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3 February 2011

Your Ref: MP 10-0075 & MP 10-0078
Our Ref: 1/11

Mr Simon Bennett
Team Leader, Strategic Assessment
GPO Box 39
SYDNEY NSW 2001

Attention: Ms Ruth Allen

Dear Ruth,

RE: North Penrith State Significant Site, Concept Plan and Stage 1 Project Application – Environmental Assessment Report Exhibition

We act on behalf of the Hunter Valley Training Company Pty Ltd owners of land described as Lot 6 in DP 1017480 Castlereagh Road, North Penrith. Attached is a submission in respect of the proposal to develop the land for the following:

MP10-0075
To facilitate the development of the site to allow for:

- 900-1000 new dwellings comprising
  - 100 seniors living/aged care dwellings;
  - 44 affordable/social housing dwellings; and
  - 44 adaptable dwellings;
- 12,500m2 of retail, business and commercial floor space, including a new town centre;
- 2ha of industrial lands;
- The retention and protection of land for Thornton Hall; and
- 8ha of open space.

MP10-0078
Is also sought for a Stage 1 Project Application involving:

- Subdivision to create 120 lots comprising:
  - 106 future residential lots;
  - 1 Village Centre lot;
  - 6 super lots;
  - 3 future open space lots, including 1 lot to accommodate the community centre;

- 1 future industrial lot;
- 1 sewer pumping station lot; and
- 2 residue lots;

- Infrastructure and site preparation works.

This submission seeks to respond to the public exhibition and invitation for submissions in respect of the proposal. The submission objects to parts of the proposed development, as detailed in the submission.

Should you require clarification of any aspect of this correspondence please do not hesitate to contact me.

Sincerely yours,

M J BROWN
DIRECTOR
MICHAEL BROWN PLANNING STRATEGIES

SUBMISSION IN RESPECT OF PROPOSED MAJOR PROJECT MP 10 - 0075 & MP 10 – 0078 - LANDCOM

Land Situated at Coreen Avenue & The Crescent, North Penrith

Prepared For:
Hunter Valley Training Company Pty Ltd

Prepared By:

michael brown
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January 2011

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Contents

Annexures

1 Brief

This submission has been prepared in respect of instructions from the Hunter Valley Training Company Pty Ltd (herein after referred to as the HVTC site); owner of land legally described as Lot 6 in DP 1017480 Castlereagh Road, North Penrith in response to the public exhibition and invitation for submissions for Major Project Applications. The proposal, as described in the Statement of Environmental Effects and in the notification from the Department of Planning involves:

MP10-0075

To facilitate the development of the site to allow for:

- 900-1000 new dwellings comprising

  - 100 seniors living/aged care dwellings;
  - 44 affordable/social housing dwellings; and
  - 44 adaptable dwellings;
- 12,500m² of retail, business and commercial floor space, including a new town centre;
- 2ha of industrial lands;
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MP10-0078

Is also sought for a Stage 1 Project Application involving:

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  - 106 future residential lots;
  - 1 Village Centre lot;
  - 6 super lots;
  - 3 future open space lots, including 1 lot to accommodate the community centre;
  - 1 future industrial lot;
  - 1 sewer pumping station lot; and
  - 2 residue lots;
- Infrastructure and site preparation works.

As part of the application, Landcom is seeking a rezoning of parts of the land, generally from industrial (refer to **Figure 2**) to residential (medium density 3 to 6 storeys).

The application submitted by Landcom is accompanied by a number of supporting technical reports and documents. It is not proposed to critique these documents to ascertain whether they are deficient in terms of the technical detail. That assessment can be undertaken by Council, the Department of Planning and the various government agencies.

2 The Context

The subject property is located in the industrial area of North Penrith, on the northern side of the Penrith Central Business District and Railway Station. The North Penrith Industrial Estate is generally located between the Nepean River to the west of Castlereagh Road, the railway line, Andrews Road to the north and Hickeys Road to the east.

Vehicular access to industrial estate is generally from Castlereagh Road, which runs in a north/south axis and bisects the estate. Coreen Avenue bisects the estate in an east/west direction; whilst Andrews Road is the northern extremity of the estate. To the east of the estate is residential suburb of Cambridge Park and Cambridge Gardens.

The majority of the Landcom site is currently owned by the Commonwealth (Department of Defence), but Landcom is in the process of acquiring ownership of the lands.

The aerial photograph below at **Figure 1** provides a contextual overview of the immediate area, with the land owned by Hunter Valley Training Company Pty Ltd highlighted. As can be seen from the aerial photograph, the HVTC site is surrounded by industrial development or land zoned for industrial purposes in accordance with the industrial zoning applying to these lands and that of the Landcom site, as shown in **Figure 2** below.

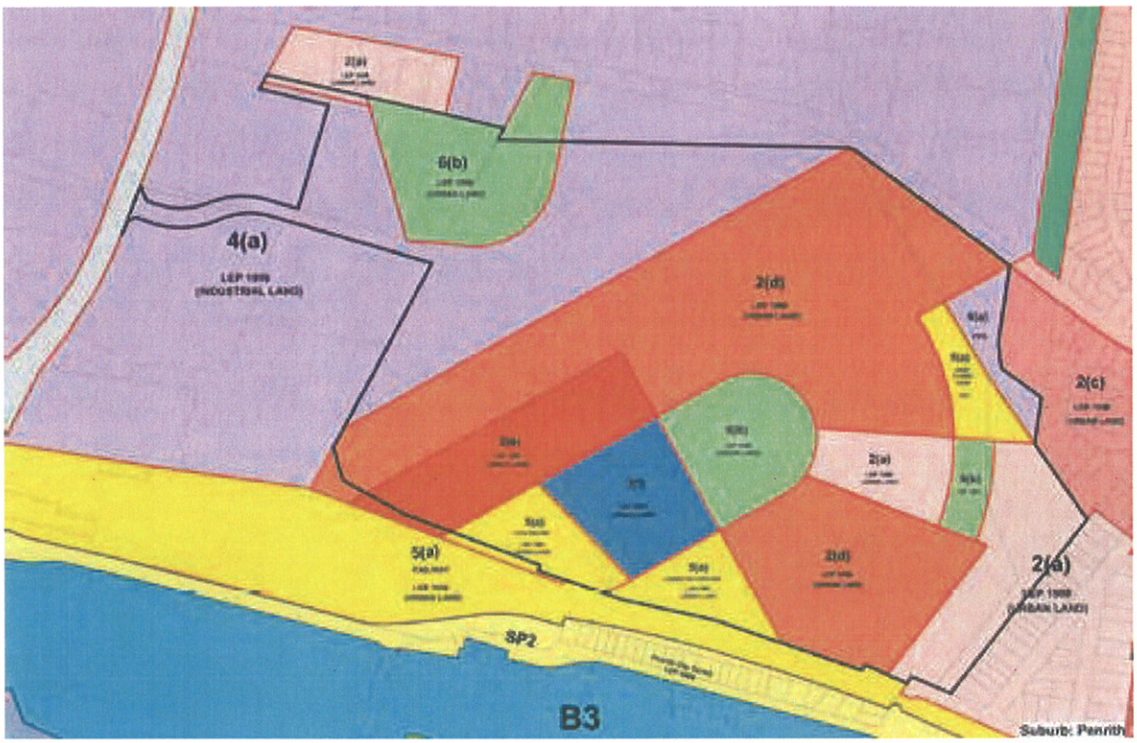
FIGURE 1 – CONTEXT OF THE SUBJECT PROPERTY TO SURROUNDING LANDS

3 The Planning Documents

3.1 PREVAILING PLANNING PROVISIONS

The Landcom land and adjoining lands are subject to various planning instruments, as shown in **Figure 2** below. Attached to the subject zones are objectives and landuse provisions. The zones list the uses that are permissible with the consent of Council, with other landuses prohibited.

FIGURE 2 – CURRENT ZONING OF THE LANDCOM LAND AND SURROUNDING LANDS



As stated above, it is not proposed to critique the various technical studies, but it is noted that that part of the land adjoining the HVTC site is currently zoned General Industrial 4(a). Under the proposal, this land is proposed to be rezoned to permit medium density housing, with potential for mixed-use development at ground floor, but predominantly medium density development. Buildings are proposed to be three and six storeys high to the northeast and east, respectively, from the HVTC site.

Currently the zoning of these lands permits a wide range of general industrial uses, subject to development consent. The land zoned for residential purposes on the LEP is further removed from the HVTC site. The implications of now having medium density development on the boundary of the HVTC site is addressed below, particularly as the HVTC site has not been fully developed for industrial purposes in accordance with the zoning of the land and the Development Control Plan.

3.2 DRAFT DEVELOPMENT CONTROL PLAN AND CONCEPT PLAN

Accompanying the rezoning proposal is a draft Development Control Plan and concept plan. As stated above, the draft Development Control Plan proposes residential buildings adjoining the HVTC site up to six storeys in height (immediate east). A copy of the heights and concept plan are provided at **Figures 3** and **4** below.

FIGURE 3 – HEIGHTS OF BUILDINGS FROM DEVELOPMENT CONTROL PLAN

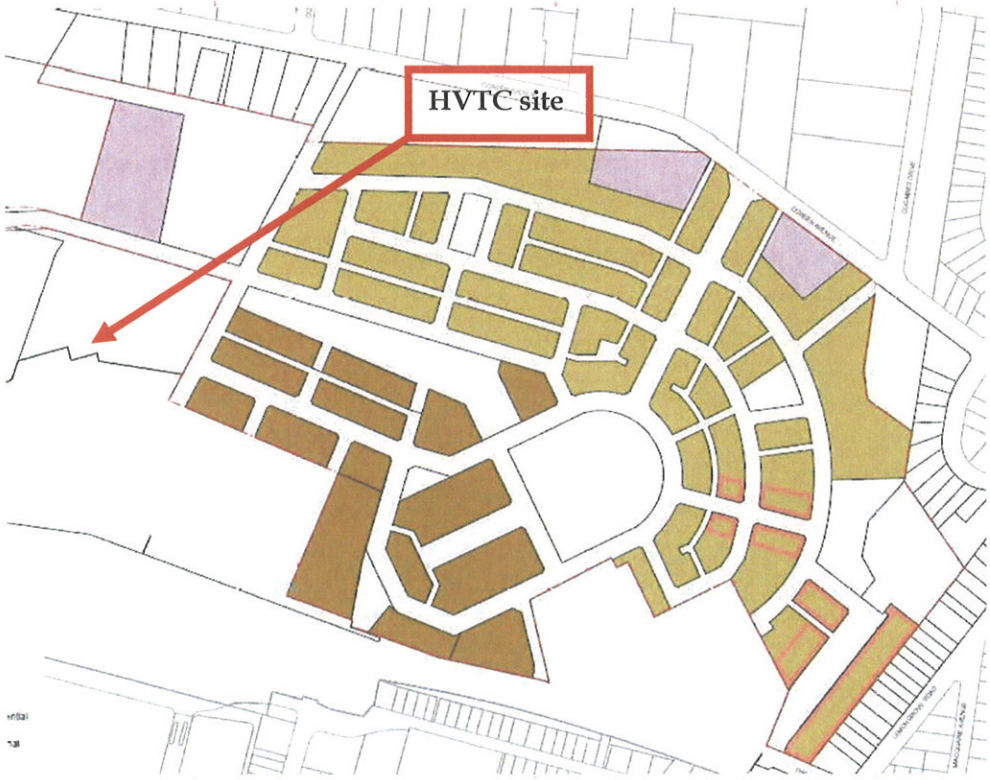


FIGURE 4 – ILLUSTRATIVE CONCEPT PLAN

4 Review of Proposal

4.1 INTRODUCTION

An issues based review of the proposal has been adopted to bring into sharp focus the inappropriateness of the residential component of the development proposal in the subject context adjoining the HVTC site. This approach importantly is not at the expense of a statutory compliance review (the more traditional approach), with such matter being addressed by the Council and other government authorities.

4.2.1 SEPARATION FROM SURROUNDING LANDUSES

As stated above, the medium density component of the project now brings this form of development adjoining the HVTC site, albeit across a road providing vehicular access to the public carparking area adjoining the railway station. In our opinion residential communities prefer to have some separation from industrial and other noise generating uses. The separation may be in the form of a landscape buffer, which would also provide for acoustic walls or similar to not only screen industrial landuses but also to ensure that residential properties are effectively attenuated from noise producing developments.

It is clearly acknowledged that there are industrial buildings and landuses located in close proximity to the proposal and that acoustic treatment of the general area has not been provided given the clear fact that the sites do not adjoin residential properties. In this regard, we would like to draw attention to the following:

The Court of Appeal decision in Inghams Enterprises v Kira Holdings (copy attached) is a case in point regarding separation of conflicting landuses. The following passage from the judgment states:

"If, at the time of considering whether consent should be granted, the incompatibility between the proposed development and that on an existing adjacent property cannot be resolved by the imposition of conditions upon the developer/applicant, the development should be refused. In my opinion it must be recognised that the decision maker considering the grant of a consent has no power to impose conditions upon a neighbouring land holder or his exercise of a legally permitted use on that land."

Our clients want to ensure that the Department of Planning and Penrith City Council take into account, in its assessment of the Landcom development, the likely future impacts from our client's current and future operations and that the Landcom approval contains sufficient safe guards to avoid complaints being made. This is particularly so when vehicular access to the Landcom site is essentially past the 'front door' of the HVTC site, noting that the full potential of the site has not been realised, to date.

It is possible in the near future that the HVTC site is redeveloped for industrial purposes including buildings with a variety of landuses permissible under the current LEP. It is also possible that given the general industrial zoning of the land that a future developer/tenant of the redeveloped site may want to operate 24 hours per day – seven days per week. This aspect is addressed below in section 4.2.4.

The potential restrictions on the HVTC site that are likely to eventuate as a result of residential development adjoining the site compared to industrial development are numerous, including potential financial implications.

For example, the Council through planning controls may impose new restrictions that were or would not have been contemplated if an industrial zoning applied to adjoining lands, such as greater setbacks to roads, restrictions on access, building heights, noise generating landuses and different landuses of a nature that may not be compatible with residential development.

These restrictions could reduce the development potential of the site with possible flow on effects on land values and /or sale of land. The current industrial zoning does not have such an affect and allows a full range of industrial landuses commensurate with the industrial zoning.

4.2.2 VISUAL IMPACTS

The design of the proposal has sited the medium density development (up to six storeys) immediately across the road from the HVTC site.

Whilst the proposal is in a conceptual stage, six storey buildings immediately opposite an industrial area provides little or no opportunity for landscape screening. It should not be incumbent on HVTC to bear any responsibility for screening their site when developed, other than what would ordinarily be required by Council for landscaping of industrial areas.

In this regard, screen landscaping has long been a principle held by the Land and Environment Court and local government Councils as not being an acceptable tool to ensure privacy. This dictum is set out in *Super Studio v Waverley Council* [2004] NSWLEC 91 @ para 6:

> *"The second principle is that where proposed landscaping is the main safeguard against overlooking, it should be given minor weight. The effectiveness of landscaping as a privacy screen depends on continued maintenance, good climatic conditions and good luck. While it is theoretically possible for a council to compel an applicant to maintain landscaping to achieve the height and density proposed in an application, in practice this rarely happens."*

The likelihood of the proposed landscaping being maintained in perpetuity is remote at best **and doesn't overcome the visual effect of six storey buildings overlooking an industrial area** and the potential for complaints regarding noise impacts from industrial operations, including industrial traffic. It is unclear whether the existing industrial sites have restrictions on hours of operation or indeed requirements to meet the EPA Industrial Noise Criteria. But in all likelihood there are no restrictions and not only does residential development on the boundary of the HVTC site have potential impacts, but this is also likely to extend to existing industrial premises in the immediate area.

4.2.3 SUITABILITY OF SITE

Whilst one of the principals of new urban development is to ensure that future residents are within close proximity to employment nodes, to have medium density development immediately across the road from industrial development without adequate safeguards in place is potentially placing the burden on Council to resolve landuse conflicts. This in our opinion is not a good planning outcome.

A more appropriate outcome would be to ensure that there are adequate buffer distances between the two conflicting landuses. It this regard a landscape buffer would be required including appropriate acoustic walls/barriers constructed to provide an adequate buffer. Such is not uncommon in areas that adjoin industrial properties.

4.2.4 POTENTIAL NOISE IMPACTS

In a similar manner to visual privacy, acoustic amenity is another primary attractor in people selecting a residential lifestyle. Again this is the case for the people residing in the proposed residential development. It also extends to people further afield who may experience the impacts of increased vehicle generated noise and landuses.

To address potential noise impacts from the development onto neighbouring properties, the report provides no recommendations to attenuate potential noise impacts on existing and future residences, nor from existing industrial landuses. This is standard practice for noise assessment.

Accordingly, our client's are extremely concerned that any future redevelopment potential for their site will be severely constrained by conditions of development consent, including imposition of acoustic treatment that ordinarily would not have been required. This has the potential to add significant costs to any future developer of the site. Indeed this would be an added cost to the development site and potentially reduce the cost of the land.

Any reduction is land value from that which could currently be realised is unreasonable at the benefit of the proposed development of the Landcom site. This includes the costs of suitable noise attenuation on the HVTC site. Given the heights of buildings proposed, it is unlikely that suitable noise attenuation could be achieved. Indeed, it is likely that in any redevelopment scenario the Council is likely to impose hours of operation restrictions that will have the potential to reduce the marketability of the land.

4.2.5 THE PUBLIC INTEREST

The proposal as established in this Submission is clearly not in the public interest by virtue of:

- Adverse residential character impacts in the locality.
- Adverse impacts upon the visual and acoustic privacy of future residents of the medium density sites and potential noise complaints regarding existing and future operations of the industrial estate.
- Potential exposure of increased persons to a variety of issues.
- Potential financial impacts on any future development of the HVTC site in terms of costs associated with acoustic treatment of industrial development and restrictions on the types of landuses.

6 Conclusion

This submission has raised several matters/issues whereby significant concerns have been expressed as to future medium density development adjoining the HVTC site has been provided with the subject proposal.

Further, the proposal is not considered to be in the public interest by virtue of its adverse character impacts, visual and acoustic amenity impacts and adverse environmental and aesthetic impacts in general.

Finally, the development proposal has the potential to have particularly significant adverse amenity impacts upon the immediate future residents and lead to a significant diminution in the value of their property.

The Department of Planning is accordingly petitioned to reject the subject application for the reasons contained in this submission or as a minimum require the relocation of the medium density sites future from the existing industrial estate and provide required acoustic treatment in the form of a wall or similar buffer.

SINCERELY YOURS,

M J BROWN
DIRECTOR
MICHAEL BROWN PLANNING STRATEGIES

Annexure "A"
Court of Appeal Decision

[SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)]

INGHAMS ENTERPRISES PTY LTD v KIRA HOLDINGS PTY LTD AND ANOTHER

Priestley, Clarke and Cole JJA

27 November 1995, 29 March 1996

Planning Appeal — Development application — Proposed residential subdivision adjacent to existing large scale poultry industry — Admission that existing development fundamentally incompatible with proposed one — Development consent granted by Land and Environment Court on basis that parties must as neighbours work out environmental problems between themselves and (presumably), if necessary, by resort to other litigation — Judge diverted from considering relevant factors by his endeavour to resolve a conflict between proposal and existing adjacent land use — Matter remitted to Land and Environment Court for reconsideration — Environmental Planning and Assessment Act 1979 (NSW), ss 90, 106, 107 — Liverpool Local Environmental Plan No 108, cl 31A.

Section 90(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) provides that in determining a development application a consent authority shall take into account such of a specified list of matters as are of relevance to the proposed development. The matters include (d) the social effect and the economic effect of the development in the locality ... (h) the relationship of the development to the development on adjoining land or on other land in the locality ... (o) the existing and likely future amenity of the neighbourhood. Section 107 provides that except where expressly provided in the Act nothing in the Act or an environmental planning instrument prevents the continuance of an existing use. The term "existing use" is defined in s 6.

Clause 31A of *Liverpool Local Environmental Plan No 108* provides that nothing therein prevents a person, with the consent of Council, from carrying out development on land referred to in Sch 4 for a purpose specified in relation to that land, subject to such conditions, if any, as are therein specified.

Kira Holdings Pty Ltd appealed to the Land and Environment Court against the local council's refusal of development consent for stages 2 and 3 of a residential subdivision adjacent to a large scale poultry industry all of which but for its poultry processing plant was an existing use. The poultry processing plant was protected by cl 31A of *Liverpool Local Environmental Plan No 108*. It was admitted and found that the existing development was fundamentally incompatible with the proposed development in terms of the nature and quality of each and by virtue of the physical contiguity of the two development sites. The Land and Environment Court (Bignold J) sought to reconcile the proposed development with the existing adjacent one and considered three possible "resolutions" to the conflict:

1. "Any resulting land use conflict must needs be encountered and be left to other areas of the law for possible resolution (eg the common law of nuisance and/or the *Clean Air Act* 1961 (NSW) and the *Noise Control Act* 1975 (NSW))."

2. The second or "intermediate approach" was to require:

> "The applicant for development consent, to the extent that it is reasonably open to him, to make a reasonable attempt to mitigate the conflicting

relationship between a proposed development and the existing development eg by way of some adjustment or compromise of his interests."

This approach also required the adjoining owner, Inghams Enterprises Pty Ltd, to make "some similar adjustment of its interests."

3. The third contemplated solution was to hold that:

"No development consent should be granted unless the conflict in relationships between the proposed development and the existing development is satisfactorily resolved, in and by the process of exercising the planning discretion."

The trial judge thought the appropriate exercise of discretion was to adopt what he called the "intermediate approach" and, on that basis, he upheld the appeal and granted development consent. The adjacent land owner, Inghams Enterprises Pty Ltd, appealed.

Held: (1) The trial judge erred in law in failing to consider the factors arising under s 90(1)(d), (h) and (o) of the *Environmental Planning and Assessment Act* 1979 because he was diverted from the task of considering those factors by an endeavour to resolve a conflict which he saw between the proposed use of the subject lands and the existing use of neighbouring lands.

North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd (1989) 16 NSWLR 50 at 51; 67 LGRA 344 at 345, explained by Cole JA.

(2) The matter must be remitted to the Land and Environment Court for reconsideration.

APPEAL

This was an appeal under s 57 of the *Land and Environment Court Act* 1979 (NSW) against a decision of the Land and Environmental Court upholding an appeal against refusal of development consent for subdivision. The facts are set out in the judgment of Cole JA.

P D McClellan QC and *T S Hale*, for the appellant.

S B Austin QC and *G B Newport*, for the first respondent.

P R Clay, for the second respondent.

Judgment reserved

29 March 1996

PRIESTLEY JA. I have had the advantage of reading in draft the reasons of both Clarke JA and Cole JA.

Like Clarke JA, I agree with Cole JA that Bignold J erred in law in failing to consider the relevant matters required by pars (d), (h) and (o) of s 90(1) of the *Land and Environment Court Act* 1979 (NSW) because his attention was diverted by his attempted resolution of a conflict between the proposed use of the appellant's land and the use of adjacent land.

I therefore agree with the orders proposed by Cole JA.

I also agree with the various observations of Clarke JA upon this appeal.

CLARKE JA. The facts in this appeal are set out in the judgment of Cole JA with whose ultimate conclusions I agree. I do so because, like his Honour, I consider that the trial judge erred in law in failing to consider the factors arising under s 90(1)(d), (h) and (o), which he identified as the subsections arising the relevant considerations, but rather was diverted from the task of considering those factors by an endeavour to resolve a conflict which he saw between the proposed user of the subject lands and the use of neighbouring lands.

Because this appeal is concerned only with errors of law I will not express any opinion upon factual considerations which will arise for consideration in the rehearing. It is, I feel, necessary to emphasise that it is for the Land and Environment Court to determine whether, having regard to the relevant considerations which arise under s 90, the appeal brought by Kira Holdings Pty Limited to that court should be allowed.

It was common ground before the trial judge and again before this Court, that the critical matter for consideration arose under s 90(1)(h) and that was the relationship of the proposed development to development on adjoining land. As the trial judge pointed out the parties accepted that the existing development on adjoining land was fundamentally incompatible with the proposed development and that this was demonstrated, according to his Honour:

> "... by the probable adverse environmental impacts (in terms of noise, odour and dust emissions together with associated human health hazards) emanating from the existing development and significantly impacting upon the future residential population of the proposed development."

His Honour was bound to consider whether, taking that incompatibility into account, he should allow the appeal (so much is clear from the terms of the section and the discussion of the section by Moffitt P in *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 339). It may be accepted that his Honour was entitled to have regard to any steps proposed by the developer to minimise the fundamental incompatibility. Nonetheless, at the end of the day, the court was required to determine whether, having regard to the incompatible relationship, the application should be granted. His Honour was, as it seems to me, diverted from that basic question by an endeavour to determine the best means of resolving the conflict or incompatibility between the two land uses. This can most readily be seen by his Honour's identification of the three possible approaches to the problem. Cole JA has identified them and it is unnecessary to spell out each of those approaches again. His Honour did, however, identify the intermediate approach in these terms:

> "... namely that the exercise of planning discretion will require of the Applicant for development consent, to the extent that it is reasonably open to him, to make a reasonable attempt to mitigate the conflicting relationship between the proposed development and the existing development eg by way of some adjustment or compromise of his interests."

I see nothing wrong in a planning authority imposing conditions on the grant of a consent designed to alleviate any problems of incompatibility. After all there is no novelty in finding that a proposed development detrimentally affects a neighbouring land use. The most obvious example is where the development consists of a building which will destroy the views enjoyed by a neighbouring land holder. When that occurs the task of the development authority is straightforward — either it grants the development, with or without conditions, or it refuses it. The same approach was required in this case.

In a sense his Honour's intermediate approach suggested that an applicant for development consent faced with an incompatible adjoining land user could, or should, make attempts to minimise the effects of the incompatibility. That is not saying any more than that a development authority may, in considering whether to grant approval to the development application, take into account the steps which the applicant has made to lessen the impact of the development on neighbouring owners in determining whether to grant consent or in the imposition of conditions. It is not, however, any part of the function of that

authority (or the court when acting in substitution for the authority) to seek to resolve conflicts or to be concerned, as his Honour was, with the prospect that the holder of the land adjoining the proposed development could or should be expected to make adjustments to its land use to accommodate the new development.

As I have earlier indicated I think his Honour, in endeavouring to find an acceptable compromise which involved a consideration of the way in which the adjoining landholder may be required to modify its land use, was diverted from the straightforward, but no doubt difficult, task of determining whether, despite the incompatibility, consent should be granted. If his Honour had directed his attention to that task there would have been no occasion for this Court, restricted to the review of legal error, to interfere. I reiterate that it is not for this Court to direct the trial court as to the manner in which its discretion should be exercised and, in this respect, I disagree, with respect, with that part of the judgment of Cole JA in which he indicates that if the incompatibility cannot be resolved by the imposition of conditions the development should be refused.

I agree with the orders proposed by Cole JA.

COLE JA. This is a class 1 appeal from a decision of Bignold J granting development consent to a subdivision of land at Hoxton Park. Pursuant to s 57(1) of the *Land and Environment Court Act* 1979 (NSW) an appeal is permitted to this Court only on a question of law. The first respondent, Kira Holdings Pty Ltd (Kira), the successful developer below, has contended that the issues raised on this appeal are in truth questions of fact and the appeal should thus be dismissed.

By amended grounds of appeal, Inghams Enterprises Pty Ltd (Inghams), an objector and the appellant, has contended that there are five errors of law disclosed in the judgment. They may be summarised briefly as follows:

1. The trial judge misdirected himself regarding the proper approach to the application of s 90 and s 91 of the *Environmental Planning and Assessment Act* 1979 (NSW) in the circumstances of this case.

2. In consequence, the decision reached was manifestly unreasonable and thus appellably wrong.

3. The trial judge misstated the proper question to be addressed in considering whether development consent should be granted having regard to the competing interests of the developer and Inghams.

4. Having wrongly stated the test and assuming it was answered favourably to the developer, the trial judge failed to give reasons for that decision.

5. Assuming the proper test had been stated, there is no evidence to support a finding favourable to the developer on that test.

Factual circumstances

The development appeal before the trial judge was in respect of the subdivision of a parcel of some 12 hectares of land being former rural zoned land included in the Sydney Urban Release Programme by being rezoned residential 2(e1) in 1992. The application concerned stages 2 and 3 of the subdivision of that land, stage 1 comprising 88 residential allotments having been approved by Council in December 1993. The subject land is zoned for residential purposes under the *Liverpool Local Environmental Plan No 108* and *Development Control Plan No 18*. The subject land is surrounded on three sides

by land owned by the appellant upon which is conducted a large scale rural industrial development comprising breeder hen sheds adjoining the subject land on two sides and waste water ponds on the third. The waste water ponds are an adjunct of a large scale poultry processing plant established on adjoining land. The trial judge saw the issue requiring resolution as being a resolution of

> "the conflicting relationship between (i) the proposed conforming development of the appeal site and (ii) Inghams existing development on the adjoining site, having a total area of some 60 ha (the Ingham site), all of which but for the poultry processing plant, are existing non-conforming uses with the entitlements conferred by Div 2 of Part IV of the *Environmental Planning and Assessment Act*". (Appeal Book at 1589.)

The development was opposed by Liverpool City Council, the second respondent, upon the basis that consent to subdivision was premature. Council contended that whilst in time the lengthy usage transition process might result in the eventual replacement of existing rural industrial developments such as that of Inghams with the residential development, it was too early in the transition process for development consent to subdivision now to be given.

The appellant, on the other hand, contended that the proposed subdivision of land for residential purposes was completely incompatible with the use it made of its adjoining land for the large scale breeding of poultry and processing of poultry at the processing plant with its necessary adjunct of waste water ponds. It argued that the environmental effects of its operations, in particular regarding emissions of noise, odour and dust, and associated health hazards to humans, particularly from asthma, would result in a substandard residential amenity on the proposed subdivided land. It also contended that diseases which might flow from animals and other sources in an adjoining residential development may affect the health of its poultry flocks.

It was against that background Bignold J posed for himself the question of how the conflicting relationship between Inghams, and the developer could be resolved.

Planning considerations

Bignold J referred to the relevant planning considerations. In particular his Honour noted that cl 31A of the *Liverpool Local Environmental Plan* contained a "special enabling provision ... to allow development for 'poultry processing factory' on a designated portion of the Inghams site". Clause 31A provides (Appeal Book at 437):

> "Nothing in this plan prevents a person, with the consent of council, from carrying out development on land referred to in Schedule 4 for a purpose specified in relation to that land in that Schedule, subject to such conditions, if any, as are so specified."

Part of the Inghams land was so designated with the purpose shown as "poultry processing factory". Thus, whilst *Liverpool Local Environmental Plan No 108* zoned both the land the subject of the appeal, and much of the Ingham land as residential 2(e1), it also recognised in the same instrument that Inghams were permitted to further develop the poultry processing factory on portion of their land which necessarily involves use of the waste water ponds. The result of cl 31A was to negate the necessity for Inghams to rely upon existing use provisions referred to in s 106 and s 107 of the *Environmental Planning and Assessment Act* in relation to development of that portion of its land upon which the poultry processing factory was constructed. This becomes

of importance in considering the "primacy" which Bignold J afforded to the designation of the land the subject of the appeal as residential 2(e1) under the *Liverpool Local Environmental Plan*.

The factual determinations

The learned trial judge recorded the following findings (Appeal Book at 1600-1602):

"1. It is common ground that the existing development is fundamentally incompatible with the proposed development in terms of the nature and quality of each development and by virtue of the physical contiguity of the two development sites. The proposed development is for development that conforms to the *Liverpool Environmental Plan* whereas the existing development does not so conform and its continued existence depends upon the existing-use entitlements conferred by Div 2 of Pt IV of the *Environmental Planning & Assessment Act*.

2. That fundamental incompatibility is demonstrated by the probable adverse environmental impacts (in terms of noise, odour, and dust emissions together with associated human health hazards) emanating from the existing development and significantly impacting upon the future residential population of the proposed development.

3. The Applicant's proposals for protective or defensive measures against the existing development (eg the position of the high acoustical perimeter fencing and the provision of a temporary buffer zone some 50m in depth from the three affected common boundaries and foregoing some 30 lots) will not, *by themselves*, relieve the adverse environmental impacts except for the noise impact, which I am satisfied will be substantially and satisfactorily mitigated. However odour and dust emissions are not touched by the Applicant's self protection measures and the successful control of these emissions would require some mitigation action to be taken by the Second Respondent itself, if there were to be a satisfactory coexistence of the two developments.

4. The extent to which mitigation measures may be undertaken voluntarily or involuntarily by the Second Respondent was not explored in any precise or thorough manner except at the hearing of the appeal. The Second Respondent (Inghams) did not give evidence (except for the various expert witnesses called on its behalf) and neither it nor its Counsel indicated a willingness or a capacity to take any environmental mitigation measures which would bring about an acceptable impact on the adjoining proposed residential estate. Although there is available technology for the dust and odour emissions to be controlled, its particular application to the breeder hen farms must be seriously doubted on the basis of the evidence of Mr Gilchrist which was essentially uncontested and which I accept.

5. Accordingly the Applicant's case ultimately depends upon the Second Respondent if necessary, being compelled to take environmental mitigation action to eliminate (or reduce to acceptable levels) the obvious adverse environmental impacts in terms of odour and dust emissions on the proposed adjoining residential estate. It is possible that such mitigation action could involve the physical

removal of all, or parts of, the adjoining developments (not involving the poultry processing plant). The required mitigation action was unspecified, save for generalised formulations of the duty to be an environmentally responsible neighbour and not to cause a private or public nuisance to owners and users of adjoining land. However some particular reliance was placed upon provisions of the *Clean Air Act* 1961 (NSW), and in particular s 19 which provides as follows:

'19. (1) The occupier of any premises shall not, unless he is in special circumstances exempted from the provisions of this section by the Minister, conduct any trade, industry or process, or operate any fuel burning equipment or industrial plant in or on such premises in such a manner as to cause, permit or allow the emission at any point specified in or determined in accordance with the regulations of air impurities in excess of the standard of concentration and rate, or the standard of concentration or the rate, prescribed in respect of such trade, industry, process, fuel burning equipment or industrial plant.

(2) Where any such standard has not been so prescribed the occupier of any premises shall conduct trade, industry or process, or operate any fuel burning equipment or industrial plant, in or on such premises by such practicable means as maybe necessary to prevent or minimise air pollution.' ''

The trial judge's legal approach to planning discretion

The learned trial judge recognised that, in exercising the planning discretion conferred by s 91 "in accordance with the duty imposed by s 90" regard should, in present circumstances, be had to subparas (h), (o) and (d) of s 90(1). Those subsections require that consideration be given to:

"(d) the social effect and the economic effect of that development in the locality;

...

(h) the relationship of that development to the development on adjoining land or on other land in the locality;

...

(o) the existing and likely future amenity of the neighbourhood".

"That development" refers to the development the subject of the appeal.

Having found that the development the subject of the appeal and the Inghams use of its land resulted in a fundamental incompatibility, the trial judge nonetheless sought to reconcile the developments. He considered three possible resolutions to the conflict. The first was, apparently, to ignore the conflict, grant development consent with (Appeal Book at 1603):

"Any resulting land use conflict must needs be encountered and be left to other areas of the law for possible resolution (eg the common law of nuisance and/or the *Clean Air Act* and the *Noise Control Act* 1975 (NSW))".

The second or "intermediate approach" was to require (Appeal Book at 1605):

"The applicant for development consent, to the extent that it is reasonably open to him, to make a reasonable attempt to mitigate the conflicting relationship between a proposed development and the existing development eg by way of some adjustment or compromise of his interests."

This intermediate approach also required the adjoining owner, Inghams, to make "some similar adjustment of its interests".

The third contemplated solution was to hold that (Appeal Book at 1603):

> "No development consent should be granted unless the conflict in relationships between the proposed development and the existing development is satisfactorily resolved, in and by the process of exercising the planning discretion."

The trial judge thought the appropriate exercise of discretion was to adopt what he called the "intermediate approach". In my view, in so doing his Honour fell into error.

Having found that the two developments were "fundamentally incompatible", and having found that Inghams were not prepared to "compromise its interest", the trial judge said (Appeal Book at 1606):

> "I do not think it incumbent upon the Applicant seeking the favourable grant of planning discretion, to establish the precise environmental regime that needs to be imposed on the Second Respondent (Inghams) to secure the desired environmental result, and the method of enforceability of that regime. I think it sufficient if the Applicant establishes that there is a reasonable prospect that the Second Respondent's conduct of its existing development may be regulated by the application of available relevant laws (statutory and common law) designed to create an acceptable environmental impact."

Further, Bignold J found (Appeal Book at 1606):

> "Although I readily acknowledge that the coming into existence of development resulting from the grant of development consent will probably create major problems for the Second Respondent in its desire to continue its existing operations, in the manner it has been operating for many years, I do not think the grant of consent will unfairly erode or undermine the Second Respondent's existing use entitlements under the *Environmental Planning & Assessment Act.*"

In his consideration of the competing interests of Inghams and the developer, Bignold J gave a primacy to the interests of the developer because of his view that, as the *Liverpool Local Environmental Plan* had, generally, zoned both the subject land and much of the Ingham's land as residential 2(e1), the continuation of the Inghams operations constituted an "exception to that general norm" (Appeal Book at 1607). His Honour regarded the developer in seeking to develop land for residential purposes as able to "legitimately claim a superior public interest in the implementation of the express aims and objects of the Liverpool Environmental Plan and the EP & A Act by carrying out its proposed conforming development" (Appeal Book at 1607). Thus in considering the competing interests, a future development for residential purposes, as contemplated by the *Liverpool Local Environmental Plan*, should be recognised by according it "superior public interest, over the continuation by Inghams of a non-conforming use" (Appeal Book at 1608).

In affording this primacy, Bignold J was influenced by a sentence in the judgment of Kirby P in *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989) 16 NSWLR 50 at 51; 67 LGRA 344 at 345. Bignold J quoted part of the sentence reading:

> "Existing use rights are a transitional derogation designed, *for a time only*, to cushion the impact of new general planning laws upon private owners

with the established use of their land which has continued without abandonment."

The emphasis was added by Bignold J.

Regrettably, Bignold J took the passage quoted out of context and misapplied it. The learned President was addressing a conflict between private and social rights. He was comparing the conflict between private and social rights in considering whether circumstances which might constitute existing use rights should be narrowly considered, thus favouring social rights, or broadly considered so as to sustain existing use rights, thus favouring private rights. The President, who clearly favoured public rights, posed that conflict before considering the law, which he did (at 57-60). Kirby P then concluded (at 60; 353-354):

"But whatever sympathy I might have for the desire of the Council and of the residential neighbours and the environmental interest in removing a building which is something of an eyesore, I am obliged to approach the matter not by some personal opinion of my own but by reference to the Act. And the Act must be applied in the manner which the High Court of Australia and this Court have laid down for the definition and protection of an existing use right."

There was thus nothing in the judgment of the President in *Boyts Radio* which, as a matter of law, sustains the view that the status to be accorded to existing use of land, permitted as it specifically is by s 106 and s 107 of the *Environmental Planning and Assessment Act*, and here relevantly by cl 31A of *Liverpool Local Environmental Plan 108*, a lesser status or weight when considering the matters referred to in s 90 for the purpose of making a s 91 determination.

This misunderstanding and misapplication of the passage in the judgment of Kirby P led Bignold J to at least two errors of law. First, he gave a primacy ("superior public interest") to the proposed development because he thought it reflected a general planning norm. This neglects the circumstance that the poultry processing factory development was specifically permitted by cl 31A of *Liverpool Local Environmental Plan 108*, and it neglects to give proper weight to s 106 and s 107 of the *Environmental Planning and Assessment Act*. Secondly, Bignold J directed his attention, not to the question whether having regard to the proposed subdivision development against the circumstance of existing legal and permitted uses on the surrounding Ingham land, and weighing the factors requiring consideration pursuant to s 90, the development consent should be given, but rather to the question of how the "fundamentally incompatible" conflict between the existing use and the proposed use could be resolved.

It may be permissible to consider a conflict between an existing and proposed development to determine whether the imposition of conditions on the proposed development could sufficiently resolve that conflict such as to justify the granting of development consent. In part Bignold J did this by recognising that the developer could ameliorate portion of the adverse effects upon the subject land by building an acoustic wall. He accepted, however, that the other found adverse effects of odour, dust emissions, and health hazards could not be overcome, perhaps at all, but certainly not without action by Inghams which they were not prepared to take. The result of adopting the "intermediate approach" was to grant development approval notwithstanding that the result would be a recognition that it would result in a residential development with

severely deleterious attributes, the contemplation being that, at some time in the future, some person or persons may be able to obtain a reduction or elimination of these deleterious attributes by, presumably, suing Inghams civilly or prosecuting under a statute. Bignold J, apparently, was of the view that such litigation would have "reasonable prospect" of success, although we were informed that the matter was not argued before him. Any such view would, at best, be speculative, in particular regarding whether, if such action were taken in the future by some person, it would result in amelioration or elimination of the deleterious aspects affecting the proposed subdivision from the Ingham operations.

In my opinion the correct legal approach to a consideration of a s 90 and s 91 discretion was the third identified by Bignold J, namely, that development consent should not be granted unless, having weighed the factors requiring consideration pursuant to s 90, it could be said, on balance, that consent should be granted. If, at the time of considering whether consent should be granted, the incompatibility between the proposed development and that on an existing adjacent property cannot be resolved by the imposition of conditions upon the developer/applicant, the development should be refused. In my opinion it must be recognised that the decision maker considering the grant of a consent has no power to impose conditions upon a neighbouring land holder or his exercise of a legally permitted use on that land.

In my opinion, for the reasons given, the errors I have summarised as numbers 1 and 3 have been established. Having found that the proposed development was fundamentally incompatible with the existing adjacent development, which incompatability could not be removed or adequately diminished by the imposition of conditions on the developer, the decision to grant consent was manifestly unreasonable. The second error is thus established. In the light of the findings made by the trial judge, the fifth error is also established. It becomes unnecessary to consider the fourth alleged error of law.

The appeal should be upheld and the matter remitted to the Land and Environment Court to be dealt with in accordance with these reasons. The first respondent should pay the costs of the appellant and the second respondent.

Appeal allowed and matter remitted to
Land and Environment Court for reconsideration

Solicitors for the appellant: *Freehill Hollingdale & Page.*

Solicitors for the first respondent: *Abbott Tout.*

Solicitor for the second respondent: *Malcolm L Waters.*

TFMN