Land and Environment Court of New South Wales

CITATION :	**Port Securities Pty Limited v Wollongong City Council & anor [2006] NSWLEC 701**
PARTIES :	APPLICANT Port Securities Pty Limited FIRST RESPONDENT Wollongong City Council SECOND RESPONDENT Director-General Department of Planning
FILE NUMBER(S) :	10939 of 2005
CORAM:	Moore C
KEY ISSUES:	Development Application :- Minimum lot size SEPP 1 objection Consolidation with adjacent land
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 Wollongong Local Environmental Plan 1990 State Environmental Planning Policy No 1
CASES CITED:	Winton Property Group Limited v North Sydney Council [2001] NSWLEC 46; Playford v Wollongong City Council & Anor [2004] NSWLEC 516; Hooker Corporation Pty Limited v Hornsby Shire Council [1996] 130 LGERA 438; Manzie v Willoughby City Council [1996] LEC 26; Goldin v Minister for Transport [2002] 121 LGERA 101
DATES OF HEARING:	24 and 25 July and 23 and 24 October 2006
EX TEMPORE JUDGMENT DATE :	10/24/2006

LEGAL REPRESENTATIVES:

APPLICANT
Mr M Wright, barrister
INSTRUCTED BY
Minter Ellison

FIRST RESPONDENT
Mr M Mantei, solictor
Kells the Lawyers

SECOND RESPONDENT
Mr P Clay, barrister
INSTRUCTED BY
Legal Services Branch
Department of Planning

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

MOORE C

24 October 2006

05/10939 Port Securities Pty Limited v Wollongong City Council

JUDGMENT

This decision was given as an extemporaneous decision. It has been revised and edited prior to publication.

1. **COMMISSIONER**: This is an appeal pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* (the Act) against the refusal by Wollongong City Council (the council) on 1 April 2005 of Development Application 2004/2079. The application was lodged with the council on 11 November 2004 and subsequently placed on exhibition.

2. The council consulted with the New South Wales Rural Fire Service who raised no objection subject to a variety of conditions being imposed. Written submissions were received from the Roads & Traffic Authority (RTA) and Sydney Water in their capacities respectively of the land to the west and the east of the site. An objection was received on behalf of the Otford Protection Society on the basis that the proposal was not consistent with the objectives of the zone within which it is located.

3. The application was referred to the Director General of the Department of Infrastructure, Planning and Natural Resources (as it was then known) for concurrence to a variation in the minimum allotment size, which was subject to an objection pursuant to State Environmental Planning Policy No 1 (SEPP 1). By letter dated 15 March 2005, the Director General advised that concurrence was refused.

4. The application proposes the construction of a single storey detached four-bedroom dwelling house with parking for four vehicles, a swimming pool and an on-site effluent disposal system at Lot 1 in Deposited Plan 584467, known as Lot 1 Parkes Street Helensburgh (the site).

5. The site is irregularly shaped as a result, in part of intrusions at the mid point of its eastern boundary and in the north-eastern corner. It has an area of 5.357 hectares. The land slopes to the north, south and west from the highest point, which is adjacent to Sydney Water's water reservoirs.

6. The lot comprising the site was registered on 8 September 1976 and the Statement of Basic Facts in these proceedings notes that the council has no record of planning approval having been granted for the subdivision that created the lot. The registered plan of subdivision for DP 584467 indicates that the subdivision was created for the purposes of the (then) Main Roads Act.

7. The applicant, Port Securities Pty Limited, purchased the site from the Commissioner of Main Roads on 23 April 1980.

8. The site is zoned 7(d) Hacking River Environmental Protection Zone under the *Wollongong Local Environmental Plan 1990* (the LEP). Permitted, with development consent, in that zone are advertisements, dwelling houses, home employment, leisure areas and utility installations.

9. A further class of development is permitted in that zone subject to an advertising and consideration regime not presently relevant. Set out in cl 11 of the LEP, those additional permitted purposes are *agriculture, buildings used in conjunction with agriculture, child-care centres, educational establishments, mines, recreation areas and restaurants*. There is no dispute in these proceedings that the highest and best use for the site is as the site of a dwelling house.

10. Dwelling houses are permitted in the 7(d) zone subject to the provisions of cl 14 of the LEP which sets out a number of minimum allotment sizes depending upon the time of creation of the original subdivision.

11. The relevant provision in this case is contained in cl 14.1(b)(i) and (ii), it being an allotment which was created after 30 April 1971 and before 23 February 1984. An area of not less than 20 ha would be required if the site area standard in that provision of the LEP were to be satisfied.

12. It is also relevant that cl 14.3 provides that the council may, as a condition of its consent to the erection of a dwelling house on an allotment of land within zone 7(d), inter alia, require the consolidation of the allotment with any other adjacent allotment in the same ownership.

13. I first inspected the site in company with the legal representatives of the parties; a director of the applicant; and a variety of experts on 24 July. A number of matters were dealt with during the course of that view (which view took place both on the site and around the road perimeter of the Roads & Traffic Authority land (as it was then described) to the west of the site.

14. As a consequence of a number of matters arising during the course of that view and the subsequent

hearing, it became obvious that significant portions contained in the original SEPP1 objection prepared by Ms Thompson, town planner on behalf of the applicant, were inaccurate and needed considerable further both factual information and further consideration. They concerned the present status of the three contiguous allotments, which have now been dealt with in the course of these proceedings.

15. The first of these is Lot 3 in Deposited Plan 606870 which became known as the Cemetery Road land.

16. The Cemetery Road land was, in fact, not as, described in the second table appearing in Ms Thomson's initial statement of evidence, a site which had approval for a single storey dwelling. The Cemetery Road land was in fact (and still is) a vacant allotment.

17. The second parcel of land is the allotment on the corner of Parkes Street and Cemetery Road (which I will refer to as the corner lot) which has an area of a little over 1100 sq m and is Lot 169 in Deposited Plan 752033 to which Ms Thomson ascribed a single residential dwelling.

18. The corner lot, in fact, was also at that time (and remains) a vacant allotment.

19. The third parcel of land is Lot 2 in Deposited Plan 584467 which is a site with an area of 2.17 hectares which I shall refer to as the RTA land. The RTA land was noted by Ms Thomson as being State Government owned but empty with extensive clearing. That allotment has been sold by the RTA and is now appropriate to be regarded as a vacant allotment.

20. The application was supported originally by that objection pursuant to SEPP 1 and subsequent amendments were made to that SEPP 1 in the Supplementary Statement of Evidence of Ms Thomson.

21. During the course of the evidence, both in writing and orally, it was obvious that there was agreement between Ms Thomson and the Court-appointed planning expert, Mr Fletcher, that the underlying objectives of the development standard for the minimum allotment size, which applies to the site, are:

> To ensure that the density of residential development is commensurate with the environmental qualities and constraints of the 7(d) zone being visual quality, water quality, flora and fauna bushfire hazard and existing infrastructure, and
>
> In relation to those lots that are vacant and already less than the minimum area, to:
>
> (a) encourage the rationalisation of the existing fragmented ownership pattern, and
> (b) require consolidation of those lots with other vacant land.

22. The council, in its Statement of Issues, pressed a number of matters but, in essence, I am satisfied that they came down to two:

1. The SEPP 1 objection should not be sustained – particularly with respect to the second of the underlying objectives, and
2. That if the objection were to be sustained, the proposal is contrary to the public interest because it would establish an undesirable precedent, which precedent would be inconsistent with good planning practice.

23. With respect to the first of the underlying objectives, I was assisted not only by Ms Thomson's Statements of Evidence but also by three Statements of Evidence by Mr Fletcher and with oral evidence given concurrently by these two planners.

24. Mr Fletcher, in his original Statement of Evidence (which was Exhibit 4), concluded, inter alia, that all the identified issues can really be narrowed to a single key issue of whether or not the SEPP 1 objection is well-founded and should be upheld. In his Supplementary Statement of Evidence dated 24 April 2006, Mr Fletcher said, "*I accept that this individual application on its own may not have significant adverse environmental impacts and I think that that was evident in my original Statement of Evidence*".

25. That view of qualified agreement with the acceptability of the proposal against the first of the underlying objectives was also reflected in his Further Supplementary Statement of Evidence dated 6 October 2006.

26. In addition, I have an assessment report dated 24 July 2006 prepared by Mr Carfield, the council's Acting Assistant Manager (West) in which he concluded, with respect to the first of the underlying objectives, that, subject to appropriate conditions, the application did not contravene those objectives.

27. Finally, in this regard, I note that I also had an original Statement of Evidence which was a review of bushfire issues prepared by Mr Brian Parry filed on 31 March 2006 in which he concluded that, with respect to bushfire management on the site, there were no reasons to refuse the application – that being a position consistent with that taken by the Rural Fire Service of New South Wales.

28. I am satisfied, therefore, that, on those bases, there is no reason to regard the first of the underlying objectives as an inhibition to the present application.

29. It is clear, therefore, that the critical tests to be applied to the SEPP 1 objection arise with respect to the question of what might loosely be described as consolidation or amalgamation of allotments.

30. The tests to be applied to such a SEPP 1 objection were set out by Lloyd J in **Winton Property Group Limited v North Sydney Council** [2001] NSWLEC 46 where his Honour set out five questions that need to be addressed.

31. The first is, "*Is the planning control a development standard?*" and there is no doubt that that is the case.

32. The second raises the underlying objectives or purposes of the standard - these have earlier been set out.

33. The third and fourth deal with the questions of consistency with the aims of the policy and the objects in 5(a)(i) and (ii) of the Act and whether or not compliance is unreasonable or unnecessary – it conventionally being the fact that if application of the standard is held to be unreasonable or unnecessary in the circumstances of the case, that the objection is likely to be well-founded (thus satisfying the fifth **Winten** test).

34. The first matter I note is that I was taken in passing, on several occasions, to a decision of Hussey C and Brown C in **Playford v Wollongong City Council & Anor** [2004] NSWLEC 516 – that being a decision concerning an application on a single small allotment on Lady Wakehurst Drive at Otford.

35. I am satisfied that the site, in that case, which had a very small area and was subject to a 40 ha minimum allotment size, is so out of kilter with the present application as to render that decision of no assistance to me in these proceedings.

36. The issue of consolidation arose primarily because of a comment made by Mr Fletcher, in his Supplementary Statement of Evidence, where he noted that, in his view, the applicant would have a stronger argument if the site were to be amalgamated with the RTA land.

37. As a consequence of that comment and the information which is available concerning all of the three touching sites which are now known to be vacant, it is appropriate to consider whether or not amalgamation might or might not be reasonable in the circumstances of each of those surrounding allotments.

38. In this regard, it is appropriate to set out a number of relevant matters with respect to the circumstances of each of those allotments.

39. I turn first to the RTA land, Lot 2 in Deposited Plan 584467, which has an area of ~ 22,000 sq m. This lot had been occupied by a RTA works depot for a number of decades and, after the RTA had determined that it was surplus to their requirements, a number of steps were undertaken by the RTA to determine whether or not it should be disposed of and if so under what terms.

40. Sinclair Knight Merz were appointed on behalf of the RTA to manage the process and they, in turn, engaged a number of consultants to assist them with respect to various issues.

41. The first of them relates to contamination. A contamination assessment was undertaken by Coffey Geosciences Pty Limited and an assessment report provided dated May 2003. Based on that report, a number of remediation activities were required and Coffey & Partners provided a report of November 2003 concerning that remediation activity which involved remediation of two identified contaminated areas in the vicinity of the drum rack and the workshop and the excavation of exploratory trenches to identify whether waste may have been buried in the centre of the site.

42. Based on that, it is noted by the Environmental Projects Officer of the RTA, in a file note of 27 November 2003, that, based on the Coffey Report, the Helensburgh property was suitable for residential land use and should be disposed of by the RTA.

43. In response to that memorandum, in early December 2003, a portfolio planning officer of the RTA, noting the terms of the Coffey Geoscience Report, proposed that, if this lot were to be disposed of, there should be a specific indemnity provision contained in the special conditions of the contract, indemnifying the RTA against any further consequences of contamination being found on the site.

44. A planning report was provided by Urban Concepts in December 2004 to Sinclair Knight Merz and it noted the constraints to development on the lot as a consequence of it sharing the zoning that is held by the site and it specifically noted that, "*It cannot be assumed that because a use is identified as permissible with consent under the LEP that development consent will be automatically forthcoming*".

45. In March 2005, Sinclair Knight Merz commissioned Advanced Valuations to undertake a valuation of the RTA land. There are two matters relevant to these proceedings noted in that valuation report. The

first, on page 6, are the prices of a number of *virgin blocks without DA* and zoned 7(d), which appear to have sold on a speculative value basis. The four instances that are given show very low values for those allotments.

46. Finally, as an analysed value, Advanced Valuations suggested, on an "as is" basis, a valuation of $100,000 would be reasonable with a minimum value of $500,000 if a development approval were obtained.

47. The RTA went to a tendering process (after expressions of interest) with only two tenders being received. Those tenders had, as the special conditions of the contract, two conditions relevant to this appeal. The first, being special condition 32, that there was no warranty in respect to the suitability for development and the second, being special condition 37, which contained the contamination of land indemnity to which I have referred.

48. On 18 July 2005, a tender evaluation team recommended that a tender offer from Durrabul Pty Limited (Durrabul) of $715,000 be accepted; it was so accepted; and settlement subsequently took place at that price. Following that process, Durrabul was given notice of intention of giving an Order pursuant to the Act by the council that Durrabul should cease using the RTA land for purposes inconsistent with its zoning. As a consequence of that, Durrabul apparently realised the restrictions that resulted as a consequence of the zoning and an application for re-zoning was submitted to the council by Durrabul. That application for re-zoning, in its current version, which is dated 6 October 2006, became Exhibit 23 and is expressed as seeking "*a more suitable and economically beneficial use of the site for both the landowners and the Helensburgh community*".

49. With respect to the corner lot, Lot 169 in DP 752033, the Statement of Basic Facts notes that the site is also affected, along its eastern boundary, by easements in favour of Sydney Water, *for access, water mains and reservoir scouring*.

50. Two large reservoir tanks are located on the adjoining lot that is bounded by the site on three sides. Consideration of one of the deposited plans shows the location of that easement and of a number of the Sydney Water facilities.

51. During the course of the second site view, I had the opportunity of looking up the access road which comprises a portion of the Sydney Water easement (which easement is on part of the site and also across part of the corner lot). The amount of land on the corner lot that remains contiguous with the site and not severed by the considerable physical intrusion of that easement and the works constructed thereon is, I am satisfied for the purposes of these proceedings, de minimus, and it is appropriate to regard the corner allotment as being substantially and significantly severed, on a permanent basis, from the site.

52. The third lot is the Cemetery Road land, Lot 3 in Deposited Plan 606870, which has an area of ~ 45,500 sq m. It has been the subject of a number of development applications by its present owner since it was acquired in the early 1990s. The most recent development application was withdrawn, after discussions between the applicant and the council, with that withdrawal taking place by letter dated 17 September 2001.

53. In the present proceedings, Mr Wright, counsel for the applicant, has submitted to me that:

- what is sought by the present proposal is not a change of zoning;

- it would be unreasonable to require the applicant to wait for some further indeterminate outcome of an unspecified review process;
- there would, in fact, be no unsatisfactory precedent or if it were a precedent it would not in fact be unsatisfactory; and
- it would not be reasonable to consider any of the three contiguous available vacant properties as being potentially available for consolidation.

54. The broad planning context within which this application with its present zoning comes to be determined arises out of a Commission of Inquiry, undertaken under the Act, into appropriate land use zonings in the vicinity of Helensburgh.

55. Commissioner Carlton reported, in December 1994, to the (then) Minister and, inter alia, suggested that there might be some possibility of future alterations to land use and that, given the potential for impacts on downstream sensitive and significant areas, land of less than 12% slope should only be encompassed for consideration of urban zoning, subject to soil type, if any such consideration was to take place.

56. It is common ground that in general terms, the site satisfies that identification criterion.

57. Commissioner Carlton further recommended that there be no change in the current LEP or current zonings until further studies are undertaken, primarily aimed at identifying existing and potential impacts from various land uses, and the setting of appropriate environmental objectives followed by identification of a cost effective strategic catchment management plan to control existing catchment pollution sources and identify land use controls capable of meeting those objectives.

58. Notwithstanding that recommendation, the present zoning and minimum allotment sizes came into effect some time thereafter.

59. As indicated earlier, I am satisfied that the proposal does not transgress the first of the underlying objectives of the development standard but nor is the fact that there is no harm from such a development any basis for the upholding or sustaining of an objection pursuant to SEPP 1 (see **Hooker Corporation Pty Limited v Hornsby Shire Council** [1996] 130 LGERA 438 at 441). However, nor should it be regarded as an inhibition to the present application.

60. It then requires me to consider the question of compliance or otherwise with the second of the objectives, that is the one relating to rationalisation and consolidation.

61. The first matter that was raised both in Ms Thomson's evidence and in submissions by Mr Wright, in this regard, was that, if I were to indicate that consolidation were required, the applicant would lose the benefit of the bonus reduction from a 40 ha to 20 ha minimum that arises by virtue of the time of creation of the allotment pursuant to the exception contained in cl 14.1(b)(i) of the LEP, if it were to consolidate and create some new allotment. I do not accept this proposition.

62. I am satisfied that there are alternatives, if the applicant were to become the holder of title in fee simple of other contiguous allotments, for a consent to be granted and, in this regard the provisions of cl 14.3 of the LEP make this clearly possible.

63. Mr Wright also says that it is not reasonable, on the evidence, to require or to consider that the

applicant might acquire and consolidate with any of the three contiguous allotments. Secondly, even if it were reasonable, he put that the applicant would be held to ransom by the other owners if they became aware of such an outcome of these proceedings.

64. I should then turn to consider the reasonableness of propositions of consolidating the site with each of the three contiguous vacant allotments.

65. First, I turn to the RTA land. Ms Thomson's Supplementary Statement of Evidence dealt with the question of amalgamation of the RTA land and considered, given that the purchase price of the RTA land was $751,000, it was simply economically unrealistic to require or consider that such consolidation might be reasonable.

66. The first point to make is that it is clear that the price of $751,000 paid by Durrabul was obviously a price well out of what might reasonably be expected to have been offered by an appropriately informed purchaser and should be regarded as aberrant and not able to be transferred as a value to any other site in the vicinity. Having said that, however, it is undoubtedly the position that Durrabul, having outlaid that sum of money for the RTA land, would, if approached to consolidate, have regard to that which it had actually outlaid. I am satisfied that that, in itself, is a significant inhibition to any possible consolidation between the site and the RTA land.

67. The second point which I consider that it would also add to the unreasonableness of requiring the applicant to consider consolidation with the RTA land is that there is an undetermined (and indeed unconsidered by the council) re-zoning application for the RTA land, which would alter the planning regime in the vicinity if it were to be granted.

68. Finally, I am satisfied that it would be unreasonable, given the uncertainties about contamination arising from the Coffey Partners Report, to consider it appropriate to press the applicant to consider consolidation with the RTA land. In doing do, I note Mr Fletcher's comments concerning the suitability of that land as a house site but do not consider that that would warrant setting aside or sufficiently diminishing the weight that I gave to the other three elements leading to my conclusion to set the possibility of amalgamation with the RTA land aside as unreasonable.

69. I turn to the corner lot.

70. The relevant point to be noted is that Mr Clay, barrister for the Director-General, and Mr Fletcher both properly made concessions with respect to this allotment (although Mr Fletcher's concession was qualified as to certainty as to alternative future use of the land). I am of the view that it would be unreasonable to require the applicant to consider amalgamation with this land because of the clear effectively permanent and total functional severance of all other than a de minimus portion of the corner lot from the site.

71. I turn to consider the Cemetery Road land.

72. The applicant's case in this regard is founded in the Supplementary Report of Mr Parry concerning bushfire management issues.

73. It is necessary for an understanding of this issue to quote from this report at some length. On page 5, Mr Parry sets out the matters of consideration with respect to the Cemetery Road land:

This site is also to the east of the subject site with frontage to both Cemetery Road and Frew Avenue. The northern boundary of the site is a common boundary with the Christian Life Centre. This building incorporates not only a church but also a well patronised gymnasium and Kidzone, an out of hours activity centre that caters for children of primary school age and high school juniors. The building is virtually a public building. The north western corner of the Cemetery Road land adjoins the land owned by Sydney Water, which is the site for one of the two reservoirs. This boundary is common with some of the eastern perimeter of the Sydney Water site and part of the southern boundary of the Sydney Water site. The western boundary of the Cemetery Road land adjoins the eastern boundary of the subject site down to the southern boundary line. From that intersecting point the Cemetery Road land forms a common boundary with the recently developed land identified as Lot 339 DP 752033 through to Frew Avenue. Lot 3 DP 606870 is susceptible to any fire on the Port Securities site, Lot 1 DP 584467 and it is also within spotting distance from intense fire to the west of the Princes Highway. There is also a lesser threat from a fire in the cemetery or from the bushland on the eastern side of Cemetery Road, which is being advertised as a future Landcom subdivision. Because of the extensive clearing that has occurred on Lot 339 DP 752033 as part of the development of that site, the risk of fire spreading from that property to Lot 3 DP 606870, the Cemetery Road land, is minimal. This situation may change if the owners decide to revegetate the site but for the moment it is not a problem.

Despite the fact that the Cemetery Road land was burnt in December 2001, there is already sufficient fire fuel accumulation upon the site to produce a severe fire with a flame length of about ten metres with an intensity exceeding 14 kilowatts per metre of fire front. This intensity and the vegetation there is the potential for the resulting radiant heat, flame impingement and ember shower to impact upon the adjoining properties and others within spotting distance.

The slope across the site is variable but knowing that historically the worst fires approach this locality from the west as they travel across the subject site onto the Cemetery Road site, they are climbing a slope which averages about 7 degrees, hence the potential for fast moving and intense fire activity. Mr Parry then does an identification of the various management regimes that would be required if any or all of the other sites were to be required to be amalgamated. With respect to the Cemetery Road land, he says that these would be to establish and maintain a fire break along the southern fence line of the Christian Centre, establish and maintain a suitable fire break around the Sydney Water boundary and split the site into manageable compartments to facilitate mosaic burning on a five year cycle.

74. Mr Parry continued to note the obligation of landholders pursuant to s 63C of the Rural Fires Act 1997 which puts an obligation on landholders for what might, in shorthand terms, be described as hazard reduction.

75. He then continued to discuss the question of management of fire in the vicinity and concluded that it would be necessary, if there were a total amalgamation, for a landholder to manage a significantly large site, which had a length series of frontages to public roads and that that would be a matter of considerable burden for a landholder.

76. He said, on page 9 of the Supplementary Report, that there would be a 2.48 km perimeter if all four parcels were amalgamated and he then drew a conclusion that:

> It is highly unlikely that effective safe fuel management can be exercised across a 20 hectare site so close to the urban bushland interface. On the other hand, on a smaller land parcel similar to the subject site the landowner can more effectively manage the fire responsibilities by wider use of slashing of the under storey, use of less flammable species in the landscaping and use of sprinklers and hoses to ensure effective control of burning operations". He notes that he was not aware of any 20 hectare woodland vegetation site close to an urban interface where one household would be expected to manage it.

77. In this regard, I had the advantage of informal evidence given on site by Mr Malcolm, Managing Director of the applicant, concerning the hazard reduction activities undertaken by the applicant over the years on the site.

78. I also had the opportunity to inspect, both from a very large aerial photograph marked with the contours of the site and surrounding lands together with a walk through the bush to a position somewhat adjacent to the more southern of the two Sydney Water reservoirs looking over the southern and south-western portions of the site and southern and south eastern portions of the Cemetery Road site. I am able to see, from the contours on the map, the slope and I have been able to see, on the ground, the ability of the applicant to undertake slashing and other hazard reduction activities.

79. As a result, I am not able to be satisfied that amalgamation with the Cemetery Road land would be unreasonable nor am I satisfied that it would be unnecessary under all the circumstances.

80. The total area of the site, if amalgamated with the Cemetery Road land, would be 9.889 hectares – considerably less than the area that would be the subject of what Mr Parry described as an unreasonable area for a single landholder. It would, in fact, be less than half of that area.

81. I certainly have no evidence in these proceedings of any discussions of amalgamation between the Cemetery Road land and the site, either on behalf of the present applicant or on behalf of the owner of the Cemetery Road land and even if I did have it, I am satisfied that that would not necessarily be relevant in the present proceedings.

82. I am satisfied that the reasonable physical possibility of consolidation with the Cemetery Road land is such that the absence of any such attempt at consolidation is contrary to the underlying objective of the development standard and that it has not been demonstrated to me that it would be unreasonable or unnecessary for that to be complied with.

83. I note that I am not expressing any opinions on the acceptability or otherwise of the possibility of development on an amalgamated Port Securities site and Cemetery Road land site. To do so, in my view, would be entirely contrary to the comments made by Bignold J in **Manzie v Willoughby City**

Council [1996] LEC 26 as any application, if such an amalgamation were to take place, would be an entirely new and different application to be assessed on its own peculiar merits at the time.

84. It was also put by Mr Wright that there were other reasons why I should uphold the objection to compliance with that development standard.

85. The first is that to require strict compliance would be contrary to the objectives of the Act, namely s 5(a)(ii) which supports the promotion and co-ordination of the orderly and economic use and development of land.

86. In this regard, in her Supplementary Statement of Evidence, Ms Thomson said, at 2.4, that the SEPP 1 objection satisfied this as leaving the site with no possible use would be contrary to the objectives of the Act. That is, in effect, triggering my consideration of the issue of precedent.

87. I am satisfied the proposal involves a variation from the 20 ha standard by requiring a discount of approximately 75 per cent from that standard. As part of the particulars in support of the Statement of Issues, the council noted that there were approximately 662 other vacant allotments in the Helensburgh locality zoned 7(d) with an area of less than 40 ha. By implication, the question of precedent arises as a consequence of the existence of the word, "orderly" in s 5(a)(ii) of the Act.

88. There are three questions against which I should consider this submission. I am satisfied that these are:

- first is the question of whether it would be an unsatisfactory general precedent;
- second is whether it is an unsatisfactory precedent in the context of the precinct within which the site is located; and
- finally, whether or not a concurrence granted by the Director-General to a development on what is known as the Frew Avenue land, immediately to the south of the Cemetery Road land, in fact acted as a precedent in support of this application.

89. As to the general question of precedent, Lloyd J said, in **Goldin v Minister for Transport** [2002] 121 LGERA 101 at 110, that if there is an application for development which is both objectionable in itself and where there is a sufficient probability that there will be further applications of a like kind, then the fact that a consent would operate as a precedent may be taken into consideration.

90. I have carefully examined the pattern of landholding shown in a map, which was at Folio 411 of one of the volumes tendered on behalf of the respondents. This map sets out the pattern of landholdings within the zone. It is obvious from that pattern that there are a very large number of allotments that are significantly smaller than the one that is the subject of the present proceedings and are much more akin to the size of the allotments dealt with by Hussey C and Brown C in **Playford**.

91. I am satisfied that my consideration of precedent in general terms with respect to the present application, if it were to be granted, would not constitute a precedent for those significantly smaller allotments.

92. There are, however, a number of allotments, both from the table of allotments and from the aerial

photograph, that are what might be regarded as generally of a similar or broadly similar size to that which is the subject of this present application.

93. I am satisfied, given the conclusion I have reached about consolidation possibilities with the Cemetery Road land, that, in general terms of a number of allotments significantly smaller than the number of allotments raised by the council, the present application would be a precedent and that the application, being inappropriate with respect to the second of the underlying objectives, would also be undesirable as a general precedent for those limited range of allotments.

94. With respect to the precinct, I am satisfied that it would, for the reasons I have earlier enunciated, only relevant to be a precedent in the hands of the present applicant with respect to the Cemetery Road land.

95. I am satisfied, for the reasons I enunciated concerning the severance of the site from the corner lot, that there is no reasonable or rational prospect of any consolidation with that allotment.

96. However, to grant the present application would also extinguish any prospect that might exist for consolidation, in the future, by Durrabul, the owners of the RTA land, and I am also satisfied that that, in the context of the underlying objective supporting consolidation, would also be unacceptable and therefore would not be unreasonable to regard this as an undesirable precedent in a much more limited extent in the site's own precinct.

97. I turn, finally, to the Frew Avenue land.

98. In this regard, as I drew attention to the parties, I am satisfied that the Department of Planning made a fundamental misconception in its assessment of this application where the Department is noted as accepting a proposition advanced, on behalf of that applicant, that all adjoining allotments either supported a dwelling or other urban development such as a cemetery, church use or horse stables with dwelling.

99. That proposition, in fact, was not submitted as is obvious from the second page of the information provided by Whelans Planning on behalf of the applicant in that case where under the heading, "Precedent", the applicant for the Frew Avenue development approval noted that **almost all** adjoining allotments supported such development. The Cemetery Road land immediately adjoins the Frew Avenue land to the north; was vacant at the time; has been vacant throughout the period; and I am satisfied that the Frew Avenue proposal on that basis was inappropriately assessed.

100. There were other reasons given by that applicant (and, apparently, by implication, accepted by the Department) relating to:

- the degree of non-compliance of 14.8%, the Frew Avenue land being a lot which had, as a result of its date of creation, only a 10 ha lot size requirement with an actual lot size of 8.52 ha;
- there being a degree of clearing on that site greater than the clearing on the site in this appeal; and
- there being signs of a past dwelling house being erected on the Frew Avenue land.

101. I am therefore satisfied that it is not appropriate to regard the Frew Avenue land as being of assistance to the applicant in these proceedings.

102. Generally, with regard to the findings that I have made with respect to precedent, the applicant, through Ms Thomson, put a number of matters that are suggested should cause me to set aside those conclusions.

103. They are set out in the revised SEPP 1 objection which came with Ms Thompson's Statement of Evidence and were expanded upon in her Supplementary Statement of Evidence as I have earlier dealt with.

104. Those reasons put for setting aside the question of precedent are the location of the site and its location particularly adjacent to the Helensburgh urban area.

105. I am satisfied that, in that general regard, although there are a whole range of other vacant allotments to the east of Helensburgh which I disregard, it is obvious from the various aerial photographs available to me that there are a number of other sites, including three in the vicinity of the present site, that might be regarded as being larger sites (but this reasoning is not confined to them).

106. The history of the zoning, being an imposition contrary to the recommendation of the Commission of Inquiry, is not something which is specific to this application and, indeed, to set aside the zoning in its entirety, which is not what Mr Wright asks me to do, would in my view be a fundamental mistake.

107. Although the area has been identified as a possibly future urban area, that is a matter which does not provide any basis upon which it is unreasonable or unnecessary to require compliance with the relevant underlying objective. If the zoning were to be changed at some future time, a matter to which I will return shortly, that is a matter for consideration at that time.

108. Ms Thomson notes that the allotment is of a size which will allow stormwater and sewerage disposal to be handled on site without adverse impacts beyond the site. That, in my assessment, is conceded by both Mr Clay and Mr Fletcher but falls within the "no harm" prescription of **Hooker**.

109. The past clearing of the site and its affectation by bushfires again is a "no harm" issue and the fact that there is a water supply available to the site – contrary to that position for most of the remainder of the sites in the zone – is again a matter which I consider falls within the "no harm" category and is no reason to found a setting aside of a fundamental development objective contained in the LEP or arising from the provisions of 14.1(b) of the LEP.

110. I have also considered the question of prematurity.

111. The applicant has owned the site since 1980. I have no evidence of urgency to develop. Indeed, one might suggest, quite the contrary, that the applicant has shown extraordinary forbearance and patience in all other earlier consideration of possible development opportunities as evidenced by the affidavit of Mr Malcolm.

112. However, I have the evidence contained in Exhibit 23 (which is the re-zoning application) that the council is currently at the very early stages of dealing with this application in the context of the requirement to consider its LEP against the LEP template that has been developed by the State Government and adherence to which is to be required, in varying forms, including reconsideration of the

maps by councils. I am satisfied that that review process does not leave the applicant without hope of some future beneficial use of the site and I am satisfied that it does provide a modest degree of prematurity to add to the other reasons for refusal but in itself is not a determinative reason.

113. I have therefore concluded, for the various reasons I have outlined, that the Court's orders should be that:

1. The appeal is dismissed;
2. Development application 2004/2079 for the construction of single storey detached four bedroom dwelling house with parking for four vehicles and a swimming pool and an on site effluent treatment system at Lot 1 in Deposited Plan 584467 known as Lot 1 Parkes Street Helensburgh is determined by the refusal of development consent; and
3. The exhibits, other than exhibit B, are returned.

Tim Moore
Commissioner of the Court