



LAND & ENVIRONMENT COURT OF NSW	
FILED ON	
29 MAY 2014	
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KU-RING-GAI COUNCIL'S STATEMENT OF FACTS AND CONTENTIONS

COURT DETAILS

Court Land and Environment Court of New South Wales
Class 1
Case number 10648 and 10834 of 2013

TITLE OF PROCEEDINGS

Applicant **Brett Stephen Lord and Marcus William Ayres as Joint and Several Receivers and Managers of the Site**

Respondent **Minister for Planning & Infrastructure**

Second Respondent **Ku-ring-gai Council**

PREPARATION DETAILS

Prepared for **Ku-ring-gai Council, Respondent**
Legal representative Christopher Thomas Drury, Sparke Helmore
Legal representative reference CLB:KUR955/47
Contact name and telephone Catherine Morton, (02) 9373 1447

PART A – FACTS

The Proposal

1. This appeal is against the decision of the Planning Assessment Commission (“**PAC**”) on 30 July 2013, to refuse concept plan application MP08_0207 and project plan application MP10_0219 for development on land at 1, 1A and 5 Avon Road, and 4 and 8 Beechworth Road, Pymble (“**Site**”).
2. On 16 January 2014, the Applicants were granted leave to file amended Class 1 applications in each of these proceedings, including a Further Revised Project Report dated December 2013 and a Revised Stage 1 Project Application.
3. Under the Revised Concept Plan Application MP08_0207, the Applicants seek development consent for:
 - a) Use of the Site for the erection of 4 residential flat buildings between 2 and 7 storeys in height with an overall floor space ratio of 0.66:1 and containing 184 units,
 - b) Basement carparking for 233 cars,
 - c) Internal roadworks to support the development,

- d) The creation of a Conservation Area for Blue Gum High Forest,
 - e) A pedestrian link through the Site from Avon Road to Beechworth Road,
 - f) Landscaped areas throughout the Site, in accordance with the Revised Concept Plan Application.
4. Under the Revised Project Plan MP10_0219 Application, the Applicants seek consent for:
- a) The demolition of existing buildings on the Site,
 - b) Construction of a residential flat building of 2 and 5 storeys, containing 33 apartments,
 - c) 1 level of basement carparking providing 41 car spaces,
 - d) Associated landscaping and stormwater management infrastructure,
 - e) Implementation of a vegetation management plan to manage and protect the Conservation Area.

The Site

5. The Site is located in Ku-ring-gai Local Government Area. The Site is located between Avon Road and Beechworth Road at Pymble and is currently zoned part R2 Low Density Residential, part R3 Medium Density Residential and part E4 Environmental Living under Ku-ring-gai Local Environmental Plan (Local Town Centres) 2012 (“**LEP 2012**”). LEP 2012 came into effect on 8 February 2013. Residential flat buildings are prohibited in each of these zones.
6. Existing on the Site are 3 dwellings located each on 1 Avon Road, 5 Avon Road and 8 Beechworth Road. The dwelling at 1 Avon Road is listed as a heritage item of local significance under LEP 2012. It is proposed to be demolished as part of the Revised Project Plan. There is also a dwelling at 6 Beechworth Road which is a heritage item of local significance under LEP 2012.

The Statutory Controls

7. The relevant Statutory Controls are:
- a) Part 3A of the Environmental Planning and Assessment Act 1979 (“**EPA Act**”),
 - b) State Environmental Planning Policy (Major Development) 2005,
 - c) State Environmental Planning Policy (Infrastructure) 2007,
 - d) State Environmental Planning Policy No. 55 – Remediation of Land,
 - e) State Environmental Planning Policy (Sydney Harbour Catchment) 2005,

- f) State Environmental Planning Policy 65 – Design quality of Residential Flat Development,
- g) Ku-ring-gai Local Environmental Plan (Local Centres) 2012,
- h) Ku-ring-gai Local Centres Development Control Plan 2013 (“DCP 2013”),
- i) Ku-ring-gai Contributions Plan 2010,
- j) Office of Environment and Heritage Best Practice Guidelines for Blue Gum High Forest.

Actions of the Respondent Consent Authority

8. On 8 October 2008, the then proponent, Mr James Woodward Neale submitted to the Department, Major Project Application MP08_0207.
9. On 1 December 2008, the Department informed Mr Neale that that application was a project to which Part 3A of the EP&A Act applies.
10. On 11 February 2009 the Department issued its DGRs to the then proponent, Mr Neale.
11. On 27 January 2010 the Director-General authorised the submission of a concept plan for residential development at Avon, Beechworth and Arilla Roads.
12. Sometime in November 2010, the Environmental Assessment (“EA”) for the Concept Plan and the Stage 1 Project Application was prepared. On 10 November 2010, the Department advised Mr Neale that the EA was considered satisfactory subject to further information being provided.
13. On 10 December 2010, a final EA for the project was received by the Department.
14. On 15 December 2010, Mr Neale lodged the Stage 1 Project Application MP10_0219 with the Department. The EA went on exhibition between 15 December 2010 and 11 February 2011.
15. On 19 April 2011 the Department requested from Mr Neale a Preferred Project Report (“PPR”). On 24 August 2011, Receivers and Managers were appointed over the Site.
16. On 25 May 2011 the Minister wrote to the Honourable Member for Ku-ring-gai advising that the Major Project Applications were declared “Major Projects” in accordance with the provisions of the former State Environmental Planning Policy (Major Projects). Part 3A of the EP&A Act has since been repealed.
17. On 30 November 2012 the Department received a PPR for the Project prepared by Urbis for the then proponent, Mr Neale. The PPR was exhibited between 23 January 2013 and 1 March 2013 for MP08_0207 and MP10_0219.

18. The Council lodged a submission dated March 2013 opposing the Project Plan for reasons that:

- a) The Project is inconsistent with strategic planning for Ku-ring-gai, is prohibited by the applicable environmental planning instruments and does not meet the objectives for the applicable zones;
- b) There is inadequate information and inconsistencies in the plans and documentation;
- c) Isolation of the Site;
- d) Ecological concerns including that the Riparian corridor should be investigated;
- e) Traffic and access;
- f) Density;
- g) The proposal will have an adverse impact on heritage items including the demolition of 1 Avon Road, which is not supported;
- h) Bushfire;
- i) Safety; and
- j) Design of the buildings.

19. On or about June 2013, the Director-General prepared an EA Report recommending approval of the Project subject to conditions.

20. On 12 June 2013 the Department referred the Project to the PAC for determination and on 18 June 2013 the PAC sent letters to public authorities inviting them to a PAC public meeting. That meeting was held on 18 July 2013.

21. On 30 July 2013, the Minister by his delegate, the PAC, refused concept plan application MP08_2007 and project plan application MP10_0219.

22. On 31 July 2013, the Department wrote to the Council informing it that the PAC had refused MP08_0207 and MP10_0219.

23. On 31 July 2013 the Department also notified the Applicants that the PAC had refused the Project.

24. On 22 August 2013 the Applicants filed a Class 1 Appeal against the Minister's refusal of the Project.

25. On 8 October 2013 an ordinary meeting of the Council was held to discuss each of the applications under MP08_207 and MP10_0219.

26. On 28 October 2013, the Applicants filed a Class 1 Appeal against the Minister's refusal of the Stage 1 Project Application.
27. Following the Court's grant of leave to the Applicants on 16 January 2014, to rely in amended applications in each of these proceedings, between 31 January 2014 and 28 February 2014, the Revised Project was publicly exhibited.
28. The 575 individual submissions received, raised the following issues:
- Unacceptable traffic and parking impacts and congestion of roads in the vicinity of the Site, traffic safety,
 - Out of character with other development in the vicinity of the Site,
 - Non-compliance with LEP 2012,
 - Excess height, bulk, scale, density,
 - Constrained Site,
 - Environmental impacts arising from loss of trees on the Site,
 - Loss of amenity and impacts on the amenity of surrounding residents including privacy impacts
 - Impacts on views from properties in the vicinity of the Site and view loss,
 - Impact on property values,
 - Unacceptable impacts on heritage items on and in the vicinity of the Site,
 - Inadequate access for emergency vehicles.
29. Following public exhibition of the Revised Project, the Council lodged a submission dated February 2014 opposing the Revised Project for reasons that:
- a) The Revised Project has not resolved all of the Council's concerns raised in its previous submission of March 2013,
 - b) The proposed development does not comply with provisions of LEP 2012,
 - c) The proposed development would result in the demolition of a heritage item at No.1 Avon Road, which has not been sufficiently justified and alternative schemes for its retention have not been adequate consideration,
 - d) The submitted peer review by NBRS & Partners does not raise the issues addressed in the Department's Statement of Facts and Contentions, including potential impacts to the heritage item at No.11 Avon Road,

- e) The proposal will result in the isolation of the adjoining property at No.3 Avon Road. The submitted plans for multi-unit housing development at No.3 Avon Road do not result in an appropriate or compliant development for the Site. The Applicants have not provided any evidence as to the frontage width of No.7 Avon Road and have not considered the constraints of that site such as slope and proximity to a heritage item,
- f) The proposed development is unsatisfactory with regard to amenity impacts and does not comply with the RFDC Rules of Thumb in relation to solar access, south facing units, cross-ventilation and building depth,
- g) The proposal relies heavily on existing and proposed landscaping to shield the bulk of the proposed development from adjoining properties, as has been shown in the submitted photo montages,
- h) The proposed development contains several areas in which inadequate deep soil landscaping has been provided,
- i) The pedestrian route proposed to Building 5 is impractical and unsafe and will compromise the provision of landscaping within the front set back of Building 5,
- j) The Applicant has failed to specify how the development will be staged in order to permit the calculation of separate s 94 contributions for each stage,
- k) The floor space ratio has been calculated incorrectly and is inconsistent with LEP 2012 and the approach previously taken by the Land & Environment Court in *Haralambis Management Pty Limited v Council of the City of Sydney* [2013] NSWLEC 1009,
- l) No amended stormwater plans have been submitted and the stormwater plans previously submitted contain inconsistencies,
- m) No assessment of the construction impacts on trees to be retained on the Site or on adjoining sites has been made,
- n) The Statements of Commitments contain errors relating to hours of work and bush fire compliance.

PART B – CONTENTIONS

The Respondent contends the matters raised in Contentions 1 to 15 should cause the Court, in exercising the functions of the consent authority, to refuse the application:

Site Suitability

- 1 The Site is not suitable for the development proposed under the Revised Project for the reasons set out in the contentions below.

Inconsistent With Current and Desired Future Character of the Area

- 2 The high density nature of the development proposed under the Revised Project is not compatible or consistent with the zoning objectives for the R2 Low Density, E4 Environmental Living and R3 Medium Density Residential Zones under LEP 2012.

Particulars:

- a) The objective at bullet point 3 for the R2 Low Density Zone.
- b) The objectives at bullet points 1, 2 and 3 for the E4 Environmental Living Zone.
- c) The objectives at bullet points 1, 2, 3 and 4 for the R3 Low Density Zone.
- d) Clause 2.3(2) of LEP 2012.
- e) The typology of the building as a residential flat building is distinct from the existing character (detached single dwellings) and the proposed character (townhouse style development).
- f) The form and scale of the residential flat building proposed for Building 1 on Avon Road is inconsistent with the existing streetscape character on that road which is characterised by detached single dwellings. The proposed Building 1 will be incongruous in the context of the existing and future streetscapes on Avon Road also as a result of its proposed proportions, fenestration and articulation, which emphasise its vertical expression.
- g) Failure to provide sample colour palette in the Design Verification statement.

Visual and Amenity Impacts (Building 1)

- 3 The proposed Project Application for Building 1 does not satisfy the RFDC Rules of Thumb for solar access, natural ventilation, quantum of storage and its location and units accessed off a single corridor. The Applicants have failed to demonstrate that the proposed buildings will enable an acceptable standard of amenity to be achieved for future occupants

Particulars:

- a) Only 17 of the 33 (51%) units proposed in Building 1 under the Further Revised Project would receive a minimum of 3 hours direct sunlight between 9 am and 3 pm, contrary to the RFDC Rule of Thumb at page 85, which requires a minimum of 70% of such units are to receive 3 hours solar access between 9am and 3pm in mid-winter.
- b) With regard to natural ventilation, 4 of the 33 (12%) kitchens proposed in Building 1 are located adjacent to a window on an external wall and receive natural ventilation. This is contrary to the RFDC Rule of Thumb at page 87 which requires 25% of kitchens to be naturally ventilated.
- c) The Applicants have failed to demonstrate that proposed Building 1 complies with the RFDC Rule of Thumb concerning the quantum and location of storage (page 82 of the RFDC).
- d) The proposed Building 1 features nine units accessed off a single corridor, and does not comply with the RFDC Rule of Thumb on page 79 which allows a maximum of eight.

Visual and Amenity Impacts (Buildings 3, 4 and 5)

- 4 The proposed Concept Plan does not demonstrate that an acceptable standard of amenity will be achieved for Buildings 3, 4 and 5. Building envelopes set the direction for the entire project and determine whether future internal amenity will comply. In particular, concern is raised in relation to building width, solar access, south-facing single aspect units and cross-ventilation.

Particulars:

- a) The proposed building envelopes for Buildings 3, 4 and 5 are up to 21 m wide and do not comply with the RFDC Rules of Thumb at pages 28 and 87 which allow a maximum building width of 18 m. The proposed enclosed winter gardens also contribute to the excessive depth of the units by increasing the effective distance between the kitchens and the windows on the external walls.
- b) The RFDC Rule of Thumb at page 85 requires that a minimum of 70% of units receive 3 hours' solar access between 9am and 3pm in mid-winter. The following buildings do not comply with this Rule of Thumb:

- i. Building 3: only 28% of units comply,
- ii. Building 4: only 48% of units comply,
- iii. Building 5: only 48% of units comply.

These calculations do not take into consideration any additional overshadowing from neighbouring buildings or topography.

- c) Proposed Building 5 does not comply with the 10% RFDC Rule of Thumb for the number of south facing single aspect units. 4 of the 29 units proposed in that building (or 14%) are south facing. In addition, Unit 5.2.04 appears to be underground which will result in unacceptable amenity impacts for future occupants.
- d) In proposed Building 3, only 27 of 57 units (47%) are cross ventilated and in Building 4 only 32 of 65 units proposed (49%) are cross ventilated. These units in Buildings 3 and 4 fail to comply with the RFDC Rule of Thumb for cross ventilation which states that 60% of units should be naturally cross ventilated (at page 87).

Site Isolation

- 5 The potential for isolation of Nos. 3 and 7 Avon Road from the development proposed under the Revised Project is unacceptable.

Particulars:

- a) Nos. 3 and 7 Avon Road are zoned R3 Medium Density Residential under LEP 2012. The minimum site area required for R3 developments under clause 6.5(2) of LEP 2012 is 1,200 m². That minimum lot size standard was established to avoid overdevelopment of sites.
- b) No. 3 Avon Road has a site area of 929.5 m² and is approximately 23% smaller than the minimum site size envisaged for multi-unit development under clause 6.5(2) of LEP 2012. Accordingly the developable site area of No. 3 Avon Road is reduced due to its two street frontages (primary and secondary) both of which will require greater setbacks than a standard single road frontage site would. The Applicants' indicative design included in the Revised Project fails to demonstrate that an appropriate and compliant development is achievable for the Site. The indicative design also does not comply with DCP 2013 at Volume A Part 6 and in particular in relation to: building setbacks, driveway location, private courtyards in front setbacks, deep soil, private open space and solar access.
- c) The Applicants' proposed indicative design for No. 7 Avon Road states that it has the minimum lot size and is therefore able to be developed for medium density development on its own. Clause 6.5(2) of LEP 2012 requires a street frontage of 24 m for sites less

than 1,800 m² in area. The Applicants have not provided any survey details to show that the frontage of No. 7 Avon Road complies with that requirement.

- d) The development of No. 7 Avon Road is also constrained by the adjoining heritage item at No. 11 Avon Road. Volume B at s 7.3(6)(iii) of DCP 2013, requires a minimum building separation of 12m for development in the vicinity of a heritage item. The dwelling at No. 11 Avon Road is set back approximately 2.8 m from the northern side boundary with a nil setback to the garage. No. 7 Avon Road is a narrow allotment with a width of about 24 m. If the development on No. 7 Avon Road were to comply with Council's setback requirements under DCP 2013, development on the site would be significantly constrained.
- e) The cross fall of No. 3 Avon Road is approximately 5 m from its northern boundaries to its south eastern corner. The cross fall of No. 7 Avon Road is approximately 6 m from its northern boundary to its western most corner. The slope of these sites also constrains their development potential.

Heritage

- 6 The Applicants peer review prepared by NBRS & Partners and dated 19 December 2013 is inadequate and contains errors.

Particulars:

- a) Under Part 5.10 at clause 2(b) of LEP 2012, development consent is required for making structural changes to the interior of a heritage item or by making changes to anything inside the item that is specified in Schedule 5 in relation to the item. The NBR&S Report does not address this issue.
- b) The NBRS Report does not demonstrate why the proposed demolition of the heritage item at No. 1 Avon Road should be approved and nor does it provide an updated heritage assessment of the current condition of the heritage items on the Site.
- c) The Applicants have not addressed clause 5.10(10) of LEP 2012 or the provisions under DCP 2013 relating to the retention of heritage items in amalgamated development sites, under Volume B, Part 7.2(4).

Deep Soil Landscaping

- 7 Inadequate deep soil landscaping has been provided at the front, rear and sides of the Site

Particulars:

- a) Building setbacks should be used to provide deep soil landscape at the front, sides and rear of the development as trees to the scale of the building will require a minimum deep soil dimension of 6 metres
- b) The following areas of deep soil are less than 6 metres in dimension:
 - (i) south-east of Building 3 adjacent to No 15 Avon Road (4.2m)
 - (ii) north-east of Building 1 adjacent to No 3 Avon Road (4.5m)
 - (iii) south-east of Building 4 adjacent to No 3 Avon Road (4.2m)
 - (iv) west of Building 5 adjacent to No 6 Beechworth Road (0 m)
 - (v) east of Building 1, within the front setback (no details of soil depth given but unlikely to support medium to large trees, inconsistent with surrounding streetscape); and
 - (vi) driveway to Building 1.

Car park layouts should be redesigned to achieve a minimum of 6m deep soil in all instances (by providing additional basements levels or reducing the carpark footprints for all buildings).

Accessibility

- 8 The proposed ramp to Building 5 at 160m in length is awkward and dangerous. The proposed accessible units in Building 1 are an unsatisfactory layout.

Particulars:

- a) The proposed ramp is not a reasonable mean for access for anyone with limited mobility. It also limits the extent of deep soil landscaping.
- b) All limited mobility accessible dwellings proposed to Building 1, have only 1 bedroom, which is an unacceptable housing choice.

Floor Space Ratio ("FSR")

- 9 The Applicants have excluded from the gross floor area ("GFA") calculation, the proposed winter gardens, which comprise fully enclosed balconies.

Particulars:

- a) The Applicants have calculated the FSR of the proposed development at 0.66:1 excluding the winter gardens. This is inconsistent with the definition of GFA under LEP 2012, which only excludes balconies with outer walls of less than 1.4m in height.

Tree Impacts

- 10 The Applicants have not provided an arborist's report documenting the condition of and potential impacts upon trees on the Site as a result of the proposed development.

Particulars:

- a) No assessment of impacts of construction upon trees to be retained on the Site (such as: 11, 245, 172, 175, 176A, 335 and 328) or on adjoining sites (such as: 264 and 267) has been made.
- b) The Applicants have not provided any tree protection methodologies or plans in compliance with AS4970-2009 (as amended).
- c) The Applicant has not made any study of existing cultural plantings, which include some existing vegetation proposed to be retained on the Site and on properties adjoining No.3 Avon Road.
- d) The impact upon the existing Turpentine trees 264-267 of the proximity of the proposed basement carpark adjacent to the western boundary of No.3 Avon Road has not been assessed.
- e) No assessment of the suitability for retention of tree 328 (which is a significant feature of the landscaped area to the south of proposed Building 1 within Stage 1), has been made.

Private Open Space

11 The proposed winter gardens do not provide appropriate areas of private open space.

Particulars:

- a) The proposed development does not comply with the RDFC Rules of Thumb at pages 49 and 78, which states that ground floor units should be provided with terraces or units at a minimum 25sqm in area with a minimum dimension of 4m. An indicative unit at 1.2.09 has an area of 10sqm and a minimum width of only 2.5m.

Stormwater

12 The Applicants have not submitted any amended stormwater management plans.

Particulars:

- a) The previous plans (Civil Certification) contained inconsistencies with regard to the proposed wetland (shown to be a temporary sediment basin).
- b) The Council had previously raised concerns relating to the provision of rainwater or onsite detention tanks. Those issues have not been addressed.

Section 94 Contributions

13 The proposal does not adequately deal with Section 94 Contributions which, in the absence of the Applicants providing further information, should be levied as particularised below.

Particulars:

- a) The Applicants have not specified how the development is proposed to be staged in order to permit the calculation of a separate section 94 contribution for each stage.
- b) In the absence of any proposal by the Applicants, all contributions pertaining to the Site should be contained in a single condition which will be due and payable at release of the first Construction Certificate for any development of the Site, on the following assumptions:
 - i. All studies capable of being used as bedrooms have been classified as bedrooms, as per the definitions of "bedroom" and "study" in Council's Contribution Plan.
 - ii. One unit in Building 1 was found to have a study which is capable of being used as a bedroom (unit 1.2.02). It has therefore been classified as a two bedroom unit.
 - iii. No detailed floor plans for Buildings 3, 4 and 5 have been provided. In the absence of detailed floor plans for Buildings 3, 4 and 5, it is presumed that all units described as "1+Bed" contain studies which are large enough to be used as a bedroom. These units have therefore been classified as 2 bedroom units.
 - iv. No floor plans for the existing dwellings at Nos. 1 and 5 Avon Road and No. 8 Beechworth Road have been provided. Based on the size of these dwellings, it has been assumed that they contain 3 bedrooms each.
- c) Council has prepared a draft condition, a copy of which is annexed to this Statement of Facts and Contentions.

Statements of Commitments

14 The Statements of Commitments contain errors.

Particulars:

- a) The section on residential amenity only refers to hours for demolition ("1am to 6pm on weekdays") and does not include hours in which excavation and constructions can be carried out.
- b) The section on bushfires incorrectly states that internal driveways will be designed to permit "...a 89 vehicle to pass". The correct reference should be made to a "B9 vehicle".

Public Interest

- 15 The matters raised by the resident objectors are summarised in the Statement of Facts in so far as those matters coincide with Contentions 1 to 13 above, they are matters warranting refusal of the application.

Noting that the Court is to have regard to the objectors' concerns pursuant to section 79C(1)(d) and (e) of the *Environmental Planning and Assessment Act*, the Council contends that the proposed application should not be approved having regard to the matters raised in the submissions received by Council insofar as those matters coincide with the contentions raised in this statement of facts and contentions.

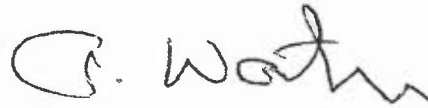
SIGNATURE

Signature of authorised officer of
respondent consent authority

Name of authorised officer

Capacity

Date of signature


ANDREW WATSON.
DIRECTOR STRATEGY &
ENVIRONMENT.

29th MAY 2014

Annexure – draft Section 94 Condition

**Section 94 Contributions - Centres.
(For DAs determined on or after 19 December 2010)**

This development is subject to a development contribution calculated in accordance with Ku-ring-gai Contributions Plan 2010, being a s94 Contributions Plan in effect under the Environmental Planning and Assessment Act, as follows:

Key Community Infrastructure	Amount
Local parks and local sporting facilities	\$2,288,897.82
Local recreation and cultural facilities; Local social facilities	\$328,285.95
Local roads, local bus facilities & local drainage facilities (new roads and road modifications)	\$451,642.22
Local roads, local bus facilities & local drainage facilities (townscape, transport & pedestrian facilities)	\$1,285,492.51
Total:	\$4,354,318.50

The contribution shall be paid to Council prior to the issue of any Construction Certificate, Linen Plan, Certificate of Subdivision or Occupation Certificate whichever comes first in accordance with Ku-ring-gai Contributions Plan 2010.

The contributions specified above are subject to indexation and will continue to be indexed to reflect changes in the consumer price index and housing price index until they are paid in accordance with Ku-ring-gai Contributions Plan 2010 to reflect changes in the consumer price index and housing price index. Prior to payment, please contact Council directly to verify the current payable contributions.

Copies of Council's Contribution Plans can be viewed at Council Chambers, 818 Pacific Hwy Gordon or on Council's website at www.kmc.nsw.gov.au.

Reason: To ensure the provision, extension or augmentation of the Key Community Infrastructure identified in Ku-ring-gai Contributions Plan 2010 that will, or is likely to be, required as a consequence of the development.