

DECLARATIONS AND ORDERS

COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	4
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

Prepared for	Sweetwater Action Group Incorporated
Legal representative	Kirsty Ruddock, Environmental Defender's Office Ltd
Contact name and telephone	Melissa Jolley (02) 9262 6989

DECLARATIONS AND ORDERS

By consent, the Court declares that:

- 1 The concept plan approval MPA 07_0064 for the development of the Huntlee New Town under section 75O of the Environmental and Assessment Act 1979 ("the Act") dated 9 February 2009 is void and of no effect.
- 2 The decision by the first respondent to recommend the amendment of the State Environmental Planning Policy (Major Projects) 2005 through Amendment no. 35 gazetted on 9 January 2009 is void and of no effect.
- 3 The State Environmental Planning Policy (Major Projects) 2005 Amendment no. 35, gazetted on 9 January 2009 is void and of no effect.

By consent, the Court orders that:

- 4 The concept plan approval MPA 07_0064 for the development of the Huntlee New Town on 9 February 2009 under section 75O of the Act is quashed.
- 5 The decision by the first respondent to recommend the amendment of the State Environmental Planning Policy (Major Projects) 2005 through Amendment no. 35 gazetted on 9 January 2009 is quashed.
- 6 The State Environmental Planning Policy (Major Projects) 2005 Amendment no. 35 gazetted on 9 January 2009 is quashed.
- 7 The first and second respondents pay the applicant's costs of the proceedings, as agreed or assessed.

- 8 The orders dated 7 October 2009 are vacated.
- 9 The hearing dates of 19 – 23 October 2009 are vacated.
- 10 Orders 4 - 9 be entered forthwith.
- 11 Such further or other orders as the Court thinks fit.

By consent, the court notes that:

- 12 The above declarations and orders are made on the basis that the parties agree, having regard to the decision of the Court in *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] LEC 140 and the statement of agreed facts, that:
- a. At the time the first respondent made the purported decision to grant concept plan approval MPA 07_0064 for the development of the Huntlee New Town under section 75O of the Act dated 9 February 2009:
 - i. there was a reasonable apprehension of bias in the first respondent;
and
 - ii. the first respondent took into account an irrelevant consideration by having regard to the Deed between the Minister for Planning, the Minister for the Environment and Hardie Holdings Pty Ltd dated 22 December 2006.
 - b. At the time the first respondent made the purported decision to recommend the amendment of the State Environmental Planning Policy (Major Projects) 2005 through Amendment no. 35 gazetted on 9 January 2009:
 - i. there was a reasonable apprehension of bias in the first respondent;
and
 - ii. the first respondent took into account an irrelevant consideration by having regard to the Deed between the Minister for Planning, the Minister for the Environment and Hardie Holdings Pty Ltd dated 22 December 2006.

SIGNATURES

Signature of legal representative
for the **Applicant**

[Signature] per Kirsty Ruddock

Capacity

Solicitor

Date of signature

19 October 2009

Signature of legal representative
for the **First Respondent**

[Signature] by her employed solicitor
Sennite Denise Smith 19.10.09

Capacity

Date of signature

Signature of legal representative
for the **Second Respondent**

[Signature] per Christine Couper

Capacity

Solicitor

Date of signature

19 October 2009

[Signature]
Judge.



19 October 2009

STATEMENT OF AGREED FACTS

1. All parties in this matter are agreed that on the basis of the facts as set out below this case is relevantly indistinguishable from that of *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140, to the extent relevant to the determination of the applicant's grounds 2, 3, 9 and 10. Those grounds allege that the *State Environmental Planning Policy (Major Projects) 2005 Amendment no. 35* ("**SEPP Amendment no. 35**") and the concept plan approval given on 9 February 2009 are invalid because the Minister took into account irrelevant considerations and there was a reasonable apprehension of bias on the part of the Minister.
2. On or about 16 October 2006, the NSW Minister for the Environment and the Minister for Planning (the **Minister**) entered a Memorandum of Understanding (the **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 as agent for the landholders of the relevant lands (pp.390-406).
3. On 22 December 2006, the Minister and the Environment Minister entered the Agreement Regarding Lower Hunter Land Offsets (the **Agreement**) 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 (pp.447-474).
4. Hardie Holdings Pty Ltd entered the Agreement (signed by Duncan Hardie) as agent for and on behalf of the landholding companies.
5. Huntlee Holdings Pty Ltd (**Huntlee**) is now the ultimate holding company of Hardie Ayrefield Pty Ltd, a signatory to the Agreement and as agent for whom Hardie Holdings Pty Ltd entered the Agreement.
6. The Agreement was made to give effect to the MOU.
7. Clause 4.2 of the Agreement provided:

4.2 Subject to cl. 4.3 and the requirements of the EP&A Act, the Minister for Planning agrees to use reasonable endeavours to allow the Landholder to achieve development that is consistent with the Development Potential of Schedule 1 Land by either:

- (a) Rezoning the land through an amendment to State Environmental Planning Policy 2005 (Major Projects) and approval of any concept plan submitted under Pt 3A of the EP&A Act; and/or
- (b) facilitating the Rezoning of the land through the gazettal of a Local Environmental Plan prepared by the relevant local government authority and made by the Minister for Planning and approval of any concept plan submitted under Pt 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.

8. On 15 December 2008 the Minister signed a briefing note recommending to Her Excellency the Governor that she make the proposed *SEPP Amendment no. 35* (pp 1525-1531). The *SEPP Amendment no 35* was made by the Governor on 7 January 2009 in accordance with the recommendation of the Minister (pp.1532 - 1562).
9. The material before the Minister at the time she made the decision to recommend the making of the *SEPP (Major Projects) 2005 (Amendment No 35)* comprised a briefing note, with attachments, prepared by the Director-General and the Executive Director, Strategic Sites and Urban Renewal. Under the heading "Statutory Context", the briefing note contained a paragraph headed Deed of Agreement which referred to and described the Agreement (p.1526).
10. The Minister admits that she took into account the existence of the Deed in determining to recommend to the Governor that the SEPP amendment be made (paragraph 80(a) of the Minister's defence).
11. The Director-General's Environmental Assessment Report is dated January 2009 (at pp.1593-1635).
12. On 9 February 2009, the Minister granted the Concept Plan Approval (p. 1731).

13. The material before the Minister at the time of the decision to grant the Concept Plan Approval included a briefing Memorandum dated 27 January 2009 from the Director-General and the Executive Director, Strategic Sites and Urban Renewal (at pp.1564 - 1571) and the Environmental Assessment Report. The Agreement was repeatedly referred to in the Environmental Assessment Report (eg pp.1599, 1616, 1633) and in the briefing Memorandum (eg pp.1567, 1571).
14. On 9 February 2009, the First Respondent signed the briefing memo (at p.1644) and approved the Concept Plan under s 75P of the *Environmental Planning and Assessment Act 1979* (p.1731).
15. The Minister admits that she took into account the existence and terms of the Deed in determining to approve the Concept Plan (paragraph 104(a) of the Minister's defence).

SIGNATURES

Signature of legal representative for the **Applicant**

Capacity

Date of signature

[Signature] per Kirsty Ruddock
Solicitor
19 October 2009

Signature of legal representative for the **First Respondent**

Capacity

Date of signature

[Signature] by her employed solicitor
Jennifer Denise Smith 19.10.09

Signature of legal representative for the **Second Respondent**

Capacity

Date of signature

[Signature] per Christine Coughton
Solicitor
19 October 2009

