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Commercial in Confidence

13 May 2013

The Hon. Barry O'Farrell MP
NSW Premier
Level 40, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Via email: office@premier.nsw.gov.au

Dear Premier,

Rio Tinto remains deeply concerned by the implications for the Mount Thorley Warkworth ('MTW') Mine of the NSW Land & Environment Court's decision to refuse the planning application for the Warkworth Extension Project. It has the potential to significantly impact our ability to maintain the existing workforce of more than 1300 people and threatens the viability of the entire Mount Thorley Warkworth operation.

As we and others in the NSW mining sector begin to understand the judgement in greater detail, it is becoming evident that it has far more wide ranging consequences than just in respect of the MTW Mine. The judgement sets a precedent with the potential to threaten all major project approvals and applications for State Significant development and therefore also threatens the broader economic development of the State. Having briefed the Rio Tinto Board and CEO on the judgement last week I can only reiterate their concern about the risks this judgement poses for other Rio Tinto projects in NSW and the need to identify a suitable solution in respect of it as quickly as possible.

Since our meeting on 2 May 2013 we have had several discussions with the NSW Department of Planning & Infrastructure. While we remain grateful for the opportunity to provide input into the Department's development of options for Government consideration, we are concerned that some options being explored will not resolve the immediate issues facing the MTW Mine and may in fact further erode confidence in the ability of the NSW planning system to deliver timely and predictable outcomes for major projects.

We understand the options include re-lodging a new development consent for the development while concurrently seeking a minor modification under the current development consent and/or amendments to the State Environment Planning Policy ('SEPP') to make the development the subject of the Warkworth Extension Project permissible without development consent when carried out in accordance with the now overturned Planning and Assessment Commission ('PAC') determination of

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2012. Given the importance of working to identify a solution, we have sought legal advice on these options (see attachment which you will appreciate is strictly confidential) to gain a better understanding of the risks should Government proceed to accept these options.

Our legal advice concludes that "*... the above mentioned solutions have considerable legal risks that are likely, at best, to result in litigation being commenced in respect of them, and at worst, them being found to be unlawful. Further, any legal challenge permits the seeking of interlocutory injunctions to prevent development being carried out while the appeal is on foot.*"

In addition to any legal risks identified in the attached advice we also believe it is highly unlikely an approval can be delivered through the options outlined above within a timeframe that will secure the future on the mine and avoid significant job losses. Having already spent 3.5 years seeking to secure planning approval at MTW Mine for the Warkworth Extension Project you can appreciate that we have little confidence that the NSW planning system is able to deliver outcomes on significantly shortened timeframes.

Based on the advice we have received to date it appears that all options within the NSW planning legislation have been exhausted for the MTW Mine in regards to the Warkworth Extension Project. The options outlined above will also do nothing to address the uncertainty the precedent set by the Court's decision has caused for mining and other industries more generally.

In our opinion the only option left to secure an outcome that will deliver certainty to MTW and other major project approvals in NSW is to legislate to validate the decision of the PAC to approve the Warkworth Extension Project. There are several precedents of the NSW Government taking such action. As examples see:

- The *State Environmental Planning (Permissible Mining) Act 1996* (NSW) which expressly validated SEPP No. 45 and the development consent for the Bengalla proposal. This meant that the appeal must be upheld, but the Court of Appeal agreed to deliver its reasons for judgment as if the Act had not been passed for the purposes of a costs hearing.

- The *Mining Amendment (Improvements on Land) Act 2008* which overturned the effect of the Court of Appeal judgment of Justices Hodgson, Tobias and Bell in the case of Ulan Coal Mines Limited v Minister for Mineral Resources and Anor [2008] NSW CA 174 in respect of its impact on mining leases granted to Moolarben Coal Mine.

- The *Mining and Petroleum Legislation Amendment (Land Access) Act 2010* which overturned the Supreme Court decision in *Brown & Anor v Coal Mines Australia; Alcorn & Anor v Coal Mines Australia Pty Ltd* [2010] NSWSC 143 in respect of the validity of various access arrangements.

The above examples clearly demonstrate that there is a strong precedent of legislating to rectify issues arising from Court decisions which do not accord with Government policy.

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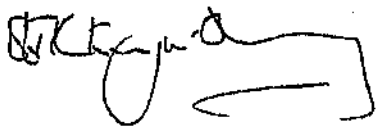
I appreciate how the NSW Government intends to proceed is ultimately a matter for the Cabinet. Our interest in providing you with the attached advice is to ensure that any options under consideration will ultimately deliver an outcome that protects the jobs of our employees and enables our business to continue to invest in NSW.

I would finally like to acknowledge your efforts and those of your office in giving due consideration to the importance of this matter.

Yours sincerely



Harry Kenyon-Slaney
Chief Executive Energy

cc.
The Hon. Brad Hazzard, Minister for Planning and Infrastructure
The Hon. Mike Baird, NSW Treasurer
The Hon. Chris Hartcher, Minister for Energy & Resources
The Hon. Andrew Stoner, Minister for Trade & Investment

MinterEllison
LAWYERS

11 May 2013

Ms Gillian Lyons
Company Secretary and Senior Corporate Counsel – Coal Australia
Warkworth Mining Limited
c/- Rio Tinto Energy, Rio Tinto Services Limited
120 Collins Street
MELBOURNE VIC 3000

BY EMAIL: Gillian.Lyons@riotinto.com

Dear Gillian

Mount Thorley Warkworth
Advice on subsequent development application for mine expansion

We refer to your request for advice, in respect of lawfulness and legal risks, of the proposal being considered to re-lodge a development application for the same development that was recently refused by Preston CJ in respect of the Warkworth Extension Project in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 (the **Warkworth decision**).

You have also asked for similar advice in respect of the proposal being considered to seek amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (the **SEPP**) to make development permissible without consent on all land the subject of the 2012 PAC determination for the Warkworth Extension Project.

ADVICE

Re-lodge a development consent

We understand that consideration is being given to a proposal to lodge a short term modification under s75W of the *Environmental Planning and Assessment Act 1979* (the **EP&A Act**) to the 2003 Warkworth Development Consent to permit mining in NDA 1 in the short term and to then re-lodge a development application for the same development that was recently refused by Preston CJ in the Warkworth decision.

In respect of the s75W modification we note that there are significant legal risks to even a small modification. Preston CJ's judgment found that the NDA1 area was central to some of the social impact arguments. We note that s75W has already been the subject of a Court of Appeal decision, *Barrick Australia Ltd v Williams* [2009] NSWCA 275 in which the Court did not rule on the ambit of the provision but did allude to the fact that a modification must have minimal environmental impacts beyond those assessed in the 2003 Development Consent.

Given this and the findings of Preston CJ in respect of the NDA1 there is a risk of a legal challenge to any such modification application. Any such legal challenge raises the risk of the

applicant seeking an interlocutory injunction, from the Land and Environment Court, to prevent any works being carried out the subject of the modification. Our view is that given Preston CJ's decision in respect of environmental impacts any such interlocutory injunction application would have reasonable prospects of success. While an application for security for costs could be sought, an argument opposing it on the grounds of public interest litigation would be likely.

In respect of the proposal for re-lodgement of a development application for the same development that was recently refused by Preston CJ regarding the Warkworth Extension Project, we are of the view that such an application would likely to be unlawful for the reasons outlined below. A similar position would exist in respect of an interlocutory injunction as outlined above.

In *Turier v Nipote Pty Ltd & Anor* (1983) 48 LGRA 20 the Court held that it was in the public interest that the Council follow an earlier decision of the Land and Environment where the Court had refused development consent to a particular development application. In that case the same development application (although refused by the Court) was subsequently submitted to the Council following the Court's refusal. In reaching its conclusion the Court relied on sections 39(5) and 56 of the *Land and Environment Court 1979* (the **LEC Act**). Section 39(5) provides:

> *"The decision of the Court upon and appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect accordingly."*

Section 56 says "*in relation to proceedings in Class 1, 2, 3 or 4 of the Court's jurisdiction ... a decision of the Court shall be final and conclusive.*"

According to McClelland CJ:

> *"In my view it is in the public interest that a consent authority should uphold a decision of this Court which is expressed in the Land and Environment Court act to be final for the purposes of that Act or any other Act or instrument.... It is the breach of this implicit duty cast upon the council by virtue of s 39(5) and s 56 o f the Land and Environment Court Act and by s 90(1) of the Environmental Planning and Assessment Act which invalidates the council's purported consent."*

A modification to the development the subject of the application for the Warkworth Extension Project is unlikely to overcome this issue. In *Parramatta City Council v PT Limited & Anor* [1999] NSWLEC 66 the Applicants sought orders that Respondents comply with the hours of operation as set out in the Respondent's development consent. The particular condition of consent (in relation to hours of operation) was the subject of earlier merit appeal proceedings before Commissioner Hussey of the Land and Environment Court. The merits appeal sought to amend the condition regarding the hours of operation. Commissioner Hussey refused the appeal on the basis of noise impacts. In the injunction proceedings Lloyd J quotes the decision of *Turier* and said "*it would thus be inappropriate for me to now depart from the Assessor's finding.*"

We do point out that there is a decision of the Land and Environment Court which distinguied the decision of *Turier*. In *W & C Miller v Sutherland Shire Council* (1996) 130 LGERA 286 Bignold J held that s 39(5) of the LEC Act did not act as a bar to litigation. In that case Applicant appealed to the Land and Environment Court under s 97 of the EP& A Act and s 317 of the *Local Government Act 1993* (**LGA**) in relation to a development application and a building application in relation to a car port. The Court had 2 years earlier refused similar appeals in respect of the same land.

The Court relied on the decision of the House of Lords in *Thrasyvoulou v Secretary of State for the Environment* [1990] 1 ALL ER 65 where Lord Bridge said (with the concurrence of the other Lords):

> "*A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in the existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such as decision cannot give rise to an estoppel per res judicatam.*"

According to Bignold J they were not the same matters which were before the Court, despite being substantially the same development and building applications which were determined by the Court's Assessor previously. According to Bignold J they were "*a new matter based upon the Applicant's new development and building application for substantially the same development as proposed in the earlier applications.*" The earlier decision of the Court's Assessor, was in Bignold J's view, "*distinct*" from the Council's decision in the current proceedings.

Bignold J, in *W & C Willliam* clearly indicated the correctness of *Turier*. However, in *W & C William* Bignold J considered that the issue of time was a factor for distinguishing *Turier*. In *Turier* the reapplication was made 5 weeks after the Court's refusal, whereas in the case before Bignold J it was made 2 years after. In our view unless a substantial period of time passes between a Court judgment and the lodging of a new planning application for the same development *Turier* is likely to apply to make such an application unlawful.

There are a number of subsequent cases which have referred to the decision in *Turier*. We enclose a copy of our review of those cases in Annexure A to this advice.

We also note that for the above approach to be successful the re-lodged development application would have to be determined within 6 months. We are of the view that this timeframe is impossible to meet and if it was met, there would be a significant risk of a legal challenge on administrative law grounds due to poor documentation and/or lack of compliance with the EP&A Act processes. In particular, we note that any re-lodged EIS would need to take into account the recently lodged Bulga EIS, more recent data and recent Government policy developments. In our view, a robust EIS could not be written in less than 6 months and a more realistic timeframe for the determination is 12 months from lodgement, as a minimum. To provide some context to this we note that the Government's own Coborra Project application is yet to be determined, 3 years after it was lodged.

SEPP Amendment

You have also asked for similar advice in respect of the proposal to consider making amendments to the SEPP to make development permissible without consent on all land the subject of the 2012 PAC determination for the Warkworth Extension Project.

Our view is that this option has a high risk of legal challenge on administrative law grounds such as bias and pre-determination, given the decision of Preston CJ. An example of such a challenge is the decision of the *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, in respect of the Bengalla Mine. As you are aware this appeal resulted in special legislation to validate the planning approval that was made invalid by the challenge to the SEPP in question.

In addition, this option would result in Part 5 of the EP&A Act applying to subsequent approvals that would be required. This would require consideration of environmental factors under s. 112

and the likely requirement for an EIS under s. 112. Absent a full and adequate EIS, any such approvals could be subject to administrative law challenges based on the decision of Preston CJ in respect of environmental impacts from the project.

Conclusion

In conclusion, the above mentioned solutions have considerable legal risks that are likely, at best, to result in litigation being commenced in respect of them, and at worst, them being found to be unlawful. Further, any legal challenge permits the seeking of interlocutory injunctions to prevent development being carried out while the appeal is on foot.

Given the above, our view is that the only risk free option for resolving the above issues is to legislate to validate the decision of the PAC to approve the Warkworth Extension Project. We note that such a solution also has benefits in respect of probity as it is a decision of Parliament and not a single Minister (which the other solutions would rely on). The following are examples of where this has occurred:

Example 1 - On 7 August 1995 the Minister then determined the Bengalla development application by granting development consent subject to conditions. Rosemount then commenced proceedings to challenge the validity of SEPP No. 45 and Stein J in the NSW Land and Environment Court held that SEPP 45 was invalid (*Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 1). This decision was subject to appeal in the Court of Appeal. While judgment was reserved in the Court of Appeal. The NSW Parliament enacted the *State Environmental Planning (Permissible Mining) Act 1996* (NSW) which expressly validated SEPP No. 45 and the development consent for the Bengalla proposal. This mean that the appeal must be upheld, but the Court of Appeal agreed to deliver its reasons for judgment as if the Act had not been passed for the purposes of a costs hearing.

Example 2 - In *Ulan Coal Mines Ltd v Minister for Mineral Resources and Anor* [2007] NSWSC 1299 ('Supreme Court Case'), Ulan Coal Mines Limited ('UCML') sought various declaratory relief. In summary, UCML argued that mining leases should not be granted to Moolarben Coal Mines Limited ('MCM') because they would cover UCML land on which 'improvements' were located. Section 62(1) of the Mining Act 1992 ('Mining Act') prevents the grant of a mining lease in this situation.

Following this decision the Minister granted the relevant mining leases to MCM.

Ulan then appealed this decision to the Court of Appeal. On 8 November 2008, judgment was handed down by Justices Hodgson, Tobias and Bell in the case of *Ulan Coal Mines Limited v Minister for Mineral Resources and Anor* [2008] NSW CA 174 ('Court of Appeal Case'). This decision effectively overturned the Supreme Court Case and would have resulted in the mining leases that had been granted to MCM being invalid.

No orders were made and parties were asked to make submissions as to what they should.

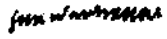
Prior to this occurring the State Government passed legislation overturning the Court of Appeal Case. This resulted in the mining leases granted to MCM being legislatively validated.

Example 3 - In *Brown & Anor v Coal Mines Australia; Alcorn & Anor v Coal Mines Australia Pty Ltd* [2010] NSWSC 143 the Supreme Court ruled that various access arrangements entered into by BH were invalid. The result would have been that these access arrangements, and various other access arrangements entered into by explorers in NSW would have been invalid.
Please give consideration to the matters raised above and provide us with your further instructions.

The above examples clearly demonstrate that there is precedent of legislating to overturn decisions of Courts that do not accord with Government policy.

Should you wish to discuss this advice please do not hesitate to contact John Whitehouse or Simon Ball.

Yours faithfully
MINTER ELLISON



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enclosure

ANNEXURE A

Turier v Nipote Pty Ltd & Anor

Facts: On 2 March 1982 Gosford City Council (the **Council**) refused a development application for holiday cabins (**development application no. 1**). The LEC rejected an appeal against the Council's refusal.

Subsequently on 21 July 1982 (one month after refusal) a further development application was lodged with the Council for holiday cabins on the same land (**development application no. 2**) under a different applicant's name (although it appeared from the evidence that the architect had lodged the development application no. 1 on behalf of the second applicant).

Development application no. 2 did not differ in any material way to development application no. 1. The Council granted development consent to development application no. 2.

The grant of development consent to development application no. 2 was challenged under s123 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) on a number of grounds, including a ground that Council breached an implicit duty to follow the earlier decision of the Land and Environment Court whilst considering development application no. 2.

Decision: CLASS 4 - On the ground alleging that it was in the public interest that Council follow the Court's decision, the Court upheld this contention, relying on section 39(5) and 56 of the *Land and Environment Court Act 1979*.

Section 39(5) provides:

> "*The decision of the Court upon and appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect accordingly.*"

Section 56 says "*in relation to proceedings in Class 1, 2, 3 or 4 of the Court's jurisdiction ... a decision of the Court shall be final and conclusive.*"

According to McClelland CJ:

"*In my view it is in the public interest that a consent authority should uphold a decision of this Court which is expressed in the Land and Environment Court act to be final for the purposes of that Act or any other Act or instrument.... It is the breach of this implicit duty cast upon the council by virtue of s 39(5) and s 56 o f the Land and Environment Court Act and by s 90(1) of the Environmental Planning and Assessment Act which invalidates the council's purported consent.*"

The majority of the decision focused on whether the Council properly considered the requirements of the then applicable Interim Development

Order which required the Council to be satisfied that the holiday cabins proposed would not be used for future permanent occupation. On this point the Court found that:

> *"The most charitable assessment which I am able to make of the council's conduct is that it displayed a casual indifference to what should have been the serious task of satisfying itself that the development to which it purported to give its consent would not result in permanent occupancy of the proposed dwelling houses."*

Cases which consider Turier

W & C Miller v Sutherland Shire Council (1996) 130 LGERA 286 – DID NOT APPLY

Facts: CLASS 1 - Applicant appealed to the Land and Environment Court under s 97 of the EP& A Act and s 317 of the *Local Government Act 1993* (**LGA**) in relation to a development application and a building application in relation to a car port. The Court had 2 years earlier refused similar appeals in respect of the same land.

Decision: The Court held that s22 and s 39(5) of the LEC Act did not act as a bar to litigation of the current appeals. The Court relied on the decision of the House of Lords in *Thrasyvoulou v Secretary of State for the Environment* [1990] 1 ALL ER 65 where Lord Bridge said (with the concurrence of the other Lords):

> *"A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in the existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such as decision cannot give rise to an estoppel per rem judicatam."*

According to Bignold J they were not the same matters which were before the Court, despite being substantially the same development and building applications which were determined by the Court's Assessor previously. According to Bignold J they were "*a new matter based upon the Applicant's new development and building application for substantially the same development as proposed in the earlier applications.*" The earlier decision of the Court's Assessor, was in Bignold J's view, "distinct" from the Court's decision in the current proceedings.

Bignold J goes on further to distinguish *Turier* from his case on the basis that *Turier* was a Class 4 proceeding which challenged the grant of development consent which had been granted by the Council, despite being refused earlier by the Council and also Court.

Bignold J also considered that the issue of time was also a factor for distinguishing *Turier*. In *Turier* the reapplication was made 5 weeks after the Court's refusal, whereas in this case it was made 2 years after.

A further factor which Bignold J considered relevant was that development consent was ultimately not required for the car port.

Parramatta City Council v PT Limited & Anor [1999] NSWLEC 66

Facts: CLASS 4 – Applicants sought an injunction against Respondents (who are part of Westfield) alleging that they are using the loading docks otherwise than in accordance with the development consent. Respondents accepted that they were acting otherwise than in accordance with the condition in relation to the loading docks, however they were awaiting the outcome of a class 1 appeal in relation to a development application to vary the hours in the loading dock condition.

In 1994 consent was granted to the shopping centre, including the loading docks. In 1997 a development application was lodged to vary the hours of operation in relation to use of loading docks. This development application was refused by the Council. Subsequently a class 1 application was lodged with the Court which was dismissed in 1998 by Commissioner Hussey. His decision was subsequently appealed under s56A. The s56A appeal was dismissed and a summons to appeal was lodged against Talbot J's decision in February 1999.

During this time a further development application was lodged seeking to extend the hours of use of the loading docks. The hours sought were similar to the earlier application (by half hour). An appeal was lodged against the Council's deemed refusal. It had not been determined at the time the Class 4 proceedings were heard.

Decision: Lloyd J noted that most of the issues raised in the Class 4 were similar issues (merit related issues) to those raised in the Class 1 before Hussey who dismissed the Class 1 on the basis that the projected noise increase would have adverse impacts on the amenity of the neighbourhood. Lloyd J then quotes *Turier* and held that "*it would thus be inappropriate for me to now depart from the Assessor's finding.*"

Lloyd J then enforced the hours of operation of the loading dock, in accordance with the development consent.

Hortis v Manly Council & Anor [1999] NSWLEC 151

Facts: CLASS 4 – Applicant challenged the Council's decision to grant development consent to a dwelling house and associated works, which were to be erected on land adjoining the Applicant's property. A number of prior development applications were made to the Council, 2 of which were appealed to the LEC and dismissed. A subsequent development application and modification application were later approved. It is these two consents that the Applicant sought to challenge.

One of the grounds of challenge was on the basis of *Turier*, namely that the Council did not have the power to approve substantially the same development.

Decision: In relation to this challenge, the Applicant was not successful.

Sheahan J noted the decision in *Turier* but declined to apply it on the basis that he did not find "*the relevant degree of congruence between proposals upon which to invoke the Turier principles.*"

A number of other cases refer to the decision of *Turier* but it is not judicially considered, nor is it applied. Those cases are:

Fobafe Pty Limited v Marrickville City Council [1999] NSWLEC 125
CLASS 1 – Notice of motion seeking costs.

Pimas Group Pty Limited v Maritime Services Board of New South Wales (1994) NSWLEC 23
CLASS 1 – Number of questions of law (including whether the development application the subject of the appeal is incapable of being approval as an approval would breach a prior condition of consent granted by the Court) .

Peter William Lean v Ku-ring-gai Municipal Council [1998] NSWLEC 226
CLASS 1 – Dealt with issue estoppel (in relation to a determination made previously by Sheahan J regarding Glossy Black Cockatoo) as opposed to action estoppel (res judicata).

Ireland v Cessnock City Council [1999] NSWLEC 153
CLASS 1 – Dealing with the issue of a building certificate for a building the subject of a demolition order. Council raised Turier as part of its submissions that the Court could not make an order to approve the use of the building which is inconsistent with the Council's earlier demolition order.

House of Lords decision in *Thrasyvoulou v Secretary of State for the Environment and Anor* [1990] 1 All ER 65

Facts: In 1982 Council issued what was effectively an order to *Thrasyvoulou* who owned a number of properties which were used to house homeless people. The order alleged that the use of the properties was for a hotel or hostel. *Thrasyvoulou* appealed against the notice. The inspector (equivalent to our commissioners) determined they were being used as a hotel however due to UK planning law they were not unlawful. Subsequently in 1985 the council issued an order that the properties were being used unlawfully as a hotel/hostel.

Decision: The House of Lords found that the subsequent order (in 1985) from the Council offended the maxim *estoppel per rem judicatam* and therefore was held not be to valid as the matter had been previously decided in 1982.

Lord Bridge (with whom all agreed) said that "*in relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless and intention to exclude that principle can be properly inferred as a matter of construction of the relevant statutory provisions.*"

However, the House of Lords went on to make a distinction between the withholding of development consent and the determination of a matter the subject of an order (i.e. lawfulness of use or building or development etc).

According to Lord Bridge a "*decision to grant planning permission creates of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is not more than a decision in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an estoppel per rem judicatam.*"

It seems that the decision in W & C Miller (above) picks up on this distinction.