason for the approval of the DA in the Notice of Determination as the positive outcome for the area due to increased employment opportunities and positive economic benefits. In addition, the JRPP gave four other reasons for its decision including that, with respect to flooding, the proposed flood and drainage systems would mitigate the impact on surrounding property and infrastructure. The JRPP adopted the Assessment Report as a whole not just in relation to State Environmental Planning Policies 55 and 62. The JRPP imposed conditions of approval, which were included in draft form in the Assessment Report of 9 July 2015, amended by the Council's memorandum of 17 July 2015 and further amended at the JRPP meeting on 24 July 2015.
49. Clause 7.3(3)(a)-(e) was expressly referred to and assessed in the SEE as set out in the extract in the table in par [15](#) above. The SEE's authors identified each of the subclauses in cl 7.3 and assessed these as able to be satisfied based on the Paterson Report. The Applicants criticised this consideration of cl 7.3(3) because the Paterson Report was said to be faulty. There is no evidence that the report is faulty. It modelled the impact of fill on the Second Respondent's land as a result of this DA being approved and concluded that the flood impacts and risks were acceptable. Following the SEE and the independent review by Dr O'Loughlin, the BMT WBM Report was prepared modelling the flood impacts of filling the whole of the WYURA. It is summarised above in pars [16-17](#). That the Council required further modelling of impacts of filling over the whole WYURA does not mean that the Paterson Report was faulty or that it was inappropriate for the JRPP to be informed by it. The Paterson Report and the later BMT WBM Report were before the JRPP. Further, that the Applicants do not agree with that assessment of compliance with cl 7.3(3) in the SEE, the tenor of several of their submissions, is immaterial in judicial review proceedings.
50. The Assessment Report also referred to cl 7.3, set out the conclusion of the BMT WBM Report, and advised that the proposed development was not inconsistent with the objectives in cl 7.3. The Applicants' criticism that sub-cl (3) was not referred to expressly in the Assessment Report is nit-picking in the extreme. The Applicants' submissions summarised in pars 34-42 above reflect an impermissible shopping list approach to identifying perceived failures in the assessment process.
51. As already identified in par [30](#) above the Court was taken in considerable detail to documents in the JRPP file by the Second Respondent in response to the Applicants' submissions on particular issues of a technical nature. The extensive evidence referred to by the Second Respondent confirmed its submission that the Applicants had not discharged their onus of establishing that the JRPP did not form the necessary state of satisfaction required by those parts of cl 7.3(3) which were relevant to the DA. It is very difficult to summarise that evidence but it is useful in placing the SEE, the Assessment Report and the JRPP's Notice of Determination in context. I have

repeated the evidence referred to by the Second Respondent in my finding in the following paragraph [52](#) up to paragraph [69](#) as the documentary evidence to which I was taken by the Second Respondent confirmed their submissions on the effect of that evidence.

52. The subject land is below the 1:100 year ARI flood level of 2.1m AHD and is shown as “flood planning area” on Council’s LEP Flood Planning Map. The Yamba Floodplain Risk Management Study as set out in the SEE determined that West Yamba would be classified as flood storage, that is, an area subject to the temporary storage of floodwaters and *not* a floodway. Therefore, the SEE states that cl 7.3 “Flood Planning” of the LEP applied.
53. In order to accommodate the development, filling was to be undertaken to a sufficient level to enable minimum flood free floor height requirements of buildings to be achieved. As set out in the BMT WBM Report summarised and extracted in pars [16-18](#) above, minimum floor heights are based on flood planning levels which, in turn, are based on the 1:100 year ARI design flood level with an additional allowance for climate change and freeboard. In modelling the flood behaviour in the developed scenario, the BMT WBM Report modelled the subject site being filled to meet these height requirements and modelled other residential areas of the WYURA as filled above the 1:100 year ARI flood level.
54. A floodway is incorporated into the design of the development to assist with flood mitigation purposes. One of the Siteplus plans of the site and the BMT WBM Report show that the floodway is located outside of the site and so mitigation relied upon an off-site solution.
55. Key features of the developed site are as outlined in the BMT WBM Report:
 1. inclusion of fill typically above 3m AHD and above the 1:100 year ARI flood level at all locations;
 2. a swale drain along the northern perimeter of the site with an associated box culvert under Carrs Drive;
 3. inclusion of a length of the proposed West Yamba Bypass Highway to the north of the site;
 4. swale drains along the western side of Carrs Drive; and
 5. a swale drain alongside Miles Street (unformed) to the south of the site.
56. The BMT WBM Report assumed the remainder of the WYURA area to be filled to be above the 1:100 year ARI flood level with the exception of the main roads through the site. The flood model in that report represented the existing case (a pre-developed case) to understand baseline flood behaviour to inform the site design. In the 1:5 year ARI flood the BMT WBM Report shows that there was no predicted inundation of the site or the remainder of the WYURA area zoned residential. The 1:20 and 1:100 year ARI flood events showed inundation of the site and took into account storm surge. See the summary of the BMT WBM Report above in pars [16](#) and [17](#) above.

57. The Council had previously adopted a minimum habitable floor height for residential development for the WYURA of 3.24m AHD. The components that defined the flood level were set out in the BMT WBM Report as follows:
1. 1:100 year ARI level of 2.34m AHD;
 2. +0.5m freeboard; and
 3. +0.4m climate change allowance.
58. The BMT WBM Report also considered flooding of West Yamba due to storm surge. For West Yamba the 1:100 year ARI peak flood level is 2.1m AHD, which the report states was considered the appropriate level for base fill.
59. The BMT WBM Report also considered the effect upon flood levels in the WYURA from filling the site in isolation and the impact on flood levels assuming the whole of the WYURA was developed. In the 1:20 year ARI flood event and also the 1:100 year ARI flood event, only small increases and decreases in flood levels were predicted. No notable flood level impacts were predicted for the 1:5 and 1:20 year ARI flood events. The mitigated 1:100 year ARI flood event showed some increases in peak flood level not however predicted to adversely affect existing dwellings.
60. Recommendations were made by the BMT WBM Report extracted above in par [18](#) that the design of the proposed floodway should be refined at the detailed design stage and that local stormwater features such as culverts should be determined based on sizing for local stormwater events. As the probable maximum flood ("PMF") would inundate the development site and the wider area anyway (apart from Yamba Hill), a flood emergency management plan was recommended to be prepared including a safe evacuation plan and/or provision of an area of safe refuge above the PMF level.
61. The plans of the proposed subdivision, which were before the JRPP include the following:
1. Sheet 03 - Stormwater Management Plan;
 2. Sheet 04 - Bulk Earthworks Plan;
 3. Sheet 17 - Bioretention Swale Details;
 4. Sheet 18 - Swale Catchment Plan;
 5. Sheet 19 - Carrs Drive Culvert Details;
 6. Sheet 20 - Miles Street Swale Details;
 7. Sheet 28 - Overflow Swale Details; and
 8. Sheet 29 - Concept Soil and Water Management Plan.

62. Sheet I contained general and particular notes including notes addressing erosion and sediment control during construction.
63. The Council's development planner expressly drew to the JRPP's attention in the Assessment Report and the draft conditions (extracted above in pars [20](#) and 25) the following matters:
1. the impact of filling of the development site on the surrounding area including drainage patterns and concluded that the proposed engineering design mitigated the effect of filling in this location and that an earthworks management plan be submitted and approved prior to issuing a construction certificate;
 2. that the site and the WYURA would be inundated by the 1:20 and 1:100 year ARI flood events under existing conditions, peak design flood levels occur as a result of storm surge, mitigation relied principally on a large floodway, no notable flood level impacts were predicted for the 1:5 and 1:20 year ARI flood event and that the mitigated 1:100 year ARI flood event showed an increase in peak flood level to the perimeter of the WYURA that would not affect existing dwellings and modelling of the site only showed no significant impact on flood levels.
64. Part D of the RDCP contained flood plain management controls some of which are extracted above in par [7](#). The Council development planner informed the JRPP in the Assessment Report that the proposed development was not inconsistent with these controls. The development planner also informed the JRPP that the proposed development provided flood and drainage systems mitigating the impact on surrounding property and infrastructure due to the development. The Assessment Report also stated that a detailed erosion and sedimentation control plan for each stage of the development would be required to be submitted and approved by the Council prior to the issue of a construction certificate.
65. Importantly, the Assessment Report also stated that the flood modelling reports in the possession of the Council had been reviewed by an independent flood expert, Dr G O'Loughlin, and that he had identified issues which required resolution. Further modelling was then undertaken by BMT WBM. It was reported to the JRPP that the BMT WBM Report had addressed the issues identified by Dr O'Loughlin and those raised by objectors. The Assessment Report concluded on this matter:
- The amended flood report has satisfied the concerns in regard to this development. In summary, the amended report has demonstrated that the filling of the proposed development does not impact on any existing property or infrastructure in the vicinity of the development.
66. The conditions of consent imposed by the JRPP included the following:
1. engineering conditions – relevantly Conditions 9, 10, 27 and 28;
 2. stormwater, drainage and flooding conditions – relevantly Conditions 36, 37, 38 and 39;

3. certification conditions – relevantly Conditions 42 and 43;
 4. earthworks conditions – relevantly Conditions 46 – 51;
 5. erosion and sediment control conditions – relevantly Conditions 52-57; and
 6. a habitat restoration management plan – Condition 61.
67. The JRPP also had before it a memorandum from Council’s development planner dated 17 July 2015 recommending amendment to the Schedule of Conditions, including an amendment to Condition 37 “to reflect Flood Impact Assessment by BMT WBM Pty Ltd”, referred to above in par [21](#).
68. The JRPP was also informed by the SEE prepared by Outline Planning Consultants extracted above in par [15](#). At Table 5.4 “Additional Local Provisions of the LEP and the Project” the authors drew express attention to cl 7.3 of the LEP, including cl 7.3(3) and set out the provisions of the clause in the text of the SEE. The statement included the following:
- Flood modelling by Paterson Consulting shows that (3)(a)-(e) can be satisfied. The flood-prone nature of the West Yamba Urban Release Area has been extensively flood modelled prior to its release for residential development. The social and economic costs of developing this locality for development were factored in prior to rezoning this area for large scale urban development.
69. The Paterson Report of June 2014 extracted above in par [13](#) was also included in the material before the JRPP. The authors drew express attention to cl 7.3 and the jurisdictional requirements of sub-cl (3), and assessed the flood issues referring expressly to the provisions of cl 7.3(3). They made express reference to the requirements of cl 7.3(3)(a) and (b).
70. An important factual context for consideration of the Applicants’ case is that the JRPP was told with respect to warning times in the Paterson Report that floods affecting the WYURA travel from Grafton, a distance that a flood would travel in a period of greater than 24 hours inter alia (as quoted in Table 5.4 of the SEE extracted above in par [15](#)). The report states that a long period of flood warning time is available at the WYURA. The Applicants criticised the Paterson Additional Flood Information as set out above in par [14](#) as in substance conceding that flood evacuation requirements have not been properly considered. That misconstrues the report’s advice which is all about considering flood evacuation requirements as the extracts above identify. The Applicants’ real complaint is with the conclusion of these reports on this topic.
71. Further, the BMT WBM Report identifies that during a 1:5, 1:20 and 1:100 year ARI flood event all habitable dwellings would be above the flood water and people could therefore stay put. Only in the PMF of 3.7m AHD which would inundate virtually all of Yamba would people need to evacuate to higher ground. The need for an evacuation plan in that context is referred to in the BMT WBM Report’s recommendation 6.2(3) for future work as set out above in par [18](#). I also note that cl 7.4 of the LEP dealing with floodplain risk management does not apply to the DA. The

objectives of that clause concern development with particular evacuation or emergency response issues and the protection of critical infrastructure during extreme flood events. Probable maximum flood is defined in sub-cl (4) and is noted as meaning the largest flood that could conceivably occur at a particular location.

72. The Applicants raised concerns about lack of assessment of evacuation measures given the presence of St James Primary School. The Paterson Additional Flood Information of August 2014 extracted above in par [14](#) stated that the change in flood level as a result of the development was so small as to be unmeasurable. It concluded that the school would not be affected by the proposed development in the 1:100 year ARI flood event.
73. The summary of the evidence in the preceding paragraphs [52-69](#) identifies that flood impacts were front and centre of the assessment material before the JRPP. As already stated, one of the reasons given in the Notice of Determination by the JRPP concluded that flood impacts in the WYURA would be acceptable.
74. Turning to the required states of satisfaction in cl 7.3(3), sub-cl (a) concerns the flood hazard of the land. The Applicants submitted that neither the Assessment Report nor the BMT WBM Report considered the flood hazard of the land or whether the development is compatible with the flood hazard as stated in cl 7.3(3)(a). The Applicants' counsel submitted from the bar table that his reading of Appendix L of the 2005 Floodplain Development Manual suggested that the flood hazard of the Second Respondent's land was high, therefore the subclause applied and no relevant satisfaction in relation to it was reached by the JRPP. This opinion not fact was based largely on the view that the Second Respondent's land would flood in a PMF event (noted under the definition in cl 7.4 of the LEP as the largest flood conceivably occurring at a particular location). Whether that is a correct assumption I do not know. The submission is an impermissible merit issue lacking a factual basis in the expert evidence. There was extensive material outlined above before the JRPP enabling it to be satisfied of the matters in cl 7.3(a) including the advice in the SEE that the clause was satisfied.
75. Additional submissions suggested an impermissible shopping list approach I have criticised above in par [31](#). Unproven factual matters of considerable technicality were made from the bar table. These submissions focussed on specific paragraphs in the flood modelling reports of Paterson and BWT WBM to the effect that the terms "velocity" and "direction of flow" did not appear in the text. In the absence of any expert or other evidence to suggest why such matters must be considered explicitly in those terms in reports which are applying a hydraulic model to flood modelling I am unable to assess the relevance of these submissions. It is a merit submission. Further, the Second Respondent's references to the evidence as a whole identified that velocity was considered in numerous places, for example in several places in the engineering plans approved in Condition 1 listed above in par [61](#) and in the Paterson Report. An extension of this argument was a reference to the information in the Paterson Report that there would be slightly more rapid rise of flood waters east of Carrs Drive. Criticism was made of the conclusion in the Paterson Report that the proposed development would not significantly impact on flood levels or flood drainage times because there was no mention of flood velocity. That submission suffers from the same difficulty of being a merit submission.

76. Another criticism was made that the Assessment Report repeated the BMT WBM Report conclusions but failed to include the recommendation section that an Emergency Management Plan be prepared. Two Class I merit appeal decisions of the Court were cited as authority that the deferral of such a plan was impermissible. That highlights the nature of the Applicants' submission as largely merit based. The BMT WBM Report as a whole was provided to the JRPP. None of these submissions support the inference of a finding of failure by the JRPP to form the requisite state of satisfaction about a relevant matter in sub-cl (a).
77. Clause 7.3(3)(b) requires satisfaction that a development is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in flood impact on other properties. The Applicants' criticism of the flood modelling reports failing to adequately consider future development on the Applicants' land is an impermissible merit submission as I stated above in par [49](#). The submissions were not based on any technical evidence to justify them, are unrealistic in expecting the staging of development of the Applicants' land and modelling was done on the basis of filling of the whole of the WYURA in the BMT WBM Report (the maximum development scenario) in any event.
78. Another criticism made of the material before the JRPP in relation to sub-cl (b) was an alleged failure to consider the impact of a large floodway beyond the subject land. The Applicants submitted that the BMT WBM Report failed to consider the impact on the property through which the floodway flowed but rather left that for later consideration as identified in the recommendation in 6.2(1) set out in par [18](#) above. The Applicants relied on *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 to submit that off-site impacts must be assessed. That finding can be accepted but has little relevance to the case the Applicants must prove. The inference arises from the BMT WBM Report that the floodway was assessed sufficiently for this DA. That a recommendation was made for future more detailed design as identified in par [18](#) above does not undermine that inference.
79. In relation to cl 7.3(3)(c) requiring the incorporation of appropriate measures to manage risk to life from flood the Applicants placed heavy reliance on the recommendations for further work in par 6.2 at the end of the BMT WBM Report set out above in par [18](#) including preparation of an evacuation plan. The report states that the modelling undertaken by them is sufficient for the present planning purpose. What is recommended is future work when more detailed design work is undertaken. I have identified above in pars [70-72](#) the evidence before the JRPP which pertained to evacuation and flood warning. That material all suggests the JRPP would have been likely to be satisfied of the matters required by sub-cl (c).
80. No evidential basis for cl 7.3(3)(d) being relevant was identified by the Applicants. The assertion was made that there was no reference to erosion, siltation, destruction of riparian vegetation or reduction in the stability of river banks and watercourses. No riparian vegetation was established as being material to the JRPP's determination. The Applicants' counsel submitted from the bar table that based on a locality map Oyster Creek and Crown foreshore reserve were nearby and therefore there was riparian vegetation in the vicinity of the Respondent's land. That topic is simply not relevant in these judicial review proceedings.

81. The Applicants also submitted that there was no formation of the state of satisfaction required by sub-cl (3)(e) of whether the development is likely to result in unsustainable social and economic costs to the community as a consequence of flooding. The community was submitted to be the Applicants, those living on adjoining properties, local residents and the public. The SEE referred to this subclause as identified in Table 5.4 extracted in par 15 and the statement that “the social and economic costs of filling this locality for development were factored in prior to rezoning the area for large-scale urban development” was said to show no consideration of this topic. To the contrary this shows the opposite. When the large amount of material referred to by the Second Respondent together with the submissions received from the community are considered there is no factual basis for asserting that there are any social and economic costs to the community which the JRPP failed to consider. Given that the primary reason for the JRPP approving the development is to encourage economic development the inference arises that the JRPP did consider the social and economic benefits to the community of the development and in that context that the JRPP also considered flood impacts were adequately dealt with given its other stated reasons for approval.

82. An impermissible merit submission was also made that as the development was part of the WYURA it may be expected to have implications for costs of developing adjacent areas within the WYURA particularly if there is an increase in flood affectation on the adjoining land and if changes to service provision are required due to the development of the Second Respondent’s land. There is no factual basis for these submissions and they are matters of merit in any event.

83. The Second Respondent submitted that the presumption of regularity as identified in *Hill v Woollahra* applied. *Hill* considered whether there was a failure to address a mandatory relevant consideration by a council in approving a development. The Applicants distinguished *Hill* from this case on the basis that the failure to reach satisfaction about the matters in cl 7.3(3) was a condition precedent to the granting of development consent and not the same as the circumstances in *Hill*. Justice Stein in *Franklins* at [28] was purported by the Applicants to say the presumption of regularity did not apply in judicial review for existence of a subjective jurisdictional fact. It is not necessary to resolve whether a rebuttable presumption of regularity operates in this case.

84. The Applicants have not discharged their onus of proof in relation to Ground 1.

Ground 2 Condition 37 impermissibly defers flooding and flood management impacts of the proposed development.

85. Ground 2 of the amended summons provides:

7. Condition 37 of the Consent is void or voidable for uncertainty, and amounts to the impermissible deferral of proper assessment of flooding and flood management impacts of the proposed development, contrary to ss 80 and 80A of the EP & A Act and is beyond the Fourth Respondent's power to impose conditions conferred by s 80A., including in that it requires development on the site to be undertaken in compliance with the flood plain management controls listed in "the Council DCP in the relevant land use zone".

Particulars

Part D of the Residential Zones DCP provides flood plain management controls that if applied to the development the subject of the Consent may result in significant change to the development approved by the Consent, including the controls in Part D3.1 of that DCP.

8. Condition 37 is inseverable from the Consent, and defers proper assessment of flooding and flood management impacts of the proposed development.

9. The Consent is invalid by reason of the invalidity of Condition 37 and its deferral of this matter.

86. Condition 37 of the consent provides as follows:

The property is flood affected. All works are to minimise the adverse effects of flooding in accordance with the relevant parts of the Council Development Control Plans and NRDC. The "Lower Clarence Flood Model Update 2013" was adopted by Council Resolution 13.043 /14 on 18 March 2014. The 1% Annual Exceedance Probability (AEP) water level in the vicinity of the site is RL 2.1 m AHD the Extreme Flood Level is RL 3.7 mAHD. Development on the site must be undertaken in compliance with the flood management controls listed in the Council DCP for the relevant land use zone.

87. Extracts of the RDCP are set out above in pars 7 and 8 including parts of Part D Floodplain Management Controls D1, D3, D5, D7, Schedule D4 Prescriptive Controls and Part X Urban Release Area Controls.

Applicants' submissions

88. Condition 37 is fundamentally unsatisfactory and uncertain. It is invalid on two bases, first that it impermissibly defers flood assessment impacts and second that it is uncertain, leaving open the possibility for a significant change to the development. This is because Condition 37 requires compliance with a global set of unidentified floodplain management controls in the RDCP. Due to the flood prone nature of the land, and the importance of flood management issues to this subdivision, if found to be invalid Condition 37 is inseverable from the consent.
89. Condition 37 is the deferral of consideration or assessment of the flood management impacts or the proper assessment of flooding and flood management impacts of the proposed development. In order for the Court to make the inference that there has been impermissible deferral it is necessary to look at the surrounding material that was before the JRPP. The JRPP failed to consider whether the development could be undertaken in compliance with the floodplain management controls in the RDCP. As in *Weal v Bathurst City Council* [2000] NSWCA 88; (2000) 111 LGERA 181 flood impact assessment was too important to defer for later consideration (at [95]).
90. Condition 37 is impermissibly uncertain as the requirement to comply with the flood management controls which are many in number may give rise to significant changes to the approved development in multiple respects. The evidence and documents before the JRPP show

that the RDCP controls may not be able to be complied with without changes such as additional or different floodways and drainage swales, more or less filling entailing less or rearranged subdivision, provisions of wider or higher local roads for emergency evacuation and emergency evacuation plans, all matters that may significantly change the development. This is contrary to *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; 73 LGRA 349.

91. Condition 37 requires compliance with the relevant parts of the RDCP and specifically refers to compliance with the flood management controls. Schedule D4 of Part D of the RDCP sets down two requirements for minimum habitable floor level under the control Floor and Pad Levels. The first requirement dictates that habitable floor levels be no lower than the 1:100 year ARI flood event, and the second that habitable floor levels be no lower than the PMF level. These two requirements are in conflict with each other and there is no criteria given for determining which criteria should be imposed. The DA meets the requirement in item 5 in that the proposed habitable flood levels are above the 1:100 year ARI flood event, but does not meet the requirement that the habitable floor levels be no lower than the PMF level. There is no evidence as to the assessment of the choice between the two requirements. There is no reason why the PMF floor level minimum does not apply to this development. This is an unresolved and fundamental ambiguity in the flood management controls to which Condition 37 requires compliance.
92. The consent was therefore granted contrary to s 79C of the EPA Act, which requires consideration of Part D (Floodplain Management Controls) of the RDCP and assessment of flooding impact prior to the grant of development consent. As Condition 37 cannot be severed from the consent, the entire consent is invalid.

Second Respondent's submissions

93. The Applicants' submissions are an impermissible merits review of a decision lawfully made. The ground as framed is misconceived. The real issues for determination in relation to this ground of challenge are whether the imposition of Condition 37 by the JRPP is within the scope of power in ss 80 and 80A of the EPA Act and if not whether Condition 37 is severable from the consent. Condition 37 is clearly within the scope of the power and so the second issue does not arise.
94. The Applicants have failed to identify how compliance with Condition 37 could result in anything different or substantially different to that which was approved. If the Court found that Condition 37 is invalid, it can in any case be severed from the consent as it does not add anything.

Ground 2 not proven by Applicants

95. The first basis for alleged invalidity of Condition 37 is that it is said to show a failure to undertake adequate flood impact assessment by the JRPP as the condition demonstrates a deferral of that issue. The Applicants have selected one condition, 37, to attempt to show that flooding assessment and other requirements in the RDCP have not been satisfied. As already identified in Ground 1, the approval process and development consent must be considered as a whole.

96. One of the reasons given by the JRPP for approving the DA refers to acceptable mitigation of flood impacts in the WYURA. The extensive material dealing with flood impact assessment as summarised in the section on evidence above and identified by the Second Respondent is set out in my finding on Ground 1 at pars 52 to 69 above. Condition 37 is one of several conditions imposed in relation to reducing flooding impacts in that part of the consent dealing with stormwater drainage and flooding being Conditions 36 to 39 extracted above in par 25. For example, Condition 39 requires the construction of box culverts as part of the WYURA flood and drainage system across Carrs Drive. In addition, Condition 1 requires that the development be completed in conformity with the EPA Act and Regulation, the Building Code of Australia and generally in accordance with the subdivision plan, the SEE and 29 specified sheets of engineering plans. The plans include a detailed drainage network including swales and specify land fill levels. The JRPP was aware that flood impacts were central to the merit assessment of the DA which assessment by inference informed the conditions of consent imposed.
97. Very detailed submissions were made by the Applicants about parts of Part D of the RDCP because as I understand the Applicants' case this demonstrated that a very different development could result if these were complied with. Part D is a lengthy and complex document of 14 pages and extends well beyond the parts focussed on by the Applicants' counsel. That immediately gives rise to the issue of matters of detail being raised which lack overall factual context. It also raises the impermissible shopping list approach as I referred to above in par 31. Further, to the large extent the Applicants' counsel made assertions as to fact these were really merit submissions about matters the Applicants consider are relevant. Whether in the Applicants' view the controls were complied with or addressed in the documents before the JRPP is not material. For example, according to the Applicants the first step in applying the RDCP is determining whether land is a general flood plain or floodway. That can be accepted but the Applicants then criticised the Paterson Report for its conclusions in this regard and stated the report is wrong. That is a merit submission.
98. Parts of Part D identified as not being dealt with by the JRPP are set out in par 7 above. Section D5.1 performance criteria (a) and (b) require that filling of flood liable land must not increase flood risk on other land within the floodplain or have any unacceptable environmental impacts such as on the ecology of riparian corridors were identified by the Applicants. No material suggesting that criterion (b) is relevant is before the Court. The prescriptive control relied on by the Applicants is D5.2.1(i) that the flood impact of the development is considered to ensure that a development will not affect elsewhere due to loss of flood storage. The lack of reference to velocity and conditions of flow was again referred to, which I have dealt with above in par 75. The submission was also made that there was no consideration of loss of flood storage. This submission appeared to be based on the absence of these words in the JRPP's Notice of Determination or elsewhere. Whether that is what the instrument requires is unclear. An explicit conclusion on loss of flood storage is not required by the instrument. The effects of the placement of fill on the Second Respondent's land and the Applicants' land were assessed as minimal and acceptable in the flood modelling reports before the JRPP.

99. There was a wealth of material on flood risk before the JRPP in the Paterson and BMT WBM Reports. The Applicants focussed on one finding of a slightly more rapid rise of flood waters east of Carrs Drive in the Paterson Report. This was considered in Ground 1 at par [75](#) above and is not a valid criticism in judicial review proceedings.
100. Section D7 concerns what information is required with an application for development on flood liable land. Given its purpose, it is not apparent how this section can be relevant to the JRPP's consideration. In any event section D7.5 is particularly relied on by the Applicants as requiring consideration of a flood study showing flood velocity and depth contours in studies for smaller developments. I note that D7.5 also states that hydraulic modelling is required for larger development as occurred in this case. The Paterson and BMT WBM Reports both state that a hydraulic model was applied. There is no apparent failure to comply with D7.5.
101. Parts of the detailed tables in Schedule D4 prescriptive controls for the Yamba floodplain inter alia referred to by the Applicants are extracted in par [7](#) above. In relation to Floor and Pad Levels one of two criteria out of six prescriptive controls concerning habitable levels of buildings set out in par [91](#) above were submitted not to be complied with. The Applicants argued that criterion 6 was not met. The Second Respondent submitted that criterion 5 was met, which the Applicants agree with. None of this is relevant in judicial review proceedings being entirely merit submissions. Given that this is a subdivision application only and no habitable buildings will be built pursuant to it the relevance of these provisions is not clear.
102. The Flood Effects prescriptive criteria in Schedule D4 set out in par [7](#) above were also relied on by the Applicants as not considered in the material before the JRPP. Putting to one side whether any of this can be relevant in proceedings of this kind, as a matter of fact that is not generally the case. The Paterson and BMT WBM Reports expressly address the flood effects of the DA as already outlined above in the summary of evidence and in Ground 1 at pars 52-69. The submissions on flood effects in the Applicants' written submissions are matters of merit asserting what the BMT WBM Report can and cannot do in the Applicants' opinion. Such submissions have no relevance to the task before the Court.
103. Section D3.1 performance criteria (c), (d), (f), dealing with flood warning and evacuation, not detrimentally increasing flood effects on other development or properties and procedures in place if necessary to enable evacuation were identified as not being complied with. All six evacuation criteria in Schedule D4 (table in par 7 above) were referred to as matters which were not considered. I have set out above in pars [70](#), [71](#) and [72](#) matters concerning evacuation in the JRPP file which suggest the inference is open that the JRPP did consider evacuation to the extent that was necessary. Further, no factual basis is established for the Applicants' submissions that the safe and orderly evacuation criteria in Schedule D were not addressed. Criticism of the Paterson Report and the Paterson Additional Food Information extracted above at pars [13](#) and [14](#) which consider evacuation matters is irrelevant.

104. A further answer to the detailed criticisms of alleged failures to comply with some of Part D of the RDCP is that the instrument states in Section D2 on how to use Part D that if a proposal does not comply with the prescriptive controls an applicant should determine if the performance criteria are nonetheless achieved. In other words on the assumption that strict compliance did not occur, about which I make no finding, the instrument recognises that strict compliance may not be warranted. This undermines the Applicants' strict enforcement approach to the RDCP.
105. As the Second Respondent submitted, Condition 37 requires the development to be undertaken in compliance with the floodplain management controls in the RDCP. These controls include for each one Performance Criteria and Prescriptive Criteria. Schedules D3 and D4 outline the controls relevant to each of the flood plains to which the plan applied. D4 applies in this case. Part X of the DCP applies to urban release areas and is to be read in conjunction with Part D and to the extent of any inconsistency Part X prevails (see par 8 above). In Part X flood and fill management controls for the WYURA are specified. It is only those controls of relevance to the approved development that are called up by Condition 37. I note that the Applicants have not relied on Part X in this ground. That is the subject of Ground 4.
106. The Applicants did not establish that the application of those parts of the RDCP relied on may result in a materially different development such as larger drainage swales and changes in fill levels. As already identified there are detailed engineering plans specifying such matters which the Second Respondent must comply with as part of the conditions of development.
107. Condition 37 does not demonstrate that the JRPP deferred consideration of the flood effects of the DA on surrounding property. The Applicants have not established that there was any failure by the JRPP to consider a mandatory relevant matter as identified in *Weal* in imposing Condition 37.
108. The second basis identified for a finding of invalidity of Condition 37 is that the Applicants submit that the consent is impermissibly uncertain as found in *Mison*. In that case Priestley JA held at 737 that if a condition "has the effect of significantly altering the development in respect of which the application is made, then the purported consent is not a consent to the application." His Honour held at 737 that it is not necessary to establish the test that compliance with the condition would make the application an "entirely different development", as had been raised at first instance. The question to be answered is, "was the effect of the consent to require or permit a development significantly different from that for which application was made?", at 737. At 738 Priestley JA agreed with Bignold J at first instance that the consent must be final and certain in order to be a consent. However his Honour stated that determining whether a consent is final and certain must be judged by a substance approach rather than a strict approach requiring absolute precision.
109. As the Second Respondent identified a number of authorities have considered this issue subsequently. In *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17; (2001) 130 LGERA 508 Spigelman CJ held at [12] that

...the common law has not developed a general principle that the exercise of a statutory power must be “certain”. The issue is one of construction of the particular statute under consideration and the application of the statute to the circumstances of the particular case.

110. His Honour cited *Mison* at [16], and Mason P in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority (NSW)* [1999] NSWCA 196; (1999) 46 NSWLR 598 stating that *Mison* was not authority that there could not be flexibility in a condition inter alia at [17]. Questions of degree are involved and whether a condition deprives a purported consent of the character of a “consent” will often be difficult to decide, at [19].

111. In *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGERA 277, Basten JA (Handley JA and Hunt AJA agreeing), following *Mison*, held at [24] that there is no lawful development consent where the consent falls into one of two categories:

The first category is where a condition has the effect of “significantly altering the development in respect of which the application is made”: at 737B; 351 (Priestley JA). The second category is where a council has purportedly granted consent, but in terms which lack either finality or certainty, so that there is, in substance, no effective consent to the application.

112. Justice Basten stated that on the first test, a consent will only fail for uncertainty where it leaves open the possibility of a significantly different development. On the second test, a condition may be of great precision and certainty of operation but may fail because it results in a significantly different development, at [28].

113. More recently in *Ulan Coal Mines Ltd v Minister for Planning* [2008] NSWLEC 185; (2008) 160 LGERA 20, Preston J followed *Winn* and other authorities in noting that there is no common law principle that an exercise of statutory power must be certain or final in order to be valid, at [49]. Preston J stated at [50] that “a condition will only be invalid, by lacking certainty or finality, if it falls outside the class of conditions which the statute expressly or impliedly permits” citing *Winn*, *Kindimindi* and others. If the condition does fall outside what is permitted under the statute, then if that condition is not severable, the purported approval is not an approval under the statute at all, at [50]. In determining whether a condition is impermissibly uncertain, questions of degree are always involved, at [77]. It may be desirable and in accordance with the statutory scheme to retain practical flexibility and to leave matters of detail for later determination, at [78].

114. The Applicants suggested that as the DA was determined under Pt 4 of the *EPA Act* rather than Pt 3A there was less scope for flexibility in conditions of consent, citing two judicial review proceedings concerning Pt 3A approvals *Pittwater Council v Minister for Planning* [2011] NSWLEC 162; (2011) 184 LGERA 419 and *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning* [2012] NSWLEC 197; (2012) 194 LGERA 113 where the need for flexibility in Pt 3A approvals given their size and complexity was identified. Ultimately the degree to which flexibility is warranted falls to be determined in each case within the constraints identified by the authorities cited above.

115. Applying *Mison* and more recent authorities identified by the Second Respondent directs attention to the power to impose conditions in ss 80 and 80A of the EPA Act, set out above in par 4. The wide power to impose conditions is specified in s 80A(1). By way of example, a condition may be imposed if it relates to any matter in s 79C(1) relating to the development. Under s 80A(1)(g) a condition is permissible if it modifies the details of the development the subject of a DA. The Applicants have not argued directly that Condition 37 is beyond power in that statutory context. A condition will only be invalid for lack of certainty or finality if it falls outside the class of conditions which the statute expressly or impliedly permits per Preston J in *Ulan* at [50]. The Applicants have not established that is the case here. It is not apparent that the requirement of Condition 37 that the development must comply with the RDCP Part D and Part X will result in a significantly altered development. There are other constraints identified in Condition 37 itself and numerous other conditions and requirements imposed by the consent designed to ameliorate any off-site flood impacts inter alia.
116. The Applicants have not discharged the onus of proof they bear in relation to Ground 2.
117. Ground 3 in the summons was not pressed at the hearing.

Ground 4 Failure to consider relevant parts of the Part X Urban Release Area Controls of the RDCP

118. Ground 4 of the amended summons provides:

14 Part X “Urban Release Area Controls” of the Residential Zones DCP 2011 (Urban Release DCP) applied to the Land.

15 The Fourth Respondent failed to take into consideration the Urban Release DCP as a fundamental element in or focal point of the decision making process, as required by s 79C (1)(a)(iii).

Particulars

The Part X Urban Release Controls in the Urban Release DCP are not considered at all.

The Statement of Environmental Effects lodged for this development does not consider the Part X Urban Release Controls in the Urban Release DCP, despite considering other parts of the Urban Release DCP at pages 72-73 of the SEE.

The Assessment Report prepared by Council dated 9 July 2015 does not consider the Part X Urban Release Controls in the Urban Release DCP.

Item 2 “Staging and Servicing” at pages 205-206 of Part X of the Urban Release DCP requires a Servicing Strategy to be lodged prior to the grant of development consent for subdivision of land in the WYURA that addressing [sic] the implications of the servicing options for other

landowners in the release area, and the proposed cost sharing arrangements with other landowners for any shared utility infrastructure including facility upgrades.

No Servicing Strategy addressing these things had been lodged with either the Third or Fourth Respondent by either the First or Second Respondents, prior to the grant of the Consent. Condition 16 of the Consent requires preparation of a servicing strategy.

Item 6 “Natural and environmental hazards - Flood and Fill management” at pages 216-217 of Part X of the Urban Release DCP has as an objective ensuring that flood and drainage impacts are considered for the development of the entire WYURA and not just in relation to the development of individual land parcels within the WYURA, and ensuring that at any stage of the overall WYURA development is successfully integrated and does not prejudice or detrimentally impact overland flow paths existing watercourses and the stormwater management network.

The Item also provides that development consent must not be granted to earthworks or land fill unless an Earthworks Management Plan (EMP) has been prepared showing the level of finished lots are at least at the 1/100 year flood event level while also maintaining an effective drainage network, and overland flow paths. Control C3 of Item 6 provided for the mandatory content of the EMP, and specified that it was to include the required width and depth of all overland flow paths, and a program of works detailing actions and duration of filling activity and compaction. Control C4 provided that development consent was not to be granted to the carrying out of works within the WYURA if it would be inconsistent with such an EMP and detrimentally increase the potential flood affectation of other development in the WYURA.

The Consent was granted contrary to the requirements of Item 6, as no EMP had been prepared as at the date of consent, as confirmed by Condition 46 of the Consent which required an EMP to be prepared. Further, the report entitled “*Additional Flood Information*” prepared by Paterson Consultants Pty Ltd and dated August 2014, expressly assumes that currently un-filled areas being the remainder of the WYURA will remain un-filled.

16 The Consent is as a result vitiated by a failure to consider Part X of the Urban Release DCP contrary to s 79C(1)(a)(iii) of the EP & A Act, which makes a consideration of that matter a mandatory relevant consideration, and requires that it be a fundamental element in or focal point of the decision making process.

Applicants' submissions

119. Although Part X of the RDCP (extracted above in par 8) was before the JRPP, the Assessment Report gives rise to an inference that it was not considered as a focal point or fundamental

element in the decision making, contrary to *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589. The failure to consider Part X in the RDCP as required by *Zhang* is apparent from Item 2 Staging and Servicing of Part X and Condition 16 (extracted above in par 25) of the consent which requires the preparation of a servicing strategy that the RDCP requires be lodged prior to the grant of any development consent for subdivision. This is particularised at par 15 of the summons extracted above in par 118.

120. The same defect arises from the failure to have considered an Earthworks Management Plan (“EMP”) (which Condition 46 makes clear does not exist) as required by Item 6 and control C3 of Part X (par 8 above). No overland flow paths have been depicted or shown on any diagram before the JRPP. This is a key omission having regard to the issue being dealt with, which is the placement of a large amount of fill in a floodplain in an area surrounded by other flood liable land.
121. An objective of Item 6 of Part X is to ensure that any stage of the WYURA development does not prejudice or detrimentally impact overland flow paths. The detail required in an EMP is specified in control C3 of Item 6 of Part X. These matters have not been addressed in any EMP or any material before the JRPP and are fundamental. The detail of these matters is made mandatory by the RDCP at the DA stage.
122. The importance of the EMP requirement is reinforced by control C4 in Item 6 of Part X that further provides that the consent authority must not grant consent to the carrying out of development which is inconsistent with an EMP and which would detrimentally increase the potential flood affectation on other development in the WYURA or result in a risk to human life. This control could not be complied with as no EMP was in existence or assessed as at the date of grant of the Consent.
123. The RDCP was amended to include Part X 72 hours prior to the grant of development consent and therefore the JRPP could not have been able to properly consider Part X. The only conclusion reasonably open on the evidence is that Part X has not been accorded significant weight or treated as a fundamental element or focal point of the decision making process. That Part X was not mentioned by name in the reasons of the JRPP or the Assessment Report is sufficient to make out this ground.

Second Respondent's submissions

124.

The Second Respondent submitted that the real issue for determination is whether the JRPP failed to take into consideration pursuant to s 79C(1)(a)(iii) the RDCP when determining the consent. The RDCP was a required consideration under s 79C. It was the subject of express consideration in the Assessment Report. The DCP that was considered included Part X pertaining to the urban release areas. It was also included in its entirety for consideration by the JRPP prior to its consideration. It can be assumed that the provisions of Part X were read by the JRPP, and

therefore taken into account. Further, conditions of consent were imposed by the JRPP to ensure that the controls in Part X would be achieved by the development. This ground of challenge must fail.

Ground 4 not proven by Applicants

125. Part X of the RDCP is a mandatory relevant consideration that the JRPP was bound to consider pursuant to s 79C of the EPA Act. The obligation pursuant to s 79C(1)(a)(iii) is for the JRPP to “take into consideration” the provisions of any development control plan that applies to the subject land. As discussed earlier in this judgment, the Applicants have the onus of proof on the balance of probabilities to establish the inference that the JRPP did not consider Part X.
126. The Applicants identified certain aspects of the consent and the conditions in an attempt to show that the JRPP did not give significant weight to the provisions of Part X. The decision of the Court of Appeal in *Zhang* was relied upon in support of these submissions. In that case Spigelman CJ (Meagher and Beazley JJA agreeing) held at [77] that the development control plan “ought to have served as a focal point for, or constituted a fundamental element in” the decision maker’s deliberations. A provision of the DCP that is directly pertinent to the application at hand should be afforded significant weight in the decision making process but is not determinative, at [75].
127. The principle in *Zhang* cannot be appropriated by a party to disguise a merits submission. As Spigelman CJ stated in *Zhang* at [62]-[63], “care must be taken that this category of judicial review or appeal on question of law is not elided into a review on the merits or an appeal on the facts”. The issue remains whether or not the decision maker took into consideration the relevant mandatory matter.
128. There is much evidence before me to show that the RDCP was a fundamental element or a focal point of the JRPP’s decision. Applying *Zhang*, it is the RDCP not its component parts that must be a fundamental element in or a focal point for the deliberations of the decision maker. Significant weight must be afforded to provisions of the RDCP that are directly pertinent to the application. The Applicants have not established that the JRPP failed to place significant weight on Part X in its decision making process. The Applicants also relied on the decision of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, (1986) 162 CLR 24 at 45-46 in support of their submission that the JRPP failed to consider a mandatory relevant consideration. That decision does not advance their case.
129. As the Second Respondent identified, Part X (or “the Draft DCP” as it was previously called) is the subject of express consideration in the Assessment Report and also of conditions of consent. Clause 6.3 of the LEP as set out above in par 6 sets out the requirements for the preparation of a DCP for an urban release area and specifically refers to the WYURA in sub-cl (6). The Assessment Report under the heading “Clause 6.3 Development Control Plan” discusses the Second Respondent’s preparation of a DCP for the development site that was found to be unacceptable by the Council. The Council decided that the most appropriate way to replace this unacceptable DCP was to amend the Council’s existing RDCP to include the Urban Release Area controls

which would apply across all urban release areas. The Assessment Report continues by saying that a report to the Council recommending adoption of the Draft DCP (i.e. Part X)

is to be considered at the July 2015 Council Meeting. The Draft DCP incorporates information provided with the application and where information has not been provided, suitable conditions have been placed within the Draft Schedule to ensure compliance with the provisions of the DCP. Therefore, it is considered that the development has met the provisions of Clause 6.3 of the LEP. A copy of the Draft DCP (as reported to Council's meeting 21 July 2015) is contained within the attachments.

130. The minutes of that Council meeting of 21 July 2015 (Exhibit 2) were included in the material before the JRPP and were listed by the JRPP in the Notice of Determination as a matter considered by it. The extract from the Assessment Report above in par [129](#) demonstrates that the JRPP's attention was specifically directed to the provisions of Part X, which was provided in full to the JRPP. The extract also shows that the JRPP was informed that the draft conditions of consent that were supplied to it had been amended to comply with Part X. This, along with the fact that the minutes of the Council meeting of 21 July 2015 were specifically named as a matter considered by the JRPP, gives rise to the inference that the JRPP did consider the relevant parts of Part X.
131. As with the other grounds, the Applicants' submissions fail to consider the JRPP's consideration of Part X in the context of the consent approval process as a whole. Clause 6.3 of the LEP set out above in par [6](#) outlines the requirements for the preparation of the DCP for an urban release area, and the specific requirements for the WYURA. It is not disputed by the Applicants that the matters in cl 6.3 were referred to by the JRPP. The inference arises from the evidence that the JRPP considered Part X as required in [s 79C](#) of the [EPA Act](#). The Applicants have examined the text of Part X in detail in order to identify elements that they submit were not directly referred to by the JRPP and therefore infer that the JRPP failed to consider those parts of Part X. This is not an acceptable approach in judicial review proceedings. For the sake of completeness I will consider the matters particularised in the summons.
132. The summons identifies control C2 of Item 2 of Part X which states "a Servicing Strategy to the satisfaction of the consent authority to be lodged prior to consent being granted for a DA to subdivide land within the WYURA". Condition 16 of the consent provides that a servicing strategy must be prepared prior to the development being connected to the sewerage treatment plant. The Applicants submit that the difference between control C2 and Condition 16, being the point in the development process that a servicing strategy must be prepared, goes to show that the JRPP did not consider relevant parts of Part X. As I found in [Gilbank v Bloore \(No 2\)](#) [2012] NSWLEC 273 at [\[99\]](#), provided that the DCP is a focal point in the JRPP's consideration of a DA, it need not be strictly complied with. Condition 16 of the consent clearly shows that the JRPP considered the matter of staging and servicing. The fact that Condition 16 requires a servicing strategy to be prepared at a later point than control C2 of Item 2 of Part X is a technical breach of the DCP at its highest. It is not evidence that the JRPP did not consider the staging and servicing requirements of Part X to the extent required by [s 79C](#). Further, section X8 of Part X extracted above in par [8](#) states that strict compliance with the controls is not necessary provided that the intent of the controls is achieved. The objective of the control requiring a servicing strategy is clearly achieved by the terms of Condition 16.

133. The summons also identifies the earthworks requirements in Part X as another failure to consider Part X. The Applicants submitted that provisions of Part X relating to the requirement for an EMP were not reflected in the conditions of consent and that the conditions of consent relating to earthworks were contrary to the requirements of Part X. In fact control C1 of Part X states that the consent authority must not grant consent to the “commencement of land fill or other earthworks associated therewith” unless an EMP has been prepared. Condition 46 of the consent provides that an EMP must be approved prior to the issue of a civil construction certificate which must precede any substantial work. The Applicants’ submission that this condition is not acceptable as it is “different” from that required by Part X is not relevant. At issue is whether the JRPP took it into consideration as required by s 79C. The preparation of the EMP is guided by Advice 10 of the JRPP’s Advices included with the conditions of consent in the Notice of Determination of the DA and extracted above in par 25. Five other conditions of consent, being Conditions 47 to 51, outline requirements relating to the design and carrying out of earthworks. The inference arises that the earthworks requirements of Part X of the RDCP were taken into consideration by the JRPP.
134. The Applicants have not discharged the onus of proof to establish that the JRPP did not take into consideration Part X of the RDCP as required by s 79C(1)(a)(iii).

Ground 5

135. Ground 5 of the amended summons provides:

17 Further, or in the alternative, the decision to grant the Consent failed to take into consideration the likely environmental impacts of the development as required by s 79C(1)(b), in that it did not consider the cumulative impact on and in relation to flooding, overland flows and drainage of both the subdivision the subject of the Consent and the development of the remainder of the WYURA, and instead considered the flooding, overland flow and drainage impacts of the proposed 161 lot subdivision in isolation.

Particulars

By way of example, the Second Respondent’s DCP at section 7.2 page 40 observes that “flood behaviour will change once the zoned urban lands within the WYURA are progressively filled”, but the material lodged in support of the development application did not and did not attempt to assess this changed flood behaviour that would arise consequent upon the development of the whole WYURA.

Applicants’ submissions

136. Section 79C(1)(b) of the EPA Act requires the JRPP to consider the likely environmental impacts of the development, including the cumulative impact in relation to flooding, overland flows and drainage of the subdivision area and the rest of the WYURA. The BMT WBM Report assumes filling of the rest of the WYURA, but the earlier Paterson Report does not consider the changes in flood velocities on the adjoining land in its undeveloped state, and neither does the BMT WBM

Report. The BMT WBM Report assumes that the whole of the site is to be filled to a 3m AHD level which cannot occur instantaneously. So there is in fact no study of the impacts on the adjoining land in its undeveloped state or partially developed state to the extent required by the RDCP, the only consideration is on the assumption that a block of assumed fill is placed across the whole of the WYURA. Even that study does not consider changes in flood velocities or flow paths. Changes in flood velocities and storage levels of the land in its undeveloped state and in any partially developed state (for example, with sequential development on the adjoining WYURA land if that occurs) or if the WYURA land is actually filled in adjoining areas to a higher or different level to comply with the RDCP Part D requirement that habitable floor levels be at the PMF level are entirely and unsatisfactorily unknown.

137. It may be contended that the BMT WBM Report shows this matter was considered. Such a submission would be rejected due to the matters pertaining to cumulative impact not addressed by that report, nor in the Assessment Report. The BMT WBM Report does not consider all required kinds of flood and flow impact (flood velocities and overland flow paths are two crucial examples) and does not consider all reasonably required scenarios (filling to a higher or lower level than proposed, sequential or partial development, higher filling on the subject land versus no filling on adjoining land, the list goes on). When a consent authority is dealing with an issue impacting so significantly on life and safety as this flood management issue in an area to be subdivided, being the WYURA, these deficiencies can only be regarded as material.

Second Respondent's submissions

138. The Second Respondent concedes that there was an obligation on the JRPP to consider the impact of filling land within the floodplain for the purposes of residential development on other land in the locality. For that reason, it provided a Flood Impact Assessment Report by Paterson and a further flood report by BMT WBM after Dr O'Loughlin reported to the Council there was a need for additional modelling. BMT WBM reported that with the proposed filling and modelling of the site alone as being filled together with modelling of the WYURA as totally developed there would be minor impact across some dwellings in the 1:100 year ARI flood event, less than 3mm. In the Assessment Report, the Council development planner concluded that the proposed development was not inconsistent with the objectives of cl 7.3 of the LEP.
139. What is destructive of this ground of challenge is the express reason for the JRPP's decision which conclusively demonstrates that the panel considered the likely impact of the development on the natural and built environment as required by s 79C(1)(b) in relation to flooding. Whether the challenger agrees with the JRPP's decision is not to the point.

Ground 5 not proven by Applicants

140. This ground alleges a failure to take into consideration the likely impact of the development as required by s 79C(1)(b) of the EPA Act. Section 79C(1)(b) requires consideration of the likely environmental impacts of a development on the natural and built environment, and social and economic impact in the locality. The Applicants' submissions in essence identify merit

considerations only. The submission also took an impermissible shopping list approach of identifying matters which in the opinion of the Applicants were mandatory relevant considerations without establishing in the s 79C(1) statutory context why they were.

141. The Second Respondent in Ground 1 identified the extensive flooding impact assessment material before the JRPP. No criticism can be made given the BMT WBM Report that the Second Respondent's land was considered in isolation from the rest of the WYURA. The criticism made again that there is no reference to velocity or overland flow paths is not sustained when the evidence as a whole is considered. For example, the Paterson Report incorporates velocities in the model described in the report on at least five pages.
142. As the Second Respondent submitted the JRPP expressly identified in the Notice of Determination that it considered detailed flood modelling which demonstrated that the proposed development provides flood and drainage systems for the WYURA and the development, mitigating impact on surrounding property and infrastructure. That is precisely the consideration required by s 79C(1)(b).
143. Given these findings on the nature of the Applicants' case, the authorities referred to *Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337; (2008) 163 LGERA 400, *Parramatta City Council v Hale* (1982) 47 LGRA 319 and *Bat Advocacy NSW v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59; (2011) 180 LGERA 99 which emphasise the need for an intellectual process of engagement in relation to a mandatory matter can all be accepted. No failure to do so by the JRPP in the Applicants' case has been established.
144. The Applicants have not discharged the onus of proof of establishing ground 5.

Ground 6

145. Ground 6 of the amended summons provides:

18 Further, or in the alternative, the decision to grant the Consent was legally unreasonable in all of the above circumstances, in that it assessed the proposed subdivision of the Land without adequate regard to the implications of the 161 lot subdivision for the development of the remainder of the WYURA and the development of the WYURA as a whole.

146. Although the Applicants submitted that Ground 6 was able to be maintained if unsuccessful on the earlier grounds of review I am unable to see how. The Applicants essentially repeated the alleged failures in the JRPP's consideration identified in other grounds in relation to Part D of the RDCP, Part X, the absence of an EMP and servicing strategy. As articulated in written submission a failure to consider the floodway within the WYURA and impacts on nearby properties is also alleged but no such failure has been established. The high hurdle of satisfaction of legal unreasonableness as identified in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [

1947] EWCA Civ 1 and considered on many occasions most recently in the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 cannot be satisfied here. The Applicants are unsuccessful on Ground 6.

147. As the Applicants have not succeeded in their judicial review challenge the amended summons dated 16 May 2016 is dismissed. Costs usually follow the event in Class 4 proceedings. An order that the Applicants must pay the Second Respondent's costs will be made in fourteen days unless a notice of motion seeking other orders is filed before then.

Orders

148. The Court orders that:

1. The Amended Summons dated 16 May 2016 is dismissed.
2. The Applicants must pay the Second Respondent's costs within 14 days unless a Notice of Motion seeking other orders is filed prior.
3. The exhibits may be returned.

Decision last updated: 17 June 2016

Cited by:

Geoffrey John Lomman v Windbelt Pty Limited [2018] NSWLEC 29 (13 March 2018) (Robson J)
Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd [2016] NSWLEC 72 ; (2016) 216 LGERA 144

Geoffrey John Lomman v Windbelt Pty Limited [2018] NSWLEC 29 (13 March 2018) (Robson J)

41. Windbelt submitted that the Lommans' approach to challenging the requisite state of mind was flawed for a number of reasons:
1. First, the Lommans conducted a minute examination of the Assessment Report, using an approach finely attuned to the perception of error. In any case the approach was flawed as the decision under review is that of Council, not the assessment of the Council's officers: *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 ('Rossi') at [268]-[269] ;
 2. Second, the fact that Council adopted a recommendation in the Assessment Report does not support an inference that this was the totality of matters considered by Council in determining the development application: *Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd* [2016] NSWLEC 72; (2016) 216 LGERA 144 ('*Dougherty Bros*') at [26] ;

3. Third, the Lommans erroneously and selectively relied on the Benbow Report and the Assessment Report to discharge their onus that the state of satisfaction was not reached, and further suggested a list of considerations which should have been taken into account. Windbelt submitted that this constituted an “impermissible shopping list approach”, which could not discharge the Lommans’ onus. Further, Windbelt submitted that the Lommans’ reliance on the Benbow Report was irrelevant to the question for determination, and represented no more than a submission on the merits of the decision; and
4. Fourth, the Lommans’ case omitted any reference to the vast body of evidence that was before Council, which, when examined fairly and as a whole, rendered impossible the inference that Council was not satisfied of the matters in cl 2.8(3) (b). Relevantly, Windbelt submitted that Council had before it and was informed by:
 - I. the SEE;
 2. the Benbow Report;
 3. many submissions that addressed noise with some people expressing no objection or conditional support, and only 12 people expressing objection;
 4. a report by Mr Boulevine, Council’s Environmental Health Officer, dated 21 July 2016, who at the time advised that noise levels were unacceptably high and intrusive at two noise receptors;
 5. a response to that report by Mr Benbow dated 21 September 2016;
 6. a further response to the Benbow Report by Mr Boulevine dated 6 October 2016;
 7. a set of draft conditions prepared by Mr Boulevine dated 18 November 2016 which were advised to be fair and properly acceptable to Windbelt;
 8. a more prescriptive set of conditions prepared by Mr Boulevine on 28 November 2016;
 9. an acoustic report prepared by Wilkinson Murray dated January 2017, and submitted on behalf of the Lommans;
 10. oral submissions made to councillors at Council meetings where the decision was made, including by Mr Bilinsky (solicitor for the Lommans), Mr Murray from Wilkinson Murray, and on behalf of Windbelt, Mr Large;
 - II. a report to the Committee of the Whole by Council’s town planner which recommended the approval of the development application subject to a number of conditions addressing the amenity of the neighbourhood. It also made recommendations for management of noise and traffic; and stated, inter alia, “it is considered that the proposed events are unlikely to have an adverse impact on the environment”; and

12. condition 29, which contained more prescriptive measures than those advocated by Mr Benbow.

Coastal Ecology Protection Group Inc v City of Charles Sturt [2017] SASC 136 (21 September 2017)
(Judgment of The Honourable Justice Blue)

597. This passage has been cited and applied by New South Wales Court of Appeal in *Notaras v Waverley Council* [103] and *Oshlack v Rous Water* [104] but in neither does it appear to have been decisive (as in *Schroders v Shoalhaven City Council* itself). This passage has been applied at first instance by the New South Wales Land and Environment Court in various cases, three of which are cited by the Council. [105].

via

[105] *Gillbank v Bloore (No 2)* [2012] NSWLEC 273 at [53]-[54] per Pain J; *Roden v Bandora Holdings Pty Ltd* [2015] NSWLEC 191, (2015) 213 LGERA 103 at [88] per Pain J; *Dougherty Bros Pty Ltd v Outline Planning Consultants* [2016] NSWLEC 72, (2016) 216 LGERA 144 at [44] per Pain J.