Our ref: R90/0241-03 Out-19089
15 December 2010

TWEED SHIRE COUNCIL
FILE No:......................................
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Mr Mike Rayner
General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Dear Mr Rayner

Legal Assistance Ballina Shire Council

The Associations received an application for legal assistance from Ballina Shire Council regarding the matter of *SJ Connelly Pty Limited v Ballina Shire Council [2010] NSWLEC 128.*

At its meeting of 19 September 2010, the Joint Executive of the Local Government Association and the Shires Association resolved "That legal assistance be granted under the terms of the Legal Assistance Policy and Guidelines"

Facts of the matter

Ballina Shire Council has recently been the respondent in a Class 4 matter in the Land and Environment Court.

Class 4 of the Land and Environment Court deals with environmental planning and protection matters (civil enforcement and judicial review).

The question that the Court was required to answer was whether the development proposed is designated development within the meaning of the *Environmental Planning and Assessment Act 1979.*

Council argued that the development was designated development, being an extractive industry, and therefore an environmental impact statement was required and as such would not determine the development application.

The applicant contended that the development was not an extractive industry and therefore was not designated development.

The site in question was a residue allotment following compulsory acquisition of land by the RTA for construction of the Ballina Bypass.

There were 2 engineering constraints on the site. Firstly, that the road was being built on land which is subject to flood inundation and secondly the road was being constructed on land that was described as soft soil.

In the road construction process excess road material from soft soil road compaction needs to be disposed of so that the construction process can proceed.

The applicant lodged a development application with council being for the temporary stockpile of 100,000m3 of soil and rock on the residue lot.

Council received advice from their solicitors that the proposal came within the definition of extractive industry and therefore was designated development.

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The applicant did not enter into discussions with council over this matter but rather made an application to the Court to decide the issue.

Council argued that it was necessary to defend the matter as it was unclear whether the development application was for designated development and therefore council was not in a position to approve the application.

Council claims that as a result of these proceedings there is now a definitive interpretation of "extractive industry" and "industry" for the purposes of Clause 19 of Schedule 3 of the *Environmental Planning and Assessment Regulation 2000.*

Clause 19 of Schedule 3 of the EP & A Regulations requires that an extractive industry as designated development needed to be an industry that obtains extractive materials by methods including excavating, dredging, tunnelling or quarrying and that the industry is one that stores, stockpiles or processes extractive materials by methods that include washing, crushing, sawing or separating those materials.

The Court held that while the method requirements of Clause 19 appeared to be fulfilled, the activity must be an "industry" and have an industrial connotation. The word industry should therefore be taken to identify "commercial activities carried on through industrial process".

The Court held that it did not consider the preparatory works and the maintenance of static stockpiles as an industrial process and that the stockpiling on the site of preloaded soil and rock is not being undertaken in the course of a particular branch of trade or manufacture nor is it being undertaken as part of a large-scale business activity.

Although this matter was in a Court of initial jurisdiction, Council's application for legal assistance was based on the legal assistance policy requirement that this was a test case as to the definition interpretation of designated development in an industrial context and will have significant implications for all councils. They also point to the fact that they were respondent in this matter and that the applicant would not enter into dialogue with the council before instigating legal proceedings.

Council also contends that as a result of this decision, all councils can now confidently consider development applications of this nature without requiring the submission of an Environmental Impact Statement and it has the potential to significantly reduce the environmental impacts associated with the use of approved disposal areas such as landfill sites for the inappropriate disposal of clean extractive materials.

A full transcript of the matter is available via links on the Land and Environment Court website.

Ballina Shire Councils costs in this matter were $90,000 of which the first $20,000 must be borne by it.

Your Council's contribution in this matter is $906.88 although under the terms of the Associations Legal Assistance Policy and Guidelines there is no obligation on any council to contribute.

If you have any questions in regards to this matter please do not hesitate to contact the Associations Legal Officer Mr Frank Loveridge on 02 9242 4125 or frank.loveridge@lgsa.org.au.

Yours sincerely

Peter Coulton
Director, Corporate Services

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Shires Association of NSW

Tax Invoice

Invoice Number 59958

Date 15/12/10

Invoice to:
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Customer Code	Customer Reference
ZZTWEE	

Item Code	Item Description	Invoice Quantity	Per	Price	GST	Amount
BALL	Ballina Shire Cl - Legal Assistance	1		906.88	0.00	906.88

Your share of Council contributions for Ballina Shire Cls legal costs incurred in the Land & Environment Court - Environmental & Protection Matters

(please refer to attached letter for detailed information)

Attn: The General Manager

Neil Baldwin

TWEED SHIRE COUNCIL
Goods/Services charged on this [illegible] received in good condition and in accordance with
23 DEC 2010
Order No ...
Job No ___/___/___
Print Name ....
Signature ....

Terms: 30 Days Invoice Date

Total Includes GST of 0.00

Total 906.88

Payment to: LGSA NSW BSB: 062005 Account No. 00090198

Reported Decision : 174 LGERA 335

Land and Environment Court of New South Wales

CITATION :	**S J Connelly CPP Pty Ltd v Ballina Shire Council [2010] NSWLEC 128**
PARTIES :	APPLICANT S J Connelly CPP Pty Ltd RESPONDENT Ballina Shire Council
FILE NUMBER(S) :	40457 of 2010
CORAM:	Craig J
KEY ISSUES:	DEVELOPMENT APPLICATION :- stockpiling of extractive material surplus to road construction – extractive material purchased from road authority for future use by adjoining land owner – whether application in respect of designated development – not ancillary development to road construction – not “extractive industry” – Environmental Planning and Assessment Regulation 2000 (NSW), cll 19 and 37A of Sch 3 WORDS AND PHRASES:- “industry” – Environmental Planning and Assessment Regulation 2000 (NSW), cl 19 of Sch 3
LEGISLATION CITED:	Ballina Local Environmental Plan 1987 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000
CASES CITED:	Egan v Hawkesbury City Council (1993) 79 LGERA 321 Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 House of Peace Pty Ltd v Bankstown City Council [2000] NSWCA 44; (2000) 48 NSWLR 498 Miltonbrook Managements Pty Ltd v Shellharbour City Council [2004] NSWLEC 185; (2004) 134 LGERA 1 Penrith City Council v Waste Management Authority (1990) 71 LGRA 376 Residents Against Improper Development Inc v Chase Property Investments Pty Ltd [2006] NSWCA 323; (2006) 149 LGERA 360 Walker Corporation Pty Ltd v Director-General Department of Environment and Climate Change (No 2) [2009] NSWLEC 177

DATES OF HEARING: 8 July 2010

DATE OF JUDGMENT: 21 July 2010

LEGAL REPRESENTATIVES: APPLICANT
P C Tomasetti SC
SOLICITORS
McCartney Young Lawyers

RESPONDENT
C W McEwen SC with M Staunton
SOLICITORS
Maddocks Lawyers

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

CRAIG J

21 July 2010

40457 of 2010

S J CONNELLY CPP PTY LTD v BALLINA SHIRE COUNCIL

JUDGMENT

1 **HIS HONOUR**: The task of categorising development proposed in a given development application is almost always a necessary prerequisite to its determination. That task may be mandated by the terms of a planning instrument in order to determine the permissibility of the development proposed. It is a task that may also be necessary in order to determine whether there are particular statutory or regulatory requirements which attend the making of the application for consent to carry out the intended development.

2 A task of the latter kind is one which is central to the determination of these proceedings. It is one made necessary by the provisions of s 78A(8)(a) of the *Environmental Planning and Assessment Act* 1979 **(the EPA Act)** which requires that an application "in respect of designated development" be accompanied by an environmental impact statement. No such document accompanied the development application in question in these proceedings. Thus, the question

presently calling for determination is whether the development proposed is in respect of designated development, within the meaning of the EPA Act.
3 The applicant, who lodged the development application with the respondent, contends that its application should not be so categorised. The respondent Council contends to the contrary and for that reason has not determined the applicant's development application.

4 For reasons that will become apparent, the applicant has sought the urgent determination of the issue between the parties. On the motion of the applicant, expedition was granted by Sheahan J on 26 June, 2010 and this judgment is given in recognition of the need for prompt resolution of the dispute.

The subject land

5 The land which is the subject of the development application is lot 11 in Deposit Plan 1011575 **(the Site)**. It is located at the intersection of the Pacific Highway and Teven Road at West Ballina. The Site is a residue allotment following compulsory acquisition of land by the Roads and Traffic Authority (the **RTA**) for construction of a major road project known as the Ballina Bypass. The Site has an area of a little over 17 hectares and is land that has been used for cane farming.

6 The statutory land use controls applicable to the Site are those found in the *Ballina Local Environmental Plan* 1987 **(the LEP)**. By operation of the LEP, the Site is the subject of four zones, those zones being:

i. 2(a) – Living Area Zone;
ii. 9(a) – Roads (Main Roads Proposed) Zone;
iii. 1(a2) – Rural (Coastal Lands Agriculture) Zone; and
iv. 1(b) – Rural (Secondary Agricultural Land) Zone.

The development proposed by the applicant is to be carried out principally on that part of the Site which is within the 9(a) Zone, with the balance located within the 1(b) Zone. It is accepted by the Council that the development proposed by the applicant is permissible with consent in both Zones.

The Ballina Bypass road project

7 Before turning to the detail of the applicant's development application, it is necessary to say something of the Ballina Bypass road construction project. I have already adverted to the fact that the Site is a residue allotment following acquisition of land by the RTA to enable it to implement that project. The land so acquired is located to the south west and west of the Site.

8 On 22 May 2003, the then Minister for Infrastructure and Planning approved construction of the Ballina Bypass by the RTA pursuant to the provisions of Pt 5 of the EPA Act. The project involves the construction of a 12.5 km four lane dual carriageway highway that will enable motorists travelling upon one of the principal road transport routes between Sydney and Brisbane to bypass the town of Ballina. Construction of the Bypass is now underway and involves substantial road works adjoining the Site.

9 Construction of the Bypass adjoining and in the vicinity of the Site is said to be subject to two engineering constraints which are presently relevant. The first is that the road is being built on land which is subject to flood inundation. The second constraint is that the road is being constructed on soils that are described as "soft soils", thereby requiring consolidation and engineering treatment so as to make the ground suitable for constructing road embankments and ultimately taking the load of road pavement and its associated structures.

10 In order to accommodate road construction on these "soft soils", fill material is applied to these soils within the road corridor. This fill is built up to a level which is somewhere between one and two metres above the intended finished level of the base road surface. The fill is then compacted, its purpose being to consolidate the "soft soils" beneath. The extent to which this additional fill causes the land to subside is measured until the required consolidation of the "soft soils" is achieved. This process is described as "preloading". Once the required consolidation is achieved by this process, the material that remains above the design base level is removed as spoil.

11 The material used for preloading is material that has been excavated as overburden from other parts of the road corridor. It comprises rock and soil. It is this material which is the subject of the applicant's development application. The Council accepts that this material is "extractive material" within the meaning of the EPA Act.

12 Construction of the Ballina Bypass had reached the stage in about April last where the required consolidation of "soft soils" in the vicinity of the Site had been achieved and the contractor responsible for road construction was seeking to dispose of preloaded materials to enable construction to continue. These materials have no further utility in implementing the Bypass project and their prompt disposal is sought to enable road construction to continue. Delay in their disposal is said to impede progress in construction of the Ballina Bypass.

13 If the road construction contractor is unable to dispose of this material promptly to the company intending to purchase the Site and on whose behalf the development application has been made, it will be necessary for the contractor to enter contracts with others for its disposal. Thus, the applicant's need for prompt determination of the issue in these proceedings.

The development application

14 On 13 May 2010, the applicant lodged development application number DA 2010/623 with the Council (**the DA**). The development application form described the development proposed as being "temporary stockpile of 100,000 m^3 of soil and rock."

15 As I have earlier recorded, the DA was not accompanied by an environmental impact statement. It was accompanied by a statement of environmental effects prepared by the applicant which conducts a town planning consultancy. In that document, the development proposed is described in the following way:

> "**Description of Proposal**
> The RTA have "preloaded" parts of the Ballina Bypass proximate to the subject site. This preloading has now reached a stage where it must be removed. Given that the subject land is immediately adjacent to the highway project, my client has accepted an invitation to stockpile the subject material. The amount of material involved is 100,000 m^3. It is proposed to place the material in 3 stockpiles and control the material to ensure that it does not affect flood behaviour, or have an adverse impact with respect to erosion or sedimentation.
>
> It is anticipated that the stockpiling will occur over a 3 to 4 month period. The approval for the stockpiling is sought for a maximum period of 2 years only."

16 The DA was also accompanied by a construction management plan prepared by Mr Peter Williams, a consulting engineer in the employ of Newton Denny Chapelle (**the CMP**). The CMP indicates that the proposed development will involve the following:

i. the construction of haul roads from the western boundary of the Site to the three nominated stockpile areas, the soil and rock to be hauled being located within the road construction corridor immediately adjoining the Site to the west;
ii. the installation of 600 mm diameter concrete drainage pipes beneath the haul roads to facilitate drainage across the Site;
iii. the placement of geofabric cloth beneath haul roads;
iv. trucks under the control of the consortium constructing the Ballina Bypass will be used to carry the soil and rock preload material from the road works to the nominated stockpile areas;
v. subject to weather and work sequence requirements of the Bypass construction contractor, the placement of fill material on the Site is expected to occupy a period of 3 to 4 months with upwards of 3,000 m³ of material being moved to stockpiles each working day during that period, involving "approximately 200 truckloads onto the Site depending upon bulk densities of the material"; and
vi. works are to be undertaken "using conventional civil works equipment, trucks and trailers, dozers and/or excavators to push over dump material, compaction equipment and water trucks to control dust during the works."

17 The estimated cost of the project is stated on the development application form to be $1.2 million. The preload fill material to be stockpiled on the Site is being acquired from the road construction consortium at what is described as "a commercial price", being a price which is "2/3 cheaper than obtaining fill from another source" – no doubt by reason of the availability of the material immediately adjacent to the Site and therefore the very short distance involved in hauling it to the proposed stockpiles.

18 Although not part of the present development application, it is anticipated by the company on whose behalf the applicant has made the development application, that it will, in due course, seek consent to develop the Site as a highway service centre. In order to carry out development of the Site for that purpose, filling of the Site will be required. Thus, the attraction of stockpiling the preload fill as is presently proposed.

19 The total surface area of the Site to be occupied by the 3 stockpiles is about 2.3 hectares. It is acknowledged by the applicant that the Site on which these stockpiles are to be placed contains acid sulphate soil.

Designated development: the statutory provisions

20 I have earlier referred to s 78A of the EPA Act. Subsection (8) of that section relevantly provides as follows:

> "(8) A development application must be accompanied by:
> (a) if the application is in respect of designated development – an environmental impact statement prepared by or on behalf of the applicant in the form prescribed by the regulations … ".

21 Section 4 of the EPA Act provides that the expression "designated development" has the meaning given to it by s 77A. The latter section, in turn, relevantly provides that *designated development* is development declared to be such by the regulations or by an environmental planning instrument.

22 Clause 4(1) of the *Environmental Planning and Assessment Regulation* 2000 **(the**

Regulation) declares that development described in Pt 1 of Sch 3 is designated development for the purposes of the EPA Act. The parties agree that it is cl 19 of Sch 3 that is relevant to be considered for present purposes. Subclause (1) of cl 19 provides as follows:

> "19 Extractive industries
>
> (1) Extractive industries (being industries that obtain extractive materials by methods including excavating, dredging, tunnelling or quarrying or that store, stockpile or process extractive materials by methods including washing, crushing, sawing or separating):
>
> (a) that obtain or process for sale, or reuse, more than 30,000 cubic metres of extractive material per year, or
>
> (b) that disturb or will disturb a total surface area of more than 2 hectares of land by:
>
> (i) clearing or excavating, or
>
> (ii) constructing dams, ponds, drains, roads or conveyors, or
>
> (iii) storing or depositing overburden, extractive material or tailings, or
>
> (c) that are located:
>
> (i) in or within 40 metres of a natural waterbody, wetland or an environmentally sensitive area, or
>
> (ii) within 200 metres of a coastline, or
>
> (iii) in an area of contaminated soil or acid sulphate soil, or
>
> (iv) on land that slopes at more than 18 degrees to the horizontal, or
>
> (v) if involving blasting, within 1,000 metres of a residential zone or within 500 metres of a dwelling not associated with the development, or
>
> (vi) within 500 metres of the site of another extractive industry that has operated during the last 5 years."

23 Subclause (2) of cl 19 excludes nominated activities from the application of subclause (1). The parties agree that the development proposed by the applicant does not fall within the exclusions identified in subclause (2).

24 There are two further provisions of Sch 3 that need to be noticed. The first is cl 37A which relevantly provides as follows:

> "37A Ancillary development
>
> (1) Development of a kind specified in Part 1 is not designated development if:
>
> (a) it is ancillary to other development, and
>
> (b) it is not proposed to be carried out independently of that other development.
>
> (2) ..."

Clause 19 is found in Pt 1 of Sch 3 with the consequence that cl 37A applies to development of a kind specified in cl 19.

25 The second provision of Sch 3 to be noticed is cl 38. By that clause the expression "extractive material" is defined to mean, inter alia, soil and rock.

The applicant's claim

26 By its statement of claim filed on 18 June, the applicant seeks a declaration that the development which is the subject of the DA is not designated development "for the purposes of the *Ballina Local Environmental Plan* 1987". As the matter was argued, this is not, in fact, the determination which the applicant seeks. Rather, it seeks a determination that the DA is not "in respect of designated development" within the meaning of the EPA Act, with the consequence that it is not required to be accompanied by an environmental impact statement. The LEP does not declare any development which it identifies as being "designated development" (cf. s 77A EPA Act). Such a declaration pertaining to development upon the Site turns upon the operation of cl 4 of the Regulation and, in the present context, Sch 3 to the Regulation.

27 The applicant founds its claim for relief on two bases. First, it asserts that the development proposed is not one that engages the provisions of cl 19(1) of Sch 3 to the Regulation. In the alternative, it contends that even if the development proposed is determined to be of a kind identified in cl 19(1), it is nonetheless ancillary to "other development", being the Ballina Bypass road construction project, and as it is not to be carried out independently of that project, it is not designated development by dint of cl 37A of Sch 3.

Clause 19 of Sch 3: its proper interpretation

28 The determination as to whether a particular development falls within or outside a category of development identified in Sch 3 to the Regulation is not always without difficulty. As the Court of Appeal observed in *Penrith City Council v Waste Management Authority* (1990) 71 LGRA 376 at 383, the consideration called for -

> " ... will inescapably result in decisions which are partly impressionistic, upon which different minds may entertain genuine differences."

29 That observation is, with respect, apposite to the determination to be made in the present case. Questions of fact and degree are involved in assigning a particular development proposal to a category of development identified in Sch 3. When summarising a number of earlier decisions of this Court, the Court of Appeal in *Penrith* continued (at 384):

> "(b)ecause the words of the statutory definition may relate to parts only of a development as proposed, it is necessary, in performing the task of characterisation to consider the "character and extent and other features of the activities" proposed to decide whether, properly classified for legal purposes, they fit into the definition against which they are being measured. This is what Glass JA suggested in *Foodbarn Pty Ltd v Solicitor-General* (citation omitted)".

This observation was cited with apparent approval by Tobias JA, (Giles JA and McClellan CJ at CL agreeing) in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* [2006] NSWCA 323 at [142]; (2006) 149 LGERA 360 at 392. However, as is appropriate to the consideration of the provision of any legislation, primary or subordinate, the words of the particular enactment being considered and their legislative context must be the primary focus when undertaking the task of interpretation (*Walker Corporation Pty Ltd v Director-General Department of Environment and Climate Change (No 2)* [2009] NSWLEC 177 at [30]).

30 At [22] I have set out in full the provisions of cl 19(1) of Sch 3. It is accepted by the applicant that its development will have one or more of the characteristics identified in paragraph (a), (b) and (c) of the subclause. It follows that the debate between the parties is as to the proper meaning of the opening provisions of the subclause which are, in effect, those provisions which define or describe what constitutes "extractive industries" for the purpose of the clause. I say that the provision is descriptive or definitional having regard to the opening words "(e)xtractive industries (**being** industries …)". I am reinforced in that view by reason of the fact that neither the EPA Act nor the Regulation contains a definition of "extractive industries". In short, the clause is self-sufficient in defining the activity to which it is intended to relate.

31 The Council submits that the development described in the DA engages the definition or description of "extractive industries" because -

i. it is an industry
ii. which will store or stockpile extractive materials and
iii. has the characteristics identified in paragraphs (a), (b) and (c) of the subclause.

As I have earlier stated, the last of these elements (element (iii)) is conceded by the applicant.

32 The applicant disputes that its proposed development is properly categorised as an "industry" within the meaning of cl 19(1). The categorisation of the development as an "industry" is the primary issue between the parties.

33 The Council's statement of element (ii) is also challenged by the applicant as being an insufficient statement of the requirements of the clause. However, it seems to me, for reasons that will later appear, that element (ii) is very much related to the primary requirement for there to be an "industry" in order to engage the provisions of cl 19(1).

34 Neither "industries" nor "industry" are words defined in either the EPA Act or the Regulation. Both parties contend that "industry" must be given its ordinary meaning. To that end, each of them contend for the meaning of the word derived from dictionaries, albeit with a different result.

35 I heed the caution expressed by Mason P (Stein and Giles JJA agreeing) in *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44 at [25] – [30]; (2000) 48 NSWLR 498 at 504 when using dictionaries to interpret a word used in a statutory context. Nonetheless, the exercise is a useful starting point before turning to a more general consideration of the statutory context.

36 Those dictionary definitions of the word "industry" to which the parties referred were -

Macquarie Dictionary
"industry

1. a particular branch of trade or manufacture: the steel industry.
2. any large-scale business activity: the tourist industry.
3. manufacture or trade as a whole: the growth of industry in underdeveloped countries.
4. the ownership and management of companies, factories, etc.: friction between labour and industry.
5. systematic work or labour.
6. assiduous activity at any work or task: to win 3-2 showed a lot of

courage, great industry."

Shorter Oxford Dictionary
"industry

1. Diligence or assiduity in the performance of a task or effort; close and steady application to a task; exertion.
2. Systematic work or labour; habitual employment in useful work. Now esp. work in manufacturing and production; trade and manufacture collectively.
3. Intelligent working; skill, ingenuity, cleverness.
4. An application of skill, cleverness, or craft; a device; a crafty expedient.
5. A particular form or branch of productive labour; a trade, a manufacture.
6. …
7. A particular (profitable) activity; esp. diligent work devoted to the study of a particular person or other subject."

37 Upon consideration of these various definitions, the Council contends that the term "industry" requires no more than that the particular development be an activity which involves work or labour but does not have to involve any manufacturing component. It contends that, provided the activity involves an "operation" of some kind and has a "business" component, the requirement for there to be an "industry" is satisfied.

38 The applicant contends that something more than work or labour to a commercial end is required in order to engage cl 19(1). It submits that some form of process is necessary which has an "industrial" characteristic. While such an approach may involve the substitution of one concept of indeterminate character with another, for reasons that I will explain, I prefer the approach of the applicant.

39 The immediate context which informs the meaning of "industry" or "industries" is the whole of the definition or description of "extractive industries" that appears in parenthesis in the chapeau to cl 19(1). A consideration of all these words suggests to me that, in order to meet the form of development being defined or described, one needs to identify four elements, some of which may be considered in the alternative. The first, as I have already recorded, is that the activity be an "industry". Its meaning or intent as part of the definition or description is then to be understood by reference to the remaining three elements, which must also be identified in the development being contemplated. Those remaining three elements are to be considered in two "strands". The "strand" first expressed is of an industry -

i. that obtains
ii. extractive materials
iii. by methods that include excavating, dredging, tunnelling or quarrying.

40 The second "strand" of industry, and that which is relevant for present purposes, is one that -

i. stores, stockpiles or processes
ii. extractive materials
iii. by methods that include washing, crushing, sawing or separating those materials.

As will be apparent, for each "strand" there is a method identified by which extractive materials

are derived or treated. The stipulation of those methods is, so it seems to me, consistent with the need for some form of process directed to the "extractive material", which involves the intervention of machinery or equipment as a necessary element in the conduct of the activity. In short, it involves an "industrial process".

41 The Council contended that the qualifying "method" identified in the second "strand" of activities which engages the operation of cl 19(1) is only applicable to the processing of extractive material. It contends that one does not store or stockpile extractive materials by "washing, crushing, sawing or separating" those materials. On reflection, such an assertion is not self-evidently correct. It is not difficult to imagine that stored or stockpiled materials are put in place on a given site consequential upon a process of washing, crushing, sawing or separation.

42 The identification of the method by which the storing or stockpiling of extracted material is achieved as an element necessary to engage cl 19(1) serves several purposes. First, it identifies some of those activities which are often associated with the winning of extractive material from land. No doubt the addition of what I have called the second "strand" of activities as part of the definition of "extractive industries" is intended to overcome the type of factual problem considered by the Court of Appeal in *Egan v Hawkesbury City Council* (1993) 79 LGERA 321 where activities being undertaken in a quarry extended beyond the winning of extractive material. The present is really the converse of that factual situation whereby the definition or description in cl 19 is intended to capture all those activities ordinarily associated with a site upon which extractive materials are won and there processed in some fashion.

43 Secondly, and perhaps more significantly, the apparent intent of the draftsperson was to include those forms of dealing with extractive materials which had an industrial connotation. In turn, that proposition needs to be understood, having regard to the apparent legislative purpose in identifying *designated development* in Sch 3 to the Regulation. Observations as to that purpose were made by Tobias JA in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* (supra) as follows (at [183]):

> "When taken in the context of the objects of the EPA Act set forth in ss5(a)(vi) and 5(c) and in conjunction with provisions such as ss 79, 80 (9) and 98 which single out designated development for particular attention, it becomes clearly enough that the requirement for an environmental impact statement to accompany a development application "*in respect of*" designated development was intended to secure for the public good the comprehensive protection of the environment from those forms of development which by their nature, have been declared by the legislature to be likely to significantly impact thereon."

44 Considered in this context, it is understandable that the draftsperson of the Regulation would be concerned to include in the definition of "extractive industries" those activities which by their nature are likely to have a significant impact upon the environment. The relatively benign activity of carting extractive material to a place where it is stored or stockpiled without further activity or process is not intrinsically likely to have the significant environmental impact to which Tobias JA referred. Conversely, the storing or stockpiling of such material by a process of "washing, crushing, sawing or separating" or by a process of a similar kind, does have the potential for serious impact. Thus, so it seems to me, the draftsperson was deliberate in qualifying storage or stockpiling by reference to the methods identified in the definitional provision of cl 19(1). None of those processes are intended by the development which is the subject of the DA.

45 The broader context of Sch 3 to the Regulation further speaks against the contention of the Council that an activity involving work or labour is all that is required in order to engage the definitional provision of cl 19(1) when considering the stockpiling or storing of extractive material. The word "industries" is used throughout Sch 3 to describe particular activities to which the Schedule applies. Some of those are "agricultural produce industries" (cl 1); "bitumen pre-mix and hot-mix industries" (cl 5); "ceramic and glass industries" (cl 8) and "livestock processing industries" (cl 22). In each of those examples, the activity to which the clause relates is defined in the same way as is the case for "extractive industries", that is, after the particular industry is stated it is defined or described by words in parentheses commencing with the words "being industries ...". In each case the definitional provision identifies that the activity involves a process which, in ordinary parlance, would be considered as having an industrial character. Importantly, the process would, in each case, intrinsically have a characteristic which would be likely to have a significant impact upon the environment.

46 By way of contrast, there are various activities identified in Sch 3 which have different descriptors. Some are described as "works" (cll 7, 14, 15, 16, 20, 24, 27, 34). By way of further contradistinction, cl 9 identifies "chemical industries or works".

47 A further distinction that the draftsperson has drawn when identifying activities that are the subject of Sch 3 is by the use of the word "facilities". These include "aircraft facilities" (cl 2); "chemical storage facilities" (cl 10); "marinas or other related land and water shoreline facilities" (cl 23) and "shipping facilities" (cl 30).

48 It must be assumed that when these various descriptors of activities were included in Sch 3, it was intended that a distinction be drawn among them. While the words "works" and "facilities" are not defined, it is clear from the various descriptions used in Sch 3 that both are apt to describe activities in a way that comprehend activities more generally than does the word "industries". A "facility" for the storage or stockpiling of extractive material or "works" involving the storing and stockpiling of extractive material would more readily accommodate that which the applicant's DA intends than does its description as an "industry" that undertakes the process in the manner described in the chapeau to cl 19(1).

49 The meaning of "industry" as the singular of the noun "industries", in the context of cl 19(1), was the subject of consideration by Pain J in *Miltonbrook Managements Pty Ltd v Shellharbour City Council* [2004] NSWLEC 185; (2004) 134 LGERA 1. There, the development in contemplation involved the subdivision of land with related site works which included a stormwater management system. That system required the creation of a number of ponds on the land being subdivided, those ponds being created by excavation and the material so excavated being placed elsewhere on the land as fill. More than 2 hectares of that land was required to receive the fill material from those excavations. Because more than 2 hectares of land was involved in depositing the excavated material, the council in that case argued that cl 19(1) was engaged (cf. cl 19(1)(b)) and thus the development was one in respect of designated development.

50 The council argued, as does the Council in this case, that the word "industry" should, in the context of cl 19(1), be afforded a broad meaning so that it required no more than the presence of "systematic work or labour" in order that the clause be engaged. Her Honour rejected that approach. She concluded her consideration of cl 19(1) in the following way (at [32]):

> "I agree with the Applicant that industry should be interpreted as it would generally be in a town planning context so that it refers to commercial activities carried on through industrial processes."

51 Her Honour reached the conclusion so expressed by a process of reasoning that differs a little

from that which I have taken. Nonetheless, I respectfully adopt her conclusion in as much as the word “industry” should be taken to identify “commercial activities carried on through industrial processes” when used in the plural in cl 19 (1).

Does the proposed development involve a commercial activity carried on through industrial processes?

52 The Council contends that even if its submission that storing or stockpiling extractive material in a way that engages paragraphs (a), (b) or (c) is, in principle, not sufficient to fall within the chapeau to cl 19(1), the development identified in the DA and its supporting material, does involve an industrial process. Apart from identifying the volume of material involved and the area of the Site which it will occupy when stockpiled, it makes reference to those aspects of the proposed activity that I have identified in [16]. It also refers to the proposal to employ a project manager and the need for ongoing management of the stockpiles in order to prevent dust and erosion. When all these matters are taken into account, it submits that implementation of the development proposed will involve the requisite “industrial processes.”

53 It cannot be questioned that the development proposed has a commercial component. As noted in [17], the preload fill intended to be stockpiled is being purchased at a “commercial price” to the intent that it may ultimately serve the interests of the owner of the Site by providing an appropriate base upon which to develop it for a commercial purpose. However, the latter purpose is not one for which consent is sought in the present DA and is one that may never be realised.

54 Importantly, I do not consider that the development proposed in the DA is one involving the “industrial process” intended by cl 19(1). First, for reasons already discussed, it does not involve the process or method of storage or stockpiling that I have earlier discussed.

55 Second, the “industrial process” contemplated by cl 19 seems to me to require more than the carrying out of preparatory works and the maintenance of static stockpiles. An industrial process carries with it the concept of some continuity in process rather than the one-off deposition of material at a nominated location on the Site and which does not involve any form of processing of the material. It will involve concentrated and labour intensive activities over a relatively short period of time in order to move the soil and rock from the road to the Site. As the applicant submitted, those works that are involved, apart from the cartage of soil and rock, are essentially civil engineering works in preparing the Site to receive the material rather than some ongoing process of an industrial character.

56 If reference is made to the dictionary definitions which I have earlier quoted, the stockpiling on the Site of preload soil and rock is not being undertaken in the course of a particular branch of trade or manufacture nor is it being undertaken as part of a large-scale business activity.

Ancillary development?

57 In light of my determination that the development proposed in the DA is not the storage or stockpiling of extractive materials as part of an industry, it is strictly unnecessary for me to determine the applicant’s alternate argument that its development is, in any event, ancillary to the Ballina Bypass road construction project and thus the provisions of cl 37A of Sch 3 are engaged. However, lest I be wrong in my primary determination, it is appropriate that I briefly address the applicant’s submission.

58 I have set out the relevant provisions of cl 37A at [24]. As will be apparent, there are two aspects of the proposed development that must both exist before that clause is engaged. They require that the development be ancillary to another development and that the proposed

development not be carried out independently of that other development. I do not find either of these elements present in the applicant's proposed development and I would reject its submission that the clause is engaged.

59 The approval of the Minister given to the Ballina Bypass road construction project did not identify, let alone consider, the ultimate destination of surplus material from the road project. Acquisition, at a commercial price, of soil and rock from the Bypass project and stockpiling that material upon the Site in order to serve the interests of the owner of the Site, rather than the entity responsible for construction of the road, cannot, by application of ordinary principles, be regarded as ancillary to road construction. The development which is the subject of the DA serves an independent purpose which does not subserve the road construction purpose (*Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 at 161).

60 Even if I be wrong in that conclusion, the second component of cl 37A is not met. Clearly, the stockpiling of spoil from the road works is development being carried out independently of the Bypass project as a discrete commercial venture. The fact that the "extractive material" being stockpiled is sourced from the adjacent road works is irrelevant to this determination.

Conclusion

61 For the reasons that I have indicated, the DA is not in respect of designated development. The development for which consent is sought does not involve the necessary industrial process such as to engage cl 19(1) of Sch 3 to the Regulation.

62 Of course, this does not mean that the Council is without the legal capacity to assess the impact that the development contemplated by the DA will have. As with any other development application for permissible development, the provisions of s 79C of the EPA Act will need to be applied to the consideration of the DA before determining whether to grant or refuse consent pursuant to s 80.

63 In the event that I am wrong in my determination that cl 19(1) of Sch 3 is not engaged, for reasons indicated, the development proposed by the applicant is not ancillary to the Ballina Bypass road construction project and thus cl 37A of Sch 3 is not engaged.

Orders

64 In light of these reasons, I make the following orders:

1. Declare that development application numbered DA 2010/623 made by the applicant to the respondent on 13 May 2010, being an application for development consent:

    i. to use lot 11 in DP 1011575

    ii. for a maximum period of 2 years

    iii. as the site for stockpiling, in three stockpiles, 100,000 m^3 of soil and rock that has been used as preloading fill in the construction of the Ballina Bypass road construction project at West Ballina and

    iv. is proposed to be carried out in accordance with the statement of environmental effects dated 13 May 2010, prepared by the applicant, together with the construction management plan dated May 2010 (Rev

B) prepared by Newton Denny Chapelle, engineers,

is not an application in respect of designated development within the meaning of s 78A(8)(a) of the Environmental Planning and Assessment Act 1979.

2. Order that the respondent pay the applicant's costs of these proceedings unless, within 14 days from the date of this order, the applicant files a notice of motion seeking to argue the question of costs.

3. Exhibits may be returned.

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