

# COURT REPORTER



**ISSUE 1, 2017**

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## Summary of cases

1. This was an appeal against a deemed refusal of an application to subdivide one block of land in to 9 lots. Of interest, the Court considered the validity of infrastructure levies which would have been imposed on the development under the relevant Interim Development Order if consent was granted to the application.
2. This was an appeal against the decision of Council to refuse to grant development consent for the construction of a new single carport over an existing hard standing parking space on a site located in a heritage conservation area.
3. This was an appeal against a deemed refusal to amend a conditional development consent. The original consent required an easement for drainage to be in place prior to the issue of the Construction Certificate, whereas the proposed modification would require it at the time of the issue of the Subdivision Certificate.

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## 1. [Bruce Kerr Pty Ltd v Central Coast Council \[2016\] NSWLEC 1598](#)

The case was an appeal against a deemed refusal by Council of a development application for the subdivision of one block of land to nine lots. This case reiterates controls and requirements imposed by Interim Development Orders remain relevant and valid considerations when assessing developments which fall under them.

### **Background**

The Applicant was the owner of land at Bensville (**Subject Site**). The majority of the Subject Site was zoned 7(c2) 'Conservation and Scenic Protection (Scenic Protection – Rural Small Holdings)', with another portion zoned 7(a) 'Conservation and Scenic Protection (Conservation)' under the Gosford Local Environment Plan 2014 (**Gosford LEP**).

The subdivision of the land zoned as 7(a) and 7(c2) is permissible with consent under an Interim Development Order 2013 (**IDO**). The Gosford LEP expressly deferred its application to the Subject Site. Accordingly, the IDO was the relevant instrument which applied in the assessment of the proposed development.

The Applicant intended that the proposed lots 1-7 and the residual lot 9, to be used as residential lots in the future. Lot 8 was proposed for dedication to Council for future open space. The Applicant sought the benefit clauses 18(4) and 18(5) of the IDO to obtain "bonus lots" (that is an increase in the number of lots permissible on the land) by virtue of the dedication of lot 8. The Council was not satisfied that the requirements of these clauses had been met.

The application sought approval for the proposed subdivision on the basis the proposed number and size of lots were generally compatible with the requirements of clause 18 of the IDO. The Applicant also provided SEPP 1 objections and sought to vary the minimum lot size development standard contained in the IDO.

The Applicant argued the dedication of Lot 8 to Council for future public land constituted an agreement with Council for the purposes of Clause 18. Council did not accept with the offer and contended that there could be no agreement in these circumstances. The Applicant also submitted the IDO already allowed a minimum 1 ha lot size and a SEPP 1 Objection could be used to override the controls for lot sizes within the relevant zones.

### **The Councils Contentions**

Council contended:

- the proposed lots did not meet the minimum lot sizes for subdivision of the zones under the IDO;
- there was insufficient information accompanying the development to determine conclusively the level of significance of impacts to threatened species, populations or endangered ecological communities;
- there was conflict between asset protection zone management and the management of riparian zones, and other vegetation;
- access from Empire Bay Drive needed to be altered to reflect comments receive from NSW Roads and Maritime Services; and
- a Bushland Management Plan was required to ensure ongoing management and protection of threatened flora and fauna identified onsite.





## Were the SEPP 1 Objections “well founded”?

The approach that the Court must take when considering whether a SEPP 1 Objection is “well founded” has been comprehensively set out in *Wehbe Pittwater Council (2007)* 156 LGERA 446. Commissioner Chilcott adopted this approach in the present case. In considering the SEPP 1 Objection the Commissioner preferred the evidence of the Council’s expert, Mr Leavey. The Commissioner agreed that the development standard which the Applicant sought to vary (being the minimum lot size) was not unreasonable or unnecessary. The Commissioner also agreed that the objectives of the development standard would be compromised through non-compliance with the standard.

Commissioner Chilcott also rejected an argument put forward by the Applicant that the Council had abandoned its minimum lot size development standard by granting other development consents which departed from that standard. The Commissioner again preferred the evidence of Mr Leavey that the intent of clause 18(2) was to provide precisely for flexibility in planning outcomes in developments to which the clause applies, and to do so in a consistent manner which addressed the public benefit requirements of s79C (i)(e) of the EPA Act.

Commissioner Chilcott found that the Applicant’s SEPP 1 Objections were not well founded.

## Conclusion

As the development did not meet the lot size requirements of the IDO, and as the SEPP 1 Objections were not well founded, the Commissioner dismissed the appeal. The Commissioner held that it was not necessary to consider the other contentions raised by the Council.

## 2. [Kim Chew v Willoughby City Council \[2017\] NSWLEC 1015](#)

This was an appeal against the decision of Council to refuse to grant development consent for the construction of a new single carport over an existing hard standing parking space on a site located in a heritage conservation area.

### Background

Ms Chew was the owner of a property located in Chatswood (**the Site**). The Site was a long, narrow parcel of land with a street frontage of 9.59m and was located in a heritage conservation area (**HCA**). A contemporary single storey dual occupancy dwelling was situated on the Site. Neither the site nor its neighbouring properties were listed heritage items. However, the neighbouring properties were examples of the architectural style of surrounding heritage listed items. Extensions to the dwelling on the site were approved and undertaken in 2014.

In July 2016, Ms Chew submitted a development application for a carport within the front setback of the Site.

Council refused the application on the basis it failed to meet the DCP requirements. The Council contended that the Carport had an adverse heritage impact on the HCA in which it was situated.

### Consideration

Council’s concern with the proposed development was that it did not comply with the relevant provisions of the Willoughby Development Control Plan (**DCP**).

Council contended the proposed carport would have unacceptable impacts on the character of the streetscape, and did not meet the provisions of the DCP which were intended to ameliorate the impacts on a HCA.





The parties agreed that the DCP established a hierarchy of preference in determining how carports should be accommodated in the HCA. The parties also agreed that the DCP did not preclude carports in front of dwellings, and that locating a carport at the rear or side of the dwelling on the Site was not possible. There was no objection to the design of the carport, only to its location. The Council contended that the structure would be visually dominant when viewed from the street and would have an unacceptable visual impact in the HCA.

The Applicant argued the streetscape was already compromised by the approval of the application to allow excision of the site to create a narrow lot in 1993 and the proposal was an acceptable alternative given the physical constraints on the site. The parties agreed the site was anomalous in the streetscape and there was some precedent in the positioning of carports at the front of HCA listed properties, on the other side of the street.

## Findings

Commissioner Smithson formed the view that the proposed carport was a reasonable balance between protecting the heritage streetscape of the HCA and providing an improved level of amenity from the Site.

The Commissioner agreed with the Applicant that the screening of the dwelling on the side (which was described as a “sympathetic but contemporary structure”) by the carport met the DCP objectives for the HCA.

The Commissioner also accepted that the application would not create an unacceptable precedent as the Site was relatively unique in the area having been the result of a subdivision which gave rise to its narrow width.

It was also held that the carport would not screen a dwelling that contributed to the streetscape nor was it adjoined by heritage items.

The Commissioner did not consider that it would detract from any adjoining contributory dwellings to any greater extent than the existing dwelling on the Site.

Finally, Commissioner Smithson held that where a contemporary dwelling existed on the Site, a flexible application of the DCP controls was reasonable.

## Conclusion

The Court held that the application met the objectives of the DCP and that the carport would not have an adverse impact on the HCA.

The appeal was upheld and development consent granted.





### 3. Orion Consulting Engineers Pty Ltd v Blacktown City Council [2017] NSWLEC 1017

This is an appeal against a deemed refusal to amend a conditional development consent granted to Orion Consulting Engineers Pty Ltd (**Orion**) by Blacktown City Council (**Council**). Orion sought to defer the time by which a registered drainage easement must be in effect. The original consent required the easement to be in place prior to the issue of the construction certificate, whereas the proposed modification would require it at the time of the issue of the subdivision certificate.

#### Background

On 21 September 2016, Orion obtained a conditional development consent from Council for the subdivision of land at Riverstone into 143 residential lots, 10 residue lots, associated earthworks, associated subdivision works, construction of new roads, demolition of existing structures, landscaping and site remediation (**Works**). The consent was obtained through a s34 conciliation, as part of Land and Environment Court proceedings.

The consent contained a large number of conditions for the carrying out of the Works. One of the conditions required Orion to obtain a drainage easement from a neighbouring property prior to the issue of a construction certificate that is, before the Works could commence.

Three weeks after obtaining the consent, Orion made an application to have the condition modified to allow the Works to commence prior to the grant of the drainage easement. Both Orion and the Council agreed there needed to be a drainage easement, but disagreed as to the timing.

The only land affected by the Works was lot 28 (**Affected Land**). The owners of that land were separated and whilst Orion was able to obtain consent for the easement from one owner it could not locate the other.

#### Consideration

The Court held that a registered easement was required, the issue was timing. The Court agreed with the Council that not only was the notification function of the easement important, so too was the affect of the easement (to allow the flow of water over the Affected Land). The Court did not agree that the Applicant's outcome focused solution was appropriate in the circumstances. Accordingly the Court found that an easement was required to be registered prior to the issue of a construction certificate.

Orion also tried to rely on the common law right to discharge water to the neighbouring property. However the court did not agree that such a common law right would arise where the water was artificially brought to the land and allowed to escape.

Orion further argued that it would suffer financial hardship if the condition was not modified. The Court found that the financial hardships faced by Orion were not an "economic impact" of development which required consideration under the EP&A Act, but rather an incidental fact and inherent risk to all developers, which "must not be used to usurp a proper planning outcome". It was held that Orion's legal obligations of lawfully discharging the water from the site outweighed such economic considerations.

Furthermore, the Court was not convinced, on the balance of evidence, that Orion exhausted all attempts to reasonably secure the easement.

#### Conclusion

The Court dismissed the appeal but noted that if Orion had provided evidence that an alternative water disposal scheme was available, the outcome may have been different.



## Definitions

**Appeal** – an application or proceeding for review by a higher tribunal or decision maker.

**Consent authority** – the body having the function of determining the application, usually a council.

**Deemed refusal** – where a consent authority has failed to make a decision in relation to a development applications within the statutory time limit for determining development applications.

**Development** means:

- a. the use of land, and
- b. the subdivision of land, and
- c. the erection of a building, and
- d. the carrying out of a work, and
- e. the demolition of a building or work, and
- f. any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

**Development Application** – an application for consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) to carry out development but does not include an application for a complying development certificate.

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

**Existing use rights** – rights under Planning Legislation to continue previously lawful activities on land which would no longer be permitted following the introduction of changes to environmental planning instruments.

**LEP** – Local Environmental Plan, planning tool created by councils to control the form and location of new development.

**Local heritage significance** – in relation to a place, building, work, relic, moveable object or precinct means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

**Objector** – a person who makes a submission to a consent authority objecting to a development application for consent to carry out designated development.

**Occupier** – includes a tenant or other lawful occupant of premises, not being the owner.

**Planning principle** – statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.

**Premises** means any of the following:

- (a) a building of any description or any part of it and the appurtenances to it
- (b) a manufactured home, moveable dwelling and associated structure
- (c) land, whether built on or not





- (d) a tent
- (e) a swimming pool
- (f) a ship or vessel of any description (including a houseboat).

**Procedural fairness** – this term is interchangeable with “natural justice” and is a common law principle implied in relation to statutory and prerogative powers to ensure the fairness of the decision making procedure of courts and administrators.

**Prohibited development** means

- (a) development the carrying out of which is prohibited on land by the provisions of an environmental planning instrument that apply to the land, or
- (b) development that cannot be carried out on land with or without development consent.

**Public authority** includes:

- (a) a public or local authority constituted by or under an Act
- (b) a government Department
- (c) a statutory body representing the Crown.

**State heritage significance** – in relation to a place building, work, relic, moveable object or precinct means significance to the State in relation to the historical, scientific, cultural, social, archeological, architectural, natural or aesthetic value of the item.

**Subpoena** – a document by which a court compels a person to attend a court to give evidence or to produce documents within that person’s possession.





## Useful links

Land and Environment Court website: [www.lec.justice.nsw.gov.au](http://www.lec.justice.nsw.gov.au)

Australasian Legal Information Institute: [www.austlii.edu.au](http://www.austlii.edu.au)

Case Law NSW: [www.caselaw.nsw.gov.au](http://www.caselaw.nsw.gov.au)

Environment Protection Biodiversity Conservation Act - subscription to EPBCA group:  
<http://groups.yahoo.com/group/epbc-info/>

Environment and Planning Law Association NSW: [www.epla.org.au](http://www.epla.org.au)

Development and Environmental Professionals Association: [www.depa.net.au](http://www.depa.net.au)

Urban Development Institute of Australia: [www.udia.com.au](http://www.udia.com.au)

Property Council: [www.propertyoz.com.au](http://www.propertyoz.com.au)

Housing Industry Association: [www.hia.com.au](http://www.hia.com.au)

Planning NSW: [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

Environment Australia: [www.erin.gov.au](http://www.erin.gov.au)

Environmental Protection Authority (NSW): [www.epa.nsw.gov.au](http://www.epa.nsw.gov.au)

EDONet: [www.edo.org.au](http://www.edo.org.au)

NSW Agriculture: [www.agric.nsw.gov.au](http://www.agric.nsw.gov.au)

NSW National Park and Wildlife Service: [www.nationalparks.nsw.gov.au](http://www.nationalparks.nsw.gov.au)

Planning Institute of Australia: [www.planning.org.au](http://www.planning.org.au)

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