



Land and Environment Court New South Wales

Case Title: Tweed Shire Council v Sikiric

Medium Neutral Citation: [2011] NSWLEC 240

Hearing Date(s): 30 November and 01 December 2011

Decision Date: 9 December 2011

Jurisdiction: Class 4

Before: Sheahan J

Decision:

1. Declares that the respondent is carrying on development consisting of the use of the Land described in the Schedule hereto ('the Land') for the purpose of an animal establishment within the meaning of *Tweed Local Environmental Plan 2000*, without development consent contrary to the *Tweed Local Environmental Plan 2000* and the *Environmental Planning and Assessment Act 1979* ('EPA Act').
2. Declares that the respondent has carried out development consisting of the erection of poultry sheds on the Land for the purpose of an animal establishment without development consent contrary to *Tweed Local Environmental Plan 2000* and the *EPA Act*.
3. Orders that the respondent be restrained from using the Land in the Schedule hereto for keeping poultry for the purposes of an animal establishment within the

meaning of *Tweed Local Environmental Plan 2000*, without development consent.

4. Orders that the respondent remove, or cause to be removed, all the poultry on the Land within 21 days of this order.
5. Orders that the poultry sheds on the Land be demolished within 40 days of order.
6. Orders that the respondent pay the applicant's costs and disbursements of and incidental to the proceedings as agreed or assessed.
7. Orders that all building materials used in the construction of the existing two poultry sheds on the Land including all litter beds and floors within them are not to be stored by the respondent on the Land except in an area not more than 50 metres from the southern boundary of the Land and being not less than 100m distance from of any waterbody (as defined in Schedule 3, Part 4 of the *Environmental Planning and Assessment Regulation 2000* ('*Regulation*') as measured from the waterbody in accordance with Schedule 3, Part 5, clause 47 of the *Regulation*, but substituting "*the building materials*" and "*litter beds*" for "*the boundary of the development site*" in that clause 47). All building materials are to be restrained to prevent any materials being displaced by wind.
8. All exhibits and the Council's Court Book are returned.

Catchwords:

CIVIL ENFORCEMENT: Egg farm commenced and buildings erected without

consent.

INJUNCTIONS AND DECLARATIONS:

Respondent agrees to declarations being made, ordered to remove poultry and buildings and pay Council's costs.

Legislation Cited: Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Regulation 2000
Tweed Local Environmental Plan 2000

Cases Cited: Hawkesbury Shire Council v Castles & Anor [1988] NSWLEC 53
Mitchell v Vella [1998] NSWLEC 250; (1998) 101 LGERA 333
Noble, M J & Anor v Thompson, C R & Anor, Cowra Shire Council v Thompson, C R & Anor [2006] NSWLEC 583
Rogers v Clarence Valley Council [2011] NSWLEC 134
Silva v Ku-ring-gai Council [2009] NSWLEC 1060
Tweed Shire Council v Litonia Pty Ltd & Ors [1993] NSWLEC 144

Category: Principal Judgment

Parties: Tweed Shire Council (Applicant)
Dean Sikiric (Respondent)

Representation

- Counsel: Mr J Maston (Applicant)
Mr P Trout (Respondent)

- Solicitors: Sparke Helmore (Applicant)
Solon Lawyers (Respondent)

File number(s): 40825 of 2011

JUDGMENT

Introduction

- 1 In these class 4 proceedings the applicant Council seeks declarations and orders in respect of a poultry/egg establishment it argues requires, but lacks, development consent. If the use of the land is properly characterised as "*animal establishment*", rather than as "*agriculture*", a consent is required.

- 2 Council unanimously resolved on 16 August 2011 to take civil enforcement action against Mr Sikiric, and filed the summons on 13 September. Craig J declined to grant urgent interlocutory relief on an *ex parte* basis, and the respondent gave the Council the following undertaking on 16 September, pending an early decision on the question of final relief:
 1. *that I will not cause, or permit, or allow any additional birds (poultry) from being kept, stocked, stored or held on the Land, until such time as final orders are made in these proceedings; and*
 2. *I will not construct, or cause to be constructed, any additional structures on the Land for the purpose of sheltering, protecting or housing birds (poultry), until such time as the final orders are made in these proceedings.*

- 3 The matter, therefore, came before me for urgent determination, and was heard on 30 November and 1 December.

Relief Sought or Agreed

- 4 The following final relief was sought in the summons:
 - ...
 3. *A declaration that the Respondent has carried out, or caused to be carried out, development on Lot 1 DP 881996, 576 Cudgen Road, Cudgen NSW ("the Land"), being the use of part of the Land for the purposes of an "animal establishment", without development consent.*
 4. *A declaration that the Respondent has carried out, or caused to be carried out, development on the Land, being the*

erection/construction of two (2) shed structures (approximately 50m x 6m) located adjacent to the western boundary of the Land, without development consent.

5. *An order that the Respondent, its servants and agents, cease carrying out development, being the use of part of the Land or place for the purposes of an "animal establishment", until such time as development consent is obtained for that use.*
6. *An order that all birds (poultry) are removed from the Land within 14 days.*
7. *An order that the Respondent demolish the unauthorised structures, being two shed structures (approximately 50m x 6m) located adjacent to the western boundary of the Land ("the Sheds"), if the Respondent fails to obtain a building certificate for the Sheds and development consent for their use.*
8. *An Order that the Respondent pay the applicant's costs of the proceedings.*
9. *Such further or other Order as the Court thinks fit.*

5 In Points of Claim filed on 17 October 2011, the relief sought was particularised in the following terms:

1. *A declaration that the respondent is carrying out development consisting of the use of the Land for the purpose of an animal establishment within the meaning of Tweed Local Environmental Plan 2000, without development consent contrary to the Tweed Local Environmental Plan 2000 and the Environmental Planning and Assessment Act 1979. [‘EPA Act’]*
2. *A declaration that the respondent has carried out development consisting of the erection on the Land of poultry sheds without development consent contrary to the Tweed Local Environmental Plan 2000 and the Environmental Planning and Assessment Act 1979.*
3. *An order that the respondent be restrained from using the Land for the purpose of an animal establishment without development consent.*
4. *An order that the poultry sheds on the Land be demolished and the building materials removed from the Land within 40 days of order, or such other period as the court thinks fit.*
5. *Further or other order.*
6. *An order that the respondent pay the applicant's costs of and incidental to the proceedings as agreed or assessed.*

6 In the Points of Defence filed on 29 November 2011, the respondent consented to orders 1, 2 and 3, as framed in the applicant's Points of Claim, but in addition sought orders:

- (a) that order No 3 be suspended for six months, and

- (b) that the building materials from the demolition of the poultry sheds be stored on the property and not used for any other purpose requiring consent without the approval of all competent authorities.

- 7 Discretion was not pleaded, but the respondent's submissions seek the court's exercise of discretion in his favour. He intends that the chickens will graze on the whole 10ha, that it will be appropriately fenced, and that no feed will need to be imported to the site, rendering the operation "agriculture", and not "animal establishment". He will lodge a development application (DA) by 9 December.
- 8 Competing Short Minutes of Order were put to the court at the conclusion of the hearing.
- 9 The Council now seeks final orders in these terms (emphasis mine):

The Court:

1. *Declares that the respondent is carrying on development consisting of the use of the Land described in the Schedule hereto ("the Land") for the purpose of an animal establishment within the meaning of Tweed Local Environmental Plan 2000, without development consent contrary to the Tweed Local Environmental Plan 2000 and the Environmental Planning and Assessment Act 1979 ("EPA Act").*
2. *Declares that the respondent has carried out development consisting of the erection of poultry sheds on the Land for the purpose of an animal establishment without development consent contrary to Tweed Local Environmental Plan 2000 and the EPA Act.*
3. *Orders that the respondent be restrained from using the Land in the Schedule hereto for keeping poultry for the purposes of an animal establishment within the meaning of Tweed Local Environmental Plan 2000, without development consent.*
4. *Orders that the respondent **remove**, or cause to be removed, **all the poultry on the Land within 10 days of this order.***
5. *Orders that the **poultry sheds on the Land be demolished within 40 days of order.***
6. *Orders that the respondent pay the applicant's costs and disbursements of and incidental to the proceedings as agreed or assessed.*
7. *Orders that all building materials used in the construction of the existing two poultry sheds on the Land including all litter*

beds and floors within them are not to be stored by the respondent on the Land except in an area not more than 50 metres from the southern boundary of the Land and being not less than 100m distance from of [sic] any waterbody (as defined in Schedule 3, Part 4 of the Environmental Planning and Assessment Regulation 2000 ("Regulation") as measured from the waterbody in accordance with Schedule 3, Part 5, clause 47 of the Regulation, but substituting 'the building materials' and 'litter beds' for 'the boundary of the development site' in that clause 47). All building materials are to be restrained to prevent any materials being displaced by wind.

10 The respondent seeks final orders in these terms (emphasis mine):

The Court:

1. *Declares that the respondent is carrying on development consisting of the use of the land describes [sic] in the Schedule hereto ('the Land') for the purpose of an animal establishment within the meaning of Tweed Local Environmental Plan 2000, without development consent contrary to the Tweed Local Environmental Plan 2000 and the Environmental Planning and Assessment Act 1979 ("EPA Act").*
2. *Declares that the respondent has carried out development consisting of the erection of poultry sheds on the land for the purpose of an animal establishment without development consent contrary to Tweed Local Environmental Plan 2000 and the EPA Act.*
3. *Orders that the respondent be restrained from using the land for the purposes of an animal establishment without development consent.*
4. *Order that the **Poultry** sheds requiring consent be **demolished within three months** of the date of this order.*
5. *Order that **order number 3 and 4 be suspended for the period of 6 months** from the date of this order.*
6. *Order that the building materials from the demolition of the poultry sheds be stored on the property and not used for any other purpose requiring consent without the approval of all competent authorities.*
7. *Further or other order.*

11 The emphasis added to the previous two paragraphs highlights the differences which remain between the parties. The respondent wants substantial time latitude, and to keep the birds on the land, and the Council wants more thorough and expeditious action to remedy the admitted breaches, both as to the birds and the sheds.

- 12 The schedule to each short minute describes "*the Land*" as all that piece and parcel of land at Cudgen in the local government area of Tweed, Parish of Cudgen, County of Rous, being Lot 1 DP 881996, being the whole of the land comprised in Folio Identifier 1/881996. That lot was created by a seven lot subdivision registered on 7 December 1998. Its address is 576 Cudgen Road, it is irregular in shape, and it "*surrounds*" a small lot known as 572 Cudgen Road, currently used as an auto-electrician's workshop.

The Evidence

- 13 The respondent relies on affidavits by himself, Margaret Wills, Sonia Macourt, and his expert Christopher Pratt. He also gave oral evidence. The Council relies on affidavits by Steve Bishop, Paul Jayne, Christine Ross, Denise Galle, and its expert, Garry Warnes.

The Respondent's Evidence

- 14 **Dean Sikiric** purchased the subject land, which has an area of 10.09ha, on 8 January 2009, for \$700,000. It was formerly used to farm sweet potatoes, and is zoned 1(b) "*Agricultural Protection*" under *Tweed Local Environmental Plan 2000* ('LEP'). The primary objective of the zone is "*to protect identified prime agricultural land from fragmentation and the economic pressure of competing land uses*". The subject land is so identified.
- 15 It is Mr Sikiric's intention to use the subject land to produce, on a commercial basis, free-range eggs, because that is the egg product for which there is a market demand. In November 2010, after a long history in the building industry, he purchased a free-range egg business called "*Knotsbury Farm*", which had been operating for approximately 12 years in Toowoomba.

- 16 He deposes that he had conversations with Christine Ross and David O'Connell (a town planner) at the applicant Council about his intention to use the subject land as part of the "*Knotsbury Farm*" business. Other evidence suggests that he uses a truck to transport eggs to Toowoomba, where they are cleaned and packaged, and then pick up feed for chickens on the subject land.
- 17 He says (par 7) he received positive advice from Christine Ross "*in or about March 2009*" that a DA would not be necessary, because "*poultry is permissible within agriculture and does not require a DA*". On the other hand, when he made inquiries about placement of animal shelters on the property, the planner, O'Connell, expressed the opinion that a DA may in fact be required. Sikiric was reluctant to go through a DA process requiring public notification because he "*might encounter opposition from neighbours, irrespective of whether they were affected or not*" (par 9).
- 18 David O'Connell sent him an email on 8 December 2010 (*Exhibit A* to the respondent's affidavit). He referred Mr Sikiric to some provisions of the LEP, notably the definitions of "*agriculture*" and "*animal establishment*" (to which I will return), and he commented that "*poultry farming could come under either of these definitions depending on the source of feed for the animals in question*". Agriculture is allowed without consent, but an "*animal establishment*" requires one. O'Connell also sent Sikiric details of the relevant Development Control Plan ("DCP") covering exempt and complying development.
- 19 In January 2011, Sikiric engaged Sonia Macourt, who trades as "*Parameter Designs*", and has 17 years experience as a building designer. He wished to explore raising the level of the house on the property so as to build underneath it an egg-grading room, as well as the animal shelters he proposed. He deposes (par 12):

I asked Sonia Macourt to submit a DA for the floor shelters and egg-grading room. At the same time I asked her to make enquiries

as to whether or not a DA was required for a free-range egg farm at the property because I had concerns from the comments of David O'Connell whose advice was contrary to that of Christine Ross.

- 20 He says (par 13) that he was prepared to lodge a DA if it were necessary. He had experience with the procedure from his business dealing in the building industry over a period of 20 years. He says that Macourt spoke to O'Connell and other members in the town planning section of the Council, but the process did not advance because of illness in Macourt's family (par 14).
- 21 In early June 2011, his lease at Toowoomba ended, and he needed to relocate approximately 3,700 birds. Macourt told him she was having trouble getting information from the Council, but that all of her research indicated there was no reason for him not to go ahead with the relocation of the birds to the property, and the construction of the animal shelters.
- 22 He commenced the erection of the shelters on 15 June 2011, and, after Macourt consulted the Council in relation to the distances between shelters and neighbouring dwellings, Steve Bishop from the town planning department attended the property on 24 June 2011. He says that Bishop told him he had "*zero chance of having a DA approved*". Bishop told him to stop work, but he did not. The 3,700 birds were delivered in two lots (on 24 and 28 June), but, on 24 June, the Council sent Sikiric a "*show cause*" letter, seeking an explanation for commencing without consent, and pursuing demolition of the buildings. The deadline for response was 8 July, but the letter did not come to Sikiric's attention until about 6 July. (He requires Council's written contact to be via a Post Office box). When he received it, he phoned the Deputy Mayor (Barry Longland), and there were some further consultations involving Macourt, Council's Director of Planning (Vince Connell), and Longland.
- 23 On 22 July 2011, Sikiric contacted Connell and Macourt informing them both that he was seeking medical assistance on account of stress.

Macourt's assistant Lisa Dent emailed Connell, confirming that Sikiric was "extremely unwell (stress related)", and would reply to the letter of 24 June as soon as possible. Connell responded that Sikiric had contacted him directly, regarding his medical condition, but that it was important for the Council to deal with the question of the unauthorised chicken farm. Council officers had received numerous phone calls in the previous 2 to 3 weeks, as well as other representations through the local state Member of Parliament. Council was concerned that it had still received no written explanation to justify the commencement of the unauthorised use, nor any commitment to lodge the required DA.

- 24 Later that afternoon Bishop and O'Connell attended the property, and Bishop and Sikiric had what Sikiric describes as "an altercation". After the altercation, Mr Sikiric attended upon his GP (Dr Frank Wyton) and was prescribed anti-depressants. (There is no medical evidence before the court).
- 25 On 16 August 2011, Mr Sikiric approached his immediate neighbour (at No 572), auto electrician Ray Booth, who provided him with a statement which indicated that he had no negative impact from the free-range chicken farm, and that it was a much better working environment for his business than when the subject land was a sweet potato farm.
- 26 Sikiric retained Wills, an agricultural consultant said to have expertise (unspecified) in free-range egg farming. (She says he approached her in July 2011). She began preparing a DA for Sikiric during August 2011.
- 27 However, on 16 August 2011, Council dealt with the complaints it had received, and reports prepared by its officers. On 23 August Council wrote to Sikiric (copy in *Exhibit C5*), seeking an undertaking by 31 August.
- 28 Sikiric replied on 31 August, and put the proposition (item 3) that "*due to the portable nature of the animal shelters, the fact that the birds are accredited free range, and therefore derive a significant part of dietary*

requirements produced on the property, that [sic] the property is not an "animal establishment" and therefore not required to have consent".

- 29 The letter indicated that Sikiric relied upon various policy documents and guidelines, emanating from Queensland and the Australian Egg Corporation, but that he was not aware of a NSW document specifying a minimum distance of 500m as a buffer for poultry enterprises. The letter expressed the view that the NSW document "*is possibly out-dated and fails to represent free range production methods*".
- 30 He described being still affected by "*ongoing illness*", which meant that he had "*a representative of the QEFA [the Queensland Egg Farmers Association] lobby*" Council members to get an extension of time to lodge a DA. He asked for a written ruling as to why the property required a DA, whereupon he would address the issue by lodging one.
- 31 His affidavit goes on to indicate the following (pars 33-49):
- He spent approximately \$20,000 each on the two sheds.
 - The Toowoomba operation having closed down, the Cudgen site is the "*sole base*" of his business.
 - He derives all of his income from the Cudgen operation.
 - The Cudgen operation produces 16,000 eggs per week, and he sources an additional 34,000 from a farm in Toowoomba.
 - He would like to expand the number of birds on the property from 3,700 to 10,000, which he believes "*is still a relatively small number for the size of the property*". (In some conversations referred to in the evidence he indicated a target flock of 12,000).
 - The Council is prejudiced against his interests, and has been heavy handed, has acted in a hostile manner, and has shown bias. It has made no serious effort to mediate.

- He understands that all free range egg farms import food stuffs to supplement natural food sources, regardless of the number of birds.
- The animal shelters can be easily relocated to a distance at least 200m from the nearest dwellings and would then be approximately 200m from the nearest waterbodies.
- He refutes allegations of amenity impacts. The peak laying times are between 8am and 10am and the birds are quiet at other times.
- His town planning advice is that he has reasonable prospects of obtaining approval.
- The Council should take into consideration "*the negligent advice given to me by its own staff members*".
- He believes he should be given "*a couple of months grace*" to lodge a DA rather than be forced to shut down the farm. He told the court that Wills will draft the DA and sent it to Pratt, hopefully to be lodged by 9 December 2011.

32 **Margaret Wills** did not comply with the Expert Witness protocols, but the court allowed her lay opinions. She deposes that she operates as a consultant in environmental management of egg farms in Queensland. After being approached during July 2011, she visited the Sikiric property, and assessed the environmental impacts in accordance with the "*ISO 14001 principles*" (of which the court has no details). She can see no reason the project should not obtain approval from the Council. When alerted by the respondent that the media had told him that the Council had the matter on its agenda for 16 August, she contacted Connell, and he referred her to the applicant's solicitors. Connell acknowledged that he was on notice that the respondent was ill. She learned on 17 August 2011 that Council had unanimously resolved on 16 August to take action to stop the operation. She understood that decision to mean that no further action could be taken by the respondent in relation to seeking development approval, but, on 16 September 2011, at the request of the respondent, she telephoned the Council's solicitors to discuss possible options for

progressing the matter. She says Mr Jayne told her he would prefer to discuss the matter with a solicitor acting for the respondent.

- 33 **Sonia Macourt** deposes to having worked with Sikiric on previous projects, including from 17 August 2009 on the possibility of completing a two-storey residence at 576 Cudgen Road. On 1 July 2010, he consulted her about the possibility of lifting the existing residence to provide storage to the lower level and possible (egg) grading facilities. Her engagement was formalised in January 2011, and she commenced a design concept in March 2011. Preliminary concept plans were provided to the respondent on 20 April 2011. She had discussions with David O'Connell regarding setbacks (par 13), but he gave her no indication there had been any other DAs in respect of adjoining properties. She believed "*our setbacks*" would "*meet the requirements*".
- 34 On 8 June 2011, Macourt emailed a Council planner (Lydia Reading) to arrange a meeting to discuss the proposed development. By 15 June 2011 she had not heard back, but the respondent had commenced work. She immediately had discussions with Ross, Marnie Jeffery, and Bishop from the Council. "*It was made very clear to me not to lodge a DA for the respondent's proposed development of a free range egg farm as the applicant would not approve it as it was 'intensive'*". The respondent would need to comply with "*Living and Working in Rural Areas*", a guideline document of the NSW Department of Primary Industries. She then checked with the Department at Maitland the requirements for free range egg farming.
- 35 On 12 July 2011, she met at the property with the respondent and the Deputy Mayor. A subsequent meeting was arranged with Connell and Lindsay McGavin (Manager of Planning at the Council). That meeting occurred on 13 July. Council officers confirmed that any application would be assessed on its merits. Macourt and the respondent spoke about getting "*a DA in motion*", and the respondent made contact with Wills. Macourt then drafted a letter for the respondent to send to Connell, but the

letter was never finalised. Two days later, she was informed of Sikiric's medical condition, and emailed Connell to inform him.

- 36 On 21 September 2011, Margaret Wills forwarded to Macourt by email a copy of "*Environmental Management System for Knotsbury Farm*" (not before the court).

The Council's Evidence

- 37 **Steve Bishop** received complaints on 22 and 23 June 2011 that chicken sheds were being erected on the land. He deposes to his understanding of the zoning provisions and definitions, and to his inspection on 24 June 2011 (with compliance officer Colin Richardson). He warned the respondent that he needed consent for a poultry farm. The respondent told him that he intended to build another four sheds to accommodate additional birds.
- 38 He annexes a filenote indicating that Sikiric was "*known to Council officers in regard to a range of other complaints*". He notes also that he had a conversation with Macourt on 22 June – she wanted some material on separation distances. He gave her a copy of the "*Living and Working in Rural Areas*" guideline, which recommended a buffer of 500m. He warned her it was highly unlikely the DA would receive favourable consideration as the nearest house appeared to be only 120m away. They discussed environmental impacts and he suggested that the property was too small for the proposed use, and its scale of operation. Fellow officers "*Marnie*" and "*Christine*" were present and could confirm his advice to Macourt that the DA would most likely be refused.
- 39 During his inspection on 24 June (with Richardson), Bishop estimated that there could be as many as 11 houses within a 500m radius of the sheds. The sheds are approximately 140m from the nearest neighbouring dwelling at 542 Cudgen Road (par 7). He issued a verbal "*stop work*" direction, followed up by letter, but the work continued.

- 40 He deposes that the Council decision on 16 August 2011 was based upon the unauthorised use of the land as an "*animal establishment*", and he annexes a copy of the Council report to the meeting. Council contends that both the use and the buildings require consent, and, despite prior verbal and written advice from Council officers that a consent may be required, the owner of 576 established the unauthorised poultry farm, the initial stages of which unauthorised use created significant concerns for nearby owners.
- 41 The report submitted to Council gave details of the discussions with Sikiric since 8 December 2010, but the reporting officers could find no record of any conversations on the telephone or at the planning counter to confirm the contentions in his evidence. His consultant (Macourt) was advised on 22 June 2011 that a buffer of 500m would be required, and that the farm was too small for the venture. Council officers complained that the work on the shed started before Council had met with Macourt. The sheds are approximately three times the size permissible as exempt development.
- 42 The report also gave some summary details of neighbourhood complaints. The local residents had their own meeting on 27 July 2011 to discuss common concerns, and Mr Sikiric declined to attend.
- 43 The report confirms what Sikiric was told on 13 July 2011, that he should respond to the "*show cause*" and submit a DA. These directives were repeated on 22 July 2011. As at 16 August 2011 he had not responded to the "*show cause*" letter despite two deadlines.
- 44 Council solicitor **Paul Jayne** deposes to sending the letter of demand, dated 23 August 2011 (*Exhibit C5*). It sought an undertaking and threatened proceedings. It also enclosed a copy of the Council's letter to Sikiric dated 24 June 2011 signed by Bishop, following the inspection that morning, confirming the verbal advice regarding a 500m buffer and the unlikelihood of approval being granted. It reiterated the order to cease

work until the matter was resolved, and prohibition on further deliveries of chickens. In a telephone conversation with Mr Jayne on 9 September 2011, Sikiric denied that his poultry farm was "unauthorised". "I went to the Council and asked Christine Rose (sic) who said that I didn't need development consent". He further stated that "they are not buildings – just canvas shelters".

45 The summons was filed on 13 September 2011.

46 On 14 September 2011, Sikiric phoned Jayne, and told him that he had no more chickens, and could not afford to bring any more on to the land for at least two years. He indicated he wanted to get the DA in, but was not sure how. He was critical of the neighbours. He indicated he would agree not to construct more sheds until the matter was resolved. Jayne suggested that he contact a lawyer and he indicated he had a further meeting set up with Connell and the Mayor "about another matter" a few days later.

47 On 15 September 2011, he rang Jayne again, and said that he wanted Wills to deal with the matter. "She is the best person in Queensland to get DAs through". On that same day, the summons, the Sparke Helmore letter of that date, and the affidavits of Bishop and Jayne were sent to Sikiric's nominated Post Office box.

48 On 16 September 2011, Wills telephoned Jayne and introduced herself as being from the Queensland Egg Farmers Association and representing Dean Sikiric. She was told that they could lodge a DA and SEE "any time you like", and wanted to put in a DA that complied with Council's requirements. On that same date, Jayne received the signed undertaking forwarded to Sikiric on 15 September. On 22 September 2011, Jayne confirmed to Sikiric that he would not now be pursuing interlocutory orders. Jayne made clear that he was happy to discuss the DA with Wills, but not the legal proceedings.

- 49 **Denise Galle** is a town planner, and coordinator of development assessment at the Council. She checked all the Council's systems. There were consents unrelated to the present use, granted in November and December 1989, and on 1 September 1995. At the time of purchase, the Sikiric land had approval only for a rural workers dwelling and some subsequent alterations. There were no development consents, approvals or permits for sheds/shelters. Relevant documents are attached to her affidavit.
- 50 **Christine Ross** is a Building and Environmental Health Technical Officer with Council, but has worked in the Development Assessment Unit of Council since 1 September 2003. In the course of her employment she handles inquiries at the front counter, and provides answers on simple zoning and constraint issues.
- 51 She specifically recalls attending upon Dean Sikiric on two occasions, but does not recall talking to him in March 2009 about establishing a free range egg farm. She would have handled any such inquiry in accordance with her usual practice. Some time in 2009 he approached her at the counter and asked about drums on an adjoining property, and she also took a phone call from him on 23 August 2011, in which he asked her if she remembered advising him about running poultry on his property. She advised him, and now deposes, that she did not, and does not, remember having that conversation, but she produced an "*Information Request Record*" dated 8 October 2009. Sikiric would have handed the form to her, but she does not recall talking to him at that time. If she did have the conversation, she would have advised only the requirements of the LEP, and relevant contents of the State Environmental Planning Policy, in respect of exempt or complying development, and would have given him extracts of those documents. She suggested that he may have mixed her up with someone else from the planning department.
- 52 She also recalled having a discussion with Macourt and getting Jeffrey to speak to her. Macourt was chasing up an inquiry she made to Council

technical officers. Bishop was also involved. Ross listened to the conversation, but cannot specifically recall the details, other than that Bishop said that getting approval would be difficult. Sikiric said that the only people he had spoken to previously were Lydia Reading and Ross herself. He indicated to Ross that he would be telling the media that she had advised him he could keep poultry on his "agricultural protection" land. She had no recollection of an earlier conversation, and wanted to transfer his call to Connell.

Complaint Evidence

- 53 Local complaints commenced on 20 June and continued into August 2011. As they were summarised in the Council report of 16 August 2011, annexed to Bishop's affidavit, and so served on Sikiric with the original summons, I allowed them to be tendered at the hearing (*Exhibit C3*). Mr Trout, counsel for Mr Sikiric, also tendered (*Exhibit R2*) a letter dated 30 November 2011 from one couple whose complaint is in *Exhibit C3*, indicating that they had had only one "bad day" when the chicken sheds were erected. The cause had been explained to them by Dean Sikiric, and their problem had been resolved.

The town planning evidence

- 54 The LEP defines the key terms of relevance to this matter as follows:

Agriculture includes horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees, and the growing of fruit, vegetables and the like. It does not include forestry, or the use of an animal establishment or a retail plant nursery.

Animal establishment a building or place used for any one or more of the purposes of intensive animal husbandry, or the boarding, training or the keeping of animals, birds, fish, crustaceans, insects or the like, generally requiring the importation of feed from outside the land on which the establishment is conducted.

- 55 The Council relies upon the expert testimony of **Garry Keith Warnes**, a town planner with Synergy Environmental Planning Pty Ltd.
- 56 He identified from scalable aerial photographs that the poultry sheds were 500m² and 600m² in area, and the enclosed "*pens*" associated with them were approximately 120m x 90m (1.08ha) and 100m x 100m (1ha), located within 100m of what he opined to be a natural waterbody, and within 150m of the dwelling at 542 Cudgen Road, not associated with the development. He reached his conclusions on the issues of noise and odour on the basis not only of the objections received and reviewed by the Council – he personally heard noise and smelled odour while on site, and concluded that the development was likely to "*significantly affect the amenity of the neighbourhood by reason of noise, odour, and dust*".
- 57 He also opines that the development on the subject site satisfies the definitional criteria of "*designated development*", as set out in cl 21(4) of schedule 3 of the *Environmental Planning and Assessment Regulation 2000* ('*Regulation*'). The court notes that the provisions of *Regulation 21(4)* are **in the alternative**, and can, therefore, affect bird numbers lower than 250,000, viz:
- (4) *Poultry farms for the commercial production of birds (such as domestic fowls, turkeys, ducks, geese, game birds and emus), whether as meat birds, layers or breeders and whether as free range or shedded birds:*
 - (a) *that accommodate more than 250,000 birds, or*
 - (b) *that are located:*
 - (i) *within 100 metres of a natural waterbody or wetland, or*
 - (ii) *within a drinking water catchment, or*
 - (iii) *within 500 metres of another poultry farm, or*
 - (iv) *within 500 metres of a residential zone or 150 metres of a dwelling not associated with the development and, in the opinion of the consent authority, having regard to topography and local meteorological conditions, are likely to significantly affect the amenity of the neighbourhood by reason of noise, odour, dust, lights, traffic or waste.*
- 58 The *Regulation* defines "*waterbody*" as follows:

- (a) *a natural waterbody, including:*

- (i) a lake or lagoon either naturally formed or artificially modified, or
 - (ii) a river or stream, whether perennial or intermittent, flowing in a natural channel with an established bed or in a natural channel artificially modifying the course of the stream, or
 - (iii) tidal waters including any bay, estuary or inlet, or
- (b) an artificial waterbody, including any constructed waterway, canal, inlet, bay, channel, dam, pond or lake, but does not include a dry detention basin or other stormwater management construction that is only intended to hold water intermittently.

- 59 Warnes concluded that the development would be for the purposes of “*animal establishment*” under the LEP, and “*designated development*” pursuant to s 77A of EPA Act. As designated development, it cannot be “*exempt*” for the purposes of the relevant 2008 State Environmental Planning Policy, cl 1.16.
- 60 He observed, during his inspection of the operation, poultry feed devices and equipment designed to fill them, in the sheds; fowls feeding from the feed trailer; and another feeding device outside the sheds. He also noted that the available land had been effectively stripped of most groundcover vegetation, severely reducing the natural source of food for chickens. The poultry on site are fed by both natural grazing/foraging and by imported feed, but Warnes opines that “*given the extent of overgrazing of the chicken pens ... the majority of the sustenance for the poultry must be provided by the import of feed*”.
- 61 “*Agriculture*” and “*animal establishment*” are mutually exclusive. As Sikiric imports almost 4 tonnes of feed per week, the use of land meets the requirements of “*animal establishment*”.
- 62 Mr Sikiric relies upon the expert testimony of **Christopher Robert Pratt**, a land use planner, and principal of Planning Resolutions. He opines (par 24) that there is a reasonable prospect for gaining development consent for a free range farm on the land.

- 63 He also opines that the hens “*have extensive access to vegetation, but seem to prefer the fresh green shoots close to the sheds*”, but he agrees with Warnes that the development is “*animal establishment*” under the LEP – intensive husbandry relying on imported feed. As a result, the sheds required prior development consent. However, the use also involves extensive grazing areas outside the pens, and they fall within the definition of “*agriculture*”.
- 64 Pratt also agrees with Warnes that the sheds stand within 150m of the dwelling house on the adjoining land (approximately 125m), and says they should be moved if approval is to be obtained. He discounts any question of dust impact, and opines that the only matters that would require detailed assessment would be noise and odour. The *Regulation* requires that any amenity impact must “*significantly affect*” the neighbourhood, and Pratt relies upon the small number of birds relative to the 250,000 specified in the *Regulation*. He opines (in par 19) that the complaints of the neighbours are not sufficient for the Council to conclude that the noise and smell would be having a “*significant affect [sic]*”. As a prime agricultural area, there are many noises and smells, but people are sensitive to any new noise and smell in their environment. He also noted that the property is very close to the jet flight path for Gold Coast airport. He recommends that the significance of noise and odour generated by the development should be assessed by a suitably qualified environmental scientist.
- 65 He opines that the sheds are more than 100m from the dam, which is an artificial or constructed waterbody within the Schedule 3 definition, and not a natural waterbody or wetland.
- 66 Neither expert was required for cross-examination, but the court received an **affidavit in reply** from Warnes, to which no objection was made.
- 67 **Warnes** opined that no part of the enclosed area of the site which includes the free range area of the land can be described or defined as anything other than “*animal establishment*”. He says (in par 9):

I understand that whilst some component of the poultry farm conducted on the site involves foraging or grazing by the poultry this component of the development does not allow for it to be separately defined insofar as definitions within Environmental Planning Instruments are to be read such that development is categorised by its more detailed definition ahead of a more generalised definition and that a use is defined as being for a primary purpose or use unless its components are such that they are distinct and separate purposes. This is not the case in this matter.

- 68 Warnes also adhered to his view that noise, odour and dust are all issues with the development, and are likely to significantly affect the amenity of nearby residents. He and Pratt had similar on-site experiences, but Warnes relied also on the local complaints, and Pratt did not. Warnes said (par 15):

As these residents are located in proximity to the development on a regular and continuing basis their submissions that the development is impacting adversely on their amenity by way of noise, dust and odour is available evidence.

- 69 As he noted (in par 22), the impact issues are *"all factors that could not be readily or easily assessed by Mr Pratt or me in the time we had at the site, but the residents are another matter in that they have been subject to the impacts from the operation of the farm since it commenced operations on the site in June 2011 ..."*.

- 70 On Pratt's suggestion that an assessment is required by a suitably qualified environmental scientist, Warnes defended their right as planning experts to express an opinion. He noted a number of guidelines exist, providing a comprehensive framework for the establishment, siting and operational environmental management of poultry farms, and he relied on those guidelines. They envisage a formal application, accompanied by scientific modelling. He discussed them in detail, noted that they identify odour as the largest source of complaint, and opined (at par 25) that, in the present case, dust and odour would be aggravated by the small area in which the chickens are confined within the larger paddock enclosure.

- 71 The buffer distances are inadequate, and Pratt should not be so dismissive of the complaints of neighbours. Likely impacts would be properly assessed in the development approval process.
- 72 Warnes correctly points out the error Pratt makes by relying only on bird numbers on the question of classification as "*designated development*", because, to use the words of cl 21(4), the current project fits within the following (emphasis added):

Poultry farms for the commercial production of birds (such as domestic fowls ...) whether as meat birds layers or breeders and whether as free range or shedded birds:

- (a) *that accommodate more than 250,000 birds or*
- (b) *are located*
 - (i) *within 100m of a natural waterbody or wetland, or*
 - ...
 - (iv) *within 500m of a residential zone or 150m of a dwelling not associated with the development and, in the opinion of the consent authority, having regard to topography and local meteorological conditions, are likely to significantly affect the amenity of the neighbourhood by reason of noise, odour, dust, lights, traffic or waste".*

- 73 The *Regulation* relevantly defines "*waterbody*" as "*a natural waterbody, including ... a river or stream, whether perennial or intermittent, flowing in a natural channel ...*", and Warnes opines that such features are clear in the aerial photos of the subject site, and the maps of the area (par 35 and *Exhibit C7*).

- 74 Warnes remained of the view that the impacts are significant, and that Pratt was not correct in asserting a reasonable prospect of consent.

Consideration

- 75 The aerial photographs (*Exhibits C1 and C2*) depict the subject site in a largely agricultural setting featuring relatively sparse urban development.

Nos 542 and 572 can be identified. Larger urban settlements are seen to the east and north-east, but the distances are not stipulated. The proximity of the alleged waterbodies to the sheds is clearly apparent. The difference between the appearance of the “pens” around the sheds and that of the balance of the subject land is also clear.

- 76 The configuration of water features on the land meets the test of “waterbody” in the *Regulation*. See *Mitchell v Vella* [1998] NSWLEC 250; (1998) 101 LGERA 333, at 344–348, the authorities there cited, and *Silva v Ku-ring-gai Council* [2009] NSWLEC 1060, at [12]ff.
- 77 It is also now known (from *Exhibit C8*) that Council granted during October, to Mr and Mrs Kelly, consent for the construction of a dwelling, shed, swimming pool and gazebo at No 572 Cudgen Road, Cudgen.
- 78 The current use is properly classified as “*animal establishment*”, in terms of both the unauthorised sheds and the intensive animal husbandry. It is not possible to do as the respondent submitted, namely regard that use of the 2ha for intensive egg farming as severable from the use of the balance of the 10ha as “*agriculture*”. The dominant use of the whole is as “*animal establishment*”, and the two uses are mutually exclusive. The focus of the respondent’s endeavours is the intensive production of eggs, and he says it is his only source of income.
- 79 The use, in both its aspects, therefore, requires consent under the LEP, and the preferable expert evidence, that of Warnes, indicates that it should, and probably will, be classified as “*designated development*”, with its possible impacts assessed accordingly (probably with the benefit of an environmental impact statement).
- 80 The “*agriculture*”/“*animal establishment*” dichotomy is not uncommon in planning instruments, and the parties referred the court to several relevant decision, all of which, including those upon which the respondent relied, support the conclusion to which I have come on the individual facts of the

present case, in the circumstances of intensity greater than normal grazing etc, and the importation of feed. The cases do not place any emphasis on elements of "commerciality". See *Hawkesbury Shire Council v Castles & Anor* [1988] NSWLEC 53; *Tweed Shire Council v Litonia Pty Ltd & Ors* [1993] NSWLEC 144; *Noble, M J & Anor v Thompson, C R & Anor, Cowra Shire Council v Thompson, C R & Anor* [2006] NSWLEC 583; and *Rogers v Clarence Valley Council* [2011] NSWLEC 134.

- 81 In fashioning the appropriate relief, given the respondent's concessions, the court must look at the circumstances in which the respondent finds himself, even though any hardship occasioned to him must be balanced against the need to defend the integrity of the planning system.
- 82 The respondent simply cannot ignore or explain away his failure to take the advice, proffered by O'Connell on 8 December 2010, that consent would likely be required for at least part of his proposal.
- 83 One would have expected him to formulate some masterplan for his project, or at least seek early legal or town planning advice, but his instructions to Macourt (a designer) shortly after were very limited in scope, and Wills is an egg industry expert.
- 84 He placed excessive weight on what he says Ross (a junior Council staff member) told him before he consulted O'Connell (a qualified planner). Ross's sworn and quite specific evidence denying the alleged conversations was not challenged.
- 85 He actively pursued his commercial objectives and was inattentive to the question of regularising his planning situation.
- 86 He says he asked Macourt in January 2011 to clarify the DA question, and he has been promising to lodge a DA since June 2011, when he ignored both Council's "stop work" order, and its request for an explanation for his doing unauthorised work.

87 However, his representatives wrongly assumed that enforcement action precluded pursuit of a DA. A DA has still not been finally drafted, and his suggested orders will continue to avoid or circumvent the assessment process. He did not consult a planner until October 2011, when he engaged Pratt.

88 I am prepared to make some allowance for the respondent's depression, but obvious errors and inconsistencies in his evidence caused me concern. He admitted to only limited knowledge of relevant guidelines etc. He says he pressed on with the construction of the sheds on "*animal welfare*" grounds, but now asks the court to sanction their demolition and allow the chickens to graze the subject land in inadequate conditions and with possibly inadequate food.

Conclusion and Orders

89 I have concluded that both the sheds and the birds should be quickly removed from the subject land, pending a DA being properly assessed to see if a consent can or will be granted for the respondent's project.

90 On the respondent's own evidence regarding the chickens and their laying life, there should be a market for them, if he cannot find alternative, but authorised, accommodation.

91 I decline to suspend the operation of the orders Council has proposed, but I am prepared to allow 21 days, rather than 10, for the removal of the birds.

92 As the Council has been entirely successful in its claims for relief, the respondent should pay its costs.

93 Accordingly the orders of the court are:

94 The court:

1. Declares that the respondent is carrying on development consisting of the use of the Land described in the Schedule hereto ('the Land') for the purpose of an animal establishment within the meaning of *Tweed Local Environmental Plan 2000*, without development consent contrary to the *Tweed Local Environmental Plan 2000* and the *Environmental Planning and Assessment Act 1979* ('EPA Act').
2. Declares that the respondent has carried out development consisting of the erection of poultry sheds on the Land for the purpose of an animal establishment without development consent contrary to *Tweed Local Environmental Plan 2000* and the *EPA Act*.
3. Orders that the respondent be restrained from using the Land in the Schedule hereto for keeping poultry for the purposes of an animal establishment within the meaning of *Tweed Local Environmental Plan 2000*, without development consent.
4. Orders that the respondent remove, or cause to be removed, all the poultry on the Land within 21 days of this order.
5. Orders that the poultry sheds on the Land be demolished within 40 days of order.
6. Orders that the respondent pay the applicant's costs and disbursements of and incidental to the proceedings as agreed or assessed.
7. Orders that all building materials used in the construction of the existing two poultry sheds on the Land including all litter beds and floors within them are not to be stored by the respondent on the Land except in an area not more than 50 metres from the southern boundary of the Land and being not

less than 100m distance from of any waterbody (as defined in Schedule 3, Part 4 of the *Environmental Planning and Assessment Regulation 2000* ('*Regulation*') as measured from the waterbody in accordance with Schedule 3, Part 5, clause 47 of the *Regulation*, but substituting "*the building materials*" and "*litter beds*" for "*the boundary of the development site*" in that clause 47). All building materials are to be restrained to prevent any materials being displaced by wind.

8. All exhibits and the Council's Court Book are returned.

The Schedule

(The Land)

All that piece or parcel of land at Cudgen in the local government area of Tweed Parish of Cudgen and County of Rous being Lot 1, DP 881996 being the whole of the land comprised in Folio Identifier 1/881996.

CERTIFY THAT THIS AND
THE 23 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE SHEAHAN


Associate

Date 9/12/2011

