

17 October 2013

**Class 1 Appeal to the Land and Environment Court
Concept Plan for the Australian Catholic University at Strathfield**

Process Update

Council's motion for joinder was heard on 26 September 2013. Judgement on Council's motion was received on 17 October 2013.

The Court made the following orders:

1. Leave be granted pursuant to rule 6.24 of the UCPR to Strathfield Municipal Council to be joined as the second respondent to these proceedings; and
2. The matter be listed before the Acting Registrar for further directions on 23 October 2013.

Copy of the published judgement is attached.

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Land and Environment Court New South Wales

Case Title: Australian Catholic University v Minister for Planning and Infrastructure

Medium Neutral Citation: [2013] NSWLEC 174

Hearing Date: 26 September 2013

Decision Date: 17 October 2013

Jurisdiction: Class 1

Before: Pepper J

Decision: Strathfield Municipal Council to be joined as second respondent to the proceedings.

Catchwords: PROCEDURE: application for joinder in Class 1 proceedings – alternatively application for *Double Bay Marina* order – whether party ought to have been joined – whether joinder necessary – joinder allowed.

Legislation Cited: Civil Procedure Act 2005, ss 56, 58, 60

Environmental Planning and Assessment Act 1979, ss 75H, 75I, 75P, 75Q, Sch 6A

Land and Environment Court Act 1979, ss 38, 39(2), 39A, s 56A

Roads Act 1993

Uniform Civil Procedure Rules 2005, r 6.24(1)

Cases Cited: Ali v Liverpool City Council [2009] NSWLEC 107

Charlton v Moore [2009] NSWLEC 61

CTI Joint Venture Company Pty Ltd v CRI

Chatswood Pty Ltd (in Liq) (No 2) [2011]
NSWLEC 91

Design Power Associates Pty Ltd v
Willoughby City Council [2005] NSWLEC
470; (2006) 148 LGERA 233

Double Bay Marina Pty Ltd v Woollahra
Municipal Council (1985) 54 LGRA 313

In the matter of Raejoe Pty Limited (receiver
and manager appointed) (administrators
appointed) as trustee for "The Coe Family
Trust" [2012] NSWSC 1457

John Alexander's Clubs Pty Ltd v White City
Tennis Club Ltd [2010] HCA 19; (2010) 241
CLR 1

Moorebank Recyclers Pty Ltd v Liverpool
City Council [2009] NSWLEC 22

News Ltd v Australian Rugby Football
League Ltd (1996) 64 FCR 410

Wollondilly Shire Council v Antoun (No 2)
[2010] NSWLEC 171

Category: Procedural and other rulings

Parties: Australian Catholic University (Applicant)
Minister for Planning and Infrastructure
(Respondent)
Strathfield Council (Intervenor)

Representation

- Counsel: Mr A Galasso SC (Applicant)
Ms S Duggan SC (Respondent)
Ms A Hemmings (Intervenor)

- Solicitors: Clayton Utz (Applicant)
Department of Planning and Infrastructure
(Respondent)
HWL Ebsworth Lawyers (Intervenor)

File number: 10350 of 2013

JUDGMENT

The Council Applies to be Joined as a Party

- 1 By notice of motion filed on 1 August 2013, Strathfield Municipal Council (“the council”), seeks leave to be joined to the proceedings as the second respondent or, in the alternative, to be independently represented in the proceedings by way of a ‘*Double Bay Marina order*’ (*Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313) pursuant to s 38 of the *Land and Environment Court Act 1979* (“the LEC Act”).
- 2 The motion was initially listed before the Acting Registrar for determination but, on the day of the hearing, the parties objected to the Acting Registrar determining the matter on the basis that she lacked the power to make the alternative order sought (but not, perversely, the joinder order). This objection was well founded as it transpires that the requisite power is absent from those delegated to her.
- 3 It was regrettable, however, that the parties did not alert the Court to this difficulty prior to the day of the hearing. As a consequence, the application, which took considerably longer to be heard than the one hour estimate given to the Court, came before me in my capacity as duty judge.
- 4 The council seeks to be joined to these Class 1 proceedings in accordance with r 6.24(1) of the *Uniform Civil Procedure Rules 2005* (“the UCPR”), which provides:

6.24 Court may join party if joinder proper or necessary

- (1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in

dispute in any proceedings, the court may order that the person be joined as a party.

5 Unlike the majority of applications for joinder to this Court, the application for joinder was specifically not made pursuant to s 39A of the LEC Act because that provision has no application to the appeal in these proceedings, which is brought under s 75Q of the *Environmental Planning and Assessment Act 1979* ("the EPAA").

6 The power to make a *Double Bay Marina* order is found in s 38(2) of the LEC Act. In this regard s 38 relevantly provides as follows:

38 Procedure

(2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.

(3) Subject to the rules, and without limiting the generality of subsection (2), the Court may, in relation to proceedings in Class 1, 2 or 3 of the Court's jurisdiction, obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings and may receive in evidence the certificate of any such person.

7 The applicant to the appeal is the Australian Catholic University ("ACU"). The ACU's Strathfield Campus currently operates under development consents granted in 1994, by the Court, and in 2002, by the council.

8 The council has received a number of complaints from local residents relating to on-street parking and traffic safety issues in streets surrounding the Strathfield Campus arising from students parking in local streets.

9 There are currently Class 4 proceedings pending in this Court brought by the council against ACU seeking relief to restrain certain breaches of conditions of the 1994 and 2002 consents relating to student numbers, staff numbers and hours of operation. The Class 4 proceedings have been

initially stood over to 18 October 2013 pending the outcome of the Class 1 appeal to which this joinder application relates. No date has yet been set, however, for the hearing of the Class 1 appeal.

- 10 The council has not sought interlocutory relief in those proceedings and the ACU has not provided any undertakings in relation to compliance with the conditions of consent relating to student numbers, staff numbers and hours of operation.
- 11 The ACU opposes the application by the council for joinder. The position of the respondent, the Minister for Planning and Infrastructure (“the Minister”), was to consent to the joinder.
- 12 Because I consider that the council is an entity that ought to have been joined as a party and whose joinder is necessary, the application is upheld and it is strictly not necessary to determine the alternative basis by which the council seeks to participate in the proceedings. Were I required to do so, I would have no hesitation in permitting the council to participate in the appeal by making an appropriate *Double Bay Marina* order.

The Concept Plan Application

- 13 The following background facts are uncontroversial.
- 14 Under s 75Q of the EPAA, which, although now repealed, is applicable by virtue of Sch 6A of the EPAA, the ACU appeals a decision by the Minister to refuse to grant approval to a concept plan application lodged by ACU under the former Pt 3A of the EPAA with the Department of Planning and Infrastructure (“the Department”) on 10 December 2010.
- 15 The concept plan application was in respect of the ACU’s Strathfield Campus. The land to which the concept plan application relates is wholly located in the council’s local government area.

- 16 The application sought approval for a concept plan for the expansion of the ACU's Strathfield Campus, with the redevelopment being carried out over four separate development stages that include:
- (a) an approval for six building envelopes between two and four storeys in height, divided into four precincts;
 - (b) an increase in student numbers to 2,000 students at any one time and enrolments to 4,800 based on Equivalent Full Time Student Load;
 - (c) an increase in staff numbers to a maximum of 260 staff;
 - (d) expanded hours of operation;
 - (e) an increase in site car parking from 346 to 717 spaces in basement and ground level parking; and
 - (f) changed access arrangements and pedestrian linkages.
- 17 On 14 January 2013, the Minister referred the concept plan application to the Planning and Assessment Commission ("PAC") for determination.
- 18 The council made a number of submissions to the PAC in relation to the concept plan application with respect to the following issues:
- (a) the intensification of student numbers;
 - (b) the impact on traffic, access and parking;

- (c) the built form, bulk and scale and detrimental impact on existing residential character;
- (d) the impact of the proposed redevelopment on residents; and
- (e) heritage matters.

19 The council's submissions were lodged, together with expert reports assessing the proposed development by:

- (a) Mr Craig McLaren of McLaren Traffic Engineering – a traffic report dated 12 March 2012 and another traffic report dated August 2012;
- (b) Mr Nigel Dickson of Dickson Rothschild – a design and planning report dated 14 March 2012 and another design and planning report dated July 2012; and
- (c) Mr David Logan of Godden Mackay Logan Pty Ltd – a heritage report dated 7 March 2012.

20 The Department also commissioned a traffic consultant, Parsons Brinckerhoff, to undertake an independent review of the travel and transport impacts of the proposal ("the PB Report"). After reviewing the two McLaren reports and a traffic assessment prepared on behalf of the ACU by ARUP in December 2011 ("the ARUP Report"), the PB Report concluded that "neither side has conclusively demonstrated what the impacts of the proposal would be and how they could be mitigated".

21 On 16 January 2013, the Director-General's Environmental Assessment Report was issued under s 75I of the EPAA, with a recommendation for approval of the concept plan application subject to conditions ("the draft DG approval").

- 22 On 27 March 2013, the PAC made its determination of the concept plan application. The PAC determination approved the concept plan application only in part but including, relevantly, the underground car park and Precinct 1 (the library) (“the PAC approval”).
- 23 The PAC determination did not approve, amongst other things, the following aspects of the ACU’s concept plan application:
- (a) the construction of Precincts 2–3;
 - (b) any increase in student numbers and staff numbers;
and
 - (c) any increase in the permitted hours of operation.

The Appeal to This Court

- 24 On 15 May 2013, the ACU filed an appeal in the Court in relation to the PAC approval pursuant to s 75Q of the former Pt 3A of the EPAA.
- 25 As stated above, the Minister is the respondent to the appeal, however, the PAC has conduct of the appeal on behalf of the Minister.
- 26 On 22 July 2013, the ACU filed its statement of facts and contentions in the Class 1 appeal.
- 27 That statement contends that the Court should (at [59]):

...determine the Application in a manner that approves the Application generally on the conditions proposed by the Director-General in the Recommended Approval.

- 28 Thus, in this appeal the ACU seeks approval of the concept plan application as modified by the terms and conditions contained in the draft DG approval.
- 29 The Minister, by contrast, has filed a statement of facts and contentions in reply on 6 September 2013, that makes it plain that the Minister is defending the appeal on the basis that the Court should only grant approval for the concept plan application that was approved by the PAC. That is to say, the approval of the underground car park and Precinct 1 but not of an increase in student or staff numbers or hours of operation and not the buildings in Precincts 2 and 3.
- 30 The council, if joined, as evident by a draft statement of contentions in reply tendered by it to the Court, would argue that the Court should only grant approval for part of the concept plan application, namely, that approved by the PAC which comprises the underground car park and associated works, but excludes the library in Precinct 1, the buildings in Precincts 2 and 3 and the increase in staff or student numbers and hours of operation. In other words, the council opposes granting approval in the terms contained in either the draft DG approval or the PAC approval.
- 31 The reasons were five-fold:
- (a) unacceptable height, bulk and scale of the buildings;
 - (b) unacceptable parking and traffic impacts;
 - (c) unacceptable amenity impact on the surrounding area due to the increase in the hours of operation;
 - (d) unacceptable impact of the increase in student numbers; and

- (e) overall the concept plan application is unacceptable having regard to the concerns raised by the nearby resident objectors.

Applicable Legal Principles for Joinder Under r 6.24 of the UCPR

- 32 As is apparent from the language of the rule, r 6.24 of the UCPR has two limbs: the first is directed to the joinder of a proper party to the proceedings; and the second, to a necessary party to those proceedings. The limbs often can and do overlap.
- 33 The terms of the rule are broad and joinder is not limited to circumstances where it is necessary for the determination of all matters in dispute in a proceedings (*Moorebank Recyclers Pty Ltd v Liverpool City Council* [2009] NSWLEC 22 at [18]). Nonetheless, the rule reflects the Court's general concern to achieve finality in litigation (*Wollondilly Shire Council v Antoun (No 2)* [2010] NSWLEC 171 at [18]).
- 34 In *Charlton v Moore* [2009] NSWLEC 61, Biscoe J articulated the test for joinder under r 6.24 of the UCPR as follows (at [2]):

- 2 In my opinion, the appropriate test for joinder is that adopted in *News Limited v Australian Rugby Football League Limited* [1996] 64 FCR 410 at 524. There the Full Court of the Federal Court, in the context of an equivalent rule of the Federal Court, adopted the following test for joinder proposed by Lord Diplock in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 (at 55-56):

"A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

An order which directly affects a third person's rights against or liabilities to a party should not be made unless the person is also joined as a party. If made, the order will be set aside."

- 35 In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; (2010) 241 CLR 1 (at [131]–[132]), the High Court referred to the decision in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 and applied a test of direct effect on the legal rights of another person. That is to say, an order which directly affects a third person's rights against, or liabilities to, a party should not be made unless that person is also joined as a party (*News Ltd* at 524E–F).
- 36 In *CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (in Liq) (No 2)* [2011] NSWLEC 91 Craig J, while not expressly referring to *Charlton* or *White City*, nevertheless adopted a similar test (at [9]–[12]).
- 37 The test in *News Ltd*, as endorsed in *White City*, has more recently been applied in *In the matter of Raejoe Pty Limited (receiver and manager appointed) (administrators appointed) as trustee for "The Coe Family Trust"* [2012] NSWSC 1457 per Black J (at [6]–[9]).
- 38 Finally, in addition to the requirements contained in the two limbs of r 6.24 of the UCPR, in exercising the discretion to join a party pursuant to the rule, regard must be had to whether the exercise will facilitate the "just, quick and cheap resolution of the real issues in the proceedings" (s 56 of the *Civil Procedure Act 2005* ("the CPA")). This relevantly includes having regard to the dictates of justice (s 58 of the CPA) and the proportionality of costs (s 60 of the CPA).

Is the Council a Party that Ought to be Joined to the Proceedings?

- 39 Relying on an affidavit affirmed by Mr Paul Jayne (a solicitor with HWL Ebsworth Lawyers, the council's legal representative) on 1 August 2013, the council submits that it is a party that ought to be joined to the appeal because as the "Roads Authority" for the purposes of the *Roads Act 1993*, it is vested in fee simple as the owner of all the public roads within the local government area of Strathfield.

- 40 Accordingly, first, its ability to care for, control and manage its roads in the manner authorised by that Act would be directly impacted by the terms of any approval granted by the Court. And second, one of the major issues of contention in the proceedings concerns the impact of the proposed development on traffic and parking in the area and the concomitant effectiveness of any ameliorative measures. These are matters that directly affect the council's legal rights and interests, and about which the council has expertise.
- 41 For example, the ACU's application relied, in part, upon the implementation of a Green Travel Plan ("the GTP") to ameliorate the impacts of an increase in student numbers. The GTP as formulated required the council to provide new pedestrian links from the Strathfield Campus to public transport on council land and to build bicycle infrastructure between the Campus and public transport on council roads. The council submits that the details of such requirements are uncertain and the impacts not properly assessed. They are not supported by the council.
- 42 Further, it was, initially at least, a contention of the Minister that if the application is approved, a resident parking scheme or parking restrictions may need to be introduced to the surrounding residential streets. The council again submitted that the impacts of such an inchoate scheme have not been properly assessed.
- 43 If joined, the council proposed to lead expert evidence from Mr McLaren in relation to the traffic, access and parking impacts – particularly the possible introduction of a resident parking scheme in the area – arising from the ACU's proposed development and the effectiveness and appropriateness of the mitigation measures proposed to address those impacts.

44 By contrast, the ACU submitted that the council ought not to have been joined because:

- (a) the council was not the relevant decision-maker, it was the Minister, through the PAC, and therefore, the Minister is the only proper contradictor to the appeal. This is reflected in (the former) Pt 3A of the EPAA, which, unlike Pt 4, evinces a legislative intention that the council play no statutory role in the decision, other than by way of objector (s 75H of the EPAA) with, as distinct from a project application, no rights of appeal. To join the council would thus defeat the clear statutory intention in this regard;
- (b) merely because the council has functions and powers under the *Roads Act* does not, of itself, mean that the council ought to have been joined as a party. As the ACU submitted, the fact that vehicles, pedestrians and cyclists associated with the development will travel on council owned roads is not unique;
- (c) the amended concept plan application the subject of the appeal instituted by the ACU does not depend on a resident parking scheme being implemented. As the *ACU Strathfield Concept Plan _ Preferred Project Report and Response to Submissions MP 10_0231* stated:

...original proposals to work with Council to introduce 2-hour timed parking in the local area have been abandoned, as it has been demonstrated that car parking in local streets is likely to significantly decrease with the additional parking on site and the use of the shuttle bus.

- (d) and the GTP does not require the council to carry out any public works to mitigate the impacts of increased student numbers, rather it contemplates a working partnership being established with, among other entities, the ACU and the council to deal with traffic impacts.

Is Joinder of the Council Necessary for the Determination of All Matters in Dispute?

45 The council submitted that it was a necessary party to be joined to the proceedings because, first, there is no contradictor to raise issues before the Court as to:

- (a) the unacceptability of the height, bulk and scale of the proposed buildings, recalling that what the ACU seeks approval for in the appeal is the concept plan as approved by the DG;
- (b) the unacceptability of the proposed mitigation measures relating to the impact of the proposed development on traffic and parking; and
- (c) the amenity impacts on the local residents both existing and future.

46 Although the Minister contests the approval of the buildings in Precincts 2 and 3, the Minister does not contest the approval of the library in Precinct 1. Whereas the council, in addition to the buildings proposed in Precincts 2 and 3, also takes issue with the height, bulk and scale of the library and its impact on the amenity of the surrounding area.

- 47 Second, there was “more than an arguable possibility” that the council would be affected if either the DG’s approval or the PAC’s approval were granted.
- 48 Supplementary to relying on many of the arguments it put in relation to whether the council ought to be joined as a party to the proceedings, the ACU forcefully argued that joinder of the council was not necessary for the determination of all matters in dispute because, simply put, when regard was had to the parties’ statements of facts and contentions, there were no issues in dispute that could not be determined in the absence of the council. More specifically, the issue of the bulk, scale and height of the proposed development was not a matter in dispute between the Minister and the ACU.
- 49 In the alternative, it submitted that the council’s views on the built form of the proposed buildings was sufficiently known for the Court to be adequately informed of the issue.
- 50 The ACU relied on an affidavit of Ms Janelle Taylor affirmed 24 September 2013 in support of these, and other, submissions. Ms Taylor is a solicitor with the legal firm Clayton Utz, which represents the ACU.

The Council Ought to Have been Joined and is a Necessary Party

- 51 Having regard to the real issues for determination in this merits appeal and the arguments raised by both parties, in my opinion, the council both ought to have been joined as a party and its joinder is necessary. Given the intertwining of relevant matters for consideration under the two limbs of r 6.24 of the UCPR it is convenient to express my reasons for reaching this conclusion in a similarly melded manner.
- 52 First, I do not accept that the legislative intention ascribed to Pt 3A by the ACU is as unequivocal as it submits in evincing, objectively, a desire to

exclude the council from participating in this appeal. Much clearer statutory language is required to achieve this effect in an appeal in Class 1 of this Court's jurisdiction.

53 Second, it must be acknowledged that a review of the PAC Report plainly demonstrates that it had regard to the submission that the council made to it with respect to the impact of the proposed development on traffic and parking, and its built form; that the PAC concurred with the council that these were significant issues; and that the Minister in his statement of facts and contentions raises in detail the issues of traffic and parking, including the GTP. But the fact that these matters were ventilated before the PAC is not determinative of whether the council ought to have been joined as a party to this merits appeal nor whether it is a necessary party to the appeal. It must be recalled that the subject matter of the appeal is not the concept plan application as modified by the PAC, it is the concept plan application as modified by the DG. And, in any event, the Court is not bound by the evidence and findings of the DG or the PAC – it must determine for itself whether or not to allow the appeal. Although, as the ACU noted, only the Minister has the power to approve the concept plan and the Court cannot make or direct the Minister on any determination that may be made when giving approval for a concept plan (see s 75P of the EPAA), the Minister must nevertheless “approve the concept plan in the manner determined by the Court” (s 75Q(3) of the EPAA).

54 Further, while the ACU is correct in its contention that merely because the council owns the roads likely to be impacted by the proposed development this does not mean it ought to be, or that it is necessary for it to be, joined as a party to the proceedings, the proposed development the subject of this appeal goes further than this insofar as it contemplates works to be carried out by the council in order to implement the GTP. These works include the construction of pedestrian pathways and cycle routes. Although the ACU draws support from the fact that presently the work is not actually required to be undertaken, it is only to be “considered”, nonetheless, in my view, the likelihood of some work having to be carried out by the council is

sufficiently high that joinder is warranted given that the ACU is seeking approval for a considerably enlarged proposed expansion of the Strathfield Campus than that approved by the PAC, both with respect to built form and student and staff numbers (the latter of which is partially endorsed by the Minister).

- 55 The ACU relied on a piece of correspondence suggesting that the Minister and the council had agreed to share the costs of experts in the appeal, to argue that “the Minister and the Council will effectively act as one”. However, this evidence was expressly disavowed by later correspondence from the Minister to the council. And moreover, even if the council and the Minister had made such an agreement, this would presumably only serve to reduce the likelihood of a multiplicity of experts with the consequence that the joinder of the council would not result in a disproportionate cost to the existing parties to the appeal. Both are factors militating in favour of joining the council to the proceedings.
- 56 Third, as the ACU concedes, only the council has the statutory power to implement a resident parking scheme. Although the amended concept plan application does not depend on the existence of a scheme, this does not mean that such a scheme will not ultimately be determined to be necessary by the Court and be reflected in a condition attached to the determination of the appeal. The ACU submitted that absent joinder any such condition would not be enforceable upon the council (again, in my opinion, this suggests that joinder is more, rather than less, appropriate). While strictly speaking this is correct, nevertheless it must be recalled that upon determination of the appeal by the Court, were the Minister to determine that approval to carry out the project was to be subject to, for example, a determination of a development application for the project under Pt 4, the determination of that development application is to be generally consistent with the terms of the approval under the concept plan (s 75P(2)(a) of the EPAA).

- 57 Fourth, the suggestion by the ACU that the built form is not an issue in dispute in the proceedings is, in my opinion, misplaced. True it is that built form does not present itself as an issue on the parties' statements of facts and contentions, but on the concept plan application proposed by the ACU (not that as approved by the PAC), it is conceivable that during the course of the appeal the bulk, scale and height of Precincts 2 and 3 will become an issue for the Court and will be reflected in its findings in determining the appeal.
- 58 The submission of the ACU wrongly, in my view, conflates the rigidity of proceedings in Class 4 of the Court's jurisdiction and the concomitant confining and structuring of the issues through the use of pleadings with the more malleable and necessarily flexible process in Class 1 proceedings. Subject to ensuring that the parties are afforded procedural fairness, as stated above, the Court is not strictly bound by the contentions identified by the parties in merits appeals. If the Court is to give serious consideration to the ACU's amended concept plan application, it is almost inconceivable that the issue of built form will not arise. This is very different to the situation that all too often arises in appeals under s 56A of the LEC Act, where a long line of authority has held that the parties are bound by their conduct of the proceedings before a Commissioner and cannot later complain that the Commissioner failed to consider issues that were not raised before him or her. The decision in *Design Power Associates Pty Ltd v Willoughby City Council* [2005] NSWLEC 470; (2006) 148 LGERA 233, relied upon by the ACU in this context, may be distinguished on this basis.
- 59 Thus, if for no other reason, there being no contradictor present before the Court to assist it in this regard, joinder of the council is necessary. To do so facilitates the overriding purpose contained in s 56 of the CPA.
- 60 Finally, although alone insufficient, I accept the council's submission that its joinder is in the public interest insofar as it is able to represent the views of the community, many of whom have expressed their objection to the

proposed development in either form. In my opinion, the council is in the best position to ventilate the concerns of the resident objectors.

61 In circumstances where any overlap in the evidence of the council and the Minister would be minimal; where the application is for a significant development in the middle of a residential environment; where there has been significant public interest in the application reflected in the number of public submissions made; where the council has acted promptly in making the application for joinder; where no evidence has been filed in the appeal and it has not been listed for hearing; and where the Minister consents to the motion, then for all the reasons discussed above, joinder of the council is appropriate in the exercise of my discretion under r 6.24 of the UCPR.

62 It must also be apparent, from the reasons given above, that there is no basis for limiting, as the ACU sought, the ambit of the joinder.

Double Bay Marina Order

63 Although strictly not necessary to determine in light of the conclusion arrived at above, and especially given the scant attention paid to it by the parties, if my discretion under r 6.24 of the UCPR were to miscarry, in the alternative, I would not hesitate to grant leave to the council pursuant to s 38(2) of the LEC Act (as to the applicable legal principles, see *Ali v Liverpool City Council* [2009] NSWLEC 107 at [30]–[32]) to adduce evidence and make submissions on the impact of the proposed development on the local residents in respect of traffic and car parking, and on their amenity, given the bulk, scale and height of the development contained in the ACU's concept approval application.

Orders

64 The orders of the Court are that:

- (1) leave be granted pursuant to r 6.24 of the UCPR to Strathfield Municipal Council to be joined as the second respondent to these proceedings;
- (2) the matter be listed before the Acting Registrar for further directions on 23 October 2013; and
- (3) the exhibits be returned.

I CERTIFY THAT THIS AND
THE 17 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE RACHEL PEPPER


.....
Associate

Date 17/10/13.....