Henroth Investments v Sydney North Planning Panel - [2018] NSWLEC 112

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Land and Environment Court

New South Wales

Medium Neutral Citation:	**Henroth Investments Pty Ltd v Sydney North Planning Panel [2018] NSWLEC 112**
Hearing dates:	15-16 May 2018
Date of orders:	31 July 2018
Decision date:	31 July 2018
Jurisdiction:	Class 4
Before:	Pain J
Decision:	See [203] of judgment
Catchwords:	ENVIRONMENT AND PLANNING – judicial review – decision of planning panel undertaking rezoning review – no apprehension of bias or actual bias – no failure to take into account a mandatory relevant consideration – irrelevant consideration not taken account – proceedings dismissed
Legislation Cited:	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 50 Environmental Planning and Assessment Act 1979 ss 23G, 23N, 26, 53, 53A, 53G, 54, 55, 56, 59, 60, 94, 117 Pt 3 Div 4 Environmental Planning and Assessment Amendment Act 2017 Environmental Planning and Assessment Regulation 2000 cll 9, 10A Greater Sydney Commission (Planning Panels) Order 2016 cl 3 Greater Sydney Commission Act 2015 ss 5, Pt 3, Sch 3 , Migration Act 1958 (Cth) s 36

	Mining Act 1978 (WA) s 57 Pittwater Local Environmental Plan 2014 Workers' Compensation Act 1926 Land Acquisition (Just Terms Compensation) Act 1991
Cases Cited:	Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54; [1977] HCA 71 Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 Capital Airport Group Pty Ltd v Director-General of the Department of Planning (2010) 171 LGERA 440; [2010] NSWLEC 5 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 Hemmes Trading Pty Ltd & Ors v State of New South Wales & Ors [2009] NSWSC 1303 Hot Holdings v Creasy (2002) 210 CLR 438; [2002] HCA 51 Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 Islam v Cash [2015] FCA 815 Lo v Chief Commissioner of State Revenue (2013) 85 NSWLR 86; [2013] NSWCA 180 McGovern v Ku-Ring-Gai Council (2008) NSWLR 504; [2008] NSWCA 209 Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40 Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30 Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189 Roy Kennedy v Director-General of the Department of Environment and Conservation [2006] NSWLEC 456 Regional Express Holdings Ltd v Dubbo City Council (No 3) [2014] NSWLEC 87 Smit v Roach (2006) 227 CLR 423; [2006] HCA 36 State Super SAS Trustee Corporation v Cornes [2013] NSWCA 257 Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71 Tolson v Roads and Maritime Service (2014) 201 LGERA 367; [2014] NSWCA 161 Vakauta v Kelly (1989) 167 CLR 568; [1989] HCA 44
Category:	Principal judgment
Parties:	Henroth Investments Pty Ltd (Applicant) Sydney North Planning Panel (First Respondent) Northern Beaches Council (Second Respondent)

Representation:	COUNSEL: A Galasso SC and D Robertson (Applicant) R Mansted (First Respondent) S Nash (Second Respondent) SOLICITORS: Mills Oakley (Applicant) Department of Planning (First Respondent) King & Wood Mallesons (Second Respondent)
File Number(s):	17/266268

Judgment

1. Henroth Investments Pty Ltd (Henroth) has commenced judicial review proceedings challenging a decision of the Sydney North Planning Panel (the Panel) in relation to a rezoning review made on 31 May 2017 concerning land in Boondah Road and Jacksons Road Warriewood.

2. The Panel was a Sydney planning panel constituted pursuant to the now repealed Pt 3 of the *Greater Sydney Commission Act 2015* (GSC Act). The Panel decided that the rezoning review should not proceed to Gateway determination under s 56 of the *Environmental Planning and Assessment Act 1979* (EPA Act). As will be discussed below, this decision is effectively a recommendation to the Greater Sydney Commission (GSC). The Panel's decision followed a refusal by the Northern Beaches Council (the Council) of Henroth's rezoning request.

3. The Amended Summons filed by Henroth on 16 March 2018 seeks inter alia:

> 1 A declaration that the determination of the First Respondent, the Sydney North Planning Panel, made on 31 May 2017 that the planning proposal submitted by the Applicant, Henroth Investments Pty Ltd, to the Second Respondent, Northern Beaches Council, to amend the Pittwater Local Environment Plan 2014 by rezoning the land in Folio Identifiers 3/26902, 4/26902 and 9/806132 **(Planning Proposal)** should not proceed to gateway determination **(Rezoning Review Decision)**, is invalid and of no effect.
>
> 2 An order that the Rezoning Review Decision be set aside.
>
> 3 An order that the First Respondent conduct a review of the Planning Proposal according to law.

4. I note that while the declaration and grounds of review refer to a planning proposal made by Henroth that is not a reference to a planning proposal within the meaning of the EPA Act. A planning proposal as defined under s 55(1) of the EPA Act can only be prepared by a council, the Secretary of the Department of Planning and Environment (the Department) or any other person or body prescribed by the regulations if the Minister directs (s 54(1)). The descriptor I will use for

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Henroth's initial application made to the Council is a rezoning request. On that request being refused, an application for review of the rezoning request was made via the Department to the Panel. The rezoning review decision of the Panel is the subject of judicial review.

Greater Sydney Commission Act 2015

5. The GSC Act at the relevant time (8 July 2016 to 30 June 2017) provided:

> **Part 2 Greater Sydney Commission**
>
> **Division 1 Constitution of Commission**
>
> **5 Constitution of Commission**
>
> (1) There is constituted by this Act a body corporate with the corporate name of the Greater Sydney Commission.
>
> (2) The Commission is a NSW Government agency.
>
> …
>
> (3) The Commission is not subject to the control and direction of the Minister (except to the extent specifically provided for in this or any other Act).
>
> …
>
> **Part 3 Sydney planning panels**
>
> **18 Constitution and functions of Sydney planning panels**
>
> (1) The Minister may, by order published on the NSW legislation website, constitute a Sydney planning panel for the part of the Greater Sydney Region specified in the order.
>
> (2) The part of the Greater Sydney Region for which a Sydney planning panel is constituted may comprise the whole of the Region.
>
> (3) A Sydney planning panel is taken to be a joint regional planning panel under and for the purposes of the Planning Act and the instruments made under that Act. Accordingly, the provisions of or under that Act (other than section 23G (1) and Schedule 4) that apply to or in respect of a joint regional planning panel apply, subject to the regulations, to or in respect of a Sydney planning panel.
>
> …
>
> (7) Schedule 3 contains provisions with respect to Sydney planning panels.
>
> **Schedule 3 Sydney planning panels**
>
> **1 Definitions**
>
> In this Schedule:

applicable council means the council of an area that is situated (wholly or partly) in a part of the Greater Sydney Region for which a Sydney planning panel is constituted.

chairperson means the person appointed by the Minister as chairperson of a Sydney planning panel.

member means a member of a Sydney planning panel.

2 Members of Sydney planning panels

(1) A Sydney planning panel is to consist of the following 5 members:

(a) 3 members appointed by the Minister (the ***State members***), one of whom is to be a District Commissioner,

(b) 2 nominees of an applicable council (the ***council nominees***) who are councillors, members of council staff or other persons nominated by the council.

(2) The State members of a Sydney planning panel are to be persons who have expertise in at least one area of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration. In appointing State members, the Minister is to have regard to the need to have a range of expertise represented among the panel's members.

(3) At least one of the council nominees of a Sydney planning panel is to be a person who has expertise in at least one area of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering or tourism.

(4) The State member who is a District Commissioner is to be appointed by the Minister as chairperson of the Sydney planning panel.

(5) Each applicable council is to nominate 2 persons as council nominees for the purposes of the Sydney planning panel. If an applicable council fails to nominate one or more council nominees, a Sydney planning panel is not required to include 2 council nominees for the purposes of exercising its functions in relation to the area of the council concerned.

...

Section 18 and Sch 3 were repealed on 1 March 2018 by the *Environmental Planning and Assessment Amendment Act 2017* .

Greater Sydney Commission (Planning Panels) Order 2016

6. The Greater Sydney Commission (Planning Panels) Order issued 19 October 2016 provided:

...

3 Constitution of Sydney planning panels

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(1) Pursuant to section 18 (1) of the *Greater Sydney Commission Act 2015* , the following Sydney planning panels are constituted:

…

(d) Sydney North Planning Panel for the North District of the Greater Sydney Region,

…

(2) A reference in this clause to a district of the Greater Sydney Region is a reference to the district by that name declared under section 75AB (b) of the *Environmental Planning and Assessment Act 1979* .

…

(d) North District (comprising the local government areas of Hornsby, Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Northern Beaches, City of Ryde and City of Willoughby),

…

Environmental Planning and Assessment Act 1979

7. At the relevant time the following sections of the EPA Act (6 January 2017 to 7 June 2017) provided:

…

Part 2A Other planning bodies

…

Division 3 Joint regional planning panels [Sydney planning panels]

23G Joint regional planning panels [Sydney planning panels]

(1) The Minister may, by order published on the NSW legislation website, constitute a joint regional planning panel for a particular part of the State specified in the order.

(2) A regional panel [Sydney planning panel] has the following functions:

(a) any of a council's functions as a consent authority that are conferred on it under an environmental planning instrument,

(b) any functions that are conferred on it under Division 1AA (Planning administrators and panels) of Part 6,

(c) to advise the Minister or the Secretary as to planning or development matters or environmental planning instruments relating to the part of the State for which it is appointed, or any related matters, if requested to do so by the Minister or the Secretary (as the case may be).

(2A) An environmental planning instrument may only confer a council's functions as consent authority on a regional panel if the development is of a class or description set out in Schedule 4A. The functions of a consent authority may only be conferred on a regional panel in accordance with subsection (2) (a) and this subsection.

(2B) Any environmental planning instrument that is in force on the commencement of subsection (2A) ceases to have effect to the extent that it is inconsistent with that subsection.

(3) A regional panel [Sydney planning panel] has the functions conferred or imposed on it by or under this or any other Act.

(3A) Without limiting subsection (3), a regional panel [Sydney planning panel] may exercise functions delegated to it under this or any other Act.

(4) A regional panel [Sydney planning panel] is not subject to the direction or control of the Minister, except in relation to the procedures of the regional panel and to the extent specifically provided for in this Act.

(5) A regional panel [Sydney planning panel] is a statutory body representing the Crown

…

Division 6 Matters relating to councils and council functions

…

23N Obligations of councils to assist Commission and regional panels

(1) The Commission or a regional panel is entitled:

> (a) to have access to, and to make copies of and take extracts from, records of a council relevant to the exercise of the Commission's or panel's functions, and
>
> (b) to the use of the staff and facilities of a relevant council in order to exercise the Commission's or panel's functions.

(2) The general manager of a council must carry out any reasonable direction of the Commission or a regional panel relating to functions of the council being exercised by the Commission or panel.

Maximum penalty: 10 penalty units.

(3) A member of a council, or the general manager or other member of staff of a council, must not obstruct the Commission, a regional panel or a member of the Commission or a panel in the exercise of the Commission's or panel's functions under this Act.

Maximum penalty: 10 penalty units.

…

Part 3 Environmental planning instruments

...

Division 4 LEPs

53 Minister may make environmental planning instruments for local areas (LEPs)

(1) The Minister may make environmental planning instruments for the purpose of environmental planning:

(a) in each local government area, and

(b) in such other areas of the State (including the coastal waters of the State) as the Minister determines.

(2) Any such instrument may be called a local environmental plan (or LEP).

(3) Despite subsection (1), the Minister may not make a local environmental plan in respect of any local government area in the Greater Sydney Region. However, this subsection does not prevent the Minister from giving directions under section 117 to a council or other public authority on any matter relating to the Greater Sydney Region.

...

53A Greater Sydney Commission may make LEPs for local areas in Greater Sydney Region

(1) The Greater Sydney Commission may make environmental planning instruments for the purposes of environmental planning in each local government area in the Greater Sydney Region. Any such instrument may be called a local environmental plan (or LEP).

(2) For the purposes of the making of LEPs that apply to local government areas in the Greater Sydney Region, a reference to the Minister in section 15, 33B (4) or (5), 54 (1), (2) (a), (c) or (d) or (4), 56, 58, 59, 73A (1) (c), 74D (5) (b) or 74F is to be construed as a reference to the Greater Sydney Commission.

54 Relevant planning authority

(1) For the purposes of this Part, the ***relevant planning authority*** in respect of a proposed instrument is as follows:

(a) the council for the local government area to which the proposed instrument is to apply, subject to paragraph (b),

(b) the Secretary or any other person or body prescribed by the regulations if the Minister [GSC] so directs under subsection (2).

(2) The Minister [GSC] may direct that the Secretary (or any other person or body prescribed by the regulations) is the relevant planning authority for a proposed instrument in the following cases:

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...

(c) the Planning Assessment Commission or a joint regional planning panel has recommended to the Minister [GSC] that the proposed instrument should be submitted for a determination under section 56 (Gateway determination) or that the proposed instrument should be made,

...

(3) A relevant planning authority that is requested by the owner of any land to exercise its functions under this Division in relation to the land may, as a condition of doing so, require the owner to carry out studies or provide other information concerning the proposal or to pay the costs of the authority in accordance with the regulations.

...

55 Relevant planning authority to prepare explanation of and justification for proposed instrument—the planning proposal

(1) Before an environmental planning instrument is made under this Division, the relevant planning authority is required to prepare a document that explains the intended effect of the proposed instrument and sets out the justification for making the proposed instrument (the ***planning proposal***).

(2) The planning proposal is to include the following:

(a) a statement of the objectives or intended outcomes of the proposed instrument,

(b) an explanation of the provisions that are to be included in the proposed instrument,

(c) the justification for those objectives, outcomes and provisions and the process for their implementation (including whether the proposed instrument will comply with relevant directions under section 117) ,

(d) if maps are to be adopted by the proposed instrument, such as maps for proposed land use zones; heritage areas; flood prone land—a version of the maps containing sufficient detail to indicate the substantive effect of the proposed instrument,

...

56 Gateway determination

(1) After preparing a planning proposal, the relevant planning authority may forward it to the Minister [GSC].

(2) After a review of the planning proposal, the Minister [GSC] is to determine the following:

(a) whether the matter should proceed (with or without variation),

(b) whether the matter should be resubmitted for any reason (including for further studies or other information, or for the revision of the planning proposal),

(c) community consultation required before consideration is given to the making of the proposed instrument (the ***community consultation requirements***),

(d) any consultation required with State or Commonwealth public authorities that will or may be adversely affected by the proposed instrument,

(e) whether a public hearing is to be held into the matter by the Planning Assessment Commission or other specified person or body,

(f) the times within which the various stages of the procedure for the making of the proposed instrument are to be completed.

...

59 Making of local environmental plan by Minister

(1) The Secretary is to make arrangements for the drafting of any required local environmental plan to give effect to the final proposals of the relevant planning authority. The Secretary is to consult the relevant planning authority, in accordance with the regulations, on the terms of any such draft instrument.

(2) The Minister [GSC] may, following completion of community consultation:

(a) make a local environmental plan (with or without variation of the proposals submitted by the relevant planning authority) in the terms the Minister [GSC] considers appropriate, or

(b) decide not to make the proposed local environmental plan.

(3) The Minister [GSC] may defer the inclusion of a matter in a proposed local environmental plan.

(4) If the Minister [GSC] does not make the proposed local environmental plan or defers the inclusion of a matter in a proposed local environmental plan, the Minister [GSC] may specify which procedures under this Division the relevant planning authority must comply with before the matter is reconsidered by the Minister [GSC].

60 Regulations

The regulations may make further provision with respect to the making of environmental planning instruments under this Division, including:

(a) requirements with respect to consultation about proposed instruments by a relevant planning authority with particular persons or bodies, and

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(b) requirements with respect to planning proposals and the submission of other related reports and documents, and

(c) requirements with respect to advertising in connection with community consultation on proposed instruments, and

(d) provisions relating to consultation by the Secretary with relevant planning authorities and others on the drafting of proposed instruments, and

(e) requirements for concurrence of public authorities in relation to the reservation of land for a purpose referred to in section 26 (1) (c).

...

Environmental Planning and Assessment Regulation 2000

8. Relevant provisions of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulation) (6 January 2017 to 30 June 2017) provided:

...

Part 2 Environmental planning instruments

9 Joint regional planning panel—eligible relevant planning authority

For the purposes of Part 3 of the Act, a joint regional planning panel [Sydney planning panel] is prescribed under section 54 of the Act as a body that may be directed by the Minister to be the relevant planning authority for a proposed LEP.

...

10A Notification when council does not support request to prepare planning proposal

When a council does not support a written request made to the council by a person for the preparation of a planning proposal under Part 3 of the Act, the council is required to notify the person as soon as practicable in writing that the proposal is not supported.

Amended statement of agreed facts

9. The parties agreed an amended statement of agreed facts (SOAF) which it is useful to set out:

1. The land at 6 Jackson[s] Road and 10 and 12 Boondah Road, Warriewood, NSW, is the land in Folio Identifiers 3/26902, 4/26902 and 9/806132 (**Land**).

2. Henry Fraser Pty Ltd is the registered proprietor of the land in Folio Identifier 4/26902

3. Cassius Investments Pty Ltd is the registered proprietor of the land in Folio Identifier 3 /26902.

4. Henlen Pty Ltd is the proprietor of the land in Folio Identifier 9/806132.

5. The companies listed in paragraphs [2] – [4] are part of the Applicant group company Henroth Investments Pty Ltd.

6. The Land is presently in the local government area of Northern Beaches Council (**Council**). Prior to about 12 May 2016, the Land was in the local government area of Pittwater Council. On about 12 May 2016, Pittwater Council merged with Manly and Warringah Councils to form Northern Beaches Council.

7. The Land is approximately 3.565 ha in size and is presently zoned RU2 Rural Landscape under the *Pittwater Local Environmental Plan 2014* (**PLEP 2014**).

8. On 12 June 2013, Pittwater Council and the Department of Planning & Infrastructure (**DP&I**) jointly reviewed undeveloped areas of the Warriewood Valley including the Southern Buffer and prepared the Warriewood Valley Strategic Review (**WVSR**).

9. In about May 2013, the Director-General of DP&I endorsed the outcomes of the WVSR.

10. The Land is in an area known as the Southern Buffer in the WVSR.

11. On 17 November 2014, the Council adopted the Warriewood Valley Strategic Review Addendum Report (**WVSR Addendum**).

Council's offer to Purchase the Land

12. On about 1 November 2016, the Deputy General Manager (Environment and Infrastructure) of Council made an offer to the Applicant to purchase part of the Land for approximately $6.6 million. The Applicant did not accept that offer.

13. On about 23 January 2017 and 30 March 2017, the Deputy General Manager (Environment and Infrastructure) of Council extended the time to accept its offer to purchase part of the Land. The Applicant did not accept those offers.

The Planning Proposal [Rezoning request]

14. In December 2016, the Applicant submitted to Council a Planning Proposal [rezoning request] in respect of the Land which sought the rezoning of the Land to partly R3 Medium Density Residential, B2 Local Centre, RE1 Public Recreation and E3 Environmental Management (**Planning Proposal**).

15. The purpose of the proposed rezoning was to allow for the development of approximately 2.047 ha of the Land for a 2-storey Bulky Goods Retail Centre, associated food and drinks premises, and 3 and 4-storey residential flat buildings comprising 25-30 dwellings.

...

17. On 28 March 2017, Council considered the Planning Proposal [rezoning request] at an Ordinary Meeting and adopted the recommendation of the Deputy General Manager, Planning & Community, that Council not progress the Planning Proposal [rezoning request] to Gateway Determination.

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The Rezoning Review

18. On or about 22 March 2017, the Applicant applied to the Sydney North Planning Panel (**Panel**) for review of the Planning Proposal [rezoning request] because Council had not indicated its support 90 days after the Applicant had submitted the request to Council to prepare the Planning Proposal (**Rezoning Review**).

19. The Panel was a Sydney Planning Panel constituted pursuant to Part 3 of the *Greater Sydney Commission Act 2015* (NSW) in force at the relevant time and section 3 of the *Greater Sydney Commission (Planning Panels) Order 2016* (NSW) .

...

21. At all material times, when conducting its review of the Planning Proposal and making the Rezoning Review Decision, the following documents were in existence:

(a) the Planning Panels Code of Conduct (**Panel Code**), dated September 2016;

(b) the Planning Panels Operational Procedures (**Panel Procedures**), dated September 2016; and

(c) Planning Circular PS 16-004, "Independent review of plan making decisions" (**PS 16-004**), issued on 30 August 2016.

22. On 26 May 2017, SJB Planning made a written submission to the Panel on behalf [of] the Applicant.

23. On 31 May 2017, the Panel convened to conduct its review of the Planning Proposal [rezoning request]. The Panel was constituted of Deborah Dearing (Chair), Juliet Savet Ward, Clare Brown, Steve Kennedy and Paul Stein. The Panel was constituted by 3 State members and 2 members appointed by Council.

24. The Applicant's director, Stanley Roth, was present at the meeting held by the Panel to consider the Planning Proposal on 31 May 2017.

25. At one stage during the Panel meeting on 31 May 2017, the Panel asked those present at the meeting if anyone had any further comments to make. The Applicant's director, Stanley Roth, stated he would like to raise the issue of Council's apparent bias in respect of the Planning Proposal. Mr Roth was denied the opportunity to make submissions on the point by the Panel. Daniel Maurici (Henroth Investments), Scott Barwick (SJB), Karla Castellanos (Urban Designer) and Troy Eyles (Civil Engineer) made submissions to the Panel on behalf of the Applicant at the meeting. John Travers (Bushfire and Ecology) answered Panel questions on behalf of the Applicant at the meeting.

26. On 31 May 2017, the Panel determined that the Planning Proposal [rezoning request] should not proceed to the Gateway determination stage (**Rezoning Review Decision**).

Amended chronology

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10. The parties agreed an amended chronology as follows:

DATE	EVENT
November 2012	Pittwater Council and the Department of Planning & Infrastructure **(DP&I)** jointly reviewed undeveloped areas of the Warriewood Valley including the Southern Buffer and prepared the Warriewood Valley Strategic Review **(WVSR).**
May 2013	Director-General of the DP&I endorsed the WVSR.
December 2013	Applicant submitted a Planning Proposal [rezoning request] to the Council which proposed rezoning of the subject land to allow for commercial and residential development of the land **(2013 Planning Proposal).**
17 November 2014	Pittwater Council adopted the Warriewood Valley Strategic Review Addendum Report **(WVSR Addendum).**
February 2015	Sydney Region East Joint Regional Planning Panel recommended to the Minister that the 2013 Planning Proposal [rezoning request] not proceed to Gateway Determination.
12 May 2016	Pittwater Council merged with Manly and Warringah Councils to form Northern Beaches Council **(Council).**
1 November 2016	The Deputy General Manager (Environment and Infrastructure) of Council made offers to the Applicant to purchase the parts of the subject land at 10 and 12 Boondah Rd Warriewood.
December 2016	Applicant submitted to Council [the Planning Proposal] PP0005/16, for the land at 6 Jacksons Road and 10 & 12 Boondah Rd Warriewood **Planning Proposal** [rezoning request].
23 January 2017	The Deputy General Manager (Environment and Infrastructure) of Council extended the time to accept the offer to purchase part of the subject land at 12 Boondah Rd Warriewood.

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24 January 2017	Email sent from Assistant Planner - Strategic of the Council, Mr Brendan Gavin, to the Section 94 Coordinator (North) of Council, Mr Robert Platt, with respect to the desired purchase of the land the subject of the Planning Proposal [rezoning request].
31 January 2017	Council adopt the Warriewood Valley Section 94 Contributions Plan - Amendment 16, Revision 2.
10 February 2017	The State Emergency Service (**SES**) provides a response to the Council's external referral on the Planning Proposal [rezoning request].
13 February 2017	The Office of Environment and Heritage (**OEH**) provide a response to Council's external referral on the Planning Proposal [rezoning request].
15 February 2017	Email sent from Manager of Reserves and Recreation of Council, Mr Les Munn, to Mr Andreas Olsen of Council, with respect of the Planning Proposal [rezoning request] and the value of the land in relation to its zoning.
17 February 2017	Email sent from Section 94 Coordinator (North) of Council, Mr Robert Piatt, to Mr Andreas Olsen of Council, with respect to the desired purchase of the land at 10 and 12 Boondah Rd, and on the effect of change to available FSR on the ability to levy appropriately under the s 94 plan.
21 February 2017	The Roads and Maritime Services provide a response to Council's external referral on the rezoning request.
22 March 2017	Applicant applied to the Department of Planning & Environment (**DP&E**) seeking a Rezoning Review of the Planning Proposal [rezoning request] as Council had not indicated its support within 90 days (**Rezoning Review**).
28 March 2017	Council considered the Planning Proposal [rezoning request] at an Ordinary Meeting and adopted the recommendation of the Deputy General Manager, Planning & Community, that the Council not progress the Planning Proposal to the Gateway for a determination.

30 March 2017	The Deputy General Manager (Environment and Infrastructure) of Council extended the time to accept the offer to purchase part of the subject land at 10 Boondah Rd Warriewood.
19 April 2017	Council wrote to the DP&E providing its views on the rezoning request.
26 May 2017	SJB Planning on behalf the Applicant made a written submission to Sydney North Planning Panel (**Panel**).
31 May 2017	The Panel convened a meeting to conduct its Rezoning Review of the Planning Proposal. The First Respondent determined that the Planning Proposal should not proceed to the Gateway Determination (**Rezoning Review Decision**).
1 June 2017	Applicant received notification of the Rezoning Review Decision.
31 August 2017	Applicant filed a Summons (Judicial Review) seeking judicial review of the Rezoning Review Decision.

Evidence

Warriewood Valley Strategic Review Report 2012

11. Henroth tendered the *Warriewood Valley Strategic Review Report* of November 2012 (WVSR Report) which was exhibited to Mr Maurici's affidavit affirmed 31 August 2017 referred to below at [51]. The WVSR Report was authored by the Department and Pittwater Council (having merged with Manly and Warringah councils in May 2016 to become Northern Beaches Council). The Department endorsed the WVSR Report on 1 May 2013.

12. The WVSR Report identified the "southern buffer" (Southern Buffer) (in which the subject land is located) as being the area at the junction of Pittwater Road and Jacksons Road Warriewood. The Southern Buffer is approximately 29 hectares and adjoins Warriewood Square. The Southern Buffer was identified as an area for further investigation.

13. Section 6.1 of the WVSR Report outlined the process for assessing land capability for development. It included a map entitled "composite capability map" which combined

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information from a number of individual maps which identified characteristics such as biodiversity, flooding, proximity to watercourses and proximity to town centres and public transport links. The "composite capability map" classified areas within Warriewood Valley as being in one of five classifications (most, more, moderate, less and least) capable of development. The Southern Buffer was identified as containing areas classified as "less", "moderate" and "more" capable of development.

14. Section 7.1 of the WVSR Report identified the outcomes of a hydrology study undertaken in relation to Warriewood Valley. In relation to the development of the Southern Buffer the hydrology study stated that flooding in the low-lying areas within the Southern Buffer depended on backwater flooding from the Warriewood Wetlands and the Narrabeen Lagoon. The hydrology study recommended a significant amount of cut and fill to create two developable areas within the Southern Buffer. It stated that there were two developable areas in the Southern Buffer, being 3.66 hectares in the southern portion of the Southern Buffer at the corner of Pittwater Road and Jacksons Road and 0.87 hectares in the northern portion of the Southern Buffer adjoining Boondah Road (the subject land being located within the 0.87 hectare portion).

15. To address the issue of flooding the hydrology study recommended that should development proceed, a flood warning system would need to be installed, that only commercial and industrial land uses be permitted in the southern portion of the Southern Buffer and that residential uses may be possible in the northern portion.

16. The hydrology report map 7 entitled "Developable Land Classification" identified areas of land and classified them according to their ability to be developed. The map classified the subject land as being in categories "B", "D" and "F". Categories "B", "D" and "F" were characterised as follows:

Category B	• Land between the Flood Planning level plus Climate Change, and PMF plus Climate Change • No increase to peak flows/levels upstream and downstream of site • Floor levels above Flood Planning level • Additional criteria incorporated during this assessment: land allows for flood evacuation with minimum risk to life, and no creation of flood entrapment or flood isolation
	• Land below the Flood Planning Level plus Climate Change • No increase to peak flows/levels upstream and downstream of site • Floor levels above Flood Planning Level

Category D	• Additional criteria incorporated during this assessment: land allows for flood evacuation with minimum risk to life, and no creation of flood entrapment or flood isolation • Where the *Warriewood Valley Water Management Specification* does not apply
Category F	• Land below the PMF plus Climate Change • Additional criteria incorporated during this assessment: Risk to life as a result of flood risk including unsafe flood evacuation, no flood warning is available, flood isolation/entrapment (beyond short durations) or vertical refuge is created, or • Flood impacts off-site

17. Section 9.3 of the WVSR Report considered the role of the new town centre to be created in the Southern Buffer following any development.

18. Section 9.5 of the WVSR Report discussed the recommended way forward for development in the Southern Buffer. The draft concept plan for the Southern Buffer proposed both a residential development and mixed-use centre including retail, civic, cafes, restaurants and a public square to be constructed in the Southern Buffer. Following public exhibition of the draft concept plan it was evident that the community was generally opposed to the draft concept plan. It was recommended that the draft concept plan for the Southern Buffer not proceed. The WVSR Report recommended that if landowners wanted to pursue other development opportunities they should do so through the preparation of a rezoning application.

Warriewood Valley Strategic Review Addendum Report 2014

19. The *Warriewood Valley Strategic Review Addendum Report* (WVSR Addendum Report) dated 17 November 2014 was authored by Pittwater Council and revised the recommendations made in the WVSR Report in light of information made available following the completion of the WVSR Report in 2012. The WVSR Addendum Report identified that a number of sectors had not been discussed in the WVSR Report, one being the Southern Buffer. Unresolved or outstanding issues were to be explored in the WVSR Addendum Report. Map 1 of the WVSR Addendum Report entitled "Land to be reviewed" identified the Southern Buffer as not having been allocated a dwelling yield in the WVSR Report due to environmental constraints or other factors which required further clarification.

20. The WVSR Addendum Report included a map entitled "composite capability map" which classified land in different development capability categories. The composite capability map

identified the northern portion of the Southern Buffer as having “more” and “moderate” capability and the southern portion of the Southern Buffer as “less” and “least” capable.

21. In relation to 3, 6, 8, 10 and 12 Boondah Road the WVSR Addendum Report At Section 5.3 recommended that these areas be designated for recreational land use for the following reasons:

    1. that additional infrastructure required by the Warriewood Valley Release Area to service incoming residents would not be funded by the Pittwater community;

    2. as a result of increased development the Council sought to acquire additional active open space lands of approximately 4.6 hectares;

    3. to meet the recommendations articulated in the *Pittwater Public Space and Recreation Strategy* which recommended acquiring a further 6.32 hectares (comprising 1.69 hectares of linear open space and 4.63 hectares of active open space) in addition to the 13.12 hectares already acquired;

    4. the Council’s assessment of the rezoning request did not support a mixed use development on these lands due to the sector’s severe flood affectation, topography and proximity to existing recreational land;

    5. based on total development approximately 4.6 hectares was required for sports fields; and

    6. the properties at 3, 6, 8, 10 and 12 Boondah Road Warriewood adjoined each other and have an aggregated site area of approximately 4.71 hectares.

6 Jacksons Road contains remnant coastal saltmarsh, being an endangered ecological community, and a section of Narrabeen Creek. It is also bushfire prone land and is highly constrained by flooding and biodiversity (foreshore vegetation). Due to these constraints this property is recommended to have a land use designation of “No development potential”.

Media release of Minister for Planning August 2016

22. Henroth relied on a media release issued by the Minister for Planning dated 30 August 2016 which stated:

    MEDIA RELEASE

    Tuesday, 30 August 2016

    REZONING REVIEW TO IMPROVE PLANNING SYSTEM

    A more independent and faster planning review process that stops rezoning applications being endlessly revived will be introduced by the NSW Government.

    The new Rezoning Review will replace the existing pre-Gateway review, enabling applicants to seek an independent review of council decisions on proposed rezonings.

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Planning Minister Rob Stokes said the new process will stop amendments being made to proposals at the review stage, slowing proceedings and wasting time and resources.

“This will end the absurd situation of proposals rising like zombies again and again in an endless cycle of amendments and resubmissions during the review process,” Mr Stokes said.

“The Rezoning Review will also be faster, more efficient and more independent, enabling local decision makers to resolve matters without additional involvement of state bureaucrats.[”]

“A simpler, easier to understand and quicker review process will benefit applicants and the community alike.”

A strengthened strategic merit test will also be applied to proposed rezonings, and review will not take place without proposals satisfying this test as a minimum threshold.

The new process will start on September 1. It was created following feedback from councils, the community and industry. Under the new process it is expected 85 per cent of all Rezoning Reviews will be processed within 90 days. All review requests will automatically be referred to relevant planning authorities within three days.

Reviews will be conducted and decided by the relevant independent body, either Joint Regional Planning Panels or Sydney Planning Panels once operational. Rezoning Reviews within the City of Sydney will be conducted and decided by the independent Planning Assessment Commission.

Extracts of Planning Circular PS 16-004

23. Henroth relied on Planning Circular PS 16-004 (the Planning Circular) issued on 30 August 2016 by the Department. Relevant parts of the Planning Circular are extracted below:

…

Introduction

The Department has revised the rezoning review process (formerly pre-Gateway review) to increase independence and transparency, and to focus reviews on a strengthened strategic merit test.

This circular replaces Planning Circular PS 12-006 and provides updates and advice in relation to changes on allowing for independent reviews of some council and Departmental decisions in the plan making process under Part 3 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act).

…

Review and determination

…

The key factor in determining whether a proposal should proceed to a Gateway determination should be its strategic merit. The Department has strengthened the Strategic Merit Test and proposals will now be assessed to determine if they are:

consistent with the relevant regional plan outside of the greater Sydney Region, the relevant district plan within the Greater Sydney Region, or corridor/precinct plans applying to the site, including any draft regional, district or corridor/precinct plans released for public comment; or

consistent with a relevant local strategy that has been endorsed by the Department; or

responding to a change in circumstances, such as the investment in new infrastructure or changing demographic trends that have not been recognized by existing planning controls.

A proposal that seeks to amend controls that are less than 5 years old will only be considered where it clearly meets the Strategic Merit Test.

...

Having met the Strategic Merit Test, the relevant Planning Panel or the Commission must then determine if the proposal has site-specific merit, having regard to:

the natural environment (including known significant environmental values, resources or hazards);

the existing uses, approved uses and likely future uses of land in the vicinity of the land subject to the proposal; and

the services and infrastructure that are or will be available to meet the demands arising from the proposal and any proposed financial arrangements for infrastructure provisions.

...

The Minister for Planning has delegated authority to a Joint Regional Planning Panel to direct itself to be the relevant planning authority where a proposal has been subject to a rezoning review and the council has not accepted this role. It is intended that the GSC will issue the same delegated authority to Sydney Planning Panels, once established. Following a rezoning review within the City of Sydney, if the Council has not accepted the role, the Secretary of the Department can be directed to be the relevant planning authority to prepare the planning proposal.

...

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.

...

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24. Extracts from the document *Planning Panels Operational Procedures* (the Operational Procedures) dated September 2016 and issued by the Department follow:

Planning Panels

Operational Procedures

September 2016

…

Introduction

…

The Joint Regional Planning Panels and the Sydney Planning Panels (planning panels) are independent bodies representing the Crown and are not subject to the direction of the Minister, except on matters relating to planning panel procedures.

These procedures are the planning panel's Charter and have been developed to explain the objectives, powers and authorities of the planning panels. They also detail the means of operating the planning panels and clarify the roles of various parties in the process.

…

Planning Proposals

…

13.2 Code of Conduct considerations

All planning panel members are required to comply with the Planning Panels Code of Conduct when exercising their functions as a panel member and make merit-based decisions in accordance with statutory obligations.

It is a requirement of the Code of Conduct (section 3.22) that to avoid any perceptions of bias, councillors who have deliberated on a planning proposal that is to come before the panel, must stand aside from their place on the panel, and allow council's nominated alternative member to take their place.

Reviews

The Minister or Commission, as relevant (or respective delegates) may request a planning panel to undertake a review of certain plan-making decisions made by councils or the Department. In particular:

- Rezoning reviews – a rezoning review may be requested by a proponent if a council has notified the proponent that the request to prepare a planning proposal is not supported, or not indicated its support 90 days after the proponent submitted a request accompanied by the required information, or has failed to submit a planning proposal for a Gateway

determination within a reasonable time after the council has indicated its support. The review will be undertaken by the relevant planning panel and be informed by information from the proponent, and advice from the council.

…

Rezoning reviews

Applications for rezoning reviews are made to the Department.

On receipt of an application the Department will notify the secretariat and the relevant council within 3 business days.

The secretariat will upload the application to the planning panels' website and notify the planning panel within 3 business days.

The planning panel is required to review the planning proposal initially considered by council, rather than an amended or updated version. Council will be requested to confirm that the proposal is consistent with that initially considered by council, and to provide any additional comments or information directly to the secretariat within 21 days.

Following council's confirmation, the secretariat will provide the application, planning proposal and any material provided by council to the planning panel for its review. The panel may request briefing meetings with the Department, council and the proponent to assist in its considerations.

Determination

The planning panel's determination is to be based on the strategic and site specific merits of the proposal that was considered by council.

The panel's determination should provide a clear decision on whether the planning proposal before it should proceed, or not proceed, for a Gateway determination rather than recommending improvements.

Strategic merit

The planning panel will undertake a review of the proposal to determine if it is:

- consistent with the relevant regional plan outside of the Greater Sydney Region, the relevant district plan within the Greater Sydney Region, or corridor/precinct plans applying to the site, including any draft regional, district or corridor/precinct plans released for public comment; or

- consistent with a relevant local strategy that has been endorsed by the Department, or

- responding to a change in circumstances, such as the investment in new infrastructure or changing demographic trends that have not been recognized by existing planning controls.

A proposal that seeks to amend controls that are less than 5 years old will only be considered where it clearly meets the Strategic Merit Test.

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…

Site-specific merit

For those proposals with strategic merit the panel is required to determine if the proposal also has site-specific merit, and is compatible with surrounding land uses having regard to the following:

- the natural environment (including known significant environmental values, resources or hazards);

- the existing uses, approved uses and likely future uses of land in the vicinity of the proposal;

- the services and infrastructure that are, or will be available to meet the demands arising from the proposal and any proposed financial arrangements for infrastructure provision.

Planning proposals that do not reasonably meet the above criteria will not be able to proceed to the Gateway.

The panel may meet with the Department, council and proponent to clarify any issues before completing the review.

The panel will determine whether the proposal has merit and should be submitted for a Gateway determination.

…

Schedule 1: Planning panel meetings

…

Speakers should focus their oral presentations on the assessment report and its recommendation rather than re-stating information outlined in their earlier written submissions. The planning panel will have read all submissions and associated documents before the planning panel meeting.

…

The planning panel's reasons

The planning panel is required to provide reasons for its decisions, which are to be recorded in the 'Determination and Statement of Reasons' template provided by the secretariat for each meeting.

The planning panel may rely on the conclusions and recommendations within council's assessment report, however, the panel must identify the reasons why it made the decision.

…

Planning Panels Code of Conduct

25. Extracts from the document *Planning Panels Code of Conduct* (Code of Conduct) dated September 2016 follow:

> **Planning Panels**
>
> **Code of Conduct**
>
> September 2016
>
> ...
>
> **Purpose of the Code**
>
> This Code sets out the minimum requirements of behaviour for planning panel members in carrying out their functions. The Code has been developed to assist planning panel members to:
>
> a) understand the standards of conduct that are expected while carrying out the functions of a planning panel member,
>
> b) act honestly, ethically and responsibly,
>
> c) exercise a reasonable degree of care and diligence, and
>
> d) act in a way that enhances public confidence in the integrity of the role of panels in the planning system.
>
> As public officials, members of planning panels have a particular obligation to act in the public interest. All members of planning panels must:
>
> - comply with the ethical framework for the public sector set out in the *Public Sector Employment and Management Act 2002* , *Government Sector Employment Act 2013*
> - have a clear understanding of their public duty and legal responsibilities, and
> - act for a proper purpose and without exceeding their powers.

26. The key principles for the operation of a panel as stated in the Code of Conduct are integrity, leadership, selflessness, impartiality, accountability and openness. The Code of Conduct stated that "Panel members must avoid or appropriately manage any conflicts of interest". The Code of Conduct addressed conflicts involving pecuniary interests, non-pecuniary interests, conflicts of duties, political donations, personal benefits, relationships between panel members and council and departmental staff and lobbying. Panel members were required to sign an acknowledgment of the Code of Conduct and make disclosures of any possible conflict. No conflicts were disclosed by any of the Panel's members. The signed documents entitled "Acknowledgement of Planning Panels Code of Conduct" for each of the Panel members were before the Court.

Offer to purchase land by Council

27. Mr Taylor deputy general manager of environment and infrastructure of the Council sent a letter dated 1 November 2016 to Mr Brown of Henroth. Mr Taylor stated that he would be prepared to recommend to the Council that it purchase the property at 12 Boondah Road Warriewood for $3,300,000 if Henroth decided to sell the property. This amount would be subject to appropriate terms and conditions and Henroth would need to inform the Council of its desire to sell the property prior to 31 January 2017. The letter noted that the purchase of the property required a resolution of the Council and that the letter was not a binding offer on the Council. No legal or other obligation, right or relationship would arise unless and until the Council passed the requisite resolution and formal legal documentation was signed.

28. In a further letter dated 23 January 2017 from Mr Taylor to Mr Brown an extension of time to consider the offer to purchase the property from 31 January 2017 to 17 February 2017 was granted. The extension was offered due to the report on the outcomes of the exhibition of the *Warriewood Valley Section 94 Contributions Plan (2014)* (s 94 Contributions Plan) being reported to the Council's meeting on 31 January 2017.

29. Mr Taylor sent a further letter dated 30 March 2017 to Mr Fraser of Henroth which reiterated the Council's offer of $3,300,000 each for the purchase of 10 and 12 Boondah Road Warriewood.

Henroth's rezoning request December 2016

30. Henroth's rezoning request for 6 Jacksons Road and 10 and 12 Boondah Road Warriewood dated December 2016 was in Exhibit A. Figure 4 in the rezoning request was an aerial map showing the subject land. Figure 7 of the rezoning request was a zoning map showing the subject land as currently being zoned RU2 Rural Landscape under the Pittwater Local Environmental Plan 2014 (PLEP). Figure 8 was a "preferred concept masterplan" identifying the proposed rezoning of the subject land to be in part R3 Medium Density Residential, part B2 Local Centre, part RE1 Public Recreation and part E3 Environmental Management. The R3 zone was proposed to facilitate approximately 25-30 dwellings and the B2 zone was proposed to facilitate a bulky goods retail centre. A list of the annexures to Henroth's rezoning request is at [43] below.

31. Section 6.4 of the rezoning request referred to the WVSR Report and considered whether there was site specific merit for the development having regard to the natural environment, the existing and approved uses of the land and the services and infrastructure that would be available to meet the demands arising from the rezoning request. It stated that the WVSR Report "...identified that it [was] practical and feasible to incorporate the site's physical and environmental attributes into a future development."

Henroth's rezoning review request March 2017

32. Also in evidence was a letter dated 22 March 2017 from Mr Barwick associate director of SJB Planning (NSW) Pty Ltd (SJB Planning) who prepared the rezoning request and rezoning review on behalf of Henroth to the Secretary of the Department. The letter sought an independent

review of the rezoning request by the Department. It stated that a review of the rezoning request was warranted due to a variance in public opinion about it. The WVSR Addendum Report stated that the land was only suitable for recreational uses due to flooding. The letter stated that the land, specifically 12 Boondah Road, was reported in the WVSR Report as having considerable development capability being predominantly above the nominated Flood Planning Level. Further the Council reported an undersupply of active open space in the Warriewood Valley region as justification for designating all private land in the Southern Buffer for recreation. The rezoning request had found contrary to the Council's assertion that there was no undersupply of open space.

33. A section in the letter entitled "Conflict of roles" stated that the role of the Council in continuing to assess the rezoning request in the context of the s 94 Contributions Plan and the Council's actions to implement the plan provided a clear basis for independent review. It stated that the conflict of interest provided justification for the Council to be removed as the relevant planning authority. A completed rezoning review application form and fee of $20,000, a proposal overview, a copy of the rezoning request lodged 21 December 2016, copies of all agency submissions received in response to the Council's notification, a letter from Mills Oakley to the Department dated 22 March 2017 and correspondence from the Council were included.

34. The letter from Mills Oakley solicitors on behalf of Henroth dated 22 March 2017 to the Department set out the background of the matter to that date and addressed the issue of the Council's perceived conflict of interest. Attached to and quoted in the letter was legal advice given to Henroth dated 17 September 2015 which advised that:

> ...the processes and actions undertaken by Pittwater Council at that time "were quite clearly improper from a probity perspective, having the appearance of being motivated by a conflict of interest whereby the rejection of the rezoning request would enable Council to subsequently pursue the rezoning and redevelopment of its own neighbouring land holdings at a significant financial gain to Council".

Minutes of council meeting on 28 March 2017

35. The minutes of the ordinary council meeting dated 28 March 2017 identified the Council's resolution not to progress the rezoning request for the site to Gateway determination. The resolution specified the following reasons for not progressing the rezoning request:

    1. it was inconsistent with the relevant strategic study being the WVSR Addendum Report (see above at [19]-[21]), adopted by the former Pittwater Council on 17 November 2014 and subsequently incorporated into the PLEP;

    2. strategic merit or site-specific merit in line with the New South Wales (NSW) Planning and Environment's *Planning Proposals: A guide to preparing planning proposals* (2016) had not been demonstrated;

    3. it was inconsistent with the local planning directions:

1. 1.2 Rural Zones;
2. 2.1 Environment Protection Zones;
3. 4.1 Acid Sulphate Soils;
4. 4.3 Flood Prone Land;
5. 4.4 Planning For Bushfire Protection; and
6. 7.1 Implementation of the Metropolitan Strategy;

4. the proposed off-site flood storage solution on the area proposed to be zoned for public recreation was deemed unacceptable to the Panel as any proposed development should have provided this capacity on private land;

5. the proposed development envisaged by the rezoning request was considered excessive in bulk and scale and out of character with the locality, delivered poor urban design outcomes and would result in inadequate landscaping setbacks; and

6. the information submitted in support of the rezoning request was substantially deficient in a number of areas.

Report to ordinary council meeting dated 28 March 2017

36. The report to ordinary council meeting dated 28 March 2017 considered inter alia a probity report undertaken by an independent consultant (Procure Group). Procure Group were commissioned to undertake a probity audit of the assessment of the rezoning request. Procure Group produced a report dated 15 March 2016 (the Probity Report) annexed to the report to ordinary council meeting confirming the probity arrangements in place during the assessment of the rezoning request. Specifically the Probity Report stated that:

    [i]n circumstances where Council has an interest in the purchase of land the subject of the Planning Proposal, Council has a conflict of roles which must be addressed. Council has taken steps in this regard and has requested Procure to conduct a review of the steps taken and to confirm their adequacy…

37. The Probity Report also noted that the Council's strategic land use planner with primary responsibility for assessing the rezoning request was nominated to conduct the assessment because he had been on secondment until late January 2017 meaning he did not have any prior involvement with the land the subject of the rezoning request. In the addendum to the Probity Report dated 27 March 2017 a correction was made to this statement, as the strategic land use planner had undertaken a prior secondment as the Council's s 94 officer. During his time as the Council's s 94 officer the employee in question did not have any role related to the potential purchase of the land by the Council.

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38. The report to ordinary council meeting outlined the following financial impacts of the rezoning request:

    1. ongoing jobs would be created through the construction of the development;

    2. there may be potential economic effects as a consequence of flooding such as the need for future residents to shelter during a flood, however this would be difficult to determine without more detailed flooding information;

    3. any future development would require a contribution in accordance with the s 94 Con tributions Plan for the provision of infrastructure and services to support the development;

    4. if the rezoning request were to proceed without adequate funding for additional traffic infrastructure there is a risk the Council would have to fund the required infrastructure; and

    5. the proposed private property flood storage solution is likely to impose a financial burden on the Council for maintenance as it is in an area zoned for public recreation.

39. The report to ordinary council meeting stated that there would likely be significant adverse environmental impacts. The rezoning request would be inconsistent with local planning directions 1.2 Rural Zones, 2.1 Environment Protection Zones, 4.1 Acid Sulphate Soils, 4.3 Flood Prone Land and 4.4 Planning for Bushfire Protection. The documentation for the rezoning request failed to demonstrate that the environmental impacts would be acceptable. The Council raised concerns about the impacts in the following areas: bushfire risk, acid sulphate soils, flora and fauna, soil stability, erosion, sediment, landslip assessment and subsidence, water quality, stormwater management, flooding, sea level rise, infrastructure servicing and coastal management.

40. The report to ordinary council meeting also attached "internal referral comments" being comments submitted by departments and offices within the Council contributing to the recommendation. The Council's business unit referred to the issue of flooding at the subject land and concluded that the rezoning request did not meet the requirements of the local planning direction – 4.3 Flood Prone Land. The place management unit referred to the issue of parks and reserves in the area and concluded that in combination the WVSR Report, WSVR Addendum Report and the s 94 Contributions Plan identified the land in Boondah Road as required for active open space as it was in close proximity to existing sports fields.

Council letter dated 19 April 2017 to Department

41. The Council sent a letter dated 19 April 2017 to the Department stating that the rezoning request was "substantially insufficient" in demonstrating strategic merit for why the PLEP being approximately three years old should be amended.

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42. The Panel had regard to the matters in items 4 and 5 in schedule 1 of the Panel's record of decision set out below at [50]. These included a number of documents summarised below.

Henroth's rezoning request documentation

43. The Panel had before it Henroth's rezoning request referred to above at [30]-[31]. The following documents were annexed to the request: bushfire hazard assessment, flooding and stormwater study, flora and fauna assessment, geotechnical advice, economic impact assessment, a groundwater monitoring assessment, transport impact assessment and an urban design study.

Panel briefing by Henroth's consultant

44. A letter dated 26 May 2017 from SJB Planning to Dr Dearing Chair of the Panel provided an overview of the issues Henroth wished to discuss at the Panel briefing to be held on 31 May 2017. The letter raised the issue of conflict of interest and bias of the Council. The letter stated that the Council had made offers to purchase part of the land for $6.6 million. It went on to say that this "…raises potential for a real and perceived conflict for Council between its role to date in assessing this matter and its adopted strategy of purchasing the subject lands via commercial negotiations."

45. The letter referred to the advice of Mills Oakley dated 17 September 2015 which said that there was not only clear evidence of the apprehension of bias but also of misleading conduct and prejudicial bias which should be raised with the Panel. Firstly the Council's floodplain management officer advised that a Direction 4.3 had been satisfied yet the WVSR stated flooding could result from non-compliance with s 117 . (A s 117 direction is a direction issued by the Minister to a council pursuant to s 117(2) of the EPA Act. Direction 4.3 relates to flood prone land). Secondly contrary to the statement in the WVSR Report that "responses were received from a number of agencies that were generally critical of the proposal", these agency responses raised no fundamental objections to the rezoning request. The exception was the State Emergency Services (SES) which was not a body to whom statutory referral is required.

Departmental briefing paper to Panel

46. A departmental briefing paper prepared by the Department dated 23 March 2017 (the Briefing Paper) before the Panel. The Briefing Paper included a section entitled "Information assessment" in which it briefly considered both the WVSR Report and the WVSR Addendum Report. It noted that the WVSR Addendum Report had not been endorsed by the Department. In a further section entitled "Views of council and agencies" the Briefing Paper identified that the Council did not support the rezoning review and listed the reasons for not supporting the rezoning review.

47. The Briefing Paper contained a number of attachments including a document entitled "Council Comments". This attachment included the letter dated 19 April 2017 referred to above at [41] and

the Council's submission on the rezoning review. The Council's submission on the rezoning review discussed the strategic and site-specific merit of the proposed rezoning with regard to the WVSR Report, the WVSR Addendum Report, the SES submission and RMS submission inter alia.

48. Also attached to the Briefing Paper was a flooding and stormwater study commissioned by Henroth. The study stated that the proposed site was dominated by flood fringe and flood storage areas. The flood management strategy proposed by the flooding and stormwater study aimed to maintain or increase the available flood storage.

49. A transport impact assessment commissioned by Henroth was also attached to the Briefing Paper. The assessment concluded that the potential traffic generation of the development was less traffic than was assessed in the Warriewood Strategic Transport Review.

Rezoning review – record of decision of Panel of 31 May 2017

50. The decision of the Panel on 31 May 2018 the subject of challenge is set out in full:

> **REZONING REVIEW**
>
> 2017SNH028 – Northern Beaches - PGR_2017_NBEAC_002_00 at 6 Jacksons Road and 10 & 12 Boondah Road Warriewood (AS DESCRIBED IN SCHEDULE 1)
>
> Reason for Review:
>
> The council has notified the proponent that the request to prepare a planning proposal has not been supported
>
> The council has failed to indicate its support 90 days after the proponent submitted a request to prepare a planning proposal or took too long to submit the proposal after indicating its support.
>
> **PANEL CONSIDERATION AND DECISION**
>
> The Panel considered: the material listed at item 4 and the matters raised and/or observed at meetings and site inspections listed at item 5 in Schedule 1.
>
> Based on this review, the Panel determined that the proposed instrument:
>
> **should** be submitted for a Gateway determination because the proposal has demonstrated strategic **and** site specific merit
>
> **should not** be submitted for a Gateway determination because the proposal has
>
> not demonstrated strategic merit
>
> has demonstrated strategic merit but not site specific merit
>
> The decision was unanimous.

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REASONS FOR THE DECISION

The Panel has considered the Department of Planning and Environment's briefing note as well as the views of the Council and of the proponent. The reasons for the Panel's decision not to recommend that

the proposal proceed to Gateway Determination are as follows:

1. The Panel notes that the proposal is smaller in scale and of different proposed uses to those previously assessed by the Joint Regional Planning Panel in February 2015. However, a number of the reasons noted for recommending refusal at that time remain.

2. The site is flood-prone land. The proposal is inconsistent with s 117 Direction 4.3.

3. State Emergency Services has noted that the proposed "sheltering in place" and evacuation strategy is unacceptable.

4. The Panel notes that the Roads Maritime Services has advised that the Traffic Study submitted does not adequately analyse cumulative traffic impacts and an addendum traffic study is required prior to any Gateway Determination.

5. The Panel is of the view that the potential traffic impacts of accessing and egressing a bulky goods facility from a collector road serving a residential area is unacceptable.

6. Council's planning strategies, including the Pittwater Open Space Study, the Addendum Report to the Strategic Review, and the Warriewood Valley Section 94 Contrib ution Plan, have identified the majority of the site for future active open space. The Panel notes that the proposal suggests a cap on the amount of residential development and that active open space could be provided elsewhere, however there is no firm proposal to address the need.

7. The proponent submits that the proposal has strategic merit in relation to meeting the draft District Plan's goal of accommodating growth in local centres. However, the Panel is of the view that a major bulky goods outlet is inconsistent with the nature and scale of a local neighbourhood centre and that the proposed bulky goods facility is separate to the existing local centre. Further, the Panel is not of the view that some of the Sustainability provisions of the draft District Plan have been satisfied, particularly in relation to water quality and transport.

8. The Panel does not agree that the provision of a public walkway and plaza to view the wetlands is of itself sufficient merit to justify the proposal.

SCHEDULE 1

1	**Panel ref – LGA – DEPARTMENT REF – ADDRESS**	2017SNH028 – Northern Beaches – PGR_2017_NBEAC_002_00 at 6 Jackson Road and 10 & 12 Boondah Road Warriewood

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2	**LEP TO BE AMENDED**	Pittwater Local Environmental Plan 2014
3	**PROPOSED INSTRUMENT**	The proposal seeks to amend the Pittwater Local Environmental Plan 2014 for 6 Jacksons Road and 10 and 12 Boondah Road, Warriewood. The proposal seeks to amend the land-use zoning, maximum building height limit, maximum FSR and dwelling yield for the site.
4	**MATERIAL CONSIDERED BY THE PANEL**	• Rezoning review request documentation • Briefing report from Department of Planning and Environment
5	**MEETINGS AND SITE INSPECTIONS BY THE PANEL**	• **Site inspection & briefing meeting with Department of Planning and Environment (DPE):** 31 May 2017, 12.00pm Panel members in attendance: Deborah Dearing (Chair), Julie Savet Ward, Clare Brown, Steve Kennedy, Paul Stein Department of Planning and Environment (DPE) staff in attendance: Wayne Williamson, Lauren Templeman • **Briefing meeting with Council & Proponent:** 31 May 2017, 2.00pm Panel members in attendance: as above DPE staff in attendance: as above Council representatives in attendance: David Kerr, Andrew Piggot, Liza Cordoba, Andreas Olsen, Jennifer Pang, Ruby Ardren Proponent representatives in attendance: Scott Barwick, Standley Roth, Dan Maurici, Troy Eyles, John Traveres, Karla Castellanos

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51. Henroth read three affidavits of Mr Maurici senior development manager with Henroth affirmed 31 August 2017, 17 November 2017 and 16 February 2018. Henroth relied on a small portion of these affidavits. I have therefore set out only as much as is necessary for my consideration below.

52. In his affidavit affirmed 17 November 2017 Mr Maurici described attending a meeting (discussed briefly in his affidavit affirmed 31 August 2017) on 31 May 2017 held by the Panel. Mr Roth (Henroth's director) also attended the briefing as did representatives of the Council. During the briefing Mr Maurici had the opportunity to address the Panel on behalf of Henroth. Mr Maurici read, referred to and handed up to the Panel replies to external referrals made by the Council in its assessment of the rezoning request, including a letter from the Office of Environment and Heritage dated 13 February 2017 (the OEH letter) (referred to below at [181]).

53. Towards the end of the briefing the Panel asked if anyone had any further comments. Mr Roth stood up and said words to the effect of: "I would like to raise the issue of the Council's bias against the planning proposal" [rezoning request]. A panel member then said words to the effect of: "Please sit down, we are not interested in hearing about that."

54. Mr Maurici reviewed the material produced by the Panel for the current proceedings. He could not find the OEH letter) amongst that material. He did not know why the OEH letter was not included in the material given that he had provided the Panel with a copy.

55. In his affidavit affirmed 16 February 2018 Mr Maurici stated that he had reviewed the documents produced by the Council on 28 November 2017. Included in those documents were three emails between officers of the Council which discussed the potential purchase of part of the land the subject of rezoning request and other financial impacts of the rezoning request for the Council.

56. The first email dated 24 January 2017 was sent from Mr Gavin assistant strategic planner to Mr Platt, s 94 coordinator. In that email Mr Gavin asked "…is it public knowledge that we want to purchase the Southern Buffer for playing fields?..." The second email dated 15 February 2017 was sent from Mr Munn manager of reserves and recreation to Mr Olsen of the Council. In that email Mr Munn stated "… [t]he plan has been collecting money for the purchase of this lesser valued land…[t]he Parks and recreation B.U. [business unit] would therefore recommend refusal of this application which would, if approved, significantly impact on the s 94 Contributions Plan for active open space provision in Warriewood Valley." The third email dated 17 February 2017 was sent from Mr Platt to Mr Olsen. In that email Mr Platt stated the Southern Buffer had been identified by the s 94 Contributions Plan as being suitable for active open space and that the Council intended to purchase five properties (including 10 and 12 Boondah Road) within the Southern Buffer. He also stated that the proposed increase in the floor space ratio for the portion of the land zoned B2 should not be supported as this would result in an inequitable allocation of s 94 contributions.

Affidavit of Mr Pigott

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57. Mr Pigott executive manager of strategic planning with the Council affirmed an affidavit on 1 May 2018. On 20 January 2017 the Council referred the rezoning request to the Roads and Maritime Services (RMS) and the SES for comment. A response was received by Council from the RMS dated 21 February 2017. A response was received by the Council from the SES dated 10 February 2017.

58. On 30 May 2017 Ms Holt from the Department sent an email to Mr Pigott's colleague Ms Newbery enclosing a copy of the Department's briefing report in relation to the rezoning request. Later that day Mr Pigott's colleague Mr Olsen sent an email stating:

> Only part of Council's submission was included in the documentation. The more detailed assessment that formed Council's submission was omitted and therefore substantially ignored by the Planning Panel.
>
> Of particular concern, the applicant raises the issue of Council's conflict of roles in the Rezoning Review Request letter. Council's original submission includes a Probity Report by an independent consultant. This needs to be rectified prior to the planning panel meeting to assess the merit of the planning proposal.

59. Later that same day Ms Holt replied to Mr Olsen's email requesting that he bring copies of the Council's detailed assessment to the meeting to brief the Panel. Also on 30 May 2017 Mr Kerr general manager of "Planning Place and Community" with the Council sent an email to Ms Holt requesting that the briefing meeting be deferred to allow the Panel to consider the Council's assessment report.

60. Mr Pigott attended the briefing meeting on 31 May 2017. At the briefing meeting copies of the Council's report to ordinary council meeting dated 28 March 2017 which comprised the Council's detailed assessment of the rezoning request were handed to the members of the Panel.

Process for making a local environmental plan under Part 3 of the Environmental Planning and Assessment Act

61. Under Pt 3 Div 4 of the EPA Act, the Minister or the GSC (as relevant) is empowered to make environmental planning instruments for local areas (local environmental plans (LEPs)). The GSC is constituted under the GSC Act.

62. Section 53 sets out the Minister's powers to make LEPs. Section 53A provides that the GSC is empowered to make LEPs for the Northern Beaches local government area inter alia under s 53A (1) . The word "Minister" in certain sections of Pt 3 Div 4 is to be read as "Greater Sydney Commission" for the making of LEPs that apply to local government areas in the Greater Sydney Region (s 53A(2)).

63. Section 59 provides for the making of a new LEP by the GSC. A new LEP must first pass through the Gateway determination stage through the making of a planning proposal as required by s 55 . Under s 56(1) a council as the relevant planning authority having prepared a planning proposal may send it to the GSC. The GSC must then conduct a review of the planning proposal.

64. Absent a direction of the GSC to the contrary, the "relevant planning authority" referred to in s 56 (1) (and in Pt 3 generally) is a local council: s 54(1) , the body entitled to submit a proposal for Gateway determination.

65. There is no compulsion on a council to submit a planning proposal to the GSC at any time. There is no statutory decision-making process by which a local council may or may not choose to put forward a planning proposal. There is no statutory decision-making process for how the local council must assess a request to rezone land for which it would be the "relevant planning authority".

66. Clause 10A of the EPA Regulation requires a council which does not support a written request to prepare a planning proposal to notify the person who made the request (here Henroth) "as soon as practicable in writing that the proposal is not supported".

67. According to the Panel, the use of the word "council" in the context of this regulation indicates an intention of the legislature to establish that both:

    1. a council has the right of first refusal to take on the role of the "relevant planning authority"; and

    2. there is no "relevant planning authority" until a decision has been made to progress a rezoning request by the preparation of a planning proposal.

68. If a council does choose to take action under s 56(1) , the planning proposal must be prepared by a council, and must comply with s 55 .

69. If a council does not choose to prepare a planning proposal, a rezoning request does not progress any further, unless the GSC nominates another person or body prescribed by the regulations as the "relevant planning authority", per s 54(1)(b) . Clause 9 of the EPA Regulation provides for a panel to be so nominated (pursuant to s 54(1)(b)) . The power of the GSC under s 54(1)(b) to appoint another person or body as the "relevant planning authority" is enlivened in the circumstances set out in s 54(2) which includes subs (c).

70. Section 54(2)(c) provides that a Sydney planning panel may make a recommendation to the GSC that a proposed instrument should be submitted for Gateway determination under s 56 . The conduct of a rezoning review by a panel is a necessary precondition to a panel providing its recommendation to the GSC, in order to enable the GSC to exercise its power to direct that a

person or entity other than a council be the "relevant planning authority" and prepare a planning proposal for "Gateway determination".

71. The rezoning review process challenged in these proceedings occurs before the process referred to in s 54(2)(c) . Providing a recommendation is a function conferred or imposed on a panel under the EPA Act in accordance with s 23G . The parties disagree under which subsection of s 23G the Panel was authorised. The circumstances in s 23G(2)(c) do not reflect the circumstances in this case. The more likely statutory basis for the conduct of the rezoning review is by virtue of a function conferred on the Panel under s 23G(3) .

Sydney planning panels

72. At the time of the Panel's decision the constitution and functions of a Sydney planning panel were set out in s 18 (since repealed) and the membership was in accordance with Sch 3 of the GSC Act (since repealed). The five member panels were constituted as set out in cl 2 of Sch 3 with 3 members appointed by the Minister and 2 members by a council. The Panel was established under the Greater Sydney Commission (Planning Panels) Order cl 3(1)(d) extracted at [6] above. Sydney planning panels' functions are identified in s 23G of the EPA Act. Sydney panels are statutory bodies representing the Crown per s 23G(5) .

Process and decision the subject of judicial review

73. The rezoning review process undertaken by the Panel which resulted in the determination that the rezoning review should not be submitted for Gateway determination is the subject of these judicial review proceedings. That determination is not underpinned by any specific provisions of the EPA Act. It is effectively a recommendation to the GSC which has the effect that the GSC will not appoint a relevant planning authority for a proposed instrument under s 54(2) because the circumstances in s 54(2)(a)-(c) have not been satisfied. Section 54(2)(c) the subsection relevant to statutory construction in this matter provides that a Sydney planning panel can recommend to the GSC that a proposed instrument should be submitted for Gateway determination. Such a recommendation enables the GSC to appoint a relevant planning authority for a proposed instrument under s 54(2) . A recommendation by a Sydney planning panel not to proceed with a Gateway determination is not mentioned in this part of the EPA Act.

74. Given the absence of a specific statutory provision for the determination to effectively recommend against the rezoning review proceeding to Gateway determination made by the Panel, the extent to which if at all an independent statutory body representing the Crown can be directed in its functions outside a statute arises in relation to two of the grounds of review (3 and 4) as discussed below.

75. Section 23G(4) of the EPA Act states that the Minister can direct a panel in relation to its procedures. The EPA Regulation at the time of the Panel decision did not include any provisions regulating how a planning panel (including a Sydney planning panel) was to operate. The Operational Procedures dated September 2016 issued by the Department and the Code of

Conduct referred to above at [24] and [25] respectively have no specific legislative basis. The Planning Circular set out above at [23] also has no legislative basis. It is a policy document.

76. Henroth submitted that upon appointment to a Sydney planning panel members must conduct a rezoning review as required by the Operational Procedures and the Code of Conduct. The Panel correctly submitted that there is no act, regulation or term of appointment that requires a member of a Sydney planning panel to comply with a planning circular.

77. Henroth bears the legal and evidentiary onus of proof of all its grounds of review. The Amended Summons identified seven grounds of review. Grounds 6 and 7 were not pressed at the hearing.

Ground 1

78. The Amended Summons states in relation to Ground 1:

> 1 The Applicant has been denied procedural fairness by the First Respondent in the review of the Planning Proposal and the making of the Rezoning Review Decision.
>
> **Particulars**
>
> (a) In reviewing the Planning Proposal and making the Rezoning Review Decision, the First Respondent was required to afford the Applicant procedural fairness, which included conducting a review and making a decision in the absence of bias, whether actual or apprehended.
>
> (b) The Second Respondent was the relevant planning authority for the purposes of considering the Planning Proposal under s 55 of the EP&A Act .
>
> (c) The Second Respondent had a conflict of interest in respect of the Planning Proposal because the Second Respondent had made two offers to the Applicant to purchase part of the land the subject of the Planning Proposal in its undeveloped state for open space.
>
> (d) In reviewing the Planning Proposal, the First Respondent was constituted by 3 State members and 2 members appointed by the Second Respondent.
>
> (e) Further, in reviewing the Planning Proposal, the First Respondent considered and placed weight upon the views of the Second Respondent, including planning strategies prepared by the Second Respondent (including the Pittwater Open Space Study, the Addendum Report to the Strategic Review, and the Warriewood Valley Section 94 Contrib ution Plan).
>
> (e1) Further, in conducting its review of the Planning Proposal and making the Rezoning Review Decision, the First Respondent was bound by the Planning Panels Code of conduct dated September 2016 (**Code**) and the Planning Panels Operational procedures dated September 2016 (**Procedures**).

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(e2) In particular Clause 3(b) of Schedule 1 to the Procedures required that at the meeting held by the First Respondent to consider the Planning Proposal, the Applicant be given an opportunity to (i) outline the proposal, and (ii) respond to the assessment report.

(e3) Clause 2.4 of the Code required that members of the First Respondent, in considering the Planning Proposal, take into consideration all the relevant facts that are known or facts that the member should reasonably be aware of, have regard to the particular merits of each case, and to not take irrelevant matters into consideration.

(e4) Clause 2.5 of the Code required that members of the First Respondent ensure that decisions and actions are reasonable, fair and for the proper purpose and that parties involved in the development process are dealt with fairly.

(e5) Clause 2.6 of the Code required that members of the First Respondent ensure that no action, statement or communication between themselves and others (including applicants) suggests that the members are not bringing an open mind to the decision.

(e6) However, contrary to their obligations under the Code and the Procedures, at the meeting held by the First Respondent on 31 May 2017 to consider the Planning Proposal, the members of the First Respondent refused to allow the Applicant's director, Stanley Roth, to make submissions to the First Respondent about the Council's apparent bias in respect of the Planning Proposal: see paragraph [20] of the affidavit of Daniel Maurici dated 17 November 2017.

(f) In the premises, there was a reasonable apprehension of bias in respect of the First Respondent considering the Planning Proposal and making the Rezoning Review Decision.

Henroth submissions

79. Henroth alleges that there was a reasonable apprehension that the Panel would not bring an independent and impartial mind to its review of the rezoning request. The Council's conflict of interest in being the relevant planning authority for the proposal under Pt 3 of the EPA Act and simultaneously seeking to purchase part of Henroth's land. The Council had an interest in purchasing the land for the lowest possible price, yet the approval of the rezoning request would rezone the land so that its value would significantly increase. It was therefore in the Council's interest to refuse the rezoning request. The Panel should have commissioned an independent town planning report and not received any material from the Council.

80. A fair-minded lay observer aware of these matters might reasonably apprehend that the Panel might not bring an independent mind to its consideration of the rezoning request (see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [6] (*Ebner*)).

81. The Panel shut down Henroth's director Mr Roth's attempts to raise the issue of the Council's actual or apparent bias at the Panel meeting on 31 May 2017. The Panel's actions were a breach of the Operational Procedures which provided that a proponent would be given an opportunity to

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make and respond to submissions. Further the Panel's actions demonstrate that it had a "closed mind" to the consideration of any actual or apprehended bias by the Council in assessing the rezoning request.

Panel submissions

82. The Panel submitted that the word "biased" was inappropriate in the circumstances to describe the interests of the Council in the rezoning review proceedings. The word would also be inappropriate to describe the interests of Henroth. The Council is under no obligation, statutory or otherwise, to be free of personal interest in making submissions to the Panel. The Council was not the decision maker. That the Council itself did not acknowledge its alleged conflict of interest cannot be relevant to an assessment of the Panel's bias.

83. Henroth could not claim the Panel was unaware of its concerns that the Council was allegedly biased. Nor could it claim that it was denied an opportunity to advance its contentions to that effect. Henroth's letter to the Panel dated 26 May 2017 referred to above at [44]-[45], which was before the Panel, identified its concerns about the alleged bias.

84. Paragraph (1)(d) of the Summons advances as an apparent ground of the Panel's bias that two of its five members were appointed by the Council. Henroth appropriately does not mention this in its submissions as this is a requirement of the statutory scheme. There can be no allegation that the appointment mechanism is inconsistent with the statutory or administrative purpose of the Panel.

85. In relation to Henroth's submission that it was denied the opportunity to address the Panel on the issue of alleged bias based on Mr Maurici's evidence at [53] above the Panel submitted, in the absence of a transcript of the Panel hearing the exchange should be afforded no weight as it was provided without context.

86. In any event Mr Maurici did not allege that this was the first or only time that the issue of alleged bias had been raised in the Panel hearing. That the Panel was not interested in hearing about the issue of alleged bias which had already been canvassed in the written submissions says nothing about bias on the part of the Panel. The Panel was not obliged to permit Henroth to re-ventilate issues addressed in the written submissions. Henroth has not alleged it was denied an opportunity to advance any new material and nor has it provided evidence of any such material.

87. The test in *Ebner* identified by Henroth "requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits." *Ebner* concerned an instance where a decision maker had a pecuniary interest in the outcome of the proceedings. Henroth has failed to identify what might have led the Panel to decide the case other than on its merits. The second step in the *Ebner* test requires that "there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits." Henroth has not articulated any such connection. Henroth merely asserted that "awareness" of the matters in the Summons would lead a lay observer to apprehend that the

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Panel might not bring an independent mind to the decision. A reasonable apprehension of bias cannot be established against a decision maker by an attack on the decision-making process as a whole: *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; [2002] HCA 51 (*Hot Holdings*) at 454-455 .

Council submissions

88. To the extent it is argued that there was an apprehension of bias in the Panel because in making the decision it had relied on the Council's allegedly "biased position" on the proposed rezoning, this must be rejected for the following reasons:

    1. the mere making of the offers to purchase part of the land does not lead to an inability on the Council's part to bring an impartial mind to a request to rezone the Land. Mr Munn's email (summarised above at [56]) on which Henroth relies, states that any rezoning would impact the s 94 Contributions Plan. There is no evidence that the Council officer ever considered the Council would itself be "out of pocket" if the land was rezoned and required to be purchased thereafter. Section 94 contributio ns are levied to put the cost of public amenities on developers;

    2. relatedly the internal referral comments in the report to ordinary council meeting dated 28 March 2017 (summarised above at [40]) recognised that the Council had officers with conflicting perspectives. The Council's "business unit and open space team" were motivated to find and purchase land through the Council's s 94 planning processes, while its assessment and planning officers were tasked with considering whether or not to recommend that the rezoning request be accepted and proceed to Gateway determination. These units were merely one of a number of inputs into the ultimate decision of the Council. In any event the Probity Report stated the conflict had been dealt with;

    3. the offers to purchase were made by Mr Taylor and were expressly made subject to a resolution of the Council (and no such resolution(s) were ever forthcoming);

    4. in correspondence with Henroth the Council said that it "respected" Henroth's decision not to accept the offers to purchase;

    5. the Council engaged a probity advisor to carry out an independent review in relation to the assessment of the rezoning request;

    6. there is no evidence of any relationship between the Panel members (particularly those appointed by the Council) and the deputy general manager (or for that matter Mr Munn) such that there could be any suggestion they were influenced by the deputy general manager's offers to purchase part of the land or Mr Munn's individual opinion (which did not reflect any resolved position of the Council); and

    7. there is no evidence that internal council communications between Mr Munn or Mr Platt influenced the author of the Council's submission to the Panel or the report to ordinary council meeting dated 28 March 2017 recommending that the rezoning request not proceed to a Gateway determination. Neither of these individuals authored the relevant documents provided to the Panel.

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89. Accordingly, the Council did not have any "conflict of interest" in respect of the rezoning request and therefore there was no substance to the allegation of "bias" in the Council which can be "imputed" to the Panel being the ultimate decision maker and arbiter in relation to the rezoning review. None of Henroth's allegations considered in isolation or collectively amount to bias.

90. The Council agreed with the Panel's submission that no procedural unfairness arose in relation to Mr Roth not being able to make further submissions to the Panel.

91. Schedule 1 of the Panel's Operational Procedures (extracted in part above at [24]) state that submissions to the Panel were to more than merely restate what was in the written submissions. The Court could not conclude what additional matters Mr Roth wished to raise for the Panel's attention in the absence of any evidence on that issue. Absent evidence to the contrary it could be inferred that he wished to raise matters already addressed in Henroth's written submissions.

No apprehension of bias or actual bias established

92. There is no contest that the Panel was obliged to afford Henroth procedural fairness, a breach of which could give rise to a breach of the hearing rule that natural justice requires a fair hearing, a well-recognised ground of administrative review. This ground of review generally alleges that the conduct of the rezoning review did not occur in the absence of bias, whether actual or apprehended. Two bases were identified in the Amended Summons. Henroth relies in part on perceived failure to afford procedural fairness to justify its bias argument. I will accept for this matter that a failure to comply with the hearing rule can overlap with the rule against bias applying to administrative bodies. The focus of argument and the authorities relied on concerned apprehension of bias. Actual bias being established "…only when preliminary views are incapable of alteration" (see *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 123 per Wilcox J) is difficult to prove. I did not understand that Henroth seriously pressed actual bias.

93. The material before the Panel is identified above at [42]-[49] and includes reports and submissions from the Council, Henroth and the Briefing Paper with attachments from the Department. The extract of the letter from SJB Planning on behalf of Henroth to the Panel chair dated 26 May 2017 stating Henroth's concerns about the Council's bias and its solicitor's opinion to that effect is set out above in [44]-[45].

94. The process undertaken by the Panel is also identified above at [50] schedule 1 item 5. The Panel met with representatives of the Council and Henroth together and both addressed the Panel on 31 May 2017. A site inspection and briefing meeting by the Department was also held on 31 May 2017.

95. The context for the decision under challenge is an essential consideration when assessing an allegation of apprehended or actual bias. The Panel is an independent expert statutory body charged by the Minister with considering the merits of a change in zoning over land owned by Henroth a decision and process which lacks any specific legislative underpinning. The Panel's

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decision will inform the decision of the GSC under s 54(2)(c) of the EPA Act. The often cited test of apprehension of bias is found in *Ebner* . The two-stage test was articulated by Gleeson CJ, McHugh, Gummow and Hayne JJ at [8] as follows:

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

96. *Ebner* concerned an allegation of apprehended bias in judicial proceedings. Caution in applying such principles in non-judicial contexts has been identified, see for example *McGovern v Ku-Ring-Gai Council* (2008) NSWLR 504; [2008] NSWCA 209 per Spigelman CJ at [6] . In *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20 (*Isbester*) Kiefel, Bell, Keane and Nettle JJ stated (footnotes included):

> [23] How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised (*Kioa v West (*1985) 1 59 CLR 550 at 612; [1985] HCA 81). The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made (*Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459) as well as to have knowledge of the circumstances leading to the decision (*Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519).

97. Gageler J separately opined:

> [58] To accommodate to a multi-stage decision-making process, or a multi-member decision-making body, the test for the appearance of disqualifying bias in an administrative context might sometimes more usefully be stated in a form which focuses on the overall integrity of the decision-making process. The test in that alternative form might be stated as whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits. Neutrality in the evaluation of the merits cannot for the purpose of that or any other test be reduced to a monolithic standard; it necessarily refers to the "kind or degree of neutrality" that the hypothetical fair-minded observer would expect in the making of the particular decision within the particular statutory framework. (*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507at 564–565, 566 ; see also at 538). What must ultimately be involved is "an assessment (through the construct of the fair-minded observer) of the behaviour of a person or persons in a position to exercise power

over another, and whether that other person was treated in a way that gave rise to the appearance of unfairness being present in the exercise of state power" (*SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [3]).

[59] Whether or not it might be useful to state the test in that alternative form, the test for the appearance of disqualifying bias in an administrative context is to be understood to mirror the test for apprehended bias in the curial context in two important respects. The first is that it is an "objective test of possibility, as distinct from probability" (*Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [28]; 179 ALR 425 at 435). The second is that its application necessarily involves three analytical steps. Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way (*cf Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345).

[60] Where the factor identified at the first analytical step concerns one person who is a participant in a multi-stage decision-making process or in a multi-member decision-making body, the second analytical step can be seen to divide into two elements: articulation of how the identified factor might affect that person individually, and articulation of how that effect on that person individually might in turn affect the ultimate resolution of the question within the overall process of decision-making. It has accordingly been emphasised that, if an appearance of disqualifying bias is hypothesised to have resulted from conduct or circumstances of a person who is not the ultimate decision-maker, "then the part played by that other person in relation to the decision will be important" (*Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 448; [2002] HCA 51).

98. The findings in *Isbester* emphasise the need to consider the particular context in which bias allegations are raised and hence what a hypothetical fair-minded observer is taken to be aware of. Justice Gageler's analysis identifies useful considerations in the case of multi-member bodies undertaking multi-stage decision-making processes. The Panel is a multi-member body constituted as required by s 18 and Sch 3 of the GSC Act. No pecuniary or non-pecuniary interest or issue of pre-judgment is raised against the Panel collectively or in relation to individual members, which includes two representatives of the Council as required by Sch 3 cl 2(1)(b) of the GSC Act. At issue is whether the relevant observer aware of the statutory framework and relevant facts might reasonably apprehend the matter in issue might not be resolved as the result of a neutral evaluation of the merits, per Gageler J at [58].

99. Gageler J identified three steps in [59]. The first step is the identification of the relevant factor which might cause a less than neutral evaluation. The only criticism made by Henroth concerns the conduct of the Council which is not the ultimate decision maker. Henroth submitted the Council was allegedly biased due to its offer to purchase the land. Because the Council was said to be biased and the Panel considered submissions from the Council that apparently gave rise to an apprehension of bias in the Panel's decision. No suggestion is made that the Council representatives on the Panel were not independent. No criticism has been made about the quality or accuracy of the material supplied by the Council to the Panel.

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100. It is difficult to understand in these circumstances precisely how that matter gives rise to an apprehension of bias on the part of the Panel in the independent review conducted (step 2) in [59]. Paragraph (1)(e) of the Amended Summons at [78] above refers to impermissibly considering and giving weight to the Council's views. That the Panel stated in its reasons on 31 May 2017 that it received the views of the Council is unremarkable. The weight it attributes to those views is a matter for the Panel.

101. As the Panel's counsel submitted any requirement of the Panel to be independent cannot equate to a prohibition on taking into account a third party submission given the nature of the process the Panel is engaged in. It is difficult to envisage how a rezoning review by a panel which did not hear at all from the relevant local council whose decision is being reviewed could be complete. This matter is informed by the existence of s 23N which requires local councils and their general managers and staff to assist Sydney (regional) panels. Not doing so is an offence under s 23N(3) .

102. Given that the rezoning review is expressly directed to reviewing the Council's decision if would be inappropriate and arguably lacking an important input if the Panel did not consider the views of the Council. The Panel also received the views of Henroth which included extensive documentation and reports concerning flooding and traffic in support of a change of zoning. This leads me to my next point.

103. In the circumstances of this rezoning review, I adopt the Panel's submission that "bias" is an inappropriate word to describe the interest of the Council, in the same way it would not be appropriate to describe Henroth's interest in achieving a rezoning through the review process in the same way. The Council's interest as a statutory planning authority with responsibility for strategic and site-specific planning in its local government area includes the provision of adequate recreational areas and not locating inappropriate development on constrained land. Importantly, there is no statutory obligation on the Council to be impartial about Henroth's rezoning request. Henroth has advocated for a change in zoning over several years (a similar application was refused in 2013) because, I infer, of the perceived financial benefit it would receive by an "'up zoning" to allow more lucrative land uses. If the Council's position can be described as biased or as might give rise to an allegation of bias the same observation would apply also to Henroth. The Panel is independent of a council whose decision it is reviewing and of the applicant seeking rezoning.

104. I therefore consider further case law on apprehension of bias reluctantly in considering the first part of the Amended Summons which allege at pars (1)(a) to (e) that the Panel placed weight on the Council's views "including the Pittwater Open Space Study, the Addendum Report to the Strategic Review and the Warriewood valley Section 94 Contribution Plan..." These are cited in Reason 6 of the Panel's decision as the Council's planning strategies extracted above at [50]. The interest alleged against the Council is that it wishes to maintain the existing zoning of Henroth's land because it can then buy the land more cheaply than if the land was rezoned as Henroth seeks. The land in the Southern Buffer which includes Henroth's land is zoned RU2 Rural Landscape. Although not stated by Henroth its allegations are really a collateral attack on the Council's planning instruments which the Panel referred to as part of its reasons. Such an attack is not available in these proceedings.

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105. As the Council submitted at [88(a)] above Henroth's submission that the Council was seeking to save money is also not accurate. Any budgetary impact which arises from any rezoning is likely to be accommodated through s 94 contributions.

106. Justice Gageler in *Isbester* at [60] recognised that where an allegation of disqualifying bias arises from someone other than the decision maker, that person's conduct should be scrutinised. As already stated no relevant criticism of the Council's actions in briefing the Panel as it saw fit whether in writing or in person has been made. A decision with arguably some relevance in such a scenario is *Hot Holdings* which concerned an appeal from the Supreme Court of Western Australia regarding an alleged apprehension of bias in a decision to grant a mining licence. Under s 57 of the *Mining Act 1978* (WA) the Minister for mines was permitted to grant exploration licences for mining. Several applications for exploration licences and mining leases for one area of land were lodged within a number of seconds of each other. A mining warden decided that a ballot should be held to determine the priority of the applications. The ballot was held and the mining warden recommended to the Minister which application should be granted. As part of this process departmental officers prepared a minute to the Director-General of the Department of Minerals and Energy to provide to the Minister. The Minister granted the application relying on the departmental minute. An officer who had a peripheral role in preparing material to be used for the purpose of the minute held shares in a company which had an option agreement with the applicant proposed by the mining warden to purchase an interest in the licence if it were granted.

107. Gleeson CJ (Gaudron, Gummow and Hayne JJ agreeing) at [24]-[25] stated that:

> ...He [the officer] made no significant contribution to the Minister's decision. That is a sufficient reason for concluding that his financial interest did not deprive the Minister's decision of the appearance of impartiality.
>
> It is not enough that an observer who knew some of the facts about the decision-making process, and did not wish to know others, might have entertained a suspicion that the decision was influenced by the pecuniary interest of Mr Miasi. No person with a person financial interest in the outcome of the matter participated in a significant manner in the making of the impugned decision.

108. As the Panel submitted *Hot Holdings* suggests that there must be participation in the making of a decision for there to be a reasonable apprehension of bias. The Council was not the decision maker – that was the Panel. It made submissions to the Panel. The Council's role as a participant was quite different from the role of a departmental officer preparing a ministerial briefing note which will be an important source of advice guiding a minister's decision.

109. *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (*Baker*), cited in *Hot Holdings* at [23] , was a decision of the Supreme Court of Canada allowing an appeal to set aside a decision to deport the appellant in that case. The appellant had sought an exemption from the decision to deport her on humanitarian and compassionate considerations. A decision was made on the recommendation of a subordinate immigration officer who had assessed the case and made notes expressing opinions which were adverse to the appellant. The issues on appeal were

whether the appellant had been denied procedural fairness due to a failure to give reasons, a reasonable apprehension of bias and/or having been denied sufficient opportunity to participate in the proceedings. On the issue of there being a reasonable apprehension of bias in the subordinate officer's recommendation L' Heureux-Dubé J stated at [45]:

> Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

110. L' Hereux-Dubé J held at [48] that the notes made by the subordinate officer demonstrated a reasonable apprehension of bias. Gleeson CJ at [24] distinguished the facts in *Hot Holdings* from that in *Baker* stating that the officer in *Hot Holdings* held only a peripheral role in contrast to the central role held by the officer in *Baker.*

111. The Panel submitted that in contrast to the facts in *Baker* the Council in this case was not an "adviser" to the Panel. I agree.

112. Henroth also submitted that it was irrelevant to this ground that Henroth communicated its concerns about bias to the Panel. I consider it is highly relevant as that reflects the actual circumstances about which the intelligent lay observer is assumed to be aware, applying *Ebner* at [6] .

113. In the second matter referred to in pars (1)(e1) to (e6) of the Amended Summons, according to Henroth the refusal of Mr Roth's request to make an oral submission was contrary to the Code of Conduct and Operational Procedures. Mr Maurici's affidavit evidence of the relevant conversation between Mr Roth and a panel member on 31 May 2017 summarised above at [53] is arguably hearsay. I will assume that the conversation took place. This allegation can be quickly dealt with. It is important to note that while the Amended Summons asserts a failure to comply with the Code of Conduct in pars (1)(e3), (e4), and (e5) and these were referred to in Henroth's submissions no specific failure to comply with the Code of Conduct by the Panel collectively or individually is in fact identified by Henroth. Indeed no specific procedural irregularity of any kind by the Panel is identified in relation to this ground other than not allowing Mr Roth to make an oral submission.

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114. Henroth had full opportunity to communicate its concerns about any issues including an allegation of apprehended or actual bias by the Council to the Panel. It made written submissions through its planning consultants and verbal submissions were made by four representatives to the Panel on 31 May 2017 by Mr Barwick, Mr Castellanos, Mr Eyles and Mr Maurici. Specifically in relation to bias Henroth frankly expressed its concerns in written submissions to the Panel as identified in the letter dated 22 March 2017 by its planning consultant SJB Planning referred to above at [32]-[33]. The Panel was also aware of the Mills Oakley advice dated 17 September 2015 which addressed the possibility of a conflict of interest and was cited in the rezoning request drafted by SJB Planning (see [34] above). The rules of procedural fairness to the extent these are set out in the Code of Conduct inter alia do not require that every request from an applicant to further address orally an issue already addressed in written submissions which the Panel members can be assumed to have read must be accepted by the Panel. This is confirmed by Schedule 1 of the Operational Procedures referred to above at [24] which state "[t]he planning panel will have read all submissions and associated documents before the planning panel meeting." Further the Operational Procedures stated that oral submissions should not merely repeat what was stated in written submissions. No suggestion is available based on the evidence that the Panel was not aware of Henroth's concern about the Council's role in the rezoning request and the Council's general manager's conditional offers to purchase land.

115. Crucially Henroth has not articulated in its evidence what additional material it would have wished to alert the Panel to had an oral submission been allowed. No failure to afford procedural fairness arises from the treatment of Mr Roth. To the extent this is also relied upon by Henroth to demonstrate an apprehension of bias by the Panel it does not.

116. Henroth relied on *Smit v Roach* (2006) 227 CLR 423; [2006] HCA 36 at 439 (Gleeson CJ Heydon and Crennan JJ) referring to *Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44 at 572 concerning an allegation of apprehended bias based on comments by a trial judge to the effect that where comments may convey to a reasonable and intelligent lay observer an impression of bias, failure to raise concern at the time of the comments can result in a waiver of the right to object at a later date. The relevance of this decision is unclear. The Panel member told Mr Roth not to address the Panel on that topic. That comment alone cannot convey an impression of bias to a reasonable and intelligent lay observer aware of all the facts and circumstances.

117. The Panel also referred to *Hemmes Trading Pty Ltd & Ors v State of New South Wales & Ors* [2009] NSWSC 1303 (*Hemmes*). *Hemmes* concerned an alleged denial of procedural fairness for taking into account an irrelevant consideration. In July 2009 the Premier of NSW issued a news release introducing a new system of restrictions and conditions on licensed venues based on the number of assaults attributable to a particular venue. Hemmes owned two licensed venues in Sydney. The second and third plaintiffs were the licensees of the two venues.

118. The second and third plaintiffs received a letter from the Director General of Communities NSW (the Director General) advising that a number of incidents of violence were attributable to these venues and that there may be potential consequences arising under changes to licensing conditions. The letters were accompanied by a "Fact Sheet" which outlined the process for reviewing the decision to impose licence conditions. The plaintiffs commenced the review process as detailed in the "Fact Sheet". During the review process the Director General had

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regard to a letter from the Alcohol and Licensing Enforcement Command (ALEC) containing adverse implications for the plaintiffs. The plaintiffs sent both correspondence and submissions to the Director General that they perceived this to be a departure from the procedure outlined in the "Fact Sheet" and that they had therefore been denied procedural fairness. Hoeben J held that the Director General had departed from the procedure in the "Fact Sheet" by having regard to the letter from ALEC at [78]. Despite this departure Hoeben J found that it had not resulted in a denial of procedural fairness to the plaintiffs as they had been given an opportunity (of which they availed themselves) to make submissions specifically concerning the ALEC letter at [85] . The Panel submitted and I agree that *Hemmes* could be distinguished from the present case as here there was no departure in procedure. At a broad level *Hemmes* confirms that procedural fairness requires adequate opportunity to advise a decision-maker of concerns. This was provided in Henroth's case.

119. The Council's submissions set out in [88] above focussed on why its evidence demonstrated that the Council could not be said to have been biased on the basis that it had a conflict of interest as a result of making offers to Henroth to purchase the land. It is strictly unnecessary to consider this argument as the relevant party to consider in this ground is the Panel as the party against which the allegation of the apprehension of bias/actual bias is made. I note the Council's submissions set out at [89] above and find there is no evidence to support a finding of apprehended or actual bias by the Council. It took appropriate steps internally to consider potential "conflict" issues including through the commissioning of a probity report (referred to above at [36]-[37]). Henroth's dismissive submissions about that report are unhelpful.

120. As Gageler J identified in *Isbester* , the whole of the decision-making process undertaken by a multi-member body must be considered in the context of any allegation of apprehended bias at [5 8] . I have referred to the first two steps identified in [60] above at [97]. Lastly, the reasonableness of apprehension of deviation in the neutral evaluation by the Panel in these circumstances does not withstand scrutiny, the third step identified by Gageler J at [59] . More simply, the evidence does not give rise to an inference that the Panel did not undertake a neutral evaluation.

121. The test in *Ebner* for apprehension of bias has not been established by Henroth in the decision-making process undertaken by the Panel. The Panel had multiple inputs including from Henroth and the review was conducted independently and at arm's length from both the Council and Henroth. No conduct which suggests anything other than an impartial approach by the Panel to the task before it has been established. Nor has actual bias been established.

122. Henroth has not established this ground of review.

Ground 2

123. The Amended Summons for Ground 2 states:

2 The First Respondent failed to conduct an independent review of the Planning Proposal, as required by the relevant statutory and administrative process for rezoning reviews, such that the review by the First Respondent miscarried.

Particulars

(a) Relevantly, pursuant to ss 54 and 55 of the EP&A Act , the relevant local authority for a planning proposal is the council for the local government area to which the proposed instrument is to apply.

(b) If the relevant planning authority fails or refuses to exercise its functions under ss 54, 55 and 56 of the EP&A Act to forward a planning proposal to the Minister or the Greater Sydney Commission **(GSC)** for gateway determination pursuant to s 56 of the EP&A Act , the planning proposal cannot proceed for further consideration.

(c) In 2016, by Planning Circular PS 16-004 -Independent reviews of plan making decisions (**PS 16-004)**, the Minister introduced a system of administrative merits review for any planning proposal that a local planning authority had refused or failed to forward to the Minister or the GSC for gateway determination.

(d) By statements made in PS 16-004, and also by statements made in a media release dated 30 August 2016, the Minister represented that rezoning reviews would be "conducted and decided by the relevant independent body", and that the rezoning review process had been revised to "increase independence and transparency".

(e) In the premises, in conducting its review of the Planning Proposal and making the Rezoning Review Decision, the First Respondent was required to act independently of the relevant local planning authority, in this case, the Second Respondent.

(f) However, in the premises, in conducting its review of the Planning Proposal and making the Rezoning Review Decision, the First Respondent was not independent of the Second Respondent.

Henroth submissions

124. Henroth submitted that the relevant statutory and regulatory scheme, in addition to the Minister' s representations in the media release dated 30 August 2016, provided for "independent" review of rezoning requests refused by councils. The review in this case was to be conducted by the Panel which necessarily had to be independent of the Council which had initially refused the rezoning request. As a matter of fact the Panel failed to conduct an independent and impartial review of the rezoning request.

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125. The Council provided the report to ordinary council meeting dated 28 March 2017 and a letter and submission to the Panel dated 19 April 2017 both in respect of the rezoning request. Neither document acknowledged the Council's conflict of interest in assessing the rezoning request. The report to ordinary council meeting and the submission were provided to the Panel for consideration as part of the review. It is evident from the Panel's reasons that they considered and placed weight upon the views of the Council. The Panel should not have had regard to the report to ordinary council meeting and submission of the Council. By relying on and giving weight to the report and submission, the Panel failed to conduct an independent review of the rezoning request as a matter of fact. The Council's actual or apprehended bias therefore infected the Panel's decision and procedural fairness was not maintained.

126. The Panel should have commissioned an independent town planning report.

Panel submission

127. The Council's report to the Panel was only one matter that the Panel considered and was entitled to consider. The Council had no assessment role in the rezoning review and information of its alleged conflict of interest was before the Panel.

128. In its record of decision (at [50] above) the Panel stated that it had "considered the Department of Planning and Environment's briefing note as well as the views of the Council and of the proponent". The Panel implicitly acknowledged that although the Briefing Paper might be expected to be an independent document, the matters submitted by the Council and Henroth were "views" of the request. There is no evidence to suggest that the Panel elevated the Council's submissions to the status of an independent review. Any requirement for the Panel to be independent could not equate to a prohibition on taking into account third party submissions.

129. Henroth characterised the Panel as having "relied on" and "given weight to" the Council's submission. The only evidence available of the way in which the Panel treated the Council's submission was that it considered that the Council had "views" and that it had taken them into account together with the "views" of the Department and of Henroth. The mere fact that the Council may have had an interest in making those submissions does not mean that taking them into account caused the decision-maker to be infected with the Council's self-interest. That is particularly so when the facts and matters said to give rise to the Council's self-interest were before the Panel. There is no evidence that the Panel was biased against Henroth.

Council submissions

130. The constitution of the Panel's membership establishes that it acted independently of the Council. None of the Panel members appointed by the Council were involved in the preparation of the report to ordinary council meeting to the Panel. Other Panel members were appointed independently of the Council representatives. The Department prepared an independent report

to assist the Panel assess the merits of the rezoning request. The Panel's reasons demonstrate that an independent review was undertaken.

No failure to carry out independent review established

131. The Amended Summons does no more than assert there was a failure to carry out an independent review. This is not a recognised ground of judicial review.

132. The Amended Summons does not articulate the alleged failure of the Panel to act impartially and independently of the Council. This ground amounted to little more than an assertion. There is otherwise substantial overlap with Ground 1. I have set out in detail in my finding on that ground the relevant principles to apply to the Panel's deliberations. The same analysis on this ground yields the same result.

133. The membership of the Panel must be in accordance with the GSC Act as identified in cl 2 of Sch 3. Its membership included two representatives of the relevant council as required by statute. The Panel was appropriately constituted or at least no complaint is made that it was not. Undertaking rezoning reviews is expressly referred to in the Operational Procedures above at [24] and the principal reason for having these must be in circumstances where a council decides not to support the initial request for a rezoning, as is the case here. The Minister's media release (extracted above at [22]) identifies why this scheme was established. Henroth's submissions recognised that circumstance. As the Panel submitted there is no legislative instrument which specifies considerations necessary to or prohibited in the Panel's decision-making process. The process for making a decision whether to make a recommendation of the type described in s 54(2)(c) is not set out in the EPA Act.

134. The Panel's decision refers to the Council's views. How much weight is given to the Council's views is a matter for the Panel. The weight attributed to the Council's report is unknown. No factual matter is established by Henroth to support a finding that the Panel failed to conduct an independent review of the rezoning request. Henroth's evidentiary and legal onus has not been discharged.

135. Henroth's written submissions relied collectively on all the matters in Grounds 1 and 2 to submit that the Panel's decision-making gave rise to an apprehension of bias. For the reasons already given that has not been established by Henroth on this basis either. Henroth has not established this ground of review.

Ground 3

136. The Amended Summons states:

> 3 The First Respondent failed to have regard to mandatory relevant considerations in its review of the Planning Proposal.

Particulars

(a) In conducting a rezoning review, PS 16-004 requires a planning panel to conduct a Strategic Merit Test in respect of the planning proposal.

(b) The Strategic Merit Test includes assessment and determination of whether the planning proposal is consistent with any relevant local strategy that has been endorsed by the Department.

(c) In May 2013, the Director-General of the Department of Planning & Infrastructure endorsed the outcomes of the Warriewood Valley Strategic Review **(WVSR),** which was a joint review by Pittwater Council and the Department of Planning & Infrastructure of the undeveloped areas of the Warriewood Valley, including the land the subject of the Planning Proposal. The WVSR was a "relevant local strategy"' for the purposes of the Strategic Merit Test.

(d) However, in reviewing the Planning Proposal and making the Rezoning Review Decision, the First Respondent failed to consider the WVSR at all, and failed to consider whether the Planning Proposal was consistent with the WVSR.

137. The reasons for the Panel's decision are set out in full above in [50]. They include that the site is flood-prone and the proposal is inconsistent with Direction 4.3 (Reason 2). The decision states that the SES does not consider the evacuation strategy is acceptable (Reason 3). The decision further states that the RMS advises that the traffic study does not adequately consider cumulative impact (Reason 4) and the potential traffic impacts of accessing and egressing a bulky goods facility from a collector road is unacceptable (Reasons 5). Reason 6 identifies that the Pittwater Open Space Study, the WVSR Addendum Report and the s 94 Contribution Plan all consider the majority of the land is identified for future active open space. Reason 7 is that the bulky goods facility is inconsistent with a local neighbourhood centre inter alia. The Panel did not agree that a public walkway and plaza to view the wetlands has sufficient merit to justify the request (Reason 8).

Henroth submissions

138. Henroth submitted that under both the Planning Circular and the Operational Procedures the Panel was required to conduct a Strategic Merit Test (SMT) for the rezoning review. The SMT required the Panel to consider whether the rezoning request was:

1. consistent with the relevant district plan within the Greater Sydney Region or any corridor/precinct plans applying to the site, including draft regional, district or corridor/precinct plans released for public comment; or

2. consistent with a relevant local strategy that had been endorsed by the Department; or

3. responding to a change in circumstances such as investment in new infrastructure or changing demographic trends that had not been recognised by existing planning controls.

139. The rezoning request included submissions on all three of these issues submitting that it was consistent with:

    1. the strategy "A Plan for Growing Sydney" and in particular Directions 1.7, 2.1 and 2.2 and Actions 1.7.1, 2.1.1 and 2.2.2;

    2. the "Draft North District Plan" and in particular Productivity Priorities 1, 2 and 3 and Actions P1 and L3; and

    3. the WVSR Report being the only local strategy endorsed by the Department.

140. From the Panel's reasons it is evident that the Panel failed to conduct the SMT. The Panel did not refer anywhere in its reasons to the WVSR and therefore failed to decide whether or not the rezoning request was consistent with the WVSR. The Panel instead referred to the WVSR Addendum Report and other studies which had not been endorsed by the Department and were therefore not relevant to the SMT.

141. The Panel only made one reference to "strategic merit" in its reasons where it stated that the "proponent submits that the proposal has strategic merit in relation to meeting the District Plan's goal of accommodating growth in local centres". Henroth submitted that this misrepresented what was stated in the rezoning request about the "Draft North District Plan" and other matters concerned with the SMT. The Panel therefore failed to consider all submissions for the SMT.

142. The Panel therefore committed legal error in conducting its review of the rezoning request in that it failed to apply the correct test, being the SMT. The Panel "applied the wrong test, misconceived its duty and failed to apply itself to the real question to be decided" (*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 (*Yusuf*) at 351-352). The Panel also committed legal error in failing to take into account mandatory relevant considerations being the matters required to be considered in the SMT and/or failed to give those matters proper, genuine and realistic consideration (see *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86; [2013] NSWCA 180 at [9]-[10] ; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40 (*Peko-Wallsend*)at 39-41; *Islam v Cash* [2015] FCA 815 at [14]).

Panel submissions

143.

The Panel submitted that there were no legislatively mandated considerations that it had to consider when making a rezoning review decision. Any mandatory considerations had to be implied from the statute. Henroth had not drawn any statutory connection between the Panel's powers and the alleged requirement to conduct a SMT. For an administrative decision to be

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invalidated by a failure to consider a relevant matter there must be a statutory duty for the decision-maker to have regard to that matter and a statutory intention that if consideration is not properly given the decision will be invalid.

144. There is no statutory duty for the Panel to conduct a SMT. The Operational Procedures and Planning Circular are nothing more than policy documents: *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* (2010) 171 LGERA 440; [2010] NSWLEC 5 (*Capital Airport)* at [29]. There is no allegation in the Summons or Henroth's submissions that compliance with the method set out in the Operational Procedures or Planning Circular is a legislative requirement without which the decision of the Panel is invalid.

145. In any event the Planning Circular is not expressed in "mandatory" language for instance where the Planning Circular states that (emphasis added):

> [t]he *key factor* in determining whether a proposal should proceed to a gateway determination *should* be its strategic merit. The Department has strengthened the Strategic merit Test and proposals will now be assessed to determine if they are:
>
> Consistent with the relevant regional plan outside of the Greater Sydney region, the relevant district plan within the Greater Sydney region, or corridor/precinct plans released for public comment; or
>
> Consistent with a relevant local strategy that has been endorsed by the Department; or
>
> Responding to a change in circumstances, such as the investment in new infrastructure or changing demographic trends that have not been recognised by existing planning controls.

146. The Panel submitted that the use of the words "key factor" make it clear that a SMT is not the only factor to be considered in determining whether a rezoning request should proceed to Gateway determination. Further by stating that the key factor "should" be a rezoning request's strategic merit, the Planning Circular leaves the weight given by the Panel to the SMT in making its determination up to the Panel. The factors the Panel considers in determining whether a rezoning request should proceed to Gateway determination and the weight to be given to those factors will both be a matter for the Panel's discretion.

147. In any event Henroth does not allege that the SMT was not undertaken. The Panel plainly did assess the strategic merits of the proposal (evident in the fact it ticked the box that said "strategic merit") in its record of decision set out above at [50]. Henroth was able to make extensive submissions about the satisfaction of the SMT to the Panel and accordingly there is no dispute that the SMT was considered by the Panel.

148. Henroth submitted that the SMT miscarried because the Panel did not consider the WVSR Report. There is no requirement for the Panel to consider the WVSR Report. The WVSR Report is referenced in a number of documents which were before the Panel including the Briefing Paper and Henroth's rezoning request above at [46]-[47] and [31] respectively.

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Council submissions

149. The Council submitted that the Panel did in fact have regard to the WVSR. The WVSR Report was identified and discussed in the Council's submission to the Panel and the report to ordinary council meeting. The Panel had both of these documents and identified that it had considered them in its decision.

150. If the Panel was required to conduct a SMT the WVSR Report was not required to be considered as it did not apply to the land despite being the only strategy endorsed by the Department. The land is located in the Southern Buffer for which the WVSR Report recommended that area not be rezoned. In any event the WVSR Report was not material to the Panel's consideration. The WVSR Addendum Report which was prepared subsequently to the WVSR Report which did apply to the land however was not endorsed by the relevant department. The Panel otherwise did conduct a SMT as evident in its decision. Henroth cannot reasonably complain that the matters identified by the Panel were only site-specific matters. In its rezoning request, flooding and stormwater study and transport impact assessment (above at [43]) Henroth had considered flooding and transport to be strategic considerations. The Council otherwise agreed with the Panel's submissions.

No failure to consider mandatory relevant consideration established

151. Whether a matter is a mandatory relevant consideration in a legal sense arises either expressly or by inference from the relevant statutory scheme: *Peko-Wallsend* at 39-40 . The fundamental hurdle this ground faces is the absence of any statutory basis for the determination of the Panel and its decision-making process and hence for the Planning Circular and Operational Procedures which refer to the SMT. I have addressed the nature of the Panel's determination above in [73]-[74] holding that there is no statutory provision underpinning the determination of the Panel that the rezoning review should not proceed to Gateway determination, which is effectively a recommendation to the GSC. As identified above, the power conferred on the GSC to appoint a relevant planning authority for a proposed instrument under s 54(2) only arises if under s 54(2)(c) a rezoning review by a Sydney planning panel recommends a proposal be submitted for Gateway determination.

152. Henroth's case did not acknowledge this deficit in opening submissions. Well known authorities referred to included *Yusuf* which considered whether the Refugee Review Tribunal had complied with powers conferred under the *Migration Act 1958* (Cth) in reviewing a decision of the relevant minister to refuse to grant a protection visa under s 36 . They are not of great assistance in this matter because at issue was the exercise of statutory power. The Panel is not exercising an express or implied statutory power. The statement in the Operational Procedures of purporting to set out the "objectives, powers and authorities.." of the planning panels, extracted above in [24], cannot confer statutory power where it does not exist.

153. The Planning Circular, a policy document, extracted above in [23] cannot without more statutory basis be a mandatory relevant consideration. The Operational Procedures and the Code of Conduct do deal with procedural matters and to the extent these are directed to achieving a fair hearing process can provide guidance to panels given s 23G(4) . Whether the Minister acting through his or her department can direct the substantive deliberation of a panel in appearing to require the conduct of a SMT is not a matter obviously covered by s 23G(4) . Regardless of the scope of s 23G(4) there is no statutory underpinning of a panel review process resulting in a determination that a rezoning review not proceed to Gateway determination.

154. In closing submissions Henroth submitted that in the absence of specific legislative provisions the Court should nevertheless infer that the SMT is a mandatory relevant consideration. As the Operational Procedures are government policy with a published set of procedures on how to undertake a task given to panels by the Minister the Panel cannot depart from them, relying on *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 (*Gray*) at 208 (French and Drummond JJ Neave J dissenting). To do otherwise would mean that the panels can do what they like according to Henroth.

155. No similar statutory or non-statutory scheme in the environmental and planning law area has been identified. It cannot be the case legally that a decision-making process and determination which lacks any statutory basis give rise to the same obligations on a decision-maker as one making a decision with a statutory basis. The circumstances in *Gray* concerned a decision of the Refugee Review Tribunal as to whether deportation of a person should be ordered under the *Migration Act* . The tribunal was determining a matter of legal status under that Act. At issue was whether the tribunal had correctly applied in a legal sense a ministerial document on criminal deportation policy. Those different statutory circumstances limit the relevance of that decision to this matter.

156. Henroth also relied on *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; [1977] HCA 71 (*Ansett*) per Barwick CJ at 61. *Ansett* concerned agreements made between it and the Commonwealth's Trans Australia Airlines creating a duopoly over trunk route airlines services by preventing the importation of aircraft without the permission of the Secretary of the Department of Transport inter alia. The Commonwealth proposed to permit other entities to import aircraft for use on trunk route airline services. The facts of that case and the consequential legal issues arising are entirely different to the circumstances I am considering. That case provides no assistance.

157. I am not seeking to imply that the conferral of the rezoning review function on the Panel by the Minister was unlawful. Section 23G(3) expressly allows for this to occur. The issue is whether the Panel's review determination (a recommendation) and the review process is subject to judicial review in the terms of Grounds 3 (and 4) given the absence of any statutory provisions relating to the function conferred and the processes to be followed in undertaking that function.

158. The Respondents essentially went back to first principles in referring to *Peko-Wallsend* where Brennan J stated at 55 :

> The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power.

159. Interestingly *Peko-Wallsend* was considering the decision of the Aboriginal Land Commissioner under s 50 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in relation to the assessment of land claims. While the Panel is undertaking a function conferred on it, it is debatable whether the rezoning review undertaken by the Panel can be described as an exercise of statutory power.

160. The EPA Act is silent on the review process and decision being made by the Panel. As already noted the Panel is essentially providing a recommendation to the GSC to assist it in deciding whether to exercise power under s 54(2) to appoint a relevant planning authority. No express mandatory legal consideration can arise. At a broad level implied considerations relevant to planning may be inferred perhaps but that cannot include the detailed matters in the policy documents relied on by Henroth. The documents are of broadly similar status to those referred to in *Capital Airport* at [29] . Accordingly it cannot be a basis for judicial review that the SMT referred to in the Planning Circular and Operational Procedures was not considered or, more accurately, was not considered in the manner that Henroth considered it should be. Nor can the Panel's consideration of the WVSR Addendum Report prepared by the Council which was not endorsed by the Department give rise to any relevant legal failure by the Panel given the absence of a statutory context.

161. That is the answer to this ground as the Respondents submitted and it therefor fails.

162. Further, considering the substance, I agree with the Respondents that there was no failure on the part of the Panel to carry out a SMT. As the Panel submitted, it purported to undertake such a task as it ticked the relevant box on the form recording the Panel's decision, set out in full above in [50]. If resolving a rezoning request should not proceed to Gateway determination the boxes provided on the form supplied by the Department to be ticked by a panel state, firstly, not demonstrated strategic merit or, secondly, has demonstrated strategic merit but not site-specific merit. The language in the form may suggest a required process. From a legal perspective it is not.

163. The WVSR Report was referred to by the Council in its submissions to the Panel and it was before the Panel. The WVSR Report does not apply to the Southern Buffer lands, they were not considered in the WVSR Report and were identified as an area for further investigation as noted above at [12].

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164. While the Panel's submissions that the procedures are not mandatory considerations are correct, a party in Henroth's position could understandably consider they were. The review process apparently cost Henroth $20,000 to initiate. The reference to "key factor" in the Operational Procedures and the form for recording a decision provided by the Department to panels adopts the language of the Operational Procedures in attempting to specifically guide panel deliberations. This form was used by the Panel in recording its decision and is set out in full at [50]. The process remains administrative not legislative in nature. The Minister's media release at [22] above has no relevance to these judicial review proceedings.

Ground 4

165. The Amended Summons for Ground 4 states:

> 4 The First Respondent took into account irrelevant considerations in its review of the plan
>
> (a0) The Applicant repeats particulars 1(e1) and (e3) above.
>
> (a) Further, or in the alternative in conducting a rezoning review, PS 16-004 requires a planning panel to conduct a Strategic Merit Test in respect of the planning proposal.
>
> (b) The Strategic Merit Test as set out in PS 16-004 requires consideration of whether a proposal is:
>
> i. consistent with the relevant regional plan outside of the regional plan outside of the Greater Sydney Region, the relevant district plan within the Greater Sydney Region, or corridor/precinct plans applying to the site, including any draft regional, district or corridor/precinct plans released for public comment; or
>
> ii. consistent with a relevant local strategy that has been endorsed by the Department; or
>
> iii. responding to a change in circumstances, such as the investment in new infrastructure or changing demographic trends that have not been recognized by existing planning controls.
>
> (c) However, in deciding that the Planning Proposal had not demonstrated strategic merit, and thus failed the Strategic Merit Test, the First Respondent took into account irrelevant considerations (being considerations other than those identified in sub-paragraphs (b)(i) – (iii) above), namely:
>
> i. That the site is "flood-prone land" (which is a site specific consideration);

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ii. The proposed "sheltering in place" and evacuation strategy (which is a site specific consideration);

iii. Traffic impacts of the proposed development (which is a site-specific consideration); and

iv. The "Pittwater Open Space Study", the: "Addendum Report to the Strategic Review", and the "Warriewood Valley Section 94 Contribution Plan" (which are not plans or studies to be considered as part of the Strategic Merit Test).

Henroth submissions

166. Henroth submitted that the Panel took into account irrelevant considerations. Rather than conducting a SMT the Panel focused instead on site-specific considerations such as the site being flood-prone land, that the SES considered the "sheltering in place" and evacuation strategy unacceptable and traffic impacts. However, as stated in the Planning Circular and the Operational Procedures, site-specific matters are only to be considered, if at all, after conducting the SMT.

167. The Panel committed legal error by taking into account irrelevant considerations in its review, being the site-specific considerations. The site-specific considerations should only have been considered if the Panel was satisfied that the SMT had been met. Further the Panel took into account irrelevant council strategies (*Lo v Chief Commissioner of State Revenue* at [9]-[10]).

Respondents' submissions

168. The Panel submitted there was no evidence that the SMT was not conducted before the site-specific merit test. In any event mention of the SMT occurs before mention of the site-specific merit test in the Panel's decision (extracted at [50] above).

169. There can be no criticism of the Panel for deciding that the rezoning request failed both the SMT and the site-specific merit test. The matters considered by the Panel were all those which were squarely raised by the submissions of Henroth and of the Council. Therefore even if Henroth could make out its ground of review in relation to Ground 3 the Panel also conducted a site-specific merit test. Failure of the site-specific merit test alone would have led to the same result being that the rezoning request would not proceed to Gateway determination.

170. The Council submitted that there was no implied limitation in the subject matter, scope and purpose of the EPA Act which provided that the Panel was bound not to take the matters alleged by Henroth to be irrelevant into consideration (see *Roy Kennedy v Director-General of the Department of Environment and Conservation* [2006] NSWLEC 456 at [160]). Whether a matter is an irrelevant consideration is determined by whether the legislation mandates that regard must not be had to that consideration. To the contrary s 26 of the EPA Act (content of environmental planning instruments) anticipates these matters and states that they are centrally relevant to the

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content of environmental planning instruments. In any event Henroth's supporting documents included a consideration of the flood-prone nature of the land, the evacuation strategy and the traffic impacts of the development.

171. Further there is no legal or factual basis to assert that the Panel was confined to considering those matters contained within the SMT.

172. Henroth's fourth ground of review is inconsistent with Ground 5 (below at [48]) which argues that the Panel did not consider the OEH letter which gave a more favourable analysis of the flooding characteristics of the land. It is inconsistent for Henroth to argue that flooding matters were not relevant to the decision and at the same time submit that they were relevant. Henroth bears the legal and factual onus of proof to establish that any alleged error was material to the decision. It has not discharged this onus.

Taking into account an irrelevant consideration not established

173. The commonly stated test of whether a decision-maker has taken into account a legally irrelevant consideration was stated by Mason J in *Peko-Wallsend* at 40 as cited by me in *Regional Express Holdings Ltd v Dubbo City Council (No 3)* [2014] NSWLEC 87 at [243] :

> [i]n the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard.

174. Essentially the same reasons for rejecting Ground 3 apply to Ground 4 given the absence of a statutory basis for the review decision and the process for undertaking it. As the Panel submitted Ground 4 takes Ground 3 further by submitting that the Panel's consideration of matters must be undertaken in a particular order, strategic assessment first followed by site specific issues.

175. Unless the Panel demonstrably took into account a matter wholly unrelated to planning considerations under the EPA Act, no argument that an irrelevant consideration was considered by the Panel is available on the evidence.

176. It is a matter for the independent Panel what planning matters it considers and how in undertaking the review function. A detailed analysis of whether a particular topic is strategic or site-specific is irrelevant and somewhat subjective in any event. I observe that a number of the matters identified by Henroth as site-specific could also well be considered strategic but no conclusion need be drawn about this.

Ground 5

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177. The fifth ground of review submitted by Henroth related to an alleged failure of the Panel to give proper consideration to flooding information:

> 5 The First Respondent failed to take into account a relevant consideration in its review of the Planning Proposal, or alternatively failed to give proper, genuine and realistic consideration to the Planning Proposal, or alternatively acted unreasonably in its decision not to recommend the Planning Proposal proceed to Gateway Determination.
>
> **Particulars**
>
> (a) In its record of decision, the First Respondent stated that one of the reasons for its decision not to recommend that the Planning Proposal proceed to Gateway Determination was that the site "is flood prone land" and the Planning Proposal "is inconsistent with s 117 Direction 4.3".
>
> (b) However, in response to the Planning Proposal, in a letter dated 13 February 2017, the Office of Environment and Heritage (**OEH**) stated inter alia that "in terms of flood risk only, OEH have no objection to the [Planning Proposal] being further considered", subject to the Applicant addressing certain identified matters (**OEH Letter**).
>
> (c) The Applicant provided a copy of the OEH Letter to the First Respondent in its request for the zoning review and during the briefing meeting on the Planning Proposal conducted by the First Respondent on 31 May 2017.
>
> (d) However, the First Respondent did not refer to the OEH Letter in its record of decision.
>
> (e) Furthermore, the First Respondent has not produced the OEH Letter under Order of the Court as being a relevant document before it when it made the Rezoning Review Decision.
>
> (f) In the premises, the First Respondent has failed to consider a relevant matter in making its findings about flooding issues in respect of the Planning Proposal, by making such findings without considering the matters stated in the OEH Letter.
>
> (g) Furthermore or alternatively, by failing to consider the matters stated in the OEH Letter, the First Respondent failed to give proper, genuine and realistic consideration to the flooding issues in respect of the Planning Proposal.
>
> (h) Furthermore or alternatively, by failing to consider the matters stated in the OEH Letter, the First Respondent acted unreasonably in making its findings about flooding issues in respect of the Planning Proposal.

Evidence relevant to Ground 5

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178. The second reason of the Panel stated that "The site is flood-prone land. The proposal is inconsistent with s 117 Direction 4.3."

179. There was extensive evidence before the Panel as to flooding risk of the subject land as follows. The WVSR Report which was before the Panel considered a hydrology study (set out above at [14]- [16] above) which recommended addressing the issue of flooding through the installation of a warning system and that only commercial and industrial land uses be permitted in the southern portion of the Southern Buffer. The WVSR Addendum Report recommended that the subject land be designated for recreational use due to its "severe flood affectation" at [21(d)] above.

180. Also before the Panel were the minutes of the Council meeting of 28 March 2017 which referred to the issue of flooding and noted that the rezoning request was inconsistent with the local planning direction pertaining to flooding (Direction 4.3) (at [35(c)] above). The report to ordinary council meeting dated 28 March 2017 addressed the issue of flooding. It stated that the proposed flood storage solution for the development would likely place financial burdens on the Council. The report also contained internal referral comments which showed similar concern to the minutes in relation to the development not meeting the local planning direction for flooding (see [39]-[40] above). Henroth's rezoning request (included in the Briefing Paper) attached a flooding and stormwater study (as detailed above at [48] and [43]).

181. The OEH letter dated 13 February 2017 to the land release team of Pittwater Council identified three areas for comment in relation to the development at 6 Jacksons Road and 10 and 12 Boondah Road Warriewood. Only floodplain risk management is relevant to this ground. The letter states:

> **3. Floodplain risk management**
>
> OEH notes that the site is flood prone and that the JRPP (17 February 2015) found that the previous rezoning proposal was "inconsistent with s 117 Direction 4.3 [Flood Prone Land] in that it may have impact on other properties". Discussions with Council's floodplain management officer indicate that the draft PP has taken into account the issues raised previously and the proposal includes measures to:
>
> - Increase flood storage capacity on-site, thereby eliminating impacts on adjoining lands. This is proposed to be achieved by basement flood storage under the bulky goods retail development.
>
> *OEH comment*: This is a technically feasible option but requires further detailed design, including measures/design detail to ensure safety.
>
> - Upgrade flood evacuation routes from the area to reduce flood risk to life, including upgrades to Boondah Road.
>
> *OEH comment*: The assessment will need to consider all flood events up to the probable maximum flood (PMF).
>
> Therefore, in terms of flood risk only, OEH have no objection to the proposal being further considered but require that the issues mentioned above be addressed as part of the PP process. Accordingly, OEH recommends the preparation of a flood study and

emergency evacuation plan for the proposal. The flood study should ensure appropriate flood planning levels for all aspects of the development using the latest available modelling, having regard to future climate change impacts. The flood emergency response plan should be prepared in consultation with the State Emergency Service to ensure safe evacuation of residents and users of the future development in the time of flood.

182. The response to a court order issued to the Panel did not include the OEH letter sent to the Council. Mr Maurici attested in his affidavit affirmed 17 November 2017 to providing the letter to the Panel and reading it, at [52] above.

Henroth submissions

183. Henroth submitted that the Panel failed to consider relevant information or made a decision in the absence of evidence regarding flooding information. In Reason 2 of the Panel's decision it stated "[t]he site is flood-prone land. The proposal is inconsistent with s 117 Direction 4.3." The reasons of the Panel did not state how the Panel considered the rezoning request to be inconsistent with Direction 4.3.

184. Previously the Panel found that the 2013 rezoning request was inconsistent with Direction 4.3 on the basis that it "may have an impact on other properties". If the Panel had proceeded on the same basis, it would have erred in doing so. This is because the OEH letter stated that the rezoning request had taken into account issues raised in respect of the 2013 rezoning request and included measures to:

1. increase flood storage capacity on site and therefore eliminate impacts on adjoining lands. This was proposed to be achieved by basement flood storage under the bulky goods retain development. The OEH further commented that this was a technically feasible option but required further detailed design, including measures/design detail to ensure safety; and
2. upgrade flood evacuation routes from the area to reduce floor risk to life, including upgrades to Boondah Road. The OEH further commented that the assessment would need to consider all flood events up to the probable maximum flood.

185. The OEH concluded that there was "...no objection to the proposal being further considered but require[d] that the issues mentioned above be addressed as part of the PP [rezoning request] process."

186. The Panel did not refer to the OEH letter anywhere in its reasons. The content of the OEH letter makes clear that the Panel would have erred if it concluded that the rezoning request was inconsistent with Direction 4.3 because it may have impacted other properties. Such a conclusion would have been contrary to the issues addressed in the OEH letter that the rezoning request included increased flood storage capacity.

187. A finding of fact based on no evidence can constitute jurisdictional error if the wrong finding of fact is material to the decision (see *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 (*Azzopardi*) at 156-157). Further, a finding of fact that could be characterised as "perverse" or "illogical" may also constitute jurisdictional error in that the erroneous finding of fact demonstrates a misunderstanding of the rezoning request so as to demonstrate that the Panel failed to address and determine the issues before it (see *Tolson v Roads and Maritime Service* (2014) 201 LGERA 367; [2014] NSWCA 161 (Tolson) at [53] ; *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257 (*State Super*) at [11]-[12]).

188. The Panel's purported finding that the rezoning request was inconsistent with Direction 4.3 without any explanation and apparently contrary to the matters in the OEH letter was a finding made in the absence of any evidence or alternatively was perverse or illogical. The finding of fact was material as it was one of the findings relied upon by the Panel in deciding the rezoning request should not proceed to Gateway determination and thus constitutes jurisdictional error.

Panel submissions

189. The Panel submitted that this ground was an attempted impermissible merits review. The OEH letter was not a mandatory relevant consideration as no statute expressly or impliedly required its consideration. As a matter of fact the OEH letter was before the Panel as Mr Maurici read it to the Panel. The Panel submitted that the substance of the letter was before the Panel in a number of other ways. The OEH letter is not inconsistent with the Panel's findings in any event.

190. There was no failure to give proper, genuine and realistic consideration to a relevant matter in the rezoning review.

Council submissions

191. The Council agreed with the Panel's submissions above at [189]. It further submitted that the *Wednesbury* reasonableness ground of review involves a high threshold that there is overwhelming proof of manifest unreasonableness. Henroth has not discharged its onus of proof that any alleged error in not considering the OEH letter was material to the Panel's decision.

No failure to properly consider flooding

192. I agree with the Respondents' submissions that this ground is an impermissible attempt at achieving a merits review in the context of judicial review proceedings.

193. The Panel is an expert panel which is required to form its own view on the matters before it. In addition to the OEH letter the Panel had a large amount of material before it concerning flood impacts from the Department, the Council and Henroth, including the WVSR Report and the WVSR Addendum Report as summarised above in [179]-[180].

194. I have outlined above in [73]-[74] and in relation to Ground 3 the absence of a statutory basis for the Panel's rezoning review and the processes for conducting it. The OEH letter is not an express or implied mandatory relevant consideration arising from any statutory provisions, is not binding on the Panel and has not been shown to have any authoritative provenance. It was one of a number of inputs to the rezoning review on the issue of flooding.

195. *Azzopardi* addresses an entirely different statutory context concerning whether there was any evidence on which to base a finding of particular injury under the *Workers' Compensation Act 1926* b y a judge of the Compensation Court. While the statement of principle cited by Henroth is orthodox it has no application in the circumstances of the rezoning review I am considering. The decision-making process on matters of merit by the Panel is difficult to equate with the fact-finding requirements placed on judges under the relevant legislation in *Azzopardi* .

196. Similarly the principles from *Tolson* and *State Super* cited can be accepted but have no application in the circumstances before me. *Tolson* concerned an appeal from the decision of a trial judge determining compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* and whether the fact-finding exercise by the judge gave rise to a perverse or illogical result. The Court of Appeal stated at [53]:

> These challenges were directed to the fact-finding exercise undertaken by the trial judge. In order to demonstrate that they involved an erroneous decision on a question of law, the appellants were confronted with the authority of this Court that a finding of fact which could be characterised as "perverse" or "illogical" does not raise a point of law: *Azzopardi v Tasman UEB Industries Pty Ltd* (1985) 4 NSWLR 139 at 156–157 (Glass JA, Samuels JA agreeing). However, as the Court has subsequently noted, an erroneous finding of fact may demonstrate a basic misunderstanding of the case brought by the claimant, so as to demonstrate that the tribunal has failed to address and determine the issues before it and has thus failed to exercise its jurisdiction: *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257 at [11]–[12] . It is therefore necessary to consider whether an error of this kind has been established in the present case.

197. There is no basis for suggesting that the Panel acted perversely or illogically. I agree with the Council's submission that the Panel has not been shown to have acted unreasonably in any way.

198.

Henroth also criticises the Panel's Reason 2 for failing to refer to the OEH letter. The Operational Procedures require the giving of reasons, see [24] above. Without resolving whether in fact these

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procedures do bind panels to provide reasons, such an approach certainly accords with good administrative practice. The Panel provided reasons as set out in full above in [50]. No express or implied obligation to refer to the OEH letter was placed on the Panel.

199. As the Panel submitted, a careful reading of the letter does not confirm Henroth's interpretation. I adopt the Panel's submission to the effect that the OEH letter is not inconsistent with the Panel's finding. The OEH letter refers to potential plans that might ameliorate flooding risk but ultimately states that these require further development. It was therefore open to the Panel to conclude that Henroth had not done enough to mitigate the risk of flooding and arrive at the conclusion it expressed in its decision.

200. This ground fails.

Conclusion

201. Henroth is unsuccessful in relation to all grounds of review and its application will be dismissed.

202. I have not heard any argument on costs. The usual rule in Class 4 judicial review proceedings is that costs follow the event so that the Respondents as the successful parties would be entitled to a costs order in their favour in the absence of any disentitling conduct. I am not aware of any such conduct. A costs order to that effect will be made in 14 days unless a notice of motion seeking a different costs order is filed and served before that date.

Orders

203. The Court orders that:

    1. The Applicant's Amended Summons dated 16 March 2018 is dismissed.

    2. The Applicant is to pay the Respondents' costs of the proceedings unless a notice of motion seeking a different costs order is filed within 14 days.

    3. The exhibits may be returned.

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Decision last updated: 03 August 2018

Cited by:

Henroth Investments Pty Ltd v Sydney North Planning Panel [2019] NSWCA 68 (12 April 2019) (Basten JA; Payne JA; Sackville AJA)

[2018] NSWLEC 112

Henroth Investments Pty Ltd v Sydney North Planning Panel [2019] NSWCA 68 (12 April 2019) (Basten JA; Payne JA; Sackville AJA)

On 31 May 2017, the Panel rejected the appellant's application for review. The appellant then sought judicial review of the Panel's decision in the Land and Environment Court. On 31 July 2018, the primary judge, Pain J, dismissed the application: *Henroth Investments Pty Ltd v Sydney North Planning Panel* [2018] NSWLEC 112 .

Henroth Investments Pty Ltd v Sydney North Planning Panel [2019] NSWCA 68 (12 April 2019) (Basten JA; Payne JA; Sackville AJA)

1. Henroth Investments Pty Ltd v Sydney North Planning Panel [2018] NSWLEC 112 .

DeBattista v Minister for Planning and Environment [2018] NSWLEC 202 (14 December 2018) (Moore J)

92. Mr Tomasetti, in his reply to this proposition, cited two cases that he said demonstrated that this was not the case. They were the decision of Pain J in *Henroth Investments Pty Ltd v Sydney North Planning Panel* [2018] NSWLEC 112 (*Henroth Investments*) and that of Biscoe J in *Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No 2)* [2011] NSWLEC 83 (*Capital Airport Group*). For the reasons discussed below, neither of these cases stands against the broad proposition advanced by Mr Pickles.

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DeBattista v Minister for Planning and Environment [2018] NSWLEC 202 (14 December 2018) (Moore J)

93. First, the paragraph in *Henroth Investments* called upon by Mr Tomasetti was [95], where Pain J observed:

> The context for the decision under challenge is an essential consideration when assessing an allegation of apprehended or actual bias. The Panel is an independent expert statutory body charged by the Minister with considering the merits of a change in zoning over land owned by Henroth a decision and process which lacks any specific legislative underpinning.

DeBattista v Minister for Planning and Environment [2018] NSWLEC 202 (14 December 2018) (Moore J)

It is clear that what was being undertaken by the planning panel as discussed in *Henroth Investments* is a non-statutory merit assessment one. It is quite distinctly different from the

delegated legislative task with which the Council is invested concerning this planning proposal. It provides no support for the proposition that the political processes of the Council in undertaking strategic planning could be equated to the processes being considered by Pain J.

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