



## Land and Environment Court New South Wales

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**Case Title:** Lend Lease Communities (Australia) Limited  
v Minister for Planning and Infrastructure,  
Shellharbour City Council and Wollongong  
City Council

**Medium Neutral Citation:** TBA

**Hearing Date(s):** 6 – 8 and 28 March, 5, 16 and 29 April,  
2013

**Decision Date:** 15 August, 2013

**Jurisdiction:** Class 1

**Before:** Moore SC and O'Neill C

**Decision:**

- 1) The parties are to file settled, consolidated conditions of development consent for Stage 1 of development of Calderwood reflecting the terms of this decision by 4:30 pm on Wednesday 28 August 2013;
- 2) The settled, consolidated conditions of consent are also to be lodged electronically by email, with the Court in Word format;
- 3) The matter is set down for mention before Senior Commissioner Moore at 4.15 pm on Thursday 29 August 2013;
- 4) If (1) and (2) are complied with, we will make orders in Chambers and the mention will be vacated; and
- 5) The exhibits, other than Exhibits 9, 20 and V, are returned.

**Catchwords:** MAJOR PROJECTS APPLICATION:  
quantum of local infrastructure contributions

**Legislation Cited:** Environmental Planning and Assessment  
Act 1979  
Land and Environment Court Act 1979  
Environmental Planning and Assessment

Regulation 2000  
Wollongong Local Environment Plan (West  
Dapto) 2010

Cases Cited: Stockland Development Pty Ltd v Manly  
Council [2004] NSWLEC 472  
Rose Consulting Group v Baulkham Hills  
Shire Council [2003] NSWCA 266; [2003] 58  
NSWLR 159; [2003] 129 LGERA 165

Texts Cited:

Category: Principal judgment

Parties: Lend Lease Communities (Australia) Limited  
(Applicant)  
Minister for Planning and Infrastructure  
(First Respondent)  
Shellharbour City Council (Second  
Respondent)  
Wollongong City Council (Third  
Respondent)

Representation

- Counsel: Mr P. Tomasetti SC (Applicant)  
Mr A. Galasso (First Respondent)  
Mr A. Pickles (Second and Third  
Respondents)

- Solicitors: Allens Linklaters (Applicant)  
Department of Planning and Infrastructure  
Legal Services Branch (First Respondent)  
Sparke Helmore Lawyers (Second and Third  
Respondents)

File number(s): 10492 of 2012

Publication Restriction: Nil

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## JUDGMENT

- 1 **SENIOR COMMISSIONER and COMMISSIONER:** This is an appeal pursuant to the provisions of s 75K (now repealed) of the *Environmental Planning and Assessment Act 1979* (EPA Act), by the development

proponent, Lend Lease Communities (Australia) Limited (Lend Lease), against the determination of the New South Wales Minister for Planning and Infrastructure's (the Minister) decision, via his delegate, the Planning Assessment Commission (the PAC), to refuse consent to Major Project Application No. 09\_0083 for Stage 1 of Calderwood Urban Development Project (Calderwood). As a consequence of the processes in s 75J (now repealed), Wollongong City Council and Shellharbour City Council were joined to the proceedings as the second and third respondents.

## **Issues**

- 2 The sole contention outstanding at the commencement of the hearing was the quantum of local infrastructure contributions to be imposed as a condition of consent. The contentions arising from the reasons for refusal of the proposal by the PAC have been resolved, to the satisfaction of the NSW Department of Planning and Infrastructure (DoPI), prior to the hearing. The Minister's position now is, therefore, that the proposal should be approved, subject to conditions.
- 3 Shellharbour and Wollongong City Councils, however, although not raising detailed objections of a planning nature to the Calderwood project, do say that the standard of and contribution to various road upgrades proposed by Lend Lease are inadequate. In one contested area, Lend Lease proposes no contribution. Furthermore, Shellharbour City Council now asserts a road upgrade (known as "Section 11" of Marshall Mount Road) warrants a contribution from Lend Lease when that proposition had not been raised prior to these proceedings.
- 4 Shellharbour City Council also contends that the local infrastructure contributions and works in kind facilities, proposed by Lend Lease, are inadequate to meet the demands for services and facilities anticipated by the development.

5 The Minister contends that the contest in this appeal concerning the quantum of local infrastructure contributions is primarily between Lend Lease and the two councils. The position of the Minister generally coincides with the position of Lend Lease, except for the following two items in dispute between Lend Lease and Shellharbour City Council:

- The Tripoli Way bypass of central Albion Park: The Minister and Lend Lease agree that only a two lane by-pass is required and the Minister contends that, if Lend Lease's position is not accepted, only the part of the route comprising residential frontages (approximately 900m) should be three lanes (evidence of Ms Brown, the Minister's planning expert); and
- Shellharbour City Performance Theatre: the Minister contends that it is reasonable for a monetary contribution to be levied towards the Performance Theatre, as such infrastructure is not otherwise provided as works in kind and the population of the proposal would benefit from the use of the facility.

6 The competing positions between the parties in terms of quantum of contributions is reflected in their different versions of condition E1 (Exhibit 9), which are summarised in the following table:

	Facility	APPLICANT	R1	R2 and R3
<b>Wollongong City Council</b>	Marshall Mount Road from the Calderwood site to Huntley Road and upgrading existing T-intersection	\$1,127.75	\$1,127.75	\$11,451.00
	Yallah Road upgrade	-	-	\$252.16
	<b>Wollongong City Council total</b>	<b>\$1,127.75</b>	<b>\$1,127.75</b>	<b>\$3,362.37</b>
<b>Shellharbour City Council</b>	Tripoli Way bypass from Illawarra Highway to Illawarra Highway East, complementary measures and new roundabout	\$1,164.60	\$1,257.80	\$5,207.00
	City-wide open space facilities	-	-	\$730.00
	City-wide community facilities	-	\$350.58	\$4,615.00
	s94 management	\$11.76 (1%)	\$16.24 (1%)	\$885.00
	<b>Shellharbour City Council total</b>	<b>\$1,176.24</b>	<b>\$1,624.46</b>	<b>\$11,437.00</b>
<b>TOTAL MONETARY CONTRIBUTION PER DWELLING</b>		<b>\$2,303.99</b>	<b>\$2,752.21</b>	<b>\$14,799.37</b>

## The site and its context

- 7 Calderwood comprises ~ 700 hectares and is located to the north-west of Albion Park, bounded to the south by the Illawarra Highway and to the north-west by Marshall Mount Road. Calderwood Road and North Macquarie Road pass through the Calderwood site, as do the Macquarie Rivulet and Marshall Mount Creek.
- 8 Macquarie Rivulet, a waterway draining from the Illawarra Escarpment to Lake Illawarra, is subject to periodic, significant flooding.
- 9 107 hectares of the northern portion of Calderwood is located within the Wollongong Local Government Area (LGA) and the remaining 590 hectares of Calderwood is within the Shellharbour LGA.
- 10 Another major Greenfield release area known as the West Dapto Release Area (WDRA) adjoins Calderwood to the north. The WDRA comprises an area of 4,700 hectares and is wholly within Wollongong LGA. When fully developed, the WDRA is to provide approximately 17,000 dwellings and employment land. The WDRA is divided into 5 stages and stages 1 and 2 have been zoned pursuant to the *Wollongong Local Environment Plan (West Dapto)* 2010.
- 11 The proposal that is the subject of these proceedings is a development application for Stage 1 of Calderwood. Stage 1 comprises approximately 107 hectares and is located in the south-eastern portion of the Calderwood site, on either side of the Macquarie Rivulet, to the north of the Illawarra Highway. The Stage 1 project is wholly within the Shellharbour LGA.
- 12 The land within Stage 1 is currently primarily used for a range of rural uses including low intensity farming and agistment and some dairy related structures remain on the Stage 1 site.

## Background and the proposal

### The approved Concept Plan for Calderwood Urban Development Project

- 13 The Concept Plan for Calderwood Urban Development Project (Major Project No. 09\_0082) (concept plan) and Stage 1 of Calderwood Urban Development Project (Major Project Application No. 09\_0083) were lodged concurrently with the DoPI on 1 April 2010.
- 14 The Minister approved the concept plan on 8 December 2010, pursuant to s 75O(1) (now repealed) of the EPA Act. The concept plan approval is for a development of approximately 4,800 dwellings, 50 hectares of mixed-use land, open space and land for environmental protection and associated infrastructure. The Calderwood project envisages a capital investment of \$410 million over its life.
- 15 The terms of approval of the concept plan includes, at *Part B – Modifications to the Concept Plan*, the following in relation to the Albion Park By-pass/Tripoli Way Extension:
- B4 Albion Park Bypass/Tripoli Way Extension report (Appendix F in the PPR) and the corresponding Statement of Commitments (numbered 13 to 17) are not endorsed.
- 16 The effect of this is to leave the nature and cost of the Albion Park Bypass undetermined.
- 17 The terms of approval of the concept plan includes, at *Part C – Further Environmental Assessment Requirements*, the following:

#### C12 Local Infrastructure Contributions

The requirements for local infrastructure shall be generally in accordance with the following principles:

- c) Local Roads – contribution towards the following road works are supported. The total cost, apportionment and timing of these works shall be determined in consultation with the Department of Planning:

- Upgrade of Marshall Mount Road (referred to in the TMAP as 22, 23 and 24);
  - Upgrade of Yallah Road from Marshall Mount Road to Haywards Bay Drive (referred to in the TMAP as 25);
  - Upgrade to the intersection of Marshall Mount Road and Yallah Road (referred to in the TMAP as 36);
  - Construction of the Tripoli Way extension (referred to in the TMAP as 14, 15 and 16);
  - The construction of the intersection of Tripoli Way with the Illawarra Highway (referred to in the TMAP as 30).
- 18 While it is not a requirement that any Stage 1 Project approval be entirely consistent with the Concept Plan approval, it is relevant to have regard to the terms of approval of the Concept Plan.
- 19 The concept plan approval includes a State Voluntary Planning Agreement (VPA), dated 3 March 2011, which deals with matters of State infrastructure. No issues arise with respect to matters covered by this agreement. As a consequence, it is not necessary to describe any details of what is covered by it.

### **Staging of Calderwood**

- 20 Calderwood is proposed to be developed in eight stages. The draft staging plan (Exhibit R) for Calderwood include the following estimates of the dates for cumulative occupied dwellings:
- Stage 1 2016 (608 occupied dwellings)
  - Stages 2-3 2021 (1,733 occupied dwellings)
  - Stages 4-6 2026 (2,858 occupied dwellings)
  - Stages 7-8 2031 (3,983 occupied dwellings)
  - Completion by 2036 (4,800 occupied dwellings)

### **The Calderwood Transport Management and Accessibility Plan (TMAP)**

- 21 To provide a basis for establishing what contributions to upgrades of the local road system required contributions from Lend Lease as a result of the proposed development of the site, Lend Lease commissioned modelling of traffic generation over the life of the project. The modelling was used to undertake an assessment of what elements of the road system required to be upgraded; what the standard of upgrade was necessary; the timing of the need for that upgrade; and an apportionment factor to calculate what contribution should be made by the site development to such upgrade.
- 22 The Calderwood Transport Management and Accessibility Plan (the TMAP) (Exhibit E, tab 2) was the document produced as a result of this modelling. The TMAP was submitted in support of the concept plan and used the estimate of dates at [20] for cumulative occupied dwellings as an assumption in determining timing arrangements.

### **Apportionment and the TMAP**

- 23 The DoPI retained ARUP to undertake a peer review of the TMAP (Exhibit 3, tab 3). ARUP found that the transport modelling approach adopted by the TMAP conforms to standard practice in transport planning, noting that the cost apportionment calculations are highly dependent on key modelling inputs, such as timing.
- 24 The following table summarises the relevant upgrades referred to by the TMAP as numbers:



<b>Council</b>	<b>TMAP item</b>	<b>Description</b>
<b>Wollongong City Council</b>	22	Marshall Mount Road from CUDP North-South Route to Yallah Road
	23	Marshall Mount Road from Yallah Road to TAFE
	24	Marshall Mount Road from TAFE to Huntley Rd
	36	Marshall Mount Road/Yallah Road intersection
<b>Shellharbour City Council</b>	14	Tripoli Way from Illawarra Highway/Broughton Avenue to Calderwood Road
	15	Tripoli Way from Calderwood Road to Illawarra Highway (east)
	16	Tripoli Way Complimentary measures
	30	Tripoli Way/Calderwood Road intersection

- 25 Wollongong City and Shellharbour City Councils contend that the TMAP does not apportion for recoupment of costs (as if under s 94(3) of the EPA Act) but only for collection of costs in advance (as if under s94(1) of this Act). This approach means only occupied dwellings at time of provision of facility would make a contribution to the facility. The councils submit that the concept plan approval does not imply approval of the TMAP itself nor of the apportionment in the TMAP.
- 26 Ms Levy was a principal consultant at Hyder Consulting, the firm that developed the TMAP. Ms Levy gave evidence in response to issues we raised concerning the TMAP.
- 27 We accept Ms Levy's evidence that the TMAP apportionment was determined at the assumed date the facility is provided. The question of recoupment is dealt with in the section later dealing with the proposed contribution toward the Yallah Road upgrade.
- 28 The TMAP apportionment to Calderwood for upgrade 22 is set at 25%, yet at the more distant element of the road, the locations of upgrades 23 and 24 (these being virtually at West Dapto) are apportioned attributable to Calderwood at 50% and 42% respectively.
- 29 Ms Levy, one of the authors of the TMAP, gave the following evidence in regard to these different apportionments:

The apportionment was based on the additional traffic on the road so it was always based on the traffic over and above the base line traffic. Then there was an algorithm derived that looked at the origin and destination pairs and we said that if the traffic was going from Calderwood to some other part of the road network be that Wollongong Centre or Sydney or another infill part of the site that 100% of that could – those trips would be attributable to Calderwood. Similarly, if there was another development site, the Yallah Marshall Mount development similarly travelling to Wollongong or parts of the broader network, they would have 100% of the trips attributed to them. However, in the instance where there were trips between two development sites it was assumed to be 50/50 between them so it was quite complex combination of those origin destination pairs and, as I said, there may have been other zones of Marshall Mount and Yallah developments coming in so when a percentage of a lower increase can appear different but I can't answer the specifics as to why other than the facts that there was a set of assumptions made that were clearly outlines in the TMAP and it relates to the specific volumes that came out of the model.

- 30 We have difficulty in discerning the meaning of what Ms Levy said as quoted above. Consequently, we find the explanation for the advocated rationale between the different percentage apportionments adopted for the different upgrades for Marshall Mount Road inadequate and lacking in logical foundation. In our view, it is counter intuitive that there is a higher apportionment attributable to Calderwood for the more distant works on Marshall Mount Road when compared to the apportionment to Calderwood for the portion of Marshall Mount Road more immediately proximate to the Calderwood site.
- 31 We are therefore unable to accept the TMAP apportionment for the Marshall Mount Road upgrades. This leaves us in the position of whether or not we should accept the apportionment factors proposed by Wollongong City Council for the three upgrades identified by the TMAP as 22, 23 and 24.
- 32 However, we accept the TMAP apportionment as it applies to the road works in Shellharbour City Council's area as there is no logical foundation upon which we can question that apportionment.

- 33 The TMAP and its underlying assumptions form the foundation for the position adopted by Lend Lease concerning contributions said to be required for upgrades to the local road network in the two council areas.
- 34 We note that the TMAP was referred to throughout Lead Lease's case, as the 'Authorised TMAP'. We observed that, although a document of this nature was required to be produced and has been adopted by the Department for assessment purposes, it is none the less Lend Lease's document. In addition, the outputs that are derived by the modelling and set out in the TMAP are, necessarily, entirely dependant on the input assumptions used as a basis for the modelling.
- 35 Both of the Councils had regard to modelling undertaken on their behalf to draw conclusions about the range of matters relevantly in each Local Government area concerning the same road upgrade issues. Unsurprisingly, the conclusions that were drawn by each Council concerning the various road upgrades are that, in each instance, a higher standard of upgrade is required and, consistent with this conclusion, a higher financial contribution is required from Lend Lease as a consequence of development of the site.
- 36 We note that, as with the TMAP, the Council's conclusions are also dependant on the assumptions that underpin their modelling - assumptions about which we do not have information to enable us to express an opinion as to their accuracy.
- 37 Stages 1 to 4 of Calderwood are located wholly within the Shellharbour LGA. Stages 5, 6 and 7 are located in both the Wollongong and Shellharbour LGAs and stage 8 is located wholly within the Wollongong LGA (Exhibit S Draft staging plan, reproduced at [54]).

## **The Stage 1 Project**

38 The proposal seeks approval for the following:

- subdivision to create 231 residential lots, 9 mixed use and medium density lots, 4 residue lots, 1 future substation lot, open space and landscaping;
- site preparation, flood mitigation measures and water sensitive urban design works;
- infrastructure and road works including upgrading an intersection on the Illawarra Highway; and
- sales and information centre and signage.

39 The proposal was refused consent by the PAC as the Minister's delegate on 17 April 2012. The reasons for refusal were set out in the PAC's determination and were, in summary, as follows:

- The proposal is inconsistent with the provisions of the Illawarra Regional Strategy and will adversely impact on the planned provision of key social and physical infrastructures to service the area;
- The proposal has not adequately demonstrated that filling in high hazard flood areas is a sustainable approach to providing land for residential purposes and that the proposed cut and fill will not adversely affect flood behaviour and adversely affect other development or properties outside the site;
- Local infrastructure contributions have not been adequately dealt with under the provision of a comprehensive s 94 contributions plan;
- Not all the relevant information supporting the application was publicly exhibited to enable meaningful public participation including a publicly exhibited and endorsed Development Control Plan (DCP) for the area to guide development.

40 The Minister now submits that the PAC's reasons for refusing the proposal have been dealt with to the satisfaction of DoPI (and that the Minister, is, as a consequence, also satisfied with the Stage 1 proposal), including the preparation of the Calderwood DCP (Exhibit FF). As a consequence, as noted at [2], the only matters of contention pressed by the Minister relate to local infrastructure contributions.

41 The PAC's determination of the proposal included the following, at section 9.8, in relation to s 94 contributions:

Shellharbour City Council considers that the Department's recommended s94 contributions are inadequate and grossly underestimated. The Council claims that the Department has based their calculations on Council's s94 plan which specifically does not apply to the Calderwood site. The Department has chosen precinct 8 to base their calculations on. Council claims the calculations should be based on the Albion Park Precinct 7 and this would mean a 6 fold increase in contributions.

Wollongong City Council shared a similar view that the recommended s94 contributions were insufficient to provide the necessary social and physical infrastructure to support the proposed development.

The Commission considers that the calculation of s94 Contributions needs to be based on appropriate s94 plans. Both the Council and the Department have been considering the Calderwood applications for some time, but neither has commenced the preparation of a s94 Plan for the area. It is considered that such a plan should be expeditiously prepared for the Calderwood Concept Plan area and used as a basis for the calculation of contributions for the development.

42 The two councils raise no merit matters concerning Calderwood generally or Stage 1 specifically apart from matters concerning local infrastructure contributions (set out at [6]).

## **Planning Framework**

43 s 94(1) and (3) of the EPA Act state:

94 Contribution towards provision or improvement of amenities or services

(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring:

- (a) the dedication of land free of cost, or
- (b) the payment of a monetary contribution, or both.

(2) .....

(3) If:

- (a) a consent authority has, at any time, whether before or after the date of commencement of this Part, provided public amenities or public services within the area in preparation for or to facilitate the carrying out of development in the area, and
- (b) development for which development consent is sought will, if carried out, benefit from the provision of those public amenities or public services,

the consent authority may grant the development consent subject to a condition requiring the payment of a monetary contribution towards recoupment of the cost of providing the public amenities or public services (being the cost as indexed in accordance with the regulations).

44 s 94B of the EPA Act includes, at (2):

(2) However, in the case of a consent authority other than a council:

- (a) the consent authority may impose a condition under section 94 or 94A even though it is not authorised (or of a kind allowed) by, or is not determined in accordance with, a contributions plan, but
- (b) the consent authority must, before imposing the condition, have regard to any contributions plan that applies to the whole or any part of the area in which development is to be carried out.

## **The scope of contributions proposed by this determination**

45 We earlier set out the contest between Lend Lease and the Minister, on the one hand, and the two councils, on the other hand, concerning what local infrastructure items and attendant contributions (if any) should result from these proceedings. It was agreed that, whilst in a strict legal position, any determination we made could only apply to the allotments approved in Stage 1, there was disagreement as to whether or not we should be reaching a conclusion expressed to be one applying solely to Stage 1 or whether it should be a determination that applied to Stage 1 but was

expressed in terms designed to provide what might be regarded as "strong but not binding" guidance for contributions to be levied, subject to indexation and minor adjustment, across all remaining stages of the project.

- 46 The primary position adopted by the two councils was that the only contributions that should be struck for Stage 1 were those directly referable to the stage. The councils rejected the proposition that all local infrastructure contributions should be apportioned across all stages of Calderwood.
- 47 On the other hand, Lend Lease and the Minister contend that the contributions should be apportioned across the entire anticipated 4,800 dwelling yield across the life of the Calderwood project.
- 48 There are also, as noted earlier, necessity for and quantum disputes concerning various items. In part, for the road projects, these relate to the proposed construction standard advocated as the basis for calculations.
- 49 We have concluded, on balance, that the second general course (spreading across all 4,800 dwellings proposed for Calderwood) is the preferable one to take. We have reached this conclusion for a variety of reasons, which are set out in the following paragraphs.
- 50 First, although this is a project proposed to be fulfilled over a period of nearly two decades, the project is an integrated one, effectively creating a new community. This community will look north to Wollongong as its major regional centre and will look south and east to Albion Park and Shellharbour in other respects. Although there will be some differences in flavour within these relationships, depending on whereabouts within Calderwood the development occurs and also arising from the staging of the development, we have no doubt that the project will be promoted as and is significantly likely to be regarded as a single community. As a consequence, although there are the differences in flavour and inferences

that will arise, we consider it appropriate that the contributions that this community will make to council based infrastructure to serve it, is appropriately spread uniformly across all stages of the project. In summary, this approach effects equity across the project in the provision of (generally) equality of access to facilities for those who will reside within the project.

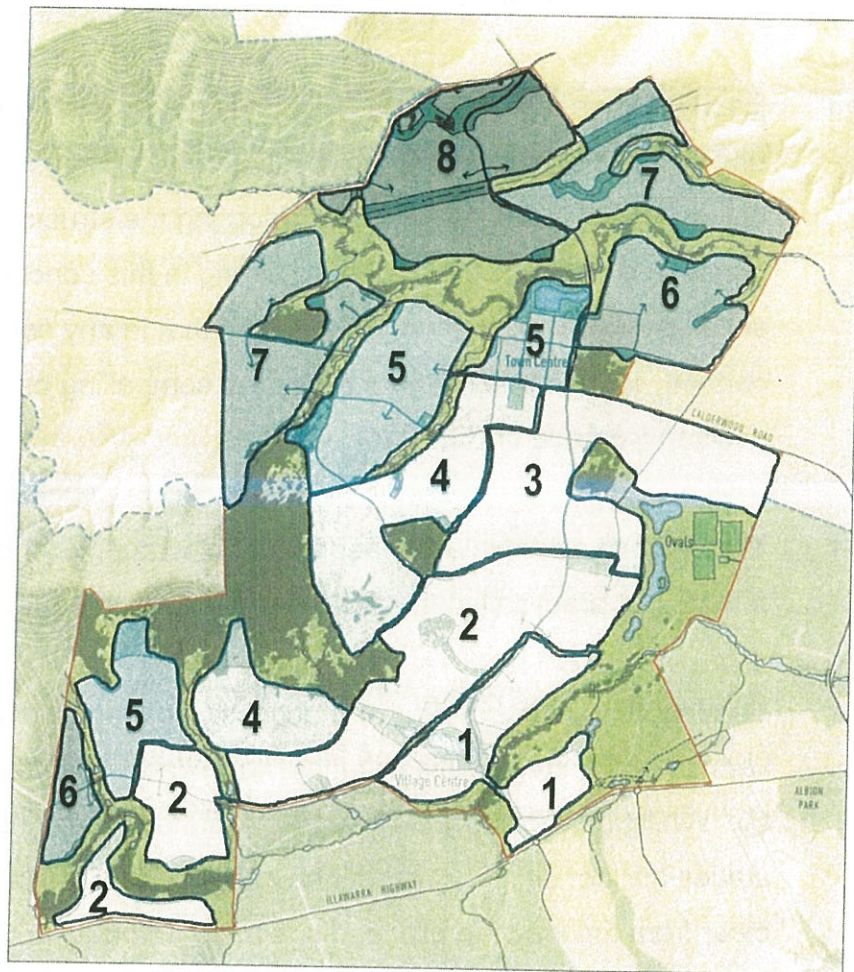
51     Second, the concept of setting contributions for Stage 1 in a fashion that is constructed to inform the setting of contributions for subsequent stages, provides what we consider to be an appropriate degree of financial predictability for the developer and for the councils. Self-evidently, this determination will not prevent either council from revising its present contributions plan or (as has been expressly foreshadowed by Shellharbour City Council) the development of an entirely new contributions plan. The items determined by us to warrant contributions payable to each of the councils across all of the stages of the project will be matters appropriate to be taken into account by the councils, in determining future statutory contributions regimes and, if necessary, by future members of the Court who might be required to deal with contributions to be set for future stages of the project. Although only guidance, we are satisfied that the identification of the expected infrastructure programs for which contributions are appropriate together with the anticipated (indexed) quantum for such contributions provides appropriate and desirable predictability able to be applied across the totality of the project.

52     Third, essentially an adjunct to the first and second reasons taken together, is that the concept approval given by the (then) Minister for Planning, clearly envisages what might be described as a unity of purpose for the whole of the project. As a consequence, it is implicit, in our view, that the broad planning framework within which the totality of the project would be brought to fruition would remain coherent and consistent, in general terms, throughout the life of the project. An essential element of



such consistency and coherence is the application of a contributions regime of the nature proposed by Lend Lease and by the Minister.

- 53 Each of these three reasons for adopting a process anticipating a uniformity of spread of contributions across all stages of the project is, in our opinion, a sufficient basis for adopting the structure advocated by Lend Lease and the Minister. If we are wrong in this conclusion concerning separate justifications, we are satisfied that in any combination (and certainly in their totality) they provide a compelling basis to adopt the position we have chosen.
- 54 There are two subsidiary reasons that also support this conclusion. One is a matter of practicality and the other a matter of equity.
- 55 Turning, first, to the matter of practicality, it is appropriate to reproduce the version of the staging diagram that was tendered by Lend Lease (Exhibit U). Whilst only broadly conceptual, it makes it clear that a number of the stages are not single, coherent and contiguous geographic areas. It is clear from the way the proceedings have unfolded before us that it is intended that separate development applications will be made for each of these stages. The staging diagram is reproduced below:



Draft Staging Plan: Subdivision & Building DAs (lodgement dates)

Stage 1\* PA: 231 lots (lodged 2010)  
 Stage 2\* DAs: c550 dwellings (c2013)  
 Stage 3\* DAs: c550 dwellings (c2015)  
 Stage 4\* DAs: c900 dwellings (c2018)  
 Stage 5\* DAs: c800 dwellings (c2021)  
 Stage 6\* DAs: c500 dwellings (c2024)  
 Stage 7 DAs: c600 dwellings (c2027)  
 Stage 8 DAs: c550 dwellings (c2031)

\* Includes Town & Village Centre dwelling products



- 56 Of particular relevance to the issue now considered is the fact that Stage 7 is not only proposed to be in two distinct and somewhat separated elements but that the western elements of Stages 5 and 7 straddle the boundary between the Wollongong Local Government Area and the

Shellharbour Local Government Area. If the setting of infrastructure contributions for these areas were to be deferred until a development application for Stages 5 or 7 respectively was made, there is the prospect that there might well be a lack of equity across the allotments in that stage from the striking of uniform contributions for that stage.

- 57 The second subsidiary reason for adopting this uniform approach arises from the fact that the present state of the internal road efficiency within Albion Park is, in our view, one that will have some residents of early stages in the project (whether for rational traffic reasons or purely psychological "rat run" ones) seeking to use the present Calderwood Road, Marshall Mount Road/Yallah Road routes for access to the north rather than testing the currently acknowledged unsatisfactory service levels of the road/intersection routes within Albion Park. Although this is not something that we are able to quantify in any coherent fashion, it does provide an indication that it is appropriate to have all stages of the project make contributions to the future upgrades of the road network to the north within the Wollongong Local Government Area, rather than simply deferring such contributions to later stages of the project.
- 58 Whilst these two subsidiary reasons do not provide, individually or in aggregation, sufficient reason to take the course we have adopted, they nonetheless provide significant reinforcement to the reasons we have earlier enunciated.

### **Site inspection and objector evidence**

- 59 We commenced our site inspection by meeting in Albion Park to hear evidence given, informally, by a number of those who had objected to the proposal. Following this informal evidence, we then proceeded to an inspection which encompassed not only parts of Calderwood (including a location on a higher portion of Marshall Mount Road overlooking the majority of Calderwood) but also encompassing the various elements of

the existing or proposed road network that are subject to disagreements about the appropriate standard of construction for their upgrading and the level of contribution (and if any, in one instance) that should be made by Lend Lease to those works.

- 60 During the course of Calderwood inspection, we heard a great deal of informal evidence from experts providing commentary about the desirable standard of road upgrade at various locations with this information being given on behalf of Lend Lease and the relevant council at each location.

### **The broader objections to the proposal**

- 61 The objections that were described at the commencement of the site inspection can be summarised as falling into four categories, two of them dealing with more general matters relating to the overall, long-term development for Calderwood and two of them relating particularly to development proposed for the Stage 1 elements that are the subject, specifically, of these proceedings.

- 62 The two general objections were:

- Permitting development of Calderwood outside the sequencing anticipated by the long term Illawarra land release program, a program that did not include Calderwood and envisaged the development of all the five stages of the West Dapto Release Area prior to any contemplation of development of Calderwood. We also understood this objection to encompass concerns that other smaller existing or anticipated release areas such as those in Albion Park South and in Tullimbar (the latter being on the southern side of the Illawarra Highway to Calderwood and in close proximity to it) would also be adversely affected by development of Calderwood in a fashion that was not consistent with the sequencing and development outcomes anticipated in the Illawarra strategy; and

- The level of contributions to local infrastructure that are contended for by Lend Lease and the Minister (as the Minister's proposed contributions reflect but a modest and in the context of these objections, insignificant increase in those proposed by the Lend Lease) in effect will give Lend Lease an unfair and thus inappropriate economic advantage over others who were or would in the future be in competition with development at Calderwood.

63 The two objections that related, specifically, to Stage 1 of Calderwood both related to different aspects of potential flooding caused by modification to the landform within the Macquarie Rivulet waterway and its floodplain. These objections related to the following:

#### **Downstream flooding levels**

- A dairy farmer, whose farmlands were traversed by the Macquarie Rivulet and comprised portion of that waterway's floodplain generally to the north of Albion Park, was concerned that elements of the works proposed to be undertaken in Stage 1 that involved works affecting the Macquarie Rivulet would adversely impact his dairy farming activities by compounding difficulties already experienced by him when the Rivulet overtopped the banks of its existing watercourse. He was apprehensive that the development of Stage 1 (and, as we understood him, would potentially be compounded by other works in other stages of Calderwood) would alter the water flow patterns within the Macquarie Rivulet so that it would be inevitable that the peak flow height during times of heavy rainfall would be higher than that which his property currently experienced. He was concerned that this would cause greater flooding of his farmland than he presently experienced; and

#### **The extent of cut/fill impacting the Macquarie Rivulet**

- This objection concerned the proposed permitting of an element of Stage 1 that involved placing fill on some land on the southern side

of the Macquarie Rivulet to lift the height of that land, render it not susceptible to flooding (compared to its current flood affected status) and permit development of it for residential purposes. This objection, voiced by Mr Fredricks, the property developer of Tullimbar, was based on a Macquarie Rivulet Floodplain Study.

### **Response to these objections to Stage 1**

- 64 It is convenient, before addressing the detail of each of the specific local infrastructure contribution disagreements involving either of Wollongong or Shellharbour City Councils, to deal with and dispose of each of these other areas of objection. In doing so, we are satisfied that these are the only specific objections that require to be dealt with that are outside those that relate to or are necessarily derived from the road upgrade and local infrastructure matters that are the subject of the contributions disputes dealt with later in this decision.

### **The two broad-based objections**

- 65 The first of the objections, that of sequencing of Calderwood outside that anticipated by the Illawarra Development Strategy is one that does not need to detain us at length.
- 66 Put bluntly, the horse has bolted.
- 67 In our view, the proper time for broad consideration of whether or not permitting development of Calderwood in the timeframe now approved was when the (then) Minister approved the broad concept plan for development of the totality of Calderwood (see [14]).
- 68 Although there might be some argument about sequencing, it has been rendered academic and is not an argument appropriate for us to rehearse or determine in these proceedings. These proceedings are confined to whether or not we should approve the Stage 1 development of

Calderwood, a stage of modest dimensions (as earlier described) within the framework of the total development for Calderwood.

69 With respect to the objection concerning economic competition, to some extent, the decisions that we have reached with respect to each of the contested contributions, when coupled with the State infrastructure contributions agreed to with the State Government and the package of local and community infrastructure works agreed to be provided within Calderwood by Lend Lease, will shape the nature of the competitive pricing position of allotments (whether for single residences or development of some greater density) in the future.

70 However, we also observe, that the standard of development proposed within Calderwood (to be consistent with the public and private development standards envisaged by the Calderwood-specific Development Control Plan) will also play a role in the marketing of (and consumer decisions about) individual development opportunities within Calderwood.

71 Although, as we understand it, this objection posits to us that development of Calderwood (and, particularly, the development contributions regime to be attached to it) is contrary to the objective in s 5 of the EPA Act of promoting the orderly economic development of land, there are two responses, in our view, that dispose of this objection in the context of the proceedings.

72 The first is that given in response to the sequencing objection discussed immediately above; the concept plan is, in reality, a done deal. It is not open to us, in the context of the confined and specific application proposing Stage 1 of development of Calderwood, to re-agitate the broader issue of whether development of Calderwood should have been permitted at this time (or, indeed, at all).

- 73 Second, a wide range of the contribution elements that go to make up the financially competitive position of development at Calderwood (leaving aside the more ambience related elements derived from the Development Control Plan) have been determined in a fashion that is outside any possible consideration by us in these proceedings.
- 74 The State infrastructure contributions and the local infrastructure works in kind that have been agreed between Lend Lease and the Minister are not within any decision-making scope as to their adequacy or otherwise save to the extent that:
- there is a legitimate contest between Lend Lease and each of the councils concerning the appropriateness of the level of contribution for each of the contested roadworks elements (informed, to a significant but not total extent, by determination of the appropriate construction standard for various roadwork elements); and
  - with respect to broader community facilities in the Shellharbour City Council area, there is also a legitimate contest as to whether Lend Lease should be required to contribute to any of these facilities and, if it were to be required to do so, what rate should that contribution be struck for application to Stage 1 of development of Calderwood.
- 75 Whilst we expect that, as discussed elsewhere, the contributions for Stage 1 are expected to have some influence in informing contributions that may arise for future stages, that will very much depend, amongst other things, by what further contributions plans may be developed by either council through the statutory contributions planning system.
- 76 Indeed, the nature of the contributions that will be applicable to Calderwood (and, indeed, generally for development) will also be shaped by whatever are the outcomes of the reforms to the planning system arising from the present White Paper process.



## **The two specific impact issues**

- 77 We were sufficiently concerned about the issues raised by the dairy farmer, that is whether the future downstream flow peaks would not exceed those that are currently experienced in the Macquarie Rivulet for his farmland, that we requested that the flooding experts address this issue. They did so. We were advised that, following joint conferencing on this issue, they had proposed an amendment to the conditions of consent that they agreed would address, specifically, this concern in an appropriate fashion to protect this farmland. Lend Lease agreed to accept this modification to the conditions.
- 78 As a consequence, we are satisfied that this issue does not now raise any impediment to the approval of Stage 1 of Calderwood.
- 79 Further, to the extent that there may have been other flooding issues of a more general nature that were encompassed in the broader community debate about the appropriates of development of the site, the flooding experts have agreed on what are the appropriate conditions to address water flow and flooding issues in the Macquarie Rivulet. As the final point on this issue, there is no proper evidentiary basis upon which we could question those outcomes or interfere with the condition regime that they propose.
- 80 Finally, concerning the matter raised by Mr Fredericks about the appropriateness of permitting the building up of land to the south of the Macquarie Rivulet to remove flood risk and this being contrary to the Macquarie Rivulet Flood Strategy, we are satisfied that this is not a basis upon which we could question the appropriateness of this element of the Stage 1 development proposal.
- 81 There are a number of reasons for this, reasons that we set out in summary form only.

- 82 First, the status of the document is not such that, in the context of *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472, significant weight would ordinarily be attributed to it. We make this observation in the context that the flooding experts have agreed to a conditions regime that deals appropriately, as we understand it, with all issues that arise with respect to the hydraulic operation of the Macquarie Rivulet not only as they would impact on this proposed Stage 1 development but also on others potentially affected by downstream flows. The flooding experts, in this context, do not raise any concerns about the technical appropriateness of development of this element of the Stage 1 proposal.
- 83 Second, the Minister does not, in these proceedings, press any concerns about this aspect of Stage 1.
- 84 Finally, although we have evidence that both councils continue to oppose development of the site (and, indeed, have sought reversion of the zoning change to return the site's land to a rural zoning), Shellharbour City Council, within whose local government area Stage 1 is located, does not press any planning concerns about this specific aspect of the Stage 1 proposal.

### **Expert evidence**

- 85 Expert evidence was provided on behalf of Lend Lease by Ms Lesley Bull (planning and development contributions) and Mr Peter Moy (engineering and development contributions). Expert evidence was provided on behalf of the Minister by Ms Clare Brown (planning). Expert evidence was provided on behalf of Shellharbour City Council by Mr Geoff Hoynes (planning and development contributions) and Mr Matthew Kritzler (quantity surveying) and on behalf of Wollongong City Council by Mr Daniel Hodge (development contributions).

## **Wollongong City Council local infrastructure contributions**

- 86 We now turn to deal with the specific areas of contested local infrastructure (both as to standard of upgrade required, in each instance, and the necessity for any contribution, in one instance).

### **Marshall Mount Road upgrade (TMAP items 22, 23, 24 and 36)**

- 87 Marshall Mount Road is within the Wollongong Local Government area and presently comprises a generally pleasant rural thoroughfare leading to the old Princes Highway and thus provides the access way to the urban areas to the more immediate north of the precinct. The West Dapto Release Area, also identified for future urban development, lies to the north-west of the precinct, primarily on the western side of Marshall Mount Road although a small element of the West Dapto Release Area is also to the east of Marshall Mount Road towards its northern end.
- 88 The contest between Lend Lease and the Minister, on one hand, and Wollongong City Council, on the other, concerning this road, relates to the nature of the upgrade to which Calderwood should contribute. There are three distinct elements in dispute concerning this roads future configuration. They are:
- The general structure and width of the upgraded road formation;
  - What should be the construction methodology for bridging of watercourses along Marshall Mount Road; and
  - What form of intersection control should be provided at the intersection of Marshall Mount Road and Yallah Road.
- 89 The contest concerning the standard of road formation is between the Council's desired future road standard of two full trafficable lanes in each direction with kerb and gutter on each side and the competing position, derived from the TMAP analysis commissioned by Lend Lease, that the

standard for which contribution is appropriate to be required from Calderwood is that of an upgraded standard of road formation with one trafficable lane in each direction but with re-engineered road shoulders to accommodate breakdowns and the like.

90      Essentially, as we understood it, Lend Lease and the Minister advanced the proposition that if a higher standard of road is required/desired by the Council, it is not rendered necessary as a consequence of increased demand for transit to the north toward the Princes Highway generated by Calderwood, even when fully completed. The position that they adopt is that, if such a higher standard of road is to be provided, the demand for it will come from future development of the West Dapto Release Area, when that eventually comes to fruition at some unspecifiable time in the future, rather than as a consequence of the lesser contributory demand that would come from Calderwood.

91      The parties agree that the Calderwood development will contribute to generating a need for Marshall Mount Road to be upgraded from a rural road to urban collector status. However, Mr Moy says that, according to the TMAP, the upgrade will not be required until 1,700 dwellings have been constructed in Calderwood, which is estimated to be by 2017 (Exhibit D, par 21).

92      My Moy disagrees with Wollongong City Council's cost estimate of \$33,625,451.00 for the upgrade of Marshall Mount Road, which is based on their s94 Contribution Plan (West Dapto). Mr Moy's cost estimate is \$16,186,951.00. Mr Moy's explains that his estimate is less than Wollongong City Council's, for the following reasons (Exhibit D, par 25):

- The north-south road within Calderwood will replace the 1.136km of road from North Marshall Mount Road to Marshall Mount Creek, identified by the s94 Contribution Plan (West Dapto) as costing \$5,339,200. Therefore Wollongong City Council's estimate can be reduced by this amount as this work is unnecessary;

- Wollongong City Council has costed a bridge 45m long at \$4,662,000, which will cross two watercourses (located in close proximity to each other) for the entire length of the 1 in 100 year floodplain at the stream crossings. Mr Moy says an appropriate bridge length is between 50% and 70% of the 1 in 100 year flood extents, with road embankments being provided for the remaining length. This would result in a bridge 32m long which (using Wollongong City Council's rate of \$7,400 per m<sup>2</sup>) would cost \$3,315,200. The WCC rate for road embankment is \$335.70 per m<sup>2</sup>, which gives a total cost of \$3,376,300 for the bridge section of Marshall Mount Road, using Wollongong City Council rates which Mr Moy says are highly conservative. This reduces the Wollongong City Council estimate by \$1,285,700;
- Wollongong City Council proposes two 6m bridges along Marshall Mount Road and Mr Moy says a culvert would be more appropriate in these locations and this reduces the Wollongong City Council estimate by \$1,108,800;
- Wollongong City Council proposes 'Super Tee' bridges and Mr Moy says standard RTA plank bridges are adequate and the cost reduction of construction of the plank bridge, compared to the Super Tee bridge, is approximately \$1,200/m<sup>2</sup>. This reduces the Wollongong City Council estimate by \$756,000;
- Mr Moy disagrees with the Wollongong City Council rate of \$4,700/m for a 2 lane road and says that in his experience and based on recent tenders in the Wollongong and Shellharbour LGAs, the rate for construction of a 2 lane road is \$2,700/m. Using the \$2,700/m rate for the 4.474km length of Marshall Mount Road (and excluding the 1.136km not required because of the north-south road within Calderwood) reduces the Wollongong City Council estimate by \$8,948,800.

93 Although we may have some reservations, as elsewhere expressed, about the transparency of the assumptions that have been made in the TMAP

model, we do not have any relevant traffic evidence provided by Wollongong City Council that would provide any satisfactory basis upon which we could set aside the conclusions to be drawn from the TMAP modelling.

- 94 Although Mr Hodge gave evidence on behalf of this Council, he did so from a basis of providing expert evidence about cost estimation for projects rather than with respect to the underlying engineering assumptions and their basis – giving rise to the concept being costed. In making this comment, we are not to be taken to be criticising his evidence, we accept that it was honestly given within his area of expertise based on the engineering scenarios he was instructed to assume.
- 95 On the other hand, Mr Moy who gave evidence on behalf of Lend Lease on road design and traffic engineering matters gave evidence that sufficiently complemented the documentation in the TMAP to enable us to conclude that, at least on this point, it is appropriate to accept that the standard of road formation for Marshall Mount Road is that to be derived from the TMAP modelling.
- 96 For similar reasons, we are satisfied that the TMAP modelling result for the intersection of Marshall Mount Road and Yallah Road should also be adopted.
- 97 With respect to the competing standards of bridge structure, we accept the evidence of Mr Moy that the conventional plank (reinforced, prefabricated concrete sections) appropriately supported at relevant standing distances is a more appropriate method of construction than the Super Tee construction methodology contended for by the Council. It is to be noted that the Super Tee construction methodology is significantly more expensive than the plank bridge methodology.
- 98 There was also a dispute (about the specific portion of Marshall Mount Road, incorporating two nearby bridges over a waterway/floodway) as to

whether this should be expanded by one, long, single bridge or by the construction of two bridges generally reflecting the present configuration with a section of roadway on an earthen embankment joining the two bridges.

- 99 Whilst we accept that the base position originally adopted by Mr Moy, it did not make appropriate allowance for demolition of the existing structures and for necessary traffic management processes that would require to be incorporated in the construction of replacement bridges. He subsequently acknowledged that allowances needed to be made for these and he and Mr Hodge provided supplementary responses that made provision for this in what we accept is an appropriate fashion. We accept Mr Moy's evidence that a plank design bridge is the one conventionally used for such purposes and we see no reason to adopt any differing, higher standard of construction in these circumstances.
- 100 As a consequence, the contribution rate to be applied across the whole of the precinct toward the future upgrade of Marshall Mount Road (with the exception of Section 11 discussed separately later in the Shellharbour infrastructure section of this decision) is to be based on the carriageway, intersection and bridge standards to be derived from the TMAP modelling process.
- 101 The TMAP proposes apportionment to Calderwood for the three upgrades to Marshall Mount Road as being:
- 22 is set at 25%;
  - 23 is set at 50%;
  - 24 is set at 42%.
- 102 We earlier explained at [29] – [31] why we were not prepared to accept these apportionment numbers. Mr Hodge, in his evidence (Exhibit 21, pages 21-25) discusses Wollongong City Council's position concerning

these proposed upgrades. The apportionments to Calderwood proposed by Wollongong City Council are:

- 22 is set at 46%;
- 23 is set at 27%;
- 24 is set at 26%.

103 These proposed apportionments appear more logically consistent given the location of each of the proposed upgrades to Calderwood. They do not suffer from the logical inconsistency of the apportionments derived by the TMAP. Whilst there is a good deal of technical discussion in support of each of the apportionments, the full details of the underlying modelling assumptions have not been made available to us by either party and they have certainly not been tested in any evidentiary sense. We are therefore left to assess which option might be reasonable on the basis of such limited of which we are possessed. On this basis, we prefer the apportionment proposed by Wollongong City Council with this apportionment to be applied to the technical road construction determinations we have adopted from Mr Moy's evidence.

104 We are therefore left with the issue of proposed upgrade 46, the intersection of Yallah and Marshall Mount Roads. The Wollongong City Council proposed apportionment is 26%, whilst that proposed by the TMAP is 47%. For the reasons set out immediately above, we are prepared to adopt the figure proposed by Wollongong City Council.

#### **Yallah Road upgrade (not included in the TMAP)**

105 The Yallah Road upgrade proposal was excluded from contributions recommendations in the TMAP.



- 106 Lend Lease submits that the Calderwood development does not create a need to upgrade Yallah Road, based on the traffic modelling undertaken for the TMAP.
- 107 According to Ms Levy, the TMAP apportions the Yallah Road upgrade to existing development in 2021 and as Calderwood stages progress from south to north, the development in Calderwood, completed by 2021, is in the south of the Calderwood site. According to Ms Levy, the TMAP indicates that the shortest route for the residents in the southern portion of Calderwood to the F6 freeway is via the on-ramps near Albion Park and not via Marshall Mount Road and Yallah Road. Therefore the TMAP output is that the residents of Calderwood in 2021 will not be using the Marshall Mount Road – Yallah Road access to the F6 freeway.
- 108 Mr Hodge, on the other hand, says that residents of Calderwood will use Yallah Road to access the F6 freeway, because this route is more direct for Calderwood residents travelling north.
- 109 Before turning to the specifics of the Yallah Road upgrade proposal, its construction standard and whether or not Lend Lease should make any contribution to the upgrade, three general points should be made concerning this road. The first is that the Minister's concept approval, in condition 12 (earlier quoted), envisages that Lend Lease will make a contribution to the upgrading of this road. Second, the TMAP envisages that the upgrade of Yallah Road will have taken place prior to any stages of development of Calderwood that will create any demand by development of Calderwood for that upgrade to occur.
- 110 Third, the two councils took the position that it stands to reason that if Lend Lease is asking for the contributions to be calculated on a basis apportioned across the whole of the Calderwood project, the patterns of road use/benefit should be considered across the whole project.

- 111 We also understood this to be submitting, if only by necessary implication, that Calderwood should contribute to the Yallah Road upgrade on the basis of s 94(3) of the EPA Act even if such a contribution was not mandated by s 94(1) of that Act.
- 112 We turn, in commencing this discussion, to the standard that should be expected for the upgrade of this road. The road provides the connection between Marshall Mount Road and the Yallah industrial area, an industrial area that abuts the freeway leading northward to Wollongong and thence to the Sydney metropolitan area. There are access ramps to and from the freeway at Yallah for those utilising Yallah Road. Yallah Road is presently constructed to a standard that reflects the largely agricultural hinterland that it serves. There is no disagreement, as we understand it, that Yallah Road will require upgrading and that that upgrading will need to incorporate the upgrading of several stream way crossings.
- 113 We have earlier set out our reasons for preferring the road standard and bridge design options proposed for Marshall Mount Road by Mr Moy. The reasons given earlier for preferring Mr Moy's approach are equally applicable to the approach to be taken to the standard of construction appropriate for the upgrade of Yallah Road. We do not need to restate them but adopt them for the Yallah Road upgrade.
- 114 The question that then arises is whether or not Lend Lease should make a contribution to this upgrade. Although Mr Tomasetti SC put the proposition that such a contribution was not appropriate, he readily conceded that the requirements of condition 12 might be regarded as creating a degree of presumption in favour of requiring Lend Lease to make such a contribution.
- 115 As a consequence of the possibility that such a contribution might be required, Mr Moy calculated what might the appropriate rate to be struck (on the basis of his approach) if we were to require such a contribution to be made.

- 116 Wollongong City Council's proposed contribution, on the other hand, was, as we understand it, predicated on us preferring the Council's proposed standard of upgrade as the appropriate work to be required. As this is not the case and we have concluded that a contribution is appropriate to be made for this upgrade for the reasons set out below, we determine that the contribution for this upgrade to be attached to the Stage 1 development consent is that proposed by Mr Moy of \$132 per allotment.
- 117 We now turn to the reasons why it is appropriate to require a contribution to be made, across the development of Calderwood, for the upgrade of Yallah Road. We have reached this conclusion on the basis of accepting that the upgrade timing for Yallah Road is that as adopted by the TMAP, namely that Yallah Road would be upgraded prior to any of the relevant later stages of development of Calderwood coming on stream. As a consequence, accepting this proposition for the purposes of this discussion, development of Calderwood cannot be said to have created the demand for the upgrade to take place (a position analogous to a s 94(1) approach). However, for reasons we think self-evident and despite the valiant attempts of Ms Levy to explain to us why this would not be the case, we are satisfied that the conclusion is logically inescapable that those who will live on allotments in the later stages of development of Calderwood will benefit from the upgrade of Yallah Road (a position analogous to a s 94(3) analysis).
- 118 Although Ms Levy also valiantly attempted to explain to us both in broad terms concerning the TMAP process and specifically concerning the upgrade of Yallah Road, the latter element of her evidence was predicated on us accepting the timing of the upgrade of Yallah Road as assumed as a TMAP input and proceeding on the basis that no retrospective recoupment element was appropriate. Even accepting - as we have, for the purposes of this discussion - the timing assumptions involved in the TMAP, we do not consider that we should discard what we consider to be the significant benefit to be derived for the more northern elements of development of

Calderwood for travelling further north, than the immediate areas readily accessible via an upgraded Marshall Mount Road and the old Princes Highway to the north into the southern suburbs of Wollongong.

- 119 Unless the freeway access ramps at Yallah are to be removed entirely, in any future upgrade of the freeway (a proposition for which there is, in our view, no evidentiary basis) the northward freeway-based travel times for those residing in the later stages of development of Calderwood will be significantly improved by utilising Yallah Road, compared to the alternatives of Marshall Mount Road/Princes Highway, or taking the more circuitous route down the North/South spine road within Calderwood, traversing the Albion Park bypass (assuming for this purpose that it has, in fact, been completed by this time) and accessing the proposed southern extension of the freeway (also assuming that this freeway extension has also been constructed by that time). Even making all these optimistic assumptions concerning a southern alternative route, the additional time/distance of travel of the southern route would render it, in our view, logically incomprehensible for its utilisation.
- 120 We accept Mr Hodge's evidence that the residents of Calderwood will utilise Yallah Road to provide a connection between Marshall Mount Road and the F6 freeway when travelling north. In our view, it stands to reason that a resident of Calderwood travelling north via the F6 is likely to access the F6 freeway to the north-west of Calderwood and not travel south-west to access the F6 freeway, as this route is counter-intuitive.
- 121 The position concerning Yallah Road adopted by the TMAP is, in our view, untenable. To assert, as the MAP assumes, that access to the freeway to travel north from anywhere in the precinct will be by travelling to the south, utilising the Albion Park bypass and joining the extension to the freeway that is to be constructed from the present end of the freeway in the vicinity of Yallah and extending then to the south of Albion Park Rail defies logic. For the more northern stages of the project, part of Stages 6 and 7 and the whole of Stage 8, accessing the freeway via Yallah Road would involve,

perhaps, one third of the journey distance compared to that postulated by the TMAP. The only possible rationale for such a position is the TMAP's assumption that the upgrading of Yallah Road will have been completed by the time those northern stages of Calderwood are developed and that retrospective recovery contributions are not appropriate.

- 122 As earlier noted, Mr Moy was requested to consider what might be an appropriate contribution to the upgrading of Yallah Road if we were to determine that this was required. He also expressed the opinion that any traffic that was appropriate to be ascribed to the utilisation of Yallah Road should be regarded as traffic that would otherwise have used Marshall Mount Road to proceed to the north.
- 123 This proposition, if adopted by us, would lead to an offsetting of all, or a significant part of, any contribution required from the project to the upgrading of Yallah Road, by deduction of that contribution in whole or in substantial part from any contribution from the project to be attributed to the upgrading of Marshall Mount Road.
- 124 We are unable to accept this proposition. Traffic from the precinct that would use Marshall Mount Road would not encompass those whose journey was to any location significantly beyond the urban area accessible by the Princes Highway via Marshall Mount Road. Any traffic seeking to travel further north, whether to Wollongong proper or beyond, would inevitably use the freeway and access it via Yallah Road. Yallah Road is presently available for such access and increased traffic demand for such journeys further to the north as a consequence of development in the precinct and future development in the West Dapto Release Area creates the necessity for the upgrading of Yallah Road.
- 125 We are satisfied that the contribution to be required to be made by development within the precinct to the upgrading of Yallah Road should be in addition to and not in substitution for the appropriate contribution toward the upgrade of Marshall Mount Road.

- 126 As a consequence, we consider it appropriate, through an analysis that broadly follows that in s 94(3) of the EPA Act, that allotments within Calderwood should make a contribution to the upgrade of Yallah Road.

### **Shellharbour City Council local infrastructure contributions**

#### **Introduction**

- 127 The contributions proposed by Shellharbour City Council can be put into three distinct categories;

- The contribution appropriate to be made by Calderwood to the Tripoli Way Bypass. The necessity for this contribution is identified by the Minister and by the TMAP (although the standard of works and thus the quantum of contributions remain in dispute and thus require our determination of the defining parameters for such contributions);
- The contribution appropriate to be made by Calderwood to the upgrade of portion of Marshall Mount Road known as Section 11; and
- The contributions appropriate to be made by Calderwood to each of a number of "City-wide facilities" identified in the current s94 plan and pressed by Shellharbour City Council as warranting the requirement of contributions by Calderwood.

### **Shellharbour City Council's s94 contributions plan**

#### **The current status of contributions plans**

- 128 According to Mr Hoynes, Shellharbour City Council's current s94 Contributions Plan 2005 is the 6<sup>th</sup> review of the original s94 plan, adopted by Council on 21 June 1993. The original plan had a timeframe of 20 years. The fifth review of the s94 plan (adopted December 2000) extended the timeframe of the plan to 2018. The current plan levies for catchments that include Benefit Areas, Precincts, City East/City West and City Wide. The current plan does not make provision for development within the Calderwood valley.

- 129 The area of the Calderwood project is within Precinct 8: Rural West precinct, for the current plan. The current plan envisages no significant level of development within this precinct during the life of the plan.
- 130 Mr Hoynes states that Shellharbour City Council is currently preparing a revised s94 Contribution Plan, which will address the Calderwood development and he referred to the proposed revised plan as the '*Draft Infrastructure Contributions Plan 2013*'.(the proposed revised s94 plan). He says the proposed revised s94 plan will update facility designs and cost estimates, as well as review implementation works schedules. According to Mr Hoynes, the decision to conduct a review of the s94 Contribution Plan 2005 was independent of the Calderwood Urban Development Project concept approval. Mr Hoynes said that it was not envisaged that Shellharbour City Council would adopt the proposed revised s94 plan before July 2013.
- 131 The proposed revised s94 plan, according to Mr Hoynes, has a timeframe up to 2028 and seeks to levy the projected 842 cumulative dwellings in Calderwood anticipated by 2028, based on the *Informed Decisions Shellharbour Population and Dwelling Projections 2006 – 2031* (i.d. forecasts) (Exhibit 25, tab 10).
- 132 Shellharbour City Council's current s94 Contributions Plan 2005 provides for the following City Wide contributions per dwelling, indexed to 2012:

Open Space Facilities	\$648.84
Community Facilities	\$1,585.11

- 133 The proposed revision of the s94 plan (as postulated from the state of the preliminary work done by Mr Hoynes) would provide for the following City Wide contributions per dwelling in the Calderwood project area:

Open Space Facilities	\$730.00
Community Facilities	\$4,615.00

134 Mr Hoynes' evidence is that the material he has prepared or assembled for the proposed revised s94 plan is a 'draft', despite having been neither adopted by Council, nor exhibited. Pursuant to s28 of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulation), a draft contribution plan must be publicly exhibited. Having considered any submissions made about the draft plan, Council may approve the plan, amend the plan or decide not to proceed with the plan and must give public notice of its decision, pursuant to s31 of the EPA Regulation.

135 In our view, the so-called '*Draft Infrastructure Contributions Plan 2013*' does not constitute a 'draft' plan. It merely currently consists of a number of preliminary studies intended to contribute to a proposed review of the existing plan. The work already undertaken by Mr Hoynes for this review is incomplete and Shellharbour City Council has not adopted any draft s94 contribution plan based on that work. The information referred to by Mr Hoynes as the 'revised s94 plan' has not yet been subjected to public exhibition and there has been no consultation with the owners of affected land (see *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 at par 91).

136 We therefore consider that we should give the information supplied by Mr Hoynes as purporting to constitute a '*Draft Infrastructure Contributions Plan 2013*' no weight in our deliberations.

**Using the 6<sup>th</sup> revision of the current s 94 plan**

137 Pursuant to s 94B(2)(b) of the EPA Act, as we are not a council, we can impose requirements for contributions that are not in accordance with a contributions plan. However, if we do so, we are required to have regard to the current s94 contributions plan. Our power to do so arises from s94B(2)(b) of the EPA Act, which reads:

**94B Section 94 or 94A conditions subject to contributions plan**



(1) A consent authority may impose a condition under section 94 or 94A only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division).

(2) However, in the case of a consent authority other than a council:

(a) the consent authority may impose a condition under section 94 or 94A even though it is not authorised (or of a kind allowed) by, or is not determined in accordance with, a contributions plan, but

(b) the consent authority must, before imposing the condition, have regard to any contributions plan that applies to the whole or any part of the area in which development is to be carried out.

- 138 The current s 94 plan *applies to the whole or any part of the area in which the development is to be carried out* in the sense that the City-wide facilities" identified in the current s 94 plan and pressed by the council in these proceedings are said to benefit all present and future residents of Shellharbour City

**Tripoli Way Bypass (TMAP items 14, 15, 16 and 30)**

- 139 The Tripoli Way Bypass (variously referred to as Tripoli Way, Albion Park Bypass, the Expressway and Illawarra Highway Bypass) (the bypass road) is a proposed road to be positioned to the north and parallel to Tongarra Road (Exhibit 26), connecting to Terry St/ Illawarra Highway at the eastern end, for the purpose of alleviating traffic along the Tongarra Road shopping strip. A land corridor 30.5m wide has been set aside by Shellharbour City Council for portions of the bypass road as a local road reservation within two elements of the Albion Park urban area.
- 140 Mr Hoynes says that the area to the south of the road reservation is low density residential and the area to the north is rural residential. He says that it would be prudent to continue with a 30.5m road reservation as the bypass road will connect to the F6 in the future and the 30.5m corridor will provide flexibility for the future.

- 141 We do not dispute Mr Hoynes' view that the 30.5m road reservation provides for future flexibility. However the question before us is not whether the 30.5m road reservation is a good idea, but whether the proposal will, or is likely to require the provision of or increase the demand for public amenities within the area, pursuant to s.94(1) EPA Act.
- 142 Plans have existed for a considerable period of time to construct a bypass along the northern outskirts of Albion Park with it to have an anticipated connection to a proposed extension of the existing freeway which extension would run to the south from the current termination at Young. At the present time, it is agreed, there is an already unsatisfactory level of service at the major intersection in the centre of Albion Park. Indeed, the inadequacy of this intersection has already lead to the banning of right hand turns for traffic going north along Tongarra Road into the centre of Albion Park so that such traffic now no longer has direct access to the Illawarra Highway to the north and, thus, to the southern end of the freeway.
- 143 There is no dispute between the parties about the need to construct the Albion Park bypass nor is there any significant dispute between the parties about the appropriateness of development at Calderwood making a significant financial contribution to the cost of constructing this bypass. Lend Lease and Shellharbour City Council differ in several significant respects about the specification necessary for the construction of the bypass. This disagreement is not only about the nature of the road itself but also about the width of the road reservation corridor and, thus, the amount of currently private land that would need to be acquired to establish the corridor within which the road would be constructed. Lend Lease's position on these issues is derived from the TMAP whilst that of the Council is derived from work undertaken by an external consultancy, in part, and by work undertaken by its own engineering staff.

- 144 The parties disagree on a cost estimate for the bypass road. Mr Moy estimates the total cost at \$13,230,000 and Mr Kritzler estimates the total cost at \$17,526,000. These estimates result in a per dwelling contribution to the bypass of \$1,202, according to Lend Lease and \$5,207, according to Shellharbour City Council (Exhibit 4, attachment A). The parties dispute the appropriate methodology for apportioning the cost of the bypass to the proposal. The significant difference in these amounts arises from the difference in the broad approach to be taken to apportionment – dealt with earlier, when we accepted Lend Leases project wide approach.
- 145 The difference between Mr Moy and Mr Kritzler regarding the overall cost estimate of the bypass derives from the design of the road and the professional fees/contingencies that the parties have respectively adopted.
- 146 Lend Lease submits that Lend Lease should contribute to a two-lane bypass road, on the basis that Calderwood does not generate any need for on-street parking along the bypass road. Mr Moy says that adequate space can be provided for vehicle breakdowns with two 4m lanes (8m total width) to allow two lines of traffic to slowly pass a broken down vehicle (Exhibit D, par 11). He says that the creation of space for parking is not consistent with the function of a bypass catering for through traffic movements away from Albion Park.
- 147 Ms Brown says that it is reasonable for the third lane to be provided for in that portion of the bypass road with residential frontages (Exhibit 4 at 7).
- 148 Shellharbour City Council submits that the proponent should contribute to a four-lane bypass road, comprising two travel lanes and an adjacent shoulder/parking/break down lane.
- 149 The bypass will need to be elevated at least 3m above ground level in the flood plane, according to Mr Hoynes, the exact level of the bypass above ground level is currently unknown, as the F6 has not yet been designed by the NSW Roads and Maritime Services (RMS) and its levels are unknown.

- 150 Mr Moy and Mr Kritzler agree that the difference in cost between an 8m wide two-lane road and a four-lane road is in the order of 40% on a simple pro-rata basis (Exhibit 23, par 29). Mr Kritzler notes that a simple pro-rata basis does not include site specific items detailed in his evidence (Exhibit 23, par 8).
- 151 Mr Moy says that the difference in the cost estimate for the bypass road between himself and Mr Kritzler is the provision for additional parking lanes combined with a significant percentages allowed for contingencies, in the order of 43% (Exhibit D, par 10). Mr Moy says that a reasonable contingency would be in the order of 10-15% and that IPART has commented that 15% is an absolute maximum contingency for cost estimates of this nature (Exhibit D, par 11b).
- 152 Mr Kritzler says he has allowed a contingency of 20% in his estimate, for additional construction costs that may eventuate due to unforeseen construction conditions and circumstances. He says that 20% is a reasonable and conservative contingency for a concept estimate based on one drawing. Mr Kritzler says that Mr Moy's 23% so described 'contingency' (Exhibit D) is not in fact a contingency, because it is an amount set aside for preliminaries, margin, survey, LSL, professional fees, environmental controls and project management, which are actual costs that will be incurred by the council and the contractor (Exhibit 23, pars 13-17).
- 153 Lend Lease submits that the appropriate method of apportionment of cost of the bypass is that for which the TMAP makes provision. Mr Hoynes says that the cost of the bypass should be apportioned on the basis of population projections/dwelling production assumptions prepared by Informed Decisions Forecast on behalf of Shellharbour City Council in preparation for the draft s94 Plan, which indicate that Calderwood will contribute 842 of the projected additional 3,635 dwellings up to 2028, which accounts for 25% of the LGA's population growth to 2028 (Exhibit 22

at 17). Shellharbour City Council has assumed a 2028 construction date for the bypass road.

- 154 In our view and based on the evidence before us, the proposal will contribute to a requirement for the bypass road and an 8m wide, two-lane bypass road is adequate to fulfil the increased demand generated by the proposal. We accept Ms Brown's evidence that it is reasonable to provide a third lane in the portion of the bypass road with residential frontages on the southern side of the road.
- 155 The road reserve, to be contributed towards by the proposal, will need to be wide enough to accommodate batters, which are required to raise the level of the bypass in the flood plane at the western end.
- 156 We accept Mr Moy's evidence that a 15% contingency is appropriate for additional construction costs that may eventuate due to unforeseen construction conditions and circumstances.
- 157 We accept the TMAP technical apportionment for the bypass, for reasons set out earlier in the judgment at [32].

#### **Section 11 of Marshall Mount Road**

- 158 Neither Lend Lease (through the TMAP process) nor Shellharbour City Council originally assessed an element of Marshall Mount Road, toward its southern end (and known as Section 11) as requiring an upgrade. As a consequence, the TMAP did not make any assessment of it and its emergence as an issue relating to upgrade contributions came comparatively late in the piece.
- 159 Section 11 of Marshall Mount Road lies along the north-western boundary of portions of Stages 6 and 7 of the Calderwood project. The land on the western side of the road is presently (and is proposed to remain) rural in character. Section 11 is approximately 1 km in length.

- 160 At the present time, this section of road is a pleasant rural road with grassed verges and no made footpaths. We travelled along this section of Marshall Mount Road during the course of our site inspection and it appeared entirely adequate for its present largely rural character.
- 161 The relevant council, Shellharbour City Council, contends that this section of Marshall Mount Road should be upgraded to a dual carriageway in each direction with kerb and gutter treatment and made footpaths.
- 162 The council proposes that development at the site should meet the total cost of this upgrade as the necessity arises solely because of the Calderwood project.
- 163 On the other hand, as we understood Lend Lease's position, no contribution was warranted for any upgrade of this section of road as there was not sufficient certainty that any increase in traffic along Section 11 that might be generated by Calderwood would trigger the need for such an upgrade.
- 164 The concept plan for Calderwood identifies this portion of Marshall Mount Road as a likely future bus route and, we infer from the range of documents in evidence, particularly the concept plan and the TMAP, at any such bus route, if adopted, would be likely to incorporate a school bus route in its operations. We have reached this conclusion from the nature of the elements of the planned internal roadwork shown in the documents together with the indicative location for the educational facilities proposed to be located within Calderwood.
- 165 We consider that there is a sufficient basis for making provision for some facilities for stops for school buses (although identifying the locations for these facilities would need to await greater clarity in the final design of the relevant stages). Given the length of road that would be traversed by a

school bus, we consider it desirable to make provision for four layover style bus stops and shelters (two for each direction of travel).

166 However, we are not persuaded that any major upgrade of the road itself can be justified at this time. The need for such an upgrade might emerge with greater clarity and imperative as Calderwood progresses. If this were to occur, it is precisely the type of minor adjustment that might be dealt with in some future iteration of the relevant s 94 contributions plan (in whatever fashion such funding plans emerge in the new planning system).

167 As we have no basis upon which we could assess the costs to be ascribed to such layover style bus stops and shelters, we leave that to discussions between the parties to settle (with recourse to us if agreement is not able to be reached).

## **City-wide facilities**

### **Introduction**

168 The current s 94 plan describes City-wide facilities in the following terms:

#### **2.3.1 City-wide facilities**

This plan recognises that there are a number of facilities that are intended to serve the City as a whole. Such facilities are generally unique to the City either in terms of their function or standard.

169 Some of these facilities are for open space and/or sporting facility projects said to serve the entire local government area of Shellharbour City whilst others are for major civic venues of varying types. Lend Lease resists being required to contribute to any of these facilities. With the exception of the contribution sought by the council for the Shellharbour City Performance Theatre, the Minister supports the opposition by Lend Lease to these proposed facilities. The facilities encompassed in the council's list of those requiring contributions are set out in the sections that follow.

170 Shellharbour City Council also seeks a contribution to the administration of the contributions plan.

### **State infrastructure contributions and works in kind**

- 171 Lend Lease submits that the proponent is committed to a total State infrastructure contribution of \$13,722.00 per dwelling, flowing from the VPA and that the local infrastructure contribution, as works in kind within the Calderwood development, amount to an equivalent contribution of \$20,840.96 per dwelling. (Annexure A, Applicant's closing submissions).
- 172 This, it was submitted, as we understood it, constituted a reasonable total contribution and additional contributions were, therefore, inappropriate. We disagree and our reasons for accepting or rejecting each specific proposed contribution sets out the basis for the specific determination.
- 173 We do not consider that, although Lend Lease is to provide facilities of various types in Calderwood, these meet, in any exhaustive fashion, the future needs of the new community.

### **City-wide open space and/or sporting facilities**

- 174 Shellharbour City Council seeks a contribution for the following City-wide open space facilities:
- Beach foreshore (recoupment);
  - City park;
  - Croom netball courts; and
  - Shellharbour City Stadium (recoupment)
- 175 Lend Lease contends that they should not contribute to these facilities, on the basis that equivalent facilities are being provided as works in kind within the Calderwood development and that the Calderwood facilities will also benefit residents of Shellharbour LGA residing outside the Calderwood development. Lend Lease further submits that the future residents Calderwood are not likely to require the provision of or increase the demand for the city-wide open space facilities.



- 176 Shellharbour City Council contends that the works in kind within the Calderwood development do not constitute city-wide facilities and that the city-wide open space facilities will benefit the future residents of Calderwood and therefore a monetary contribution should be levied on Lend Lease for these facilities. The amount is to reflect the present s94 Plan contribution for this item.

Beach Foreshore (recoupment)

- 177 We agree with Mr Hoynes' evidence that the beach foreshore is iconic and that the passive open space within Calderwood, to be provided by Lend Lease, is not a substitute for access to a beach. In our view, access to the beach is most likely to be a significant determinant for choosing to live in the Shellharbour LGA and consequently, we find that the beach facilities will be used by the city-wide population, including the future residents of Calderwood. A monetary contribution should be levied on the proposal to contribute to the recoupment of Shellharbour City Council's expenditure on the beach foreshore facilities. The amount is to reflect the present s94 Plan contribution for this item.

City Park

- 178 The *Shellharbour City Council Open Space, Recreation and Community Facilities Needs Study Report* March 2010 (Needs Study Report) (Exhibit E, tab 18) has been prepared to establish Shellharbour's requirements for open space, parks, sporting fields and community facilities to 2021.
- 179 The Needs Study Report states the following in relation to city-wide parks in the LGA (Exhibit E, tab 18, folio 679):

The overall provision of parks is generally well above the provision requirements, particularly in the east of the city where significant citywide and district parks exist.

- 180 We accept the recommendation of the Needs Study Report in regard to parks and find that the Calderwood development is not likely to require the

provision of or increase the demand for park facilities within the Shellharbour LGA. Consequently, no monetary contribution is required for this facility.

#### Croom Sporting Complex Netball Courts

181 Shellharbour City Council contends that the proposed Croom Sporting Complex Netball Courts are a regional facility, the Calderwood development will increase the demand for netball facilities in the LGA and Calderwood should therefore make a monetary contribution to the provision of this facility. Lend Lease contends that the Calderwood development includes netball courts within Lend Lease's provision of sporting facilities and that a monetary contribution should not be levied towards the Croom Sporting Complex Netball Courts.

182 The Needs Study Report states the following in relation to sporting grounds in the LGA (Exhibit E, tab 18, folio 710):

The overall area of sporting facilities is clearly meeting the provision target of 1.7 ha per 1000 persons. In the eastern portion of the LGA, the area provided for sporting facilities is more closely aligned to the provision requirements, though still exceeding this level.

183 The Needs Study Report recommends, in relation to netball facilities (Exhibit E, tab 18, folio 713) that the existing netball facilities be maintained and upgraded to meet training and off-season competition needs, as the regional Val Curren Netball Centre at Berkeley will cater for future high level competition.

184 We accept the recommendation of the Needs Study Report in regard to netball facilities and find that the Calderwood development is not likely to require the provision of or increase the demand for netball facilities within the Shellharbour LGA and that consequently, no monetary contribution is required for this facility.

### **Shellharbour City Stadium (recoupment)**

185 The s94 Plan says that Shellharbour City Stadium 'is required to cater for the increasing demand for indoor sporting facilities in the City including basketball, netball, futsal and volleyball' (Exhibit 25, tab 1, Contributions Plan Part 2). Ms Brown considers that the open space and community facilities to be provided at Calderwood will meet the reasonable local needs of the future residents. She does not consider that any open space or sporting facilities contribution is necessary for this reason. Ms Bull mentions the City Stadium specifically (Exhibit C, par 131 – 133) and rejects any contribution toward it because of its 'sub-regional nexus' and because it is not required 'to meet the reasonable demand arising from the future population of the Calderwood Project for access to city-wide open space and recreation facilities'. She considers that the facilities being provided by Lend Lease in Calderwood would render any additional monetary contribution unreasonable.

186 As earlier noted, Mr Hoynes advocated a contribution based on what he described as the Revised Contributions Plan, a concept we have rejected. However, his contingent position was that if we did not adopt that proposal, the rates from the current s94 Plan should be applied.

187 As the facilities are ones of a type that are not to be provided within Calderwood, but are likely to be utilised, at least to some extent, by future Calderwood residents, we consider a contribution is appropriate. This contribution should be at the rate provided for in the current s94 Plan.

### **City-wide community facilities**

188 Shellharbour City Council seeks a contribution for the following City-wide community facilities:

- New council administrative offices;
- Central Library and museum;
- Sessional services facilities; and

- Theatre and Auditorium

#### New Council Administrative Offices

189 The council administration offices in the current 2006 s94 plan attract a levy of \$151.49 per dwelling (transcript 16 April par 40). According to Mr Hoynes, the contribution towards the council administrative offices in the 'draft' s94 plan has increased to \$1,720 per dwelling (transcript 16 April par 25). Mr Hoynes says that the reason for the increase is that the council is now planning to construct a civic centre which will include the council accommodation as well as retail and commercial space, a library, a museum and basement parking. An axonometric 'diagram' and conceptual plans of the proposed Shellharbour City Civic Centre, Option 2 have been prepared by Brewster Hjorth Architects (exhibit AA).

190 The proposed Shellharbour Civic Centre will consist of the following accommodation:

- Two basement levels of car parking for 240 cars with retail accommodation on both basement levels fronting Cygnet Avenue;
- Ground level: civic square with a breezeway connection to the park, coffee shop accommodation, council accommodation including sessional services offices and elements of the library;
- Level 1: council accommodation and the remainder of the library;
- Levels 2 and 3: office administration;
- Levels 4 and 5: future commercial accommodation.

191 In our view, the added administrative load, generated by the residents of Calderwood, will not require the entire reconstruction of the council chambers. We are not satisfied that Calderwood will, or is likely to, require the provision of a new civic centre (excluding the central library) and further, it is inappropriate to require a monetary contribution towards the commercial facilities proposed within the civic centre, including the

basement levels of retail accommodation, the ground floor coffee shop and the potential levels 5 and 6 of commercial floor area.

- 192 As a consequence, the proposed new level of levy is not appropriate, but that derived from the present s94 Plan as a contribution to the Council's current administrative facilities is appropriate on a basis analogous to a s94(3) recoupment. The rate is to be that provided for in the current s94 Plan.

#### Central Library and museum

- 193 According to Ms Bull, the Calderwood development includes a branch library in works in kind and therefore a monetary contribution is not required towards the central library.
- 194 The Needs Study Report states that the 2007 Library Facilities Review proposed the provision of three branch libraries supported by a central library in the City Centre and that the assumptions used to develop the review for the Shellharbour LGA remain fundamentally unchanged. (Exhibit E, tab 18, folio 722).
- 195 We accept the recommendation of the Library Facilities Review quoted in the Needs Study Review. In our view, a central library is essential to co-ordinate branch libraries, including the proposed branch library within the Calderwood development. A central library also performs a range of functions such as the organisation and management of inter-library loans, overall collection coordination, ordering of new acquisitions and the like, that are distinctly different in comparison to those activities ordinarily expected of a branch library. The proposed central library will provide valuable support to the branch library proposed for Calderwood. Therefore a monetary contribution is required for the central library facility. The rate is to be that provided for in the current s94 Plan.

### Sessional services facilities

- 196 Sessional services facilities are, as we understood Mr Hoynes evidence, essentially meeting facilities for external social service and other community service providers. He was not able to provide any extensive list of examples of users for such facilities. There is proposed to be adequate, in our opinion, space for such uses within the community facilities to be provided by Lend Lease at Calderwood. We are not satisfied that Calderwood will, or is likely to, require the provision of centralised sessional services facilities of the type proposed.

### Theatre and Auditorium

- 197 We agree with Mr Hoynes' evidence that the proposed theatre and auditorium will be used by the city-wide population, including the future residents of Calderwood. Ms Brown also agreed that a contribution to this facility is appropriate (Exhibit 3, par 63). She did not specify the quantum that should apply.
- 198 There is no comparable facility envisaged by Lend Lease to be provided at Calderwood. We accept that larger scale cultural venues are usually only able to be provided on a local government area-wide basis. There is no reason to believe that the uses of such cultural facilities will not be to the benefit of, or required for, the future residents of Calderwood. It is not reasonable to assume that Calderwood will be a cultural desert. A monetary contribution should be levied on the proposal to contribute to these facilities. The rate is to be that provided for in the current s94 Plan.

### **s94 management contribution**

- 199 Ms Bull provided a number of examples (Exhibit C, par 168) of administration percentages or monetary contributions. Where a percentage has been applied, it has not been greater than 1%. Ms Bull also said (par 174), 'if a plan administration component were to be applied, in my view, it ought not exceed 0.5 – 1% of the otherwise determined

monetary contribution.' We accept the position of Lend Lease and 1<sup>st</sup> Respondent that a 1% management contribution is appropriate.

200 Ms Brown said (Exhibit 3, par 64), 'the administration levy proposed under Shellharbour Council's draft s94 plan appears to comprise 14% of the total contribution sought to be levied. This appears to be an unreasonable quantum to be imposed.'

201 Ms Brown's sentiment is undoubtedly self-evidently correct. It is inconceivable to imagine an administration impost of that dimension. On the other hand, we do not consider it unreasonable to make some provision for the administration of the plan. The range proposed by Ms Bull seems sensible and, given the range of matters to be covered and the limited number of matters for which a contribution is to be required of Lend Lease, an administration component at the top of her range is not unreasonable.

202 We therefore consider that an administration charge of 1% to be applied to the Shellharbour s94 contributions derived from this judgment should be added to those contributions.

### **"Unjust enrichment"**

203 In Lend Lease's submissions, there was a suspicion, a merest suspicion, of the suggestion that Shellharbour Council would, in some fashion, be obtaining an inappropriate advantage for its community if it were permitted to levy s 94 contributions for community facilities. We understood this to be the suggestion that, because those facilities had been costed and provided for in the current s 94 contributions plan across levels of development within the local government area that did not include the site, receiving contributions as a consequence of development of the site would constitute some form of windfall bonus.

- 204 We do not accept this proposition. Contributions for community infrastructure are levied either because of demand for new community facilities arising from development or because the new residents will benefit from community facilities already provided in anticipation of population changes.
- 205 Over time, a council collecting such contributions is required to manage those funds for the purposes of meeting the costs of such facilities. If there were to be money left over, those funds are required to be expended on community facilities and, in any event, costings projections over the life of a s 94 plan operating for 10 years or more are necessarily imprecise. In addition, although funds for such facilities are collected by being levied for the various facilities described in the plan, provided those facilities are constructed over the life of the plan, the funds are able to be utilised in a responsible sequencing fashion by the collecting council – sequencing that enables the bringing forward or the pushing back of the particular items depending on the level of funding available.
- 206 We see nothing incongruous or inappropriate in levying such contributions on the site.

## **Conclusion**

- 207 Although the matters in contention in a pleaded sense were confined to infrastructure upgrade standards and the extent to which contributions should be required to be paid to either Wollongong City or Shellharbour City Councils for those purposes, the proceedings nonetheless related to considering whether approval should be granted to Stage 1 of development of Calderwood. This required us to consider not only the limited range of matters related to infrastructure that were pleaded, formally, in the proceedings but also to consider the broader public objections raised in the proceedings.



- 208 In the early portion of this judgement, we set out our reasons for concluding that there was no basis to reject all or any part of the present Stage 1 application for Calderwood.
- 209 Having reached that broad conclusion, we have then turned to consider the specific construction standard and financial contribution issues raised by each of the councils.
- 210 The Court is exercising the Minister's functions, on appeal and the constraints on the imposition of local infrastructure contributions by reference to formally adopted contributions plans, does not exist, pursuant to s 94B(2)(a) of the EPA Act. The discretion afforded by this section is constrained by the requirement to have regard to any contributions plan that applies to the whole or any part of the area in which the development is to be carried out, pursuant to s 94B(2)(b).
- 211 In addition, even if we were to regard the existing contributions plans as being significantly persuasive (although not binding), it is clear that the functions of the Court are significantly less constrained with respect to the appropriateness or otherwise of identified contribution items and the level of contribution for such item in a council contributions plan (see *Rose Consulting Group v Baulkham Hills Shire Council* [2003] NSWCA 266; [2003] 58 NSWLR 159; [2003] 129 LGERA 165).
- 212 We have earlier set out, with respect to each of the areas of contest about an item of local infrastructure, what we consider to be the appropriate construction standard to which a contribution should attach (when that construction standard was in contest between Lend Lease and the relevant council) and, where we were able to do so, the rate that should be applied for any infrastructure contribution we have determined is appropriate. We have not, however, set out a derived finalised contribution, for each council, to be applied to all of the allotments in Stage 1 of the development of Calderwood. We prefer to leave settlement of the appropriate amounts for each of Wollongong City Council and

Shellharbour City Council to be settled by the parties with the option of recourse to us if the parties are unable to agree on the relevant amount to be the derived for each council.

213 As a consequence, although the orders of the Court, when finalised, will uphold the appeal and grant development consent to Stage 1 of Calderwood, the appropriate course to follow to permit this to occur is to give directions embodying a timetable for the parties to settle and file (including filing electronically) agreed, consolidated conditions of development consent to permit those orders to be made. We therefore give the following directions:

- (1) The parties are to file settled, consolidated conditions of development consent for Stage 1 of development of Calderwood reflecting the terms of this decision by 4:30 pm on Wednesday 28 August 2013;
- (2) The settled, consolidated conditions of consent are also to be lodged electronically by email, with the Court in Word format;
- (3) The matter is set down for mention before Senior Commissioner Moore at 4.15 pm on Thursday 29 August 2013;
- (4) If (1) and (2) are complied with, we will make orders in Chambers and the mention will be vacated; and
- (5) The exhibits, other than Exhibits 9, 20 and V, are returned.



**Tim Moore**  
**Senior Commissioner**



**Susan O'Neill**  
**Commissioner**

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