IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S120 of 2011

BETWEEN: **Cumerlong Holdings Pty Ltd (ACN 008 484 875)**
Appellant

HIGH COURT OF AUSTRALIA
FILED
16 MAY 2011
THE REGISTRY SYDNEY

Dalcross Properties Pty Ltd (ACN 083 792 054)
First Respondent

Dalcross Holdings Pty Ltd (ACN 083 791 931)
Second Respondent

Australasian Conference Association Limited (ACN 000 003 930)
Third Respondent

INTERVENER'S SUBMISSIONS

Part I: Internet publication

1 This submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2 The Minister for Planning and Infrastructure ("the Minister") seeks leave to appear as amicus curiae in these proceedings.

3 The Minister submits that the decision of the Court of Appeal is correct and the appeal to this Court should be dismissed.

4 The Minister's interest these proceedings arises from his portfolio responsibility for administering the *Environmental Planning and Assessment Act 1979* NSW ("the EPAA"). In particular, the Minister seeks to assist the Court by placing before it submissions concerning the proper construction of s 28 of the EPAA and relevant planning instruments.

5 The submissions the Minister wishes to make, set out in Part V below, are either different or differently expressed from those put by the parties and are unaffected by the motives of private adversaries in inter partes litigation.

6 The Minister's submissions are intended to assist the Court in both determining the proper construction of the relevant legislative provisions and in formulating an important principle of planning law for the State.

7 The Minister was granted leave to appear as amicus curiae before the Court of Appeal and at first instance.

Date of Document: 16 May 2011
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Part III: Reasons why leave to appear amicus curiae should be granted

8 The hearing of an amicus curiae is entirely in the Court's discretion. [1] The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. [2] An amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.[3]

9 The situations in which the Court will be assisted by the submissions of a non-party cannot be identified in advance. [4] However, there are many examples of this Court granting leave to governmental and non-governmental organisations to make submissions as amici curiae where their interests have suggested a capacity to provide submissions from a specialised viewpoint, an industry perspective or in the public interest.[5]

10 The Minister submits that he should be granted leave to appear as amicus curiae in these proceedings for the following reasons.

11 The proceedings raise important questions as to the proper construction of s 28 of the EPAA and its predecessor, s342G(4) of the Local Government Act 1919 ("LGA"), as well as sub-clause 68(2) of the Ku-ring-gai Council Planning Scheme Ordinance ("KPSO"). The resolution of these questions will have important implications for planning law in New South Wales, particularly in relation to:

11.1 the scope and operation of provisions of the kind authorised by s 28 of the EPAA, that have the effect of suspending private rights for the purpose of allowing development to be carried out; and

11.2 the procedure by which environmental planning instruments ("EPI") are amended and land is rezoned.

12 "Suspension of covenant" clauses of the kind authorised by s 28 of the EPAA are found in almost all EPIs. Although the form of such clauses can differ from one EPI to another, it is common for suspension of covenant clauses to be 'zone based', like the clause at issue in these proceedings, such that the clause does/does not operate on land within certain zones (Eg: Burwood PSO, Concord PSO, Ku-ring-gai PSO, Ryde PSO, Strathfield

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[1] *Levy v State of Victoria* (1997) 189 CLR 579 per Brennan CJ at 604.

[2] *Levy v State of Victoria* (1997) 189 CLR 579 per Brennan CJ at 604; See also *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309 per French CJ at 312.

[3] *Levy v State of Victoria* (1997) 189 CLR 579 per Brennan CJ at 604-605.

[4] *Levy v State of Victoria* (1997) 189 CLR 579 per Brennan CJ at 604.

[5] *See Attorney-General v Breckler* (1999) 197 CLR 83 per Kirby J at [103] and cases cited therein at fn 176; See also *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309 per French CJ at 312.

PSO, Ashfield LEP, Blue Mountains LEP No.4, Cessnock LEP, Kiama LEP, Sutherland Shire LEP and Queanbeyan LEP).

13 The Minister seeks leave to appear in the proceedings for the limited purpose of making written submissions, supplemented by brief oral submissions on matters that have not been fully covered by either party and which bear on the proper construction of the relevant provisions in both primary and secondary legislation.

14 No undue unfairness will be occasioned to the parties to the proceedings, should leave be granted to the Minister to appear as amicus curiae. The matters of construction referred to above transcend the facts of the particular proceedings. The parties have had the benefit of the Minister's written submissions, provided to them on 16 May 2011, and have had the opportunity to respond to those submissions in writing. The parties will have the further opportunity of responding to the Minister's submissions orally. The Court will retain complete control over the length of any oral submissions made on behalf of the Minister.

Part IV: Statutory provisions

15 The applicable statutory provisions are as set out in Part VII of the appellant's submissions. Copies of those provisions are attached to the appellant's submissions.

Part V: Submissions

16 It is necessary to identify with precision the legal source of the suspension of the relevant covenant.

17 At AS [16] the appellant submits that, "with the repeal of s.342G(4), the source of power for the suspension of covenants was intended by the Parliament to be confined to the procedure in s. 28 of the EP&A Act". That statement is not correct.

18 The operative provision which suspends the operation of the relevant covenant is sub-cl. 68(2) of the Ku-ring-gai Planning Ordinance Scheme ("KPSO"). That provision does not derive its validity from s 28 of the EPAA but rather from s 342G of the *Local Government Act 1919* ("LGA") (notwithstanding the repeal of that Act) and subsequent savings provisions enacted following its repeal.[6]

19 Consequently, the proper scope and operation of sub-cl. 68(2) must be ascertained having regard to the terms of the LGA and, in particular, subs. 342G(4) of that Act.[7]

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[6] *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233 at 239-240; *Craven v City of Richmond* [1930] VLR 153; *Leaney v Sandland* [1933] SASR 285; Pearce & Argument, *Delegated Legislation in Australia*, 3rd ed., at [25.6].

[7] Under the LGA there was no separate requirement, of the kind now found in s 28(3), that a provision made pursuant to s 342G(4) be approved by the Governor. Rather, a scheme made under the LGA was made in its entirety by the Governor (cf Appellant's submissions at p 6.30, [19]).

20 Subsection 342G(4) of the LGA provided:

> *"A scheme may suspend **either generally or in any particular case or class of cases** the operation of any … rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument, …to the extent to which the provision is inconsistent with any of the provisions of the scheme."* (emphasis added).

21 As envisaged by subs. 342G(4), sub-cl. 68(2) of the KPSO operates to suspend covenants in a particular class of cases. It provides that:

> *"In respect of any land which is comprised within any zone, other than within zone No 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g) or 2(h), the operation of any covenant ….is hereby suspended to the extent to which any such covenant…is inconsistent with **any provision** of this Ordinance or with **any consent** given thereunder."* (emphasis added)

22 Whether land to which a covenant relates is inside or outside the relevant class is determined by reference to the zoning of the land, as it exists from time to time.

23 Despite the repeal of the LGA, sub-cl. 68(2) continues to have effect "according to its tenor"[8], that is, according to the precise terms of the provision.[9]

24 The appellant does not challenge the validity of sub-cl.68(2). However, at AS [16] the appellant submits that "The ambulatory operation of clause 68(2) ought not be expanded/allowed, where its putative operation and effect, *vide* LEP 194, is such as to require that operation and effect to have the Governor's approval (per s 28 of the EP&A Act)". It is not at all clear what is meant by that submission, particularly the reference to an "expanded" ambulatory operation. Whatever is intended by it, the submission is not supported by reference to any principle of statutory construction.

25 Unless a contrary intention can be discerned, a legislative instrument is deemed to be always speaking and thus to include reference to amendments and variations as made from time to time: see s 68 *Interpretation Act 1987* NSW.

26 In order to reach the conclusion that sub-cl. 68(2) was not intended to be always speaking, it would need to be apparent, having regard to the context, scope of purpose of sub-cl. 68(2) when enacted, that the provision was intended to be confined to dealing with matters current at the date on which it was made.

27 The appellant has made no attempt to identify a contrary intention in either sub-cl. 68(2) of the KPSO or in s. 342G of the LGA, in support of its submission that "the ambulatory operation of clause 68(2) ought not be expanded/allowed …". It is submitted that no such contrary intention can be discerned.

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[8] See cl. 28 of Schedule 6 of the Environmental Planning and Assessment Act 1979.

[9] See *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2010] NSWCA 214 Tobias JA at [32].

28 The form in which sub-cl. 68(2) of the KPSO is drafted clearly indicates that the intention of the original enactment was that its particular application could vary over time. The provision, in its terms, contemplates future events, such as future development consents. Implicitly, it also contemplates future events such as rezonings or new covenants. In the Minister's submission, when the Governor made sub-cl. 68(2) of the KPSO, it was intended both to speak to the present and to reach into the future, for the purpose of enabling development, the precise nature and location and type of which could not be foreseen. It must have been intended that the operation of sub-cl. 68(2) would vary over time, as development consents were granted, covenants were created and land was rezoned. There is no statutory basis for suggesting that sub-cl. 68(2) was intended to speak only to the past when, explicitly and implicitly, it contemplates future events.[10]

29 Further, a construction that would promote the purposes or object underlying sub-cl. 68(2) is to be preferred to a construction which would not promote that purpose: s 33 *Interpretation Act 1987*. Subsection 342G(4) of the LGA had the same "self-evident purpose" as has s 28 of the EPAA, namely "to nullify and remove all obstacles to the planning principles decided on by the Council or the Minister".[11] If sub-cl. 68(2) of the KPSO is not "always speaking", its purpose would be undermined.

30 Further, the construction contended for by the appellant would cause considerable practical inconvenience, in that it would not be possible to ascertain the effect of that subclause (which would necessarily be very limited) without resort to the zoning of Ku-ring-gai as it existed in 1971. That was plainly not the intention of the Governor in making the subclause pursuant to the broad terms of subs. 342G(4) of the LGA.

The effect of LEP194

31 LEP 194 amended the KPSO by, relevantly, creating a new zone 2(d3) and changing the existing zoning of various land. The effect of amending the KPSO by LEP 194 is to produce a revised text of the KPSO which is thereafter to be construed as a whole.[12] LEP 194 did not amend the terms of sub-cl. 68(2) of the KPSO.

32 The fact that LEP 194, by amending the KPSO, had the incidental affect of altering the *operation* of sub-cl 68(2) of the KPSO in relation to a particular covenant on a particular piece of land does not mean that sub-cl. 68(2)

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[10] Compare *Deputy Commr of Taxation v Clark* (2003) 57 NSWLR 113 at 145 where Spigelman CJ held that as "[the Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality, a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary over time." See also *R v Gee* (2003) 212 CLR 230 at 241.

[11] *Coshott v Ludwig* (1997) NSW ConvR 55-810 at 56,538; see also *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 341 at 348.

[12] *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463, 479.

ceases to have effect "according to its tenor" or does not speak to current events.

33 Following the enactment of LEP 194, sub-cl. 68(2) is to be read and applied against the revised text of the KPSO, which includes the provisions of LEP 194. The amendments made by LEP 194 supply the relevant facts upon which sub-cl. 68(2) operates so as to suspend the relevant covenant. LEP 194 does not itself operate so as to suspend the relevant covenant. Nor does it contain any provision that has the effect of suspending the relevant covenant in a legal sense.

34 The fact that zone 2(d3) did not exist when sub-cl. 68(2) of the KPSO was enacted in 1971 is not relevant to its current field of operation. It is not uncommon for a consequence of the "always speaking" approach to be that a word extends to previously unknown entities or activities of a like kind that have developed or occurred after the legislation was drafted but which appear to fall within its intended field of operation.[13]

Section 28 is not engaged

35 There is no proper basis to conclude that s 28(3) of the EPAA prevents sub-cl. 68(2) from operating, according to its tenor, upon the facts supplied by LEP 194.

36 Section 28(3) only applies to "a provision referred to in subsection (2)". Subsection (2) is in clear and unambiguous terms. It refers to a provision of an environmental planning instrument that suspends the operation of a regulatory instrument specified in that environmental planning instrument either entirely or subject to modifications specified in that environmental planning instrument for the purpose of allowing development to be carried out. It is clear from the statutory context that "provision" in s 28(3) means a clause of or statement in an LEP that provides, in terms, that a regulatory instrument therein specified will not apply to the development of land within any of the zones referred to.[14]

37 Such a 'provision' will be readily and easily identifiable on its face. It will have the effect described in s 28(2) and it will specify the relevant matters set out in s 28(2). The repetition of the definite article "that" in s 28(2) makes it clear that the Governor is only required to approve the making of the particular environmental planning instrument that contains the specified matters. LEP 194 does not contain any provision of the kind referred to in s 28(2). In the present case, the only instrument that contains a provision of that character is the KPSO, which includes sub-cl. 68(2). That provision has

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[13] See, for eg, *Chappell and Co Ltd v Assoc Radio Co of Australia Ltd* [1925] VLR 350 where a radio broadcast in a public place of a piece of music was held to constitute a performance in public of the music within the meaning of the Copyright Act 1912, notwithstanding that the radio had not been invented when the Act was passed; *Re Treneski and Comcare* (2004) 80 ALD 760 where it was held that a "machine made copy" included a hard copy of an email.

[14] Tobias JA at [38].

already been validly made and does not require further gubernatorial approval to operate upon the facts supplied by LEP 194.

38 The appellant complains that "to read *provide/provision* as the plurality did, by restricting it to the requirement for express text to that effect ... was to ignore the operation of LEP 194 in its context, and in particular in the face of the requirements of s.28 of the EP&A Act" (AS [15]). The proper meaning of s. 28 of the EPAA is to be construed by reference to the language, object and purpose of the EPAA. It is not to be construed by reference to the facts of this case, or the terms of LEP 194.

39 In enacting s 28(3), Parliament could not have intended that the Governor's approval would be required every time an amendment to an EPI has the incidental effect of changing the operation of a suspension of covenant clause in respect of a particular piece of land. Such a result would be impractical and would undermine the detailed planning regime set out in the EPAA.

40 The fact that LEP 194 might have the practical "effect" of causing the suspension of covenant clause to operate in a particular manner in a particular case is not sufficient to engage s 28(2). There must be an express suspension of covenant provision to enliven the requirement in s 28(3). Parliament would not have intended the operation of a suspension of covenant clause to wax and wane depending on the Governor's ability to successfully search for and approve provisions that might produce a particular result, not spelt out in the text (cf Handley JA at [78]).

41 In any event, the appellant's characterisation of the "effect" of LEP 194 is inaccurate. The appellant submits that the "effect of LEP 194 was to *provide* that restrictive covenants would not apply to land in the new zoning" (AS [15]). That statement is not correct. Subclause 68(2) only operates to suspend covenants to the extent that they are "inconsistent with any provision of [the KPSO] or with any consent given thereunder". The "effect" of LEP 194, insofar as it rezoned certain land as Residential 2(d3), was not to suspend all covenants within that zone. It had the practical effect of causing the relevant covenant to be suspended because a) it rezoned the appellant's land to Residential 2(d3); and b) it provided that "hospital" is a permitted use within that zone, such that the relevant covenant was inconsistent with the KPSO. If "hospital" had not been a permitted use under zone Residential 2(d3), then LEP 194 would not have had the "effect" of suspending the operation of the relevant covenant at all. The covenant would have remained effective until it became inconsistent with a provision of the KPSO by reason of a further amendment to the KPSO, changing the permitted use of land in zone Residential 2(d3) to include "hospital".

42 To put it another way, contrary to the appellant's position, covenants within zone 2(d3) would remain effective if they are not inconsistent with any provision of the KPSO or any consent granted thereunder. On the appellant's argument, in addition to gubernatorial approval being required for any rezoning, any amendment to the KPSO which is capable of rendering an existing covenant (in any zone other than 2(a), 2(b), 2(c) or

2(d)) "inconsistent" with the KPSO would also require gubernatorial approval. That would cause considerable practical inconvenience and cannot have been the intent of s 28(3).

43 Parliament cannot have intended that any amendment to the permitted use of land within a particular zone would require gubernatorial approval against the mere possibility (which the Governor would have no means of confirming) that such an amendment *might* have the effect of suspending a covenant within that zone.

44 A further example may be given of the practical inconvenience that would flow from the appellant's construction of s 28. Assume that an LEP contained a provision in similar terms to sub-cl. 68(2) of the KPSO and that the same LEP zoned various land within the relevant Local Government Area. On the applicant's argument, even if the Governor approved the express suspension of covenant clause found in the LEP, that clause could not take effect unless and until the Governor also separately approved the zoning provisions, including zoning maps and provisions relating to permitted use, found in the same instrument. That cannot have been the intent of s28(3). If Parliament had intended Gubernatorial approval to be required before land can be zoned or rezoned, it would have said so by enacting a provision to that effect in express terms like the one found in s 28(3).

45 At [65] Handley JA, in dissent, held that "An argument that the protection of s 28(3) would be engaged if the suspension of covenants was achieved by an LEP drafted one way, but the same result can be achieved without engaging s 28(3) if the LEP is drafted another way invites the closest scrutiny". The rezoning of the appellant's land by LEP 194 was not an attempt to achieve indirectly that which could not be achieved directly. It is simply an example of sub-cl. 68(2) operating as intended. If sub-cl. 68(2) required further gubernatorial approval in order to take effect in respect of land rezoned by LEP 194, the provision would be presented to the Governor for re-approval, without amendment, in identical terms. Handley JA's analysis at [65], [79]-[80] ignores the fact that a valid suspension of covenant clause is in operation, the purpose of which is to suspend or render inapplicable private covenants where they are inconsistent with land to be developed, by reference to the zoning of land as determined from time to time.

Conclusion

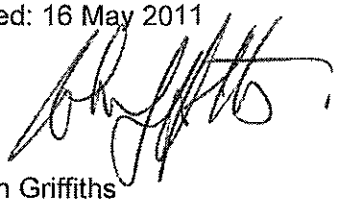
46 When the Governor made sub-cl. 68(2) of the KPSO pursuant to subs. 342G(4) of the LGA, it was intended both to speak to the present and to reach into the future, for the purpose of enabling development, the precise nature and location and type of which could not be foreseen. It must have been contemplated that the operation of sub-cl. 68(2) would vary over time, as development consents were granted, covenants were created and land was rezoned. There is no statutory basis for suggesting that sub-cl. 68(2) was intended to speak only to the past when, in its very terms, it contemplates future events.

47 LEP 194 amended the KPSO in such a way as to vary the operation of sub-cl. 68(2) in relation to a particular covenant on particular land.

48 Tobias and McColl JJA were correct to find that LEP 194 does not contain any provision of the kind referred to in s 28(2) and therefore gubernatorial approval was not required prior to the making of LEP 194 in order for LEP 194 to be valid and take effect.

49 The Minister otherwise agrees with the submissions of the Third Respondent.

1 10 Dated: 16 May 2011



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