Options for funding: Environmental compliance programs in New South Wales

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Councils have legal responsibilities for carrying out a wide range of environmental functions. Their capacity to effectively deliver on their environmental responsibilities depends heavily on their capacity to fund and resource appropriate personnel. The powers of authorised council officers to make, monitor and enforce decisions in relation to their roles as environmental managers depends upon the conferment of appropriate legislative powers. This article reviews the legal powers available to councils in New South Wales to fund their environmental management and compliance programs; and the practice of councils in the Hunter Region that strive to integrate the delivery of desired local services with recognised and accepted obligations for environmental management. Although most of the material for this article is drawn inevitably from New South Wales, the options available to, and practice of, Hunter councils should be relevant to councils in other jurisdictions.

INTRODUCTION

The role of local government as an environmental manager and protector relies heavily on councils' ability to resource effective environmental compliance programs. Councils are responsible for enforcing a wide range of legislative and planning instruments relating to the environment and its protection. Proactive programs to promote voluntary compliance and environmental best practice are also part of councils' responsibilities in protecting the environment. Ensuring environmental compliance is thus an ongoing role requiring sophisticated monitoring, record keeping and communications systems. These environmental compliance programs and systems require significant monetary resources and funded positions in a range of expert roles, including rangers, development planners and assessors, environmental officers, education and public relations officers, legal advisors and compliance systems managers.

In addition to core funding sourced from residential rates, local councils in New South Wales have a number of options available to them to raise resources for the specific function of enforcing environmental legislation. These options include:

- Fees – for a wide range of compliance services, including inspection fees associated with monitoring compliance of conditions of licences and approvals, such as conditions of development consent and building regulations.
- Levies – including environmental levies.
- Fines – from criminal prosecutions for regulatory breaches.
- Bonds – as security for a range of issues, including:
  - impacts on adjacent council property, eg to trees; and
  - other environmental impacts, such as salinity and drainage issues.
- Voluntary Planning Agreements (VPAs).

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- Contributions to public infrastructure or services.
- Public positive covenants.
- Grants.

Apart from the possibility of gaining grants for one-off environmental improvements, options available to councils fall broadly into two distinct categories:

(a) imposition of fees and charges to be paid to council, eg for services rendered and costs of monitoring and enforcement of conditions of approvals; or
(b) imposition of requirements on proponents of projects and activities to dedicate monies directly to works aimed at environmental safeguards or improvements, eg through planning agreements, public positive covenants and s 94 contributions.

In this article a range of funding options are discussed in the context of the legal mechanisms that allow them to be used for the purpose of supporting environmental compliance and protection programs. Outcomes from case law provide information on the courts' interpretation on the specific use of various funding options. Examples, from within and outside the Hunter and Central Coast region, show how specific funding options have been successfully used to support environmental compliance and protection programs.

FEES

Income from fees can be used to support compliance programs. Fees are raiseable under a number of pieces of legislation, including:

- s 608 of the *Local Government Act 1993* (NSW) (LG Act) – "Council fees for services";
- s 80A of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) (relating to conditions of consent);
- other sections of the EPA Act; and
- the *Protection of the Environment Operations Act 1997* (NSW) (PEO Act).

LG Act, s 608: Council fees for services

Legislative provisions

Section 608 of the LG Act allows councils to charge and recover an approved fee for any service it provides (other than annually charged services; see ss 496 and 501 of the Act).

For a limited range of business activities[1] a council may determine a fee, but only in accordance with a pricing methodology adopted by the council in its Operational Plan. However, a council may at any time determine a fee otherwise than in accordance with such a pricing methodology, but only if the determination is made by a resolution at an open meeting of the council.[2]

For non-business activities[3] a council may determine the amount of a fee for a service, but must take into consideration the following factors:

(a) the cost to the council of providing the service;
(b) the price suggested for that service by any relevant industry body or in any schedule of charges published, from time to time, by the Department;
(c) the importance of the service to the community; and
(d) any factors specified in the regulations (there are none).

[1] *Local Government Act 1993* (NSW), s 610A. These are described as: (a) the operation of an abattoir; (b) the operation of a gas production or reticulation service; (c) the carrying out of a water supply or sewerage service (other than a service provided, or proposed to be provided, on an annual basis for which the council is authorised or required to make an annual charge under s 501); (d) the carrying out of work under s 67 (carrying out works on behalf of private owners and occupiers, such as tree removal and tree planting); (e) the carrying out of graffiti removal work under s 11 of the *Graffiti Control Act 2008* (NSW); (f) any other activity prescribed by the regulations for the purposes of this subsection (none have been prescribed). This provision does not apply to a fee charged by a council for a service relating to the issuing of a certificate under Pt 4A of the *Environmental Planning and Assessment Act 1979* (NSW) (compliance and other certificates).

[2] *Local Government Act 1993* (NSW), s 610B.

[3] *Local Government Act 1993* (NSW), s 610D.

The cost to the council of providing a service in connection with the exercise of a regulatory function need not be the only basis for determining the approved fee for that service.

A council must not determine the amount of a fee for a non-business activity until it has given public notice of the fee and has considered any submissions duly made to it during the period of public notice.[4] Public notice of the amount of a proposed fee must be given (in accordance with s 405) in the draft Operational Plan for the year in which the fee is to be made. However, if, after the date on which the Operational Plan commences a new service is provided, or the nature or extent of an existing service is changed, or the regulations in accordance with which the fee is determined are amended, the council must give public notice (in accordance with s 705) for at least 28 days of the fee proposed for the new or changed service or the fee determined in accordance with the amended regulations.

In what circumstances may a fee be charged?

The LG Act states that the services for which an approved fee[5] may be charged include services provided under the LG Act or any other Act or regulations. Examples for which fees may be charged, given by the Act, include:

- supplying a service, product or commodity;
- giving information;
- providing a service in connection with the exercise of the council's regulatory functions, including receiving an application for approval, granting an approval, making an inspection and issuing a certificate; and
- allowing admission to any building or enclosure.[6]

A wide range of activities need council approval (see LG Act, s 68). This means that councils may charge fees in relation to any activity for which they have to assess applications for approvals, and for which they need to inspect premises to determine compliance with conditions of approval.

In principle, if fees have been prescribed and remain unpaid, there is no reason why a fee could not be charged for recovery of the unpaid fees. To discourage non-payment of fees a rebate could be offered for payment within a certain timeframe, although in practice this may benefit only those who would have paid anyway. Those who do not intend to pay would not be affected by a proposed rebate, although those who do intend to pay may respond by paying quicker to beat the deadline for the rebate. Another way to encourage payment of scheduled fees may be to make fewer inspections but charge a higher fee for each inspection. Both the necessity for the inspection and the consequences of non-payment would then be invested with a "higher value". This of course needs to be guided by the necessity to conduct inspections for the particular purpose. Conducting fewer inspections with higher value might also lead to a reduction in the "paperwork", ie the administrative costs and time associated with such inspections.

If a fee for a service is determined under another Act:

(a) a council may not determine an amount that is inconsistent with the amount determined under the other Act; and

(b) a council may not charge a fee in addition to the amount determined under the other Act.

[4] *Local Government Act 1993* (NSW), s 610F.

[5] "Approved fee" means: (a) in relation to a fee to which Div 2 of Pt 10 of Ch 15 applies, a fee determined by the council in accordance with that Division; or (b) in relation to a fee to which Div 3 of Pt 10 of Ch 15 applies: (i) the fee prescribed by the regulations for the purposes of the provision in relation to which the expression is used or determined by the council in accordance with any such regulations, or (ii) if no such regulations are in force, the fee (if any) determined by the Director-General for the purposes of the provision in relation to which the expression is used, or (iii) if no such regulations are in force and no fee is determined by the Director-General, the fee (if any) determined by the council for the purposes of the provision in relation to which the expression is used (*Local Government Act 1993* (NSW), Dictionary).

[6] *Local Government Act 1993* (NSW), s 608.

If the charging of a fee for a service is prohibited under another Act, a council must not charge a fee for the service under the LG Act.[7]

This leaves the question whether, if another Act is silent on whether or not fees may be charged under that Act, fees may be charged under the LG Act for services rendered under that other Act. On the surface it seems, and has always been assumed, that this would be lawful under the reference in s 608 to "services for which an approved fee may be charged include the following services provided under this Act or any other Act or the regulations". This question is affected now, however, by the recent decision of the Land and Environment Court in *Wei v Parramatta City Council* [2010] NSWLEC 1046, discussed below.

Inspection of premises

A council may charge an approved fee for inspecting premises that are reasonably required to be inspected in the exercise of the council's functions. This can be done whether or not the inspection is requested or agreed to by the owner or occupier of the premises.

For premises used for non-commercial activities, eg residential premises, a fee may only be imposed where it is necessary to inspect the premises:

- in connection with an application for an approval concerning the premises; or
- in connection with any inspection that is reasonably necessary to determine if an approval has been complied with.

Fees for inspections in relation to compliance may only be imposed, however, if the charging of the fee has been included as a condition of the approval. Such a fee may not be charged for such an inspection before the approval is granted. Additionally, an approved fee may not be charged for the inspection of any thing for which the council relies on a certificate under s 93 that the thing has been done in compliance with the approval.

Commenting on and responding to State government initiatives

Many councils indicate that their workload is significantly increased by having to respond to State government consultation initiatives, eg responding to draft policy releases and environmental assessments. While consultation is intrinsically useful, councils query whether some form of cost recovery could be employed when councils have to respond to State government requests. One particular example relevant to councils in the Hunter region would be giving advice on mine rehabilitation plans. Section 608(2) of the LG Act specifically provides that councils may charge an approved fee for "giving information" and "supplying a service". Although charging State government for advice and information is not a response that seems to have been commonly employed in the past, it is arguable that s 608 would permit such a request. Ultimately, this is a question that may need to be raised with the State government for political resolution.

Legal considerations

The ability to charge service fees reflects the principle of ecologically sustainable development outlined in the *Protection of the Environment Administration Act 1991* (NSW), s 6(2)(d):

> improved valuation, pricing and incentive mechanisms-namely, that environmental factors should be included in the valuation of assets and services, such as:
>
> (i) polluter pays-that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
>
> (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
>
> (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

[7] *Local Government Act 1993* (NSW), s 610.

One of the purposes of the LG Act (s 7) is to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities. Directing the imposition of fees at services that promote principles of sustainable development is therefore directly encouraged by the legislation.

Cost recovery for services provided is also of major concern for councils. While not a direct requirement for the exercise of councils' functions, cost recovery clearly goes to other objects of the LG Act, which include, for example, the ability of a council to provide equitable services and facilities. The Victorian Auditor-General has recently completed an *Audit Summary of Fees and Charges: Cost Recovery by Local Government* (2010),[8] which concluded that the councils studied for the review were not effectively managing the full costs of the services they provide; and further, that the councils had no clear understanding of these costs or how to go about assessing whether and how they should be recovered. This shows that there is potential for councils to more accurately assess and recover costs associated with providing environmental compliance services.

Councils' powers under s 608

Councils may charge fees for determining whether approvals have been complied with for both commercial and domestic premises (subject to the qualification above that an approved fee may be charged for an inspection of premises only if the charging of the fee has been included as a condition of the approval). For inspection of non-business activities, rules about public notice must be followed. For the limited range of business activities set out in s 610A, fees must be determined in accordance with a pricing methodology adopted by the council in its operational plan or otherwise by council resolution at an open meeting.

Otherwise, as part of its monitoring of compliance role, it has previously been assumed that there is no reason why a council could not charge a reasonable fee for inspection of premises to determine whether conditions of development consent, or the conditions on which the issue of any other council approval has been granted, are being carried out.

Recently, however, it has been doubted whether the power to impose an approved fee for inspections of premises under the LG Act, s 608(6) can extend outside *approvals* as defined under the LG Act, eg to development consents granted under the EPA Act, despite the existence in s 608(2) of the power to charge an approved fee for services provided under any other Act. In *Wei v Parramatta City Council*, Commissioner Pearson, in the New South Wales Land and Environment Court (NSWLEC), said at [43]:

> Section 608(6) is concerned with the charging of a fee "if inspections are reasonably necessary to determine if an approval has been complied with". The term "approval" is defined in the Dictionary to the LG Act to mean "an approval that is in force under this Act"…There is no indication in the context or subject matter that would enable a broader meaning to be given to the term "approval" than that given to it by the LG Act, such that it could include a development consent granted under the EPA Act.

In *Wei v Parramatta City Council (No 2)* [2010] NSWLEC 1107, Commissioner Fakes saw no reason to depart from this analysis. A similar stance was taken by Commissioner Brown in *Chen v Parramatta City Council* [2010] NSWLEC 1101. In other words, the NSWLEC is making a distinction between: fees charged under the LG Act for *services* carried out under other legislation, which is clearly authorised by LG Act, s 608(2); and fees in relation to *approvals* governed by s 608(6). While fees for services supplied under other legislation may still be charged under s 608(2), fees for approvals (s 608(6)) must relate to approvals granted under the LG Act. Fees for inspections in relation to approvals granted under other legislation would need to rely on other statutory authorisations for their validity, including conditions on which an approval is granted.

If this case stands as representing the proper legal interpretation of the LG Act, s 608, then councils will need to recover inspection fees for monitoring compliance with conditions of consent for development under the EPA Act by including such a condition in the development consent (EPA Act,

[8] Victorian Auditor-General's Report, *Fees and Charges: Cost Recovery by Local Government* (Victorian Government, April 2010), http://www.download.audit.vic.gov.au/files/LG_Fees_and_Charges_full_report.pdf viewed 30 July 2010.

s 80A). They cannot rely on their powers under the LG Act, s 608 for this purpose. Powers under the EPA Act to charge fees for monitoring compliance with development consents are discussed further below.

Councils' practice

Many councils use fees and charges to recover costs associated with compliance and enforcement and to, indirectly, provide incentives for compliance.[9] Some examples, discussed here in more detail, include:

- licensed premises compliance fees;
- impounded animal fees;
- enforcement "levy" fees;
- building inspection on privately certified sites;
- auditing of industrial premises; and
- other inspection and administration fees.

Licensed premises compliance fees

These fees allow council to recover costs associated with inspections and reinspections of licensed premises and activities and the issuing of notices and advice when non-compliance occurs. The use of reinspection and advice/notice administration fees is a disincentive that will help encourage first time compliance if promoted. Similar fee structures are able to be used for regulation of Onsite Sewage Management Systems.

Councils in the Hunter region who use this or similar mechanisms include Gosford, Taree, Muswellbrook (reinspection fees), Upper Hunter (reinspection fees), Wyong and Lake Macquarie.

Gosford City Council has the following environmental health inspection fees:[10]

- Food Premises Reinspection Fee: $145 per hour + $37 per 15 minutes thereafter.
- Food Premises (inspection fee): $145 per hour + $37 per 15 minutes thereafter.
- Written advice regarding registered premises: $300.
- Compliance and Administration Fee: Cost + $145.
- Compliance and Advisory Fee: $140 per hour + $35 per 15 minutes thereafter.
- Food Premises (issue of improvement notice involving one reinspection): $330.
- Recovery of Cost of Entry and Inspection for Enforcement Action: $105 per hour + $27 per 15 minutes thereafter.

Lake Macquarie City Council's fees and charges include a fee for the inspection of regulated premises and administration fees associated with the issuing of clean-up, prevention and noise control notices.[11]

Impounded animal fees

Many councils use impounding fees to provide a disincentive to repeat offenders and animals impounded for longer amounts of time. Some councils use impounding fees to help improve compliance with registration and micro-chipping requirements.

Councils in the region using one or both of these incentive mechanisms include Cessnock, Dungog, Gloucester, Great Lakes, Taree, Maitland, Newcastle, Port Stephens, Singleton and Upper Hunter. For example, Cessnock Council has escalating release fees for animals that have been impounded multiple times.[12]

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[9] For a complete scheduled list of environmental fees set by a council, see eg those prescribed by Muswellbrook Shire Council, http://www.muswellbrook.nsw.gov.au/Council-services/Rates-charges/Fees-charges-2010-2011.pdf viewed 30 July 2010.

[10] Gosford City Council, *2010-2011 Fees and Charges*, http://www.gosford.nsw.gov.au/customer/fees-charges/fees-charges-2011.pdf viewed 30 July 2010.

[11] City of Lake Macquarie Council, *Pricing Policy 2010-2011* (July 2009), http://www.lakemac.com.au/page.aspx?pid=109&vid=10&fid=105&ftype=True viewed 30 July 2010.

[12] Cessnock City Council, *Fees and Charges 2009/2010*, http://www.cessnock.nsw.gov.au/resources/file/Publications/Adopted_Copy__Fees_and_Charges_2009_to_2010_Mgmt_Plan.pdf viewed 30 July 2010.

Enforcement "levy" fees

Some councils are using extra fees for development to pay for the costs of enforcing developments to comply with regulations. Some councils are referring to these fees as a "levy". For example, Gosford City Council's 2009-2010 fees and charges[13] contain the following fees based on the scale of development:

- Development Application – Compliance Levy:
  - Up to $50,000: 0.200% of estimated cost up to a maximum of $75.
  - $50,001-$100,000: 0.175% of estimated cost up to a maximum of $150.
  - $100,001-$250,000: 0.150% of estimated cost up to a maximum of $275.
  - $250,000-$500,000: 0.125% of estimated cost up to a maximum of $500.
  - $500,001-$1M: 0.100% of estimated cost up to a maximum of $750.
  - <$1,000,001 >$5M: 0.075% of estimated cost up to a maximum of $2,250.
  - <$5M: $3,700.
- Recovery of Cost of Entry and Inspection for Enforcement Action: $105 per hour + $27 per 15 minutes thereafter

Gosford notes that the yield potential (at $75 to $3,700 per development) is $290,000 per year, while Wyong expects $70,000 in 2009/2010.

Councils using this mechanism include Gosford, Ryde, Woollahra, Tweed, Penrith (larger developments only), Wyong (Environmental Assurance Fee – compulsory on commercial developments only, voluntary for others).

Building inspections on privately certified sites

Some councils' building inspection fees vary according to whether the site's Construction Certificate (CC) or Complying Development Certificate (CDC) has been issued by a private certifier or by council. This allows the costing of the extra time that is needed for the officer to become informed about the site and the consent that is being issued privately. For example, see Singleton Council's building inspection fees,[14] where Class 1 and 10 building inspections and reinspections (individual) are charged $100 where council has issued the CC or CDC, or $125 where the CC or CDC has been privately issued.

For another example of a building fee, see eg *Kawkab Nassif v Holroyd City Council* [2004] NSWLEC 226.[15]

Auditing of industrial premises

Wollongong Council has an Industrial Auditing program where inspections are provided to businesses involving the use of a standard check sheet that covers air/noise/water pollution, chemical storage, waste management and environmental management planning. A report is provided summarising actions that are required and/or recommended to be undertaken and a follow up inspection is programmed to ensure that required corrective actions have been undertaken. A certificate is issued to the business once all required corrective actions have been completed. Wollongong charges the following environmental assessment fees:[16]

- Inspection Fee – low risk: $249.
- Inspection Fee – medium risk: $395.
- Inspection Fee – high risk: $572.
- Reinspection Fee: $100.

[13] Gosford City Council, n 10.

[14] Singleton Council, *Schedule of Fees 2009-2010*.

[15] Building Inspection Fee Payment of a $1,024.40 fee for the inspection by council of the works at key stages, where council is the Principal Certifying Authority.

[16] Wollongong City Council, *Fees and Charges 2009-2010*; in its Environmental Risk Assessment of Industrial Premises – Auditing Policy, Wollongong City Council states that inspections fees are appropriate under s 608 of the *Local Government Act 1993* (NSW) to be applied for this service whether or not the inspection is requested by the industrial operator or owner.

The NSWLEC has said that monitoring licence conditions is an important part of an adaptive and precautionary approach.[17]

Other inspection and administration fees

In *CSA Architects Pty Ltd v Woollahra Council* [2009] NSWLEC 1054, a Public Tree Management Inspection Fee of $160 and a Security Administration Fee of $175 were imposed under s 608, where security was taken against potential damage to trees on council property or any other council property. Woollahra Council has frequently adopted a similar fee structure for other developments as conditions of development consent, citing the LG Act, s 608; and these conditions have been endorsed by the NSWLEC.[18]

In *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 166, a Kerbside Usage Fee imposed on a development by council to partly cover loss of revenue from parking fees was argued to be outside the power conferred by s 608. Meriton argued that no "*service*" was provided by council, that the fees were more in the nature of a "*rent*" for parking spaces, and that their amount was excessive and unreasonable. The court thought these points were reasonably arguable but did not have to determine them directly at that time.

All these cases now have to be read in light of the decision in *Wei v Parramatta City Council* (above) to the effect that the LG Act, s 608 cannot be used to justify imposition of fees in development consents, and that the consent itself would have to make provision for fees. In these cases the conditions of development consent did impose the fees, even if the authority to make them (LG Act, s 608) was wrongly stipulated in the consent.

EPA Act fees for monitoring conditions of development consents

Legislative provisions

The EPA Act, s 137 contemplates that fees may be charged under the EPA Act for a wide variety of reasons, as prescribed or determined in accordance with the Regulation (*Environmental Planning and Assessment Regulation 2000* (NSW)). The Regulation contain some 60 provisions indicating circumstances in which fees may be charged. Many specify maximum fees; some do give flexibility, though prescribe the methodology by which fees are to be calculated. While fees for inspection and evaluation in relation to applications for development consent are specifically covered in cl 245AA of the Regulation, there is no specific power to charge fees for monitoring conditions of development consent. Such a power would seem to be implied, however, from the general power in s 137 to charge fees in connection with "giving any permission". Clause 263 of the Regulation then states that if a fee has not been prescribed by the Director-General the maximum that can be prescribed is 120% of the cost to council of doing anything referred to in s 137.

Under the EPA Act, s 80A consent authorities may impose conditions on grants of development consent. Such conditions can make provision for fees to be charged. In law, such conditions have to pass the standard test for conditional approvals known as the *Newbury* test, ie the condition must be imposed for a planning purpose, fairly and reasonably relate to the permitted development, and be reasonable in its terms.[19] So long as fees imposed for the purpose of monitoring compliance with development consents are reasonable in their terms (eg in relation to cost, number and duration of inspections) then such conditions may be imposed on a grant of development consent.

[17] *Environment Protection Authority v Ballina Shire Council* (2006) 148 LGERA 278.

[18] See *Evenrace Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 1522; *Michael Suttor Pty Ltd v Woollahra Municipal Council* [2009] NSWLEC 1402; *Star v Woollahra Municipal Council* [2009] NSWLEC 1231.

[19] See, eg *Lake Macquarie City Council v Hammersmith Management Pty Ltd* (2003) 132 LGERA 225 at [52]; *Dogild Pty Ltd v Warringah Council* (2008) 158 LGERA 429; *Cavasinni Constructions Pty Ltd v Fairfield City Council* (2010) 173 LGERA 456.

Councils' practice

In practice many such fees are imposed as part of the conditions of development consent. Such conditions may be accessed as appendices to many of the cases cited in this article. Some examples are also given in Appendix 1. Conditions that deal with planning agreements and s 94 contributions are discussed separately below.

EPA Act other fees and charges

These include (this list is not comprehensive):

- fees for s 149 certificates;[20]
- fees payable to the relevant planning authority by owners submitting draft development control plans;[21]
- assessment and preparation fees for draft development control plans;[22]
- fees for certified copies of documents;[23]
- additional processing fee for integrated development;[24]
- application fee for modification of consent;[25]
- fees for development applications;[26]
- fee for an application for a building certificate;[27] and
- fees for development that requires advertising.[28]

PEO Act fees and charges

Local councils are the appropriate regulatory authority for many activities involving management of pollution under the PEO Act. Although local councils do not license activities under this legislation in the same way that the Department of Environment, Climate Change and Water licenses scheduled activities that fall within its responsibilities of management, nevertheless local councils do have approval functions under this Act. The *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), cl 6G, for example, states that a council of a local government area specified in Pt 2 of Sch 8 may grant an approval[29] in respect of the burning of dead and dry vegetation on the premises on which the vegetation grew in the local government area, and that conditions may be attached to such an approval. On general principles governing the imposition of conditions on approvals, discussed above, then councils could arguably impose fees for evaluation, monitoring and inspection in relation to such approvals.

Fees for the issue of clean-up, prevention and noise control notices are prescribed in cl 99 of the *Protection of the Environment Operations (General) Regulation 2009* (NSW).

[20] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 259.

[21] *Environmental Planning and Assessment Act 1979* (NSW), s 74E.

[22] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 25AA.

[23] *Environmental Planning and Assessment Act 1979* (NSW), s 150.

[24] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 253.

[25] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 258.

[26] *Environmental Planning and Assessment Regulation 2000* (NSW), regs 245AA; 246.

[27] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 260.

[28] *Environmental Planning and Assessment Regulation 2000* (NSW), reg 252.

[29] *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), reg 6A Definitions.

LEVIES

Levies can be used by councils to raise longer term funding to assist environmental compliance programs. Levies under both the LG Act and the EPA Act are discussed below.

LG Act, s 495: Making and levying of special rates

Legislative provisions

A council may levy a special rate in accordance with s 495 of the LG Act:

> for or towards meeting the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken, by the council within the whole or any part of the council's area, other than domestic waste management services.[30]

The special rate is to be levied on such rateable land in the council's area as, in the council's opinion:
(a) benefits or will benefit from the works, services, facilities or activities; or
(b) contributes or will contribute to the need for the works, services, facilities or activities; or
(c) has or will have access to the works, services, facilities or activities.

Money generated by this levy can only be used for the purpose for which the rate or charge was levied.

Levies from special rates form part of the "general income" of a council;[31] and variations to general income are subject to ministerial consent,[32] which means that the levying of special rates may effectively require ministerial consent.[33]

Although the imposition of levies may encounter political and community resistance, levies may also be more warmly received when the community can see that the monies collected are being applied to a particular service (hypothecated) rather than disappearing into general revenue.

Councils' practice

Environmental special rates are becoming quite common and can provide valuable resources to assist in funding environmental compliance and enforcement programs. For example, North Sydney Councils Environmental Levy has been used since 2000 to fund the position of Environmental Protection Officer (EPO). The objective of the position has always been to educate and enforce the provisions of the PEO Act, for which North Sydney Council is the appropriate regulatory authority, and reduce the amount of environmental pollution occurring within the local government area.[34]

Although special rates have to receive ministerial approval before they can be levied, experience suggests that where the rate is to be used for environmental purposes that can be demonstrated to have firm community support, ministerial approval is not likely to be withheld. Lake Macquarie Council, for example, has successfully used a special rate for their lake improvement program that is now proposed to be extended to fund sustainability/community engagement programs.

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[30] Income to be applied by a council towards the cost of providing domestic waste management services must be obtained from the making and levying of annual charges or the imposition of charges for the actual use of the service, or both. Income obtained from charges for domestic waste management must be calculated so as to not exceed the reasonable cost to the council of providing those services (*Local Government Act 1993* (NSW), s 504).

[31] *Local Government Act 1993* (NSW), s 505.

[32] *Local Government Act 1993* (NSW), ss 506, 508(2), 508A.

[33] For example, Lake Macquarie's four-year operational plan states: "The amounts shown in the column 20010/2011 Rate Yield have been calculated in accordance with the maximum permissible increase in Council's Notional General Income, for 2010/2011 of two point six per cent (2.6%) as advised by the Minister for Local Government in accordance with Section 508(2) of the *Local Government Act 1993*. In addition, the amounts detailed in the 2010/2011 Rate Yield are subject to Council making a successful application to the Minister for Local Government for a Special Variation to General Income to increase Council's rate income by $2,103,300 over the maximum allowable increase of 2.6%. The purpose of the proposed increase is to support a program of sustainability and environmental activities identified through technical analysis by Council and the 10-year community planning processes": see Lake Macquarie City Council, *Draft 2009-2013 Revised 4-Year Delivery Program* (2010), http://www.lakemac.com.au/page.aspx?pid=101&vid=1&apt=detail&aid=779 viewed 30 July 2010.

[34] North Sydney Council, *Environmental References Services Group Report ES07* (10 August 2009), http://www.northsydney.nsw.gov.au/resources/documents/ES073.pdf viewed 30 July 2010.

Most councils use special levies to help fund stormwater programs. Stormwater levies are subject to the provisions of ss 125A-AA of the *Local Government (General) Regulation 1995* (NSW), which specify allowable charges.

A special rate is also applied by Parramatta City Council for Open Space Acquisition and Embellishment. This special rate is levied to provide funds for the acquisition of new open space land (including compulsory acquisitions of open space) and embellishment of existing open space areas (including environmentally-sensitive areas).[35]

EPA Act, s 80A: Imposition of conditions (involving security)

Levies may also be imposed as a condition of development consent under the EPA Act, s 80A, eg for ongoing maintenance of a conservation area.[36] Section 80A(6) specifically allows for the provision of security by the applicant for the payment of completing any public work (such as stormwater drainage and environmental controls) required in connection with the consent.

EPA Act, s 94A: Fixed development consent levies

As an alternative (but not in addition) to a s 94 contribution (see below), s 94A of the EPA Act also allows a consent authority to impose, as a condition of development consent, a requirement that the applicant pay a levy of the percentage, authorised by a contributions plan, of the proposed cost of carrying out the development.

Money required to be paid by a condition imposed under this section is to be applied towards the provision, extension or augmentation of public amenities or public services (or towards recouping the cost of their provision, extension or augmentation). The application of the money is subject to any relevant provisions of the contributions plan. A general development or planning and administration levy would be justified by this provision.[37]

FINES

Income from fines consequent upon prosecutions for breaches of legislation or conditional approvals has been used by some councils to help fund compliance and enforcement programs.

Revenue from fines and penalties under any Act or proceeding instituted by council must be applied to a council's Consolidated Fund.[38] Money and property held in a council's Consolidated Fund may then be applied towards any purpose allowed by this or any other Act.[39] Court awarded costs, following a successful prosecution, can also help to fund compliance and enforcement programs.

On the other hand, prosecution is generally a measure of "last resort" in dealing with infringements. Prosecutions are time and resource intensive, and success depends heavily upon the expertise with which investigations are conducted, and evidence gathered and presented. A good example is *Warringah Council v Koch and Severino* [2006] NSWLEC 551, where council failed to establish "cause and effect" necessary to convict the defendant, thereby opening itself up to a costs award against it. Note, however, that since then significant restrictions have been imposed on the ordering of costs in favour of a successful defendant in proceedings of this type by s 257D of the *Criminal Procedure Act 1986* (NSW).[40] This gives councils a measure of comfort so long as the investigation is reasonably carried out.

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[35] See Parramatta City Council, *Special Rates Programmes* (2006), http://www.parracity.nsw.gov.au/residents/pay_rates/faq#special viewed 30 July 2010.

[36] *Ron C Dunkley & Assocs and Daleport Pty Ltd v Blue Mountains City Council* [2009] NSWLEC 1396.

[37] See, eg *CSA Architects Pty Ltd v Woollahra Council* [2009] NSWLEC 1054; *Michael Suttor Pty Ltd v Woollahra Municipal Council* [2009] NSWLEC 1402; *Mosman Church of England Preparatory School v Warringah Council* [2009] NSWLEC 1190.

[38] *Local Government Act 1993* (NSW), s 694.

[39] *Local Government Act 1993* (NSW), s 109.

[40] "Professional costs [see below] are not to be awarded in favour of an accused person in proceedings under this Part unless the court is satisfied as to one or more of the following:
(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

Even where council is successful in prosecuting a case, however, failure to recover full costs plus a low level of fine may effectively leave a prosecutor out of pocket or negate the value of the prosecution.[41] It should be noted that where a defendant pleads guilty the court generally applies a "discount" of around 20-25% in determining the appropriate level of fine to be imposed.

The upside of course with environmental litigation is that most offences are "strict liability", ie the state of mind of the accused is irrelevant to liability and the only matter necessary to be proved is that the accused committed the unlawful act.

The court also has available to it a wide range of responses, particularly for pollution, including:

- ordering the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;[42]
- ordering the offender to carry out a specified environmental audit of activities carried on by the offender; or
- ordering the offender to pay a specified amount to the Environmental Trust established under the *Environmental Trust Act 1998* (NSW), or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes.[43]

More use could be made of these options for funding environmental projects.

Councils contemplating prosecution of offenders have to carefully evaluate whether the anticipated "bang for the buck" makes it all worthwhile. Threat of prosecution, however, may make offenders more willing to consider negotiated alternatives, such as voluntary rehabilitation and offsets.

ADMINISTRATIVE ORDERS FOR ENVIRONMENTAL PROTECTION

When an incident occasioning environmental harm occurs, or a regulator suspects that perhaps because of lax standards of management an incident might occur, the regulator may issue a notice or order requiring specified conduct to be stopped or prevented, or requiring that certain positive action be taken. These administrative orders enable regulators to respond quickly and positively to both incidents and threats, without needing to seek court orders. Councils would be aware of, and use, at least some of these powers, eg to issue noise control notices relating to premises,[44] smoke abatement notices,[45] clean-up and prevention notices,[46] orders to abate a public nuisance,[47] and orders about removal or keeping of waste[48] (see generally LG Act, s 124 for a full range of orders that may be

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs."

"Professional costs" means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court: *Criminal Procedure Act 1986* (NSW), s 257A.

[41] For example, in *Newcastle City Council v Pace Farm Egg Products Pty Ltd (No 2)* (2005) 141 LGERA 133 and *(No 3)* [2005] NSWLEC 423 (offence of placing egg waste in a position where it was likely to fall, descend, or be washed into waters), although the action was successful the fine amounted to just $12,000 and the council recovered only 30% of its costs. On the other hand, for a case where full recovery, including costs of investigation, was secured, see *Fairfield City Council v Florence Flowers Pty Ltd* [2006] NSWLEC 707. In *Gosford City Council v Australian Panel Products Pty Ltd* [2009] NSWLEC 77 (pollution of waters) the council was also successful in gaining a fine of $25,000 plus costs of $5,844.

[42] For example *Council of Camden v Runko* (2006) 147 LGERA 214.

[43] *Protection of the Environment Operations Act 1997* (NSW), s 250.

[44] *Protection of the Environment Operations Act 1997* (NSW), s 264.

[45] *Protection of the Environment Operations Act 1997* (NSW), s 135B.

[46] *Protection of the Environment Operations Act 1997* (NSW), ss 91-100.

[47] *Local Government Act 1993* (NSW), s 125.

[48] *Local Government Act 1993* (NSW), s 128A.

given under that Act). Such a notice or order will have effect until the recipient has complied with it or the issuer has indicated it is satisfied that no more needs to be done.[49]

The ability to recover fees for the issue of clean-up and prevention notices under the PEO Act is specifically endorsed by the legislation,[50] including costs of monitoring and compliance.[51] Failure to pay a fee may be enforced by criminal prosecution.[52] Otherwise recovery of costs under the LG Act, s 608 for inspection of premises seems to be contemplated by the note to s 104 of the PEO Act.[53] The issue of an order itself is arguably not covered by s 608 nor by any other provision of the LG Act; although costs recovery for failure to carry out an order may be undertaken under the LG Act, s 678.[54]

EPA Act, s 121B orders

Legislative provisions

Under the EPA Act, s 121B an order may be given to a person by a council to do or to refrain from doing anything specified in the table set out in that section. The subject-matter of such an order includes, for example, to comply with a development consent,[55] to carry out – or cease carrying out – specified works,[56] and to cease using premises for specified purposes. If a council has adopted criteria in a development control plan on which it is to give an order, the council is required to take the criteria into consideration before giving the order.[57] An intention to make such an order must be given and a person allowed to make representations before an order can be issued.[58] A person who carries out work in compliance with a requirement of an order does not have to make an application for consent to carry out the work.[59] If the recipient of an order defaults, a council may carry out the terms of the order and recover costs.[60] On the other hand, a person who satisfies the court that the giving of the order was unsubstantiated or the terms of the order were unreasonable may recover compensation.[61]

These provisions contemplate that security may be used (though not taken) for carrying out the terms of an order.[62] Since the power to impose a security is not specified in these provisions, it must therefore rely on other provisions of this or another Act. Since the LG Act, s 97 and the EPA Act, s 80A(6) authorise security only by way of conditions of approval or conditions of development consent, then it would seem that only an order that is directed at compliance with conditions of approval for which security has already been required, would be contemplated by these provisions. Provisions for security are discussed further below.

[49] *Tonkin v Cooma-Monaro Shire Council* (2006) 145 LGERA 48. An action taken against council for negligent issue of such an order was dismissed in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102, but this case does stand as a warning that the issue of administrative orders needs to be carefully considered.

[50] *Protection of the Environment Operations Act 1997* (NSW), ss 94, 100.

[51] *Protection of the Environment Operations Act 1997* (NSW), ss 104-107.

[52] *Ryding v Kempsey Shire Council* [2008] NSWLEC 306.

[53] Note: see also s 608 of the *Local Government Act 1993* (NSW) for charges for inspection of premises by a local council in the exercise of its functions as a regulatory authority.

[54] *Local Government Act 1993* (NSW), s 678 allows councils to carry out the work of an order that has not been complied with and recover costs for these works

[55] See, eg *Birdon Contracting Pty Ltd v Hawkesbury City Council* (2009) 167 LGERA 178.

[56] See, eg *Fairfield City Council v Phan* [2008] NSWLEC 145.

[57] *Environmental Planning and Assessment Act 1979* (NSW), s 121F.

[58] *Environmental Planning and Assessment Act 1979* (NSW), s 121H-K.

[59] *Environmental Planning and Assessment Act 1979* (NSW), s 121O.

[60] *Environmental Planning and Assessment Act 1979* (NSW), s 121ZJ.

[61] *Environmental Planning and Assessment Act 1979* (NSW), s 121ZL.

[62] *Environmental Planning and Assessment Act 1979* (NSW), s 121ZJ(6) and (7).

It should be noted that orders given to persons under s 121B will continue to apply to successors in title of the person who was originally served with the notice.[63] While clean-up and prevention notices under the PEO Act do not automatically apply to successors in title, they can of course always be reissued to subsequent occupiers. Cost compliance notices to recover costs and fees relating to clean-up, however, may be registered on title.[64]

A person may apply to a council for a certificate as to whether there are any outstanding notices of an intent to make an order, or any orders in force, in respect of any land within the council's area. Such an application must be accompanied by the fee determined by the council under the LG Act.[65]

Councils' practice

Gosford, for example, uses s 121B orders to deal with land clearing that needs, but has not obtained, development consent. Rehabilitation, maintenance and monitoring, and the use of qualified consultants, may all be required as part of the conditions of a s 121B order. Gosford has also used s 121B orders to require estate agents, as managers of premises, to clean up rubbish dumped outside residential dwellings.

Unlike clean-up orders under the PEO Act (above), s 121B orders are subject to merits appeals in the NSWLEC.[66] For this reason, in circumstances where a clean-up order may be issued, it may be preferable to use this route rather than a s 121B order to achieve the same outcome.

SECURITY (BONDS)

Security (bonds) may be used by councils as a way of ensuring compliance and environmental outcomes associated with approvals under the LG Act and the EPA Act. This security can be required through:

- conditions of approval under the LG Act, s 97;
- conditions of consent under the EPA Act, s 80A.

These are discussed in further detail below.

LG Act, s 97: Conditions concerning security

Legislative provisions

An approval under the LG Act may be granted subject to a condition that the applicant provides to the council security for the payment of the cost of either or both of the following:

(a) making good any damage that may be caused to any council property as a consequence of doing or not doing any thing to which the approval relates,

(b) completing any works that may be required in connection with the approval.

Works (the completion of which may be required in connection with an approval) could include footpaths, kerbing and guttering, road works, trunk drainage and environmental controls.[67]

EPA Act, s 80A: Imposition of conditions

Legislative provisions

A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the costs of inter alia completing any public work including environmental controls required in connection with

[63] *Environmental Planning and Assessment Act 1979* (NSW), s 121Y.

[64] *Protection of the Environment Operations Act 1997* (NSW), ss 104-107.

[65] *Environmental Planning and Assessment Act 1979* (NSW), s 121ZP.

[66] *Environmental Planning and Assessment Act 1979* (NSW), s 121N.

[67] *Environmental Planning and Assessment Act 1979* (NSW), s 97(1) Note.

the consent, and remedying any defects in any such public work that arise within six months after the work is completed.[68] The security is to be for such reasonable amount as is determined by the consent authority.[69]

Section 80A(6) of the EPA Act is the exclusive and only source of power for a consent authority to require the provision of security as a condition of development consent and is limited to the circumstances set out in that subsection.[70]

Bonds can be used, for example, to protect waterways and other environmentally-sensitive areas that are adjacent to development work on private land.

Councils' practice

Examples of matters for which councils have taken environmental security bonds include: silt and sediment control, to ensure that there is no transmission of soil or other material off-site and onto a public road or into a drainage system;[71] and security against damage to adjoining council property.[72] Other examples include: an infrastructure works bond, for completing any public work, including, stormwater, drainage and environmental controls, required in connection with the consent;[73] and a bond taken as security for public place and environmental damage.[74]

Tree and landscape bonds – private land

Some councils have, in the past, used s 80A(6) to justify the imposition of tree or landscape security bonds. Councils that have made mention in various documents to the use of this mechanism include Holroyd, Great Lakes, Lake Macquarie, Dungog, Woollahra, North Sydney and Strathfield.

There is some concern about the legality of bonds that protect trees and landscaping works on private land. Woollahra Council has cited the case *Datum Pty Ltd v Botany Bay City Council* [2003] NSWLEC 62 as a reason to discontinue the imposition of tree and landscape bonds. This case (amongst other things) resulted in the court removing a condition of consent that required a bond for the satisfactory completion and maintenance of landscaping works on private land. The court noted this was not the intention of the EPA Act.[75]

This position was reaffirmed by the court in *Charalambous v Ku-ring-gai Council* (2007) 155 LGERA 352.

It must be accepted therefore that s 80A(6) does not authorise the imposition of a condition of development consent by a local council requiring the payment of a monetary bond for the stated purpose of protecting trees and/or landscaping on private property. It is possible, however, to do this by way of a VPA (see below). It is also possible, as part of the general conditions of a planning consent under the EPA Act, s 80A, to require, for example, conservation management or bushland

[68] *Environmental Planning and Assessment Act 1979* (NSW), s 80A(6).

[69] *Environmental Planning and Assessment Act 1979* (NSW), s 80A(7).

[70] *Charalambous v Ku-ring-gai Council* (2007) 155 LGERA 352.

[71] *Manotik v Warringah Council* [2008] NSWLEC 1463; *Mosman Church of England Preparatory School v Warringah Council* [2009] NSWLEC 1190; *Minnici v Warringah Council* [2009] NSWLEC 1098.

[72] For example *Abacus Property Group v Ashfield Municipal Council* [2009] NSWLEC 1097.

[73] *Small v Woollahra Municipal Council* [2008] NSWLEC 1239.

[74] *Aberline Associates Pty Ltd v Sutherland Shire Council* [2009] NSWLEC 1335

[75] Pearlman J said at [51]: "Proposed condition 16 would have imposed a security bond on the applicant for the purpose of ensuring the maintenance of the landscaping. The applicant objected on the ground that such a bond did not fall within the scope of bonds permitted by s 80A(6) of the *Environmental Planning and Assessment Act 1979*. These provisions of the Act empower the consent authority to require such a bond in limited circumstances and it is clear that the protection or maintenance of landscaping on private property is not amongst those permitted purposes. I decline therefore to impose this condition."

regeneration plans that include ongoing maintenance.[76] But that would not include providing security as part of the general power to impose conditions under s 80A.[77]

Tree and landscape bonds – public land

Protection of trees on public land can, however, be made the subject of conditions of any development consent, and a security bond taken for that purpose. Under s 80A, trees are "property of the consent authority". But as indicated above, such a condition has also to be tested against the *Newbury* principles. In *Klompe v Woollahra Municipal Council* [2009] NSWLEC 1071, for example, the NSWLEC accepted council practice of valuing its trees for the purpose of security deposits by a methodology called The Thyer Tree Valuation Worksheet 2000a, which by a number of calculations based on the measurements of the tree and its qualities came to $48,994. The relevant condition required that:

> the value of the deposit represents the full value of the tree as calculated using the Thyer Tree Valuation method. The tree damage security deposit will not be released until Council has inspected and is satisfied with the condition of the trees to which it applies. Council may use part or the entire deposit to carry out works to trees or replace them if they are not in a satisfactory condition. Where trees have not been preserved and retained in accordance with this Consent, the Applicant may forfeit the total deposit amount.

The court thought this provision was unfair. There was no time limit for the period that the security deposit might be held. Nor did the condition state the time at which council must carry out an inspection to determine whether or not it was satisfied. The applicant regarded the amount of the bond as a penalty rather than a security deposit. The court agreed and substituted a bond of $10,000.

Other examples of environmental security bonds that have been endorsed by the court include: a "tree damage security deposit" for making good any damage caused to any public tree as a consequence of the doing of anything to which the consent related;[78] a "tree protection bond";[79] and a bond for the removal and replanting of a tree on a nature strip, not to be released until six months after the tree had been planted, providing the tree had been successfully retained in a healthy and vigorous state to the satisfaction of council's tree technical officer.[80]

VOLUNTARY PLANNING AGREEMENTS

VPAs under the EPA Act, ss 93F-L

Voluntary Planning Agreements may allow funding to be sourced from development for aspects of environmental compliance programs that have a relevant public purpose.

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[76] *Ron C Dunkley & Assocs and Daleport Pty Ltd v Blue Mountains City Council* [2009] NSWLEC 1396.

[77] In *Falcomata v Ku-ring-gai Council (No 2)* (2005) 143 LGERA 346 at [34], the court said: "Any condition of consent must withstand the so-called *Newbury* test, i.e. it must relate to the development, it must be for a planning purpose and it must be reasonable. In the case of the condition for a bond proposed by the council, the first and third tests are, in my opinion, satisfied, since the amount of the bond is not high. However, I do not think that the second test is satisfied. While I accept that the maintenance of landscaping is a planning purpose, I do not think that the lodgement of a bond that will be returned only if the landscaping is well maintained is also a planning purpose. If, at the end of the three-year period, the council finds that the landscaping is not well maintained, it cannot enter the applicant's property and plant trees on it. It most certainly could not (and would not) return once a week to water the seedlings. The bond would not achieve the planning purpose of healthy landscaping. And what would happen to the bond money? Would it go to the council's consolidated revenue? Would it be used for public landscaping elsewhere? In either of those cases it would no longer relate to the subject development. I have considered the notion that a monetary bond may be seen as an incentive, in the sense that an applicant is more likely to look after the landscaping if this will lead to the return of the bond money. The incentive may therefore be considered to be the planning purpose. However, this kind of reasoning seems to me to move too far away from a proper application of the *Newbury* test. For this reason I have not imposed the two conditions requiring monetary bonds. However, Condition 88 requires that the landscaping be completed before the building can be occupied and that it be maintained in a satisfactory condition at all times. If the applicant fails to maintain the landscaping, the council can take action."

[78] *CSA Architects Pty Ltd v Woollahra Council* [2009] NSWLEC 1054.

[79] *Walsh v Holroyd City Council* [2009] NSWLEC 1271.

[80] *Diab v Ashfield Municipal Council* [2009] NSWLEC 1094.

Legislative provisions

Under ss 93F-L of the EPA Act, a VPA can be entered into by a consent authority[81] and a developer who has sought a change to an environmental planning instrument or has made, or proposes to make, a development application. A planning agreement is a voluntary agreement under which the developer may agree to provide material public benefits or pay monetary contributions for public purposes[82] or otherwise achieve or advance the purposes of the planning regime. A planning agreement voluntarily offered by a proponent can be made a condition of development consent, so long as the content of the condition is otherwise within the power of the consent authority.

Under a VPA, a developer may be required to dedicate land free of cost, pay a monetary contribution, and/or provide any other material public benefit to be used for a public purpose. Two of the relevant public purposes listed in the Act are "the monitoring of the planning impacts of development", and "the conservation or enhancement of the natural environment".

Councils' practice

A public or planning purpose could, for example, include the conservation or enhancement of the natural environment and monitoring the planning impacts of development,[83] and provision of access to the foreshore.[84] Purchasing land for conservation purposes, perhaps to provide for an offset, could fall within the definition of public services or public amenities.[85] Further information on offsets under VPAs can be found in Appendix 2.

Greater Taree City Council has exhibited a draft VPA for a Diamond Beach development.[86] This draft VPA includes potential contribution of land as well as environmental and recreational project works by the developer. Associated with the project works is a maintenance bond relating to the planned works. This bond requires the planned works to comply with a management plan for a period of time until land is handed over to council.

CONTRIBUTION TOWARDS PROVISION OR IMPROVEMENT OF AMENITIES OR SERVICES

EPA Act, s 94 contributions

Section 94 contributions may allow funding to be sourced from development for aspects of environmental compliance programs that provide a required public service to the area being developed.

Legislative provisions

The EPA Act, s 94 is the exclusive source of power for a consent authority to impose conditions requiring payment of monies.[87]

If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring:

[81] In *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355 at [44], Jagot J held that if a developer offers during the hearing of an appeal under s 97 of the *Environmental Planning and Assessment Act 1979* (NSW) to enter into a planning agreement, under s 39(2) of the *Land and Environment Court Act 1979* (NSW), the court may exercise the functions of the consent authority to impose a condition in terms of the offer. The court cannot, however, require a consent authority to enter into such an agreement: *Progress & Securities Building Pty Ltd v Burwood Council (No 2)* (2008) 158 LGERA 102.

[82] *Environmental Planning and Assessment Act 1979* (NSW), s 93F.

[83] *Environmental Planning and Assessment Act 1979* (NSW), s 93F(2)(f).

[84] *Dodaro Robert v City of Canada Bay Council* [2008] NSWLEC 1406.

[85] *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355.

[86] *Draft Voluntary Planning Agreement: Greater Taree City Council and SAF Properties Party Ltd* (2008).

[87] *Fairfield CC v Olivieri* [2003] NSWCA 41; *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355.

(a) the dedication of land free of cost; or
(b) the payment of a monetary contribution; or
(c) both.

A consent authority may impose a condition under s 94 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan.[88] A condition may be imposed only to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned.[89] Section 94 conditions are subject to ministerial direction.[90]

A useful summary of the statutory context of s 94 is given in *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 64.[91]

Legal considerations

In *Antipas v Hurstville City Council* [2007] NSWLEC 674 at [28], the court stressed that:

[88] See, eg *King, Markwick, Taylor v Bathurst Regional Council* (2006) 150 LGERA 362.

[89] The decision-making process to be carried out under s 94 was explained by the New South Wales Court of Appeal in *Broker Pty Ltd v Shoalhaven City Council* (2008) 164 LGERA 161 at [49]-[51]: "If an application for subdivision of land is made to a council, and the council is satisfied that that subdivision 'will or is likely to require the provision of or increase the demand for public amenities and public services within the area', the council's power to grant the development consent subject to a condition for payment of money under section 94 is triggered. In making the judgment whether the subdivision 'will or is likely to require the provision of or increase the demand for public amenities and public services within the area', the council is not restricted to considering only those consequences which must inevitably flow from, or are legal consequences of the granting of, the subdivision approval. As well, the council can consider the practical consequences that are likely to follow from the granting of the consent. If the council is satisfied that a subdivision consent, once granted, is likely to be acted upon, and to instigate a process whereby people come to occupy the separate lots that arise from the subdivision, the council might, in the circumstances of the particular case, be satisfied that the subdivision will, or is likely, to require the provision of or increase the demand for public amenities and public services within the area. The notion that a development will or 'is likely to require the provision of…public amenities and public services within the area' is that the development will, or is likely to, bring about a need or desire for the provision of public amenities and public services, where the need or desire is of sufficient strength for it to be appropriate to say that the provision of the public amenities and public services are 'required', and where those public amenities and public services were not previously required. In other words, the requirement is caused by the development. The notion that a development 'will or is likely to…increase the demand for public amenities and public services' within an area contemplates a situation where there is already a demand for public amenities and public services within the area in question, but that the development for which development consent is sought will or is likely to increase the demand for those public amenities and public services within the area. In that case, it is the increase in the demand that is caused by the development. Whether the predictive enquiry that the council engages in is one of considering whether the development will, or is likely to require the provision of public amenities and public services within the area, or is one of considering whether the development will or is likely to increase the demand for public amenities and public services within the area, the council is engaged in an exercise in comparison. What is being compared in each case is what public amenities and public services within the area will be required, or be ones for which a demand exists, if the development occurs, and those that will be required, or for which a demand exists, if the development does not occur. The predictive exercise is one that the council carries out by reference to the particular development for which development consent is sought. Thus, in the case where consent is sought to a subdivision, it is the subdivision that is the relevant development, the consequences of which the council seeks to predict. In the case where development consent is sought to the erection of a house, it is the erection of the house that is the relevant development, the consequences of which the Council seeks to predict."

[90] *Environmental Planning and Assessment Act 1979* (NSW), s 94E. For an example in relation to Lake Macquarie's contributions plans, see Lake Macquarie City Council, *Section 94* (2010), http://www.lakemac.com.au/page.aspx?pid=545&vid=12 viewed 30 July 2010; and for a direction requiring a council to cease levying for street trees, see Hon Kristina Keneally MP, *Letter to Blacktown City Council* (1 June 2009), http://www.planning.nsw.gov.au/planningsystem/pdf/local_contributions_review_blacktown_letter_direction.pdf viewed 30 July 2010.

[91] *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 64 at [23]-[25]: "The provisions of s 94(1) and 94(2) are in general terms and state that a contribution can only be imposed for the increase in demand for public amenities and public services within the area resulting from a development. Section 94 contributions can only be levied by a Council under s 94B(1) if determined in accordance with a contributions plan made under s 94EA and the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation). Section 94(4) states that only reasonable contributions can be levied under s 94(3)…The Council in its submissions referred to the s 94 plan more generally and the Development Contributions – Practice Notes July 2005 issued by the Department of Infrastructure, Planning and Natural Resources. These are intended to provide guidance to local councils on the correct approach to the determination of contributions. A cursory reading of both documents suggests that there are many factors that can be considered as relevant to calculating existing and future demand for the purpose of determining a S. 94 contribution. For example, the Practice Notes refer to discounting contributions and credits for existing development. Reasonableness is a guiding principle as identified in the Practice Notes at page 1 when identifying principles underlying the calculation of development contributions and as held in several cases…Further, that approach is reflected in the

> whilst s 94 and s 94B of the Act provide the Court with considerable flexibility as to a condition of consent requiring contributions in relation to increased demand on public amenities and public services, as a matter of principle, contributions plans should be given considerable weight. Judicial notice is to be taken of such plans that are, like development control plans subject to public scrutiny before their adoption. Hence the provisions of and the approach indicated by s 94 contributions plans should be applied unless there are very good reasons not to do so.

Woollahra[92] has favoured a process that adopts s 94A (fixed development consent levies, see above) in preference to s 94 partly because the s 94A plan avoids constant argument about the justification for, and the monetary amount of community facilities and services contributions. It simply provides a uniform levy across all works requiring development consent.

Councils' practice

Purposes for which s 94 contributions may be levied include: community and cultural facilities; public reserves and open space; civic and urban improvement; cycle ways; surf lifesaving;[93] tree planting;[94] bushland and environmental works;[95] and park acquisition and embellishment.[96] It has also been held that purchasing land for conservation purposes is not outside the scope of "public amenities and public services" referred to in s 94.[97] Lake Macquarie City Council, for example, has prepared and issued a number of s 94 contributions plans for various parts of its council area.[98]

Contributions under s 94 are currently being reviewed by the Minister for Planning.[99] The future ability of this mechanism to fund environmental works and associated compliance monitoring will be dependent on the outcomes of this review.

BIODIVERSITY CERTIFICATION OF PLANNING INSTRUMENTS

Amendments to the *Threatened Species Conservation Act 1997* (NSW) (TSC Act)[100] now allow the Minister to grant "biodiversity certification" to environmental planning instruments[101] if satisfied that the instrument, in combination with other measures, would lead to the overall maintenance or

wording of s 94B(3) which provides that a commissioner can amend a development consent condition based on a s 94 contributions plan if it is unreasonable in the particular circumstances of a case (but that decision does not amend the plan itself)."

[92] In *IUS Pty Ltd v Woollahra Municipal Council* [2006] NSWLEC 690, the court commented that a s 94 Community Facilities and Services Contributions Plan is very different to a s 94A levy. In s 94A there is no nexus requirement. Section 94A states that a consent authority may impose, as a condition of development consent, a requirement that the applicant pay a levy of the percentage, authorised by a contributions plan, of the proposed cost of carrying out the development.

[93] See, eg *Bennette v Byron Council* [2004] NSWLEC 565; *Warringah Properties Pty Ltd v Warringah Council [2]* [2004] NSWLEC 443; *Meriton Apartments Pty Ltd v Ku-Ring-Gai Council* (2006) 152 LGERA 301; *Tetbury Pty Ltd v Ku-ring-gai Council* [2007] NSWLEC 771; *Valhalla Village Pty Ltd v Wyong Shire Council* [2009] NSWLEC 1355.

[94] *Valiant Timber and Hardware Co Pty Ltd v Blacktown City Council* (2005) 144 LGERA 33.

[95] *Long v Hornsby Shire Council* [2007] NSWLEC 267; *Masterbuilt Pty Ltd v Hornsby Shire Council* [2005] NSWLEC 212.

[96] *Meriton Apartments Pty Ltd v Ku-Ring-Gai Council* (2006) 152 LGERA 301.

[97] *Lake Macquarie City Council v Hammersmith Management Pty Ltd* (2003) 132 LGERA 225; *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355.

[98] Lake Macquarie City Council, n 90.

[99] See the following websites for further information: Department of Planning, *Development Contributions System* (New South Wales Government, 2010), http://www.planning.nsw.gov.au/PlanningSystem/DevelopmentContributionsSystem/tabid/75/language/en-US/Default.aspx viewed 30 July 2010; Department of Planning, *Local Contributions Review* (New South Wales Government, 2009), http://www.planning.nsw.gov.au/planningsystem/pdf/local_contributions_review_summary_tranche1.pdf viewed 30 July 2010; Department of Planning, *Draft Local Development Contributions Guidelines* (New South Wales Government, 2009), http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=5OjXuNg3DlQ%3d&tabid=386 viewed 30 July 2010.

[100] *Threatened Species Conservation Act 1997* (NSW), ss 126B-126N.

[101] Certification has to date been bestowed only on the State Environmental Planning Policy (Sydney Region Growth Centres) 2006: http://www.environment.nsw.gov.au/resources/nature/biocertordwsgcentres.pdf viewed 30 July 2010. The Wagga Wagga LEP has also been submitted for certification: see http://www.environment.nsw.gov.au/resources/nature/0937WaggaBiocertification.pdf viewed 30 July 2010.

improvement of biodiversity values. The practical effect of certification is to remove procedural and substantive requirements relating to development consent for concurrence and preparation of a species impact statement (SIS).[102] Such a proposal relies heavily on the theory that comprehensive strategic planning ("a landscape approach") can remove the necessity for compliance with detailed "site by site" requirements so long as the proposal fits squarely within the contemplation of the strategic plan. Where a council can assist a proposal, or a proposal for rezoning to enable a project to proceed, by obtaining biodiversity certification for a particular area within its planning scheme, then conceivably a monetary contribution from the developer or proponent could be negotiated. Alternatively, a proponent may be prepared to cover the costs of biodiversity research in an area on the understanding that council will then submit an application for biodiversity certification.

PUBLIC POSITIVE COVENANTS

Legislative provisions

The *Conveyancing Act 1919* (NSW), s 88E allows a local authority to impose restrictions on the use of or impose public positive covenants (PPC) on any land not vested in the authority, so that the restriction or PPC is enforceable by the authority. This effectively enables a local council to manage and protect adjoining property. For example, in *Edwina Doe v Cogente P/L* [1997] NSWLEC 115 a covenant was upheld in the following terms:

(i) The proprietor of the property shall be responsible to keep clear, maintain and repair all pits, pipelines, trench barriers and other structures.

(ii) The Proprietor have a consulting engineer inspect the OSD facilities annually and provide a certification to Council that they have been maintained as designed and ensure that any rectification works have been completed.

(iii) The Council shall have the right to enter upon the land referred to above with or without workman and with or without equipment, at all reasonable times to construct, install, clean, repair and maintain in good working order all pits, pipelines, trench barriers and other structures in or upon the said land which comprise the on-site stormwater detention facilities ("OSD") or which convey stormwater from the said land; and recover the costs of any such works from the proprietor.

(iv) The Council shall have the right to enter upon the land referred to above with a consulting engineer to annually inspect all pits, pipelines, trench barriers and other structure comprising the OSD.

(v) The registered proprietor shall indemnify the Council and any adjoining land owners against damage to their land arising from the failure of any component of the OSD or failure to clean, maintain and repair the OSD.

Councils' practice

Wyong Council is beginning to experiment with the use of these covenants for environmental protection by requiring Environmental Protection Areas to be maintained in accordance with an approved Habitat Restoration Plan, as stipulated by other conditions of consent; and to protect areas from unnecessary vegetation clearing and other activities that may impact on environmental assets.

In *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd* [2010] NSWLEC 48, it was accepted that a registered public positive covenant was appropriate to secure the performance of requirements under a Biodiversity Management Plan.

Such covenants bind the affected land in perpetuity,[103] until released or varied.[104] Under the EPA Act, s 28, however, the operation of a covenant may be effectively suspended by an environmental planning instrument in order to allow development to be carried out that is being restricted by the operation of the covenant.

[102] *Threatened Species Conservation Act 1997* (NSW), ss 126D, 126I.

[103] *Conveyancing Act 1919* (NSW), s 88F.

[104] *Conveyancing Act 1919* (NSW), s 88E(7).

GRANTS

Numerous environmental grants are available, facilitated by agencies such as the New South Wales and Commonwealth governments.[105] These grants have the potential to fund environmental protection and compliance programs. For example, Great Lakes Council, in partnership with Greater Taree City Council and MidCoast Water, commenced a New South Wales Environmental Trust funded project in 2009. This project involves a number of compliance-related outputs, such as the development of an internal construction site auditing procedure and the implementation and review of audits of environmental compliance across a number of council construction sites.

Although grants are a valuable funding source for councils they do have disadvantages, including:

- they have a limited duration and extent;
- they are not a guaranteed funding source and completing an effective application can be time-consuming;
- significant matching resources are often required; and
- they are highly competitive.

Although grant funding may not be continuous it can be a valuable way to obtain support for environmental compliance programs during resource-intensive project phases such as project initiation or review and redevelopment.

CONCLUSION

This article has discussed the range of funding options available to councils to support environmental protection, monitoring and enforcement programs. All funding options discussed have their limitations and require careful application. Utilisation of a combination of options in as many ways as applicable and feasible is the best way to provide ongoing support to environmental compliance programs.

Resourcing environmental compliance programs is a whole-of-council responsibility, requiring the shared expertise of a range of roles within council to identify diverse and creative opportunities for funding this important and challenging area. For example, council staff responsible for monitoring and compliance need to work closely with council staff who devise plans and conditions of approvals for environmental management. The choice of a particular approach for managing environmental impacts may trigger possibilities for cost recovery, particularly through inspection and monitoring; or opportunities to offset environmental impacts by having a proponent pay directly for offsets or provision of environmental assets.

Councils should consider a collaborative and diverse funding scheme for environmental compliance. Careful reference to legislative provisions and the past experience of other councils should be made to ensure the use of the most suitable funding options and avenues.

[105] For example, see: The Commonwealth's *Caring for our Country* program (the successor of the Natural Heritage Trust), http://www.nrm.gov.au viewed 30 July 2010; and also State sources such as collaboration with the Roads and Traffic Authority (RTA) Stormwater Environment Improvement Program, http://www.rta.nsw.gov.au/environment/waterquality/seip.html viewed 30 July 2010; the Sydney Water Community Sponsorship Program, http://www.sydneywater.com.au/CustomerServices/CommunityEvents/index.cfm viewed 30 July 2010, and of course collaboration with the local Hunter-Central Rivers Catchment Management Authority, http://www.hcr.cma.nsw.gov.au viewed 30 July 2010. The Myer Foundation (http://www.myerfoundation.org.au/programs/overview.cfm?loadref=22 viewed 30 July 2010) and the Ian Potter Foundation (http://www.ianpotter.org.au viewed 30 July 2010) may also support programmes based around sustainability, the environment and conservation. A range of possibilities for community grants may also be found on the Community Builders website, http://www2.communitybuilders.nsw.gov.au viewed 30 July 2010. Some ideas might also be gleaned from overseas experience, eg the US EPA Center for Environmental Finance, http://www.epa.gov/efinpage/efp.htm viewed 30 July 2010; the Environmental Finance Center Network, http://www.efcnetwork.org/Home.php viewed 30 July 2010 (which represents a number of university centres); the Environmental Finance Center at the University of Maryland, http://www.efc.umd.edu viewed 30 July 2010; the New Mexico Environmental Finance Center, http://www.nmefc.nmt.edu/home.php viewed 30 July 2010; and the OECD Environmental Finance website, http://www.oecd.org/department/0,3355,en_2649_34335_1_1_1_1_1,00.html viewed 30 July 2010.

APPENDIX 1: EXAMPLES OF GENERAL CONDITIONS OF DEVELOPMENT CONSENT (AS ENDORSED BY THE NSWLEC)

This appendix includes examples of consent conditions that provide an environmental protection and/or a compliance funding outcome. These conditions were endorsed by the NSWLEC through cases involving the following councils:

- Woollahra Council;
- Warringah Council;
- Sutherland Shire Council; and
- Wyong Shire Council.

The relevant conditions are shown below under the relevant cases that determined their use.

A1.1 CSA Architects Pty Ltd v Woollahra Council [2009] NSWLEC 1054

Conditions which must be satisfied prior to the demolition of any building or construction

Establishment of Tree Protection Zones

To limit the potential for damage to trees to be retained, Tree Protection Zones are to be established around all trees to be retained on site. The Tree Protection Zones are to comply with the following requirements:

a) Tree Protection Zone areas

Council Reference No:	Species	Location	Radius from Trunk*
1	*Lophostemon confertus* (Brushbox)	Council nature strip – front of number 45 Spencer street	2.5 m
2	*Lophostemon confertus* (Brushbox)	Council nature strip – between number 47 and 49 Spencer Street	2.5 m

*__NB:__ Where this condition relates to street trees and the fence cannot be placed at the specified radius, the fencing is to be positioned so that the entire verge (nature strip) area in front of the subject property, excluding existing driveways and footpaths, is protected.

b) Tree Protection Zones are to be fenced with a 1.8 m high chainmesh or weldmesh fence to minimise disturbance to existing ground conditions. The area within the fence must be mulched, to a depth of 75 mm, irrigated and maintained for the duration of the construction works.

c) Trunk protection, to a maximum height permitted by the first branches, is to be installed around the trunks of the trees listed in the table below.

Council Reference No:	Species	Location
1	*Lophostemon confertus* (Brushbox)	Council nature strip – front of number 45 Spencer street
2	*Lophostemon confertus* (Brushbox)	Council nature strip – between number 47 and 49 Spencer Street

A padding material, eg Hessian or thick carpet underlay, is to be wrapt around the trunk first. Harwood planks, 50 mm × 100 mm and to the maximum possible length, are to be placed over the padding and around the trunk of the tree at 150 mm centres. These planks are to be secured in place by 8 gauge wire at 300 mm spacing.

d) A sign must be erected on each side of the fence indicating the existence of a Tree Protection Zone and providing the contact details of the site Arborist.

e) Existing soil levels must be maintained within Tree Protection Zones. Where excavation is undertaken adjacent to such an area, the edge of the excavation must be stabilised, until such time as permanent measures are installed (eg retaining wall etc) to prevent erosion within the Tree Protection Zone.

f) Sediment control measures are to be installed around all Tree Protection Zones to protect the existing soil levels.
g) The storage of materials, stockpiling, siting of works sheds, preparation of mixes, cleaning of tools or equipment is not permitted within Tree Protection Zones.

Site personnel must be made aware of all Tree Protection requirements, measures and any actions that constitute a breach of the Conditions of Development Consent with regard to tree protection on site during their site induction.

C.2 Payment of security, levies and fees (ss 80A(6) and 94 of the EPA Act, s 608 of the LG Act)

The person(s) with the benefit of this consent must pay the following long service levy, security, development levy, and fees prior to the issue of any construction certificate, subdivision certificate or occupation certificate, as will apply.

The certifying authority must not issue any Part 4A Certificate until provided with the original receipt(s) for the payment of all of the following levy, security, contributions, and fees. Specifically:
a) prior to the issue of a construction certificate, where a construction certificate is required; or
b) prior to the issue of a subdivision certificate, where only a subdivision certificate is required; or
c) prior to the issue of an occupation certificate in any other instance.

Description	Amount	Indexed	Council Fee Code
LONG SERVICE LEVY under *Building and Construction Industry Long Service Payments Act 1986* (NSW)			
Long Service Levy Use Calculator: http://www.lspc.nsw.gov.au/levy_information/?levy_information/levy_calculator.stm	Contact LSL Corporation or use their online calculator	No	
SECURITY under s 80A(6) of the EPA Act			
Property Damage Security Deposit Making good any damage caused to any property of the *council* as a consequence of the doing of anything to which the consent relates.	$52,470	No	T115
Tree Damage Security Deposit Making good any damage caused to any public tree as a consequence of the doing of anything to which the consent relates.	$5,200	No	T114
DEVELOPMENT LEVY under Woollahra s 94A of the Development Contributions Plan 2005 This plan may be inspected at Woollahra Council or downloaded from our website: http://www.woollahra.nsw.gov.au			
Development Levy (s 94A)	$25,231.19 + Index Amount	Yes, quarterly	T96
INSPECTION FEES under s 608 of the LG Act			
Public Tree Management Inspection Fee	$160	No	T95
Public Road and Footpath Infrastructure Inspection Fee	$375	No	T45
Security Administration Fee	$175	No	T16
TOTAL SECURITY, CONTRIBUTIONS, LEVIES AND FEES	$83,611.19 Plus any relevant indexed amounts and long service levy		

C.5 Soil and Water Management Plan – submission and approval

The principal contractor or owner builder must submit to the Certifying Authority a soil and water management plan complying with:

a) *Do it Right On Site, Soil and Water Management for the Construction Industry* published by the Southern Sydney Regional Organisation of Councils, 2001; and
b) *Managing Urban Stormwater – Soils and Construction*, 4th ed, published by the New South Wales Department of Housing (*The Blue Book*).

Where there is any conflict *The Blue Book* takes precedence. The Certifying Authority must be satisfied that the soil and water management plan complies with the publications above prior to issuing any Construction Certificate.

Note: This condition has been imposed to eliminate potential water pollution and dust nuisance.

Note: The International Erosion Control Association – Australasia (http://www.austieca.com.au) lists consultant experts who can assist in ensuring compliance with this condition. Where erosion and sedimentation plans are required for larger projects it is recommended that expert consultants produce these plans.

Note: The *Do it Right On Site, Soil and Water Management for the Construction Industry* publications can be downloaded free of charge from http://www.woollahra.nsw.gov.au.

C.12 Tree management details

The Construction Certificate plans and specifications required by cl 139 of the Regulation must, show the following information:

a) trees to be numbered in accordance with these conditions;
b) shaded green where required to be protected and retained;
c) shaded yellow where required to be transplanted;
d) shaded blue where required to be pruned;
e) shaded red where authorised to be removed; and
f) references to applicable tree management plan, arborists report, transplant method statement or bush regeneration management plan.

D.6 Erosion and sediment controls – installation

The principal contractor or owner builder must install and maintain water pollution, erosion and sedimentation controls in accordance with:

a) the Soil and Water Management Plan if required under this consent;
b) *Do it Right On Site, Soil and Water Management for the Construction Industry* published by the Southern Sydney Regional Organisation of Councils, 2001; and
c) *Managing Urban Stormwater – Soils and Construction*, 4th ed, published by the New South Wales Department of Housing (*The Blue Book*).

Where there is any conflict *The Blue Book* takes precedence.

Note: The International Erosion Control Association – Australasia (http://www.austieca.com.au) lists consultant experts who can assist in ensuring compliance with this condition. Where *Soil and Water Management Plan* is required for larger projects it is recommended that this be produced by a member of the International Erosion Control Association – Australasia.

Note: The *Do it Right On Site, Soil and Water Management for the Construction Industry* publications can be downloaded free of charge from http://www.woollahra.nsw.gov.au.

Note: A failure to comply with this condition may result in penalty infringement notices, prosecution, notices and orders under the Act and/or the PEO Act *without any further warning*. It is a criminal offence to cause, permit or allow pollution.

Note: Section 257 of the PEO Act provides inter alia that "the occupier of premises at or from which any pollution occurs is taken to have caused the pollution". Warning: irrespective of this condition any person occupying the site may be subject to proceedings under the PEO Act where pollution is caused, permitted or allowed as the result of their occupation of the land being developed.

E.10 Tree preservation

All persons must comply with council's Tree Preservation Order (TPO), other than where varied by this consent. The order applies to any tree, with a height greater than 5 m or a diameter spread of branches greater than 3 m, is subject to council's TPO unless exempted by specific provisions. Works to be carried out within a 5 m radius of any tree, subject to the TPO, require the prior written consent of council.

General protection requirements:

g) There must be no excavation or work within the required Tree Protection Zone(s). The Tree Protection Zone(s) must be maintained during all development work.

h) Where excavation encounters tree roots with a diameter exceeding 50 mm excavation must cease. The principal contractor must procure an inspection of the tree roots exposed by a qualified arborist. Excavation must only recommence with the implementation of the recommendations of the qualified arborist or where specific instructions are given by council's Tree Management Officer in strict accordance with such council instructions.

i) Where there is damage to any part of a tree the principal contractor must procure an inspection of the tree by a qualified arborist immediately. The principal contractor must immediately implement treatment as directed by the qualified arborist or where specific instructions are given by council's Tree Management Officer in strict accordance with such council instructions.

Note: Trees must be pruned in accordance with Australian Standard AS 4373 – 2007 *Pruning of Amenity Trees* and *Workcover NSW Code of Practice Amenity Tree Industry 1998.*

Standard Condition: E8

E.11 Tree preservation and approved landscaping works

All landscape works must be undertaken in accordance with the approved landscape plan, arborist report, tree management plan and transplant method statement as applicable.

a) The following trees must be retained:

Trees on Council Land

Council Reference No:	Species	Location	Dimension	Tree Value
1	*Lophostemon confertus* (Brushbox)	Council nature strip – front of number 45 Spencer street	9 m × 7 m	$2,600
2	*Lophostemon confertus* (Brushbox)	Council nature strip – between number 47 and 49 Spencer Street	9 m x 7 m	$2,600

Note: The trees required to be retained should appear coloured green on the construction certificate plans.

b) The following trees may be removed:

Council Reference No:	Species	Location	Dimension
3	*Syagrus romanzoffianum* (Cocos Palm)	Front yard of 47 Spencer Street	6 m x 2 m
4	*Syagrus romanzoffianum* (Cocos Palm)	Front yard of 47 Spencer Street	7 m × 2 m
5	*Cinnamomum camphora* (Camphor laurel)	Rear yard of 45 Spencer Street	7 m x 4 m

Note: The trees that may be removed should appear coloured red on the construction certificate plans.

H.2 a. A positive covenant pursuant to s 88E of the *Conveyancing Act 1919* (NSW) must be created on the title of the subject property, providing for the indemnification of council from any claims or actions and for the ongoing maintenance of the on-site-detention system and/or absorption trenches,

including any pumps and sumps incorporated in the development. The wording of the Instrument must be in accordance with council's standard format and the Instrument must be registered at the Land Titles Office.

A1.2 Mosman Church of England Preparatory School v Warringah Council [2009] NSWLEC 1190

3. Submission of Detailed Landscape Plans

Prior to the issue of the Construction Certificate, detailed revised Landscape Plans are to be submitted to the Certifying Authority for approval incorporating the requirements of the other landscape conditions of this consent. The plans are to include only the use of local native species in screen planting and garden planted areas. The planting buffer indicated along the Tooronga Road and Kallaroo frontages of the site is to be planted generally in accordance with the following rates:

- Canopy Trees = 12.5 per 25 ^{2} (0.5/m^2) – (27 L pots)
- Shrubs = 25 per 25 m^2 (1/m^2) – (20 L pots)
- Grasses, groundcovers, etc = 100/25 m^2 (4/m^2) – (tube stock)

Any plants that do not survive or are badly disease damaged during the first 24 months after planting are to be replaced.

Reason: To ensure compliance with Council's Local Habitat Strategy.

4. Landscaping plants

All plants used in the landscaping for this development must be from native seed and cuttings collected from the locality. No *Grevillea* or *Banksia* hybrids are to be used in the landscaping for this development. Silvertop Ash and Brown Stringybark are to be included in a balanced proportion with the selection of other local native canopy trees used for tree planting.

An appointed and qualified project ecologist is to certify in writing to the PCA that this condition has been complied with and provide a copy of the certification to Warringah Council prior to completion of landscaping works.

Reason: To ensure compliance with Council's Local Habitat Strategy.

16. Bond for silt and sediment control

The payment of $10,000 shall be deposited with council prior to the issue of the Construction Certificate as security to ensure that there is no transmission of material, soil etc off the site and onto the public road and/or drainage systems.

Reason: To ensure appropriate security against environmental damage.

30. Project ecologist

Prior to any work being undertaken on site a Project Ecologist is to be employed for the duration of the construction work to ensure all bushland protection measures are carried out according to the conditions of consent. The Project Ecologist will provide certification that conditions relating to the Vegetation Management Plan prepared by Conacher Travers and dated December 2007 are carried out. The Project Ecologist will provide this certification to the PCA and copies to Warringah Council. The Project Ecologist is to be vegetation management specialist and to have at least four years' experience in the management of native bushland in the Sydney region and have at least a TAFE Certificate III in Bush Regeneration or Conservation and Land Management – Natural Area restoration.

Reason: To ensure bushland management.

33. Protection of trees during works

All trees that are to be specifically nominated to be retained by notation or condition as a requirement of development consent shall be maintained and protected during demolition, excavation and construction on the site. Details of required protection methods shall be provided to the Certifying Authority by an appropriately qualified person prior to commencement of any works on the site.

Reason: To ensure compliance with the requirement to retain significant planting on the site.

35. Vegetation management

Vegetation management and pest control is to be carried out in accordance with the submitted Vegetation Management Plan by Conacher Travers dated December 2007 subject to the conditions of this consent.

Reason: To ensure vegetation is managed in a sustainable manner for rural amenity.

48. Aboriginal heritage

If in undertaking excavations or works, any Aboriginal site or object is, or is thought to have been found, all works are to cease immediately and the applicant is to contact the Aboriginal Heritage Officer for Warringah Council, and the Cultural Heritage Division of the Department of Environment and Climate Change.

Any work to a site that is discovered to be the location of an Aboriginal object, within the meaning of the *National Parks and Wildlife Act 1974* (NSW), requires a permit from the Director of the DECC.

Reason: Aboriginal Heritage Protection.

49. Fauna and tree hollow relocation

During vegetation clearance for Asset Protection Zones and construction operations the Project Ecologist is to be present to relocate any displaced fauna that may be disturbed during this activity.

Tree hollows are to be salvaged from trees within the development area and placed within the Conservation Areas within the lots. This is to be done by a qualified and experienced arborist, under the direction of the Project Ecologist.

The Project Ecologist is to certify in writing to the PCA that this condition has been complied with and provide a copy immediately to Warringah Council.

Reason: To ensure bushland management.

50. Weeds

No noxious or environmental weeds, as listed on Warringah Councils website are to be imported on to the site.

Any noxious weeds or environmental weeds on the site are to be managed continuously, in accordance with the Vegetation Management Plan prepared by Conacher Travers dated December 2007 for this development.

Reason: To ensure bushland management.

56. Trees

(1) Tree roots of 50 mm or greater in diameter encountered during excavation, shall only be cut following consultation with a qualified Arborist. Tree roots between 10 mm and 50 mm in diameter, severed during excavation, shall be cut cleanly by hand.

(2) Underground services should use common trenches as far away from tree roots as possible. If the services need to be run within the protection zone, all utility pipes are to be laid using appropriate directional boring techniques. Directional Boring shall be carried out at least 600 mm beneath natural ground to avoid damage to tree/trees root system. Entry and exit points are to be located outside the protected area. No tree roots are to be severed, or damaged during this work. Should problems arise, work is to cease until those problems are resolved and confirmed in writing by council's Tree Management Officer.

(3) All new overhead utility services are to be located outside the canopies of existing trees.

(4) The following guidelines are to be complied with at all times:

(i) The applicant shall ensure that at all times during the development period no activities, storage or disposal of materials shall take place beneath the canopy of any tree covered under council's Tree Preservation Order unless specifically approved by council.

(ii) Trees marked for retention are not to be damaged or used to display signage, or as fence or cable supports for any reason.

(iii) Siting of sheds, stockpiles and vehicle parking should be sited so that they are remote from trees.

(iv) Site personnel are to be made aware of tree requirements and protective measures. Paving materials placed within the dripline of any tree should be of a porous material.

(5) During the construction period the applicant is responsible for ensuring all protected trees are maintained in a healthy and vigorous condition. This is to be done by ensuring that all identified tree protection measures are adhered to. In this regard all protected plants on this site shall not exhibit:

(v) A general decline in health and vigour.

(vi) Damaged, crushed or dying roots due to poor pruning techniques.

(vii) More than 10% loss or dieback of roots, branches and foliage.

(viii) Mechanical damage or bruising of bark and timber of roots, trunk and branches.

(ix) Yellowing of foliage or a thinning of the canopy untypical of its species.

(x) An increase in the amount of deadwood not associated with normal growth.

(xi) An increase in kino or gum exudation.

(xii) Inappropriate increases in epicormic growth that may indicate that the plants are in a stressed condition.

(xiii) Branch drop, torn branches and stripped bark not associated with natural climatic conditions.

(xiv) The presence of any of these symptoms or signs may be considered by council as a breach of the Conditions of Development Approval.

(6) All trees on neighbouring properties are to be protected from adverse impacts caused by the works. Any excavations or changes of level occurring within the canopy of trees on neighbouring properties shall only be undertaken following consultation by a suitably qualified Arborist.

Any mitigating measures and recommendations required by the Arborist are to be implemented.

The owner of the adjoining allotment of land is not liable for the cost of work carried out for the purpose of this clause.

Reason: Protection of trees.

65. Positive covenant for on-site stormwater detention

A positive covenant shall be created on the title of the land requiring the proprietor of the land to maintain the on-site stormwater detention structure in accordance with the standard requirements of council prior to the issue of an Interim/Final Occupation Certificate. The terms of the positive covenant are to be prepared to council's standard requirements (available from Warringah Council) at the applicant's expense and endorsed by council prior to lodgment with the Department of Lands. Warringah Council shall be nominated as the party to release, vary or modify such covenant.

Reason: To ensure ongoing maintenance of the on-site stormwater detention system.

A1.3 Aberline Associates Pty Ltd v Sutherland Shire Council [2009] NSWLEC 1335

Bonds and contributions

The following security bonds and contributions have been levied in relation to the proposed development.

4. Public place and environmental damage security

Before the commencement of any works (including demolition) or the issue of a Construction Certificate the applicant shall provide security to council to the value of $4,600 against damage caused to any council property and/or the environment as a consequence of the implementation of this consent. The security may be provided by way of a deposit with the council or a satisfactory guarantee. A non refundable inspection/administration fee is included in the bond value.

It is the applicant's responsibility to notify council of any existing damage to public areas in the vicinity of the development site through the submission of a current dilapidation report supported by photographs. This information shall be submitted to council at least two days prior to the commencement of works.

Should any public property and/or the environment sustain damage during the course of and as a result of construction, or if the construction works put council's assets or the environment at risk, council may carry out any works necessary to repair the damage and/or remove the risk. The costs incurred shall be deducted from the security.

A request for release of the security deposit may be made to council after all works relating to this consent have been completed. Such a request shall be submitted to council on the Bond Release Request Form signed by the owner or any person entitled to use of the consent.

8. Detailed landscape plan

A detailed Landscape Plan shall be prepared by an experienced Landscape Designer (a person eligible for membership of the Australian Institute of Landscape Designers and Managers) or a Landscape Architect (a person eligible for membership of the Australian Institute of Landscape Architects as a Registered Landscape Architect).

The plan shall accord with s 6.7 of Council's Landscape Development Control Plan, which sets out the requirements for a Detailed Landscape Plan, and the relevant conditions of this consent.

The Detailed Landscape Plan shall be based on the Concept Landscape Plan No.07-2017D sheets 1 and 2 prepared by Zenith Landscape Designs dated 21.08.09 and shall address the following:

a) Water efficient irrigation system in accordance with Sydney Water requirements and relevant Australian Standards serving all landscaped areas on No.17 and No.19 Milford Road shown on the concept landscape plan.

The Landscape Designer or Landscape Architect shall provide written certification to the Accredited Certifier that the Detailed Landscape Plan has been prepared having regard to the requirements of this consent. This certification and the Detailed Landscape Plan shall be submitted to the Accredited Certifier for approval prior to the issue of the Construction Certificate.

9. Site Management Plan

An Environmental Site Management Plan shall accompany the Construction Certificate. This plan shall satisfy the Objectives and Controls in Pt 4 of Ch 3 of Sutherland Shire Development Control Plan 2006 and shall address the following:

(i) What actions and works are to be employed to ensure safe access to and from the site and what protection will be provided to the road and footpath area from building activities, crossings by heavy equipment, plant and materials delivery, and the like.

(ii) The proposed method of loading and unloading excavation machines, building materials.

(iii) Areas within the site to be used for the storage of excavated material, construction materials and waste containers during demolition/construction.

(iv) How it is proposed to ensure that material is not transported on wheels or tracks of vehicles or plant and deposited on surrounding roadways.

(v) The proposed method of support to any excavation adjacent to adjoining properties, or the road reserve. The proposed method of support is to be certified by a Certifier accredited in civil engineering.

(vi) The provision of temporary fencing to secure the work site (fencing, hoarding or awnings over public land require council approval under the *Roads Act 1993* (NSW)).

(vii) The control of surface water flows within and through the construction site to minimise erosion and movement of sediment off site.

(viii) The type and location of erosion and sediment control measures, strategies to minimise the amount of soil uncovered at any time, the conservation of topsoil for reuse on site, the location and protection of stockpiles.

(ix) Identify all trees that are to be retained and the measures proposed to protect them (including fencing, mulching, watering, erection of signs excluding access to the protection zone etc), and identify areas for revegetation.

Note: The footpath and road reserve shall not be used for construction purposes (including storage of skips or building materials, standing cranes or concrete pumps, erecting hoardings, or as a construction zone) unless prior approval has been granted by council under the *Roads Act 1993* (NSW).

38. Environment protection and management

The environment protection and management measures described in the required Environmental Site Management Plan (including sediment controls and tree protection) shall be installed or implemented prior to commencement of any site works and continuously maintained during the period of construction or demolition. These measures shall generally be in accordance with the requirements of Pt 3 of Ch 8 of Sutherland Shire Development Control Plan 2006 and the Sutherland Shire Environmental Specification 2007 – Environmental Site Management.

39. Runoff and erosion controls

Runoff and erosion controls shall be installed prior to commencement of any site works and shall be continuously maintained during the period of construction or demolition. These control measures shall generally be in accordance with the requirements of Pt 3 of Ch 8 of Sutherland Shire Development Control Plan 2006 and the Sutherland Shire Environmental Specification 2007 – Environmental Site Management and shall specifically address the following matters:

(a) diversion of uncontaminated runoff around cleared or disturbed areas;
(b) a silt fence or other device to prevent sediment and other debris escaping from the cleared or disturbed areas into drainage systems or waterways;
(c) controls to prevent tracking of sediment by vehicles onto adjoining roadways and public areas; and
(d) disturbed areas shall be stabilised either temporarily or permanently by the use of turf, mulch, paving or other methods approved by the council.

40. Stockpiling of materials during construction

Topsoil, excavated material, construction and landscaping supplies and on-site debris shall be stockpiled within the erosion containment boundary and shall not encroach beyond the boundaries of the property or the drip-line of any tree marked for retention. For further information, refer to Pt 3 of Ch 8 of Sutherland Shire Development Control Plan 2006 and the Sutherland Shire Environmental Specification 2007 – Environmental Site Management.

A1.4 Valhalla Village Pty Ltd v Wyong Shire Council [2009] NSWLEC 1355

Consolidation plans

53. Prior to the siting of any mobile homes on proposed Sites 301-466 the consolidation of Lot 274 and Lot 339 in DP 755266 into one lot by plan of consolidation. The plan of consolidation and s 88 instrument must be to the council's satisfaction and establish the following restrictive and public positive covenants; with the council having the benefit of these covenants and having sole authority to release, vary or modify these covenants. Wherever possible the extent of the land affected by these covenants is to be defined by bearings and distances shown on the plan of subdivision.

a) Section 88B restriction to user covenant denoting all areas shown on the approved development plans as Open Space (Retained Vegetation) and the full extent of the Mulloway Rd Buffer Area on Lot 274 DP 755266 (generally 40 m south of the boundary) as "Environmental Protection Areas", and prohibiting all works, uses and activities on "Environmental Protection Areas" with the exception of passive recreation and environmental restoration/management. This is to clearly state that no clearing, underscrubbing, fuel reduction (other than approved hazard reduction burning), erection of structures, agriculture, keeping of livestock, active recreation, boundary adjustments or similar activities are permitted.
b) Section 88E public positive covenant requiring the "Environmental Protection Areas" to be maintained for ecological purposes, including preservation, protection and enhancement of the environment in accordance with the approved Habitat Restoration Plan.

c) Section 88B restriction to user denoting all areas shown on the approved development plans as Communal Open Space to be denoted as "Communal Open Space", and prohibiting any development or use of land for purposes other than provision of community or recreational facilities.

APPENDIX 2: OFFSETS UNDER PLANNING AGREEMENTS

An offset is a device for allowing a development to proceed that might otherwise be refused consent; or that might enable environmental conditions to be placed on a grant of consent for permitted development. An offset could be required as a result of a VPA entered into by a proponent and made a condition of development consent; or it could conceivably be required where statutory provisions allow the consent authority to specify a condition of consent requiring dedication of land free of cost or payments of monetary contributions where the development might require or increase the demand for public services and public amenities (see s 94 contributions below). For example, in *Lake Macquarie City Council v Hammersmith Management Pty Ltd* (2003) 132 LGERA 225, such a condition was imposed requiring payment of monies for "conservation land requirements", more specifically to provide for a vegetation corridor; although in the event the condition was later struck out in a merits appeal on the basis of lack of perceived demand.

In *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355, it was said that an offset under a planning agreement might be appropriate where a proposed development implemented all available prevention and mitigation measures, was justified and where the development might otherwise proceed without an offset; although in this case the offset was rejected as not based on sound ecological principles, and "meagre evidence" to the effect that better alternative sites were unavailable, indicating a strict and comprehensive approach would be required to support any claim for an offset. The court also thought, though did not decide, that it would not have the power to require the applicants to pay a monetary contribution in relation to acquisition of compensatory land in the absence of an offer to enter into a planning agreement, ie the general power under s 80A to impose conditions of consent would not justify such a condition.

In *Gerroa Environment Protection Society Inc v Minister for Planning and Cleary Bros (Bombo) Pty Ltd* [2008] NSWLEC 173 and *Gerroa Environment Protection Society Inc v Minister for Planning and Cleary Bros (Bombo) Pty Ltd (No 2)* [2008] NSWLEC 254, Preston CJ allowed an offset for vegetation clearing by way of planning agreement by reference to the following criteria:

a) **Offsets should provide values for periods commensurate with impacts from clearing:** Offsets should be secured over timeframes that can span changes in land ownership and tenure. The planning agreement must provide for the implementation of compensatory planting, protection of the vegetated conservation area (including existing vegetated areas to be conserved and the compensatory planting areas) in perpetuity, implementation of a Landscape and Rehabilitation Management Plan, and insurance of the conservation area against the impact of fire or vandalism.

b) **There must be adequate compliance:** The efficacy of offsets is dependent upon adequate compliance. This requirement can be satisfied by the conditions of approval, including the requirements of a VPA, landscape and rehabilitation management plan, landscape and rehabilitation bond, environmental management plan, environmental monitoring program, incident reporting, annual reporting, independent environmental audit and community consultative committee.

In *Stanton Dahl Architects v Penrith City Council* [2009] NSWLEC 1204, the court also accepted that an offset through a VPA for the purpose of protecting the threatened Cumberland Plain Land Snail was appropriate:

> Through the VPA the conservation area is to be retained in perpetuity, will be fenced to exclude access (except for management, monitoring and/or educational purposes) and will optimise habitat for the snail.[106]

[106] By contrast, in *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2007] NSWLEC 229 an offset proposal was deemed inadequate to protect the Snail. The Snail cropped up again in *BTG Planning v Blacktown City Council* [2008]

For a case where the court allowed an offset under a planning agreement in an appeal against a council refusal to enter into such an agreement, see *Black v Ku-ring-gai Council* [2008] NSWLEC 1501.

The recent development by the New South Wales Department of Environment, Climate Change and Water of assessment methodology to support the application of Biobanking[107] may now be used to test the adequacy of offsets offered up to support applications to local councils.[108]

Decision-makers should, however, apply a cautious approach to offsets. In *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355, Jagot J refused to accept a proposed offset that was 12 km away from the development site involving a different endangered ecological community; while in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd* [2010] NSWLEC 48, the court proposed, taking into account the precautionary principle, to extend an offset from 0.2 ha of land to 6 ha. In the event, this 6 ha became effectively 66 ha. As the court explained (*Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd (No 2)* [2010] NSWLEC 104) at [12]:

> The final conditions also ensure adequate offset is provided for damage caused to the White Box endangered ecological community by the proposed development. The offset is not merely the supplementary 6ha area to be included in the extended Project Site. It also includes the long-term conservation of the vegetation on all of the Project Site not directly to be quarried or used for ancillary works and uses (54ha) as well as, after quarrying operations have finished, the rehabilitation and conservation of the areas damaged and used for quarrying operations (6ha). The long-term conservation of the White Box endangered ecological community on the combined area of 66ha will be required by the final conditions of consent (as summarised above). I am satisfied that there will be gains in the conservation of biodiversity of sufficient magnitude in these total offset areas to compensate for the loss of vegetation during quarrying operations.

A2.2 Offsets are a "last resort"

Opponents also argue that given the scientific uncertainties surrounding this approach, biodiversity retention would be much better than trying to recreate habitat ("restoration ecology") – "The claim that overall biodiversity values can be maintained or improved in a system based on gradually eroding the stock of patches of remnant vegetation has a rhetorical element and is counter-intuitive."[109] In other words, offsets should be considered only as a last resort, an approach that is being adopted in Victoria and now in New South Wales. In *Reeve v Hume CC* [2009] VCAT 65, for example, the tribunal said:

> [T]he starting point when contemplating a subdivision (or development) proposal, should be to ask the question why such vegetation should be lost rather than how can the loss be offset. The latter approach has more often than not been adopted for infill urban subdivisions and developments. More particularly, the zoning of the land is not the starting point in considering the suitability of a subdivision proposal. The proposition that a residential zoning carries with it an overriding or automatic expectation that conventional subdivision can or should occur, with all its subsequent consequences for loss of native vegetation, is not accepted. What is called for on such land is innovation that enables the retention of significant native vegetation on the land.

NSWLEC 1500, where the court observed: "The application of the Precautionary Principle requires that we do not approve the proposal merely in the hope that the revegetation offset and the translocation of the Snail will succeed. However, if we conclude that approval would be justified (after balancing environmental against other considerations) even in the certain knowledge that the revegetation offset and the translocation of the Snail will not be successful, then such approval is consistent with the Precautionary Principle. This does not mean that revegetation and translocation should not be required as a condition of consent. Although we are not certain of their success, to try and fail is better than to never try at all."

[107] See Department of Environment, Climate Change and Water, *BioBanking* (New South Wales Government, 2009), http://www.environment.nsw.gov.au/biobanking viewed 30 July 2010.

[108] See *Glendinning Minto Pty Ltd v Gosford City Council* [2010] NSWLEC 1151.

[109] Robinson D, "Strategic Planning for Biodiversity in NSW" (2009) 26 EPLJ 213 at 221.

A similar approach was adopted by the Land and Environment Court in *Roach v Pittwater Council* [2007] NSWLEC 607 at [33]:

> The applicant made an offer to enter into a planning agreement with Council under the *Environmental Planning and Assessment Act 1979* for an offset arrangement to compensate for the loss of that part of the rainforest its experts agreed would be lost on the site. The agreement would endow funds of $100,000 in a trust for…maintenance and environmental management…In this case the council would not agree to an offset because it was proposed, really, as a justification for destruction of LRF (littoral rainforest). The real purpose of an offset where it has been used by other Authorities has been as a tool to get a managed result…This proposal destroys the "heart" and most of the LRF, it is only the perimeter that is said to be preserved…
>
> There is no replacement or regeneration of the lost LRF possible, its micro-climate, soil, water supply, exposure and topographical requirements are so specialised one cannot just expand the LRF…or, go out and plant a new LRF in the same way one can find new sites for and plant other forms of bushland. In tacit recognition of this the applicant has offered to condition the endowment to allow council to spend offset funds on other LRF areas. Once again this belies the fact that the subject LRF is destroyed and there is a net loss to the existing reserves of endangered ecological community LRF in the region.

The Minister has also adopted such an approach in determining proposals for offsets under the EPA Act, Pt 3A "by preventing, mitigating, remediating and, only as a last resort, providing suitable offsets to compensate for any residual impacts not dealt with by the other mechanisms".[110] So long as such an approach is maintained it should effectively deal with the tendency of developers to try to minimise environmental impacts by offering up offsets as a means of claiming that a project will therefore have minimal environmental consequences. In *Glendinning Minto Pty Ltd v Gosford City Council* [2010] NSWLEC 1151 at [88], the NSWLEC said that "the offset proposal is a fundamental consideration in determining whether the development has acceptable ecological impacts and is not a matter, which is ancillary to the development that can be dealt with by conditions". It is clear from this approach that a project must be considered on its merits before the question of offsets can become relevant.

A2.3 Offsets must be based on "no net loss"

In *Motorplex v Port Stephens Council (No 3)* [2008] NSWLEC 1280, the court said that the cardinal principle of offsetting should be "no net loss", and that offsets will only contribute to no net loss if the following parameters are satisfied:

(a) restoration of the values lost from clearing is feasible or the vegetation proposed for clearing is unlikely to persist;
(b) clearing the vegetation does not constitute an immediate risk to a species, population or ecological process;
(c) there is adaptive management of the offsets;
(d) offsets provide values for periods commensurate with impacts from clearing; and
(e) there is adequate compliance.

Whether the application of these principles allows offsets from a development in one council area to be proposed in another council area is problematic. Such an approach would have clear implications for enforceability – the consent authority would have no clear powers to enforce conditions of development consent in the jurisdiction of another planning authority. Whether this could be overcome by agreement between the two affected councils remains a moot point. Further advice may need to be sought where such a proposal becomes an operational possibility.

[110] *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213 at [132].

A2.4 Offsets and mining

Offsets have also been considered appropriate in relation to the environmental impacts of coal mining. In *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213, a condition required the proponent to prevent, minimise, and/or offset adverse environmental impacts by:

- setting standards and performance measures for acceptable environmental performance;
- requiring regular monitoring and reporting; and
- providing for the ongoing environmental management of the project.[111]

[111] Preston CJ said at [129]-[130]: "The condition, therefore, operates in a cascading manner: first, prevent any impact, but if that fails, remediate the impact, but if it is not reasonable or feasible to remediate the impact, provide a suitable offset to compensate for the impact. Because the operation of the condition is cascading, it is narrowing: the number of impacts the subject of prevention will exceed the number of impacts the subject of remediation which, in turn, will exceed the number of impacts the subject of compensatory offset. This is relevant in understanding the extent to which there might be provision of offsets for impacts not prevented or remediated. It is also to be noted that the offsets that can be required by the condition are not at large, but are constrained by the terms of the section. First, the concept of 'offset' itself, when used in relation to impact, establishes equivalence between the impact and the offset. Secondly, the offset is required to 'compensate' for the impact. This too reinforces the requirements for equivalence between the impact and the offset. Thirdly, the offset must be 'suitable'. Suitability includes equivalence between offset and impact but also appropriateness of the offset to the nature of the impact (such as on water resources, watercourses, biodiversity, land, heritage or built features) and proportionality between the offset and the significance of the impact."