

## APPLICANT'S POINTS OF CLAIM

### COURT DETAILS

Court The Land and Environment Court of New South Wales  
Registry 225 Macquarie Street, Sydney  
Case number 40225 of 2009

### TITLE OF PROCEEDINGS

Applicant Sweetwater Action Group Incorporated  
First Respondent Minister for Planning  
Second Respondent Huntlee Holdings Pty Ltd

### FILING DETAILS

Filed By Sweetwater Action Group Incorporated  
Legal representative Kirsty Ruddock, the Environmental Defender's Office(NSW) Ltd  
Legal representative reference 11988  
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### THE APPLICANT CLAIMS THAT:

#### The Parties

- 1 The Applicant is:
  - a. an incorporated association established on 9 March 2009 for the purposes of protecting the environment and promoting ecologically sustainable development in the North Rothbury, Branxton and Greta areas of NSW. The Applicant brings this action on its own behalf and in the public interest.
  - b. a person entitled to bring proceedings by reason of section 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
- 2 The First Respondent (the Minister) is the approval authority under Part 3A of the EP&A Act.
- 3 The Second Respondent, Huntlee Holdings Pty Ltd:
  - a. is the proponent of the Huntlee Concept Plan application No. MPA No. 07\_0064;
  - b. is incorporated under the *Corporations Act 2001* (ACN 125849863);
  - c. has multiple shareholders including Hardie Garnet Pty Ltd.

**The Land**

4 The following land:

- a. Lot 1 in DP 811604
- b. Lots 3 and 4 in DP 813163
- c. Lots 15, 16, 33, 34, 36, 37, 38, 39, and 43 in DP 755211
- d. Lots 6, 7, 8, 9, 10, 11 and 12 in DP 729973
- e. Lot 211 in DP 828787
- f. Lot 1 in DP 707207
- g. Lot 1 in DP 137264
- h. Lots 240 and 241 in DP 1105591
- i. Lot 200 in DP 828468
- j. Lot 1 in DP 848702
- k. Lot 10 in DP 1105639
- l. Lot 201 in DP 828406
- m. Lot 230 and 231 in DP 879198
- n. Lots 1, 2, 7 in DP 1042140
- o. Lot 123 in DP 1012402
- p. Lot 300 in DP 1029733
- q. Lot 102 in DP 1040618
- r. Lot 32 in DP 1003656
- s. Lot 200 in DP 1008434
- t. Lot 21 in DP 1050597
- u. Lot 106 in DP 1064738

v. Lots 10 and 11 in DP 1087556

(together the **Huntlee New Town site**)

consists of approximately 1748 hectares, the majority of which is owned by Hardie Ayrefield Pty Ltd (which is wholly owned by the Second Respondent) and is in the Cessnock City and Singleton Local Government Areas.

5 The Huntlee New Town site is located immediately to the south of the town of Branxton in the Hunter Valley of NSW. Cessnock is located approximately 20km to the south, Singleton is located 23km to the north west, Maitland is located 25km to the east and Newcastle 55km south west of the Huntlee New Town site.

6 Duncan Hardie is a shareholder and director of Hardie Garnet Pty Ltd. In 2005, Hardie Garnet Pty Ltd established Eco Trades Pty Ltd, for the purposes of purchasing conservation lands in NSW.

7 Prior to 2006, Hardie Ayrefield Pty Ltd, which was wholly owned by Hardie Garnet Pty Ltd, acquired potential development land and / or the option to purchase potential development land in the North Rothbury region, including land in the Huntlee New Town site.

8 In May 2007, Hardie Garnet Pty Ltd sold its interest in Hardie Ayrefield Pty Ltd to NSW Land Pty Ltd.

9 In June 2007, the Second Respondent was established for the purposes of implementing the Huntlee New Town development.

10 The Second Respondent is now the ultimate holding company of NSW Land Pty Ltd as well as Hardie Ayrefield Pty Ltd, the owner of the majority of the land in the Huntlee New Town site.

### **Sweetwater**

11 In early 2006, Hardie Holdings Pty Ltd submitted a request to the Minister that the Huntlee New Town proposal (then known as "Sweetwater") be considered as a State significant site and a project under Part 3A of the EP&A Act.

12 The initial proposal was to develop a mixed use compact new city including 28,000 homes, 50 hectares of business park, 70 hectares of employment lands and 24 hectares of retail and commercial land. In total the Sweetwater proposal was to accommodate 60,000 residents and generate 8,500 jobs.

13 Following discussions between Hardie Holdings Pty Ltd and the Minister, it was agreed that the proposal be deferred and reviewed pending the finalisation of the Lower Hunter Regional Strategy.

### The Draft Lower Hunter Regional Strategy

- 14 On or about December 2005, the Minister released the draft Lower Hunter Regional Strategy (**the draft Strategy**).
- 15 Prior to this, the Department of Planning published a Draft Explanation of Multi-criteria analysis which indicated that of 91 candidate areas for development in the Lower Hunter area, the area of the Huntlee New Town site was ranked last out of 91 candidates.
- 16 The draft Strategy:
- a. included seven major urban release areas and 20 smaller urban release areas;
  - b. did not include the Huntlee New Town site as an urban release area.

### The Memorandum of Understanding

- 17 On or about 16 October 2006 the NSW Minister for the Environment and the Minister (together, **the NSW Government**) entered a Memorandum of Understanding (**MOU**) in relation to (among other development areas) the development area known as "Sweetwater – Branxton in the Local Government areas of Singleton and Cessnock" with Hardie Holdings Pty Ltd.
- 18 Hardie Holdings Pty Ltd entered the MOU (signed by Duncan Hardie) as agent for and on behalf of:
- a. Hardie Ayrefield Pty Ltd being the owner or option holder of land described in Schedule 1 of the MOU as, "Potential Development Lands"; and
  - b. Hardie Ayrefield Pty Ltd and Eco Trades Pty Ltd being the owners or option holders of land described in Schedule 2 of the MOU as, "Environmental Lands Offsets"; and
  - c. Hardie Gamet Pty Ltd (which owns an interest in the Second Respondent).
- 19 The MOU provided by clause 3, together with Schedules 1 and 2, that the Minister intended to use reasonable endeavours to allow Hardie Holdings Pty Ltd to achieve the development potential of the development area known as Sweetwater (**the MOU Potential Development Land**).
- 20 The development potential of the land was as follows:
- a. Residential development covering up to 600 hectares to achieve 7, 200 residential dwellings;
  - b. Rural residential development covering up to 93 hectares to achieve 300 lots; and

- c. Commercial or employment lands development covering up to 160 hectares;

**(the MOU Development Potential)**

- 21 The Minister agreed to use reasonable endeavours to allow Hardie Holdings Pty Ltd to achieve the MOU Development Potential by:
- a. rezoning the land through the *State Environmental Planning Policy 2005 (Major Projects) 2005 (the Major Projects SEPP)* and approving any concept plan submitted under Part 3A of the EP&A Act; and / or
  - b. facilitating the rezoning of land through the gazettal of a Local Environmental Plan and approving any concept plan submitted under Part 3A of the EP&A Act;
- 22 Pursuant to clause 4.4 of the MOU the parties to the MOU agreed that if the MOU Development Potential of the MOU Potential Development Land was reduced (in relation to the number of dwellings or lots) then a proportional reduction would occur in the amount of Environmental Lands Offsets to be transferred to the Minister for the Environment.

**The Lower Hunter Regional Strategy**

- 23 The Lower Hunter Regional Strategy:
- a. was released on 16th October 2006, being the same day the MOU was signed;
  - b. included the Huntlee Town Centre site as a major urban release area, able to accommodate up to 7500 dwellings, including 7200 residential plus 300 rural residential.

**The Deed of Agreement**

- 24 On 22 December 2006, the Minister and the Minister for the Environment (together, **the NSW Government**) entered the Deed Regarding Lower Hunter Land Offsets (**the Deed**) with Hardie Holdings Pty Ltd in relation to (among other areas) "the development area known as Sweetwater – Branxton, in the Local Government areas of Singleton and Cessnock" which includes the Huntlee New Town Site.
- 25 Hardie Holdings Pty Ltd entered the Deed (signed by Duncan Hardie) as agent for and on behalf of:
- a. Hardie Ayrefield Pty Ltd being the owner or option holder of land described in Schedule 1 of the Deed as, "Potential Development Lands"; and
  - b. Hardie Ayrefield Pty Ltd and Eco Trades Pty Ltd being the owners or option holders of land described in Schedule 2 of the MOU as, "Environmental Lands Offsets".

- 26 The Deed was made to give effect to the MOU.
- 27 Pursuant to the clause 4.2 of the Deed, the Minister agreed to use reasonable endeavours to allow Hardie Holdings Pty Ltd to achieve the development potential of the development area known as Sweetwater, which includes the Huntlee New Town site (**the Potential Development Land**) by:
- a. Rezoning the land through a SEPP amendment and approval of any concept plan submitted under Part 3A of the EP&A Act;
  - b. Facilitating the Rezoning of the land through a gazettal of a local environment plan ... and approval of any concept plan submitted under Part 3A of the EP&A Act; and/or
  - c. Any other means that achieves or encourages the more intensive use of the land, in accordance with the Lower Hunter Regional Strategy and the Lower Hunter Regional Conservation Plan.
- 28 The development potential of the Sweetwater land was defined in the Deed to mean:
- a. Residential development covering up to 600 hectares to achieve 7, 200 residential dwellings;
  - b. Rural residential development covering up to 93 hectares to achieve 300 lots; and
  - c. Commercial or employment lands development covering up to 160 hectares;
- (**the Deed Development Potential**)
- 29 Pursuant to clause 5.1 and Schedule 2 of the Deed, the parties agreed that Hardie Holdings Pty Ltd (as agent for and on behalf of the land holders and option holders) would transfer environmental lands offsets (which included approximately 3280 hectares of conservation land including the "Sweetwater Reserve" and the "Persoonia Reserve") to the Minister for the Environment, upon the Rezoning.
- 30 Pursuant to clause 5.1 of and Schedule 2 to the Deed, the Minister and the Minister for the Environment agreed that they would give to Hardie Holdings Pty Ltd (as agent for and on behalf of the landholders and option holders), within fourteen (14) days after the Potential Development Land was Rezoned, written notice requiring Hardie Holdings Pty Ltd to effect a transfer of the corresponding Environmental Offsets Lands to the Minister for the Environment.
- 31 Pursuant to clause 5.2 of the Deed, the parties agreed that Hardie Holdings Pty Ltd could object to the requirement in clause 5.1 to effect transfer of the Environmental Lands Offsets, and could offer to transfer a reduced proportion of the Environmental Lands Offsets.

- 32 Pursuant to clause 5.3 of the Deed, Hardie Holdings Pty Ltd could not object to the transfer of the environmental lands offsets, if the Potential Development Lands that had been rezoned pursuant to the Rezoning, had substantially achieved the Deed Development Potential.
- 33 Pursuant to clause 5.5 of the Deed, the Minister for the Environment had the option of consenting or not consenting to the transfer of the reduced proportion of the environmental lands offsets.
- 34 If the Minister for the Environment did not consent to the transfer of the reduced proportion of the environmental lands offsets, then pursuant to clause 5.6 of the Deed the parties agreed to use reasonable endeavours to reach agreement on the land to be transferred. In doing so, the parties agreed to take into account a number of factors including if:
- a. The Deed Development Potential in relation to the number of dwellings or lots to be achieved is reduced, then there should be a proportional reduction in the areas of the environmental offsets lands to be transferred to the Minister for the Environment; and
  - b. the extent to which the rezoning substantially achieves the Development Potential of the Potential Development Land.

**(the Proportionality Incentive)**

- 35 In agreeing to the clauses set out above, the First Respondent expressly and/or impliedly, or might reasonably be taken to have expressly or impliedly:
- a. agreed to take steps that might otherwise not have been taken to make the SEPP amendments and/or approve a concept plan for the Potential Development Land under Part 3A of the EP&A Act; and
  - b. committed to an incentive to facilitate the achievement of the Deed Development Potential by making the SEPP amendment and approving a concept plan (**the Rezoning and Approval Incentive**).
  - c. committed itself to the Proportionality Incentive;
  - d. committed the NSW Government to using reasonable endeavours to achieve particular outcomes under Part 3A of the EP&A Act, as already agreed between Hardie Holdings Pty Ltd and the NSW Government, and to have done so prior to:
    - i. any application having been made under that Part;
    - ii. any public consultation occurring under that Part;

- iii. any Panel or other report being received for the purposes of that Part; and/or
- iv. receipt of the Director-General's report required by section 75I of the EP&A Act.

36 Pursuant to clause 6.2 for as long as it remained the legal owner of the land, in respect of the land described as Branxton (Sweetwater) – *Persoonia* Reserve and Branxton (Sweetwater) which is included in the Huntlee New Town site, Hardie Holdings Pty Ltd agreed to undertake measures which included:

- a. to manage the land in accordance with an interim land management agreement to be negotiated with the NSW Department of Environment and Conservation;
- b. unless otherwise specified in the land management agreement to exclude stock from the land, not to undertake slashing of any vegetation on the land south of Black Creek, and to cease any other activities that will have a negative impact on *Persoonia* numbers and its habitat;
- c. to undertake trial measures as agreed with members of staff of the NSW Department of the Environment and Conservation that could help increase the numbers of *Persoonia*.
- d. to protect all *in situ* occurrences of *Persoonia* for up to five years from the date of the Deed by creating a 30 metre diameter buffer around each plant of the Sweetwater site, collecting seeds and cuttings from these plants with the view to achieving successful propagation, translocating plants to the land described as Branxton (Sweetwater)) – *Persoonia* Reserve within five years of the Deed, and on completion of the obligations to translocate to the reserve, ceasing to have any obligations in relation to the relevant plants.

37 Pursuant to clause 6.5 of the Deed Hardie Holdings Pty Ltd agreed to contribute \$80,000 to the Minister for the Environment within 28 days of the Deed being signed by all parties, with a view to trying to establish propagation techniques for *Persoonia*.

38 The Second Respondent is now the ultimate holding company of Hardie Ayrefield Pty Ltd, which owns the majority of the Potential Development Land under the Deed.

#### Procedure under Part 3A of the EP&A Act

39 On or about 2 February 2007, JBA Urban Planning Consultants Pty Ltd wrote to the Department of Planning on behalf of the Second Respondent, requesting that:

- a. a proposal for the development of 853 hectares of land known as the Huntlee New Town, Branxton (**Huntlee New Town proposal**), be considered as a State significant site; and

b. the Minister authorise the submission of a Concept Plan to be assessed under Part 3A of the EP&A Act.

- 40 On 1 March 2007, the Minister declared that Part 3A of the EP&A Act applied and authorised the submission of a Concept Plan for the Huntlee New Town proposal (**the Proposed Concept Plan**).
- 41 On 1 March 2007, the Minister also determined pursuant to clause 13(1) of Schedule 1 of the Major Projects SEPP, that the Huntlee New Town proposal was important for achieving State or regional planning objectives.
- 42 On or about 17 April 2007, the Second Respondent was advised to prepare a State Significant Site study (**a SSS Study**) for the purposes of making the Huntlee New Town proposal a State significant site.
- 43 On or about 7 May 2007, the Second Respondent submitted a Preliminary Assessment for the Huntlee New Town proposal. The area of the Huntlee New Town proposal can be seen on Figure 4 included in the Preliminary Assessment (**Attachment A** to these Points of Claim)
- 44 On or about 20 September 2007, the Director-General issued Environmental Assessment Requirements (**EARs**) pursuant to section 75F of the EP&A Act.
- 45 On 21 November 2007, the Second Respondent submitted a SSS Study and Environmental Assessment for the Huntlee New Town proposal in response to the Director General's EARs.
- 46 As regards *Persoonia* the SSS Study and Environmental Assessment included a report from Bell & Driscoll which recommended that all individuals of *Persoonia* present within the study area should be protected within a buffering conservation area to recognise the ecological importance of this narrow endemic.
- 47 From 12 December 2007 to 15 February 2008, the SSS Study and Environmental Assessment were placed on public exhibition pursuant to section 75H of the EP&A Act.
- 48 A total of 211 public submissions (**Public Submissions**) were received in response to the exhibition period including 208 objecting to the proposal and 3 offering conditional support. These included detailed submissions objecting to the Huntlee New Town Proposal on the grounds of likely impact upon *Persoonia*.
- 49 On or about 24 October 2008 the Second Respondent submitted a Preferred Project Report and a revised Statement of Commitments to address the issues raised during the exhibition period.
- 50 In response to submissions that questioned the proposed arrangements with regard to the future conservation and management of *Persoonia*, the Preferred Project Report stated that:

- a. some lands would be added to the environmental offset lands along the eastern edge of village 5 to improve the conservation potential of *Persoonia* in this location but that an area of land along the north-eastern boundary of the Harwood estate would be designated residential. The overall effect of this change was to lead to an overall reduction of approximately 73 ha conservation offset lands to 803 ha. The changes are shown in Appendix C to the Preferred Project Report (**Attachment B** to these Points of Claim ), when compared with the earlier Huntlee proposed zoning Map placed on public exhibition (**Attachment C** to these Points of Claim).
- b. the majority of individual *Persoonia* plants would be protected and remain in situ;
- c. future management of *Persoonia* is addressed in the Deed;
- d. the ongoing status of *Persoonia* within the site needs to be considered, given the likelihood of changing population numbers and micro-distribution over time; and
- e. In respect to a request from the Commonwealth Department of Environment, Water, Heritage and the Arts for information on the proposed contingency measures should the translocation and propagation program for *Persoonia* fail, that the Second Respondent had agreed to work with the Department of Environment and Conservation and had contributed the \$80,000 under the Deed but that *"It is recognised that there are no certainties associated with translocation and propagation of this species. The commitment by the proponent provides a willingness to fully explore and understand the species, hopefully leading to long term benefits"*.

### ***Persoonia Pauciflora***

- 51 *Persoonia Pauciflora* (**Persoonia**) was on 8 July 2005 included as one of 81 EPBC species that are Critically Endangered for the purposes of section 18 of the Environment Protection Biodiversity Conservation Act 1999 (Cth) and under the Threatened Species Conservation Act 1995 (NSW).
- 52 *Persoonia* is only found in the area of the Huntlee New town site and its immediate surrounds.
- 53 It was stated in the SSS Study and Environmental Assessment submitted on behalf of the Second Respondent that:
- a. At October 2005, the total known population of *Persoonia* was within 2 km of North Rothbury.
  - b. In April 2008, it was reported that of the original 28 *Persoonia* plants in the region of the concept plan, 16 were within the Huntlee New Town proposal area, 6 were in close proximity to the lands and 6 were dead.

- c. The Huntlee New Town proposal covers the majority of the known area of occupancy for the *Persoonia* species and will involve the removal of a number of individuals and a significant area of potential habitat.

54 It was submitted by the Department of Environment and Conservation as part of the public consultation in respect of the Proposed Concept Plan that:

- a. The Proposed Concept Plan will involve the removal of a number of *Persoonia* and a significant area of potential habitat;
- b. Most *Persoonia* species have proven very difficult to propagate ex situ, either by seeds or by cuttings, suggesting that propagation of *Persoonia* is unlikely to be achievable;
- c. The longer-term viability of *Persoonia* within the proposed *Persoonia* reserve is complicated by the low number of individuals, past disturbance history, and the reserve's size and disjunct location adjacent to Stage 1 of the Huntlee development area;

55 It was submitted by the Hunter River Catchment Management Authority that the arrangement about the translocation of *Persoonia* is viewed as high risk and should be avoided. All *Persoonia* plants should be left in situ and none removed at any time (Hunter Central Rivers Catchment Management Authority submission dated 11 February 2008).

56 It was stated in the submission of Gordon Patrick dated 15 February 2008 as part of the public consultation in respect of the Proposed Concept Plan that:

- a. The vast majority of the proposed Huntlee New Town site can be regarded as potential habitat for *Persoonia*, not only the actual locations where individuals of the species currently occur. The proposed Huntlee New Town site covers approximately 50% of the entire known distribution of the species (approximately 455 individuals);
- b. Translocation of *Persoonia* cannot be considered as an amelioration measure, as success cannot be even partially guaranteed. A previous attempt to translocate mature *Persoonia* in 1998 resulted in all specimens dying within 1-2 months. Translocation should not be considered as a method for impact amelioration as the specimens will likely not survive the translocation process;
- c. It would be premature to consider the removal of any individuals of the species or their associated habitat until studies as to genetics are undertaken;

- d. There is little evidence that propagation from seed is a simple process. The vast majority of *Persoonia* species cannot be grown from seed at this stage. Propagation from cuttings may be viable but will not lead to genetic diversity in the specimens;
- e. Persoonia Park (17 ha) is not large enough to provide viable habitat for the *Persoonia* population in the medium or long term and has the potential to become isolated. It would be vulnerable to a single fire and would provide little in regard to future expansion;
- f. There are no successful working examples of the possible restrictions that may be placed on the land title if an Environmental Conservation area was declared or on rural/residential lots containing the species outside of the proposed conservation area;
- g. A significant impact is likely on *Persoonia*.

57 Attached to the Sweetwater Action Group (SWAG) submission as part of the public consultation in respect of the Proposed Concept Plan to the SWAG were:

- a. A statement by Simon Smith, Deputy Director General, Environment Protection and Regulation, NSW Department of Environment & Conservation dated 29 September 2006, that the risk of extinction of *Persoonia* is very high.
- b. A statement by Tricia Hogbin, Threatened Species Officer in the Newcastle Office of the Department of Environment & Conservation that there is a separate aggregation of the species in the North of the North Rothbury area and the proposal will isolate or remove the northernmost aggregation of *Persoonia* which is critically important.

### Environmental Assessment Report

58 In January 2009 the Director-General prepared an Environmental Assessment Report under section 75I of the EP&A Act.

59 On 29 January 2009, the First Respondent was provided with the Director-General's Environmental Assessment Report, the Preferred Project Report and the Environmental Assessment, pursuant to section 75I of the EP&A Act. This included:

- a. In the Introduction that "*In balancing the State significant planning outcomes with the issues raised, the Department is of the view that the proponent has satisfactorily mitigated the impacts arising from the proposed development. In assessing the proposal, the Department has resolved any outstanding issues through modifications to the Concept Plan (see Appendix A) and future assessment requirements*".

- b. As regards the precautionary principle, the conclusion that the findings and recommendations of the range of specialist studies have not revealed the need to adopt the precautionary principle from an ecological point of view to either delay or prevent the Concept Plan application from proceeding;
- c. As regards the inter-generational principle, no reference to *Persoonia*.
- d. As regards the biodiversity principle, the conclusion that *"The development will satisfy this principle through protection of significant habitat, dedication of conservation lands; dedication of offset lands; creation of Persoonia Park; habitat preservation and creation; and provision of wildlife corridors"*.
- e. By way of conclusion, the statement that the Department as of the view that the proponent had satisfactorily mitigated the environmental impacts arising from the Huntlee New Town proposal and that in assessing the proposal the Department had resolved any outstanding environmental issues through modification.
- f. No reference to the matters set out at paragraphs 53-57 above.

**State Environment Planning Policy (Major Projects) 2005 (Amendment No 35) (SEPP Amendment)**

60 On 15 December 2008, the First Respondent signed a Department of Planning briefing memorandum in relation to the proposed amendment of the Major Projects SEPP by Amendment No. 35 – Huntlee New Town (**the SEPP Amendment briefing memo**). The land zoning thereby effected is shown in the Huntlee New Town Site – Land Zoning Map sheet LZN 001 (**Attachment D** to these Points of Claim).

61 The SEPP Amendment briefing memo recommended that the First Respondent:

- a. Form the opinion pursuant to section 39(3) of the EP&A Act that the proposed SEPP was of significance for environmental planning for the State;
- b. Determine that it was not appropriate or necessary to publicise the proposed SEPP under section 39(2) of the EP&A Act;
- c. Recommend to Her Excellency the Governor that, pursuant to section 39(1) of the EP&A Act, the Governor make the proposed SEPP.

62 The SEPP Amendment briefing memo stated that:

- a. On 22 December 2006, the NSW Government had entered into the Deed with Hardie Holdings Pty Ltd for the implementation of the Environmental Lands Offsets Scheme to complement and

support the Lower Hunter Regional Strategy and the Lower Hunter Regional Conservation Plan, consistent with the MOU;

- b. Once rezoning of the land to achieve the development potential is approved, environmental offsets including 803 ha of land within the Huntlee New Town site and a further 4,988 ha at other sites in the Lower Hunter Region will be dedicated to the NSW Government for conservation purposes; and
- c. A new zoning and development control regime was required to be put in place to facilitate development contemplated by the Lower Hunter Regional Strategy and the Deed.

63 There was no material before the First Respondent to establish that the environmental impact of the rezoning and/or the Proposed Concept Plan upon *Persoonia* would be mitigated by the Agreed Measures.

64 On 9 January 2009, the SEPP Amendment was made with the effect that:

- a. Schedule 3 of the State Environmental Planning Policy (Major Projects) 2005 was amended to declare the Huntlee New Town site a proposal to which Part 3A of the EP&A Act applied;
- b. The Huntlee New Town site was rezoned as set out in the Huntlee New Town Site – Land Zoning Map sheet LZN 001 precisely to reflect the proposed land use in the Proposed Concept Plan. (**Attachment D** to these Points of Claim)

65 The SEPP Amendment stated one of its aims was "*to provide for appropriate development of that land that satisfies the principles of ESD*".

### **Concept Plan Approval**

66 On 9 February 2009, the First Respondent purported under section 75O(1) of the EP&A Act to grant approval for the Huntlee Concept Plan (MPA No. 07\_0064) (**the Concept Plan Approval**), and determined under section 75P(1)(c) of the EP&A Act that "*no further environmental assessment is required under sections 5A and 78A of the Act in respect of the future development of the residential villages, town centre and large lot residential areas in accordance with the Huntlee Concept Plan*".

67 The material before the First Respondent comprised:

- a. A briefing Memorandum dated 27 January 2009 from the Director-General and the Executive Director, Strategic Sites and Urban Renewal (**the Briefing Memo**) which:
  - i. recommended that the First Respondent approve the Proposed Concept Plan subject to modifications;

- ii. stated that the key issues identified regarding the Proposed Concept Plan included:
    - 1. the transfer of high conservation value land to the Department of the Environment and Climate Change in accordance with the Deed, and
    - 2. the ongoing protection and conservation of the critically endangered *Persoonia*.
  - iii. stated that *Persoonia* was only found in the Huntlee area and immediate surrounds; and that its population has been significantly reduced over recent years,
  - iv. stated that *Persoonia* presented a significantly unusual management consideration, and was the central environmental issue surrounding the proposal;
  - v. included reference to the provisions of the Deed and the environmental offsets, and to the Agreed Measures;
  - vi. stated that the Huntlee New Town proposal offered the means to take positive steps to protect *Persoonia*, whereas in the absence of the proposal, the current decline may continue.
  - vii. stated that numerous submission expressed concerns about the impact of the impact of the development on endangered vegetation and biodiversity values, and that some submissions questioned whether the lands to be dedicated to the State were of sufficient quality as to provide a balancing in ecological values. Many submissions referenced potential impact on *Persoonia* as grounds to oppose the proposal.
- b. included a summary of key issues raised by agencies and the Department of Planning's response to those issues. This included:
- i. the issue raised as referred to above at paragraph 54 and 55 and
  - ii. from the Department of Environment, Water, Heritage and the Arts (Cth) a further issue raised identifying that it is unclear if the proposed offsets will adequately mitigate against the impact of the development on *Persoonia*. The response as stated in the summary was simply to refer to the 17 ha *Persoonia* Park and potential habitat to the south of Black Creek within the proposed conservation area.
- c. The Environmental Assessment Report;
- d. The Revised Preferred Project Report Statement of Commitments;

- e. The Instrument of Approval for the Proposed Concept Plan;
- f. The Preferred Project Report;
- g. Copies of some agency submissions, including the submission from the Department of Environment and Conservation which reiterated that Department's committing to the terms of the Deed, and included the statements set out at paragraph 54 above:
- h. A summary of public submissions including:
  - i. A summary of the submission of Gordon Patrick (who is described in the Department of Environment and Conservation NSW submission included in material before the First Respondent as the environmental consultant who has been engaged to collate information on *Persoonia*) which identified that the Proposed Concept Plan was highly likely to have a significant long term impact on the critically endangered species *Persoonia*, the EA documentation is inadequate and contains a number of uncertainties, and the proposed Persoonia Park is poorly located well away from the main population area of the species located to the west and not considered large enough to provide viable habitat for the *Persoonia* population in the medium or long term.
  - ii. A summary of submissions which showed that 189 of the 210 public submissions objected expressly or by implication on the grounds of the impact upon *Persoonia*.

68 There was no material before the First Respondent to establish that the environmental impact of the rezoning upon *Persoonia* would be mitigated by the Agreed Measures, or which provided a reasoned response to the submissions set out at paragraphs 53 to 57 above.

69 On 9 February 2009 the First Respondent signed the Briefing Memo, apparently indicating adoption of the recommendation.

70 The Concept Plan Approval is subject to a number of modifications as set out in Schedule 2 of the Concept Plan Approval, including the following:

*Persoonia Pauciflora*

- a. *Huntlee will continue to undertake the actions related to the protection of Persoonia Pauciflora as required in the Deed of Agreement signed between the NSW Government and Huntlee,*
- b. *Huntlee is to continue to work with members of the NSW Department of the Environment and Climate Change and implement trial measures to increase the number of Persoonia Pauciflora;*

- c. *Huntlee will protect all in-situ occurrences of Persoonia Pauciflora within the site for up to 5 years consisting of the following measures: development of a 30 m diameter buffer surrounding each plant on the site, collection of seeds and cuttings with a view to achieving successful propagation and plants to be translocated within 5 years of the date of the Deed of Agreement by DECC. ...*

(together the Agreed Measures)

"B20. Public Bus Services

*The proponent shall contract a private bus operator or make other appropriate arrangements to provide bus services to the residential villages, town centre and large-lot residential area to the development and achieve a 70% car transport mode share. Details of the proposed private operator service arrangements, including bus routes and service frequency shall be provided with the future applications for each subsequent stage."*

(the Transport Measure)

## The Public Interest

71 The precautionary principle and/or the principles of inter-generational equity and conservation of biological diversity (as defined in the EP&A Act) as they applied to the risks or serious and irreversible damage to *Persoonia* form part of the public interest as regards the SEPP amendment and the Concept Plan Approval given that:

- a. the circumstances of the case make it clear that the precautionary principle and the principles of conservation biodiversity and of inter-generational equity are of central importance given the clear threats of serious and irreversible damage to *Persoonia* and
- b. Australia has international obligations in relation to the conservation of threatened species. Australia entered into the international treaty Convention on Biological Diversity in 1992 and one of the primary aims of this treaty is to conserve biological diversity. Conservation of biological diversity is a foundation of ecologically sustainable development and is one of the three core objectives of the Federal Government's National Strategy for Ecologically Sustainable Development, which was created to meet our international obligations under the Biodiversity Convention.
- c. Complying with international obligations is in the public interest.
- d. Encouragement of the principles of ESD is expressly incorporated as one of the objects of the EP&A Act and the scope, object and purpose of the EP&A Act construed in the context of a legislative scheme which includes the Environment Protection Biodiversity Conservation Act 1999 (Cth) and the Threatened Species Conservation Act 1999 (NSW) is that, in circumstances

such as this case where a Proposed Concept Plan is likely to have a serious and irreversible impact upon a critically endangered species, ESD principles are part of the public interest.

- e. The listing of *Persoonia* as a critically endangered species under both the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and the Threatened Species Conservation Act 1999 (NSW) reflect a public concern for the preservation of *Persoonia*, and are indicative of a public interest in the proper consideration of potential environmental impacts upon *Persoonia* and of proper assessment of the effectiveness of the Agreed Measures.
- f. The requirements under schedule 4 of the Environment Protection Biodiversity Conservation Regulations 2000, which include that Environment Assessment Report must include a detailed assessment of the nature and extent of likely short term and long term relevant impacts, a statement whether any relevant impacts are likely to be unknown, unpredictable or irreversible, any technical data and other information used or needed to make a detailed assessment of the relevant impacts and a description and assessment of the expected or predicted effectiveness of mitigation measures are indicative and reflective of the public interest.
- g. The significance of protecting the environment and of threatened species is such that the precautionary principle and the principles of conservation of biodiversity and inter-generational equity as regards *Persoonia* are part of the public interest.
- h. The public submissions make it clear that biodiversity and the impact of the Proposed Concept Plan upon *Persoonia* were matters upon which members of the public who were aware of the proposal were considerably concerned, which reflects and/or is indicative of a public interest in preserving biodiversity and avoiding significant long term impacts upon *Persoonia*.

### Grounds of Application as regards the SEPP Amendment

#### **Ground 1: Failure to take proper and meaningful account of the public interest**

72 The First Respondent was required to take the public interest as set out above into account in determining whether or not to make the SEPP Amendment.

73 The First Respondent failed to give proper and meaningful account of the public interest, the precautionary principle and the principles of conservation of biodiversity and inter-generational equity as they applied to the risks or serious and irreversible damage to *Persoonia*.

74 The First Respondent thereby failed to comply with an inviolable limitation upon her jurisdiction.

### Particulars

- a. The precautionary principle and/or the principles of conservation of biodiversity and inter-generational equity required consideration of the likely impacts of the proposed SEPP amendment upon *Persoonia* and of the extent to which mitigation measures will ameliorate those impacts.
- b. The precautionary principle and/or the principles of conservation of biodiversity and inter-generational equity required consideration of the likely impacts of the SEPP amendment upon *Persoonia* and of the extent to which mitigation measures will ameliorate those impacts.
- c. There was no material before the First Respondent to enable her to give proper and meaningful consideration to the precautionary principle and/or the principles of conservation of biodiversity and inter-generational equity as regards to the risks or serious and irreversible damage to *Persoonia*.

#### **Ground 2 – Reasonable apprehension of Bias**

- 75 By entering into the Deed the First Respondent agreed to take steps that she might not otherwise have taken to amend the SEPP to effect rezoning in respect of the Huntlee New Town site and/or adopted the Rezoning and Proportionality Incentives.
- 76 The First Respondent thereby:
- a. publicly stated that the NSW Government was inclined towards a particular outcome;
  - b. attached the NSW Government to a statement of predisposition as to the outcome of an application for SEPP amendment and/or applications made under Part 3A;
  - c. agreed that the sum of \$80,000 should be paid to the Department of Conservation in exchange for the promises as set out in the Deed; and/or
  - d. committed the NSW Government to help the Second Respondent achieve an outcome that it desired with respect to applications made under Part 3A.
- 77 A commitment to the terms of the Deed was specifically asserted in the submission of the Department of Environment and Conservation (a successor to a party to the Deed) indicating the continuing relevance of the Deed to that Department's response to the Proposed Concept Plan.
- 78 In the circumstances, there was, at the time the First Respondent made the purported decision to make the SEPP Amendment, a reasonable apprehension of bias in the decision-making of the First Respondent.
- 79 In the premises the SEPP Amendment is invalid.

**Ground 3 – irrelevant considerations**

- 80 In the SEPP Amendment the First Respondent took into account the existence and terms of the Deed.
- 81 This could not permissible be taken into account by the First Respondent in exercising such powers.
- 82 In the premises the SEPP Amendment is invalid.

**Grounds of Application as regards the Concept Plan Approval****Ground 4 – Failing to inquire as to impact on *Persoonia* and/or the efficacy of the Agreed Measures**

- 83 The material before the First Respondent clearly put her on notice as to issues as regards impact upon *Persoonia* and/or as regards the efficacy of the Agreed Measures.
- 84 The First Respondent was required in the circumstances to inquire and satisfy herself as to the likely impact of the Proposed Concept Plan and/or the efficacy of the Agreed Measures prior to determining the Concept Plan Approval.
- 85 The First Respondent failed to make any such inquiries.
- 86 The First Respondent thereby failed to comply with an inviolable limitation upon her jurisdiction.

**Particulars**

- a. The material before the First Respondent clearly indicated potentially serious impacts upon *Persoonia*.
- b. There was no scientific or other expert or experienced assessment before the Minister of the likely impact or the efficacy of the Agreed Measures.
- c. It was therefore incumbent upon the First Respondent to make inquiries to satisfy herself that the Agreed Measures would effectively mitigate the likely impacts upon *Persoonia*.

**Ground 5 – Failure to take proper and meaningful account of the public interest**

- 87 The First Respondent is required to give proper and meaningful consideration of the public interest before approval a Proposed Concept Plan.
- 88 The First Respondent failed to give any or any proper or meaningful consideration to the public interest comprising the precautionary principle and the principles of conservation of biodiversity and inter-generational equity as they applied to the risks or serious and irreversible damage to *Persoonia*.
- 89 The First Respondent thereby failed to comply with an inviolable limitation upon his jurisdiction.

Particulars

- a. The material before the Director-General in relation to the impacts of the Huntlee New Town proposal on *Persoonia*, as set out at paragraphs 53 to 57 and 67(b) above clearly indicated that the proposal would have a significant impact upon *Persoonia* and that the Agreed Measures were either known not to have succeeded in respect of *Persoonia* in the past, known not to succeed in respect of the *Persoonia* species generally, or were untested.
- b. The precautionary principle and the principles of conservation of biodiversity and inter-generational equity required proper and meaningful consideration of the likely impacts of the Proposed Concept Plan upon *Persoonia* and of the extent to which mitigation measures would ameliorate those impacts.
- c. The material before the Director-General and available to the First Respondent, as set out at paragraphs 53-57 above, showed that the Agreed Measures were unlikely to manage the environmental impacts of the proposal on *Persoonia* or were of uncertain benefit as regards managing the environmental impacts of the proposal on *Persoonia*.
- d. The First Respondent did not have before her any scientific or other informed assessment of the means by which the impacts of the Proposed Concept Plan upon *Persoonia* would be mitigated by the Agreed Measures.
- e. The First Respondent adopted the recommendation of the Director-General.
- f. The Environmental Assessment Report does not contain or evidence any proper or meaningful assessment of the environmental impacts of the Proposed Concept Plan or any proper or meaningful assessment of the efficacy of the Agreed Measures;
- g. There was no material before the Director-General and/or the First Respondent to allow either reasonably to conclude and/or infer that the environmental impacts of the Proposed Concept Plan upon *Persoonia* would be addressed or managed by the Agreed Measures.
- h. Given the extant obligations of the Second Respondent under the Deed, there was no basis to conclude that the Agreed Measures were dependent upon approval of the Proposed Concept Plan and/or that, absent such approval, those measures could not be relied upon.
- i. In the circumstances the First Respondent did not give any proper or meaningful consideration to the precautionary principle and/or the principles of conservation biodiversity or intergenerational equity as regards *Persoonia* which was a necessary component of the public interest.

**Ground 6 – Failure to take proper and meaningful account of agency and public submissions.**

- 90 The First Respondent was required to give proper and meaningful consideration of the results of submissions made under section 75H of the EP&A Act before approving the Proposed Concept Plan.
- 91 The First Respondent failed to give any or any proper or meaningful consideration to the agency and public submissions as they applied to the risks or serious and irreversible damage to *Persoonia*.
- 92 The First Respondent thereby failed to comply with an inviolable limitation upon her jurisdiction.

**Particulars**

- a. The Submissions as set out in paragraphs 53-57 and 67(b) above raised significant issues as to the impact on *Persoonia* and the efficacy of the Agreed Measures.
- b. These issues are not addressed or responded to in any meaningful way in the Environmental Assessment Report or the Briefing Memo;
- c. The Environmental Assessment Report and the Briefing memo are inconsistent with and / or do not make reference to the submissions set out at paragraphs 53-57 and 67(b) above.

**Ground 7 – Reaching an irrational conclusion as to the efficacy of the Agreed Measures**

- 93 If and to the extent that the First Respondent adopted and/or relied upon the Director-General's conclusion that the Agreed Measures would adequately manage the environmental impact of the Proposed Concept Plan upon *Persoonia* this was an irrational and unreasonable conclusion not based upon findings or inferences of fact supported by logical grounds.

**Ground 8 – No power to impose unachievable and unenforceable modification on Concept Plan Approval**

- 94 In the Concept Plan Approval the First Respondent stated that the reason for the imposition of modifications to the Proposed Concept Plan included to adequately mitigate the environmental impacts of the development and to protect the public interest.
- 95 To be effective, modifications to a concept plan as imposed under a concept plan approval under section 75O of the EP&A Act must be capable of implementation by the proponent.
- 96 The First Respondent acts beyond power if she requires a modification of a concept plan which is incapable of being effected by the proponent.
- 97 Modification B20 Public Bus Services as set out at paragraph 70 above, depends, for compliance, upon the achievement of a 70% car transport mode share.

98 The Second Respondent is not able to effect compliance with that requirement.

99 Accordingly, modification B20 Public Bus Services is beyond the power of the First Respondent.

100 In the circumstances, the Concept Plan Approval is invalid.

**Ground 9 – Reasonable apprehension of Bias**

101 The Applicant repeats and relies upon the matters identified in paragraphs 75 to 77 above.

102 In the circumstances, there was, at the time the First Respondent made the purported decision to grant the Concept Plan Approval, a reasonable apprehension of bias in the decision-making of the NSW Government of which the First Respondent is a member.

103 In the premises the Concept Plan Approval is invalid.

**Ground 10 – irrelevant considerations**

104 In the Concept Plan Approval the First Respondent took into account the existence and terms of the Deed.

105 This could not permissibly be taken into account by the First Respondent in exercising such powers.

106 In the premises the Concept Plan Approval is invalid.

**Relief sought**

107 The Applicant seeks the relief sought in the Summons.

**SIGNATURE**

Signature of legal representative

Capacity

Date of signature

*M. J. Kelly per Kirsty Ruddoch*  
Solicitor

*26 May 2009*

**Attachment A**  
Applicant's Points of Claim

Sweetwater Action Group Inc v Minister for Planning & Huntlee Holdings Pty Ltd

Land & Environment Court Proceedings No. 40225 of 2009

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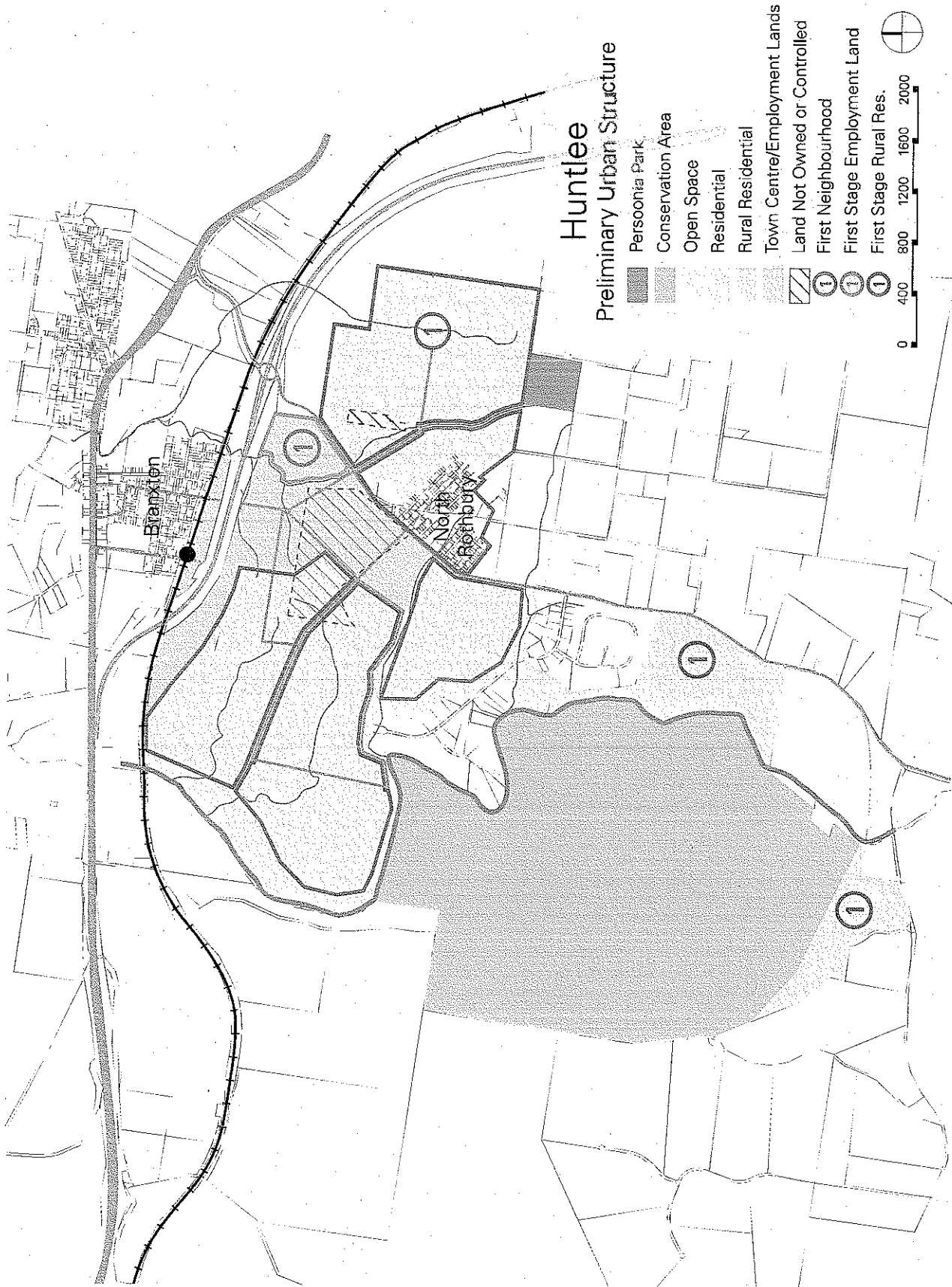














Figure 4 - Preliminary Urban Structure

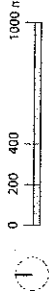
**Attachment B**  
Applicant's Points of Claim

Sweetwater Action Group Inc v Minister for Planning & Huntlee Holdings Pty Ltd

Land & Environment Court Proceedings No. 40225 of 2009

Huntlee - Concept Plan

-  Major Village Centre
-  Minor Village Centre
-  Villages
-  Residential
-  Large Lot Residential
-  Town Centre Residential
-  Employment
-  Potential Rail Museum Site
-  Open Space
-  Conservation Area
-  Persoonia Park
-  F3 Reservation








**Attachment C**  
Applicant's Points of Claim

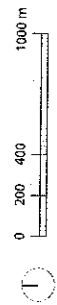
Sweetwater Action Group Inc v Minister for Planning & Huntlee Holdings Pty Ltd

Land & Environment Court Proceedings No. 40225 of 2009



Huntlee - Proposed Zoning

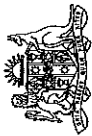
-  R1 Residential
-  R5 Large Lot Residential
-  B4 Mixed Use
-  B5 Business Development
-  E1 Conservation Area



**Attachment D**  
Applicant's Points of Claim

Sweetwater Action Group Inc v Minister for Planning & Huntlee Holdings Pty Ltd

Land & Environment Court Proceedings No. 40225 of 2009



NSW GOVERNMENT  
Department of Planning

**State Environmental Planning  
Policy (Major Projects) 2005  
(Amendment No 35)-**

Huntlee New Town Site-  
Land Zoning Map-  
sheet LZN 001

Subject Land



Zone

**B4** Mixed Use

**E1** National Parks and Nature Reserves

**R1** General Residential

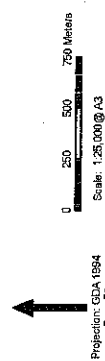
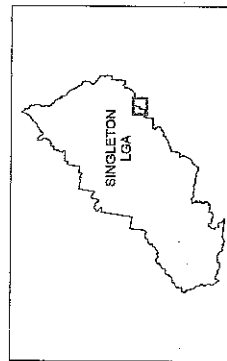
**R5** Large Lot Residential

**PRE3** Public Recreation

**SP2** Infrastructure

Cadastral

Cadastral 18/11/08 © Dept of Lands



Projection: GDA 1984  
Zone 56

Map Identification Number  
SEPP\_MP\_INT\_LZN\_001\_20081119

