Attachment F

Chief Judge Preston Judgement
20 March 2025

Land and Environment Court

New South Wales

Case Name:	Billyard Ave Developments Pty Limited v The Council of the City of Sydney
Medium Neutral Citation:	[2025] NSWLEC 22
Hearing Date(s):	10 March 2025
Date of Orders:	20 March 2025
Decision Date:	20 March 2025
Jurisdiction:	Class 1
Before:	Preston CJ
Decision:	The Court orders: (1) The appeal is upheld. (2) The decision and orders of Commissioner Walsh of 19 December 2024 are set aside. (3) The proceedings are remitted to a Commissioner other than Commissioner Walsh to be determined in accordance with law and these reasons for judgment. (4) There is no order as to costs with the intention that each party pay their own costs of this appeal.
Catchwords:	APPEAL – appeal on question of law – misconstruction of statutory provision – Commissioner's decision to refuse development consent for demolition and erection of new residential flat buildings – contravention of building height development standard – written request seeking to justify contravention – Commissioner not satisfied that development is consistent with zone objectives – misconstruction of zone objectives – misunderstanding and misapplication of principles of statutory interpretation APPEAL – appeal on question of law – denial of

	procedural fairness – Commissioner decided appeal on issues not contested by the parties - consent orders – Commissioner's findings of social impacts and negative environmental effects of development not in issue – denial of procedural fairness by failing to give parties notice and opportunity to be heard
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW), s 4.16 Land and Environment Court Act 1979 (NSW), s 34 Land and Environment Court Rules 2007 (NSW), r 3.7 Standard Instrument (Local Environmental Plans) Order 2006 Sydney Local Environmental Plan 2012, cl 4.6
Cases Cited:	Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust v The Council of the City of Sydney [2024] NSWLEC 1825 Botany Bay City Council v Pet Carriers International Pty Ltd (2013) 201 LGERA 116; [2013] NSWLEC 147 Cumberland Council v Tony Younan [2018] NSWLEC 145 Drake v Minister for Immigration and Foreign Affairs (1979) 24 ALR 577 House of Peace Pty Ltd v Bankstown City Council (2008) 48 NSWLR 498; [2000] NSWCA 44 Jeffrey v Canterbury Bankstown Council (2021) 250 LGERA 340; [2021] NSWLEC 73 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 R v Brown [1996] 1 AC 543 Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57; [2001] HCA 22 South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69 Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54 2 Elizabeth Bay Road Pty Ltd v The Owners-Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409 Muin v Refugee Review Tribunal (2002) 76 ALJR 966; [2002] HCA 30 Murlan Consulting Pty Ltd v Ku-ring-gai Municipal

	Council (2009) 170 LGERA 162; [2009] NSWCA 300 Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106 Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc (2014) 86 NSWLR 527; [2014] NSWCA 105 Zhiva Living Dural Pty Limited v Hornsby Shire Council (2020) 242 LGERA 280; [2020] NSWCA 180
Category:	Principal judgment
Parties:	Billyard Ave Developments Pty Limited (Appellant) The Council of the City of Sydney (Respondent)
Representation:	Counsel: A Galasso SC and H Grace (Appellant) Submitting appearance (Respondent) Solicitors: Mills Oakley (Appellant) The Council of the City of Sydney (Respondent)
File Number(s):	2024/474896
Publication Restriction:	NIL
Decision under appeal:	
Court or Tribunal:	Land and Environment Court of NSW
Jurisdiction:	Class 1
Citation:	[2024] NSWLEC 1825
Date of Decision:	19 December 2024
Before:	Walsh C
File Number(s):	2024/474896

JUDGMENT

1 This appeal from a decision of a Commissioner refusing a development application for a new residential flat building raises two questions of law. The first concerns the proper construction of a standard objective of the R1 General Residential zone that is found in all local environmental plans throughout the

State. The second concerns the proper process for affording procedural fairness in a development appeal where there are no contested issues joined between the parties and the parties seek orders by consent.

The development application and appeal against deemed refusal

2 The appellant, Billyard Ave Developments Pty Limited (Billyard), applied for development consent to demolish two existing residential flat buildings and erect two new residential flat buildings in their place on two parcels of land at 21C Billyard Avenue and 10 Onslow Avenue, Elizabeth Bay. Although the type of housing would remain the same, residential flat building, the mix of housing would change. The existing buildings have 16 one bedroom apartments, 4 two bedroom apartments and 8 three bedroom apartments, totalling 28 apartments with 48 bedrooms. The new buildings will have 2 two bedroom apartments and 18 three bedroom apartments, totalling 20 apartments with 58 bedrooms. Thus, although the number of apartments would decrease by 8, the number of bedrooms would increase by 10. The development would thereby decrease the number of domiciles but increase the number of people that could be housed in the buildings.

3 The Council of the City of Sydney (the Council), which is the consent authority, has failed to determine the development application. Billyard appealed against the deemed refusal of the development application to this Court. The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (Court Act) between the parties, but agreement was not able to be reached and the conciliation conference was terminated.

4 Notwithstanding the termination of the conciliation conference, the parties continued to negotiate. These negotiations were productive. Billyard amended the development application to address the Council's concerns. This resulted in the Council withdrawing or no longer pressing all of the substantive contentions that it had raised in its Statement of Facts and Contentions. The parties reached agreement in the form of "consent orders" seeking that the Court grant development consent subject to conditions in the form annexed to the consent orders.

5 Regrettably, the form in which this agreement was recorded was not an agreement under s 34(3) of the Court Act, but instead consent orders signed by the solicitors for the parties and dated 4 November 2024. The consent orders recorded the parties' agreement that:

> "By Consent, the Court orders:
>
> 1. The Applicant's written request made pursuant to cl 4.6 of the *Sydney Local Environmental Plan 2014* (NSW) to vary the development standard for the height of building within clause 4.3 thereof, prepared by Urbis, is upheld.
>
> 2. The appeal is upheld.
>
> 3. Development Application No. D/2023/727 for the demolition of existing buildings/trees, construction of two new residential flat buildings (including excavation for a shared basement structure), site landscaping and provision for utilities and stormwater infrastructure at 21C Billyard Avenue and 10 Onslow Avenue Elizabeth Bay 2011 NSW is approved subject to the Conditions of Consent annexed hereto at **Annexure A**."

6 I say regrettably because if the parties had recorded their agreement as an agreement under s 34(3) of the Court Act, the Commissioner allocated to preside over the conciliation conference (either the original conference or another conference arranged by the Court) would have been obliged to dispose of the proceedings in accordance with the decision recorded in the agreement to grant development consent subject to conditions, provided that decision was one that the Court could have made in the proper exercise of its functions.

7 In this case, the decision agreed between the parties for the grant of development consent subject to conditions was a decision that the Court could have made in the proper exercise of its functions. The reasons for the Commissioner deciding to refuse the development application were evaluative and not jurisdictional. They were reasons why the Commissioner determined that he *would* not, but not that he *could* not, exercise the function to grant development consent to the development application.

8 Hence, if the parties had entered into an agreement under s 34(3) of the Court Act, and the Commissioner had presided over a conciliation conference, the Commissioner would have been obliged to dispose of the proceedings in accordance with the agreed decision to grant development consent subject to conditions.

9 But the Council did not agree to this course of implementing the parties' agreement through the process under s 34(3) of the Court Act. The Council also did not agree to grant development consent itself in accordance with the parties' agreement as recorded in the consent orders. Billyard's appeal to the Court was against the deemed refusal by the Council of the development application, not an actual refusal. The Council thereby retained power to determine the development application, notwithstanding the appeal to the Court (see s 8.11(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act)).

10 Nevertheless, the Council chose neither to exercise the function to determine the development application by the grant of development consent subject to conditions nor to enter into an agreement under s 34(3) of the Court Act for the Court to exercise that function to grant development consent subject to conditions; instead, the Council chose to ask the Court to make orders by consent at the hearing of the development appeal. That is the appeal the Commissioner heard and disposed of.

11 Although parties may consent to the Court making orders to grant development consent subject to conditions, the Court is not obliged to do so. The hearing of an appeal against a deemed or an actual refusal of a development application is a hearing de novo. The Court re-exercises the function of the consent authority under s 4.16 of the EPA Act to determine the development application. In determining the development application, the Court is required to take into consideration such of the matters in s 4.15(1) of the EPA Act as are of relevance to the development the subject of the development application. The Court must determine for itself whether to grant or to refuse the development application, regardless of the parties' consent to the Court granting development consent.

12 The difficulty that arises, where the parties consent to the Court granting development consent, is that the Court in disposing of the appeal does not have the benefit of any issues joined between the parties. There are no contested legal or factual issues raised by the parties that can illuminate and

inform the Court's consideration and determination of the development application.

13 For this reason, the Court's Practice Note – Class 1 Development Appeals requires parties, who apply by consent for final orders granting consent or approval, "to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to grant the consent or approval having regard to the whole of the relevant circumstances, including the proposed conditions. The consent authority will be required to demonstrate that relevant statutory provisions have been complied with and that any objection by any person has been properly taken into account" (paragraph 99).

14 As the Practice Note states, this is necessary to enable the Court to determine whether the consent order sought by the parties is, first, lawful (in the same sense as is required by s 34(3) of the Court Act that the order is one that the Court could make in the proper exercise of its functions) and, second, appropriate (in the sense that the order is one that the Court would make in the circumstances on the material before the Court).

15 This requirement in the Practice Note for the Court to determine whether the consent order is lawful and appropriate echoes the commonplace formulation of the task of a court or tribunal in undertaking merits review of an administrative decision to make the "correct" or "preferable" decision based on the evidence before the Court: *Drake v Minister for Immigration and Foreign Affairs* (1979) 24 ALR 577, 589. A correct decision is a decision that is legally available and required by law. A preferable decision is one that is appropriate in all the circumstances on the material before the Court.

16 The Practice Note facilitates the Court making the correct or preferable decision by the parties providing the Court with information that demonstrates that the decision sought in the consent order is legally available to be made and ought to be made in the circumstances.

17 In this case, the parties did present at the hearing evidence to allow the Commissioner to determine whether the order the parties sought by consent to grant development consent subject to conditions was not only lawful but also appropriate in the circumstances. The evidence included expert evidence of

the parties' experts as well as lay evidence of objectors to the development. The Commissioner also undertook a site view to observe for himself the existing buildings and environment and to assess the impacts the development would have on residents of the existing and neighbouring buildings and on the environment.

The Commissioner's decision and appeal grounds

18 At the conclusion of the hearing, on 5 and 6 November 2024, the Commissioner reserved judgment. The Commissioner delivered judgment six weeks later on 19 December 2024: *Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust v The Council of the City of Sydney* [2024] NSWLEC 1825. The Commissioner refused the development application and dismissed the appeal.

19 The primary reason the Commissioner gave was that he was not satisfied that the proposed development is consistent with the objectives for development within the applicable R1 General Residential zone in which the development is proposed to be carried out. Clause 4.6(4)(a)(ii) of the Sydney Local Environmental Plan 2012 (SLEP), at the time the development application was lodged and before it was determined, provided:

> "(4) Development consent must not be granted for development that contravenes a development standard unless—
>
> (a) the consent authority is satisfied that—
>
> …
>
> (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out."

20 As a consequence of the Commissioner not being satisfied of the consistency of the development with the zone objectives, the Commissioner was precluded from being able to grant consent under cl 4.6(4)(a)(ii) of SLEP. The proposed buildings would contravene the maximum heights for buildings on the two parcels of land, set by cl 4.3 of SLEP. In this circumstance, development consent could only be granted if the Commissioner upheld the applicant's written request under cl 4.6 of SLEP seeking to justify the contravention of the building height development standard. In order to uphold the written request,

the Commissioner needed to be satisfied that the proposed development is in the public interest because it is consistent with the objectives for development within the zone in which the development is proposed to be carried out (cl 4.6(4)(a)(ii) of SLEP). The Commissioner decided he was not satisfied: at [91].

21 The Commissioner's decision that the proposed development is not consistent with the zone objectives is the subject of the first two grounds of Billyard's appeal under s 56A(1) of the Court Act (Grounds 1 and 2). These grounds allege, in various ways, that the Commissioner misconstrued the objectives of the R1 General Residential zone, especially the first objective "to provide for the housing needs of the community". This misconstruction of the zone objectives undermined the Commissioner's decision that the proposed development is not consistent with the zone objectives.

22 Although the Commissioner's decision that the proposed development is not consistent with the zone objectives was dispositive of the dismissal of the appeal (at [92] and [94]), the Commissioner nevertheless went on to consider the merits of the proposed development (at [95] - [135]). The Commissioner made findings of fact on view loss and other matters, which were inconsistent with the parties' agreed position and the experts' evidence. In particular, the Commissioner disagreed with the parties' experts on two matters: the Commissioner found that the view loss from neighbouring properties would be more significant than the parties' experts had agreed (at [97]-[115]), and that the environmental benefits of the new buildings advanced by the parties' experts were not convincing, as the experts did not give consideration to "the negative effects (eg waste generation from demolition and disposal of relevant materials, embodied energy associated with construction of new development)" (at [124]).

23 In so finding, the Commissioner partly relied on the evidence of the objectors, but also relied on his own observations made at the site view and his independent research.

24 These negative impacts were not contested issues on the appeal. The Council had not raised as a contention the negative environmental effects relating to waste generation and embodied energy. Although the Council had raised view

loss as a contention in its Statement of Facts and Contentions, upon the amendment of the development application and the parties reaching agreement before the hearing that development consent should be granted subject to conditions, the Council did not press any substantive contention that development consent should be refused, including the contention on view loss. The only contention remaining at the hearing was that the Court should consider the public interest by having regard to the submissions raised by the objectors. This is not a substantive contention that development consent should be refused, but rather a process contention raising a matter for the Court's consideration in determining the appeal. As a matter of fact, the Commissioner did consider the submissions raised by the public, both the written submissions made on the development application and the oral submissions made at the hearing.

25 The consequence was that at the hearing there was no issue joined between the parties that development consent should be refused because of unacceptable view loss or negative environmental effects from waste generation or embodied energy. Those were not issues formally in dispute between the parties. The Commissioner did not give the parties notice, at the hearing or before giving judgment, that he would consider these negative impacts in deciding whether to grant or refuse development consent.

26 The Commissioner's consideration of the negative impacts of the proposed development was material to his decision to refuse the development application. The Commissioner balanced the negative impacts with the positive impacts of the development, finding that the negative impacts outweighed the positive impacts, so that the development consent should be refused. The negative impacts included not only those concerned with view loss and negative environmental effects, but also the negative social effects associated with the proposed development reducing the number of apartments and changing the mix of housing. The latter impact had earlier been identified by the Commissioner in his interpretation and application of the objectives of the R1 General Residential zone in deciding that the proposed development is inconsistent with the zone objectives.

27 The Commissioner's findings of the social impacts of the proposed development in reducing housing stock and affordable housing and the negative environmental effects are the subject of two grounds of appeal (Grounds 3 and 4). Billyard alleged that the Commissioner denied it procedural fairness by raising and deciding issues concerning the social impacts and negative environmental effects that were not in dispute between the parties and in respect of which the Commissioner had not given Billyard notice and an opportunity to be heard.

28 Billyard therefore raised four grounds of appeal against the Commissioner's decision: two grounds that the Commissioner misconstrued the objectives of the R1 General Residential zone and two grounds that the Commissioner denied Billyard procedural fairness. The Council entered a submitting appearance except as to costs.

Upholding of appeal and remitter

29 I have determined that both sets of grounds of appeal should be upheld. The Commissioner misconstrued the zone objectives, which caused his decision that the proposed development is inconsistent with the zone objectives to miscarry. The Commissioner denied Billyard procedural fairness by raising and deciding issues that were not raised by the parties and of which no notice had been given. The appropriate order is to remit the matter to be reheard according to law and these reasons for judgment. An exclusionary remitter order should be made for the matter to be determined by a commissioner other than the Commissioner.

Misconstruction of zone objectives

30 The opinion of satisfaction required by cl 4.6(4)(a)(ii) of SLEP is of consistency between the proposed development and the objectives for development within the zone in which the development is proposed to be carried out. In this case, the proposed development is to be carried out in the R1 General Residential zone. This is one of four residential zones prescribed by the Standard Instrument (Local Environmental Plans) Order 2006 (Standard Instrument). These are Zone R1 General Residential, Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone R4 High Density Residential.

The Standard Instrument prescribes objectives of the zone that a local environmental plan must include, although other objectives can be added. The prescribed objectives for the R1 General Residential zone are threefold:

> "● To provide for the housing needs of the community.
> ● To provide for a variety of housing types and densities.
> ● To enable other land uses that provide facilities or services to meet the day to day needs of residents."

31 SLEP adopted these three objectives for the R1 General Residential zone in the City of Sydney, but added a fourth objective "to maintain the existing land use pattern of predominantly residential uses."

32 The evaluative decision required by s 4.6(4)(a)(ii) of SLEP of consistency of the proposed development with the objectives of the R1 General Residential zone demands an understanding at the outset of the meaning of the objectives. That is what the Commissioner attempted to do (at [50]-[89]). Unfortunately, the Commissioner misunderstood the process of statutory interpretation and misconstrued the objectives of the R1 General Residential zone, especially the first objective "to provide for the housing needs of the community". The errors in construction are manifold but the following discussion identifies the key errors.

33 First, the Commissioner sought to construe the zone objectives by reference to the opinion evidence of the parties' experts and the lay evidence of the objectors as to their interpretation of the first objective of the R1 General Residential zone. Statutory interpretation is not a matter of evidence, but rather a question of law applying settled principles of statutory interpretation. The Commissioner was cognisant of the principles of statutory construction: he quoted a summary by Robson J in *Cumberland Council v Tony Younan* [2018] NSWLEC 145 at [71]-[72] (at [65]).

34 The Commissioner sought to apply the principles by considering the text of the first objective (at [67]-[78]), the context of the first objective (at [79]-[82]) and the "mischief" that the Commissioner believed the objective was seeking to remedy (at [83]-[89]). But this consideration and application of the principles of statutory construction all came after the Commissioner had already determined

what he termed “alternative interpretations” of the first zone objective derived from the expert and lay evidence.

35 The two alternative interpretations were set out in [62]. The first interpretation (in (1)) the Commissioner derived from the lay evidence of the objectors. The second interpretation (in (2)) the Commissioner derived from the expert evidence. Neither is in reality an interpretation of the first objective at all, as it derived from people’s opinions about the consistency or inconsistency of the development with the first objective, and not from construing the text of the first objective itself. This evidentiary rather than legal approach to construction of the first objective is fundamentally erroneous.

36 Second, the Commissioner conflated the steps of construction of the first objective with the subsequent step of application of the first objective. The Commissioner’s attempt to construe the first objective involved deciding whether the proposed development is consistent or inconsistent with the first objective. That is made plain throughout the judgment, as the following references will show.

37 In the section where the Commissioner is discussing the opinion evidence of the experts relating to the interpretation of the first objective (beginning at [50]), the Commissioner inserted a heading “The expert evidence is that the proposed development is consistent with the first R1 zone objective.” In the discussion underneath that heading, the Commissioner identified three reasons why the parties’ experts considered that the development is consistent with the first objective (at [51]-[58]). None of the three reasons advanced the experts’ interpretation of the first objective.

38 The first reason concerned the written request under cl 4.6 of SLEP justifying the contravention of the building height development standard. The Commissioner noted that the cl 4.6 written request directly addressed the consistency of the proposed development with the zone objectives and set out an extract from the experts’ joint report in relation to the consistency of the proposed development with the first objective (at [51]).

39 The second reason concerned the experts’ agreed response to the submissions of the objectors. The experts’ responded to the objectors’

concerns that proposed development would not retain affordable rental housing and would reduce the number of dwellings (at [54]). The experts responded to the objectors' concern that "the proposal does not achieve the objectives of the R1 General Residential zone" (at [55]), explaining why in fact the proposed development is consistent with the zone objectives (at [56]).

40 The third reason concerned the experts' oral evidence responding to questioning by the Commissioner. The Commissioner said he "raised the issue generally with the experts" (at [57]). The "issue" that the Commissioner raised "generally" was not specified in the judgment, but would appear to be the issue of the consistency of the proposed development with the zone objectives. That inference flows from the Commissioner's statement that "the experts' oral evidence essentially followed the points nominated above" (at [57]). The points nominated in the immediately preceding paragraph were the points the experts advanced as to why the proposed development is consistent with the zone objectives (in [56]).

41 The Commissioner raised a fourth point concerning the assessment of the heritage impact of demolition of the existing buildings (at [58]), but that was irrelevant to the issue of the consistency of the proposed development with the zone objectives.

42 It can be seen, therefore, that the Commissioner's discussion of the expert evidence solely concerned the issue of the consistency of the proposed development with the objectives of the R1 General Residential zone, as the heading foreshadowed, and did not seek to interpret the meaning of any of the zone objectives, including the first objective.

43 That section of the judgment was followed by a section entitled "Lay evidence that the proposed development is not consistent with the first R1 zone objective." The Commissioner summarised the lay evidence of the objectors (in [59]-[61]), all of which concerned the impacts of the proposed development on the reduction in the number of homes (apartments) and reduction in "more affordable housing supply", and as a consequence the alleged inconsistency of the proposed development with the zone objectives. The Commissioner quoted the evidence of one objector that: "It's difficult to see how the application can

maintain that this proposal is compliant with the LEP land use zone objective 'to provide for the housing needs of the community' when it creates a net reduction in housing supply in the midst of a housing crisis'" (at [59]).

44 All of this lay evidence concerned the issue of the consistency of the proposed development with the zone objectives, not the issue of the interpretation of the meaning of the zone objectives.

45 The next section of the judgment was entitled "Synthesising alternative views on interpretation of the term 'housing need'." That section extends from [62]-[64]. The discussion in the section reveals that the heading is inaccurate. The section does not synthesise alternative views on "interpretation" of the first objective, but instead the evidence of the experts and the objectors on the issue of the consistency of the proposed development with the zone objectives summarised in the preceding two sections.

46 The Commissioner outlined two alternative interpretations which might be understood from the evidence above in [62]. These are:

> "1. The proposed development is inconsistent with the first objective of the R1 zone because it would (1) decrease housing provision overall, (2) decrease the availability for those in need (eg decrease more affordable housing); and each work against the objective of 'providing for the housing needs of the community'.
>
> 2. The proposed development is consistent with the first objective of the R1 zone because it would (1) provide for a greater amount of three and four bedroom housing which is in relatively short supply in the local area (based on ABS data [54]) and (2) there is a demand, or 'want' for the form of housing proposed, therefore there is a need for it."

47 It can be seen that although the Commissioner stated he would outline "alternative interpretations" of the first objective, he did not do so; what he outlined was the alternative evidence of the experts and objectors on the issue of the consistency or inconsistency of the proposed development with the first objective.

48 This conflation of the issues of interpretation and application of the first objective continued in the following paragraphs in the section (at [63] and [64]). The Commissioner referred to the "first interpretation" (in [62](1)) and the "second interpretation" (in [62](2)) as aligning with the views of the objectors and the evidence of the experts respectively.

49 By this point in the judgment, the Commissioner had settled on his "alternative interpretations" of the first objective (even though they were not interpretations at all). The discussion that followed seeking to identify and apply the principles of statutory construction (at [65]-[89]) was framed by and was dependent upon the Commissioner's formulation of the "alternative interpretations". His analysis of the text, context and mischief were for the purpose of determining which of the two alternative interpretations outlined in [62] was the correct one. For each criterion, the Commissioner determined that the first interpretation was correct: see [74] and [77] for text, [80] and [82] for context, and [86], [88] and [89] for mischief.

50 But the referent used by the Commissioner, although termed by the Commissioner as "alternative interpretations" of the first objective, was in fact the experts' and objectors' opinions of the consistency or inconsistency of the proposed development with the first objective and not an interpretation of the first objective at all.

51 The Commissioner's analysis of the text, context and mischief of the first objective was thereby undermined by his conflation of the issues of interpretation and application of the first objective.

52 Third, the Commissioner's approach of first deriving alternative interpretations of the first objective from the evidence then testing which of these alternative interpretations was the correct one by reference to the text, context and mischief of the first objective inverted and subverted the proper process of statutory interpretation.

53 As the extract the Commissioner quoted in [65] from *Cumberland Council v Tony Younan* clearly states, "construction must begin with a consideration of the text itself." The Commissioner did not begin with the text of the first objective of the R1 General Residential zone, but instead began with the evidence of the experts and the objectors on the different question of the consistency of the proposed development with the first objective.

54 Fourth, the Commissioner's analysis of the text of the first objective, when later undertaken, itself was contrary to orthodox statutory interpretation of text in at least three ways.

55 The first error is that the Commissioner failed to have regard to the words used in the first objective and instead substituted different words. One example is the Commissioner substituting the word "need" for "needs" in the term "housing needs". That substitution occurred in the heading of the section on the text before [67]: "Beginning with the text: definitions and general meanings ascribed to 'need' and 'want'"; in saying that SLEP does not define "housing need" or "need" in its Dictionary (in [70]); in referring to the definition of "need" as a noun in the Macquarie Dictionary (in [72] and [74]); and in giving examples of the use of the word "need" in popular music (in the Rolling Stones' "You Can't Always Get What You Want" and Coldplay's "Fix You") (at [75] and [76]). Nowhere does the Commissioner construe the plural word "needs" that is used in the first objective.

56 Another example of substituting words for the words of the statutory provision is the Commissioner's reference to "want" in contradistinction to "need". The word "want" does not appear in the first objective or any of the other objectives of the R1 General Residential zone. The meaning of "want" is irrelevant to the construction of the zone objectives. Yet, the Commissioner used the dictionary meaning and popular music uses of "want" to construe the first and second objectives of the zone (at [73] and [75]-[78]).

57 The second error is what Lord Hoffmann identified in *R v Brown* [1996] 1 AC 543 at 561 as "the fallacy … to treat words of an English sentence as individual building blocks whose meaning cannot be affected by the rest of the words of the sentence". As Leeming JA observed in *2 Elizabeth Bay Road Pty Ltd v The Owners-Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [82]:

> "It is axiomatic that (a) the words in a sentence are not building blocks whose meaning is unaffected by the rest of the sentence, (b) the sentence is the unit of communication by which language works, and (c) the significance of individual words is affected by other words and the syntax of the whole sentence."

58 The Commissioner's atomistic construction of individual words was contrary to this rule of statutory construction. The Commissioner erred by interpreting the individual words in the first objective in isolation from the rest of the words in the sentence by sequentially citing the dictionary definitions of "provided for" (at

[68]), “community” (at [69]), “housing” (at [71]), and “need” (at [72]), without ever construing the sentence of the first objective as a whole.

59 This erroneous approach resulted in an incorrect interpretation of the objective. In particular, the Commissioner misconstrued the phrase “the housing needs of the community”. By focusing on the words in isolation, and without regard to syntax, the Commissioner failed to appreciate that the term “housing” qualifies the term “needs” and is proceeded by a definite article (“the”), which all indicate that the terms should be construed as a composite expression (“the housing needs”) whose meaning is different from the sum of its parts. The use of the word “of” indicates the relevant “housing needs” are those belonging to “the community”. The community is necessarily made up of diverse people. The reference is to the community as a whole and not just to some subset of the community, such as socioeconomically disadvantaged people. The “housing needs of the community” are thus those belonging to the community as a whole and not some subset such as those in the community “who are in need, or with limited access to” housing stock (at [63]).

60 The third error is the Commissioner’s inappropriate use of the dictionary to construe each of the words making up the sentence of the first objective. Leeming JA in *South Western Sydney Local Health District v Gould* (2018) 97 NSWLR 513; [2018] NSWCA 69 at [78] cautioned that: “The legal meaning of a statutory term is but rarely assisted by resort to a dictionary definition.” He continued:

> “The fact that one of the meanings in a dictionary may support the legal meaning of a statutory term chosen by a court does little to provide a basis for a conclusion as to legal meaning. It often does no more than to provide the illusory comfort that the court’s construction is supported by common usage.”

61 Likewise Mason J in *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498; [2000] NSWCA 44 at [28] observed that dictionaries “can illustrate usage in context, but can never enter the particular interpretative task confronting a person required to construe a particular document for a particular purpose.” But as Leeming JA noted, “even in cases where a dictionary might assist at the outset, the court’s task is not accomplished by surveying the range of meanings found in a dictionary and choosing that which seems most apt.

Doing so may often disguise the real reasons which favour a particular legal meaning": *South Western Sydney Local Health District v Gould* at [81].

62 The Commissioner's interpretive approach violated these admonitions on the limited use of dictionaries to construe words in a statutory provision. The Commissioner first outlined alternative interpretations of the statutory provision, then chose the meaning from the range of meanings of the words constituting the statutory provision in the dictionary that he thought supported the interpretation he favoured (the first interpretation of the objective). That might have provided "illusory comfort" that the Commissioner's interpretation was supported by common usage, but it disguised the real reason why the Commissioner interpreted the first objective in the way that he did.

63 Fifth, the Commissioner's analysis of the context of the first objective of the R1 General Residential zone was erroneous. The Commissioner correctly observed that the first objective is one of four objectives of the R1 General Residential zone (at [18] and [79]) and that "there is a kind of pairing evident" with the first and second objectives (at [80]). But the Commissioner misunderstood the meaning of and the relationship between the first and second objectives. The Commissioner's interpretation was framed by and dependent on his earlier finding of there being two alternative interpretations of the first objective (in [62]). The Commissioner aligned the interpretation of the first objective with his first interpretation and the interpretation of the second objective with his second interpretation (at [80]-[82]). This paid no regard to the different language of the two objectives or that the alternative interpretations were both of the first objective, and not of the second alternative at all.

64 To force the interpretive shoe to fit on the objective foot, the Commissioner introduced the term "wants" to differentiate from the term "needs" (see at [72], [73], [77]), thereby allowing the first objective, with its reference to "needs", to be aligned with the first interpretation, and the second objective, without a reference to "needs" but interpreted to refer impliedly to "wants", to align with the second interpretation (at [82]). This approach is antithetical to the proper use and understanding of context in statutory interpretation.

65 Sixth, the Commissioner's analysis of "mischief" was also antithetical to the principles of statutory interpretation. Whilst it is permissible, after regard is first had to the text and then the context of the statutory provision, to have regard to the general purpose and policy of the provision, including the mischief (if any) the provision is seeking to remedy, the manner in which the Commissioner sought to have regard to "mischief" was erroneous.

66 The statutory provision to be construed was an objective of the R1 General Residential zone. As I have explained earlier in the judgment, this is a prescribed objective of the R1 General Residential zone required to be included by the Standard Instrument in all local environmental plans. It is not an objective that is bespoke tailored for SLEP or for any neighbourhood in the City of Sydney such as Elizabeth Bay. As a standard objective it is descriptive of the purpose of establishing the general residential zone. All residential zones are intended to provide for the housing needs of the community – that is the purpose of residential development. As the R1 zone is the general residential zone, the first objective is expressed in general terms without qualification. This may be contrasted with the first objective for the other three residential zones, R2, R3 and R4. For each of those zones, the first objective begins in the same way as for the R1 zone, "to provide for the housing needs of the community", but adds the qualification "within a low density [or medium density or high density] residential environment." In this way, the first objective describes the purpose of the respective residential zones.

67 One of the key methods by which each residential zone provides for the housing needs of the community within the applicable residential environment is by prescribing the residential development that is permitted with consent in the zone. The R1 General Residential zone, being the most general residential zone, permits a wider range of residential development, from low density to medium density to high density residential developments, including attached dwelling houses, group homes, hostels, multi-dwelling housing, residential flat buildings, semi-detached dwellings, seniors housing and shop top housing. This wide range of housing types provides for the housing needs of a diverse range of people in the community.

68 The R2 Low Density Residential zone restricts the range of residential developments to only those which are compatible with the low density residential environment of that zone. The only two residential developments permitted are the low density residential developments of dwelling houses and group homes. These housing types provide for the housing needs of the community within the low density residential environment of the zone.

69 The R3 Medium Density Residential zone enlarges the range of residential development permitted to those which are compatible with the medium density residential environment of that zone. The residential developments permitted are attached dwellings, boarding houses, group homes, multi-dwelling housing and seniors housing.

70 These housing types provide for the housing needs of the community within the medium density residential environment of the zone. The R4 High Density Residential zone matches the residential developments permitted with the high density residential environment of the zone. The residential developments permitted are boarding houses, residential flat buildings and shop top housing. These housing types provide for the housing needs of the community within the high density residential environment of the zone.

71 This explanation of the purpose of the first objective in the R1, R2, R3 and R4 zones informs the interpretation of the meaning of the phrase in each objective "to provide for the housing needs of the community". There is no "mischief" that the first objective of each zone is seeking to remedy. That is not the purpose of stating the first objective in the terms it is stated. The first objective is simply descriptive of the purpose of the particular residential zone, which is to provide for the housing needs of the community in different density residential environments.

72 The Commissioner's search for the "mischief" which the first objective seeks to remedy was misguided. That "mischief" was not to be found in the aims of SLEP (at [83]), the objects of the EPA Act (at [84]), the submissions of the objectors (at [86]), the National Housing Supply and Affordability Council's publication, "State of the Housing System" (2024) (at [86]), or some general assessment of "the housing problem (if not crisis)" (at [87]). The Commissioner

was in error in inferring from these information sources that "'the mischief' that the first zone objective is seeking to address is deep-seated problems with providing required levels of housing to meet essential community needs" or that "the first zone objective's particular mischief involves both supply of housing stock generally and the accessibility of housing (ie including affordability)" (at [88]). Neither of those conceptions of "mischief" are derived from the text and context of the first objective of the R1 General Residential zone or the other residential zones or from the evident purpose of the first objective that I have stated.

73 These fundamental errors in interpreting the first objective of the R1 General Residential zone undermined the Commissioner's conclusion that the proposed development is inconsistent with the first objective. The reason the Commissioner gave reveals his misinterpretation of the first objective:

> "This is because the proposed development would (1) decrease housing provision overall, (2) decrease the availability of more affordable housing. Each of these aspects of the proposal work against the first R1 zone objective of 'providing for the housing needs of the community'."

74 The appeal should be upheld on the first two grounds that the Commissioner erred on a question of law by misconstruing the first objective of the R1 General Residential zone, so that the finding that the proposed development is not consistent with that objective miscarried.

Denial of procedural fairness

75 The third and fourth grounds of appeal claim that the Commissioner denied Billyard procedural fairness by determining the appeal on issues not raised by the parties and on information not in evidence before the Court.

76 There will be a denial of procedural fairness, first where a court determines a matter on a basis that was not in issue or argued in the proceedings (*see Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; [1986] HCA 54; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22 at [142]; *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527; [2014] NSWCA 105 at [40]; *Zhiva Living Dural Pty Limited v Hornsby Shire Council* (2020) 242 LGERA 280; [2020] NSWCA 180 at [79]) and, secondly, where

information is used by a decision-maker in a way that could not reasonably be expected by one party and that party is not given an opportunity to respond to that use (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* at [142]; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; [2002] HCA 30 at [128]-[134]; *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* at [40]).

77 As I have explained earlier in the judgment, by the time of the hearing, there were no issues joined between the parties. The Council had withdrawn or no longer pressed every substantive contention it had raised as to why development consent should be refused and instead had signed and put before the Court the consent orders seeking that development consent be granted subject to conditions.

78 Of importance, the Council no longer contended that the written request under cl 4.6 justifying the contravention of the building height development standard should not be upheld. Implicit in this withdrawal of the contention is that the Council accepted that the Court should be satisfied that the proposed development is consistent with the objectives of the R1 General Residential zone in which the development is to be carried out. The issue of consistency of the proposed development with the zone objectives was not an issue joined between the parties. The issue may have been raised by the objectors in their submissions, but this did not make it a contested issue in the proceedings.

79 If the Commissioner wished to decide the appeal on the basis that the proposed development was not consistent with the first objective, which was not in issue or argued in the proceedings, he needed to notify the parties and give them an opportunity to be heard on that matter. As I said in *Botany Bay City Council v Pet Carriers International Pty Ltd* (2013) 201 LGERA 116; [2013] NSWLEC 147 at [101], and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [129].

> "It may be accepted that, as a general rule, if a Commissioner or Judge hearing a Class 1 appeal is to determine the proceedings by reference to matters beyond the issues identified by the parties, then procedural fairness requires that the parties be given notice of those additional matters and accorded the opportunity to be heard upon them: see *Cavasinni Constructions Pty Ltd v Fairfield City Council* at [39]. This is because ordinarily, the Court

> determines the proceedings on the substantive issues joined between the parties: *Segal v Waverley Council* [2005] NSWCA 310; (2005) 64 NSWLR 177 at [42], [95] and *Design Power Associates Pty Ltd v Willoughby City Council* [2005] NSWLEC 470; (2005) 148 LGERA 233 at [37], [38]. If, however, the Court considers that there are issues additional to those joined between the parties that need to be considered, procedural fairness requires the parties to be notified and given an opportunity to be heard in relation to the additional matters."

80 The general issue of the application and operation of cl 4.6 of SLEP to enable development consent to be granted was an issue in the proceedings. As I noted in *Jeffrey v Canterbury Bankstown Council* (2021) 250 LGERA 340; [2021] NSWLEC 73 at [85]:

> "The matters raised by the statutory provisions of cl 4.6(3) and (4) are jurisdictional: the Court cannot grant development consent for development that contravenes a development standard unless the matters raised by the statutory provisions are satisfied. Such matters will be principal contested issues regardless of whether the parties raise them: see *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 at [180]."

81 The matter in cl 4.6(4)(a)(ii) of the consistency of the proposed development with the objectives for development within the zone in which the development is proposed to be carried out was, therefore, an issue in the proceedings. But the parties had agreed that the Commissioner, exercising the consent authority's function, would be satisfied that the proposed development is consistent with the objectives, including the first objective of the R1 General Residential zone in which the development is proposed to be carried out. That matter was not in issue before the parties and therefore was not argued by the parties.

82 If the Commissioner wished to decide that matter contrary to the parties' agreed position, he needed to notify them and give them an opportunity to argue that the Commissioner ought not to decide the matter in that way. The Commissioner did not do so. The Commissioner gave no notice to the parties at the hearing or after the reserved judgment that he was thinking of deciding that the proposed development was inconsistent with the first objective and for the reasons he gave in the judgment. The parties argued that the Commissioner's reasoning and his conclusion were legally and factually erroneous. Billyard was thereby denied procedural fairness.

83 The matter of the consistency of the proposed development with the zone objectives was the principal matter in respect of which the Commissioner denied Billyard procedural fairness. But there are two other matters as well, one concerning view loss and another concerning the negative environmental effects of development.

84 The potential view loss from neighbouring properties had been raised as a contention by the Council (contention 6 in the Statement of Facts and Contentions). But after Billyard amended the development to mitigate view loss, the Council withdrew view loss as a reason for refusal of the development (see Amended Statement of Facts and Contentions) and instead entered into consent orders for the grant of development consent subject to conditions. The parties' experts assessed and agreed the extent of the view loss from the different neighbouring properties to be "minor" or "negligible".

85 Notwithstanding this agreed position that the view loss impacts were acceptable, the Commissioner embarked on his own assessment of the view loss from the neighbouring properties. The Commissioner relied in part on the objectors' lay evidence expressing their concerns about view loss but more importantly he relied on his own assessment of view loss based on his observations during the two site visits, one during the conciliation and another during the hearing. Based on his own assessment, the Commissioner disagreed with the experts' evidence about the negligible or minor extent of view loss, and instead found the view loss to be "moderate" rather than "negligible" (from Unit 6C, 15-19 Onslow Avenue) (at [106] and [108]); "moderate rather than "minor" (from Units 5 and 7, 7-12 Onslow Avenue) (at [114]); and "moderate-minor" rather than "minor" (from Unit 2-13 Onslow Avenue) (at [115]).

86 These findings of moderate view loss were material in the Commissioner's balancing of the positive and negative impacts of the proposed development. They undoubtedly contributed to the Commissioner's finding that the negative impacts outweighed the positive impacts, justifying refusal of the development application.

87 The view loss impacts of the proposed development were, however, no longer an issue between the parties. The parties, based on the experts' evidence, had agreed that the view loss from neighbouring properties was negligible or minor and not a reason justifying refusal of development consent. If the Commissioner wished to raise view loss an issue, either generally or particularly from certain neighbouring properties, notwithstanding that it was not an issue, he needed to notify the parties and give them an opportunity to be heard on the issue of view loss both generally and from particular neighbouring properties.

88 The Commissioner did not do so. The Commissioner gave Billyard no notice that he was considering rejecting the unchallenged expert evidence that the view loss was negligible or minor, and instead assessed the view loss for himself. Billyard was denied the opportunity to address the Commissioner on these matters. Billyard was therefore denied procedural fairness: see *Initial Action Pty Ltd v Woollahra Municipal Council* at [129]-[130].

89 The other issue in respect of which the Commissioner denied Billyard procedural fairness concerned certain negative environmental effects of the proposed development. The Commissioner raised this matter for the first time in [124] of his judgment:

> "While the new building is argued to be a relatively high performer in environmental terms (mindful of Ex 4 p 39 Topic V Point 5), I do not see the environmental benefits argued by the experts as convincing. As far as I could see the arguments do not give consideration to the negative effects (eg waste generation from demolition and disposal of relevant materials, embodied energy associated with construction of new development)."

90 These "negative effects" were not raised as a contention by the Council or, it seems from the Commissioner's discussion of the matter, by the objectors. The matter was not in issue or argued in the proceedings. If the Commissioner wished to consider this matter in balancing the positive and negative impacts of the development in determining the development application, the Commissioner needed to notify Billyard and give it an opportunity to be heard on the matter. The Commissioner denied Billyard procedural fairness in not doing so.

91 The third and fourth grounds of appeal should therefore be upheld. The Commissioner denied Billyard natural justice in deciding the appeal on issues not raised by the parties and using information in a way that could not reasonably be expected by the parties.

Orders in upholding appeal

92 Billyard seeks, if the appeal is upheld, that the Court make the order the Commissioner could have made of granting development consent subject to conditions, in the terms of the consent order signed by the parties. I find that the Court is not able to make this order in the circumstances of this case.

93 On the upholding of an appeal under s 56A(1) of the Court Act, the Court can, first, remit the matter, whether to the Commissioner or otherwise, or secondly, "make such other order in relation to the appeal as seems fits" (s 56A(2)(b)). This second type of order, despite the apparent breadth of expression, is limited by reference to the subject matter of the appeal. Basten JA in *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* (2009) 170 LGERA 162; [2009] NSWCA 300 at [70] reviewed the scope of the power in s 57(2) of the Court Act, which is in the same terms as s 56A(2) of the Court Act.

> "The scope of this provision has been considered, over the years, in numerous cases, including recently in *Thaina Town (On Goulburn) Pty Ltd v Sydney City Council* [2007] NSWCA 300; 71 NSWLR 230; *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187; *Director-General, Department of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102; *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138 and *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 at [18]-[22] (Spigelman CJ) and [24] (Allsop P); see also at [118]-[120]. These cases enunciate the following principles:
>
> > (a) despite the apparent breadth of sub-s (2), the kind of orders permitted will be limited by reference to the subject matter of the appeal;
> >
> > (b) because the appeal is limited to a decision by the Land and Environment Court on a question of law, the orders should properly be limited to that which is appropriate to correct an erroneous decision in that Court;
> >
> > (c) a finding of error does not open a gateway to reconsideration of factual findings made in the Land and Environment Court;
> >
> > (d) nor is a review of factual findings permitted under s 75A of the *Supreme Court Act 1970* (NSW);
> >
> > (e) on the other hand, the Court is not necessarily limited to orders of the kind which would be appropriate on judicial review;

> (f) in particular, the Court may make orders disposing of the proceedings on the basis of facts fully found by the Land and Environment Court or otherwise agreed, or (arguably) on the basis of findings which are the only ones reasonably open in the circumstances, and
>
> (g) the Court may exercise a discretionary judgment in disposing of costs orders in the Land and Environment Court."

94 In *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 at [36], Basten JA doubted whether the power under s 57(2)(b) of the Court Act (s 56A(2)(b) being in the same terms) would extend to granting development consent to a development application, where the decision under appeal was to refuse consent to the development application: see also *Zhiva Living Dural Pty Limited v Hornsby Shire Council* at [88]-[92].

95 In the present case, I am not able to exercise the power the Commissioner was exercising to determine the development application by the grant of development consent subject to conditions as all of the facts necessary to make that decision were not found by the Commissioner. As Basten JA stated in *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council*, the Court may make orders disposing of the proceedings either on the basis of facts fully found by the Commissioner or otherwise agreed, or on the basis of findings which are the only ones reasonably open in the circumstances. Here, because the Commissioner determined to refuse consent to the development application, he did not make all of the findings of fact necessary to grant development consent. These included the findings of positive satisfaction about the matters in cl 4.6(3) and (4) of SLEP which are necessary to enliven the power to grant development consent. Nor can it be said that findings as to those matters are the only ones reasonably open in the circumstances.

96 Accordingly, the Court cannot order, under s 56A(2)(b) of the Court Act, the grant of development consent subject to conditions.

97 The appropriate order is to remit the matter to be reheard by the Court below. Billyard sought an exclusionary remitter order to a commissioner other than the Commissioner. Billyard submitted that the Commissioner's error in the interpretation and application of cl 4.6(4)(a)(ii) of SLEP and the first objective of the R1 General Residential zone not only affected the Commissioner's

consideration of that matter, it also infected the Commissioner's evaluation of the merits of the proposed development.

98 Billyard submitted that the Commissioner has determined the same issues of fact which he would be required to re-determine on a re-hearing of the appeal, both as to cl 4.6 of SLEP and the merits of the development application. In these circumstances, in the language of Tobias AJA in *Baulkham Hills Shire Council v Basemount Pty Ltd & Anor* (2003) 126 LGERA 339; [2003] NSWCA 189 at [22]:

> "there is a reasonable apprehension that [the Commissioner] will not decide the case impartially in the sense that [he] has (understandably) pre-judged the very issues of fact in respect of the very same development application which [the Commissioner] would be required, if he was to re-hear the matter, to now determine afresh."

99 I find, in the circumstances of this case, it is appropriate to make an exclusionary remitter order. The form of the remitter on any appeal will depend on all the circumstances but in particular on the nature of the error on a question of law made by the Commissioner. As Tobias AJA stated in *Baulkham Hills Shire Council v Basemount Pty Ltd & Anor* at [23]:

> "Before concluding, I should make it clear that the present case is being decided on its own facts. It should not be assumed that merely because a Commissioner's decision is set aside on a s 56A appeal on the ground of error of law that it necessarily follows that any re-hearing and re-determination of the appeal should be by a Commissioner other than the Commissioner from whose decision the appeal was brought. There are many errors of law which would not require an exclusionary order under s 56A(2)(b). Thus if a Commissioner has mistaken the law and asked himself or herself the wrong question, there may be no reason why the appeal should not be remitted to that Commissioner to be determined by him or her in accordance with law. Again, where the error only involves the misconstruction of a statutory provision or the like there may be no reason why the Court as originally constituted cannot apply the facts as found by it to the law as declared on the appeal. In such cases the Commissioner's earlier decision may have been based on a false issue or be otherwise severable so that there will have been no pre-judgment on the real issue."

100 There are other errors of law, however, where an exclusionary remitter order may be appropriate, as I observed in *Initial Action Pty Ltd v Woollahra Municipal Council* at [139]:

> "There are some types of errors, however, where an exclusionary remitter order may be appropriate. Where the proceedings below had been conducted in such a way as to give rise to a reasonable apprehension of bias, this will usually justify an exclusionary order: *Seltsam Pty Ltd v Ghaleb* (2005) 3 DDCR

> 1; [2005] NSWCA 208 at [12]. Where there has been a denial of procedural fairness in the conduct or determination of the proceedings below, this might also ground an exclusionary order, depending on the circumstances of the denial of procedural fairness: *Baulkham Hills Shire Council v Basemount Pty Ltd* at [22], [24]. One circumstance might be where the Commissioner determines issues of fact without notice, evidence or argument, which issues would need to be redetermined on the rehearing. Where there is a reasonable apprehension that the Commissioner might not decide the matter impartially because the Commissioner has prejudged the same issues of fact that will need to be determined afresh on the rehearing, an exclusionary remitter order may be appropriate: *Baulkham Hills Shire Council v Basemount Pty Ltd* at [22], [24]; *Castle Constructions Pty Ltd v North Sydney Council* at [85], [140]; *Boral Cement Pty Ltd v SHCAG Pty Ltd* [2013] NSWLEC 203 at [136], [137]."

101 In the present appeal, the errors of law are twofold: misconstruction of the first objective of the R1 General Residential zone, which caused the Commissioner's consideration of cl 4.6(4)(a)(ii) of SLEP to miscarry, and denial of procedural fairness in various ways. Those errors of law affected the Commissioner's consideration of the merits of the proposed development.

102 The Commissioner's finding that the proposed development would decrease housing provision overall and decrease the availability of more affordable housing, which caused the development to be inconsistent with the first zone objective (at [91], also lessened the positive aspects of the development that could be balanced against the negative impacts of the development (at [135])). The material influence of the Commissioner's findings on the adverse impacts of the development on housing is encapsulated in the Commissioner's conclusion on the merits in [138]:

> "The proposal would also fail on merits. The merits failure is also essentially concerned with the adverse social impact of reduced housing supply which meets community need. In my view this easily outweighs the construction-related economic benefits which generate, the platform for which is created by effecting the removal of existing housing stock. The amenity impacts are moderate and would, were the situation to be "reversed" (ie the proposal was increasing housing supply, particularly were it for an in-need group), the weightings could also be reversed."

103 Because of the fundamental interrelationship between these errors on questions of law and the Commissioner's merit determination of the development application, and the reasonable apprehension that the Commissioner has pre-determined the same issues of fact that would need to be determined on the remitter of the matter, the matter should be remitted to a commissioner other than the Commissioner.

104 On the remitter, another hearing of the appeal by a different Commissioner will need to be undertaken, unless the Council decides to take one of two alternative courses.

105 The first course would be for the Council to determine the development application by granting development consent subject to conditions, in the terms the Council had agreed in the consent orders the Council's solicitor signed. On the Court upholding the appeal against, and setting aside, the Commissioner's decision the development application once again becomes undetermined. As the Council has never determined the development application, upon the Commissioner's determination being set aside, the Council can exercise the function to determine the development application by granting development consent subject to conditions. Upon the Council doing so, the appeal becomes inutile.

106 The second course would be for the parties to seek for the Court to arrange another conciliation conference under s 34(1) of the Court Act and for the Council and Billyard to enter an agreement under s 34(3) for the Court to grant development consent subject to conditions, in the terms the parties agreed in the consent orders. In this event, the Court could dispose of the proceedings in accordance with the parties' agreement to grant development consent subject to conditions.

107 The Court cannot order the Council to pursue either of these courses, which would implement the parties' agreement reflected in the consent orders signed by each party's solicitor. But if the Council chooses not to take either of these courses, and puts Billyard and the Court to the cost of conducting a further hearing of the appeal against the Council's deemed refusal of the development application, in circumstances where there still remains no contested issue that development consent should be refused, the Council's conduct can be taken into account in deciding whether it is fair and reasonable to make a costs order against the Council under r 3.7(2) of the Land and Environment Court Rules 2007 (NSW). Nevertheless, the approach the Council might take on the remitter of the matter is a question for another day.

108 Appropriately, Billyard did not seek an order for costs. The errors committed by the Commissioner were not caused or contributed to by the Council. The Council joined with Billyard in seeking the consent orders for the grant of development consent subject to conditions. In these circumstances, there should be no order as to costs.

109 The Court orders:

(1) The appeal is upheld.

(2) The decision and orders of Commissioner Walsh of 19 December 2024 are set aside.

(3) The proceedings are remitted to a Commissioner other than Commissioner Walsh to be determined in accordance with law and these reasons for judgment.

(4) There is no order as to costs with the intention that each party pay their own costs of this appeal.

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