



Our ref: 10119

3 February 2011

Director General
Department of Planning

Attention : Scott Schimanski

By email

Dear Scott

**RE: OBJECTION TO PART 3A APPLICATION 10/0076 FOR A MIXED USE
DEVELOPMENT AT 566-594 PRINCESS HIGHWAY, KIRRAWEE**

We act on behalf of the Westfield Limited and DEXUS Property Group owners of the Westfield Miranda Shopping Centre and several other shopping complexes in major retail centres throughout metropolitan Sydney. We have prepared this submission on the owner's behalf following our review of the submitted Environmental Assessment for the project and conclude that the project should be rejected for the reasons outlined below.

BACKGROUND

Prior to its acquisition in 2007 by the current owner, the 4.2 ha site was owned by Sydney Water and planning for the future development of the land commenced with the nomination of Kirrawee as part of the 'Living Centres Program' in 2001. The joint initiative was led by the Urban Design Advisory Service in association with Sutherland Council, Council's Economic Development Committee, the Department of Infrastructure, Planning and Natural Resources and Sydney Water (the owners of the Brick Pit site). Extensive public consultation was undertaken with the ultimate production of a Local Area Masterplan (LAM) for the Kirrawee Town Centre in 2003.

The LAM considered that the industrial area surrounding the Brick Pit should be encouraged to redevelop and provide more opportunities for high employment generating activities. Consequently, the LAM proposed a mixed-use zone for the area to enable redevelopment to accommodate commercial/office and some retail space at ground level with residential above.

The LAM also indicated that the retention of the existing water body on the site was critical for the preservation of threatened species (including the grey headed flying fox and the Sydney Turpentine Ironbark Forest). The LAM indicated that any future pit filling and the resolution of other geotechnical issues would require extensive analysis as part of any future detailed design.

The culmination of the LAM for the Kirrawee Town Centre was the adoption and gazettal of the Sutherland LEP 2006 and DCP 2006. The zoning of the subject site includes Zone 7 - Mixed Use – Kirrawee and a 0.9 ha parcel of land accommodating the brick pit and zoned Public Open Space (Zone 13) under the provisions of the Sutherland LEP 2006.

However, as a result of concerns regarding the possible use of the site for significant retailing, subsequent amendments were made to the LEP and DCP which specifically limited retail use on the site.

A DA was lodged in 2008 for a mixed use development on the site comprising 10,678sqm of retail floor space including 2 supermarkets totalling 7,003sqm as well as 250 dwellings, commercial floor space of 2,235sqm and associated parking and landscaping (including a public park). The applicant appealed the deemed refusal of this DA to the Land and Environment Court ('the Court').

During the course of the proceedings the plans were amended in a number of respects with the final development statistics being:

- 6,163sqm of general retailing;
- 4,581sqm of commercial including a child care centre;
- 250 dwellings with a GFA of 27,112sqm;
- 927 car spaces.

The most notable change made was the reduction in retail floor space to 6,163sqm including a single 4,500sqm supermarket. The total floor space of the proposal was 42,045sqm.

In the judgment handed down on 7 August 2009 (see **Attachment A**), the DA was refused consent for a number of reasons however the main reason was the potential adverse impact of the proposed retail space (and particularly the supermarket) on the economy and strategic roles of the Kirrawee and Sutherland Town Centres.

THE PROPOSED DEVELOPMENT

The proposed Concept Plan proposal includes staged development and seeks consent for:

- 9,360sqm of general retailing;
- 660sqm of commercial;
- 2,930sqm of 'highway' retail/showrooms;
- Around 450 dwellings with a GFA of 49,657sqm;
- 1,349 car spaces including 200 'commuter' parking spaces;
- landscaping of the site including a public park.

The Hill PDA report which forms part of the EA indicates that the total retail floor space is 14,340sqm. The total gross floor area is 64,837sqm.

Therefore compared to the proposal rejected by the Court, the current scheme has increased retail floor space by 8,177sqm, increased the number of dwellings from 250 to 450 and increased parking by 442 spaces. Commercial floor space has been decreased by 3,921sqm. The total floor space has increased by 22,792sqm

The proposal now contained in the proponent's documents differs markedly from the proposal for which the Minister authorised the proponent to apply for the approval of a concept plan. A concept plan can only be approved where the Minister authorises or requires a proponent to apply for approval of a concept plan. The proposal outlined in the Environmental Assessment is not the one for which Ministerial approval was given.

POINTS OF OBJECTION

1. The proposal is contrary to the established hierarchy of centres in Sutherland.

There is a very clear hierarchy of centres in Sutherland Shire that is established by both the local and State planning controls and strategies and also the physical characteristic of the existing centres.

Although the Director General's Environmental Assessment Requirements expressly included a requirement that the proponent address the impact of the proposed retail on the hierarchy of centres in the Environmental Assessment, no such analysis is undertaken.

The existing Kirrawee commercial centre is a small shopping village fronting Oak Road located to the south-west of the subject site. According to the Hill PDA Report, it has a retail floor space of around 2,900sqm. It includes a number of retail shops fronting the street ranging from food outlets, newsagent, fruit shop, law firm, accountant, bike shop etc. Some of the shop tenancies have an office or residential apartment on a first floor level.

The suburb of Kirrawee is located within an area which is currently well served by both the established town centre of Sutherland the large retail centre at Gymea and the larger urban centre of Miranda which includes the two large shopping centres of Parkside Plaza and Westfield Miranda. Westfield Miranda is located fronting the Kingsway at the intersection of the Kiora Road (a southern extension of Port Hacking Road) and is well located to provide for higher order retailing that supports the surrounding district and sub-region.

The extract from Part A of the Hill PDA report at **Figure 1** provides a summary of the existing centres in Sutherland. This table shows that hierarchy in terms of the size of retail and commercial floor space correlates 100% with the zoning under Sutherland

LEP 2006 in that the 7 largest centres are all zoned Urban. This is the highest order of centres, the others being Local and Neighbourhood. Kirrawee centre is a Local centre. There is also general correlation with the draft South Subregion categories. There are some inconsistencies, however it should be noted that zoning and other designations do not necessarily reflect only retail/commercial floor space or the current circumstances – they have regard to these matters but set the framework for the future planning.

Table 36 - Centre Types

Centre Typology DoP	Centres	Council LEP Classification	Hill PDA Rank (retail and commercial floorspace)
Town Centre: 800m radius (a comfortable 10 minute walk). Town centre is a large group of shops and services with one or two supermarkets, sometimes a shopping mall, community facilities, medical centre etc. Contain between 4,500 and 9,500 dwellings. Usually a residential origin rather than employment destination	Caringbah Cronulla Menai Miranda Sutherland	Urban Urban Urban Urban Urban	2 4 5 1 7
Village: 600m radius. A strip of shops and surrounding residential area within a 5 to 10 minute walk containing a small supermarket, hairdresser and take-away food shops. Contain between 2,100 and 5,500 dwellings	Engadine Gymea Kirrawee	Urban Local Local	3 9 14
Small Village: 400m radius A small strip of shops and adjacent residential area within a 5 to 10 minute walk. Contain between 800 and 2,700 dwellings.	Illawong Jannali Kareela Loftus Southgate Woolooware	Local Local Local Neighbourhood Urban Neighbourhood	11 8 12 - 6 -
Neighbourhood Centre: 150m radius. One or a small cluster of shops and services. Contain between 150 and 900 dwellings.	Bangor Como Heathcote Kurnell Sylvania Waters Sylvania Heights	Neighbourhood Neighbourhood Local Neighbourhood Neighbourhood Neighbourhood	13 - - - - 10

South Subregion, draft Subregional Strategy, NSW Government and Sutherland Shire LEP 2000 and 2006

Figure 1 - Table 36 from Part A of Hill PDA Report

It is of great importance to note that the subject site (and some adjacent land) does not have a 'centres' zoning. This land has an area specific zoning and that is Zone 7 Mixed Use - Kirrawee. The objectives of this zone (as discussed in detail below) indicate that it is not intended that this area be an extension of the existing Kirrawee centre but is designed to support and revitalise the existing centre.

The proposed development seeks consent for retail floor space of approximately 14,340sqm (as indicated in Table 1 of Part B of the Hill PDA report), almost 5 times that which currently exists in the existing Kirrawee village centre and slightly more than exists in Sutherland.. This floor space includes a supermarket of 3,810sqm, a discount supermarket of 1,460sqm and a 'mini major' retail store of 1,280sqm. In addition the proposal includes 2,930sqm of 'highway' retailing (which is described in more detail in the Hill PDA letter of 5 October 2010 as being suitable for mini major retail occupants) and 660sqm of commercial floor space. With a total of 15,180sqm of non-residential floor space, the proposal is more than five times the size of the existing Kirrawee shops

and, due to its isolation and lack of integration with the existing centre, will become a stand-alone district centre.

Whilst no details could be found in the EA in relation to hours of operation, the previous scheme proposed hours of operation of 6am to midnight trading, 7 days a week. The applicant needs to specify this information as it is important to the overall consideration of the proposal. Extended hours would be expected given the size and layout of the retail area and would further reinforce the 'district centre' type role that would result from the proposal.

A centre of this size can be classified as a district centre or in terms of the Draft South Subregion Strategy a 'Town Centre' (see discussion below).

Whilst not designed as an extension of the existing Kirrawee centre, when considered in conjunction with this centre, the proposal will result in a total retail and commercial (non-residential) area of over 18,080sqm, which would be the 7th largest centre in the Sutherland Shire, surpassing Sutherland (currently the 7th largest)(see **Figure 1**). Therefore the centre (with or without the inclusion of the existing shops) would more closely correlate with those centres with an Urban Centre zoning under the LEP or a Town Centre designation under the Metro/draft Subregion Strategies.

Not only would the proposal result in changing the role of Kirrawee in the hierarchy of centres, it would also threaten the ability for Sutherland to fulfil its role as an Urban Centre under the LEP and a 'Potential Major Centre' under the Metro Strategy (see **Figure 2**). In this regard Sutherland is presently the smallest of the 'Urban Centres' in Sutherland Shire. Further it is in very close proximity to Kirrawee (only 1.5km) making the subject site a very accessible alternative to Sutherland.

Sutherland is the administrative centre of the Shire and is at the junction of the Illawarra and Cronulla rail lines. This being the case it is a logical location to encourage further growth and appropriate that it be designated as the main 'centre' for Sutherland Shire. Whilst this does not mean that Sutherland will need to be the largest retail centre (Miranda already fulfils a regional shopping need), it does need to be able to maintain and enhance its role in the hierarchy. This is reflected in the latest Metropolitan Strategy that designates Sutherland as a 'Potential Major Centre'.

We made similar conclusions to those above in regard to the previous scheme. The Court agreed with these conclusions making comments such as the following:

234 There is clearly an undersupply of retail floorspace within the region and a need for further supermarkets. The key question is whether Kirrawee is the appropriate location for such a large supermarket. We have concluded that LEP 2006 and DCP 2006 define a hierarchy of centres and that, in this hierarchy, retailing has a specific role to play. Kirrawee is intended to remain a local centre and retailing is to serve the needs of the local population. The Brick Pit site is intended to provide predominantly residential development with a commercial component and to a lesser extent retail supporting the needs of the new population and creating an active live/work environment. In our opinion, Kirrawee Town Centre together with the development of the Brick Pit site is envisaged to remain a local centre.

191 The role of Sutherland is varied and not defined only by retailing but retailing plays an important support role in its growth. The placement of a large supermarket in Kirrawee may compete with and delay the development of Sutherland. In particular, the experts agreed that it is difficult to provide a supermarket in Sutherland due to the amalgamation pattern, cost of land and ease of access within the road systems. It is much easier to provide large supermarkets out of centres or on large site such as former industrial sites. We note that the Brick Pit site is only part of Zone 7 and that there are other sites that, if the submissions of Mr Galasso are accepted in relation to the role of Kirrawee not being a local centre, could be developed for retailing in preference to Sutherland. The proposal may further exacerbate the difficulty of providing a supermarket in Sutherland at least in the immediate future and has the potential to impact upon the future role of Sutherland as an urban centre as well as elevating the Role of Kirrawee beyond that of a local centre.

With the new scheme providing more than double the retail floor space than the previous scheme and retaining a large supermarket and other large format retailing as part of this floor space, it would be difficult to justify a conclusion substantially different from that of the Court. If anything, the proposal is even more inconsistent with the acknowledged retail hierarchy.

It is noted that in the report 'A Centres Study for Sutherland Shire' prepared by Hill PDA which forms part of the EA, there is no detailed discussion of the hierarchy of the existing centres and the relationship of the proposal to this hierarchy. The assessment is focussed on the need for additional floor space (including retail floor space) and the ability to accommodate it within existing centres. There is also an assessment of the potential retail impact of the proposal on existing centres. Therefore the work by Hill PDA does not address the central issue in the judgement of the Court, nor does it address the Director General's Environmental Assessment Requirements.

There is no argument that there is a demand for additional retail space in Sutherland Shire. This issue was explored by the Court and it was accepted by all parties. The key issue is how to address this demand. In our view this is a matter that can only be appropriately determined by the authority which manages this region – Sutherland Shire Council. There is a very clear strategic planning process under the EP&A Act which allows Councils, under the guidance of the State Government, to adequately plan for future needs. Part of the LEP process is to consider the impacts of land use change having regard to supply and demand for various types of floor space. This is particularly the case with comprehensive LEP's where the State Government requires that specific targets for dwelling numbers and floor space increases are achieved in order to meet the current and future needs of an area and, in the case of Sydney, the whole of the metropolitan area.

Consideration of the need for retail/commercial floor space would have been part of the process for LEP 2006 and it is assumed that Council was able to demonstrate that there was adequate capacity in Sutherland Shire -at that time. This assumption is supported by the conclusions of Hill PDA who identified a shortfall of retail space of 205,559sqm at 2036 and an 'emerging supply' of 94,231sqm. This means that almost half of the estimated demand over the next 25 years could be potentially met by developments which are already approved/proposed under current controls. With LEP's being required to be reviewed every 5 years, there are ample opportunities for Council and the State government to identify any additional floor space demand and where it is to be accommodated. This is a process than can only be subjectively undertaken by government authorities through the legislation that was designed for this purpose. It is not the role of private developers to frustrate or break down the strategic planning framework (in this case the hierarchy of centres) and not the role of Part 3A to facilitate this.

The inconsistency of the proposal with the established hierarchy of centres in Sutherland is further discussed more specifically in relation to the Sutherland LEP and DCP and State policies below.

2. Discussion of the draft Centres Policy and draft State Environmental Planning Policy (Competition) 2010

Draft Centres Policy

This policy is almost 2 year old and has not proceeded beyond the draft stage. Therefore it should be given little weight in the consideration of this application. In any event, the principles it lays out are part of the normal consideration undertaken as part of the strategic planning process under Part 3 of the EP&A Act. The Hill PDA Report (p19 of Part A) identifies these principles as:

- “1. The need to reinforce the importance of centres and clustering business activities;*
- 2. The need to ensure the planning system is flexible, allows centres to grow and new centres to form;*
- 3. The market is best placed to determine need. The planning system should accommodate this need whilst regulating its location and scale.*
- 4. Councils should zone sufficient land to accommodate demand including larger retail formats;*
- 5. Centres should have a mix of retail types that encourage competition; and*
- 6. Centres should be well designed to encourage people to visit and stay longer.”*

There is no indication that in order to achieve these principles, one needs to go outside the established strategic planning process. Whilst Councils need to be proactive in this regard, the State Government has the ultimate role in ensuring that these outcomes are achieved.

In regard to the proposal, whilst the market may have identified a ‘need’ for some of the floor space types proposed, it is up to the planning system to ‘accommodate this need whilst regulating its location and scale. As noted above it is considered that the current planning framework is achieving this with around 50% of the demand for retail space over the next 25 years already being approved/proposed under current controls. Further this framework regulates the location and scale of the required floor space by way of appropriate local zonings (ie Urban, Local and Neighbourhood) and State strategies which reinforce this. The proposal is so poorly integrated with the existing centre that it will effectively operate as a new stand alone district or town centre, contrary to the existing planning framework, which in our view, reinforces the principles of the draft Centres Policy.

Draft State Environmental Planning Policy (Competition) 2010

The draft SEPP has not proceeded since being publicly exhibited in August last year. In our view it should be given little weight in the consideration of this application. The Hill PDA Report does not deal with the draft SEPP presumably because the draft SEPP deals with impacts on specific businesses and the Hill PDA report does not identify any impact that would be considered significant in this regard.

However, quite inappropriately, the EA (p55) refers to the impact on Kirrawee village having regard to the draft SEPP. The draft SEPP does not state that the impacts on

centres should not be appropriately considered. This is a valid consideration not only in terms of impact on trade but more importantly (as detailed above) the impact on the role of Kirrawee (and Sutherland) in the retail hierarchy.

The EA also incorrectly states that the provision of the DCP which states that supermarkets are inappropriate is in conflict with the draft SEPP. The draft SEPP refers to restrictions on the number of particular types of retailers not an overall restriction on retail types. A general restriction of types is essential for proper planning and to reinforce the hierarchy of centres. The draft SEPP relates only to competition, not other planning issues and we agree that a planning control that required, for example, that no more than one supermarket could be provided in the existing Kirrawee 9 Local Centre zone, would be anti-competitive.

Further the draft SEPP does not restrict the ability to control the scale of development and in this regard the proposal vastly exceeds the permitted FSR and the restriction on the amount of retail space permitted on the site.

3. The proposal is inconsistent with the zoning of the land.

It is noted that whilst the proposal, being under Part 3A of the EP&A Act, does not have to 'comply' with the Sutherland LEP and DCP, given that these documents lay out the hierarchy of centres in Sutherland Shire and that the proposal challenges this hierarchy, it is appropriate that they be considered in the assessment of the proposal.

The EA provides only cursory consideration of these documents that were given determining weight by the Court, concluding that: *"that those controls [development standards such as FSR] are not consistent with current regional planning principles described earlier in this EA and therefore should be given only limited weight in the assessment of this proposal"*

As discussed below, we are of the view that the local controls support the regional strategies for the area and establish the hierarchy of centres in Sutherland which should not be threatened by a project under Part 3A.

Clause 11 of Sutherland LEP 2006 provides the objectives for the Mixed Use – Kirrawee zone that need to be considered as part of the development of the subject site (as noted above). It is important to note that this zoning only applies to the subject site and some adjoining land in Kirrawee. Therefore the provisions relating to this zone can be taken to mean the objectives of the proposed development. Unlike other zones which apply more broadly, it is reasonable to expect that in this case all the zone objectives would be met by the proposal. The following table considers the proposal in relation to the zone objectives.

Objective	Comment
(a) to take advantage of the zone's access and profile from the Princes Highway,	The proposal takes better advantage of exposure along the Princes Hwy frontage than the previous scheme however residential uses still dominate this frontage.

Objective	Comment
<i>(b) to create development that mixes employment activities within a liveable urban environment,</i>	Whilst a mix of uses is proposed, they are uses which are not specifically encouraged by the zone objectives.
<i>(c) to encourage high employment-generating development that encompasses high technology industries, commercial display centres and light industries compatible with the existing locality and adjoining residential buildings,</i>	The proposal provides for none of these uses and as such it is directly in conflict with this objective. These uses have been specified because they represent the uses which make greatest use of the site exposure to the highway, proximity to transport and services in the existing centre and relate to the existing industrial development to the south and east of the site.
<i>(d) to allow the zone to support a live-and-work culture that provides for local employment and acts as a transition between employment activity and strict residential uses in the surrounding neighbourhood,</i>	The proposal provides some ability for people to live and work on the site however as noted above the mix of uses is inappropriate. Further the nature of the uses do not provide an appropriate transition between adjoining uses, being more in keeping with a commercial centre than industrial development.
<i>(e) to encourage industrial uses that are compatible with the desired future residential amenity of the zone,</i>	The proposal provides for no industrial uses and as such is in direct conflict with this objective.
<i>(f) to ensure the design of all residential buildings is of a high architectural quality and all residential buildings have an attractive streetscape setting,</i>	The architectural merit of the proposed residential buildings is difficult to determine as only concept plans have been prepared. However the overall urban design of the site is poor as discussed in detail below.
<i>(g) to ensure development is carried out in a way that addresses the street concerned (achieving an attractive and vibrant streetscape) and reinforces surveillance of the public domain,</i>	For the reasons detailed below, the proposal does not achieve this objective.
<i>(h) to make provision for a prestigious gateway development capable of employing a substantial workforce,</i>	There is no aspect of the proposal which makes it a 'prestigious gateway development'. The only reason a 'substantial' amount of jobs will be generated is because the proposal so significantly exceeds the permitted FSR. Proportionally, residential use takes up the vast majority of the floor space proposed (77%).
<i>(i) to provide a substantial area of public open space for employees, residents and the local community,</i>	The proposal achieves this objective.
<i>(j) to facilitate the re-vitalisation of the Kirrawee Town Centre and the Kirrawee railway station precinct.</i>	Contrary to this objective, it is considered that due to the nature of retailing proposed on the site, the proposal will adversely affect the vitality of the existing centre. The EA notes on page 3 that the proposal will have a 6.3% impact on the trade

Objective	Comment
	<p>within the existing Kirrawee centre. Any negative impact will not 're-vitalise' the centre and the proposal will severely diminish its present role.</p> <p>In relation to the previous smaller scheme the Court concluded:</p> <p><i>"..., we do not accept that it will result in a revitalising of the existing Kirrawee Town Centre, which is envisaged to remain the main retail precinct of Kirrawee, or the Railway Precinct. The size of the retail proposal on the Brick Pit site will impact on the existing Kirrawee Town centre. The evidence indicates, although inconclusive, that there may be an impact on individual retailers but that the existing centre is likely to remain viable. However, the evidence does not indicate that the existing Kirrawee Town Centre or the Kirrawee Railway Precinct will be "revitalised" in the face of such strong competition and therefore, the proposal is inconsistent with objective (j)"</i></p> <p>Given the larger nature of the current retail scheme and the lack of any integration between the site and the existing retail strip, the above conclusions would remain valid.</p>
<p><i>(k) to ensure any expansion of shopping and retail activities throughout the zone maintains the role and function of Kirrawee Centre without impacting upon the sustainability of other centres throughout the LGA.</i></p>	<p>As noted above the proposal will completely change the role of Kirrawee in Sutherland's hierarchy of centres, changing it from a village centre to a town centre. In this regard the conclusions of the Court remain valid:</p> <p><i>"We find that the proposal is also inconsistent with objective (k) in relation to the role and function of Kirrawee Town Centre. As discussed above, the role and function of retailing in Kirrawee Town Centre as stated in objective (b) of Zone 9 is to promote viable, small, local and specialty shops to support the needs of the local population. The role of retailing in Zone 7 is to support this role as stated in objective (l) of Zone 7. Due to size of the retail component of the development, particularly the undisputed evidence that the supermarket would be the largest in the area and would attract people from a wide catchment area, the proposal is likely to elevate the retail role of Kirrawee Town Centre above that of a local centre.</i></p>
<p><i>(l) to ensure any new shops and retail activity integrate with the existing</i></p>	<p>The proposal provides for very poor integration with the existing centre, focussing the retail activity in the</p>

Objective	Comment
<i>Kirrawee Centre through good urban design in order to revitalise the centre.</i>	central/eastern part of the site, remote from the existing shops and common street frontages. It provides no retailing to Flora Street and the nearest shop (café) is almost 100m away. In this regard the proposal is even more internalised than the rejected scheme and as such, even more inconsistent with this objective.
<i>(m) to ensure development is compatible with, and does not adversely impact on, the amenity of the surrounding residential area, particularly in terms of air pollutants, noise emissions and visual effects.</i>	The proposed residential buildings are very large and out of keeping with the character of the area. They will certainly have an adverse visual effect on the adjacent residential area.

The amendment to the LEP that introduced objectives (k) and (l) also deleted convenience stores and included light industry in the list of permitted uses in the Mixed Use – Kirrawee zone. These amendments supported the notion that retailing is not intended to be the focus of the non-residential development on the site. It is our understanding that it was not the planning intent of the LAM or the Kirrawee Town Centre plans to allow a significant retail redevelopment of the site. This is further supported by the background to the draft amendment to the LEP. In this regard the Council Officers report on the draft amendment to the LEP and DCP (PLN049-08) dated 17 September 2007 states that:

“It was never the intention of Council or the UDAS in preparing the local area masterplan to see the Brick Pit site developed as an extension of the Oak Road retail precinct, or as an alternative town centre. The establishment of a high number of retail premises, or large shops or a supermarket would detract from the existing neighbourhood services which are provided in the existing town centre/strip shopping area. Instead the future development needs to work in synergy with the existing shops so that the new business adds to the vitality of the existing retail outlets.”

It is considered that the proposed development is completely inconsistent with the desired future character for Kirrawee and the existing Mixed Use zoning.

4. The proposal is inconsistent with the Draft South Subregion Strategy and Metropolitan Strategy for 2036

The Draft South Subregion is part of the State Government’s Metropolitan Subregional Strategy documents.

The Metropolitan Strategy for 2036 identifies definitions for centre types. These are termed Strategic Centres which include – Global Sydney, Regional Cities, Specialised Centres and Major Centres, and small local centres which include – Town Centres, Villages and Neighbourhood Centres.

Kirrawee is identified as a 'village centre' under the provisions of the Draft South Subregional Strategy (and also shown as such in the Metro Strategy). It is defined as a *"strip of shops and surrounding residential area within a 5 to 10 minute walk and usually contain a small supermarket, hairdresser, take away food shops and have between 2,100 - 5,500 dwellings."*

It is our opinion that the proposed development is entirely inconsistent with the provisions of the above State Government South Subregion Strategy and established hierarchy of centres within the southern region of Sydney. Even without being considered in conjunction with the existing Kirrawee centre, the proposed development constitutes a 'Town Centre' in terms of the Strategy –

"Town Centres have one or two supermarkets, community facilities, medical centres, schools etc."

The draft Strategy nominates Sutherland, Miranda, Caringbah and Cronulla as 'Town Centres' with Kirrawee and Gymea being 'Villages'. Therefore it is considered that the LGA is well provided for in terms of higher order centres, particularly with Sutherland and Miranda being in such close proximity to Kirrawee. The Strategy acknowledges that the role of centres may change over time however it notes that only Sutherland, Miranda/Caringbah and Woollooware have this potential. In this regard it is noted that in the latest metro Strategy, Sutherland has been upgraded to a 'Potential Major Centre' (see **Figure 2**).

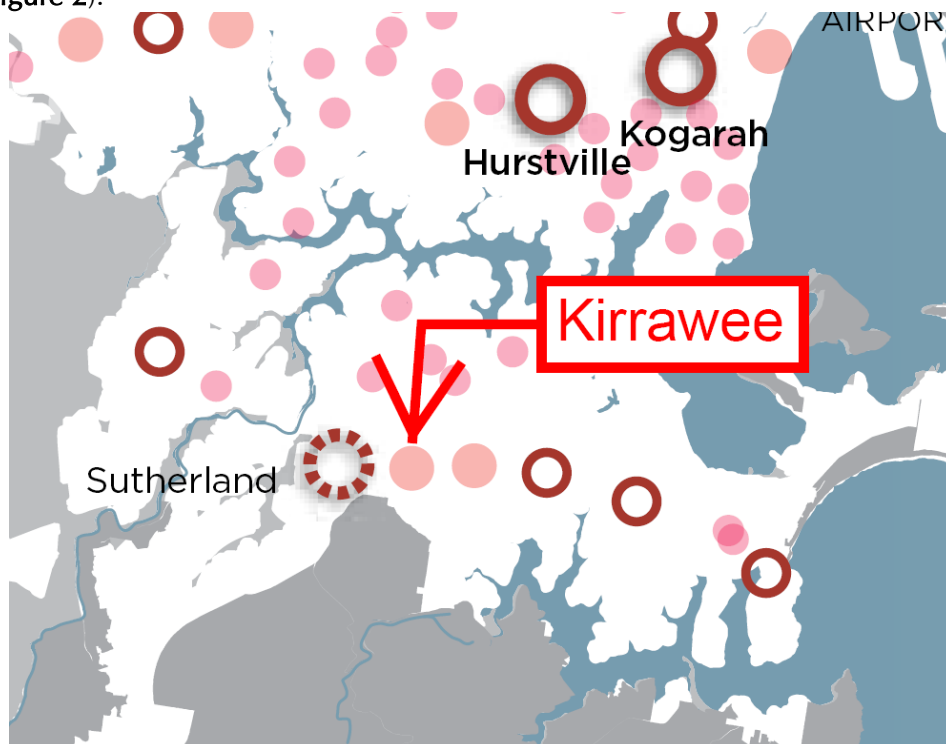


Figure 2 – Extract of Centres Map from Metropolitan Strategy for 2036

The location of potentially 6 major stores including supermarkets and other large format retailers as well as new specialty retailing in an enclosed shopping centre that is distant and poorly integrated with the existing Kirrawee village centre will not serve any other purpose other than promoting itself as an isolated, car orientated destination attracting patrons from throughout the surrounding region. This is not sound planning practice as evidenced by its inconsistency with the draft Subregional Strategy and latest Metro Strategy.

The proposal is also inconsistent with the draft South Subregion Strategy in terms of the 'potential Enterprise Corridor' nominated for the Princes Highway. The Strategy indicates that Enterprise Corridors have been identified as areas which provide low cost accommodation for a range of local and regional services, including start-up offices, light industrial, showrooms, building supplies and retail, which benefit from high levels of passing traffic." It appears that the provisions of the Mixed Use-Kirrawee zone attempts to be consistent with the intention of the Enterprise Corridor designation. However the proposal does not respond to the zone objectives or the intention of the Enterprise Corridor – it is focused on residential use along this frontage which is not dependant on highway exposure.

The Strategy nominates Kirrawee as "the second largest cluster of Employment Land in the Sutherland LGA" and is given strategic importance. The subject site which is a substantial part of the Mixed Use-Kirrawee zone should have regard to this adjoining area and it is considered that the objectives of the zone aim to provide an appropriate transition between the industrial lands and the Kirrawee commercial centre and residential areas. The proposed development however has little regard for this transitional role of the zone, proposing a development that would be typical of a town centre redevelopment in a fully commercial zone ie podium or ground level retail/commercial uses with residential above.

5. The proposal is inconsistent with the provisions of LEP 2006

The proposal significantly exceeds both the building height controls and the FSR control of LEP 2006.

Clause 33 of the LEP indicates that buildings in the Mixed Use-Kirrawee zone must comply with the number of storeys and maximum height specified in the attendant map. The relevant map indicates a storeys control ranging from 3 to 6 storeys in specific 'footprints' on the site, however the maximum height controls relate to buildings only over 6 storeys. In this case subclause (4) provides for default controls of 7.2m to the underside of the ceiling and 9m to the top of the roof. The proposal fails to comply with these controls in a significant way. In this regard:

- the proposed buildings extend outside the 'footprints' shown on the map;
- the actual number of storeys is up to 12 storeys higher than permitted;
- all buildings fail to comply with the maximum height controls.

In regard to FSR the map referred to in Clause 35 indicates a maximum FSR of 1:1 across the site. The proposal has an FSR of 1.52:1 significantly greater than that permitted. In this regard it is noted that in the ICAC report on Part 3A of December 2010 that where development exceeds development standards by more than 25% that the Planning Assessment Commission (PAC) be the determining authority.

The proposed FSR and the height of building form is excessive and out of keeping with the character of the area. The contention of the EA that: *"the Concept Plan has been inspired by the 'iconic forms' of the Marie Tjibaou Cultural Centre in New Caledonia"* is laughable given that these forms are 'lightweight' see-through structures. The proposal provides for 8 massive structures up to 15 storeys high.

It is noted that the 'comparison height study' does not provide any analysis of building heights in the surrounding locality (or anywhere else in Sutherland Shire). The only comparison is of other developments that may or may not be in the vicinity of a railway station. What relevance this has to the subject site we don't know. Surely any professional consideration of this issue should have appropriate regard to the local setting and area generally. The proposed buildings would be some of the largest in the LGA – highly inappropriate for site that is not within a 'centre'.

6. Showroom retailing

The EA indicates the provision of 2,930sqm of 'highway' or 'showroom retailing. Quite rightly the Hill PDA report does not differentiate between this retailing and other retailing. In its letter of 5 October 2010 Hill PDA confirm that it would be suitable for mini major retail occupants. Further State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 allows one retail use to be changed to another retail use as exempt development. Further, change of use from one commercial premises (which includes retail premises) to another commercial premises can be undertaken as complying development. Any condition of approval which seeks to restrict uses which are permissible on the site would, in our view, be unlawful. As the process under this SEPP does not require any impact assessment, any commercial floor space proposed needs to be assessed as retail for the purposes of retail impact assessment.

7. The proposal will significantly increase traffic movements in and through the village centre of Kirrawee.

The proposal will generate a significant amount of traffic and will result in the existing traffic on Flora Street and Oak Road being significantly increased.

The Kirrawee village centre is located within a small pocket of low density residential and industrial development occupying an area generally surrounded on three sides by the Princess Highway and the Sutherland – Cronulla railway line. The only connection to the other surrounding residential areas requires crossing of the Princess Highway to the north or crossing of the railway line at Kirrawee station to the south west.

As such the subject site is located within a pocket of land that in many ways is isolated from major traffic flows other than local traffic flows utilising Flora Street as a connection to Sutherland town centre.

It is clear from the documentation provided with the application that the development is intended to serve a much wider area than the needs of just residents within the immediate neighbourhood.

It is considered that providing a major retail centre in this local village centre will significantly increase traffic movements to and through the area which will have inappropriate amenity impacts on the locality.

The circulation of traffic within this relatively confined village centre that is likely to eventuate from the proposed major car orientated retail destination is likely to lead further demand for street parking and traffic congestion within the locality.

Further it is noted that Council raised significant concerns about traffic impacts in relation to the previous scheme. Whilst in the Court case, the relevant experts reached an agreement on this issue, traffic was still a concern raised by local residents and businesses. With the proposal having 54% more floor space than the previous scheme and 422 more car spaces (including commuter parking), the proposal will have far greater impact on the surrounding road network than the Court refused smaller scheme.

8. The proposal is inconsistent with the provisions of the Sutherland DCP 2006

The proposal is inconsistent with the DCP in respect of the following:

- contrary to 1a1 Values and Character the proposal will not complement:

“the existing town centre by accommodating a variety of uses, possibly including residential, commercial, educational, community and open space” as it provides for significant retail development;

“the existing character of the surrounding residential neighbourhood by observing a two storey height limit”. In this regard whilst it is acknowledged that the LEP allows for buildings up to 6 storeys, this value highlights the sensitivity of this issue for the community and as such the development should strictly comply with the LEP controls;

- contrary to 1b Centre Aims, the proposal will not:

“Build on the structure formed by the site’s existing industrial, retail and residential character ensuring the new development provides flexibility to the uses as per population’s demand between cohesion between employment, retail and residential uses”. The proposal does not provide for flexibility for the proposed uses and does not provide an appropriate mix of uses having regard to the existing structure;

“Distribute and design built form to define and enhance the spatial quality of streets, open spaces by aligning buildings to streets and to the edges of parks.” As noted above the proposed buildings are excessive in height and bulk and will detract from the surrounding streetscapes;

“Encourage “long life loose fit buildings” with a high level of adaptability over time as uses change.” The proposed buildings are not designed with adaptability in mind. This is particularly important on a site in this location which has been identified as a possible ‘enterprise corridor’ in the draft Subregional Strategy;

- contrary to 1c, the proposal is inconsistent with the specific provisions relating to the Brick Pit Precinct and in particular the proposed amendments to the DCP which state that:

“Shops within the Mixed Use - Kirrawee Zone shall serve the immediate daily needs of the local workforce or provide specialist retail uses.” The provision of 2 large supermarkets, four ‘mini majors’ and significant specialty shops indicate that the site will become a ‘town centre’ and will serve a demand much greater than immediate daily needs;

“Shops within the Mixed Use - Kirrawee zone shall not create a second town centre or duplicate the typical supply of shops for daily shopping needs in the Kirrawee Local Centre. Development of the mixed use zone shall not undermine the function of the Kirrawee Local Centre as the town centre for the locality, serving the regular shopping and service needs of the local community.” The proposed uses will duplicate the provision of goods and services offered by the existing Kirrawee centre. Further the size of the proposal is likely to undermine the function of this centre, being large enough to be classed as a ‘Town Centre’ as defined in the Subregional Strategy.

- contrary to 9b2, the proposal is inconsistent with the specific urban design controls relating to the Brick Pit Precinct:

“Shops shall meet the immediate needs of workers or be specialist retail [sic] outlets. Supermarkets, and other shops designed to serve daily shopping needs are not appropriate.” The proposal provides for 2 supermarkets which is in direct conflict with this provision.

CONCLUSION

The proposal provides for a much larger development, both overall and in regard to retail space, than that recently rejected by the Land and Environment Court. The proposal represents another attempt by the land owner to subvert proper town planning process – previously they sought to rely on Part 4 of the EP&A Act and now they are using Part 3A.

As outlined above, the proper mechanism for changing the strategic planning for an area to such a significant extent is Part 3 of the EP&A Act. The process under Part 3 gives Councils, the State government and also land owners the opportunity to ensure that the demands of the market are met. Further, in relation to Sutherland, where the applicant's expert notes that around 50% of the demand for retail floor space for the next 25 years is able to be achieved by approved or proposed developments, the existing strategic planning framework is operating in an appropriate manner and as provided for under the EP&A Act.

In view of the above, we are of the opinion that the application should be rejected and the applicant encouraged to produce a scheme which will support rather than diminish or threaten the village status and character of Kirrawee and protect the existing hierarchy of centres in Sutherland, consistent with the findings of the Land and Environment Court.

Please do not hesitate to contact Brett Brown, Director if you wish to discuss this matter.

Yours faithfully



Brett Brown
Ingham Planning Pty Ltd



Land and Environment Court
of New South Wales

CITATION : Restifa Pty Ltd v Sutherland Shire Council & ors [2009]
NSWLEC 1267

PARTIES : APPLICANT
Restifa Pty Ltd

RESPONDENT
Sutherland Shire Council

INTERVENOR
(admitted under s 38 (s) of the Land and Environment Court Act,
1979)
Westfield Ltd and Supabarn Supermarket Pty Ltd

FILE NUMBER(S) : 10696 of 2008

CORAM: Tuor C - Taylor C

KEY ISSUES: SECTION 97 APPEAL :- appeal for deemed refusal of a development
application for a mixed use development

LEGISLATION CITED: Environmental Planning and Assessment Act, 1979; Environment
Protection and Biodiversity Conservation Act, 1999; Land and
Environment Court Act 1979; Threatened Species Conservation Act,
1995. Sutherland Shire Development Control Plan 2006; Sutherland
Shire Local Environmental Plan, 2006.

CASES CITED: Aldi Foods v Holroyd City Council [2004] NSWLEC 253.
Blackmore Design Group Pty Ltd v North Sydney Council [2001]
NSWLEC 279.
Bongiorno Hawkins Frassetto & Associates Pty Ltd v Griffith City
Council [2007] NSWLEC 205.
GPT Limited v Belmorgan Property Development Pty Ltd [2008]
NSWCA 256.
Kavia Holdings Pty Limited v Sydney City Council [2003] NSWLEC
195.
Morrison Design Partnership Pty Limited v North Sydney Council and
Director General of the Department of Planning [2007] NSWLEC
802.
Stockland Development Pty Ltd v Manly Council [2004] NSWLEC
472
Terrace Tower Holdings v Sutherland Shire Council (2003) 129
LGERA 195.
The Village McEvoy v City of Sydney Council [2009] NSWLEC
1232.
Zhang v Canterbury Council (2001) 51 NSWLR 589

DATES OF HEARING: 17, 18, 19, 20, 23 February; 3, 9 April; 19, 30 June; 1, 2, 16, 20, 31 July 2009

DATE OF JUDGMENT: 7 August 2009

LEGAL REPRESENTATIVES: APPLICANT
Mr A Galsso SC
BARRISTER
INSTRUCTED
by Gadens

RESPONDENT
Mr T Robertson SC
INSTRUCTED
by HWL Ebsworth

INTERVENOR
Mr Hutley SC with Mr Larkin, BARRISTER
INSTRUCTED
by Mallesons and Freehills

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Tuor C with Taylor C

7 August 2009

10696 of 2008 Restifa Pty Ltd v Sutherland Shire Council

JUDGMENT

- 1 **COMMISSIONERS:** This is an appeal against the deemed refusal by Sutherland Shire Council (the council) of a development application under the *Environmental Planning and Assessment Act 1979* (the Act) for a mixed use development at 566-594 Princes Highway, Kirrawee (the site).
- 2 The issues raised by council relate principally to the impact of the proposed retail development on the role and function of Kirrawee and Sutherland Centres. Council also contends that the proposal does not address adequately a number of urban design and landscape issues and the compensatory habitat water body (the pond) to be provided on the site is unresolved. The parties also did not agree on the extent of traffic management works to be provided.

The site

- 3 The site is known as the Kirrawee Brick Pit and has a frontage to the north to the Princes Highway (252m), to the south to Flora Street (251m), to the west to Oak Street (160m). To the east the site adjoins the industrial premises that form part of the James Cook Industrial Estate.
- 4 The site is approximately 4.2 ha in area and slopes from south west to north east with a fall of approximately 10m.

- 5 Situated in the northern part of the site are remnants of foundations of the Brick Foundry, which existed on the site from the 1900s ceasing production in the 1970s. An electricity substation is located near these remains to the north of the site.
- 6 About a third of the site is occupied by the disused quarry, which has become a lake with depths of up to 10m to 15m. The lake is a source of water for the Grey Headed Flying Fox and the Eastern Bent winged Bat.
- 7 Remnant Sydney Turpentine-Ironbark Forest is located along the southern and western boundaries of the site.
- 8 The locality is characterised by residential development being a mixture of single dwellings and residential flat buildings to the east and north east and industrial development to the west, south and north of the site. Kirrawee centre is located to the south east and Kirrawee Railway station is walking distance from the site. Sutherland centre is about 1.4 km from the site.

Planning framework

- 9 The majority of the site is within Zone 7 Mixed Use - Kirrawee under *Sutherland Local Environmental Plan 2006* (LEP 2006), which is where the mixed use development is proposed. The remainder and western part of the site is within Zone 13 – Public Open Space and is where the park and the pond are to be developed.
- 10 Mixed use premises are permissible with consent within Zone 7. LEP 2006 defines mixed use premises as:

Mixed use premises means a building that is used both for a land use having a residential purpose and for another non – residential land use that is permissible with or without consent.
- 11 The objectives of Zone 7 are:

- (a) to take advantage of the zone's access and profile from the Princes Highway,*
- (b) to create development that mixes employment activities within a liveable urban environment,*
- (c) to encourage high employment-generating development that encompasses high technology industries, commercial display centres and light industries compatible with the existing locality and adjoining residential buildings,*
- (d) to allow the zone to support a live-and-work culture that provides for local employment and acts as a transition between employment activity and strict residential uses in the surrounding neighbourhood,*
- (e) to permit light industrial uses that are compatible with the desired future residential amenity of the zone,*
- (f) to ensure the design of all residential buildings is of a high architectural quality and all residential buildings have an attractive streetscape setting,*
- (g) to ensure development is carried out in a way that addresses the street concerned (achieving an attractive and vibrant streetscape) and reinforces surveillance of the public domain,*
- (h) to make provision for a prestigious gateway development capable of employing a substantial workforce,*
- (i) to provide a substantial area of public open space for employees, residents and the local community,*
- (j) to facilitate the re-vitalisation of the Kirrawee Town Centre and the Kirrawee railway station precinct,*
- (k) to ensure any expansion of retail activity within the zone maintains the role and function of Kirrawee Town Centre and does not adversely impact on the sustainability of other centres in the Sutherland Shire,*
- (l) to ensure any new shops integrate with and support the existing Kirrawee Town Centre,*
- (m) to ensure development is compatible with, and does not adversely impact on, the amenity of the surrounding residential area, particularly in terms of air pollutants, noise emissions and visual effects.*

- 12 Amendment 4 to LEP 2006 (LEP 2006 Amendment 4) was gazetted on 9 January 2009, which is after the development application was lodged. LEP 2006 Amendment 4 made a number of general amendments including changes to the definition of "gross floor area" to exclude the parking and access required by council. LEP 2006 Amendment 4 also made specific changes to Zone 7, it added objectives (k), (l) and (m). It also deleted *convenience stores* and added *vehicle and mechanical repair premises* and *light industries* to the permissible uses in Zone 7.

- 13 Clause 58 of LEP 2006 is a savings provision which provides:

A development application made, but not finally determined, before the commencement of Sutherland Shire Local Environmental Plan 2006 (Amendment No 4) is to be determined as if the plan had been exhibited but had not been made.

- 14 The parties agree that as LEP 2006 Amendment 4 has been gazetted it is imminent and certain but disagreed on the weight to be given to the amendments to Zone 7, which we discuss in the Strategic issue below. We find that the proper planning approach is that the proposal should be consistent with the planning framework established by LEP 2006 Amendment 4.
- 15 LEP 2006 includes other relevant clauses in relation to building height (cl 33), building density (cl 35), landscape area (cl 36), urban design – general (cl 48), and urban design – residential buildings (cl 49). The proposal does not comply with the building height and building density controls and the applicant has submitted an objection under *State Environmental Planning Policy No 1* (SEPP 1). Council did not press the non compliance with these controls as an issue in the proceedings.
- 16 *Sutherland Development Control Plan 2006* (DCP 2006) is also relevant. Chapter 2 includes Locality Strategies for areas in Sutherland Shire, including Kirrawee (Clause 1) and Sutherland Centre (Clause 2).
- 17 Chapter 3 – Urban Design of DCP 2006 provides objectives and controls for development. Clause 9.a.3 provides the following objective for Floor Space Mix in the Mixed Use – Kirrawee Zone:
- to ensure that the scale and intensity of retail development within the mixed use zone does not undermine the function of the Kirrawee Local Centre as the town centre of the locality, nor undermine the role of other centres in the locality.*
- 18 Clause 9.b.2 provides that:

1. *The development of land at 556-594 Princes Highway, Kirrawee (the Brick Pit site)*
 - a. *Must provide for the following mix of floor spaces:*
Residential: 27,320 sqm.
Employment: 10,470 sqm.
with the retail component of employment uses not exceeding 20% of the total employment generating floor space.
 - b. *Land on the corner of Oak Road and Princes Highway must be either hotel, commercial development, Seniors Housing or a mix of residential and these uses.*
 - c. *Land fronting the Princes Highway must have commercial uses on the ground floor with medical and legal uses preferred.*
 - d. *Land fronting on the eastern side of the site fronting Princes Highway may be used as either commercial or residential/commercial mix subject to noise transmission being addressed through the imposition of appropriate performance criteria.*
 - e. *Land with no street frontage must be designed so that the ground floor units can be used for either commercial or residential uses.*
 - f. *Shops shall help activate streetscapes and the public domain so that the amenity of residents and workers is enhanced.*
 - g. *Intensive retail land uses, such as a large supermarket, are not appropriate.*
2. *Despite subclause 1. the use of the site for educational purposes is encouraged.*
3. *Development of land elsewhere in the Mixed Use – Kirrawee Zone must provide a minimum of 25% floor space for Employment use with the retail component of employment uses not exceeding 20% of the total employment generating floor space.*

- 19 Amendment 4 to DCP 2006 (DCP 2006 Amendment 4) became effective in 9 January 2009, which is after the development application was lodged. The objective (cl 9.a.3), the maximum 20% retail component (cl 9.b.2.a), cl 9.b.2.1.g and cl 9.b.2.3 were added under DCP 2006 Amendment 4, which does not include a savings clause. The parties disagreed on the weight to be given to DCP 2006 Amendment 4, which we discuss in the Strategic issue below. We find that the proper planning approach is that the changes made as part of DCP 2006 Amendment No 4 expand and clarify controls which were already included in DCP 2006. The changes should be considered and given weight, although as with any DCP an application

may be inconsistent with the requirements of the DCP if, on the merits, this is appropriate.

- 20 The *Kirrawee Local Area Masterplan* (LAM) was prepared by the former owner of the site, Sydney Water, following extensive community consultation and was endorsed by council in September 2003. The conclusions of the LAM have been incorporated into LEP 2006 and DCP 2006.
- 21 A number of strategic planning documents have been prepared by council. These include *Our Shire our Future, Shaping the Shire to 2030, Hirst Report, Blueprint for Action* and the *Structure Plan 2003*. The parties disagreed on the weight to be given to these documents and to the LAM which we discuss in the Strategic issue below. We have given these documents and the LAM little weight other than that they form the basis of LEP 2006 and DCP 2006. We acknowledge that these background documents may be considered to assist in understanding the intent of provisions in LEP 2006 and DCP 2006 where this is unclear or in dispute between the parties. However, we have not found it necessary to do so.
- 22 In November 2007, the NSW Government prepared the *Draft South Subregional Strategy* (draft Strategy) as part of the Metropolitan Strategy. The Strategy has been exhibited but to date has not been adopted. The parties disagreed on the weight to be given to the Strategy, which we discuss in the Strategic issue below. We have considered the Strategy but given it little weight as it is not an adopted policy and there is no certainty as to its future. We note that the Metropolitan Strategy identifies Sutherland Centre as a "potential major centre" however, the structure of the Metropolitan Strategy is that it will be implemented through more detailed controls, such as the sub regional strategies, LEPs and DCPs. Within this context, the proper planning approach is to give weight to LEP 2006 and DCP 2006 although we find that these documents are not inconsistent with the future role for Sutherland identified in the Metropolitan Strategy.

Background

- 23 The hearing began on site on 16 February 2009. The retail component of the proposal proposed two supermarkets (7003sqm) and a total retail component of 10,678sqm (the original proposal). The court heard evidence from residents, visited the site, Kirrawee Centre and Sutherland Centre.
- 24 The Court heard evidence from the urban design, economic and traffic experts. On the morning of 20 February, the parties indicated that they had reached an in-principle agreement as to changes that were required, including:
- *creating the principle pedestrian entry to the shopping centre at the corner of West and Flora Streets enabling a closer physical connection to the Oak Road retail precinct;*
 - *increasing the active retail frontage along Flora Street and the new pedestrian entry;*
 - *deletion of one supermarket and reduction in gross leasable floor area of shopping centre to 8000sqm, excluding cafes on ground level of Building E;*
 - *relocation of proposed childcare centre from Building A, adjacent to open plant room and loading dock driveway, to Building I, opposite the proposed public open space;*
 - *reduction in the required parking in the order of 106 spaces;*
 - *relocation of the building footprint of Building K to achieve an open space area consistent with that required under the DCP 2006;*
 - *reduction in the footprint of the residential component of Building K, to more closely reflect DCP 2006 and the addition of an extra residential level.*
- 25 The parties requested an adjournment to enable amended plans that reflected the in-principle agreement to be prepared and for the amended application to be renotified and considered by council. We granted the adjournment and issued Directions for an agreed timetable on 3 March 2009 for the amended plans (March amended application).
- 26 Council considered the March amended application at its meeting on 23 March 2009. It did not determine the application and resolved to continue to defend the appeal.

- 27 By Notice of Motion filed on 27 March 2009, Westfield Limited (Westfield) sought leave to be joined as a party pursuant to s 39A of the *Land and Environment Court Act 1979* (the Court Act). The parties agreed that the Notice of Motion be vacated on the basis that Mr B Brown be granted leave to provide planning evidence in the proceedings on behalf of Westfield.
- 28 The hearing resumed on 3 April 2009. The Court heard further resident evidence (4 objectors) on the March amended application. A joint statement of the urban designers, planners, stormwater and traffic experts recommended further detailed changes (Exhibit CC). A further joint report from the economists (Exhibit BB) indicated that they did not object to a single supermarket of the size proposed in the March amended application. The applicant sought that the agreed changes be implemented through deferred commencement conditions or alternatively that the matter be again adjourned for amended plans. Council opposed both submissions.
- 29 On the basis that the changes were beyond those appropriately dealt with by conditions and the agreement of the experts as to appropriateness of the changes, we again granted leave for the amended plans and issued directions for a timetable (April amended application).
- 30 By Notice of Motion filed on 12 June 2009, Westfield and Supabarn Supermarket Pty Ltd (Supabarn) sought orders to intervene in the proceedings. The Notice of Motion was heard on 19 June 2009. For the reasons discussed below, on 22 June 2009, we granted leave for Westfield and Supabarn to intervene in the proceedings pursuant to s38 (2) of the Court Act.
- 31 On 19 June 2009, Mr Robertson SC, for the council, sought leave to call a new expert in relation to the hydrology and water quality issue. Mr Galasso SC, for the applicant, opposed the additional expert but submitted that the

applicant would also seek leave to call an additional expert if council's motion was successful. On 22 June 2009, we refused council's application on the basis that hydrology and water quality issues of the pond had been an issue in the proceedings from the start. The parties had selected experts with appropriate expertise to deal with the issue. These experts had generally reached agreement on the pond scheme subject to further information being provided. Therefore, a different expert was not warranted, particularly as the applicant objected. In reaching this decision we were unaware that an alternate scheme for the pond was now proposed.

- 32 The hearing again resumed on 30 June 2006 to consider the April amended application. The Court heard further resident evidence (2 objectors) and expert evidence on ecology and water quality issues, traffic, urban design, landscape, economic and planning issues.
- 33 The applicant made submissions at the end of the hearing. A timetable was set for the intervenor and the council to file written submissions on 15 July and the applicant to file written submissions in reply on 25 July. The intervenor filed its submissions on 16 July but the council did not provide its submissions until 20 July. The applicant was therefore granted an extension until 31 July, which was met.

Notice of motion

- 34 Westfield and Supabarn sought orders that:

1. The Intervenors be joined as a party to the proceedings pursuant to s 39A of the Land and Environment Court Act 1979.

2. The Intervenors be permitted to call expert town planning and economic impact evidence in relation to the retail component of the proposed development that is the subject of the proceedings.

3. In the alternative to Orders 1 and 2, that the Intervenors be permitted under s 38(2) of Land and Environment Court

Act to participate in the proceedings by leading evidence, cross examining witnesses and making submissions in relation to the retail component of the proposed development that is the subject of the proceedings.

4. Such further orders as the Court sees fit.

35 Council supported the motion and the applicant opposed it.

36 In support of the motion, Westfield relies on an affidavit of Ms D Townsend sworn on 12 June 2009 and Supabarn relies on the affidavit of Mr Kahagalle and Mr Koundouris both sworn on 12 June 2009.

37 Section 39A of the Court Act provides:

39A Joinder of parties in certain appeals

On an appeal under section 96 (6), 96AA (3), 96A (5), 97 or 98 of the Environmental Planning and Assessment Act 1979, the Court may, at any time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:

(a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or

(b) that:

(i) it is in the interests of justice, or

(ii) it is in the public interest,

that the person be joined as a party to the appeal.

38 Section 38(2) of the Court Act provides:

(2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.

39 The Notice of Motion was heard on 19 June 2009. Mr N Hutley SC, for the applicants for joinder (the intervenor), and Mr Galasso referred to *Morrison Design Partnership Pty Limited v North Sydney Council and Director General of the Department of Planning* [2007] NSWLEC 802 where Preston CJ provides a summary of the relevant principles in applying the tests in s39A. These include that it is appropriate to join a party where, if

not joined, the Court would not have a “*meaningful assistance*” or there would be “*no meaningful contradictor*” on important issues that “*the Court needs to consider to give a proper and lawful decision*”.

40 Both Mr Hutley and Mr Galasso referred to other authorities to support their position.

41 In summary, the key difference in their submissions was whether the economic and planning issues would be “*sufficiently addressed*” without joinder.

42 Mr Hutley submitted that the issues would not be sufficiently addressed for the following key reasons:

- i. The economic evidence is based on flawed assumptions in relation to zonings and there has been no economic analysis of the amended proposal for one supermarket.
- ii. The economic and planning issues have a direct impact on Supabarn. It is in a position to provide evidence, which it alone can adduce.
- iii. Council’ planning and economic experts have changed their position on the appropriateness of the retail component without adequate justification. Due to the unexplained agreement there is no effective contradictor to the evidence of these experts on significant issues in dispute.
- iv. The Court would be assisted by evidence from the intervenor’s planning and economic experts and through cross examination of the Council’s experts, which would not be able to be undertaken by the council.

43 Mr Hutley submitted that leave is now being sought because previously Council’s planning and economic experts were addressing the relevant issues. However, their opinions had changed, not in response to design changes, and without adequate explanation. While Council was still

pressing the issues there was no effective contradictor or an ability for council to effectively cross-examine its own experts.

44 Further, Mr Hutley submitted that the joinder would not delay or significantly extend the proceedings.

45 Mr Galasso submits that the issues had been sufficiently addressed through expert evidence and cross-examination. The experts had reached agreement through a process of the evolution of changes to the design in response to expert evidence. There had therefore, been an effective contradictor.

46 Both Westfield and Supabarn had ample opportunity to make written submissions and be heard by the Court. Both are competitors to the proposed supermarket and the issue before the Court is one of broad strategic context and not of competition. Section 39A is not a facility to enable dissatisfied objectors to seek to intervene as issues are resolved.

Findings

47 While we accept that there is merit in Mr Galasso's submission and that it is unusual to permit a party to intervene at this late stage of proceedings. However, the proceedings, as outlined else where in the judgment and detailed in the affidavits in support of the motion, have been unusual given the adjournments for amended plans and changing position of council and its experts.

48 In his detailed submissions, Mr Hutley has raised significant issues in relation to the evidence before the Court which we consider have not, and given the agreement of the experts, are not likely to be sufficiently addressed without an effective contradictor. Given the complexity and seriousness of the issues we consider that it is important that they be examined thoroughly. In reaching this decision we note that the Intervenor is able to meet the timetable and that there is unlikely to be a material extension of the proceedings.

49 We note that the Notice of Motion seeks an alternative order to intervene under s38(2) of the Court Act which despite the introduction of s39A remains open to the Court as stated by Pain J in *Kavia Holdings Pty Limited v Sydney City Council* [2003] NSWLEC 195. As noted by Jagot J in *Bongiorno Hawkins Frassetto & Associates Pty Ltd v Griffith City Council* [2007] NSWLEC 205, the considerations in s 39A are also of relevance in exercising discretion under s38(2).

50 Due to the unexplained change in position of council's planning and economic experts and the questions raised about the economic methodology, it is appropriate we be informed by further economic and planning evidence to give proper consideration of the matters before the Court. However, given the limited nature of the issues we did not think it necessary to join the intervenor as a party under s39A of the Court Act.

51 We therefore made the following order and a timetable for evidence:

The Intervenors be permitted under s38(2) of the Land and Environment Court Act 1979 to call expert economic and planning evidence, cross examine economic and planning experts and make submissions in relation to the retail component of the proposed development.

The proposal

52 The April amended application for which consent is now sought is for a Masterplan for the entire site and construction of Stage 1 for a mixed retail, commercial, residential development with a child care centre, basement car parking and open space recreation area.

53 The proposal is described in the Final Amended Statement of Facts and Contentions as follows:

Masterplan

The Masterplan for the proposed development consist of the following:

- Residential Development - consisting of approximately 250 dwellings (equating to approximately 27,112sq.m GFA)
- A retail shopping centre - as outlined in the Stage 1 description)
- Commercial uses (4,581sq.m GFA) including offices and a child care centre for up to 20 children
- All uses contained within structures below the assumed or actual ground level of the site or in a series of building envelopes of between 2 and 6 stories above the podium level.
- 927 parking spaces in various basement, podium and driveway locations.
- A public park (approximately 0.9ha)
- Various pocket parks or urban spaces within the development and general landscaping of the site;
- Associated site works (including dewatering), parking/loading, services and amenities.
- New north-south and east-west roads to provide vehicular, bicycle and pedestrian access internally through the site, and
- External road improvements.
- In situ conservation of the brick kiln foundations

The total gross floor area of the proposal is 42,045 sq.m.

Stage One

Stage One of the Masterplan involves the following components. These components are provided in greater detail as follows;

Retail and Commercial Component

A total of 11,274 sqm of commercial and retail floorspace is proposed, comprising:

- A shopping centre on the lower ground level;
 - 1 supermarket (4,500sq.m (GFA)
 - 1 mini-major (675 sqm GFA)
 - Mall specialty stores and kiosks (225sq.m GFA);
- External specialty shops and cafes along the Flora Street frontage (600sq.m GFA);
- Block E Retail (Cafes) at podium level 163sq.m GFA)
- Lower Ground Commercial (765sq.m GFA)
- Podium Level Commercial (176sq.m GFA)
- The shopping centre has direct pedestrian access to Flora Street, with pedestrian entrances in Building E at the corner of West and Flora Streets and at the eastern end of Flora Street. An escalator and lifts provide access between the car park and the shopping centre and the ground floor podium.

- Loading facilities comprising 7 docks are provided on the Lower Ground level.
- The total retail and commercial component of the stage 1 proposal equates to 9,104 sqm. GFA. The full retail component is contained within the Stage 1 application.
- The hours of operation of the retail facility are as follows;
Retail uses 6am to midnight (7days)
Loading dock 6.00am to 11 pm (7 days)
Cafe 7am to 10.00pm (7 days)

Residential Component

Stage 1 proposes four residential buildings consisting of 63 units in total, as described in further detail below;

- Block C - is located at the south-eastern corner of the site. 10 apartments are proposed to be accommodated within a 3 level building. 6 x 2 bedroom, 3 x 3 bedroom and 1 x 3 bedroom (plus study) apartments are proposed.
- Block D - is located at the south of the site. It is proposed to accommodate 30 apartments within a 4 level building. 14 x 1 bedroom, 9 x 2 bedroom, 7 x 2 bedroom apartments are proposed.
- Block E - is located at the south of the site, between Block D and the Brick Pit Park. The proposed 4 level building is to accommodate the shopping mall entry and cafe areas at the ground floor podium level, and 9 x 2 bedroom apartments within the 3 floors above.
- Block F - is located in the approximate centre of the site, adjacent to the Brick Pit park. 13 apartments are proposed to be accommodated with a 4 level building. 6 x 2 bedroom, 1 x 2 bedroom (plus study), 1 x 3 bedroom and 5 x 3 bedroom apartments (plus study) are proposed.
- Off street parking for the proposed new residences is accommodated on the Basement 2 level. 216 car parking spaces are proposed on this level to service both the proposed Stage 1 residences and some of the future staged DA residences.

Parking Provision

A total of 679 parking spaces are proposed in the stage 1 development comprising:

- Basement 1 (Retail) - 358 spaces
- Basement 2 (Residential and Visitor) - 249 spaces
- Princes Highway Driveway Entry - 14 spaces
- Ground Level Podium - 58 spaces

Public Park

The proposal involves the dedication of the land zoned 13 - Public Open Space to Council as a public reserve, and is seeking consent to carry out physical works to that land.

Embellishment works include:

- Construction of a 801.6 sqm pond;
- Filling of the existing brick pit to assist in providing works;
- Retention of the portions of the endangered ecological community (STIF) within the site, combined with compensatory planting in other off site locations;
- Supply and treatment of water to maintain the proposed pond as a compensatory habitat;
- Entrances and safety fences
- Construction of amenities area
- Construction of a playground

Landscaping

Permanent landscaping works, including a series of "pocket parks"

Roads

Internal north-south and east-west roads to provide vehicular, bicycle and pedestrian access through the site.

Signage

Signage zones for Stage 1 retail buildings; and

Site Works

Associated site works including de-watering, services and utilities for the Stage 1 works.

The evidence

Expert evidence

54 The Court heard expert evidence for the Applicant from:

- Ms G Morrish, architect and urban designer
- Mr G Pindar, traffic consultant
- Mr A Darroch, planner
- Dr D Robertson, ecologist
- Mr A Dimasi, retail economist
- Mr M Richards, hydraulic engineer
- Ms N Sonter, landscape consultant

- 55 The Court heard expert evidence for the council from:
- Mr N Dickson, architect and urban designer
 - Mr C McLaren, traffic consultant
 - Mr K Nash, planner
 - Mr I Drinnan, environmental scientist
 - Mr B Haratsis, economist and planner
 - Dr G Amos, hydraulic engineer
 - Mr M Sherrie, infrastructure manager
 - Mr N Metcalf, landscape consultant
- 56 The Court heard expert evidence for the intervenor from:
- Mr B Brown, planner
 - Mr M Evesson, planner on economic issues
- 57 In addition, Mr A Kingswell, for the applicant and Mr I Drinnan, for the council provided expert reports on contamination issues but were not required for cross examination on this issue.

Resident evidence

- 58 The Court visited the site and heard evidence from people both in favour and opposed to the development. The key concerns of those who opposed to the development are the increase in traffic and impacts on the existing road system from cars and service vehicles, inadequate parking provision and noise. The adjoining owners and occupiers of the James Cook Industrial Estate were concerned about the restrictions that the proposal would place on the operation of their businesses, particularly the location of the driveway adjoining their property. They were also concerned that the driveway, in conjunction with the existing substation and the strata ownership of their property, would limit the opportunity for its future redevelopment.
- 59 Ms B Hoffmann and Ms C Stubbs who operate car repair businesses in the James Cook industrial Estate were particularly concerned that the

location of the driveway would prevent brake tests, which are currently carried out in Flora Street and require a length of 100m for cars and 300m for trucks. They stated that there was no other suitable location for brake testing in the vicinity. They were also concerned by the loss of on street parking in Flora Street, which they considered had not been adequately replaced within the development. They maintained their concerns in relation to the March and April amended applications.

- 60 Mr Koundouris, a Director of Supabarn gave evidence on site in relation to the impact of the proposal on the Supabarn supermarket (under construction on the corner of President Avenue and Old Princes Highway, Sutherland) and Sutherland Town Centre. He considered that the retail component of the proposal would effect the viability of the business and consequently would impact upon Sutherland Town Centre failing to develop its higher order role in the retail strategy.
- 61 Mr D Hunt, a local retailer, expressed concern about the impact of the proposal on small retailers. He considered the additional competition from a large shopping centre would impact on small shopping centre which, in his opinion, plays an important part, such as providing improved security of streets through informal surveillance by shop keepers.
- 62 The main reason that people supported the proposal was because it would provide increased retail facilities for which there was a demand from people within the area, particularly older people who supported a supermarket in close proximity to their homes.

Strategic context

- 63 Contention 1 refers to the strategic context of the proposal. Council contends that:

The proposal involves, amongst other things, a large major supermarket and mini major. Retail development of that scale is entirely inconsistent with the strategic planning for the site as embodied in the Metropolitan Strategy, the

Sutherland Shire Structure Plan 2003, Sutherland Shire Local Environmental Plan 2006, Sutherland Shire Development Control Plan 2006, Amendment No 4 to Sutherland Shire Local Environmental Plan 2006, the adjoining Kirrawee Village Shopping Centre and the planning outcomes envisaged through the extensive community consultation process undertaken as part of the Kirrawee Local Area Masterplan.

Further the proposal does not provide for adequate or suitable employment uses, contrary to the evolved planning strategic context for the subject site.

64 Contention 1 provided further particulars on the proposal's inconsistency with these planning documents.

65 The key disagreement between the parties and the intervenor was the weight to be given to the planning document, whether they established a retail hierarchy and whether the proposal is consistent with the strategic objectives.

66 Mr Nash and Mr Brown considered that there was a clear centre hierarchy established by the LEP 2006 and DCP 2006, Amendment 4 and the other planning documents, including the draft Strategy. In response to the original proposal for two supermarkets, Mr Nash concluded that:

The development of a stand alone shopping centre on the Kirrawee Brick Pit would seriously dent the potential for the retail development envisaged for Sutherland Centre being achieved thereby inhibiting the likelihood of Sutherland Centre becoming a major centre.....and is inconsistent with the strategic planning outcomes reflected in the State and Local Environmental Planning Instruments and the DCP.

67 Mr Darroch gave little weight to the draft Strategy as this and the Metropolitan Strategy set the future direction of areas whereas the site is already zoned under LEP 2006 to permit a mixed use development. In his opinion, there are only two broad strategic questions which need to be addressed; firstly does the proposal meet the objectives of Zone 7, in particular objective (j) *to facilitate the re-vitalization of the Kirrawee Town*

Centre and the Kirrawee railway precinct. Secondly, what is the impact on existing retail facilities in surrounding centres.

- 68 In Mr Darroch's opinion, both the original and the amended proposal meet the objectives of the zone, in particular, it will provide over 500 new residents in walking distance of the station. The additional residents will revitalise Kirrawee Town Centre. Mr Darroch gave little weight to objectives (k) and (l) of the zone which were introduced under LEP 2006 Amendment 4, as he considered these to be made in response to the development application. Nonetheless, he considered the proposal met these objectives.
- 69 The planning experts relied on the evidence of the economists to determine whether the proposal would result in an economic impact on other centres, particularly Sutherland.
- 70 In response to the evidence of Mr Haratsis and Mr Dimasi on the original proposal, Mr Nash, in his oral evidence on 3 April 2009, stated that Kirrawee could accommodate one supermarket and not impact on the local area and therefore not impact on the future role of Sutherland as a major centre. This conclusion was based on the likelihood that the occupants of the original proposal for two supermarkets at Kirrawee would be Coles and Woolworths, which would mean that neither of these major retailers would be likely to locate in Sutherland. Whereas if one supermarket was located at Kirrawee the potential remained for an additional supermarket, including a Coles or Woolworths, to be established in Sutherland as a competitor. We understand that this conclusion was the genesis of the March amended application.
- 71 In response to the further evidence of Mr Haratsis on 1 and 2 July, Mr Nash expressed doubts about the size of the supermarket proposed as this had not been modelled and it may have the potential to impact negatively on Sutherland and Gymea. He was satisfied that a single

supermarket of the size proposed (4,500 sqm) would not impact on the existing Kirrawee Town Centre.

- 72 The planning experts agreed that for the purpose of the objectives for Zone 7 in LEP 2006, the term Kirrawee Town Centre means the existing Oak Road shops. Although Mr Darroch considered that the term has other meanings in other documents.

- 73 Both Mr Darroch and Mr Nash agreed that:

*Oak Road will remain the retail precinct for Kirrawee Village.
The Brickpit proposal is a destination shopping centre mainly accessible by vehicles.*

- 74 Despite the difference in the catchment of the centres, Mr Nash and Mr Darroch agreed that the new centre would not become a second town centre and that the Kirrawee Town Centre would remain a local centre. Other than Mr Nash's concerns in relation to the impact of the proposal on Sutherland, and to a lesser extent GyMEA, they agreed that the proposal generally met the objectives for Zone 7 in LEP 2006 and the requirements of DCP 2006

- 75 Mr Brown states that Sutherland has an existing retail floorspace of 8,500 sqm and an approved retail floor space of 3,200 sqm (including the 2,500 sqm Supabarn supermarket), a total of 11,700 sqm. The proposal provides 8,151 sqm of retail floorspace and the existing shops in Oak Road provide 2,500sqm, a total of 10,6512 sqm. He concludes that:

Given the similar amount of floorspace and the proximity to Sutherland, Kirrawee will compete with Sutherland as the higher order centre in this part of the Shire.....

The proposal will draw on customers from a wide catchment (certainly much wider than the local area) in conflict with Kirrawee's designated role, not only as a local centre but as local centre which is not intended to grow significantly. The proposal would change its functions so that it will be more akin to an 'Urban Centre' zoning. Further there is concern that approval of the proposal will allow other sites in the

Mixed Use zone to provide for competing retail uses, further eroding the established hierarchy

76 In Mr Brown's opinion this was inconsistent with the strategic role for Sutherland and Kirrawee established by the planning controls. In particular, Mr Brown did not consider that the proposal met the objectives for Zone 7 in LEP 2006 and was inconsistent with a number of the controls in DCP 2006.

77 Whereas Mr Darroch's held the contrary opinion that:

The proposal will not change the Centre's hierarchy. It is not just the retail component that determines the role of the centre its other uses as well. In the case of Sutherland it is the administrative and civic functions that mean that it will always remain the dominant centre over Kirrawee. Kirrawee will remain as a local centre. Sutherland will maintain its role as the economic evidence is that the proposal not inhibit the ability of Sutherland have a full line large scale supermarket.

Findings

78 The parties made extensive submissions about the weight to be given to LEP 2006 Amendment 4 and DCP 2006 Amendment 4 and to the other planning documents. They agreed that under s79C of the Act, LEP 2006 and DCP 2006 must be taken into consideration but disagreed as to whether these documents established a retail hierarchy.

Proper planning approach

79 For the reasons discussed below we find that the proper planning approach is an assessment of the application under LEP 2006 and DCP 2006. LEP 2006 Amendment 4 must be considered and given weight and the proposal should be consistent with the planning approach established in this amendment.

80 DCP 2006 Amendment 4 is not to be given determinative weight but is to be considered in conjunction with the other provisions of DCP 2006 as a focal point to assess the merits of the application.

81 We have not found it relevant to consider the other planning documents as LEP 2006, DCP 2006 and their amendments provide an adequate planning framework to assess the application.

- LEP 2006 Amendment 4

82 The parties agreed that the savings provision in cl 58 of LEP 2006 require that LEP 2006 Amendment 4 be considered as if exhibited but not made. The parties also agreed that as the amendment is gazetted it should be considered as imminent and certain. Further, the parties agreed that the approach to determining the weight to be given to amendments in these circumstances is outlined in *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279 where Lloyd J reviewed relevant cases and applicable principles as follows:

21. The first question is the weight to be given to the 2001 LEP. That question is governed by cl 5(3) of that instrument: 'the environmental planning instrument repealed or amended by this plan shall apply as if this plan had been exhibited but had not commenced'. With the benefit of hindsight it is possible to say that although the 2001 LEP had not been made, at the time of lodgement of the development application on 13 November 2000 it was both certain and imminent. At that stage, the then draft LEP had been exhibited three times, had been formally adopted by the council and had been forwarded to the Department of Urban Affairs and Planning for making by the Minister.

22. The weight to be given to a draft local environmental plan in such circumstances is settled. In particular the question has been considered in a series of cases involving the present 2001 LEP in draft form.

23. Mathers v North Sydney Council [2000] NSWLEC 84 (unreported) was heard when the then draft LEP had had its second exhibition but submissions had not been considered. Talbot J said (at par[29]):

'It is appropriate given the history of the development of the draft instruments to give draft LEP 2000 significant weight to the extent the Court is satisfied that approving the development will not detract from its objectives as expressly stated or reflected in the proposed controls ...'

24. *Architects Haywood & Bakker Pty Ltd v North Sydney Council* [2000] NSWLEC 138 (unreported) was heard after the third exhibition, when submissions following that exhibition were being considered. Pearlman J put the question in the following terms (at par [32]):

'The question, then, is the degree of weight to be placed upon [the plan's] provisions in the assessment of the proposed development. That involves considering whether the making of the Draft LEP is certain and imminent. It also involves considering the effect cl 5(3) of the Draft LEP which is a savings provision ...'

25. Pearlman J then said (at par [33]) that the planning approach which the draft LEP adopts must be regarded as certain to be brought into force within the reasonably foreseeable future; and hence she placed 'significant weight' upon its provisions in the assessment of the development application in that case. Her Honour then turned her attention to the savings provisions of the draft LEP (at par [34]):

'The savings provision does not require a different approach. The effect of cl 5(3) is to place the Draft LEP in precisely the same position so far as concerns this development application whether it had formally come into force or still remained a draft as currently pertains. In either case, it is to be taken into consideration as if it had been placed on public exhibition, and accordingly given some weight in the assessment of the planning implications of the development application.'

26. *Edward Listin Properties Pty Ltd v North Sydney Council* [No.2] [2000] NSWLEC 181 (unreported) was also heard after the third exhibition but also after the council had resolved to make the plan and had forwarded it to the Department of Urban Affairs and Planning to be made by the Minister. Talbot J said (at par [9]):

'In the circumstances outlined above it is incumbent upon the Court to place considerable weight on any relevant provisions of the draft LEP and the impact that granting of development consent may have on implementation of its objectives.'

27. *Walker v North Sydney Council* [2001] NSWLEC 211 (unreported) was heard almost one month after *Edwards Listin Properties*. Cowdroy J said in that case (at par [31]):

'Arising from the judgments of Talbot J and Pearlman J the adoption of the draft LEP is imminent ... The Court therefore gives due force to such clause and upholds the council's submission that cl 68 of the draft LEP warrants rejection of the development application.'

28. Finally, *Detita Pty Ltd v North Sydney Council* [2001] NSWLEC 209 (unreported) was heard after the 2001 LEP had been made. I held (at par [6]) that the effect of the savings clause (cl 5(3)) meant that the notionally draft planning instrument must be awarded such weight as must be given to any such instrument when its implementation is certain and imminent. I further decided (at par [11]) that in the circumstances of that case the notionally draft local environmental plan should be afforded determining weight.

29. It seems to me that in applying the savings clause, cl 5(3), to the present case, one cannot ignore the fact that the 2001 LEP has been made. In applying the words of the clause that 'the environmental planning instruments repealed or amended by this plan shall apply as if this plan had been exhibited but had not commenced', it is necessary in the light of that circumstance to assume that the making of the notionally draft plan was certain and imminent. In *Architects Haywood v Bakker Pty Ltd*, Pearlman J said that the savings provision does not require a different approach. I thus reject the submissions of the applicant that this approach is not consistent with the purpose of cl 5(3).

30. Whether one applies the test of 'significant weight', or 'some weight', or 'considerable weight' or 'due force' or 'determining weight' to the later instrument is not, however, the end of the matter. The savings clause still has some work to do. The proposed development is a permissible development by dint of the savings clause. In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith".

83 Mr Hutley submits that considerable weight must be given to the changes to Zone 7 to include objectives (k) and (l) introduced as part of LEP 2006 Amendment 4. In his submission the proposal is inconsistent with these objectives. Mr Robertson endorsed this submission.

84 Mr Galasso submits that the changes relevant to the proposal do not effect an actual change to LEP 2006. Further, he submits that the new objectives:

...arguably emphasise the planning goal of providing retail in the zone and provide goals for that retail, namely: revitalisation; integration; and not adversely impacting on the

sustainability of others centres in the Shire. For the reasons outlined the proposal meets the general goals of these objectives.

85 In reviewing these submissions it appears that there is no disagreement that objectives (k) and (l) introduced as part of LEP 2006 Amendment 4 must be given considerable weight. The disagreement between the parties is whether the objectives are met, which we discuss below.

86 We note that the planning experts give considerable weight to the changes in LEP 2006 Amendment 4 to the definition of "gross floor area" which excludes parking required by the development. Without this amendment the proposal has an FSR of 1.52: 1, which exceeds the FSR of 1:1 permissible under clause 35 of LEP 2006.

87 We find that the proper planning approach is that the proposal should be consistent with the planning framework established by LEP 2006 Amendment 4.

- DCP 2006 Amendment 4

88 Mr Hutley submits that the weight to be given to a DCP is established in *Zhang v Canterbury Council* (2001) 51 NSWLR 589 where the Court of Appeal held:

The consent authority has a wide ranging discretion ... but the discretion is not at large and is not unfettered. DCP 23 had to be considered as a 'fundamental element' in or a 'focal point' of the decision making process. A provision so directly pertinent to the application for consent ... as was cl 4.0 of DCP 23 was entitled to significant weight in the decision making process but was not, of course, determinative.

89 DCP 2006 Amendment 4 contains no savings provisions and limits the size of any retail development throughout Zone 7, including the Brick Pit site. Mr Hutley submits that the proposal is contrary to the provisions in DCP 2006 Amendment 4 and that:

DCP Amendment No. 4 is entitled to be a "fundamental element" in the decision making process, and be given

"significant weight", despite the circumstance that it was made after the development application was lodged. In making its decision, the Court must apply the law and find the facts as they exist when the appeal is heard: see Janlz Constructions v Randwick Municipal Council (1976) 35 LGRA 70 at 72-73 (CA) per Grass JA; Woollahra Municipal Council v TAJJ Investments (1982) 49 LGRA 123 at 130 (CA) per Mahoney JA; Sofi v Wollindilly Shire Council (1975) 31 LGERA 416 per Waddell J; and Architectural Property Services v Rockdale City Council [1999] NSWLEC 83 at [16] per Lloyd J. DCP Amendment No. 4 constitutes a significant element of the legal and factual matrix to be applied at the time of the making of the Court's decision.

- 90 Mr Galasso accepts that the provisions of a DCP are to be the focal point but submits that there is no requirement that the provisions must be met as a condition precedent to the granting of development consent. Further he submits that:

....changes to the DCP must be taken into account, but because they were introduced following the lodgement of the development application and after the commencement of the appeal, and the Applicant contends in fact as a reaction to the proposed redevelopment of the site (pp 140-141 of Council's bundle, exhibit 1), such timing requires that they be given according weight.

In this regard, there have been a number of decisions in which the Court has held that a DCP introduced after a development application has been lodged should be given less weight. For example in Architectural Property Services v Rockdale City Council [1999] NSWLEC 83 Lloyd J said at [16]:

"Where the relevant development control plan commenced after the development application had been made it should not be given determinative weight. This is not to say that the standards.... should be ignored, they should be taken into account. A failure to comply will not necessarily be fatal to the application provided that it is otherwise satisfactory. Although [the] previous development control plan.... is now repealed, its controls may also be taken into consideration as indicative of standards and controls which applied when the development application was made.

- 91 We note that in the circumstances of this case, DCP 2006 Amendment 4 applies to Zone 7, although some provisions refer only to the Brick Pit site,

such as the limit on the retail floorspace component, however, a similar limit has also been introduced to the remainder of Zone 7. Amendment 4 does not repeal or replace provisions of a DCP but rather adds to existing provisions to clarify their intent. DCP 2006 Amendment 4 came into force after the development application was lodged on 9 April 2008. However, Mr Nash's evidence is that council adopted a report on the proposed changes in September 2007 and they were initially exhibited in March/April 2008 as part of DCP 2006 Amendment No 3. The changes have therefore had a long gestation period and generally deal with a wider area than just the Brick Pit site. We find that the provisions in Amendment 4 are not to be given determinative weight but are to be considered in conjunction with the other provisions of DCP 2006 as a focal point to assess the merits of the application. There is no requirement that the provisions in DCP 2006 Amendment 4, as with any provisions in a DCP must be met, but they must be considered.

- Other planning documents

- 92 The parties held different opinions about the weight to be given to the non statutory planning documents, including the planning studies, LAM, the Strategy and the Metropolitan Strategy. Mr Hutley and Mr Robertson submit that these documents should be given weight. LEP 2006 and DCP 2006 have evolved from a long history of strategic planning which they submit establishes a retail hierarchy for Sutherland that is also recognised in regional planning documents. Mr Hutley submits that:

The LEP must not be read in a vacuum, in the manner for which the applicant contends. The non-statutory policies form the background against which the value judgments required by the EPA Act and the LEP are to be made.

Of course, the non-statutory policies are also matters to which the Court may have regard when it considers "the public interest" as required by s.79C(1)(e): Terrace Tower Holdings v Sutherland Shire Council (2003) 129 LGERA 195,...

- 93 Mr Hutley submits that the LAM should be considered on the basis of the principles established by McClellan CJ in *Stockland Development Pty Ltd*

v Manly Council [2004] NSWLEC 472 and by Talbot J in *Aldi Foods v Holroyd City Council* [2004] NSWLEC 253. Mr Hutley states that:

The LAM is a master plan which was the product of extensive research and public consultation. It has not been significantly departed from. It is compatible with the LEP, the DCP and the Draft South Sub-Region Metropolitan Strategy. It should be given weight in the Court's assessment of the application.

- 94 Mr Galasso submits that there is no retail hierarchy, whether strategic or otherwise. He accepts that the historical planning for the site should be recognised but submits that:

....where historical assessment has merged into contemporary planning instruments or plans, which themselves are specifically required to be taken into account in the determination of a development application, it is illogical, incorrect and patently disproportionate to that merging to suggest that the historical documents should be resurrected and afforded a level of importance beyond their true place in history.....

.....The LEP and the DCP speak for themselves.....

- 95 Mr Galasso submits that there is no adopted “regional planning policy” and that the LAM is not a “policy” as referred to in *Stockland* as its relevant provisions have been incorporated into LEP 2006 and DCP 2006. Nor is it a “masterplan” as referred to in *Aldi* as it is not made as a consequence of the controls in LEP 2006 or DCP 2006.

- 96 Mr Galasso states that there is no requirement in s79C to take into account other planning documents although he acknowledges that they may be considered under “public interest” consistent with the decision in *Terrace Towers*.

- 97 We accept Mr Galasso’s submission to the extent that under s 79C of the Act, LEP 2006 and DCP 2006 must be considered and that these documents “*speak for themselves*”. LEP 2006 and DCP 2006 were prepared following extensive strategic planning and incorporate provisions

relating to the Brick Pit site and other areas. We find that these provisions are adequate to understand the role and function for these centres envisaged under the planning controls. The non statutory planning documents could be considered to assist in the understanding of the LEP and DCP or as part of the “public interest” considerations. However, this is not mandatory and we have not found it necessary to do so.

- 98 We note that this approach is not inconsistent with the approach of the applicant’s experts and Mr Galasso who referred to the LAM to understand the type of planting required along the Princes Highway frontage of the development.

Retail hierarchy- role of the centres

- LEP 2006

- 99 Mr Hutley and Mr Robertson submit that the zones in LEP 2006 and the Locality Strategies in DCP 2006 establish a three level hierarchy of centres being Zone 10 – Neighbourhood Centre, Zone 9 – Local Centre (which includes Kirrawee Town Centre) and Zone 8 – Urban Centre (which includes Sutherland). These three centre zones occur in locations throughout the Shire.

- 100 Mr Galasso accepts that the “centres” have different roles but that:

...nowhere within either the LEP or the DCP is any notion of a centres hierarchy established. Within the LEP no such concept is even marginally addressed; and within the DCP, whilst certain town/areas are addressed individually, they are not ranked inter-se sufficient to be able to establish any hierarchy.

- 101 The Brick Pit and other land in Kirrawee is within Zone 7 – Mixed Use Kirrawee. This zone is specific to Kirrawee and does not occur elsewhere in Sutherland. In Mr Hutley’s and Mr Robertson’s submission, the role of Zone 7 is different to that of Zone 9 and it is not part of the Kirrawee Town Centre referred to in the Zone 7 objectives. They submit that the Kirrawee Town Centre is that part of Kirrawee within Zone 9. The objectives of Zone

9 seek to maintain its role as a local centre and they submit that the proposal's impact on these objectives should also be considered.

102 Mr Galasso submits that Kirrawee Town Centre is not limited to Zone 9 but that the Brick Pit site and other parts of Zone 7 are an integral part of Kirrawee Town Centre. Further he submits that the zoning of Zone 7 establishes that "Kirrawee is intended to grow and serve a broader function than a mere local centre area".

103 To understand these competing submissions and determine whether there is a retail strategy established by LEP 2006, it is necessary to consider the objectives of the zones.

104 The zone objectives for each of the centre zones define different roles for the different centres being urban, local and neighbourhood. Although not explicit, this implies a hierarchy of centres or the strategic role the centre is to play in the Shire. It also indicates the role of retail in each type of centre.

105 Mr Galasso places considerable weight on the permissibility of "shops" in Zone 7 as providing an imprimatur for a supermarket of the size proposed. However, "shops" are permissible within each centre zone as well as in the mixed use zone and there are no numerical prescriptions on their size and intensity within the LEP controls. "Shops" whether a single corner shop or a supermarket are permissible within each zone, the test then being whether it is consistent with the zone objectives and other relevant controls. A number of the zone objectives are similar in each centre zone. However, each centre zone includes a different objective in relation to retailing and employment.

106 In Zone 9 the objectives include:

(b) to promote viable, small, local and specialty shops to support the needs of the local community and provide local employment,

107 Zone 10 includes an objective that limits the scale of retail. It provides:

(a) to promote small scale retail and business activities to serve the day to day needs of the surrounding local community.

108 Whereas Zone 8 has a broader range of permissible retail uses and does not include an objective that limits retail to a local catchment. Until LEP 2006 Amendment 4, the objectives for Zone 7 were silent on retail. Given the extensive range of objectives we interpret this absence to be that retailing, while permissible, was not a priority within the zone. Amendment 4 has clarified this omission.

109 Mr Galasso submits that the addition of objectives (k) and (l) in LEP 2006 Amendment 4 elevate the important role of retailing in Zone 7. He states that:

Importantly, neither the LEP nor the DCP prohibit retail development on the subject site, or in Zone 7..... Although the Applicant's submissions are that the amendments to the LEP and the DCP post-date the lodgment of the development application, and whilst necessary to be taken into account (in terms of the LEP amendments), and whilst required to be taken into account (in terms of the DCP amendments), those amendments in fact for the first time speak in a positive sense about retail development in Zone 7. Quite ironically, this, for the first time, points to and contemplates retail development on the subject site, and more extensively within Zone 7.....

110 We do not accept that the introduction of these objectives should be interpreted in this manner. Rather, it appears that the objectives were introduced to clarify the role of retail in Zone 7. While the use was permissible there were no objectives for shops. The primary role of the zone when the objectives are read as a whole is to encourage residential uses in conjunction with some employment generating uses to create a live/work precinct.

111 We accept that it is not clear what the term Kirrawee Town Centre refers to in the Zone 7 objectives. Different planning documents use different terms to refer to the existing shops in Oak Road such as the existing Kirrawee

Town Centre, Kirrawee Local Centre, Kirrawee Village and the Main Street Precinct. The planners agreed that Kirrawee Town Centre in LEP 2006 refers to the existing centre (Zone 9). However, we find that, as it is expressed in LEP 2006, the Kirrawee Town Centre as it develops will consist of both the Local Centre Zone (Zone 7) and the Mixed Use Zone (Zone 7).

112 However, while both zones will be part of the future Kirrawee Town Centre their roles, as articulated in LEP 2006 and in greater detail in DCP 2006, are envisaged to be different. Kirrawee Town Centre would comprise distinct precincts: Zone 9 being primarily the retail precinct and the Zone 7 being primarily a residential and employment generating precinct with retail having a support role.

113 We do not accept Mr Galasso's submissions that the retail role of the future Kirrawee Town Centre should be other than as a local centre, which is clearly stated in objective (b) of Zone 9.

114 We accept Mr Hutley's submission that objectives for Zone 9 identify clearly its retail function as being to meet local needs. The retail role of Zone 7 needs to be considered within this context. It is clear that development of the Brick Pit site and other sites within Zone 7 will expand the role of Kirrawee Centre with a large increase in residential and commercial uses with retail meeting the needs of the increased population. However, we do not accept that LEP 2006 envisages that this will result in Kirrawee not remaining a local retail centre.

115 Objectives (k) and (l) of Zone 7 aim:

- (k) to ensure any expansion of retail activity within the zone maintains the role and function of Kirrawee Town Centre and does not adversely impact on the sustainability of other centres in the Sutherland Shire,*
- (l) to ensure any new shops integrate with and support the existing Kirrawee Town Centre*

116 Objective (k) requires that any expansion of retail in Zone 7 *maintains the role and function of Kirrawee Town Centre*. We accept that Kirrawee Town Centre can include both Zone 9 and Zone 7 but that its function, whether separately or combined, is as a local centre. It is inevitable that Kirrawee will grow with increased residential and to a lesser extent employment generating uses in Zone 7, but as we understand objective (k), retail in Zone 7 is to support that in Zone 9 and is to meet the needs of this expanded local population but is not to provide a broader regional function.

117 Further, objective (l) provides that new shops in Zone 7 should integrate with and support the existing Kirrawee Town Centre. We accept Mr Hutley's submission that:

These provisions confirm that the role of any development of the Brick Pit site vis-a-vis the Kirrawee Town Centre should be a "supporting" role, rather than a principal or dominating role as proposed by the applicant.....

- DCP 2006

118 The role for each centre is described in greater detail in DCP 2006 and further clarifies the role envisaged for each centre.

119 Clause 1.a of Chapter 2 of DCP 2006 includes a Centre Strategy for Kirrawee. Relevantly this provides that:

The intention of the strategy is not to be overly prescriptive, but to provide a strategic framework for future planning and design of the Town Centre. Detailed building envelopes have therefore not been developed.

Rather, the key aspect of the approach is to prioritise the public domain, which means the new development should be designed in response to the scale and character of the street and open space area. This approach recognises that development controls in the private domain need to be flexible to meet market demand. It is also important that the framework responds to the community vision for Kirrawee Town Centre.

120 Clause 1.a.1 includes the following values and character for Brick Pit site

Redevelopment of the Kirrawee Brick Pit complements the existing town centre by accommodating a variety of uses, possibly including residential, commercial, educational, community and open space.

- 121 The aim in Clause 1.b.1 to create a identifiable character for the town centre includes:

Reinforce the role and function of the existing Oak Road retail precinct as the town centre of Kirrawee.

- 122 Clause 1.c provides specific strategies for precincts within the Kirrawee Centre including Precinct 1 – Main Street Precinct and Precinct 2 - Brick Pit Precinct.

- 123 The specific strategies for the Main Street Precinct relevantly include:

Precinct 1: Main Street Precinct

The Main Street, Oak Road, is the retail precinct for Kirrawee Village. 1-2 storey street edge buildings define the precinct. New corner buildings at the northern and southern ends will define the edges of the precinct.

Expansion of the retail precinct south over the railway is desirable in the longer term as the local population grows. Expansion of the south part will include train bus interchange, bus stops and shelters and necessary space to accommodate future transport activities. Those changes will help identify the precinct from President Avenue. Pollard and Rotary Park will be enhanced and Pollard Park will be integrated to become the gateway.

This strategy seeks to provide the following:

- *Retain the main character of the street.*

.....

- *The retail precinct is encouraged to expand allowing retail uses to extend around the corner into Flora Street for a short distance.*

.....

- *The new buildings should allow retail uses fronting at ground level and residential or commercial uses on the upper floors.*

.....

- *Area of commercial and retail space to be increased by approximately 3000sqm.*

- 124 The specific strategies for the Brick Pit Precinct are:

Precinct 2: Brick Pit Precinct

The Brick Pit site is the main focus of future development. It presents huge potential for a mix of development including mixed employment, a variety of housing types including apartments, live / work building types, and accessible building for aged and disabled people. The Brick Pit has the potential to become an urban lifestyle area with high amenity, easy access to transport, and good access to facilities and services.

The Brick Pit has been disused for some time. There is contamination to both soil and groundwater and, because of the unstable edges of the Pit, risks to pedestrians. There is a cost implication associated with the remediation of those edges. This strategy promotes and / or provides the following:

- A lively mixed use precinct close to public transport and shops.*
- New streets creating a permeable block structure and connectivity*
- Larger barrier type apartment buildings located along the Princes Highway frontage with large landscape setbacks to reduce noise impacts and improve amenity and street address.*
- Mixed employment / residential developments close to existing James Cook Business Park as a transition between existing industrial and future residential development.*
- Mixed employment/ residential developments along Princes Highway and Flora Street.*
- Housing for older people or people with a disability especially high care (nursing home) and low care (hostel) housing, be considered for any residential component on the Brick Pit Site.*
- Native tree plantation to proposed new streets.*
- Clear car parking spaces in between new street trees.*
- New pavement and street furniture should be incorporated within development applications, consistent with overall concept of town centre design.*
- Proposed 0.9Ha public open space zoned as Park, including an amphitheatre, an outdoor café, artificial lake and community toilets. Park will include existing remnants of Sydney Turpentine Ironbark Forest and native flora. The park will be funded by the contributions of the developers within the study area.*
- Proposed a total of 0.135Ha Public Open Space as pocket parks.*
- Shops within the Mixed Use – Kirrawee zone shall not due to their size or intensity create a second town centre. Development of the mixed use zone shall not undermine the function of the Kirrawee Local Centre*

as the town centre for the locality, meeting the regular shopping and service needs of the local community.

- *Shops within the Mixed Use – Kirrawee Zone shall help activate the public domain and enhance the predominately residential and non-retail commercial character of the site.*
- *The design and siting of any shops within the Mixed Use - Kirrawee Zone shall have clear, direct accessible pedestrian links to the existing Oak Road retail precinct so that shops support the revitalisation of the retail function of the Kirrawee Local Centre.*

125 Similar to LEP 2006, the DCP included no explicit references to retail prior to Amendment 4 when the last three strategies were added.

126 Chapter 2 section 2.a of DCP 2006 provides the strategy for Sutherland Centre, which relevantly includes:

The key focus for the future of Sutherland Centre is to create a vibrant retail and administrative core which increases the existing level of retail activity and provides for the centre to be supported by appropriate residential densities and housing types. The strategy aims to achieve this through ensuring that development is of an appropriate scale and character to define Sutherland Centre.

.....

Notwithstanding the extensive redevelopment in the middle and outer rings of the centre, the majority of the retail core area is yet to be redeveloped. This DCP seeks to create a framework that fosters best practice in the development of residential and commercial buildings for these important remaining areas. The consolidation of allotments in certain areas may be necessary to achieve development which contributes to the enhancement of the town centre's built form.

The future (re)development of Sutherland Centre will enable the Centre to be characterised by increased residential development and administrative, office and cultural activities and also significantly improved retail functions.....

.....

It is hoped that future development will include the introduction of a large-scale supermarket and discount department store, bulky goods retailers and small-scale

active retailers. This range of retail activities will create variety and vitality throughout the centre.

The comprehensive redevelopment of Sutherland Centre's retail activities will support the significant increase in resident population anticipated by this Plan.

Sutherland Centre plays a significant role in Sutherland Shire and is recognised as a district centre. The district role of the centre is reinforced by the concentration of major government functions and Council's administrative services. Recent residential development surrounding the retail and commercial functions of the centre has highlighted the opportunities available for sustainable growth within the Sutherland Centre retail and commercial core.

Sutherland Centre is a primary public transport node being located on the Cronulla/Illawarra/South Coast rail line and provides opportunities to build its role as the principal bus/rail interchange in the Shire.

- 127 We find that the Locality Strategies in Chapter 2 of DCP 2006 clearly define different roles for different centres and precincts. While there is no specific reference to a retail strategy or hierarchy this can be inferred through the different role of retailing in each centre or precinct. The function or importance of retailing is linked to the area or catchment it is proposed to serve, for example Kirrawee is identified as serving local needs whereas Sutherland is identified as serving a district role.
- 128 From the Locality Strategies for Sutherland and Kirrawee; including the Main Street Precinct and the Brick Pit Precinct, we conclude that there is an emphasis on the important role that retailing is to play in Sutherland Centre. Clearly the centre fulfils a number of other roles such as administrative, residential and as a transport interchange but retailing is also specifically identified as a major function that planning for the centre encourages.
- 129 Similarly in Kirrawee, Oak Road is identified as the retail precinct for Kirrawee, with limited opportunities for physical expansion. The Brick Pit Precinct identifies that its principal function is to provide a support role for

retail in the existing centre and to meet the needs of the increased local population likely to result from residential and employment generating development in Zone 7.

Consistency with the Zone objectives

- 130 The question then becomes one of whether the proposal is consistent with objectives for Zone 7.
- 131 There is no clause in LEP 2006 that an application may only be approved if it is consistent with the objectives of the zone. Nonetheless we find that a consideration of the zone objectives and the consistency of the proposal with these objectives are relevant, although a finding of inconsistency would not result in an automatic failure of the application.
- 132 There was no disagreement that the residential component of the development (about 27,000 sqm GFA) and (following amendments) that the urban design and amenity of the development generally met the objectives for Zone 7.
- 133 To a lesser extent, the council was concerned about the amount of commercial floorspace to be provided (about 4,581 sqm GFA), particularly in proportion to the retail component (about 8,000 sqm GFA) and whether this met the employment generating and live/work objectives of the zone. Although, there was recognition that retailing would generate employment opportunities and the issue was not pressed other than in relation to the retail issue.
- 134 By far, the key difference between the parties related to the retail component of the development and whether this met the Zone 7 objectives (j), (k) and (l). This issue did not focus on the use per se but on the scale of the retail development. There was general agreement that retailing and a supermarket should be provided on the site. The site was seen as ideal for such a use as the brick pit created a large hole that now needs to be filled. A supermarket and parking is suited to such a below ground use.

The main concern was that the size of the supermarket, the mini major and specialty retail was too large and beyond that required to meet the needs of the existing and future local population. The proposed retail component would be attractive to a wider catchment area and, if approved, would change the role of Kirrawee from a local centre and potentially compete with Sutherland.

- 135 The evidence of the council planning and economic experts on this issue changed markedly between amendments. The basis for the change was unclear and to a large extent contradictory given their initial evidence in response to the two supermarket proposal and their later evidence in respect of the one supermarket proposal. While we understand their change of opinion in response to the number of supermarkets, we do not understand their response in relation to the size of supermarkets. It appears that Mr Nash's evidence relied strongly on that of Mr Haratsis, which we discuss below.
- 136 In assessing the proposal against the relevant retail objectives (j), (k) and (l) of Zone 7, if Kirrawee Town Centre is considered to be both Zone 7 and Zone 9, we accept that the increase in population generated by the development is likely *to facilitate the re-vitalisation of the Kirrawee Town Centre and the Kirrawee railway station precinct* as a whole (Zone 7 and 9). However, we do not accept that it will result in a revitalising of the existing Kirrawee Town Centre, which is envisaged to remain the main retail precinct of Kirrawee, or the Railway Precinct. The size of the retail proposal on the Brick Pit site will impact on the existing Kirrawee Town Centre. The evidence indicates, although inconclusive, that there may be an impact on individual retailers but that the existing centre is likely to remain viable. However, the evidence does not indicate that the existing Kirrawee Town Centre or the Kirrawee Railway Precinct will be "revitalised" in the face of such strong competition and therefore, the proposal is inconsistent with objective (j).

- 137 We find that the proposal is also inconsistent with objective (k) in relation to the role and function of Kirrawee Town Centre. As discussed above, the role and function of retailing in Kirrawee Town Centre as stated in objective (b) of Zone 9 is *to promote viable, small, local and specialty shops to support the needs of the local population*. The role of retailing in Zone 7 is to support this role as stated in objective (l) of Zone 7. Due to size of the retail component of the development, particularly the undisputed evidence that the supermarket would be the largest in the area and would attract people from a wide catchment area, the proposal is likely to elevate the retail role of Kirrawee Town Centre above that of a local centre.
- 138 As there has been no economic assessment of the impact of a single 4,500 sqm supermarket, we therefore cannot conclusively assess whether the proposal meets objective (k) in relation to the sustainability of other centres in Sutherland Shire, principally Sutherland. At the very least, a supermarket of this size in close proximity to Sutherland will compete with this centre and may impact on its ability to attract a further supermarket, given the issues associated with developing within Sutherland Centre compared to land within Zone 7. As discussed above, retailing is identified as playing an important and integrated function with other uses in the sustainability of Sutherland Centre.
- 139 In relation to objective (l) we acknowledge that changes to the design have resulted in a better physical integration with the proposed shops of the existing Kirrawee Town Centre by locating the entrance closer to Oak Street. However, we are doubtful that there would, in reality, be any meaningful integration between the two shopping precincts. The proposal will provide for all shopping needs by including a supermarket, mini major and specialty shops, with some placed at street level. The proposal is a car-based centre, for which the majority of users are likely to drive to. Unless the shops in the existing Kirrawee Town Centre have unique attributes that make them an attractive shopping destination, it is unlikely that people will leave the Brick Pit Precinct to shop in Kirrawee. The

proposed retailing is significantly larger than both the existing retailing and what is envisaged for the existing Kirrawee Town Centre. It is inevitable therefore that the proposed retailing will dominate the existing centre. The new shops therefore do not *integrate with or support the existing Kirrawee Town Centre* and the proposal is inconsistent with objective (l).

Consistency with DCP 2006

- 140 The parties disagreed on whether the proposal complied with the requirements of DCP 2006.
- 141 For similar reasons stated above we do not think that the retail component of the proposal is consistent with the Locality Strategies for Sutherland Centre, Kirrawee Main Street Precinct and the Brick Pit Precinct. The strategies envisage a significant retail function being an integrated part of the role of Sutherland Centre. Kirrawee Main Street Precinct is identified as being the retail precinct for Kirrawee with retail uses extending around the corner into Flora Street for a short distance and commercial and retail space increasing by about 3000sqm. As we understand it, these strategies were not amended as part of DCP 2006 Amendment 4.
- 142 The strategy for the Brick Pit Precinct, prior to Amendment 4, did not refer to retail and the emphasis of the strategy was and remains focused clearly on residential and employment generating uses. The strategies introduced as part of Amendment 4 refer to Kirrawee Local Centre, which, although undefined, appears to refer to the existing Kirrawee Town Centre (as referred to in the LEP 2006). The DCP further emphasises that development on the Brick Pit site *shall not undermine the function of Kirrawee Local Centre as the town centre for the locality, meeting the regular shopping and service needs of the local community*. As stated above, the proposal does not meet this strategy.
- 143 The strategy also includes that shops within the Mixed Use – Kirrawee zone shall not, due to their size or intensity create a second town centre. As stated above, while the centre is physically integrated with the existing

Kirrawee Town Centre, it is unlikely that shoppers at the Brick Pit will also shop at the existing centre. The proposal is for a car-based clientele while the existing shops are more suited to pedestrian access. The proposal is significantly larger than the existing centre and is likely to operate as a stand alone centre. We conclude that this will create a second town centre, at least in relation to its retail function.

- 144 The proposal generally meets the other two strategies in that *it will help activate the public domain and enhance the predominately residential and non-retail commercial character of the site* and will have *clear, direct accessible pedestrian links to the existing Oak Road retail precinct*. However, for the reasons given above we do not consider that the proposed shops will support the revitalization of the retail function of the Kirrawee Local Centre, being the existing shopping precinct.

- 145 The retail and employment component of the proposal does not comply with the floor space mix in cl 9.b.2.1a that requires that the development on the Brick Pit site must provide the following mix of floor space:

*Residential: 27,320 sqm.
Employment: 10,470 sqm.
with the retail component of employment uses not exceeding
20% of the total employment generating floor space.*

- 146 The proposal also does not comply with cl 9.b.2.1g which provides that:

Intensive retail land uses, such as a large supermarket, are not appropriate.

- 147 The 20% retail component and the restriction on supermarkets were introduced as part of DCP 2006 Amendment 4. We note that a similar restriction on retail component was also introduced for the remainder of the Zone 7 (cl 9.b.2.3).

- 148 If the proposed retail component was consistent with the strategies for the Brick Pit precinct, the Main Street Precinct and Sutherland Centre we

would accept these numerical non-compliances, however, this is not the case.

149 We note Mr Galasso's submission that Kirrawee Town Centre cannot remain a local centre and that with the development it will fulfil a broader role. However, we find that the intention of the controls is to maintain its role as a local centre, particularly for retailing.

150 There are many positive aspects to the proposal and clearly development of the site is to be encouraged. However, the proposed retail component of the development is inconsistent with the strategic framework and the role for Zone 7 and the Brick pit precinct established by LEP 2006 and DCP 2006 and on this basis the appeal must be dismissed and development consent refused.

Economic impact

151 Contention 2 refers to the economic impacts of the proposal. Council contends that:

The proposal is unacceptable having regard to the adverse economic impacts upon the existing retail trade area (section 79C(1)(b) of the Environmental Planning and Assessment Act 1979)

152 Contention 2 provides further particulars on council's contention relating to economic impacts.

153 The key disagreement between the parties is whether an assessment of the economic impacts of a 4,500sqm supermarket is required or whether the Court can rely on the agreed position of Mr Haratsis and Mr Dimasi that this size of supermarket would have an acceptable impact.

154 To understand the difference between the parties it is necessary to summarise the evolution of the evidence of Mr Haratsis and, to a lesser extent, Mr Dimasi. Both experts have prepared a number of reports in

relation to the development application and its amendments during the hearing.

- 155 Mr Dimasi prepared an Economic Impact Assessment April 2008 which formed part of the Statement of Environmental Effects. Mr Haratsis prepared a Retail Sustainability Assessment December 2008 and an Economic Impact Assessment December 2008 of the proposal for council.
- 156 Both Mr Haratsis and Mr Dimasi prepared statements of evidence and a joint report (first joint report) in response to the original proposal for two supermarkets (7003sqm) and a total retail (10,678sqm). Both experts provided oral evidence to the Court on 19 February 2009.
- 157 In the first joint report, the experts were generally in agreement on the trade area, population growth rates, retail spend per capita and the viability of different centres. Mr Dimasi provided figures on the actual sales performance of certain supermarkets in the Sutherland Region (which he has access to in his role as a consultant for Woolworths). Based on these figures, he adjusted Mr Haratsis base case estimates of sales (p.28 Ex 22), which demonstrated an average trading level or retail turnover density (RTD) in excess of \$10,700 per sqm which is above the Sydney Metropolitan average of about \$8000 per sqm and "reflects the gross under provision of supermarket floor space in the region".
- 158 Mr Dimasi estimated that without the development, sales would grow to \$10,900 per sqm at 2011 and with the development (using the impact estimated by Haratsis) the average trading level would be in excess of \$9,800 per sqm at 2011. Mr Haratsis accepted these figures but the experts maintained their disagreement on the core issues with the proposal, which are summarised in their conclusions in their first joint report.
- 159 Mr Haratsis concluded that:

Need: there is no demonstrated need for a retail development of this size in Kirrawee. Findings from the Community Survey Research do not provide any compelling evidence to support the need for two full line supermarkets in Kirrawee particularly given the potential risk this would put on the planning intentions for the Sutherland Centre. Given that need has not been demonstrated, the proposed retail development will create an unnecessary risk on the established retail hierarchy and evolution of the Sutherland Centre.

Impact on retail hierarchy: the proposed development will establish itself as the major food shopping destination in the Sutherland Shire and will therefore transfer the District Role of Sutherland Centre to the Kirrawee Village Brick Pit, contrary to the planning intent for the Sutherland Shire.

Impact on Sutherland Centre: the opportunity for the Sutherland Town Centre to establish a major full line supermarket anchor will be lost if two full line supermarkets are approved at the Kirrawee Brick Pit site. Both Coles and Woolworths would be the likely tenants of the proposed supermarket development (3,538sqm and 3,515 sqm respectively) meaning that it will be difficult to find a tenant for a major supermarket development 1.4km away. This will have significant implications for the future role and function of the Sutherland Centre and in particular the food retailing role). The proposed development will therefore impose a high and unnecessary risk on the evolution of the Sutherland Centre.

Local Centre: the size, role and function of the proposed Kirrawee development is contrary to the objective of local centres in providing viable, small, local and specialty shops to support the needs of the community and provide local employment.

160 Mr Dimasi concluded that:

There is a demonstrated undersupply of supermarket floorspace throughout Kirrawee and surrounding suburbs.

The Kirrawee development will not result in economic or other impacts on any other centre, and in particular on the Sutherland Centre, which will threaten that centre's future.

The residents of the Kirrawee area are currently disadvantaged as a result of the under provision of modern supermarket facilities, and the proposed development would

provide increased shopping choice, increased employment and increased amenity for these local residents, on a site which would be ideal for such a development.

- 161 In their first joint report, both experts agreed that there is a demand for 4 – 5 additional supermarkets within the trade area. Mr Dimasi considered the proposal independent of planning considerations. He stated that:

questions of appropriate role and scale for centres as defined in the various planning policy documents are very gray, and are best left to the specialist planners and the Court to decide.

- 162 In Mr Dimasi's opinion the:

Existing supermarkets within the defined main trade area are still projected to achieve average trading levels of \$9,057 per sqm, assuming two supermarkets at Kirrawee. This level of projected sales would be some 15% lower than existing trading levels of \$10,639 per sqm but still above the accepted average of \$8000 per sqm for supermarkets within the Sydney metropolitan area.

- 163 Mr Haratsis considered that two supermarkets of the size proposed would create a district centre, wherever they were located, particularly if occupied by Coles and Woolworths. He accepted that the economic impact on existing centres would be between 15% and 20%, which would not threaten the viability of existing centres, however, their role and function may change. He stated that for Kirrawee to maintain its role as a local centre it could support one new supermarket (around 1,800 sqm) by 2011. The size of the supermarket was based on a catchment of about 800 m radius around the site being a 5-10 minute walking distance. Under cross examination he conceded that Kirrawee could support one full line supermarket (i.e. over 2500 sqm which meets all the needs for weekly shopping such as groceries, fruit and vegetables, chemist) and maintain its local function.

- 164 Mr Haratsis' comments on the amended application for a single 4,500 sqm supermarket were incorporated into the report to council on 23 March 2009. He stated:

In my opinion the proposed development will result in potential competitive impacts on other centres in the region and will have impacts on the role and function of the Sutherland Town Centre.

The proposed supermarket size of 4,500 sqm is at the upper range of larger format supermarkets. The proposed supermarket would introduce a major retail anchor for the development and will create the largest supermarket in the region. Typically supermarkets of this size supply an expanded range of "non-food" items to compete with discount department stores located in sub-regional and regional centres. The proposed mini major (740 sqm) will also create another anchor in the retail centre.

Therefore, the size, role and function of the amended proposed Kirrawee development would not meet the objective of a local centre in providing viable, small, local and specialty shops that support the needs of the local community and provide local employment. The proposal in its latest iteration still has the potential to have significant implications for the established retail hierarchy and also the future role and function of the Sutherland Centre. The proposed development will therefore impose a high an unnecessary risk on the evolution of the Sutherland Centre.

In my opinion, Kirrawee can support a new supermarket anchor (around 1800 sqm) by 2011. This opinion on the existing market gap is referred to in my statement of evidence. This will assist in achieving the economic and planning objective for the Kirrawee Local Area by revitalising the area through supporting an appropriately sized supermarket anchor that is sustainable by the local community and at the same time ensure the economic viability of other centres in the retail hierarchy.

From an economic perspective, I conclude that I have significant concerns with any retail development at Kirrawee that will introduce supermarket anchor larger than 3000sqm. A supermarket larger than this will introduce a major retail anchor that has the potential to have significant impacts on the established retail hierarchy and the role and function of Sutherland Town Centre.

- 165 Mr Haratsis and Mr Dimasi prepared a joint report on the March amended application, which was filed on 7 April 2009 and tendered at the hearing on 9 April (second joint report). The experts were not called for cross-examination at this time as the other experts had agreed to further

amendments to the plans and the appeal was further adjourned. No material change to the retailing component of the proposal was made between the March and April amended applications.

- 166 The second joint report of Mr Haratsis and Mr Dimasi includes the following comments in relation to the March amended application:

Mr Haratsis and Mr Dimasi agree that 8,000 sqm of retail floorspace, including one supermarket, is appropriate in terms of role and function of the project as part of a Local Centre. The position can be summarised as follows:

<i>Proposed Use</i>	<i>Original</i>	<i>Amended</i>
<i>Supermarket</i>	<i>7003 sqm (2)</i>	<i>4500(1)</i>
<i>Mini-Major</i>	<i>513 sqm</i>	<i>740</i>
<i>Fresh Food Speciality</i>	<i>653 sqm</i>	<i>478</i>
<i>Speciality Retail</i>	<i>2031 sqm</i>	<i>1868</i>
<i>Kiosks</i>	<i>78 sqm (4)</i>	<i>52(2)</i>
<i>External Speciality Shops</i>	<i>400 sqm</i>	<i>450</i>
<i>Total GLFA</i>	<i>10678 sqm</i>	<i>8088 sqm</i>
<i>Difference</i>		<i>-2590 sqm</i>
<i>Cafes (Building E)</i>	<i>238 sqm (2)</i>	<i>175</i>

Mr Haratsis notes that in giving joint evidence, he agreed that a 3,000 - 3,500 sqm supermarket would be appropriate. He acknowledges that the impacts of an additional 1,000 - 1,500 sqm of floorspace above that figure (in a single supermarket format) would not alter the role and function of Kirrawee as a Local Centre. In addition, Mr Haratsis notes that, impacts on the existing Kirrawee Centre are not likely to be significant, and Mr. Dimasi agrees.

Mr Dimasi and Mr Haratsis previously agreed that the viability of existing centres, including Sutherland, was not necessarily at risk. They now further agree that the elimination of one supermarket and consequent reduction in floorspace in the proposal will result in an acceptable and sustainable level of impact on all other centres, including Sutherland.

- 167 A supplement to the Statement of Environmental Effects (amended SEE) was prepared for the April amended application. Section 4.9.3 of the amended SEE deals with economic impact by including the comments of the economic experts in their second joint report.

168 Mr Haratsis and Mr Dimasi prepared a further joint report with Mr Evesson (third joint report) and provided oral evidence on 1 and 2 July 2009. The joint report is largely a critique of Mr Evesson's Statement of Evidence. Mr Haratsis and Mr Dimasi did not agree with Mr Evesson's estimates, methodology or conclusions. Mr Evesson's principle concern was that no assessment of a 4,500 sqm supermarket had been undertaken. The third joint report does not provide further analysis on the economic impacts of such a proposal.

169 Under cross-examination, Mr Haratsis explained his change in position. He stated that as a 3000 – 3500 sqm supermarket is acceptable then the impact of an additional 1000 – 1500 sqm of supermarket floor space is also acceptable. This evidence corresponded with his views expressed in the second joint report. While Mr Haratsis acknowledged that no impact assessment of the retail expenditure likely to be generated by a single 4,500 sqm supermarket had been undertaken, he stated that while it is advisable that such an assessment be undertaken, it was not essential.

170 Mr Dimasi also accepted that no assessment of the economic impact of a 4,500 sqm supermarket had been undertaken. Nonetheless, he maintained his position that his assessment found that two supermarkets totalling 7003 sqm were acceptable, therefore one smaller supermarket of 4,500 sqm would also be acceptable.

Findings

171 Section 79C(1) of the Act provides that:

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

.....

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts on the locality.

- 172 The parties did not disagree that the likely economic impact of the retail components of the proposal was a relevant consideration. The key economic consideration is the impact of the supermarket on the other centres in the main trade area being Sutherland, Kirrawee and Gymea. Supermarkets provide a retail anchor that supports visitation to centres. A new supermarket at the Brick Pit may change the existing retail pattern thereby affecting existing supermarkets and potentially impact on the role of the centre as a whole. The economic impact on competitive supermarkets and the impact on the role of centre are therefore relevant considerations in the assessment of economic impact.
- 173 Mr Galasso submits that the evidence of Mr Haratsis encapsulated the primary economic issue of the case. This being that the proposed dual supermarket design would have the effect of preventing a major supermarket tenant from opening in Sutherland. Mr Haratsis considered that a two supermarket development would impact on the role and function of Sutherland town centre. Mr Galasso submits that the subsequent reduction of the proposal to include only a single supermarket would eliminate these impacts and that this shift also would have the effect of reducing any *"notion of impact upon the centres nominated, or upon Sutherland"*.
- 174 Both Mr Dimasi and Mr Haratsis agreed that a key component of economic impact assessment is the RTD likely to be generated by the proposed development and that the best estimate of RTD is the current sales of other similar supermarkets in the Sutherland Area. Without this component both experts agreed that one cannot commence to determine the likely effect upon competitive centres or supermarkets.
- 175 The annual RTD of existing supermarkets in Sutherland (p.28 Exhibit 22) range from about \$6000 per sqm to about \$20,000 per sqm with the average being \$10,729 per sqm. The actual sales figures for Woolworths supermarkets at Carringbah SC (\$20,321 per sqm), Menai Market Place

(\$16,174 per sqm) and Engadine (\$15,125) are significantly higher than the average sales figures and these supermarkets are similar in size to the amended proposal (4,429sqm, 4,328 sqm and 3,967 sqm). In each case, another supermarket is located within the same centre, which achieved significantly lower sales than the Woolworths supermarket.

- 176 Mr Dimasi estimated the RTD of the original proposal to be \$7,851 per sqm in the first year of trading, which is considerably below the average of supermarkets in the area and the real figures generated by Woolworths stores of similar size to the proposal. The derivation of the estimated RTD figure for the proposal was not explained clearly to the Court, which is particularly significant in light of the evidence showing the very high trading figures in the region. He considered that the current average figure was above the Sydney average and reflected the significant undersupply of retail floor space in the region. In his opinion there was a clear demand for additional supermarkets in the region and therefore, while the sales of existing supermarkets would be affected, their viability would not.
- 177 Both Mr Haratsis and Mr Dimasi concluded that the likely impacts of the proposal for a single 4,500sqm supermarket would be less than the impacts of the original proposal (two supermarkets with 7000sqm). In this regard, Mr Galasso submits that despite extensive cross-examination neither of these experts *"resiled from the opinion that such an assessment was necessary in the circumstances of the case"*. However, they acknowledged that there is not a linear relationship between floor space and RTD and no further estimate of RTD was undertaken for the 4,500 sqm supermarket, considering this is an essential component in the assessment of economic impact. In addition, no assessment was undertaken to establish the reasons why Woolworths supermarkets of a similar size to the proposal achieved such high RTD (particularly as these figures were based on real data). Mr Haratsis stated that the trading levels achieved by Woolworths were "unlike anything he had ever seen". In his opinion, it was possible, but not probable that the proposal could achieve

similar sales figures and he acknowledged that further assessment was advisable, but not essential.

178 Mr Haratsis considered that either Coles or Woolworths are likely to be the operator of the supermarket and that they are both moving towards 4,500 sqm supermarkets as a preferred model. He surmised that the success of a 4,500 sqm may be linked to the size being able to provide for the full range of shopping needs including groceries, fresh fruit and vegetables, meat, liquor and soft goods. He acknowledged that the supermarket in conjunction with the mini major and the other specialty shops, and the availability of parking, ease of access and the adjoining park would result in a very desirable shopping location. The supermarket would be the largest in the region. In his opinion, the success of the centre would have flow on effects for Kirrawee and result in significant passing trade for the existing centre to maintain its retail function. Mr Dimasi agreed with this conclusion.

179 Mr Galasso submits that there is no evidence before the Court that the impacts of a single 4,500 sqm supermarket will be unacceptable. The applicant accepts that there may be a reduction of supermarket turnover but that the trading data shows that the region's supermarkets are performing at a higher level than the Australian and Sydney average because of the undersupply of supermarket floor space in the trade area. In part, this is why the applicant contends that the proposal's impact would be acceptable economically, but also that it would not be inconsistent with the provisions of LEP 2006 and DCP 2006 since it would not disrupt or limit any future major supermarket tenancy at Sutherland.

180 Mr Hutley submits that:

On the evidence, the Court should find that it is "likely", in the sense that there is at least a real or not remote chance, that any 4500 m² supermarket at Brick Pit may trade at a retail turnover density of similar magnitude to Caringbah, Menai and Engadine. If so, its gross trading performance will be significantly superior to the two 3500 m² supermarkets

originally proposed, with resultant "likely impacts" far greater than any ever modelled, assessed or even considered in these proceedings.

181 Mr Robertson made similar submissions that the economic impact of a 4.500 sqm supermarket had not been modelled and that the elevated trading levels achieved by other Woolworths supermarkets in the region were a significant possibility.

182 We accept Mr Hutley and Mr Robertson's submission that an adequate assessment of the amended proposal has not been undertaken for the Court to have sufficient certainty as to the likely economic impacts of the proposal. The Court relies on the evidence of experts to assist it in its assessment of issues in dispute between the parties. However, the role of the Court is not to accept without question expert evidence, even if the experts have reached agreement. The evidence must be able to withstand independent scrutiny. A 'judgement call' of experts is not sufficient if this is not supported by adequate data and analysis.

183 Understanding the economic evidence was made more difficult by the change in opinion of Mr Haratsis. His change of opinion on the size of the supermarket is not one that has evolved through changes in the design or through the provision of additional information. Mr Haratsis held very definite opinions about the unacceptable impacts of the original proposal that related principally to there being two supermarkets and to their size. He supported the deletion of one supermarket but reiterated in his comments on economic and planning impacts in relation to the final size of a supermarket at the subject site in his report to council on the March amended application. His principal concerns were:

- a supermarket larger than 1800 sqm would impact upon the retail hierarchy established under the planning controls, which identifies Kirrawee as a local centre.
- a supermarket anchor larger than 3000 sqm has the potential to have significant impacts on the role and function of Sutherland Town Centre.

184 No further information or amendment to the retail proposal followed these statements. However, Mr Haratsis' opinion in the second joint report was that a 3,000 to 3,500 sqm supermarket would be appropriate and that an additional 1,000 – 1,500 sqm would not alter the role and function of Kirrawee as a local centre. Even with the assistance of further oral evidence we did not fully understand the basis for his apparent change in opinion.

185 In contrast, the evidence of Mr Dimasi has been consistent throughout the hearing. However, there remain questions in relation to the predicted RTD of the original proposal given that it is lower than the average for existing supermarkets in the region and the Sydney Metropolitan area. The lack of an estimate of RTD for the amended proposal means that the Court does not have adequate information to assess the economic impact of the proposal.

186 It was agreed by the experts that if the high RTD levels similar to those in other supermarkets were to be achieved by the proposal, it could impact on other supermarkets, which underpin the viability of centres. In essence, there is a lack of data to support the estimates of Mr Dimasi of the trading levels of a supermarket the size of 4,500 sqm. This means that it is also therefore impossible to evaluate properly the economic impacts of the proposal.

187 The evidence of Mr Dimasi is based on the assumption that there is a demand for a supermarket and while there will be a drop in sales of other supermarkets this will not affect their viability. Therefore, in his opinion, the economic impacts are acceptable. Mr Dimasi stated that the issues of location and impact on retail hierarchy are not relevant to his assessment, although he acknowledged that they are matters to be considered by planners and the Court.

188 Mr Hutley submits that:

It is not necessary for there to be a direct present significant economic impact on another centre, for there to be a significant impact on, or inconsistency with, a retail hierarchy. For example, a proposal can be contrary to a retail hierarchy if:

- (a) it inhibits the extent of the growth, or delays the timing of growth, in another centre in the future;*
- (b) if it locates services in a place not contemplated by the retail hierarchy, because this will have multiple consequences including those associated with the provision of services, public transport, traffic flows, generation of single purpose trips, greenhouse gas impacts and so on; or*
- (c) if it is an out-of-centre development which discourages or risks present or future investments in the designated centres.*

- 189 Mr Hutley refers to *The Village McEvoy v City of Sydney Council* [2009] NSWLEC 1232 where at para 59 Bly C observed:

.... in my opinion impacts on the Town Centre need to be assessed more broadly. As Mr Gibbins explained the proposal is a threat to the Town Centre's commercial success in part because the land market will react unfavourably if private investment is undermined by ad hoc competing developments. There will be significant community cost if its role is undermined. Similarly, Mr Anderson taking into account the substantial investments that have occurred to this time, was concerned regarding threats to the viability of the Town Centre and the significant risks to its overall integrity. Also, in this regard, Mr Harrison was concerned that should the proposed development be operational before the Town Centre supermarkets this would in turn adversely affect the primacy and vibrancy of the Town Centre. Whilst I doubt that the proposal would completely undermine the ultimate role of the Town Centre these concerns point to the need to ensure the present investments in it are not put at risk especially during the start-up phase and further weigh against the proposal.

- 190 The economic evidence is that there is an undersupply of retail in the Sutherland region. Mr Robertson submits that:

Council's planning strategy is to ensure that Sutherland captures a substantial part of the demand, and to do so in a timely manner. The Brick Pit proposal seriously compromises this strategy by selecting an exceptionally large supermarket, whose impacts on Sutherland have not been assessed, and are therefore unknown. Even if it does

not sap the retail demand upon which the expansion of Sutherland otherwise relies, it may delay that expansion so that redevelopment will take decades not years. That is as adverse an impact as the measurable effect of soaking up excessive demand, but it is not assessed by the economists.

191 The role of Sutherland is varied and not defined only by retailing but retailing plays an important support role in its growth. The placement of a large supermarket in Kirrawee may compete with and delay the development of Sutherland. In particular, the experts agreed that it is difficult to provide a supermarket in Sutherland due to the amalgamation pattern, cost of land and ease of access within the road systems. It is much easier to provide large supermarkets out of centres or on large site such as former industrial sites. We note that the Brick Pit site is only part of Zone 7 and that there are other sites that, if the submissions of Mr Galasso are accepted in relation to the role of Kirrawee not being a local centre, could be developed for retailing in preference to Sutherland. The proposal may further exacerbate the difficulty of providing a supermarket in Sutherland at least in the immediate future and has the potential to impact upon the future role of Sutherland as an urban centre as well as elevating the Role of Kirrawee beyond that of a local centre.

192 It is therefore advisable and in our opinion essential that an economic assessment of the single 4,500 sqm supermarket be undertaken to adequately assess its likely impacts.

Ecological and water quality and quantity issues

193 The development of the Kirrawee Brick Pit is constrained by the fact that it supports two species listed under the NSW *Threatened Species Conservation Act, 1995*. These are the Grey-headed flying fox (*Pteropus poliocephalos*) and the Eastern Bent-wing bat (*Miniopterus schreibersii oceanensis*) and also one ecological community, the Sydney Turpentine-Iron bark Forest (STIF). The Grey-headed flying fox is also listed as a vulnerable species under the Commonwealth *Environment Protection and Biodiversity Conservation Act, 1999*. The bat species currently take

advantage of the significant water body extant on the subject site for drinking during their nocturnal migration movements. As noted earlier, the proposal is to retain the western end of the subject site for use as a public park including the retention of a water body, such that the ecological species and communities are not significantly impacted.

- 194 The proposal does not include a Species Impact Statement (SIS) (as per s 94 of the *Threatened Species Conservation Act, 1995*), which is required if under s 5 of the *Environmental Planning and Assessment Act, 1979* there is likely to be a significant effect on the threatened species, populations or ecological communities, or their habitats. The parties determined that an SIS was not required for the STIF community if the site works, conservation of trees and offsite compensatory planting were to occur as was agreed.
- 195 With respect to the habitat for the bats (in this case the provision and perpetual availability of a suitable drinking water source (800 sqm) and a 40 m 'landing area' to enable the bats to swoop, drink and then disperse), it was originally agreed that a SIS was not required due to the proposed size and shape of the pond at the Brick Pit site.
- 196 This agreement with respect to the bats was very specific in two regards: (i) That the retention of water body in the park was to have a surface area of approximately 800 sqm and that the water quality is to be maintained at the agreed level. The water quality standard agreed to was the ANZECC Water Quality Guidelines for Freshwater Lakes and Reservoirs. The ecologists agreed that if either of these two requirements were not met then a SIS would be required to assess the effects of the proposal on the threatened flora and fauna associated with the site.
- 197 In addition to the need to protect the ecological communities and species that either use or exist at the subject site, the planning controls for the Brick Pit site are also relevant. The controls determine the intended outcome and use of any future development. Specifically, the proportion of

the Brick Pit where the park and the pond is proposed to be located is zoned 13, Public Open Space under LEP 2006. Mr Robertson stated that *"Habitat conservation is not inconsistent with it [Zone 13], but it is not primarily a habitat conservation zone."* Further, in DCP 2006, Chapter 2, Local Strategies, it is clear that there is the intention to construct the park with multiple-use purposes in mind:

Proposed 0.9Ha public open space zoned as Park, including an amphitheatre, an outdoor café, artificial lake and community toilets. Park will include existing remnants of Sydney Turpentine Ironbark Forest and native flora. The park will be funded by the contributions of the developers within the study area.

- 198 Consequently, any future use, role and function of the park, its associated ecological community and species needs to meet the objectives of Zone 13 in LEP 2006 and the strategies in DCP 2006. The requirements for the park need to enable retention of ecological species and habitats while simultaneously providing an aesthetically acceptable and adequately safe environment for recreational use.
- 199 As we understand it, there remains no significant issue with respect to the impact of the proposal on the STIF community since any localised impacts arising from the proposal have been dealt with adequately. These issues have been addressed through the retention of existing flora in Zone 13 coupled to compensatory planting.
- 200 However, we note that there were some unsatisfactory design elements, in particular, those that related to the use of biofilter pods along the northern boundary because they would interfere with proposed replanting of STIF in this location.
- 201 Following joint conferencing between the stormwater experts, Mr Amos and Mr Richards, it was made clear to the Court what the remaining issues were in relation to the use of treated stormwater to maintain ecological habitat and the pond. The experts provided the following statement as to

what amendments were necessary to the proposal in order to render deficiencies in the design acceptable:

Without the stormwater management plan being resolved up front, there is no guarantee that the water volume and hence water quality to the compensatory habitat water body can be maintained and that the threatened species reliant on it will be protected. Failure to satisfy this requirement means Court can't be satisfied that the development won't have a significant impact on a Threatened Species.

These concerns have been addressed with the provision of the following details of stormwater discharge to the compensatory habitat:

- *It proposes supply of roof water from stage 1 residential buildings.*
- *The **desired option is likely to involve storage to ensure that no** less than 150 L/month per m³ of pond volume **is provided** to ensure regular turnover of water in the pond.*
- *The likely location of such storage is to be under West Street adjacent to the park. Further details to be provided by the stormwater experts in terms of the capacity required. Its location is also to be co-ordinated with the architectural drawings.*
- *The use of rainwater from buildings C, D, E and F for this purpose will need to be excluded from the BASIX certificate calculations.*
- *There will be an overflow from the park water supply retention tank to the OSD system.*
- *The stormwater experts are to provide further information on the management of outflow from the pond itself to the catchment.*
- *The stormwater experts are to provide further design details on the discharge point, the overflow and water treatment. These all need to be located so that they are out of the flight path of the Grey Headed Flying Fox and the design of such needs to be signed off by the ecologists.*
- *The water quality within the pond needs to meet the criteria established in condition 6.3 of the respondent's Without Prejudice Conditions of Consent as filed on 09.02.2009. It is noted that this condition needs to be amended to include the removal of particulate matter.*

202 Partly as a consequence of this consensus, we agreed to allow the applicant to amend its proposal. At this time, it was our view that the joint

conferencing of the experts had, so it seemed, produced a more acceptable proposal in regards to the issues of stormwater and ecology. However, on returning to the Court with the final amended proposal in late June 2009, it became clear that the applicant had altered their pond design in a manner significantly different to the above agreement. Consequently, this resulted in further new issues.

203 The primary concern arising out of the final amended proposed development relates to the pond, its water quality and quantity and the physical shape of the pond edges (the batter slope).

204 In relation to water quality, the essence of the issue is what is an acceptable water quality standard for the proposed pond and its use as a drinking water source for the bats as well as for incidental exposure and contact with humans. In addition and of some significance, was the issue of surety in regards to the ongoing maintenance of any determined water standard for the pond.

205 Originally, the ecology experts for the applicant and council, Dr Robertson and Mr Drinnan, respectively, agreed that the water quality should be the ANZECC Water Quality Guidelines for Freshwater Lakes and Reservoirs. However, arising from the final amended plans now before the Court, the applicant has proposed a different water quality standard, one equivalent to that found in the nearby Engadine constructed wetland.

Water quality impacts of the proposal

206 The Court has received limited evidence from the applicant as to why and precisely how the proposed pond system at the subject site will function in a similar way to the wetland at Engadine. We note that the applicant in its amended SEE describes the Engadine system as a stormwater pond. They also describe the treatment of water in the proposed pond would be consistent with the functioning of the Engadine system. It is apparent that the Engadine wetland system is significantly different from the pond proposed at the park in several important ways:

(i) The Engadine wetland is not an enclosed system since it receives fresh water inputs and flushing from natural runoff from its upstream catchment. This enhances this system's capacity to turnover its water body and to flush nutrients, contaminants and associated environmental problems such as algal blooms and related odours from the waterbody. The subject development's pond is a limited open system, meaning its capacity to 'self regulate' is largely absent. We note that there will be some inflow to the pond (calculated at < 250 L/month per m³ of storage from the parkland and internal roads) along with direct evaporation and precipitation and overflow releases. However, the proposed biofiltration methods will not remove all of the total nitrogen and phosphorous and there is limited capacity once these are in the pond for the treatment of contaminants, particularly as they accrue overtime.

The proposal to seal of the pond's base will have the effect of stopping any vertical ground water fluxes with the pond system, which erases two potential beneficial opportunities: flushing and the provision of a potential water source to top up the lake. We note that the Joint Experts report on Contamination prepared by Mr Drinnan and Mr Kingswell stated that it was agreed that beneficial reuse of ground water on the site is not practical and that the issue can be managed by a condition stating that no groundwater can be reused on site. However, in oral evidence, Mr Drinnan and Mr Amos suggested that groundwater could be used to top up the pond in the event of a dry period causing the surface to fall below the agreed 800 sqm. In any case, the potential for the use of groundwater has not been given due consideration nor has it been explained properly why it could or should not be used. We note that there be a remaining contamination issue in relation to the pond's bottom sediment, which is a matter that could be resolved by conditions of consent. Water quality testing results reported in Mr Kingswell's statement of evidence, revealed that the water quality in the Brick

Pit passed ANZECC quality guidelines for a wide range of contaminants. The conclusion of the water testing was that *"the physical and chemical parameters indicated that the water within the former brickpit showed no evidence of unacceptable impact by natural or anthropogenic factors"*.

(ii) The Engadine wetland is a larger waterbody and has a macrophyte footprint to waterbody ratio of 1:3. Macrophytes and wetlands have a significant capacity for reducing nutrient and contaminant loading and associated algal blooms. The proposed pond at the subject site would require an estimated area of ~2400 sqm (equivalent ratio of 1:3 of waterbody : macrophytes, as per the Engadine wetland) for adequate natural biotreatment of waters. Further, water treatment is enhanced via flow and turnover in wetland systems, which will not be possible at the subject site because it is a closed system. Arising from these limitations, it was noted in Exhibit 24 (section 4.16, p. 3.3 and 3.4) that an on-site water treatment plant was required to maintain water quality. The Ecology experts noted in relation to this requirement: *"It is agreed provided that provision is made to maintain water quality in the proposed lake"*. The current proposal before the Court offers no such provision.

(iii) The Engadine wetland is not generally accessible to the public, which means that it is less likely to be affected by rubbish and other deleterious human artefacts, which may have the potential to reduce water quality. In addition, the Council argued that because the wetland at Engadine is not associated with public recreational use a lesser water quality standard at this location is acceptable compared to that at the proposed site.

207 On the basis of the evidence before the Court, we have formed the view that there is insufficient information for us to compare the two systems, their use and functioning. Consequently, the proposal is unsatisfactory

since it relies upon the Engadine wetland as an exemplar of the potential future functioning of the pond system at the subject site. These issues have the effect of causing us to have either or both (i) sufficient uncertainty about the outcome of the pond proposal, and (ii) that the information pertaining to design and likely outcomes is of an inadequate standard to warrant refusal of the application. These issues can be summarised as follows:

- The Engadine system is of a different size, physical and biological functioning (including inputs, throughputs and outputs) and has a different application and relationship with respect to human use than that proposed at the subject site. Consequently, the differences are uncertain and of such magnitude that it is inappropriate to use the Engadine system as a comparison of what may be achieved at the subject site.
- The reliance on a water quality standard in the proposed pond that is not suitable for the dual use of habitat provision for threatened species as well as recreational activities in the adjacent park. The applicant proposes a water quality standard equivalent to that in the Engadine wetland compared to those stated in the ANZECC Water Quality Guidelines for Freshwater Lakes and Reservoirs, as preferred by the council.
- There is a lack of evidentiary material demonstrating that the water quality will be maintained in perpetuity in the pond, such that as a very minimum, it meets the needs of endangered species. Alternatively, in the Council's case, there is insufficient explanation as to how the water quality will continue to meet the aforementioned ANZECC standard. Indeed, in order to achieve acceptable water quality standards it was agreed by Dr Robertson, after being advised by Mr Drinnan, that sufficient mechanical methods must be in place to protect the drinking water source for benefit of the threatened species.

208 The Court understands that there was an element of conflicting evidence about the acceptability of a specific water quality standard for the threatened bats that use the Brick Pit site. Dr Robertson's opinion that was based on field observations were that the bats were not so constrained by water quality given that he had seen bats drinking from sewage treatment ponds. In oral evidence Mr Drinnan agreed that the attainment of the ANZECC guidelines for the bats represented the "*high standard*" and acknowledged that it was now accepted knowledge that the bats drank from the Engadine wetlands. Further, in oral evidence the ecological experts agreed that the critical factor for the Grey-headed flying fox bats was the provision of food sources more so than the provision of water. Nevertheless, there remains two salient facts arising out the current proposal:

(i) Irrespective of the zoning of the park (Zone 13 – Public Open Space), the proposal intends to have no impact on the threatened fauna and as the Court understands it, the current application provides no information to demonstrate how water quality (ANZECC or Engadine standard) will be maintained in perpetuity. Dr Robertson in his oral evidence noted that there would indeed be some need for fine-tuning to ensure that the water body and its determined quality are maintained. We do not disagree with the applicant's final submissions that maintaining water quality in a pond such as this is not "*novel*" and is "*commonplace*". However, it is unfortunate that in amending its final design the applicant has failed to explain how this will be achieved and without this certainty, there can be no guarantee that the threatened fauna will not be negatively impacted.

(ii) There remains a significant and unresolved difference of opinion between the council and the applicant in regards to the relationship between the use of the pond and its water quality. The land where

the pond is to be located is within Zone 13 which provide the following objectives:

- (a) to enable development of land for open space and recreation purposes,*
- (b) to provide active and passive open space, allowing for a range of recreational activities and facilities that meet the needs of all ages in the community,*
- (c) to enable development ancillary to the primary legal use of land that will encourage the enjoyment of land in the zone,*
- (d) to preserve public open space that enhances the scenic and environmental quality of Sutherland Shire.*

209 Relevantly, the objectives require that the land provide for a range of recreational uses for all ages in the community. Thus, while some may prefer a more passive interaction with the adjoining water body (e.g. reading) others may prefer a more active space. Children in particular are likely to fall into this latter category. Further, it was the Council's view they envisaged making use of the park for educational purposes that would require some access to the water for macroinvertebrate sampling. As noted correctly by Mr Galasso in his submissions, this would require that water quality standards must be compliant with ANZECC water quality guidelines for freshwater lakes and reservoirs. Given the likely contamination of pond waters by faecal coliforms from birds and mammals, maintenance of the water quality to the higher ANZECC standard (or even the Engadine standard) would be problematic without some form of mechanical or chemical treatment, as was originally intended. In the creation of the park there is a significant opportunity to design a water body and to ensure ongoing maintenance and highest recreational use. These goals can be coupled to achieving a minimal environmental and human risk through the provision of an appropriate treatment train at the development stage. Although the applicant contends that access to the water (active recreational use) is not necessary or appropriate, there are significant recreational, educational and social benefits that may arise from the higher standard as opposed to the lesser standard and design as proposed.

210 The applicant also contends that a higher level of embellishment to the pond should be undertaken by the council, financed via funds gathered from existing and future s 94 contributions. We were not asked to adjudicate on the funding of the park or s 94 contributions. We also note that the FSR calculations for the development include the site area of the park, which provides significant additional floor space for the development. The park forms part of the applicant's proposal and its adequacy must be assessed regardless of how it is to be funded.

211 We are of the view that the proposal in its current form is sub-optimal because the maintenance of the water quality standard is not certain and in its proposed form, results in a sub-optimal design and less holistic use of the park and its surrounds. Given the integral nature of the park and its ecological constraints and the amendments that have already occurred, we are not satisfied that the design can be left to a deferred commencement condition.

Water quantity impacts of the proposal

212 It was agreed by the experts Mr Drinnan and Dr Robertson that the development's stormwater detention system should be used to ensure that there is sufficient water to maintain a waterbody of at least 800 sq m at all times.

213 It was also agreed in the Joint Town Planning, Urban Design, Traffic and Stormwater Expert Report that in order to guarantee the necessary water volume for the pond system, that the "*desired option is likely to involve storage to ensure that no less than 150 L/month per m³ of pond value is provided*". The current proposal before the Court does not include supplementary storage, the consequences of which are water fluctuations resulting from prolonged periods of drought. Over the next 30 years these fluctuations were estimated to be in the order of ~300 mm for 90 % of the time but up to a maximum of 1.2 m during exceptionally dry periods (incorporating climate change effects).

- 214 The lack of definite provision to buffer the anticipated water fluctuations in the proposed pond is an unsatisfactory outcome of the design because it affects the agreed area and volume of water required to maintain a drinking water source for the threatened bat species. The predicted water fluctuations has resulted in an amended pond design that proposes a 1:2 batter and a 'moat' of fringing macrophytes along its eastern edge to discourage entry to the pond adjacent to the proposed park.
- 215 The council suggest that the proposed steep batters (1 vertical (V): 2 height (H)) at the edges of the pond are a response to the anticipated water fluctuations and the absence of any alternative water storage systems to deal with this issue. Mr Richards, disagreed that the batter design was a response to the potential for the pond water level to fluctuate. Nevertheless, construction of batters of this angle causes conflicts with good design as recommended in the Department of Land and Water Conservation (1997) Constructed Wetlands Manual. This document recommends that batters should have very gentle edge slopes between 1V:6H and 1V:8H. These would have the effect of providing wide areas for macrophyte growth (assisting biofiltration) as well as providing additional safety (entry and exit) for anyone who accidentally enters the waterbody.
- 216 The applicant's response to the potential safety issues arising from such a steep batter has been to propose an adjacent fringing wetland (moat) and a pool-type fence along the eastern margins of the pond, where the public would interface with the pond. The applicant contends that these structures will provide a significant barrier to the pond and reduce the risk of park users falling into the pond.
- 217 Nonetheless, the result of the fluctuating water levels will be that the pond's macrophytes (a contributor to biofiltration and water treatment – though argued to be insufficient by the Council on their own due their size) as well as the 'moat' vegetation may be negatively impacted by any prolonged dry periods. While we accept the Mr Galasso's submission that

this could be dealt with by the provision of an irrigation system, there was no detail provided as to how this would work and whether it would rely on reticulated or captured stormwater.

- 218 It is our understanding that the council objects to this design for several reasons. These include that it represents an inappropriate response for a recreational park/pond interface and that there is no detail in the design as to how the fringing moat (macrophyte) vegetation will be sustained during dry periods.
- 219 The council also objected to the proposed pool type fence as it was not only a response to poor design of the pond and its system, but that it provided insufficient security. A fence of this nature was, in the Council's view, inadequate and that a "*man-proof fence*" would be required. Mr Dickson concurred with the view that the fence was an inappropriate response and that it conflicted with intended use of the park and the associated pond.
- 220 In oral evidence Mr Drinnan and Mr Amos for the Council said that principal issues relating to the applicant's stormwater and water quality conundrum could be resolved with the following alterations:
- by having a batter edge around the edge of the pool with a steepness of 1V:6H;
 - by ensuring the system was properly flushed, which would enable a proper turnover of the waterbody;
 - the inclusion of mechanical or chemical treatment device for the water to ensure water quality standards are maintained;
 - the use of groundwater or roof top water as a top up for the pond in the event of dry periods.
- 221 Mr Richards considered the current design was satisfactory but agreed it could be amended to take advantage of on-site rainwater capture and re-

sue but this may impinge on the BASIX requirements for the development. He accepted that the suggestions of Mr Drinnan and Mr Amos are feasible but that these solutions would require extra water storage and pumping (which were proposed in previous versions of the design). Mr Richards noted that these aspects had been minimised in the current scheme before the Court. We note that there was no explanation from the applicant as to why the agreed amendments to the previous scheme were abandoned in favour of the current proposal.

- 222 Mr Drinnan asserted that the deficiencies in the current proposal could not amended via a deferred commencement condition because there would remain significant uncertainties in the outcome.
- 223 It is a requirement that the consent authority be satisfied that there will be no significant impact on the site's listed species and the STIF community. Without a final design before the Court in regards to maintenance and functioning of the water system we are not provided with this satisfaction and therefore cannot approve the application.
- 224 Mr Drinnan noted that the issue relating to water and ecology was a long standing problem of the applicant's proposal and that there had already been two amendments but the matter remained unresolved and consequently the proposal as it stands, with all its deficiencies, was in his view, unsatisfactory.
- 225 We also adhere to that view and are in agreement with the council that the significant and protracted problems related to the issue of integrating properly the water and ecological issues means that we are not confident about imposing a deferred commencement condition. Therefore, in the absence of a final and resolved scheme, this proposal remains inadequate for approval.

Urban design and landscape

226 The initial proposal raised significant disagreement between the urban design experts, which has been substantially resolved through the amendments. Despite this, there remained some substantial changes that these experts and the planners recommended. These included;

- That the length of building N be reduced to 45m
- The footprint of the revised Building N be moved
- Building L be reduced in length by 4m.

227 Ms Morrish and Mr Dickson remained in disagreement on matters including the design of the pond, amenity issues with Buildings C, D and E, and the provision of landscaping along Princes Highway. Although the key disagreement centred on whether the proposal was sufficiently resolved after so many amendments to be approved or whether the changes still required were beyond conditions and resulted in uncertainty.

228 Mr Robertson submits that due to the urban design changes as well as the stormwater management and the road and parking designs, the proposal lacks finality and would not satisfy the principles established in *GPT Limited v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256. He states that:

These design inadequacies are simply too numerous and too inextricably related to other development objectives to be subject to deferred commencement conditions. In our submission, it would not only be unwise to grant consent without resolving them, it would be unlawful to do so

229 Whereas Mr Galasso submits that:

To the extent, finally, that conditions of consent are an appropriate vehicle by which to accommodate slight design change (s 80A(1) of the Act), or to achieve “express outcomes or objectives” (s 80A(4) of the Act) it is to be recalled that this site is quite extensive in nature, and the level of specificity for design with respect to the site is uncommon. The level of specificity provided by the Applicant

and the approach to fine tune the development in the circumstances of the significant size of the site, and the development, is proportionate and appropriate. It is neither unwise, nor unlawful, to impose such conditions and any submission to that effect (CWS [80]) is inappropriate, and wrong.

- 230 While it is disappointing that after amendments there are still matters that require further design resolution. However, it is a very large development and the application is for a masterplan and construction of Stage 1. Further development approval will be required for later stages. In relation to the urban design changes we do not accept Mr Robertson's submission's that they cannot be affected through conditions of consent or further development approvals. In our opinion, the nature of the urban design changes does not result in sufficient uncertainty that would warrant a refusal of the application.

Traffic

- 231 Similarly, in relation to the issues that remain in dispute between the traffic experts, we find that these would not warrant refusal of the application and could be affected through conditions of approval. As for other reasons we have found that the application must fail we have not adjudicated on the remaining issues between these experts.

Conclusion

- 232 The proposal is a major mixed use development on a significant site in Kirrawee. There was general support for the residential and commercial components of the development and, through the process of amendments, the urban design and traffic issues between the parties are largely resolved.
- 233 The main issue relates to the retail component of the development, particularly the size of the supermarket. While a supermarket and retail use of the site is appropriate there is concern about the size of the 4,500 sqm supermarket, particularly the impact it may have on Sutherland and Kirrawee, both economically and on the strategic role of these centres.

- 234 There is clearly an undersupply of retail floorspace within the region and a need for further supermarkets. The key question is whether Kirrawee is the appropriate location for such a large supermarket. We have concluded that LEP 2006 and DCP 2006 define a hierarchy of centres and that, in this hierarchy, retailing has a specific role to play. Kirrawee is intended to remain a local centre and retailing is to serve the needs of the local population. The Brick Pit site is intended to provide predominantly residential development with a commercial component and to a lesser extent retail supporting the needs of the new population and creating an active live/work environment. In our opinion, Kirrawee Town Centre together with the development of the Brick Pit site is envisaged to remain a local centre.
- 235 The agreed evidence of the experts is that the supermarket and associated retail will mainly be accessible by vehicles and will meet the shopping needs of a wider catchment. The submission of the applicant is that with the development of the Brick Pit site and other sites in the mixed use zone it is inevitable that Kirrawee Town Centre will not remain a local centre. In our opinion this is inconsistent with what is envisaged in the planning controls for the area.
- 236 No assessment of the economic impacts of a 4,500 supermarket has been undertaken. Given the scale of the development and its likely impacts we are not satisfied that we can rely on the previous economic analysis for the original two supermarket and a "judgement call" made by the experts. Particularly as there were significant doubts raised about the impact of the original scheme and its methodology in calculating the figure for retail trade data. Given the amendments to the proposal, we do not think it appropriate to further delay the proceedings for such an assessment to be undertaken nor was any request to this effect made by the parties.
- 237 In our opinion the size of the supermarket and retail component has the potential to impact on the sustainability of Kirrawee and Sutherland

Centres. If not economically but in the strategic role that they play in the region, which needs to be thoroughly assessed.

238 The other concern is in relation to the role of the park and the final design of the pond. It is clear under the planning controls that the park is to be both a recreational facility as well as meet an ecological function. The evidence is that the park and pond can meet these roles but despite the amended schemes this has not been achieved. We are not satisfied that this matter can be resolved as a deferred commencement condition given its inter relationship with the ecological issues on the site.

239 For these reasons the application must fail.


Orders

240 The Orders of the Court are:

- 1) The appeal is dismissed.
- 2) The development application for a mixed use development at 566-594 Princes Highway, Kirrawee, is refused
- 3) The exhibits, except Exhibit 49, are returned.



Annelise Tuor
Commissioner of the Court



Dr Mark Taylor
Commissioner of the Court