

## AMENDED POINTS OF CLAIM

### COURT DETAILS

Court	The Land and Environment Court of New South Wales
Registry	225 Macquarie Street, Sydney
Case number	41213 of 2008

### TITLE OF PROCEEDINGS

Applicant	<b>Gwandalan Summerland Point Action Group Inc</b>
First Respondent	<b>Minister for Planning</b>
Second Respondent	<b>Rose Property Group Pty Ltd</b>
Third Respondent	<b>Lakeside Living Pty Ltd</b>

### FILING DETAILS

Filed By	<b>Gwandalan Summerland Point Action Group Inc</b>
Legal representative	Kirsty Ruddock, the Environmental Defender's Office
Legal representative reference	JW12407
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### THE APPLICANT CLAIMS THAT:

#### The Parties

- 1 The Applicant, Gwandalan Summerland Point Action Group, is a corporation established in 2007 for the purposes of protecting the Gwandalan environment and ensuring that any development in the area is the outcome of a legal decision making process.
- 2 The First Respondent is the NSW Minister for Planning (the "Minister").
- 3 The Second Respondent, Rose Property Group Pty Ltd:
  - a. is incorporated under the *Corporations Act 2001*;
  - b. is related to Lakeside Living Pty Ltd and Coastal Hamlets Pty Ltd.
- 4 The Third Respondent, Lakeside Living Pty Ltd, is a subsidiary company of the Second Respondent.

## The Land

- 5 Lot 3 in DP 588206 (The "Gwandalan Site") is approximately 26 ha in area and is in the Wyong Shire Council Local Government Area.
- 6 The following land:
- a. Lots 5,6 and 7 in DP 774923;
  - b. Part lot 2031 in DP841175;
  - c. lot 2 in DP809795;
  - d. lot 201 in DP702669;
  - e. lot A and B in DP 384745; and
  - f. the residue of the original land grant being private land shown as roads DP 163, lot 3 and 4 in DP 129431 at Catherine Hill Bay;
- (together, "the Catherine Hill Bay site")
- consists of around 370 hectares owned by Coastal Hamlets Pty Ltd (ACN 100 126 994) and is in the Lake Macquarie Council Local Government Area.
- 7 The Gwandalan site is located 17km by road from the Catherine Hill Bay site on a separate peninsular.

## The Course of Events

### The Draft Strategy

- 8 On or about December 2005, the NSW Minister for Planning released the draft Lower Hunter Regional Strategy ("the draft Strategy").
- 9 The draft Strategy:
- a. was intended to ensure there is adequate land to accommodate the projected housing, employment and environmental needs in the Lower Hunter Region;
  - b. applied to the Local Government areas of Newcastle, Lake Macquarie, Port Stephens, Maitland and Cessnock.

- c. included seven major urban release areas and 20 smaller urban release areas;
- d. did not include either the Gwandalan site or the Catherine Hill Bay site as urban release areas.

The Memorandum of Understanding

- 10 On or about 16 October 2006 the NSW Minister for the Environment and the Minister ~~(the "Government")~~ entered a Memorandum of Understanding ("MOU") in relation to the Land with two subsidiary companies of the Second Respondent, being the Third Respondent and Coastal Hamlets Pty Ltd.
- 11 The MOU, inter alia, set out the intentions of the Respondents in relation to the ~~implementation~~ implementation of an Environmental Land Offset Scheme ("ELOS") for the Lower Hunter region to complement and support the Lower Hunter Regional Strategy and the Lower Hunter Regional Conservation Plan.
- 12 The MOU provided by clause 3, together with Schedules 1 and 2, that the First Respondent intended to use reasonable endeavours to allow the Third Respondent and Coastal Hamlets Pty Ltd, both subsidiaries of the Second Respondent, to achieve the development potential of 60 hectares of land in the Catherine Hill Bay area to achieve 600 dwellings and the residential development of 26 hectares of land in the Gwandalan area to achieve 12 dwellings per hectare; by rezoning the land through State Environmental Planning Policy 2005 (Major Projects) ("the 2005 SEPP") and/or facilitating the rezoning of land through the gazettal of a Local Environmental Plan.
- 13 The MOU further provided that the Third Respondent and Coastal Hamlets Pty Ltd intended to transfer approximately 310 hectares of land in the Catherine Hill Bay and Wallarah Peninsula to the First Respondent.
- 14 Pursuant to clause 4.4 of the MOU the parties to the MOU agreed that if the development potential of the Catherine Hill Bay site is reduced then a proportional reduction will occur in the amount of land to be transferred to the Minister for the Environment and vice versa.
- 15 In so agreeing in the terms set out in the preceding paragraph, the Minister created an incentive for himself not to reduce the land available for development when

considering any relevant application for approval of development ("the Proportionality Incentive").

- 16 Pursuant to clause 3.2 of the MOU the Minister agreed to use reasonable endeavours to allow the Second and Third Respondents to achieve the development potential of that portion of the Land identified in Schedule 1 (the Catherine Hill Bay site and Gwandalan site) by, ~~inter alia~~:
- a. ~~facilitating applications for development to be dealt with under Part 3A of the Environment Planning and Assessment Act (EPA Act) as described in paragraph 12 above, rezoning the land through an amendment to the 2005 SEPP and/or facilitating the rezoning of the land through the gazettal of a Local Environment Plan; and~~
  - b. approving any concept plan submitted under Part 3A of the *Environment Planning and Assessment Act 1979* (NSW) ("EPA Act");

(together, "the Commitments in the MOU").

- 17 Pursuant to clause 4 of the MOU, the parties to the MOU agreed to use best endeavours to enter into a legally enforceable agreement, of which the details of the ELOS described in clause 3 of the MOU would form part, as soon as possible but noting a target of three months from the date of the MOU for this to occur.

~~4718~~ By making the commitments referred to in the preceding paragraph Commitments in the MOU, the Minister might reasonably have been understood to have committed himself to using reasonable endeavours to achieve particular outcomes under Part 3A of the *EPA Act*, and did to have done so prior to:

- a. any application having been made under that Part;
- b. any public consultation occurring under that Part;
- c. any Panel or other report being received for the purposes of that Part; and/or
- d. receipt of the Director-General's report required by section 75I of the Act.

The Lower Hunter Regional Strategy

~~4819~~ The Lower Hunter Regional Strategy:

- a. was released on 16th October 2006, being the same day the MOU was signed;
- b. included both the Catherine Hill Bay site and Gwandalan site as urban release areas;
- c. made reference to a sustainability criteria for assessing future urban development, but which criteria did not apply to green corridors already identified such as the Catherine Hill Bay site and Gwandalan sites.

Initial concept plan

1920 In December 2006 the Second Respondent lodged a concept plan for residential development at Catherine Hill Bay and Gwandalan (the "Original Scheme").

2021 The Minister appointed an Independent Hearing Assessment Panel (IHAP) to examine the Original Scheme.

2122 In April 2007, the IHAP prepared an interim report on the Original Scheme that identified that the Plan in its submitted form was unacceptable, for reasons which included the following:

- a. non-compliance with the NSW Coastal Policy and Design Guidelines;
- b. impacts on the scenic, aesthetic and cultural heritage of Catherine Hill Bay;
- c. lack of clear considered design approach which responds to the environmental attributes of the site,
- d. failure of the development to provide for high quality access for the public to the beach front and lake front open space areas, coastal walks and cycle paths,
- e. incorporation of unsympathetic development on headland, ridgelines,
- f. inclusion of significant number of tourism beds in highly visually prominent location on ridgeline of Catherine Hill Bay; and
- g. limited consideration of adaptive reuse potential for existing structures on the site and in the vicinity.

2223 In response to the IHAP, the Second Respondent withdrew the concept plan.

Order concerning State significance

2324 By order dated 27 June 2007 the Minister declared a revised proposal (including up to 600 dwellings at Catherine Hill Bay/Moonee and up to 220 dwellings at Gwandalan) to be of State Significance and to be a Major Project for which the Minister is the consent authority under Part 3A of the *EPA Act* ("the State Significance Order").

Further consideration of the proposed development

2425 On or about 1 August 2007, the Director General issued new Environmental Assessment Requirements (the "new EARs") for the revised proposal under section 75F of the *EPA Act*.

2526 On 24th August 2007 the Second Respondent lodged a revised concept plan for residential development for lots 5,6 and 7 in DP 774923, Part lot 2031 in DP841175, lot 2 in DP809795, lot 201 in DP702669, lot A and B in DP 384745 and lot 3 and 4 in DP 129431 at Catherine Hill Bay and Part lot 3 in DP588206 at Gwandalan (the "Revised Scheme").

2627 The Second Respondent submitted an Environmental Assessment Report purportedly following the new EARs, which went on public exhibition from on or about 5 September 2007 through until on or about 12 October 2007.

2728 On 18<sup>th</sup> December 2007, the IHAP provided their report on the Revised Scheme, in which the IHAP continued to express concerns about the Revised Scheme, although recommending the grant of approval for the Gwandalan site and some modifications for the Catherine Hill Bay site.

2829 On 6<sup>th</sup> December 2007, the Second Respondent lodged a Preferred Project Report for the Revised Scheme and Project Application.

2930 On or about February 2008, the Second Respondent lodged a further revised Preferred Project Report for the Revised Scheme.

3031 On or about August 2008, the Department of Planning released the Director-General's Environmental Assessment Report pursuant to s.75I of the *EPA Act*.

The Deed

32 On 1 September 2008, the Minister and the Minister for Climate Change and the Environment entered a Deed Regarding Lower Hunter Land Offsets (the "Deed") in relation to the Land with two subsidiary companies of the Second Respondent, being the Third Respondent and Coastal Hamlets Pty Ltd.

33 The "Development Potential of Schedule 1 Land":

- a. was defined in clause 1.1 of the Deed to mean the development potential specified in Schedule 1 of the Deed, including any reduction in the development potential of the Gwandalan Land due to the Landholder's own decision to reduce the number of dwellings in the Schedule 1 Land from that contemplated in the MOU;
- b. was defined in essentially the same terms in the Deed as in the MOU, save that the Deed definition now included the possibility of the Landholder deciding itself to reduce the number of dwellings.

34 By the time of entry into the Deed the Second and Third Respondents had decided to reduce the number of dwellings sought to be developed in the Schedule 1 Land from the number identified as the Development Potential, such that only 187 dwellings were sought at the Gwandalan site instead of the 312 referred to in Schedule 1 of the MOU and the Deed.

Particulars

The reduction occurred in or about February 2008.

35 The Deed:

- a. was made to give effect to the MOU (see Recitals C and D of the Deed);
- b. was not made within 3 months of the MOU, but some 22.5 months later;
- c. was made the day before the Minister approved the concept plan application (as to which see paragraph 41 below);
- d. unlike the MOU, did not contain either the Proportionality Incentive or any equivalent provision;

e. provided pursuant to clause 6 and Schedule 2 that upon rezoning of land at the Catherine Hill Bay site and the Gwandalan site, the relevant landholder (being either the Second or Third Respondent or a related company) would:

i. immediately lodge a plan of subdivision;

ii. as expeditiously as possible following registration of that plan, transfer identified land (being some 310 hectares) for the purposes of the Environmental Land Offset Scheme to the Minister for Climate Change and the Environment;

f. thus provided for the transfer of environmental offset land to the full extent contemplated by the MOU, in circumstances where:

i. the Second and Third Respondents (or related persons) had decided to reduce the size of the development sought for the Gwandalan Land; and

ii. in apparent contemplation that the Minister would grant approval for the Concept Plan Application and the associated project application.

36 Pursuant to clause 4.1 of the Deed, the Minister agreed to use reasonable endeavours to allow the Second and Third Respondents to achieve the Development Potential of Schedule 1 Land by, inter alia:

a. rezoning the land through an amendment to the 2005 SEPP and/or facilitating the rezoning of the land through the gazettal of a Local Environment Plan; and

b. approving Concept Plan Application number MP 06 0330 ("the "Concept Plan Application") submitted under Part 3A of the EPA Act;

(together, "the Commitments in the Deed").

37 Pursuant to clause 4.2 of the Deed:

a. the Minister stated that it was his intention to allow the Relevant Landholder (being the Second and/or Third Respondents or related persons) to achieve development that is consistent with the Development Potential of Schedule 1 land by rezoning the land in accordance with a draft SEPP;

b. in so stating, implied (or might reasonably be taken to have implied) that he would approve the Concept Plan Application and the related project application.

38 Pursuant to clause 5.5 of the Deed:

- a. the Minister for Climate Change and the Environment acknowledged that the Third Respondent and Coastal Hamlets Pty Ltd would be developing the Catherine Hill Bay site and the Gwandalan site in accordance with a rezoning of those lands and approval of the Concept Plan Application;
- b. the Minister, by being party to this acknowledgment, implied (or might reasonably be taken to have implied) that he would approve the Concept Plan Application and the related project application.

39 By doing each and all of the following, the Minister might reasonably have been understood to have committed himself to using reasonable endeavours to achieve particular outcomes under Part 3A of the EPA Act, and particular outcomes as already agreed between the Second and Third Respondents, and to have done so prior to receipt of and/or due consideration of the Director-General's report and associated material required by sections 75I and 75O of the Act:

- a. being a party to the Deed;
- b. making the Commitments in the Deed;
- c. being a party to clause 4.2;
- d. being a party to clause 5.5.

*Approval by the First Respondent*

40 On 2 September 2008 the Department provided to the Minister, for the first time:

- a. a minute recommending approval of the Concept Plan Application and the associated project application;
- b. the Director-General's Environmental Assessment Report, which was annexed to the minute.

3441 On 2 September 2008 the Minister purported to grant concept-plan-approval for the Concept Plan Application, being a concept plan application for the development at

the Catherine Hill Bay site and the Gwandalan site. The concept plan approval under section 75O of the *EPA Act* was for:

- a. the dedication of 310 hectares of land to the NSW Government to be conservation;
- b. a staged residential development at the Catherine Hill Bay site with a maximum of 600 dwellings over seven district hamlets,
- c. a maximum of 750 metres square GFA in Hamlet 1 for retail uses, community services and infrastructure; and
- d. a residential development at the Gwandalan site comprising of 26 hectares into 188 lots in Torrens title scheme to create 187 new lots, residue lot for existing foreshore dwelling and services.

3242 Under the Concept Plan approval the Second and Third Respondent was authorised to develop in Kanangra Drive Gwandalan involving the subdivision of lot 3 in DP 588206 into 187 residential lots and associated works (the "project application").

3343 On 2 September 2008 the First Respondent purportedly granted approval for the project application under section 75J of the Act.

44 The Minister's approval of the Concept Plan allowed the Second and Third Respondents (or related persons) to achieve the Development Potential of the Schedule 1 Land as defined in the Deed.

#### **Ground 1 – Reasonable apprehension of Bias**

3445 By acceptance of the Proportionality Incentive in the MOU the MinisterFirst Respondent attached himself to recognition of an incentive to approve more of the Land for development.

3546 By acceptance of each and all of the Commitments in the MOU, the Commitments in the Deed, and clauses 4.2 and 5.5 of the Deed, the First RespondentMinister:

- a. publicly-committed himself to a particular outcome that did not include the rejection of the concept plan and project application;
- b. attached himself to a statement of predisposition as to the outcome of applications made under Part 3A of the EPA Act; and/or

c. committed himself to help the Second and Third Respondents achieve an outcome that they desired with respect to applications made under Part 3A;

and did so prior to the undertaking and/or completion of the process of assessment provided for in Part 3A of the EPA Act, including receipt and consideration of the Director-General's Environmental Assessment and associated materials.

3647 There was, at the time of the making of the purported decisions to grant approvals under sections 75O and 75J of the *EPA Act*, a reasonable apprehension of bias in the decision-making of the Minister.

3748 In the premises the said decisions were and are invalid.

### **Ground 2 – Irrelevant considerations**

~~In entering the Deed, the Minister took into account the existence and terms of the MOU, including the Proportionality Incentive and the Commitments in the MOU.~~

4849 In making the said decisions the Minister took into account the existence and terms of the:

- a. MOU, including the Proportionality Incentive and the Commitments in the MOU; and
- b. Deed, including the Commitments in the Deed and clauses 4.2 and 5.5 thereof ("the Considerations").

3950 The Considerations could not permissibly be taken into account by the Minister in exercising his approval powers under sections 75O and 75J of the *EPA Act*.


### **Particulars**

In entering the MOU and the Deed the Minister had fettered his discretion as to whether or not to approve the Concept Plan Application and the project application.

The Minister was obliged to consider the applications on their merits, and taking account of the Environmental Assessment and associated materials, regardless of any pre-existing commitment as to how the discretions should be exercised.

4051 In the premises the said decisions were and are invalid.

**SIGNATURE**

Signature of legal representative   
Capacity Solicitor  
Date of signature 21/5/09