



## APPLICANT'S POINTS OF CLAIM

### COURT DETAILS

Court Land and Environment Court of New South Wales  
Class Class 4  
Case number 41214/08

### TITLE OF PROCEEDINGS

Applicant **Nambucca Valley Conservation Association Inc**  
First respondent **Nambucca Shire Council**  
Second respondent **Paul Joseph**

### FILING DETAILS

Filed for **Nambucca Valley Conservation Association Inc – Applicant**  
Legal representative Environmental Defender's Office  
Legal representative reference IR 12717  
Contact name and telephone Ian Ratcliff – Solicitor – 02 6622 8341

### APPLICANT'S POINTS OF CLAIM

The Applicant pleads its claim as follows:

#### Parties

1. At all material times the Applicant is and has been an incorporated association capable of suing in the name of the Nambucca Valley Conservation Association Inc.
2. At all material times, the First Respondent is and has been a council with the function of being a consent authority under the Environmental Planning and Assessment Act 1979 ("the EPA Act") for the Local Government Area of the Nambucca Shire.

#### The Subject Land

3. At all material times the Second Respondent is and has been the registered proprietor of the land described as Lot 2 DP 548175, also known as 346 East West Road, Valla ("the Subject Land").

#### Planning Instruments

4. At all material times, the Subject Land is and has been within the Local Government Area of the Nambucca Shire.

5. At all material times, the Nambucca Local Environmental Plan 1995 ("the LEP") applied for the purpose of controlling proposed development, including subdivision, of the Subject Land under the EPA Act.
6. At all material times, the Subject Land is and has been zoned part 1(a2) Rural (Prime/Flooding) and part 1(a1) Rural/Residential under the LEP.
7. On 4 March 2004, the Nambucca Development Control Plan No 12 – Notification and Advertising (2004) ("the Advertising DCP") was adopted by the First Respondent to have effect from 15 March 2004.

Particulars

- a. The Advertising DCP was expressed to apply to all land within the Nambucca Shire local government area and to all development in that area (unless exempted).
- b. There were no transitional provisions in the Advertising DCP.

**The First Application**

8. Between about 25 September 2003 and 13 October 2003, an agent of the Second Respondent lodged with the First Respondent a development application seeking development consent for an 11 lot rural-residential subdivision of the Subject Land ("the First Application").

Particulars

- a. The First Application was allocated the number 2004/136;
- b. The First Application was accompanied by, inter alia:
  - i. Proposed 11 Lot Rural Residential Subdivision of Lot 2 DP 548175 East West Road, Valla dated Sept 2003 prepared by Amos & McDonald Surveyors including "Section 5A Assessment";
  - ii. Sketch Plan,  
  
and, later, by
  - iii. Statement of Environmental Effects prepared by Yarranbella Environmental Services dated 30 October 2003

9. The development the subject of the First Application was advertised by notice published in a Local Newspaper on or about 18 December 2003.
10. On or about 1 July 2004 the First Application was determined by the First Respondent under the EPA Act by refusal.

Particulars

- a. The Notice to Applicant of Determination of a Development Application is dated 2 July 2004 and expresses the determination was made on 1 July 2004. The Notice is signed by C Hannavy, Manager Planning and Assessment, on behalf of the First Respondent.
- b. On or about 7 July 2004, the Second Respondent was advised orally by Mr Hannavy that the Notice of Determination was ready to be signed and would probably be sent out on that date.
- c. On or about 8 July 2004, the Second Respondent was advised orally by Mr Hannavy that the Notice had been signed, but not sent.

**First ground: Refusal of the First Application**

11. Since 8 July 2004, the First and Second Respondent have purported to act in a manner inconsistent with the First Application having been determined by refusal on or about 1 July 2004.

Particulars

- a. Between 8 July 2004 and August 2008, the Second Respondent provided the First Respondent with further information for consideration of the First Application.
- b. On 21 August 2008 the First Respondent purported to determine the First Application, as amended, by the grant of development consent.

**The Second Application**

12. If the Court finds that the First Application was not determined by refusal, then between about 6 October 2005 and 16 November 2005, the Second Respondent sought to amend, and about that time the First Respondent agreed to amend, the First Application to alter the proposed subdivision layout and delete a proposed lot ("the Second Application").

Particulars

- a. The Second Application was processed under the same development application number as the First Application;
  - b. The Second Application was accompanied by, inter alia:
    - i. a Statement of Environmental Effects Amended Application Proposed 9 Lot Rural/Rural Residential Subdivision dated October 2005 prepared by Amos & McDonald Surveyors;
    - ii. An ecological impact assessment report prepared by Darkheart Eco-Consultancy
    - iii. SEPP 44 Koala Habitat Management Plan for Proposed Rural-Residential Subdivision of Lot 2 DP 548175 dated September 2005 prepared by Darkheart Eco-Consultancy ("the 2005 KPOM").
13. The Advertising DCP applied to the Second Application.
14. The development proposed in the Second Application involved:
- a. subdivision, where three or more additional allotments would be created;
  - b. an application requiring a species impact statement; or
  - c. Integrated development.
15. The Second Application was not advertised in a local newspaper in accordance with the Advertising DCP.

Particulars

Clauses 3.1, 3.2 and Schedule 1 Advertising DCP.

16. In September 2006, the First Respondent received submissions from the public with respect to the Second Application ("the Public Submissions").

Particulars

- a. Letter of the Applicant dated 25 September 2006
- b. Letter of Jungle Stone dated 25 September 2006
- c. Letter of Paul Davies dated 26 September 2006
- d. Letter of John Tait dated 26 September 2006
- e. Letter of Brenda Santi dated 28 September 2006

- f. Letter of Benita Schuh dated 28 September 2006
- g. Letter of Scotts Head Protection Group Inc dated 1 October 2006.

### **The Third Application**

- 17. On or about 4 June 2007 the Second Respondent sought to amend the Second Application to propose a community title development.
- 18. On or about 4 December 2007, the First Respondent agreed to amend the Second Application ("the Third Application").

#### Particulars

- a. The Third Application was processed under the same development application number as the First Application;
  - b. The Third Application proposed an 8 lot community title rural residential subdivision.
  - c. The Third Application was accompanied by, inter alia:
    - i. a Statement of Environmental Effects Proposed 8 Lot Community Title Subdivision (undated) prepared by Amos & McDonald Surveyors
    - ii. Neighbourhood Management Statement
    - iii. SEPP 44 Koala Habitat Management Plan for Proposed Rural-Residential Subdivision of Lot 2 DP 548175 dated December 2007 prepared by Darkheart Eco-Consultancy ("the 2007 KPOM").
19. The Advertising DCP applied to the Third Application.
20. The development proposed in the Third Application involved:
- a. subdivision, where three or more additional allotments would be created;
  - b. an application requiring a species impact statement; or
  - c. Integrated development.
21. The Third Application was not advertised in accordance with the Advertising DCP.

#### Particulars

Clauses 3.1, 3.2 and Schedule 1 Advertising DCP

### The Koala Plan of Management Approval

22. On or about 20 September 2006, the 2005 KPoM was submitted by the First Respondent to the Director General of the Department of Planning for approval to be granted under cl 13 of State Environmental Planning Policy No 44 Koala Habitat Protection ("SEPP 44").
23. On or about 11 January 2008, an amended 2007 KPoM was submitted by the First Respondent to the Director General of the Department of Planning for approval to be granted under cl 13 of SEPP 44.
24. On or about 20 May 2008, the Director General of the Department of Planning, by his delegate, granted approval under cl 13(2) of SEPP 44 ("the SEPP 44 Approval") subject to the condition that a detailed Environmental Management Plan be prepared as part of the Koala Plan of Management providing necessary details regarding the replanting, management, monitoring and reporting requirements to the satisfaction of the Council.

#### Particulars

Letter of Jim Clark, Acting Regional Director, Northern Region to M Coulter, General Manager dated 20 May 2008 reference G06/00035

### The Fourth Application

25. On or about 11 July 2008, the Second Respondent sought to amend the Third Application to propose an amended subdivision layout including changes to the proposed access road.
26. On a date unknown to the Applicant in these proceedings, but likely to have been around 11 July 2008, the First Respondent agreed to the amendment of the Third Application ("the Fourth Application").

#### Particulars

- a. The Fourth Application was processed under the same development application number as the First Application;
27. The Advertising DCP applied to the Fourth Application.

28. The development proposed in the Fourth Application involved:

- a. subdivision, where three or more additional allotments would be created;
- b. an application requiring a species impact statement; or
- c. Integrated development.

29. The Fourth Application was not advertised in accordance with the Advertising DCP.

30. The development the subject of the Fourth Application was likely to significantly affect threatened species, populations or ecological communities, or their habitats.

Particulars

- a. The development was likely to significantly affect:
  - i. *Subtropical Coastal Floodplain Forest of the NSW North Coast Bioregion*
  - ii. *microchiropteran bats, and in particular the eastern free-tail bat*
  - iii. *koalas*
  - iv. the habitat of (ii) or (iii)
- b. *The development* proposed clearing of foodstock and hollow bearing trees which was likely to significantly affect the species, population or ecological communities listed in (a), or their habitats by in particular imposing a measure of nutritional stress on members of the resident koala population so affected.
- c. The development increased the probability of dog attacks on koalas.
- d. The development proposed inadequate compensatory measures and such measures as were proposed introduced a time lag until compensatory plants would be of sufficient size to be of use to the resident population.
- e. The development contained insufficient buffers or other measures to prevent the modification of (a)(i).

**The 21 August 2008 Meeting**

31. On 21 August 2008 the First Respondent met to determine the Fourth Application ("the Meeting").

32. At the Meeting, the material before the councillors of the First Respondent did not include:

- a. A species impact statement as required under s 78A(8)(b) EPA Act;
- b. The Public Submissions as required by cl 6.1 of the Advertising DCP;
- c. An Environmental Management Plan independent of or contained within the KPOM as required under the SEPP 44 Approval;
- d. A Koala Plan of Management for the development the subject of the Fourth Application as required under cl 13(2) of SEPP 44.

33. At the Meeting, the material before the councillors of the First Respondent used for the determination of the Fourth Application consisted only of:

- a. a report dated 21 August 2008 prepared by the Director Environment and Planning ("the Director's Report") and its attachments;
- b. a submission prepared on behalf of the Second Respondent.

#### **The Purported Consent**

34. At the Meeting, the councillors of the First Respondent purported to determine the Fourth Application by the grant of development consent subject to conditions ("the Consent").

#### Particulars

- a. The Conditions to which the grant of the consent was subject were those contained in the Director's Report.
- b. The Consent was expressed to be subject to changes to the conditions in the Directors Report only insofar as they were so as to provide for a private internal road as part of the community title.

#### **The Notice of Determination**

35. On or about 28 August 2008, the First Respondent notified the Second Respondent of the determination of the Fourth Application by the grant of consent subject to conditions ("the Notice").

36. Conditions contained in the Notice are not conditions of the Consent.

#### Particulars

- a. Condition 3 in the Notice is not part of the Consent;

- b. Condition 15 in the Notice, to the extent that it expresses the following statement, is not part of the Consent:

*'The Neighbourhood Management Statement shall include the Environmental Management Plan (EMP) (required by condition 3) as an acknowledged appendix to the document.'*

**Second ground: Failure to comply with mandatory requirements of the EPA Act**

37. In granting the Consent, the First Respondent did not have:

- a. A species impact statement as required by s 78A(8)(b) of the EPA Act;
- b. an Environmental Management Plan as part of or supporting the Fourth Application as required by the condition of the approval of the delegate of the Director General of the Department of Planning;
- c. a draft condition requiring preparation of an Environmental Management Plan as required by the condition of SEPP 44 Approval;
- d. A koala plan of management for the development the subject of the consent approved by the Director General of the Department of Planning as required under cl 13(2) of SEPP 44 as the 2007 KPOM was not a koala plan of management for the development the subject of the Fourth Application and had not been amended under cl 13 of SEPP 44;

And thus the First Respondent lacked power to grant the Consent.

**Third Ground: Failure to consider relevant mandatory considerations**

38. In granting the Consent, the First Respondent failed:

- a. To consider the provisions of clause 13 of the LEP and hence contravened s 79C(1)(a)(i) of the EPA Act;
  - Particulars
    - i. Part of the subject land on which the development is proposed lies outside the indicative broken black line on the map accompanying the LEP;
- b. To consider the zone objectives for the 1(a1) Rural/Residential zone in the LEP and hence failed to consider whether the proposed development was inconsistent with

any of the objectives of the zone in which it is intended to be carried out and hence contravened cl 11 of the LEP;

- c. To consider the zone objectives for the 1(a2) Rural (Prime/Flooding) zone in the LEP and hence failed to consider whether the proposed development was inconsistent with any of the objectives of the zone in which it is intended to be carried out and hence contravened cl 11 of the LEP;
- d. To consider the Public Submissions and hence contravened:
  - i. cl 6.1 of the Advertising DCP and s 79A(2) of the EPA Act; and
  - ii. s 79C(1)(d) EPA Act.

#### **Fourth ground: Deferral of essential matters for consideration**

39. If, in the alternative to paragraph 36, the Consent included Conditions 3 and 15 contained in the Notice (which is otherwise denied), in granting the Consent subject to a requirement for the Second Respondent to prepare an Environmental Management Plan, the First Respondent deferred for later consideration a matter (or matters) essential for consideration under s 79C of the EPA Act and thereby failed to determine the Fourth Application under s 80 of the EPA Act.

#### Particulars

- a. The purpose of the need for an Environmental Management Plan was for assessment of environmental impacts associated with clearing of native vegetation to be assessed in order for the Council to determine:
    - i. the suitability of the site for the proposed development (under s 79C(1)(c) of the EPA Act)
    - ii. if proposed mitigation or rehabilitation works would mean that there was not a significant impact on threatened species, populations or ecological communities, or their habitats; and
    - iii. if the proposed development would maintain the existing amount, diversity and form of native vegetation and wildlife habitat areas under cl 16(l) of the LEP.
40. The absence of an Environmental Management Plan meant that the First Respondent was not able to assess (i) – (iii) above as such assessment was deferred.

**Fifth ground: Failure to comply with mandatory statutory requirements for advertising**

41. In granting the Consent to the Fourth Application, which was not advertised in accordance with the Advertising DCP, the First Respondent contravened s 79A(2) of the EPA Act.

**Conclusion**

42. In the premises, the Consent is void.

**SIGNATURE**

Signature of legal representative

A handwritten signature in black ink, appearing to be the initials 'KR' with a stylized flourish.

Capacity

Solicitor for the Applicant

Date of signature

26/2/09