New South Wales
Court of Appeal

CITATION:	**HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL [2009] NSWCA 285**
HEARING DATE(S):	1 May 2009
JUDGMENT DATE:	11 September 2009
JUDGMENT OF:	McColl JA at 1 Basten JA at 11 Young JA at 70
DECISION:	Appeal dismissed with costs
CATCHWORDS:	ENVIRONMENT AND PLANNING – planning schemes and instruments – consistency of instruments – construction and interpretation – meaning of 'inconsistency' – Local Environmental Plan – State Environmental Planning Policy – whether permission under Policy inconsistent with prohibition under Plan – whether Policy intended to operate as exclusive code – whether Policy mandated consent when development proposal in accordance with terms of Policy STATUTORY INTERPRETATION – environment and planning – meaning of 'inconsistency' – *Environmental Planning and Assessment Act 1979* (NSW), s 36 WORDS & PHRASES – 'consent considerations' – 'cumulative impact' – 'development consent' – 'environmental planning instrument' – 'general presumption'
CATEGORY:	Principal judgment
FILE NUMBER(S):	**CA** 40279/09
PARTIES:	Hastings Point Progress Association Inc – Appellant Tweed Shire Council – First Respondent Aeklig Pty Ltd – Second Respondent

LEGISLATION CITED:	Constitution, s 109 *Environmental Planning and Assessment Act 1979* (NSW), ss 4, 36, 37, 39, 69, 70, 78A, 79C, 80, 117; Pt 4, Divs 1, 2 *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW), Sch 2(5) State Environmental Planning Policy (Seniors Living) 2004, cll 2, 4, 5, 16, 17, 18, 19, 25, 26, 27, 28, 38, 39, 53, 79; Ch 3, Pts 2-7 Tweed Local Environmental Plan 2000, cll 8, 11
CASES CITED:	*Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 *Butler v Attorney-General (Vic)* [1961] HCA 32; 106 CLR 268 *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52 *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1994) 84 LGERA 324 *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 *DEM (Australia) Pty Ltd v Pittwater Council* [2004] NSWCA 434; 136 LGERA 187 *Ferdinand v Commissioner for Public Employment* [2006] HCA 5; 225 CLR 130 *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39 *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 *Parramatta City Council v Hale* (1982) 47 LGERA 319 *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56
TEXTS CITED:	Blackshield T and Williams G, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) at 376 Pearce D C and Geddes R S, *Statutory Interpretation in Australia* (2006, 6th ed) at [4.42]
COUNSEL:	P Greenwood SC/A Pickles – Appellant P J McEwen SC/Dr S Berveling – Second Respondent
SOLICITORS:	Environmental Defender's Office, Lismore – Appellant Marsdens Law Group – First Respondent Stacks/Gray, Murwillumbah – Second Respondent
LOWER COURT JURISDICTION:	Land & Environment Court

LOWER COURT FILE NUMBER(S):	LEC 40784/07
LOWER COURT JUDICIAL OFFICER:	Pain J
LOWER COURT DATE OF DECISION:	6 June 2008
LOWER COURT MEDIUM NEUTRAL CITATION:	*Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 180

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40279/08
LEC 40785/07

McCOLL JA
BASTEN JA
YOUNG JA

11 September 2009

HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL

Headnote

On 8 May 2007 the Tweed Shire Council granted development consent in response to an application seeking approval for a "proposed seniors living facility" in Hastings Point, lodged by the respondent (Aeklig Pty Ltd) on 27 April 2006. This application was made under the State Environmental Planning Policy (Seniors Living) ("the SEPP-SL"), though it also addressed relevant requirements of the Tweed Local Environmental Plan 2000 ("the TLEP") amongst other environmental planning instruments. Clause 5(3) of the SEPP-SL stated that in the event of inconsistency between it and any other environmental planning instrument the SEPP-SL was to prevail to the extent of the inconsistency. Section 36 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EP&A Act") provides that in the event of inconsistency, the SEPP-SL would be generally presumed to prevail over the TLEP.

In the Land and Environment Court the appellant sought to challenge the validity of that consent on the basis that the Council failed to consider, and satisfy itself of one of the requirements set out in cl 8(1) of the TLEP, namely that the development "would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole". Pain J upheld the grant of consent on the basis of a potential for inconsistency to arise between cl 8(1) of the TLEP, which could give rise to a refusal of consent, and cl 17 of the SEPP-SL, which permitted the development to occur. The appellant brought an appeal to this Court challenging her Honour's decision.

The issue for determination on appeal was the correct approach to ascertaining the existence of an inconsistency for the purposes of s 36 of the EP&A Act and cl 5(3) of the SEPP-SL.

Held, dismissing the appeal:
(per McColl JA):

1. Where cl 8(1) of the TLEP mandates that the Council refuse consent to development unless the three conditions to which it refers are satisfied, and cl 17 of the SEPP-SL permits the development to which it refers despite the provisions of any other instrument if the development is carried out in accordance with the SEPP-SL, the two clauses are incapable of concurrent operation, and inconsistency arises as between them: [8].

    Coffs Harbour Environment Centre Inc v Minister for Planning (1994) 84 LGERA 324; *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; 155 LGERA 52, cited.

(per Basten JA, dissenting):

2. Inconsistency may arise where an intention to cover the field is discernible on the part of the instrument having paramountcy. It may also arise where a requirement found in one environmental planning instrument prohibits a particular use on land to which another instrument applies which permits that use. Where the provisions of the SEPP-SL do not demonstrate an intention to cover the field, and are silent on the subject matter giving rise to a refusal of consent under cl 8(1)(c), no inconsistency can be said to arise: [51]–[55].

    Coffs Harbour Environment Centre Inc v Minister for Planning (1994) 84 LGERA 324; *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284, considered.

    Parramatta City Council v Hale (1982) 47 LGERA 319; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31; *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565; *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39; *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56, referred to.

(per Young JA):

3. The cumulative effect of cll 2(2) and 17 of the SEPP-SL is to impart to the SEPP-SL an aim to encourage the development of certain housing by overriding planning controls that would prevent such development. Clause 8(1) of the TLEP purports to remove the power of a council to consent to an application which complies with the SEPP-SL, but which neglects to address 'cumulative impact', and accordingly gives rise to an inconsistency: [94] – [96].

    Currey v Sutherland Shire Council 91998) 100 LGERA 365; *Franklins Ltd v Penrith City Council* [1999] NSWCA 134; *DEM (Australia) Pty Ltd v Pittwater council* [2004] NSWCA 434; 136 LGERA 187, referred to.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40279/08
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McCOLL JA
BASTEN JA
YOUNG JA

11 September 2009

HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL

Judgment

1 **McCOLL JA**: I have read the reasons in draft of Basten JA and Young JA. The history of the litigation is sufficiently set out in their reasons and I shall not repeat it. In short it concerned the proper construction of cl 17 of the State Environmental Planning Policy (Seniors Living) 2004 ("SEPP – SL") and cl 8 of the Tweed Local Environmental Plan 2000 ("TLEP 2000").

2 Basten JA has identified at [54] the issue on appeal as being "in substance, whether the Policy precludes the consent authority taking into account any consideration which is not identified in [it]".

3 With respect, that was not the issue. The critical issue on appeal was whether cl 8 of the TLEP 2000 was inconsistent with cl 17 of SEPP – SL for the purposes of s 36 of the *Environmental Planning and Assessment Act* 1979 (NSW) (the "EP Act") because it mandated refusal of a development which nevertheless was to be carried out in accordance with SEPP-SL.

4 Thus, the issue was not whether SEPP – SL mandated the grant of development consent in the event the respondent submitted a development which accorded with its provisions. Rather, the question was

whether cl 8 was inconsistent with cl 17 of the SEPP – SL because it mandated refusal of consent to the respondent's proposed development if it failed to comply with any of its provisions.

5 It is unnecessary, in my view, to engage in a semantic analysis of the meaning of the word "inconsistency". In the present case it carries its plain meaning – whether cl 8 of the TLEP 2000 and cl 17 of the SEPP – SL could operate concurrently: *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1994) 84 LGERA 324 (at 331) per Kirby P; *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52 (at [41]) per Tobias JA (Bell J agreeing).

6 Relevantly one can distil from Basten JA's reasons, the following propositions with which I agree:

(a) when any environmental planning instrument is relevant to a particular proposed development, it is required to be taken into account pursuant to s 79C of the EP Act;

(b) in considering whether to grant approval for a development which falls under the SEPP – SL, the consent authority must also take into consideration the matters set out in s 79C(b) – (e);

(c) it thus follows that the fact that a development proposal to which SEPP-SL applies accords with its provisions does not mandate that it be granted consent;

(d) accordingly, the fact that a consent authority has power to grant consent for a development which accords with the requirements of SEPP-SL does not prevent it, in the exercise of its discretion, from refusing to grant that consent;

(e) the distinction drawn by Preston CJ in *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC

284 referred to by Basten JA at [52] between the existence of the power to consent and the manner of its exercise as reflected in the present case, is reflected in proposition (d) above.

7 Had cl 8 of the TLEP 2000 been drafted in a manner which required the Tweed Shire Council to take into consideration the factors to which it referred, there would have been no inconsistency in the sense to which I have referred between it and cl 17 of the SEPP – SL.

8 However, as Young JA points out at [94] that is not how cl 8(1) is drafted. It mandates that the Council may grant consent to development only if the three conditions to which it refers are satisfied. In other words, it mandates that consent be refused unless each of those conditions are satisfied. That provision cannot, in my view, operate concurrently with cl 17 of SEPP – SL which permits the development to which it refers "despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy".

9 This is not to say that the consent authority is not required by s 79C to take those conditions into account in its consideration of a development that otherwise complies with SEPP-SL. But having done so, the consent authority has a discretion to grant consent, notwithstanding that it is not satisfied of each of the three conditions in cl 8(1). The inconsistency arises because cl 8(1) mandates refusal in those circumstances.

10 I agree with the orders Young JA proposes.

11 **BASTEN JA**: On 27 April 2006 the second respondent, Aeklig Pty Ltd ("the respondent"), lodged a development application with the first respondent Tweed Shire Council ("the Council"), seeking approval for a "proposed seniors living facility" on Coast Road near Hastings Point in northern New South Wales. The proposed development involved 84 independent living units, 94 hostel units and a residential care facility with 67 beds. With the application to Council, the agent for the developer

lodged a statement of environmental effects which, while asserting that the proposal would be developed under the State Environmental Planning Policy (Seniors Living) ("the SEPP-SL" or "the Policy"), also addressed relevant requirements of the Tweed Local Environmental Plan 2000 ("the TLEP"), the North Coast Regional Environmental Plan 1988, other State environmental planning policies concerning development standards, coastal wetlands and remediation of land, and relevant development control plans applicable to the area.

12 On 8 May 2007 the Council gave consent to the application. The appellant sought to challenge the validity of that consent in the Land and Environment Court on the basis, critically for present purposes, that the Council failed to satisfy itself that the development "would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole". The obligation to be so satisfied was sourced to cl 8(1)(c) of the TLEP. The primary judge, Pain J, dismissed the application on the basis that the requirement in the TLEP was inconsistent with the terms of the SEPP-SL and was not, therefore, applicable to the development: see *Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 180 at [65].

13 The appellant asserts that the primary judge misapprehended the interrelationship of the relevant environment planning instruments and erred in concluding that cl 8(1) of the TLEP did not constrain the Council's power to consent to the development. It was common ground between the parties that if the appellant were correct and cl 8(1) applied, the decision of the Land and Environment Court should be set aside and the matter remitted to that Court to determine whether in fact the Council had failed to be satisfied of the matters identified in cl 8(1). The Council took no part in the proceedings, in accordance with the principles stated in *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 at [12] (Gaudron and Gummow JJ).

Legal structure of planning controls

14 The legal structure of planning control in this State is primarily found in the *Environmental Planning and Assessment Act 1979* (NSW) ("the EP&A Act"). Again in general terms, the EP&A Act envisages that development may be identified by reference to three categories, namely that which does not need consent, that which does need consent and that which is prohibited: EP&A Act Pt 4, Div 1. To identify the category into which a particular development falls it is necessary to ascertain the effect of the relevant environmental planning instrument. For most purposes, that will be determined by looking to the local environmental plan and ascertaining the zoning provisions with respect to the particular land to be developed.

15 The EP&A Act further provides that a person may apply to a consent authority for consent to carry out development: s 78A. Consideration of such an application is governed by subsequent provisions in Pt 4, Div 2, including, relevantly for present purposes, s 79C(1) which provides:

> **"79C Evaluation**
>
> (1) **Matters for consideration — general**
>
> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> ...
>
> (iii) any development control plan ...
>
> that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,

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

(e) the public interest."

16 The term "environmental planning instrument" is defined to mean a State environmental planning policy, a regional environmental plan, or a local environmental plan: s 4(1), ***environmental planning instrument***.

17 A critical issue in the present case was whether cl 8 of the TLEP applied to the land: whether or not it did depended in part on the effect of the SEPP-SL. The answer to that question required consideration of the terms of each instrument, and their interrelationship.

18 A State environmental planning policy is made by the Governor, on recommendation of the Minister, by reference to a draft policy prepared by the Director-General: EP&A Act, ss 37 and 39.

19 A local environmental plan is made by the Minister after considering a report by the Director-General under s 69 of the EP&A Act: see s 70. The plan may be in accordance with a draft submitted by the council, or may contain "such alterations as the Minister thinks fit relating to any matter which in the opinion of the Minister is of significance for State or regional environmental planning": s 70(1)(a)(ii). Section 69 reads, in part, as follows:

"**69 Report by Director-General**

(1) The Director-General shall furnish a report to the Minister as to:

(a) whether the draft local environmental plan submitted under section 68(4) is inconsistent with any State environmental planning policy, regional environmental plan, or relevant direction under section 117, applying to the land to which the draft plan applies,

(b) if there is such an inconsistency—whether the inconsistency is justifiable in the circumstances,

...

(d) the relationship between the draft plan, and other proposed and any existing environmental planning instruments, and any relevant directions under section 117, applying to the land to which the draft plan applies ...."

20 Section 117 empowers the Minister to give directions to a council with respect to the content of a draft local environmental plan. (No such direction was given in the present case.) Significantly, both ss 69 and 70 envisage that there may be inconsistency between a local environmental plan and a State policy. They do not provide for resolution of that inconsistency. That is dealt with by s 36 which reads as follows:

"**36 Inconsistency between instruments**

(1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:

(a) there is a general presumption that a State environmental planning policy prevails over a regional environmental plan or local environmental plan made before or after the policy, and

(b) there is a general presumption that a regional environmental plan prevails over a local environmental plan made before or after the regional environmental plan, and

(c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.

(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved."

21 The proper application of s 36 gives rise to a number of questions, including the following:

(a) how is the existence of an "inconsistency" to be determined?

(b) what is the status of the relevant "general presumption"?

(c) where should one look to find provision "otherwise" than that contained in s 36(1) itself?

22 In the present case, the TLEP was made in 2000, and therefore before the SEPP-SL, which was promulgated in 2004. If there were inconsistency between the TLEP and SEPP-SL it would not have been identified by the Director-General under s 69 when considering a draft of the TLEP.

23 In considering the operation of s 36, it is convenient to note that, in the course of its history, it has undergone a number of striking changes. As enacted, s 36 read as follows:

> **"Inconsistency between instruments**
>
> **36** In the event of an inconsistency between environmental planning instruments, then, to the extent of the inconsistency and unless otherwise provided:
>
> (a) there is no general presumption that:
> (i) a State environmental planning policy prevails over a regional environmental plan or a local environmental plan; or
> (ii) a regional environmental plan prevails over a local environmental plan; and
>
> (b) the provisions of a later instrument prevail over the provisions of an earlier instrument, unless the contrary intention appears."

24 In 1996, a new provision was inserted in the following terms:

> **"36 Inconsistency between instruments**
>
> (1) In the event of an inconsistency between environmental planning instruments, then, to the extent of the inconsistency and unless otherwise provided:
>
> (a) there is no general presumption that an environmental planning instrument of one kind prevails over an environmental planning instrument of another kind, and

(b) the provisions of a later environmental planning instrument prevail over those of an earlier environmental planning instrument, whether of the same or a different kind.

(2) A State environmental planning policy prevails over a regional environmental plan or a local environmental plan made before or after the policy to the extent of any inconsistency, if the policy expressly so provides.

(3) A regional environmental plan prevails over a local environmental plan made before or after a regional environmental plan to the extent of any inconsistency, if the regional environmental plan expressly so provides.

(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved."

25 Section 36 achieved its present form through amendments contained in the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW), Sch 2(5). No explanation of the significant changes in the provision were given by the Minister in the second reading speech, which was relevantly limited to the following observations (Hansard, Legislative Council, 9 June 2005, p 16,768):

> "The amendments in schedule 2 to the bill will support those reforms to simplify and modernise statutory land use planning. The amendments do not involve a radical rewrite of part 3 of the Act and are limited to changes necessary for delivering major elements of the reform program."

The major elements of the reform program appear to have been directed to the streamlining of approvals for critical infrastructure projects.

26 At least since the 1996 amendments, the section expressly envisaged that an environmental planning instrument might itself provide the manner in which an inconsistency was to be resolved. Absent other provision in the EP&A Act or the regulations made under it, or any other relevant legislation, it may be assumed that 'provision otherwise', referred to in

s 36(1), was intended to include such provision in an instrument. No doubt such a provision could be made in a local environmental plan with respect to a State environmental planning policy, so as to overcome the general presumption, because the plan would only be made with the approval of the Minister and after consideration by the Director-General. There was no such provision in the present case; rather, as will be seen shortly, SEPP-SL contained a provision consistent with the general presumption identified in s 36(1)(a).

27 The legislative scheme concludes (relevantly for present purposes) with the imposition on the consent authority of an obligation to determine a development application either by granting or refusing consent: s 80(1). That obligation is qualified in various ways by subsequent provisions, but none are relevant for present purposes.

The relevant instruments

28 This case requires the consideration of specific provisions in two environmental planning instruments. The earlier in time, the TLEP contained two relevant provisions. The first involved the zoning of the land the subject of the development application.

29 The TLEP listed the subject land under zone 2(c), which provided that the buildings, works and uses proposed in the application were allowable only with consent: see TLEP, cl 11, Table, zone 2(c) urban expansion, item 2. One form of development permitted only with consent was that of "dwelling houses if each is on an allotment of at least 450m^2". Had the proposed development been limited to "environmental facilities" it would have been allowed in this zone without consent; if it had involved certain other forms of development, it would have fallen either within item 3, which permitted development only in accordance with the provisions of cl 8(2), or item 4, which identified prohibited uses.

30 Zone 2(c) was entitled "urban expansion" and the primary zone objective was identified in the following terms:

"To identify land for urban expansion (which will comprise mainly residential development focused on multi-use neighbourhood centres) and to ensure its optimum utilisation consistent with environmental constraints and the need to minimise residential landtake."

31 The other relevant provision of the TLEP was cl 8 which, so far as relevant provided:

> **"8 Consent considerations**
>
> (1) The consent authority may grant consent to development ... only if:
>
> (a) it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and
>
> (b) it has considered those other aims and objectives of this plan that are relevant to the development, and
>
> (c) it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole."

32 It is the requirement in cl 8(1)(c), which was the focus of the present case. It was that which Pain J determined was "inconsistent" with relevant provisions of SEPP-SL. It is necessary, therefore, to turn to the Policy.

33 SEPP-SL, as promulgated in March 2004, replaced an earlier policy entitled "Housing for older people or people with a disability". There seems to have been some vacillation as to sensitivities, as, having changed the name to "Seniors Living" in 2004, the current name of the Policy refers to "Housing for Seniors or People with a Disability". It is convenient for present purposes to use the title in force at the date of the development application, which was lodged in April 2006. The Policy has been significantly amended since that date but cl 53(1) of the current Policy provides that the amendments do not apply to a development application which had been lodged, but not finally determined, before the commencement of the amending instrument. It was common ground

between the parties that the present application had not been finally determined at the date of the amendments, namely 12 October 2007.

34 Clause 4(1) of the SEPP-SL stated:

> "4 **Land to which Policy applies**
>
> (1) This Policy applies to land within New South Wales:
>
> (a) that is zoned primarily for urban purposes or that adjoins land zoned primarily for urban purposes, and
>
> (b) on which development for the purpose of any of the following is permitted:
>
> (i) dwelling houses ...."

35 The operation of the SEPP-SL was dependent upon the relevant local environmental plan, the zoning under that plan and the category of development applicable under the plan. Chapter 3 was headed "Development for seniors housing". It included cl 18, in the following terms:

> "18 **Development consent required**
>
> Development allowed by this Chapter may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent."

36 The appellant drew attention to cl 16 of the SEPP-SL which provided that the objective of Ch 3 "is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frailer, and other people with a disability regardless of their age". That objective, the appellant noted, did not seek to prescribe an exclusive approach to the consideration of a development application for seniors housing, nor did it preclude reference to other provisions of relevant environmental planning instruments. So much may be accepted;

nevertheless, the SEPP-SL did identify conditions with which development applications must comply and conditions with which they need not comply.

37 Clause 17 is also of significance for the present case and read:

> "**17 What Chapter does**
>
> This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:
>
> (a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and
>
> (b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel or a residential care facility."

38 Consistently with the terms of cl 17, cl 5(3) specified the relationship between the SEPP-SL and other instruments:

> "**5 Relationship to other Environmental Planning Instruments**
>
> ...
>
> (3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency."

39 Both parties referred in the course of argument to the terms of cl 2. It is a matter which is to be taken into account in construing other provisions in the Policy and should therefore be set out in full:

> "**2 Aims of Policy**
>
> (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:

(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
(b) make efficient use of existing infrastructure and services, and
(c) be of good design.

(2) These aims will be achieved by:

(a) setting aside local planning controls that prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
(b) setting out design principles that should be followed to achieve built form that corresponds to the characteristics of its site and form, and
(c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes."

Contentions of parties

40 The primary question for determination is whether cll 5(3) or 17 (or both in combination) of the Policy operated so that:

(a) any development proposal to which the Policy applied and which was in accordance with its terms must be given consent by the relevant consent authority, or

(b) any proposal to which the Policy applied and which was in accordance with its terms might obtain approval from the relevant consent authority, but the requirements of other relevant environmental planning instruments may still be taken into consideration when deciding whether to grant or refuse consent to the proposal.

The respondent contended for (a), while the appellant contended that (b) was the proper approach.

41 There may be a third possibility, namely that a development proposal that accords with the Policy may be refused based on considerations permitted under other legislation or environmental planning instruments, but cannot be the subject of mandatory refusal, even on grounds not addressed by the Policy. Why that should be considered a significant distinction is unclear. Once it is accepted that a council is entitled to consider other factors (not addressed by the Policy) it would seem to follow that a council may refuse consent on such a ground. If it may refuse consent (that not being inconsistent with the Policy), an obligation to refuse consent on the same basis will not be inconsistent with the Policy. To describe the Policy as 'permissive' and cl 8 as 'preclusive' is to invoke a semantic characterisation at too high a level of generality; it fails to pay regard to the actual scope of inconsistency, discussed below at [51]-[53].

42 The respondent sought to put a similar argument, submitting that the Policy did not constitute a code of relevant and irrelevant considerations, except to the extent that any permissible consideration which might lead the consent authority to reject an application which was in accordance with the Policy, would itself be inconsistent with the Policy and therefore ineffective. However, a gloss in those terms is misconceived. Either a council has power to consider factors in accordance with the local environmental plan, which might lead it to exercise its discretion against grant of approval, or it does not. It makes little sense to say that a factor can be considered but only to the extent that it favours approval of the proposal.

43 Although the agent for the respondent asserted in the statement of environmental effects that the application was made "under" the provisions of the SEPP-SL, the application was in fact made under s 78A of the EP&A Act. As the appellant contended, the Council was required to determine the application in accordance with s 79C of the EP&A Act. That required the Council to take into consideration each environmental planning instrument of relevance to the subject of the application:

s 79C(1)(a)(i). That, the appellant contended, required consideration of the TLEP.

44 That argument took the matter little further: in its terms it was correct, but the statutory provision was clearly intended to pick up only those parts or provisions of a relevant planning instrument which "apply" to the subject of the application. If a provision of the TLEP was not applicable to the current application because it was inconsistent with the SEPP-SL, its consideration was not required by s 79C.

Approach in Court below

45 In the Land and Environment Court, Pain J appears to have come to the conclusion that cl 8(1)(c) did not apply because inconsistent with the SEPP-SL on the basis of three interrelated propositions: see [2008] NSWLEC 180 at [57]-[59]. First, her Honour stated at [57]:

> "Clause 17(a) of SEPPSL ... applies so that no environmental planning instrument can prevent a development if it is carried out in accordance with the SEPPSL."

46 Secondly, her Honour found that there was a clear intention that SEPP-SL have "primacy" over other environmental planning instruments: at [57] (first sentence) and [59] (first sentence). It is not entirely clear whether that was a second basis for rejecting the appellant's contentions. If it were, it operated at a level of generality which was only consistent with the Policy constituting an exclusive code as to the relevant criteria.

47 The third limb in the reasoning, which may be a part of the second, held that there was "a potential inconsistency between SEPPSL and the application of cl 8 of the TLEP", to the extent that the application of cl 8 could give rise to a refusal of a development which is in accordance with the Policy. In substance, this was no more than the specific application of the exclusive code construction.

Determination of issue

48 The parties approached this case primarily on the basis that it turned upon a proper understanding of the meaning of "inconsistency" in cl 5(3) of the Policy. However, on one view, to commence with either or even both of the environmental planning instruments was a misconception. Primacy must be given to the statutory scheme in the EP&A Act: unless that Act permits otherwise, an instrument made under it cannot affect its operation. On that approach, it would be necessary to consider the relationship between the various factors which, to the extent that they are relevant, are mandatory considerations prescribed by s 79C(1). Thus, although an environmental planning instrument may affect aspects of the considerations identified in pars (b)-(e) of the subsection, arguably it cannot remove the obligation of the consent authority to take such matters into account. On that approach, it is not possible for a State environmental planning policy, or a local environmental plan, to mandate the outcome of the consent authority's consideration by restricting the matters to which it is required to have regard: cf *Parramatta City Council v Hale* (1982) 47 LGERA 319. As that approach raises large questions as to the scope of an environmental planning instrument to limit the operation of s 79C, and as that was not the way in which this case was argued it is necessary to leave that approach out of consideration, at least for the present.

49 A seminal discussion of the concept of "inconsistency" in the present context (albeit with reference to an earlier form of s 36) is to be found in *Coffs Harbour Environment Centre Inc v Minister for Planning* (1994) 84 LGERA 324. Kirby P noted a matter warranting comment as the need to construe the term "inconsistency" in s 36 "having regard to the ordinary meaning of the word": at 331. His Honour continued:

> "The resolution of this dispute requires only that the word 'inconsistency' be given its ordinary and natural meaning without the gloss which has necessarily developed around the meaning of the word in a constitutional setting. Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is 'want of consistency or congruity';

'lack of accordance or harmony' or 'incompatibility, contrariety, or opposition' with another environmental planning instrument."

50 The other members of the Court (Mahoney JA and Sheller JA) did not resort to synonyms; nor is it clear that any great assistance is achieved by substituting consideration of a number of words for the one used in the statute. The synonyms raise variations in connotation which tend to distract.

51 Nevertheless it is not self-evident that no assistance is to be gained from the discussions of the concept of inconsistency in the context of s 109 of the Constitution. Context and purpose is an important point of distinction: the constitutional provision gives primacy to the law of the Commonwealth over an inconsistent State law, a principle of paramountcy which is not necessarily reflected when judging inconsistency of State laws: see *Butler v Attorney-General (Vic)* [1961] HCA 32; 106 CLR 268 at 276 (Fullagar J). On the other hand, it is also necessary to distinguish the approach to inconsistency adopted when seeking to reconcile the provisions of two statutes of the same legislature, or identify the extent of any implied repeal: see *Ferdinand v Commissioner for Public Employment* [2006] HCA 5; 225 CLR 130 at [47]-[49]. This is a case where paramountcy is to be accorded to one instrument over another where inconsistency is established. In undertaking that task, it may be of assistance to characterise potential inconsistency by reference to one of the three broad approaches identified in Blackshield T and Williams G, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) at 376 in the following way:

(1) the impossibility of obedience to both laws, as in the case of an obligation combined with a prohibition;

(2) the conferral of a power by one law and its removal or diminution by another, and

(3) a discernable intention to "cover the field", on the part of the law having paramountcy.

52 A clear example of inconsistency would be a case in which the zoning requirement in a local environmental plan prohibited a particular use on land to which the Policy applied and with respect to which that use was permitted with consent: see *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 at [33] (Preston CJ).

53 The Policy also contains provisions which prohibit consent in certain circumstances: eg, cll 19, 25, 26, 27, 28, 38, 39. If, under the local environmental plan, consent could be given in such circumstances, there would be direct inconsistency between the Policy and the plan. That, however, is not the present case.

54 The issue in the present case is, in substance, whether the Policy precludes the consent authority taking into account any consideration which is not identified in the Policy. Although the term can be imprecise, one way of describing that situation is to identify the Policy as a "code" in respect of the criteria for assessment of developments to which it applies. Another way of describing that result is that the Policy was intended to "cover the field" of relevant and irrelevant considerations with respect to such development.

55 The provision primarily relied upon in support of that conclusion was cl 17, set out at [37] above. On one view the opening words of the clause ("This Chapter allows") mean that the consent authority is required to give consent to a development proposal to be carried out "in accordance with" the Policy. However, read in context, that is an implausible construction. The preceding provision, cl 16, describes the objective of the chapter as "to create opportunities for the development of housing" for seniors and those with disabilities. The subsequent provision, cl 18, expressly requires that consent is a necessary precondition for such development: see at [35]. The following clauses, as already noted, include a large number of

prohibitions on the grant of consent, but nowhere is there a clause expressly saying that if the requirements of the Policy are complied with the consent authority must give consent.

56 The subsequent Parts of Ch 3 are as follows:

> "Part 2 Site-related requirements
>
> Part 3 Design requirements
>
> Part 4 Development standards to be complied with
>
> Part 5 Development on land adjoining land zoned primarily for urban purposes
>
> Part 6 Development for vertical villages
>
> Part 7 Development standards that cannot be used as grounds to refuse consent."

57 Part 7 is significant in this context. It contains different divisions for different facilities. Division 2 refers to residential care facilities and identifies as grounds on which consent cannot be refused standards with respect to (a) building height; (b) density and scale; (c) landscaped area and (d) parking for residents and visitors. If the Policy were intended to provide a code, or an exclusive statement of the requirements for such development, one might expect that Part 7 would prohibit refusal of consent on any ground outside the terms of the Policy. It does not do so.

58 Furthermore, the kinds of matters dealt with in the Policy are almost entirely site-related or related to the design of the development. The exceptions relate to heritage conservation areas and heritage items and bushfire prone land. Broadly speaking, what is missing is any consideration of the likely impact of such a development on the locality, or on the facilities and services available in the locality or more widely. Absent clear words, one would not expect to find a State policy which prevented a consent authority taking such matters into account. To do so might impose on other public authorities significant costs, for example with respect to waste disposal, public transport or roads.

59 It is permissible (though not essential) in support of this conclusion to refer back to the terms of s 79C(1). A reason for not construing the Policy as excluding such wider considerations is the fact that, where they are relevant to a particular proposed development, they are required to be taken into account by the EP&A Act, s 79C(1)(b)-(e). It was not suggested in the course of argument that a State policy could derogate from that requirement.

60 Before leaving the question of construction, it is desirable to refer to the reliance placed by the respondent on the "objects clause", being cl 2 of the Policy. Clause 2(1) identified the aims of the Policy, including the encouragement of the provision of housing for seniors and people with a disability. Clause 2(2) described the means by which the Policy achieved those aims.

61 As in a statute, the statement of objects in the Policy provided an expression of the purpose or purposes underlying the Policy and may also help to resolve any uncertainty or ambiguity in the operative provisions: see Pearce D C and Geddes R S, *Statutory Interpretation in Australia* (2006, 6th ed) at [4.42]; and *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 75 and 78 (Cole JA). In *Rosemount*, Cole JA further accepted that "the objects clause does not control clear statutory language". However, the line between uncertainty or ambiguity and clear meaning is often difficult to draw and it is often unhelpful to try. A preferable approach is to use an objects clause as part of the statutory context in construing the operative provisions. That is likely to provide a more nuanced approach, providing a factor to be weighed in the balance: see, eg, *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 at 568 (Black CJ), noting that "reference to the objects of the Act points against the expansive interpretation of the power ...".

62 In the present case, the question remains whether cl 17 had the effect of "setting aside local planning controls that would prevent the development of housing for seniors or people with a disability" in all circumstances, or only in the circumstances which the Policy addressed. Given that key provisions in the Policy (such as cll 30 and 78) identified prohibitions on the grant of consent, the objects clause provides little assistance in giving an expansive interpretation of this kind to cl 17, which is not otherwise supported by the Policy read as a whole. The object of the Policy is not in doubt, nor are the mechanisms by which the objects were to be achieved. That conclusion may properly be reached by reference to cl 2; otherwise the clause takes the matter no further.

63 Once it is concluded that, in general terms, the Policy does not provide an exclusive set of criteria for consideration by the Council in considering the development application, there remains the possibility that some specific provision in SEPP-SL is inconsistent with cl 8(1) of the TLEP for the purposes of cl 5(3) of the SEPP-SL. However, no such provision was identified in submissions, nor is any apparent.

64 This conclusion is consistent with *Australian Lifestyle Corporation*, handed down by the Chief Judge of the Land and Environment Court after her Honour's judgment. After noting that the Policy was effective to override a prohibition against such development in a local environmental plan, Preston CJ continued:

> "[34] However, a distinction needs to be drawn between the existence of the power and the manner of exercise of the power. The fact that SEPP (SL) enlivens the power of a consent authority to determine a development application for a seniors housing development on land to which SEPP (SL) applies does not necessitate that such a power be exercised in only one manner, namely to grant consent to the seniors housing development. The consent authority has a discretion, to be exercised in accordance with law and having regard to the merits of the particular development in the development application.

> [35] In exercising the discretionary power under s 80(1) to determine the development application, the consent authority must consider the matters of relevance to the development application in s 79C(1) of the [EP&A Act].
>
> ...
>
> [41] There are also the relevant, general matters in s 79C(1)(b), ...; s 79C(1)(c) ...; and s 79C(1)(e) ...."

65 Although Preston CJ also discussed the possible relevance of other environmental planning instruments referred to in s 79C(1)(a), that discussion has been omitted for the reasons earlier given, namely that the applicability of such instruments will depend upon the operation of the paramountcy provision.

66 Although each State environmental planning policy must be considered in its own terms, the reasoning set out above is consistent with that adopted by this Court in *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39 (Tobias JA, Spigelman CJ and Ipp JA agreeing), in relation to SEPP 21, dealing with caravan parks and related home developments. In concluding that there was no inconsistency between SEPP 21 and the relevant local environmental plan, Tobias JA noted that Jagot J had reasoned to similar effect in *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56 at [32]-[33]: *Najask* at [34].

Conclusions

67 It follows that there was no "inconsistency" between the requirement of cl 8(1) that the Council be satisfied as to the matters it identified and the terms of the Policy. The SEPP-SL did not purport to impose an exclusive code with respect to considerations relevant to the determination of the development application. (Arguably it could not have done given the terms of s 79C(1)(b)-(e).)

68 Her Honour's conclusion in this respect was erroneous and must be set aside. It being common ground that, in those circumstances, the matter must be remitted to the Land and Environment Court for determination as

to whether the Council had indeed considered and been satisfied of the matters specified in cl 8(1), that course should now be taken.

69 I would propose the following orders:

(1) Allow the appeal and set aside the judgment and orders in the Land and Environment Court.

(2) Remit the proceedings to the Land and Environment Court.

(3) Order the Second Respondent to pay the Appellant's costs of the appeal.

(4) Grant to the Second Respondent a certificate under the *Suitors' Fund Act 1951* (NSW), if not disqualified by s 6(7).

70 **YOUNG JA**: I have had the privilege of reading in draft the reasons of Basten JA. I gratefully adopt the first 29 paragraphs, [11]-[39], of his Honour's reasons in which he sets out the various planning instruments and basal facts and also his paragraphs [45], [46] and [47].

71 I have found this a very difficult matter indeed, but regret to say that after much consideration, I am unable to agree with his Honour's conclusion.

72 The basal problem is that there are two sets of planning instrument which, in any given case, actually or potentially overlap.

73 This then calls into play s 36(1) of the *EP & A Act* which, so far as relevant, provides that in the event of an inconsistency between environmental planning instruments, and unless otherwise provided, there is a general presumption that a State environmental planning policy prevails over a local environmental plan made before or after the policy.

74 I respectfully agree with Basten JA's paragraph [21] that the proper application of this statutory provision gives rise to questions including:

(a) what is an "inconsistency" and how is its existence determined?

(b) what is meant by "general presumption"?

I myself do not see the need to consider the expression "unless otherwise provided".

75 As to the second question, there is no definition of "general presumption", but it seems to me that it means rebuttable presumption rather than conclusive presumption and that the term means that unless, on a proper construction of the relevant instruments one can see some other legislative intention, in the event of an inconsistency, the State environmental planning policy prevails and a provision of a local environmental plan ceases to apply to the extent of the inconsistency.

76 As to inconsistency, I would agree with Basten JA's analysis.

77 At this point I might be permitted to make two digressions. Digression A, dealing with some of the facts of this case, and digression B dealing with some propositions which appear to be common ground between the parties.

78 As to A, the basal facts which I take from the council officer's report about the development which commences at 282 of the Blue Appeal Book, the facts are that the subject site is at the southernmost end of Hastings Point Village and is separated from other residential zoned land by Crown reserves. The application was for a three stage seniors' living development. Stage 1 would comprise the construction of independent living units, Stage 2 hostel units and Stage 3, residential care units, additional hostel units and a dining and servery area and there would be gradual winding down of the existing caravan park facility on the site.

There would be buildings of three storeys high on the site, the tallest building being Building F, part of Stage 3, which would come to a height of 10.8 metres.

79 The application provoked a considerable amount of adverse comment from persons who claimed to be affected. One of the prime matters of concern raised by objectors was the height of the building and how permitting buildings of this height in Hastings Point would affect the area generally. The TLEP in clause 16, when read with the height of buildings map, permits three storey development on the subject site.

80 On 6 July 2005, the Tweed Shire Council resolved to amend the TLEP by reducing the maximum height of buildings south of Cudgera Creek from three storeys to two storeys and the council prepared proposed amendment No 81. However, the Director General of the NSW Department of Planning, informed council on 30 March 2006, that he was withholding the issuing of authorisation with respect to amendment No 81. On 19 December 2006, council resolved to abandon pursuing amendment No 81. On 20 March 2007, the Director General provided the council with authorisation conferring the right to exhibit publicly the draft amendment. The council did so on 10 May 2007, and invited comment from the public. The council approved the development application at its general meeting on 8 May 2007 and gave notice of the determination granting approval on 14 May 2007.

81 Miss Galle, town planner, prepared her report to the council in relation to the development. She said in that report, inter alia (Blue 336):

> "The bulk and scale of the development is a controversial component of the development as a whole. Whilst the Tweed LEP stipulates that the subject site is affected by a three-storey height limit, Council has previously considered reducing the height limit to two storeys in this location. Draft LEP 81 has since been deferred for consideration in the new LEP and therefore the three-storey height limit remains in force.

> The proposed development complies with this height limit but would not be consistent with the existing one to two-storey character of the area. Given the applicable three-storey height limit it can be argued that this development is one of the first to contribute to a changed character for Hastings Point. This is topical, however, given the three-storey height limit for the purposes of this Clause the proposed development is considered satisfactory based on a changing character for Hastings Point.
>
> The proposal will add and enhance the character and amenity of the area, through the introduction of modern architecturally designed buildings ... ".

82 As to digression B, it seems to me that it was accepted by everybody that one effect of clause 17 of SEPP-SL is that any zoning restriction preventing housing for seniors or disabled persons in a particular zone of a shire is overridden.

83 Mr Greenwood SC for the appellant, submitted that is as far as the clause operated.

84 Next, Mr Greenwood acknowledged that if there is a situation where there is a "can do" under the SEPP-SL and a "can't do" under the local environmental plan, then the SEPP-SL prevails; see *DEM (Australia) Pty Ltd v Pittwater Council* [2004] NSWCA 434; 136 LGERA 187.

85 Thirdly, it is conceded that the provisions in the SEPP do not override the need to comply with s 79C of the *EP & A Act*. However, Mr McEwen SC for the second respondent made it clear that a consent authority's statutory obligation to take into consideration the provisions of any environmental planning instrument picks up only applicable environmental planning instruments. Thus, it will only pick up an LEP if it is applicable despite the SEPP.

86 Both counsel agree clause 2 of SEPP-SL is significant. It reads as follows:

> **"Aims of Policy**

(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:

(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
(b) make efficient use of existing infrastructure and services, and
(c) be of good design.

(2) These aims will be achieved by:

(a) setting aside local planning controls that would prevent the development of housing for seniors ... ".

87 Mr Greenwood says that subclause (2) is merely aspirational. He submits that it doesn't in fact set aside local planning controls and that what one must bear solidly in mind is the aim of the policy in subclause (1).

88 Whilst the submission as to subclause (2) may be correct, clause 17 of SEPP-SL and s 36 of the *EP & A Act* seem to do the work that clause 2(2) of SEPP-SL aspired to do.

89 I now turn back to my mainstream consideration of the current appeal.

90 There was discussion during oral argument as to whether the SEPP-SL was a code. I believe the upshot of this decision was that Mr Greenwood posited that the SEPP-SL was not a code, whilst Mr McEwen put that whilst it was not a complete code, it was a species of code in that it endeavoured to cover completely various aspects of the planning process. It comprehensively dealt with site analysis and design requirements, even to the extent of the minutiae of prescribing the format of letter boxes. However, there may be other aspects which were not covered by SEPP-SL.

91 Certainly, the SEPP-SL deals with certain matters in great detail. I need not go into all of these matters, but so far as height of building is concerned, there are provisions which deal with the subject. However,

they do not deal totally with the subject. Clause 38(4) of SEPP-SL deals with the height in zones where residential flat buildings are not permitted, and mandates that buildings in such zones must be 8 metres or less in height. Now that does not apply in the instant case. However, what is significant is that if a building was 10.8 metres in height, but was three storeys, then it could be approved under the TLEP, but could not be approved under the SEPP-SL and there would be a clear inconsistency.

92 Clause 79 of SEPP-SL (and 80 and 81 are in the same plight) provides that:

> "A consent authority must not refuse to consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:
>
> (a) **building height:** if all proposed buildings are 8 metres or less in height."

93 Mr Greenwood says that, properly read, that means that a consent authority may refuse consent if it finds that a building in the development application exceeds 8 metres in height. That is probably correct. However, again, if all the buildings in this development were 8 metres or less in height, could a consent authority say (now referring to TLEP clause 8(1)(c)) that the council declined to consent to a development because, taking into account factors including building height, it was not satisfied that the development "would not have an unacceptable cumulative impact on the community or locality" (I cannot get away from the triple negative!)?

94 However, I do not need to answer that question because it seems to me that Mr McEwen, in his submissions, put an unanswerable proposition. Clause 8(1)(c) of the TLEP says that the consent authority may grant consent to development *only* if it is satisfied that the development would not have an unacceptable cumulative impact on the locality etc [the italics are mine]. Cases such as *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 and *Franklins Ltd v Penrith City Council* [1999] NSWCA 134

(especially at [23]) point out the significance of the sort of phraseology used in 8(1) and that is to deprive the consenting authority of any power to issue a consent unless the precondition is satisfied.

95 Accordingly, here, we have the situation where the SEPP contains an aim in cl 2 to encourage the provision of housing that will increase the supply and diversity of residences that meet the needs of seniors and make efficient use of existing infrastructure and services. There are detailed considerations to be given, for instance, in Part 3 of Chapter 3 of SEPP-SL recite analysis, there are provisions with respect to site area, height, landscaping etc, all of which can be set at nought if a council has no power to approve the development because an assessment of cumulative impact of existing and similar proposals to the one in the application has been carried out and the result found to be acceptable.

96 Mr Greenwood says that the SEPP does not deal with cumulative impact at all; therefore, there is no inconsistency with clause 8(1)(c) of the TLEP with the SEPP. For the reasons I have just given, that, in my view, is not the correct way of looking at the matter. Whilst it would be a quite different matter if clause 8 had said that a consent authority was to take into account cumulative impact, when the clause removes the power of a council to consent to an application which complies with SEPP but which does not address cumulative impact, then, to my mind, there is an inconsistency.

97 Thus, in my view, her Honour was quite correct in saying that the failure to be satisfied under clause 8 cannot, on its own, give rise to a refusal of a development application which is for a development that is within SEPP-SL.

98 Accordingly, in my view the appeal should be dismissed with costs.

****

I Certify that this and the 29 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Basten and of the court.

Date 11 September 2009

Associate .....