



## Land and Environment Court New South Wales

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Case Title: Dellara Pty Ltd v Minister for Planning and Penrith City Council

Medium Neutral Citation: TBA

Hearing Date(s): 3, 4, 5, 8 August 2011  
23, 24, 27, 28 and 29 February 2012

Decision Date: 13 July 2012

Jurisdiction: Class 1

Before: Tuor C and Johnson AC

Decision: See paragraph 250

Catchwords: DEVELOPMENT APPLICATION - waste and resource management facility comprising a non-putrescible waste recycling facility, an ancillary waste emplacement, waste transfer station, continued shale/clay extraction and site rehabilitation. Whether the proposal will result in unacceptable land use conflicts and visual impacts. Whether the clay/shale resource extraction is optimised and can occur with the emplacement of waste. Community submissions and public interest, contribution to road works and conditions of approval.

Legislation Cited: Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation 2000  
Contaminated Land Management Act  
Protection of the Environment Operations Act  
State Environmental Planning Policy (Infrastructure) 2007  
State Environmental Planning Policy (Major Development) 2005

Sydney Regional Environmental Plan 9 –  
Extractive Industries  
Sydney Regional Environmental Plan 25 –  
Orchard Hills  
Penrith Local Environmental Plan 2010

Cases Cited: New Century Developments Pty Ltd v  
Baulkham Hills Shire Council (2003) 127  
LGERA 303  
Pittwater Council v Minister for Planning  
[2011] NSWLEC 162

Texts Cited:

Category: Principal judgment

Parties: Dellara Pty Ltd (Applicant)  
Minister for Planning (First Respondent)  
Penrith City Council (Second Respondent)

Representation

- Counsel: Mr C McEwen, SC with Mr M Staunton,  
barrister (Applicant)  
Ms S Duggan, SC with Mr Nash, barrister  
(First Respondent)  
Mr J Robson SC with Mr M Fraser, barrister  
(Second Respondent)

- Solicitors: King & Wood Mallesons (Applicant)  
Department of Planning (First Respondent)  
Gadens Lawyers (Second Respondent)

File number(s): 10928 of 2010

Publication Restriction:

## JUDGMENT

- 1 This is an appeal under s 75K(2) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the First Respondent, the Minister for Planning (the Minister), of a major project under Part 3A of EPA Act. Although Part 3A has been repealed, it continues to apply to the project under Schedule 6A, cl 2 and 3 of the EPA Act.
- 2 Penrith City Council (the council) is an objector to the Project application and has applied to the Court under s75K (3) of the EPA Act to be heard as a party to the Appeal. The council is the Second Respondent in the Appeal.

### **The site and its locality**

- 3 The site comprises lot 40 DP 738126 and is located at 123-179 Patons Lane, Orchard Hills (site). It has an area of 60ha.
- 4 Access to the site is off Patons Lane, which runs off Luddenham Road. Patons Lane is a public road but it is currently unsealed and blocked by gates. Luddenham Road connects with Mamre Road, which provides access to the Great Western Highway and the M4 Motorway, about 5km to the north of the site.
- 5 The site has operated intermittently as a quarry since 1981 which has resulted in disturbance across most of the land. The main areas of disturbance consist of two extraction areas, four dams and a sump and perimeter bund walls which vary in height from 5m to 19m and are about 1.9km long. The site also includes an internal road network and various buildings. Blaxland Creek runs through the north west corner of the site.

- 6 A residential subdivision known as 'the Vines Estate' is located approximately 500m from the northern boundary of the site. The subdivision was approved on 25 September 1989. There are 117 lots within the Vines Estate which are predominantly large allotments (800-1000sqm) developed with two storey houses. There are views to the site from the Vines Estate. Development further to the north is predominantly detached houses on large allotments.
- 7 Rural residential properties are located to the east of the site including 'Roughwood Park' and along Luddenham Road.
- 8 Immediately to the west, the site adjoins land owned by the Department of Defence which contains significant areas of vegetation.
- 9 To the south, along Patons Lane, is a former horse stud and further to the south is the Twin Creeks housing estate.

## **Planning framework**

### ***Part 3A of the EPA Act***

- 10 Section 75B(1)(a) of the EPA Act relevantly provides that Part 3A applies to the carrying out of development that is declared to be a project to which Part 3A applies, inter alia, by a State environmental planning policy. Further, s 75B(3) provides that if only part of any development is a project to which Part 3A applies, the other parts of the development are taken to be a project to which Part 3A applies.
- 11 Clause 6 of the *State Environmental Planning Policy (Major Development) 2005* (Major Development SEPP) relevantly provided that development that, in the opinion of the Minister, is development of a kind that is described in Schedule 1 is declared to be a project to which Part 3A applies. Clause 27(3) of Sch 1 included development for the purpose of resource recovery or recycling facilities that handle more than 75,000

tonnes per year of waste or have a capital investment value of more than \$30 million.

- 12 The project has been declared to be a Major Project under Part 3A of EPA Act. Although Part 3A has been repealed, it continues to apply to the project under Sch 6A cl 2 and 3 of the Act.
- 13 Section 75F of the EPA Act requires the Director General to prepare environmental assessment requirements (DGs Requirements) for the project. The DGs Requirements are a mandatory relevant consideration (*Pittwater Council v Minister for Planning* [2011] NSWLEC 162 at [142]).
- 14 Section 75H requires the proponent to submit an environmental assessment to the Director General and for this to be made publicly available.
- 15 Section 75I(1) of the EPA Act provides that the Director General is to give a report on a project to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project. Section 75I(2) and cl 8B of the *Environmental Planning and Assessment Regulation 2000* provide the matters that are to be included in the Director General's Report (DGs Report).
- 16 Under s 75J(2) of the EPA Act, the Minister, in deciding whether or not to approve the carrying out of the project, is relevantly to consider the DGs Report (and the reports, advice and recommendations contained in it).
- 17 Section 75J(3) of the EPA Act provides that in deciding whether or not to approve the carrying out of the project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of s 75R) apply to the project if approved.

18 Section 75J(4) of the EPA Act provides that the project may be approved with such modifications or conditions that the Minister determines.

19 Section 75R of the EPA Act provides that State environmental planning policies (SEPPs) only apply to the declaration of a project as a Part 3A project and to the carrying out of a Part 3A project.

***State Environmental Planning Policy (Infrastructure) 2007***

20 Clause 121(1) of *State Environmental Planning Policy (Infrastructure) 2007* (Infrastructure SEPP) permits 'any person' to carry out development for the purposes of a 'waste or resource management facility' in a 'prescribed zone'.

21 A 'prescribed zone' for the purpose of waste or resource management facilities in the Infrastructure SEPP includes the RU2 Rural Landscape zone. That part of the site where the facility is to operate is within land zoned RU2. The proposal is therefore permissible with consent under the Infrastructure SEPP.

22 Clause 123 of the Infrastructure SEPP includes matters that must be considered in the determination of an application for the purpose of the construction, operation or maintenance of a landfill for the disposal of waste. Clause 123(1)(c)(ii) includes a reference to the publication *EIS Guideline: Landfilling (Department of Planning, 1996)* (Landfill Guidelines). The proposal's compliance with cl 123(1)(c)(ii) is in dispute between the parties, which is discussed later in the Judgment.

***Sydney Regional Environmental Plan 9 – Extractive Industries***

23 The site is included in Sch 1 of *Sydney Regional Environmental Plan 9 – Extractive Industries* (SREP 9) as a clay/shale extraction area of regional significance. Clause 7 of SREP 9 permits development for the purpose of an extractive industry with consent.

*Sydney Regional Environmental Plan 25 – Orchard Hills*

- 24 Sydney Regional Environmental Plan 25 – Orchard Hills (SREP 25) applies to the adjoining rural residential areas, including the Vines Estate. It does not apply to the site itself. The aims of SREP 25 are set out in cl 2 as:

*This plan aims:*

- (a) to identify and protect the prime agricultural land of Orchard Hills and to encourage the continuation of the use of that land for the purpose of agriculture,*
- (b) to protect and enhance the scenic landscape quality of the area,*
- (c) to ensure that development does not compromise the agricultural or scenic qualities of Orchard Hills,*
- (d) to ensure that development is compatible with existing infrastructure,*
- (e) to promote Orchard Hills as a rural landscape buffer area both along the F4 Freeway and between the various residential areas of Penrith,*
- (f) to permit the carrying out of development which promotes the agricultural and scenic qualities of Orchard Hills,*
- (g) to identify and protect land which may be needed in the future for urban development,*
- (h) to identify and conserve items of the environmental heritage, and*
- (i) to identify and protect land required by the Commonwealth for the operation of defence facilities.”*

- 25 The Minister and the council submit that the proposal is not consistent with the aims of SREP 25 and results in a land use conflict.

***Penrith Local Environmental Plan 2010***

- 26 Most of the site is zoned RU2 Rural Landscape under *Penrith Local Environmental Plan 2010* (LEP 2010). A small corner of the site, around Blaxland Creek, is zoned E2 Environmental Conservation under LEP 2010, however no works are proposed in this area.
- 27 The proposal is prohibited in the RU2 and the E2 zones. However, a waste recycle facility would be permissible in the RU2 zone under the Infrastructure SEPP and an extractive industry is permissible under SREP 9.

28 The Minister and the council submit that the proposal is not consistent with the objectives of the RU2 zone in LEP 2010 and results in a land use conflict. The objectives are:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To minimise conflict between land uses within the zone and land uses within adjoining zones.*
- *To preserve and improve natural resources through appropriate land management practices.*
- *To ensure development is compatible with the environmental capabilities of the land and does not unreasonably increase the demand for public services or public facilities."*

## **Background**

29 The site was originally used for agriculture and the first extractive use appears to be by Vacik Pty Limited pursuant to a development consent (DA116/80) granted on 23 November 1981 by the council. The consent approved the use of the land for the extraction of sand and shale. The consent identifies two extraction areas being Area 1 and Area 2. Area 1 was originally approved for extraction to 44m AHD and Area 2 was approved for extraction to 27m AHD. On 12 November 1986, the consent was modified to permit extraction in Area 2 down to 20m AHD. The current rate of approved extraction is 130,000 tonnes per annum. The consent provides for a rehabilitated final landform in the shape of a dish with 3m high bund walls. The consent does not include a condition which limits its period of operation.

30 In 1989, Vacik Pty Ltd sought to modify DA116/80 to permit the rehabilitation of the site using non-putrescible industrial and building waste. Council refused the application and, in 1992, the Court dismissed an appeal on the grounds that the proposed modification was not substantially the same development as originally approved.



- 31 Vacik Pty Ltd sold the site in 2002 to Orchard Holdings (NSW) Pty Limited who continued to operate the quarry.
- 32 During this period, unauthorised construction and demolition wastes, including asbestos containing materials, were brought onto the site and incorporated into the northern and north eastern bund walls to a height exceeding the three metre height approved under DA116/80.
- 33 The site was purchased by Dellara Pty Limited (the applicant) in August 2008 and has been in a state of "care and maintenance" since that time.
- 34 In response to a request by the applicant, the Director General, under delegation, declared on 11 November 2008, that under s75 B of the EPA Act and cl 6 of the Major Development SEPP the proposal was a development to which Part 3A applies.
- 35 On 21 May 2009, the DGs Requirements under s 75F of the EPA Act were issued. The Major Project Application dated 27 May 2009 was submitted.
- 36 The DGs Requirements for the project include:
- General Requirements*  
*The Environmental Assessment (EA) must include:*  
 .....  
 • *A detailed description of the project, including:*  
   - *The need for the project, having particular regard to the requirements of clause 123 of State Environmental Planning Policy (Infrastructure) 2007*  
   - *the alternatives considered, including detailed justification for the proposed alternative (ie. The project)*  
 .....  
 • *A detailed assessment of the key issues...*  
 .....  
 • *A conclusion justifying the project, taking into consideration: the suitability of the site; the economic, social and environmental impact of the project as a whole; and whether it is consistent with the objects of the Environmental Planning and Assessment Act 1979;.....*
- References*  
*The Environmental Assessment must take into account relevant State Government technical and policy guidelines...*

- 37 The key issues identified in the DGs Requirements can be summarised as: noise, traffic and transport, waste, soil and water, rehabilitation and final landform, air, odour, greenhouse gas, biodiversity, heritage, visual, hazards, social and economic.
- 38 The Environmental Assessment prepared by R W Corkery & Co Pty Ltd dated April 2010 (Environmental Assessment) was publicly exhibited pursuant to s 75H of the EPA Act from 30 April 2010 to 30 June 2010. During this period 3,768 submissions, including seven submissions from public agencies, were received.
- 39 A response to submissions prepared by R W Corkery & Co Pty Ltd, including the Preferred Project Report dated July 2010, was submitted and the DGs Report dated September 2010 was prepared under s 75I of the EPA Act.
- 40 The DGs Report includes an Executive summary, Background (Section 1), Proposed development (Section 2), Statutory context (Section 3), Issues raised in submissions (Section 4), Assessment of key issues (Section 5) and Conclusions (Section 6).
- 41 The Minister refused the Preferred Project application in accordance with s 75J of the EPA Act on 27 September 2010. The reasons for refusal were:

- I. There is no demonstrable need for a proposal of this scale and in this location in terms of landfill capacity given the concentration of landfill capacity in Western Sydney;*
- II. The planning setting of the proposal in close proximity to residential areas would inevitably introduce land use conflicts which would necessitate ongoing and onerous management. The project at this scale is fundamentally and strategically inconsistent with good land use planning;*
- III. There is an unacceptable level of risk associated with the project's ability to meet relevant noise criteria throughout the life of the proposal;*
- IV. The proposal is inconsistent with the key strategic planning instruments in relation to maintaining the scenic qualities and rural landscape character of the area;*

*V. The proposal will result in unacceptable long term visual impacts; and*  
*VI. The proposal is not in the public interest.*

- 42 On 16 November 2010, the applicant lodged an appeal under s 75K(2) of the EPA Act against the Minister's refusal. A detailed history of the events prior to the hearing is contained in the Minister's Further Amended Statement of Facts and Contentions filed on 1 December 2011.
- 43 The hearing commenced on site on 3 August 2011. The applicant sought consent for the Modified Preferred Project (MP Project) for which leave was granted on 19 July 2011. During the hearing the applicant tendered a draft condition that sought to increase the amount of clay/shale to be extracted from the site by increasing the depth of extraction and reducing the area to be filled. The applicant also sought to reduce the finished height of the bund walls. The Minister and the council considered the changes proposed were beyond those that could be imposed by conditions and that the applicant should seek to formally amend the project application. The hearing was adjourned for mention on 19 September 2011 to enable the applicant to prepare the amended project application for which leave was to be sought.
- 44 The applicant prepared the amended project application, which was provided to the Minister and the council. On 19 September 2011, the applicant sought an adjournment in order to provide further information requested by the Minister and the council in response to the amendment. Council opposed the adjournment and the amendment to the project. The Minister reserved its position on the amendment until the further information was provided.
- 45 The matter was adjourned until 10 October 2011, where the applicant sought leave to amend the project. The amendments to the project include:

i. Reduction in height of the final landform:

- a reduction in the finished level of the northern face from 55m AHD to approximately 44m AHD, 3m to 4m above the pre-existing ground levels (the interim acoustic mound would be at 53m AHD for acoustic purposes);
- a reduction in the elevation of the northern face to a 5% slope profile to integrate more closely with the existing ground level; and
- the substantial removal of the south western, southern and eastern bund walls and the forming of part of the final landform during the course of the project, to reduce visual impacts.

ii. Increased extraction of clay/shale resources:

- extraction of additional clay/shale resources in Cell 2 by increasing the level of extraction from 37m AHD to 28m AHD; and
- no emplacement of waste in the final cell. The final cell is to be backfilled with clay/shale.

iii. Contingency stockpile:

- a new contingency stockpiling area, which would be located in the south eastern corner of the Project Site, enabling stockpiles of clay and shale destined for export to be stored as far from residents as possible; and
- consequential relocation of the site office and light vehicle parking area.

- 46 The council opposed the granting of leave for the amended project on the basis that the applicant's costs undertaking was unclear; the project had already been previously amended and that more time should not be spent on a further amended application which will not resolve the issues in dispute. In its letter dated 8 October 2011, the Orchard Hills Community Association also objected to the amendments.

- 47 The Minister did not oppose the granting of leave provided any information the applicant was seeking to rely on was provided prior to the project being renotified. In particular, the Minister considered further information should be provided in relation to contamination and air quality.
- 48 The Court granted leave for the applicant to rely on the Further Modified Preferred Project Report (FMP Project Report) dated September 2011. The reasons for granting the leave are firstly, that the applicant had provided an undertaking in regard to the costs of both the Minister and the council. Secondly, the amendments have arisen in response to the contentions and evidence during the hearing dealing with the visual impact of the proposal, particularly the final landform resulting from the bund walls, the amount of extraction of the clay/shale resource and how the extraction of the resource and the emplacement of waste can occur concurrently. Thirdly, the amendments are consistent with those discussed during the hearing which was adjourned to enable the applicant to prepare an amended project and seek leave. If leave were not granted the hearing of the MP Project would need to resume. It is more appropriate that a further hearing consider the FMP Project, as even if the amendments do not completely resolve the issues in dispute between the parties, they have been reduced.
- 49 The FMP Project Report was exhibited and 18,214 submissions were received, including four from public authorities. The submissions and the issues they raise are discussed later in this Judgment.
- 50 The proposal in the FMP Project Report is the project for which consent is now sought. The evidence and submissions in response to this project were considered at the hearing in February 2012.

## Further modified preferred project

- 51 The project application is for 'a waste and resource management facility comprising a non-putrescible waste recycling facility, an ancillary waste emplacement, waste transfer station, continued shale/clay extraction and site rehabilitation'.
- 52 The principal Project activities would include the following.
- Construction/establishment and operation of a materials recycling facility for construction and demolition (C&D) waste and commercial and industrial (C&I) waste.
  - Resumption of clay/shale extraction (particularly light-firing clay/shale) to recover raw materials for use by the brick industry and other clay/shale materials as optimal cover material for the on-site waste emplacement and final capping.
  - Development and operation of staged waste emplacement cells to contain all residual wastes from the recycling and re-processing facility, other imported wastes (unable to be re-processed) and selected construction and demolition wastes recovered from the existing on-site perimeter bund walls.
  - Refurbishment of the former weighbridges and offices together with the construction of a range of on-site infrastructure including a site office for the recycling and re-processing facility, truck wheel wash, site workshop and water management structures.
  - Progressive site rehabilitation including modification of existing perimeter bund walls and relocation of existing fill and revegetation
- 53 The major components of the proposal are summarised in the following table (Table 2.2 of the FMP Project Report):

<i>Aspect</i>	<i>Description</i>
<i>Project summary</i>	Construction and operation of a waste recovery and disposal facility at the former Erskine Park Quarry site adjacent to Patons Lane, Orchard Hills
<i>Landfill Area</i>	<p>Total Capacity: 4.3 million tonnes (excluding landfill caps)</p> <p>Operational Life: 25 years including capping and revegetation</p> <p>Maximum Final Landform Elevation: 57 m ADH</p> <p>Staging: The landfill will consist of three waste cells, divided into various sub-cells. The recycling and re-processing area will be refilled with on-site clay and shale materials.</p>
<i>Waste</i>	<p>Total Input: up to 450 000 tonnes per annum</p> <p>Waste Recycled: up to 350 000 tonnes per annum</p> <p>Waste Landfilled: up to 205 000 tonnes per annum</p> <p>Types of Waste Received: general solid (non-putrescible) waste, including up to 100 000 tpa of contaminated soil which meets this waste classification. The general solid (non-putrescible) waste would predominantly comprise C&amp;D and C&amp;I wastes.</p> <p>Types of Waste Recycled: C&amp;D wastes such as concrete, bitumen, bricks and roofing tiles; C&amp;I waste such as metals, wood, plastics and cardboard.</p> <p>Types of Waste Landfilled: only waste classified as general solid (non-putrescible) and asbestos recovered from the bund walls on site.</p>
<i>Site Access</i>	Site access would be via Patons Lane. The Proponent proposes to complete the construction and sealing of the 1.3km section of Patons Lane between Luddenham Road and the Project Site entrance.
<i>Recycling and re-processing area</i>	<p>Area: approx 5.6ha</p> <p>Components: Various buildings (recycling facility warehouse, C&amp;I waste storage building, office, mobile C&amp;D recycling equipment and outdoor product bays)</p>
<i>Ancillary infrastructure</i>	<p>Existing weighbridges (to be refurbished)</p> <p>New site office and car parking areas</p> <p>Site office for recycling facility, truck wheel wash, workshop and water management structures</p> <p>Dams for storage of leachate and collection/storage or stormwater</p> <p>Internal road network</p>
<i>Clay/shale extraction</i>	<p>Total resources proposed to be extracted from Cells 1, 2 and 3 (following the same sequence as the emplacement cells) to an average depth of 28 m AHD</p> <p>Clay/shale extracted: 5 200 000 tonnes.</p> <p>Clay/shale despatched from site: 3 150 000 tonnes (2 184 000 of light-firing clay/shale).</p> <p>Maximum resource export rate 160 000 tonnes per annum.</p> <p>Clay/shale on-site use: 2 050 000 tonnes.</p> <p>Cell 4 – 994 000 tonnes light firing shale available for future extraction</p>
<i>Amenity Bund Walls</i>	<p>Acoustic mounds and existing bund walls around the perimeter of the operational areas will provide noise protection and visual screening. All mounds and bund walls would be removed when no longer needed for noise mitigation.</p> <p>Details of the mounds and bund walls are as follows:</p> <ul style="list-style-type: none"> <li>- Northern Face and bund – reprofiled during the site establishment phase with on-site VENM</li> <li>- Central acoustic mound - VENM</li> <li>- Southern acoustic mound – VENM</li> </ul> <p>Recycling and re-processing area acoustic mound – VENM to</p>

<i>Aspect</i>	<i>Description</i>
	be – constructed during the site establishment phase - Eastern face - Southern face - South-western face
<i>Employment</i>	<u>Construction</u> : 10-15 people <u>Operation</u> : 20 people full time + up to 10 part-time contractors
<i>Hours of Operation</i>	<u>Construction</u> : <ul style="list-style-type: none"> <li>• Monday to Friday 7am to 6pm; and</li> <li>• Saturday 8am to 2pm</li> </ul> <u>Operation</u> : <ul style="list-style-type: none"> <li>• Monday to Friday 7am to 6pm; and</li> <li>• Saturday 8am to 2pm</li> </ul>
<i>Heavy vehicle movements</i>	250 heavy vehicle movements per day

- 54 The site layout is shown in Attachment 1 (Figure 2.5 of the FMP Project Report).
- 55 The Project is to be carried out in stages over a period of 25 years after the initial establishment period. The stages and indicative time frames are:

Site establishment: approximately 6 months

Operational stages - progressive extraction, filling, capping and rehabilitation of sub cells:

Cell 1: Years 1-7

Cell 2: Years 8-14

Cell 3: Years 15-24

Final Cell: Year 25

Final rehabilitation: Year 25

- 56 The site establishment stage would include the construction/shaping of the final rehabilitated landform along the northern and eastern sides of the property together with acoustic mounds above prior to the first waste materials being received on the site. It would also include the construction and sealing of the 1.1km section of Patons Lane between Luddenham Road and the site entrance.



- 57 The indicative emplacement and cell rehabilitation sequence is outlined in Table 2.5 of the FMP Project Report as:

Year <sup>#</sup>	Activity <sup>*</sup>
Year 1	Cell 1A is prepared to receive waste and filling commences. Deconstruction of the section of the existing eastern bund wall located over the clay/shale extraction area within Cell 2 is underway and all wastes placed in Cell 1A.
Year 2	Cell 1B is excavated and leachate infrastructure installed and is available for waste emplacement. The northern section of Cell 1A is capped and rehabilitated soon after.
Year 5	Cell 1C is excavated and leachate infrastructure installed and is available for waste emplacement. The northern section of Cell 1B is capped and rehabilitated soon after.
Year 8	Cell 2A is excavated and leachate infrastructure installed and is available for waste emplacement. Cell 1C is capped and rehabilitated soon after.
Year 10	Cell 2B is excavated and leachate infrastructure installed and is available for waste emplacement. The northern section of Cell 2A is capped and rehabilitated soon after.
Year 12	Cell 2C is excavated and leachate infrastructure installed and is available for waste emplacement. The northern section of Cell 2B is capped and rehabilitated soon after.
Year 15	Cell 3C is excavated and leachate infrastructure installed and is available for waste emplacement. The northern section of Cell 2C is capped and rehabilitated soon after.
Year 18	Cell 3B is excavated and leachate infrastructure installed and is available for waste emplacement. Cell 3C is capped and rehabilitated soon after.
Year 21 to 23	Cell 3A is excavated and leachate infrastructure installed and is available for waste emplacement. Cell 3B is capped and rehabilitated whilst Cell 3A is filled to finished levels. Cell 3A is capped and rehabilitated.
Year 24 to 25	The area of the recycling and reprocessing facility is filled to final levels and rehabilitated.
# Indicative Only                      *Assumes an average waste emplacement rate of 205 000 tpa	

- 58 The rehabilitation of the site is proposed to occur progressively throughout the life of the project. The initial rehabilitation of the northern and eastern bund walls will occur in the establishment stage. Rehabilitation activities will be staged to follow the cessation of waste emplacement in each cell. The operational area for the recycling and reprocessing plant would be removed at or near the end of Year 23 and the site decommissioning would commence following the completion of waste emplacement in Cell 3. The final cell would be progressively filled with clay/shale.

- 59 The final landform would result in the creation of a gently sloping grassed knoll with a maximum elevation of approximately 57m AHD, which is marginally lower than the maximum natural elevation (58m AHD) near the southern boundary of the site. The northern and north eastern bund walls would be lowered. Overall, the final landform would be an average of 4m above the pre-extraction landform.
- 60 All areas of the final landform would be progressively revegetated soon after the areas are shaped and covered with topsoil. Revegetation would commence during the site establishment phase principally to stabilise the constructed drainage channels and embankments and the northern and eastern faces. Following initial stabilisation, the entire northern face, the nearby riparian zone adjoining Blaxland Creek and the eastern face would be revegetated with native trees and shrubs.
- 61 It is intended that most of the rehabilitated site would be land suitable for grazing, although parts of the site would be vegetated with a range of woodland and riparian species.
- 62 Attachment 2 is a plan of the final landform and landscaping (Figure 2.22 of the FMP Project Report). Attachment 3 shows north south and east west cross sections (Figures 2.14 and 2.15 of the FMP Project Report).

### **Minister's contentions**

- 63 The Minister contends that the FMP Project should be refused on the basis of contentions 2, 4 and 6 of the Further Amended Statement of Facts and Contentions, namely:
- a. The setting of the project in close proximity to residential areas would introduce land use conflicts and would therefore be inappropriately located (contention 2);
  - b. The project would result in unacceptable visual impacts for the duration of its operational life (contention 4); and

c. The project is contrary to the public interest (contention 6).

- 64 As a result of further information, amendments to the project, expert evidence and proposed conditions, the Minister had deleted contention 1 (demand for waste facility) and contention 3 (leachate) and did not press contention 5 (acoustics), contention 7 (contamination), contention 8 (insufficient information) and contention 9 (conditions).

### **Council's contentions**

- 65 The Council's Amended Statement of Contentions raised 11 contentions. As a result of further information, amendments to the project, expert evidence and proposed conditions the council did not press contention 1 (unlawful construction of the bund walls), contention 5 (landform - drainage), contention 6 (ecology), contention 8 (conditions, other than Roads and Traffic), contention 9 (insufficient information) and contention 10 (contamination).

- 66 Contention 2 (character and visual), contention 3 (shale extraction and resource utilisation), contention 4 (regional and state planning matters), contention 7 (land use conflicts) and contention 11 (quarry and waste fill operation) remain outstanding.

- 67 The dispute between the council and the applicant in relation to conditions of approval dealing with roads and traffic (contention 8) also remains outstanding.

- 68 The Council submits its fundamental concerns are:

- a. There are unresolved conflicts in the simultaneous activities proposed to be carried out which will mean that proper planning outcomes are unlikely to be achieved.
- b. An approval given to the FMP Project and draft conditions will not ensure:

- achievement of those outcomes, or
  - terms of approval which will enable enforcement to ensure those outcomes.
- c. The proposal involves land use conflicts where the long term strategic planning does not invite such a development.

## Community evidence

- 69 The Court visited the site and the locality on 3 August 2011 and heard evidence from objectors to the MP Project. A number of objectors also gave evidence in Court in response to the FMP Project.
- 70 A summary of submissions made in response to the exhibition of the Preferred Project Report (3,575 community submissions) is included in the DGs Report. The submissions made in response to the MP Project Report (9084 community submissions) were tendered (a copy of each submission from individuals and community groups was provided as well as a copy of the proforma submission and list of names and addresses of people who made proforma submissions). The submissions include a thorough submission made by the Residents Against Industrial Dump (RAID) Committee of the Orchard Hills Community Association Inc. The issues raised in the community submissions are summarised in the Minister's Further Amended Statement of Facts and Contentions. The issues raised in response to the Preferred Project and the MP Project are similar to those raised in response to the FMP Project for which consent is now sought.
- 71 There were 18,210 community submissions received in response to the exhibition of the FMP Project which were tendered (in CD form for the proforma submissions and written form for the individual submissions). The issues raised in the community submissions are summarised in the Minister's Further Amended Statement of Facts and Contentions.

- 72 The community submissions included:
- i. Three letters from community groups:
    - Mulgoa Valley Landcare Group
    - Cumberland Conservation Network
    - Orchard Hills Community Association
  - ii. 12 letters from individuals objecting to the proposal
  - iii. Proforma submissions.

- 73 The proforma letter states:

**ORCHARD HILLS WASTE PROJECT (09\_0074 & LAND ENVIRONMENT  
COURT CASE NO: 10928 of 2010)-  
EXHIBITION OF FURTHER MODIFIED PREFERRED PROJECT REPORT**

*I wish to object to the Further Modified Preferred Project Report by Dellara Pty Ltd to establish an industrial waste resource management facility at Patons Lane, Orchard Hills. My reasons for objection are as follows:*

*Conflict of land use.* *The proposed facility is in close proximity to residential areas and would introduce unacceptable land use conflicts. The facility would be inconsistent with the current strategic planning for the Orchard Hills area, and with good land use planning.*

*Air Quality Impact.* *The prevailing winds in the area are from the south. The project will produce unacceptable levels of dust to nearby communities, particularly to the residential area located directly north of the site, which has a history of dust problems from the existing site. The site could also potentially produce unacceptable levels of odour to nearby residents.*

*Heritage Value.* *The area of and surrounding the proposed waste facility has significant Australian Heritage value (Blaxland land grant 1809). We believe that the proposed location of the facility at Orchard Hills would not be conducive to this heritage value.*

*Conservation Corridor Value.* *The proposed site would be built directly adjacent to and discharging into Blaxland Creek, which is the only remaining conservation corridor in western Sydney protecting the movement of terrestrial fauna and the conservation of the critically endangered Cumberland Plain Woodland. The Project would amount to an unacceptable risk to the corridor.*

*Illegal Bund Walls.* *The bund walls are too high and unsightly to residents, contain contaminated wastes (including asbestos), and are illegal structures which the proponent relies upon for the operation of the facility for at least the next 15 years.*

*Traffic Safety Risks.* *We are concerned that the increased truck movements generated by the site will adversely affect the infrastructure of Luddenham Road and potentially result in increased risk of accidents and injury to our local community.*

*Impacts of Fluoro-chemical Surfactants and Polymers.* *The proposed facility will accumulate and disperse toxic fluoro-chemical surfactants and polymers (contained in industrial &*

*commercial waste) that will adversely impact the greater community for generations to come. The Proposal contains no proven control measures or advice from any established experts in this field.*

*I acknowledge that this submission has been prepared by the Orchard Hills Community Association Inc. I have read and fully understand this submission and hereby adopt it as my submission. I declare that I have not made any political donations in the previous two years.*

- 74 The objectors who gave oral evidence spoke on behalf of numerous other objectors to the proposal and the Court acknowledges the manner in which this evidence was organised to ensure that the issues of concern were raised in an efficient and effective way. The key concerns raised by the objectors who provided oral evidence to the Court in response to the MP Project and the FMP Project generally reflect the contentions initially raised by the Minister and the Council and the matters raised in the proforma letter.
- 75 A number of objectors who gave oral evidence also provided further written submissions to the Court.
- 76 Representatives of RAID gave evidence both on site and in Court. They expanded upon the concerns that were raised in the proforma letters and emphasised that the community's opposition to the project is not from a small group of residents who are likely to suffer direct amenity impacts, but rather the opposition is from an entire community who had expected the site would by now have been rehabilitated. The community opposes the introduction of an intensive industrial use for another 25 years.
- 77 Mr George, on behalf of RAID, commented on and questioned the Joint Reports of the experts in relation to noise, traffic, town planning, leachate, visual impact, air quality and contamination. He was particularly concerned that even if it could be demonstrated that there was a demand for a waste facility this should not be met by Western Sydney, which already had a disproportionate number of such facilities that service greater Sydney. He also emphasised that there are inherent land use conflicts between the

industrial uses proposed for the site and the rural residential character of the area.

- 78 Other objectors supported the issues raised by RAID. The residents of the Vines Estate gave evidence that the project would have a negative effect on the quiet ambience of the local area and would be inconsistent with the strategic planning controls for the site. They were particularly concerned about the appearance of the site and the visibility of industrial activities, such as trucks, during the life of the project. They were also concerned about impacts of noise and dust, which they stated had resulted from the previous operation of the extractive industry on the site and which they considered would be exacerbated by the proposal.
- 79 The owner of 202 Luddenham Road was also concerned about impacts on his amenity. His property is located directly opposite Patons Lane which is the entrance to the site. In particular, he was concerned about the number and frequency of trucks which will pass his house causing noise, vibration and safety concerns.

### **Submissions from public authorities**

- 80 A summary of the seven submissions from public authorities made in response to the exhibition of the Preferred Project Report is included in the DGs Report. A summary of the six submissions from public authorities made in response to the exhibition of the MP Project Report is included in the Minister's Further Amended Statement of Facts and Contentions.
- 81 The following four public authorities made submissions in response to the FMP Project:
- Office of Environment and Heritage (OEH).
  - Office of Water
  - Transgrid
  - Roads and Maritime Services (RMS)

- 82 In response to a request from the applicant, the Department of Trade and Investment assessed the application and provided advice that it supported the extraction of light fired clay/shale and its combination with a recycling and waste facility.
- 83 Where relevant to the issues in dispute between the parties, these submissions are discussed in the Judgment.

### **Expert evidence**

- 84 The following experts have provided evidence to the Court on the FMP Project:
- (a) acoustic experts: Mr S Cooper (Minister and council); Mr B Clarke (applicant)
  - (b) air quality experts: Mr S Welchman (Minister and council); Mr M Nash and Ms J Cox (applicant)
  - (c) clay/shale resources experts: Mr K Berzins and Mr G Thomson (council); Mr A Dyer (applicant)
  - (d) contamination experts: Mr J Clay (Minister and council); Mr M Nash (applicant)
  - (e) extraction/emplacement methodology experts: Mr G Thomson (council); Dr S Dever and Mr P Grace (applicant)
  - (f) groundwater experts: Mr J Clay (Minister and council); Mr A Dixon, Dr S Dever and Mr M Nash (applicant)
  - (g) planning experts: Ms C Brown (Minister); Mr K Berzins (council); Mr H Sanders (applicant)
  - (h) leachate and surface water experts: Mr D Ife (council); Mr A Dixon, Dr S Dever and Mr C Bagnell (applicant)
  - (i) visual experts: Ms C Brown (Minister); Mr K Berzins (council); Dr R Lamb (applicant)



85 Mr E Hausfeld and Mr Meier (council) and Mr C Hazell (applicant) provided evidence on the traffic conditions proposed in response to the MP Project. These conditions are also sought to be imposed by council in response to the FMP Project. The amendments to the project did not require further evidence from these experts and did not change the issues in dispute between the council and the applicant on this matter.

86 In addition to the above experts, the Court also received expert evidence on the MP Project from the following experts. The contentions addressed by these experts were not pressed in respect of the FMP Project:

- (a) ecology experts: Mr A Price (council) and Mr G Cunningham (applicant)
- (b) demand for a waste facility: Mr A Wright (applicant and council) and Mr D Gamble (applicant)

87 At the request of council, Mr A Mackenzie, a representative of CSR, gave evidence on the 8 August 2011 in relation to his company's history with the site and on matters related to clay/shale resource, including its extraction, stockpiling and the joint operation of extraction with a waste facility. His evidence was not expert evidence and the clay/shale experts and the extraction/emplacement methodology experts later dealt with the matters discussed by Mr Mackenzie.

#### **Land use conflict**

88 The Minister and Council contend that the project will create land use conflicts. Principally, they are concerned that the proposal intensifies and extends the industrial use of the site for 25 years. The industrial use creates inherent land use conflicts and is inconsistent with the strategic planning objectives for the area.

89 Each of the technical experts who assessed the FMP Project have agreed that if it is carried out in accordance with the conditions then the impacts

caused by each of the proposed activities will comply with the relevant statutory criteria.

- 90 Ms Brown and Mr Berzins consider that despite the technical compliance, the proposal would result in adverse impacts on the amenity of residents who live in close proximity to the site and will result in land use conflicts.
- 91 Ms Brown and Mr Berzins agree that the existing character of the area is rural residential and that the current condition of the site is inconsistent with this character. They acknowledge that the site has a current approval for an extractive industry, however, the expectation of the community is that the extraction should be completed by now and the site rehabilitated.
- 92 In Ms Brown and Mr Berzins' opinion, the proposal includes three distinct land uses, being receipt of waste and recycling, emplacement of waste into cells and increased extraction of clay/shale. These uses are intensive industrial activities that will occur on the site for a further 25 years and will conflict with the surrounding rural and residential uses. There is a possibility that neighbouring defence land may be rezoned for residential purposes, which will further exacerbate this conflict.
- 93 Due to the proximity of residential development, Ms Brown and Mr Berzins consider that there is an inevitable land use conflict and the site is unsuited to the proposed development.
- 94 Mr Sanders considers that land use conflict manifests itself in impacts such as noise, air quality and traffic. Land use planning relies on objective criteria to measure impacts. The experts have agreed that the potential impacts of the proposal can be appropriately managed and mitigated to meet the relevant criteria. The impacts on residential amenity based on these objective criteria are therefore acceptable. In his opinion, it is not appropriate to impose subjective criteria to assess impacts on residential amenity. He does not consider the project is inappropriately located or that it will result in land use conflicts.

- 95 Ms Brown and Mr Berzins referred, in particular, to the strategic objectives sought by SREP 25 and LEP 2010. These plans seek to retain the scenic quality, rural landscape character and vistas within Orchard Hills. In their opinion, the proposal is inconsistent with these objectives. Further, they consider that the use of the site for landfill does not meet the locational principles included in the Landfill Guidelines which are a consideration under the Infrastructure SEPP. Similarly, Mr Berzins considers that the objectives of SREP 9 are not met as the extraction of clay/shale is not maximised. He considers there is a conflict between using the site for both landfill and extraction.
- 96 Mr Sanders acknowledged that during its operation the proposal would not be fully consistent with the objectives for the RU2 zone under LEP 2010 or with SREP 25, which applies to the surrounding land. However, he considered that as the proposed industrial uses are prohibited within the RU2 zone, it would be unreasonable to expect that they should be consistent. However, he considered that the site's remediation and final landform would be consistent with both LEP 2010 and SREP 25.
- 97 In Mr Sanders opinion, the key strategic planning policies are SREP 9 and the Infrastructure SEPP by which the proposed uses gain their permissibility. The proposal utilizes the clay/shale resource and meets the strategic objectives of SREP 9. It also meets the requirements of cl 123(1)(c)(ii) of the Infrastructure SEPP, including the locational principles in the Landfill Guidelines, other than the proposal's proximity to Blaxland Creek, however, no adverse ecological impacts on the Creek have been identified. The site exceeds the minimum 250m separation distance from residential development suggested in the Landfill Guidelines, being 500m from the Vines Estate. The Defence land is unlikely to be developed in the short term given its constraints and, if it were to be developed, a similar buffer zone could be achieved.

## Findings

98 The DGs Requirements stated that the environmental assessment must take into account relevant state government technical and policy guidelines. It attached a list of guidelines which may be relevant to the project but noted that the list is not exhaustive. The list includes the Infrastructure SEPP, but does not refer to SREP 25, SREP 9 or LEP 2010. These documents are relevant to our consideration of the proposal.

99 The DGs requirements also required an assessment of the need for the project, having particular regard to the requirements in cl 123 of the Infrastructure SEPP. At the time the DGs Requirements were issued, s 123 of the Infrastructure SEPP required a consideration of whether a “justifiable demand” exists for the landfill development. Section 123 was amended prior to the DGs Report being prepared to remove this requirement and introduce new criteria for landfill projects. It provides:

*(1) In determining a development application for development for the purpose of the construction, operation or maintenance of a landfill for the disposal of waste, including putrescible waste, the consent authority must take the following matters into consideration:*

*(a) whether there is a suitable level of recovery of waste, such as by using alternative waste treatment or the composting of food and garden waste, so that the amount of waste is minimised before it is placed in the landfill, and*

*(b) whether the development:*

*(i) adopts best practice landfill design and operation, and  
(ii) reduces the long term impacts of the disposal of waste, such as greenhouse gas emissions or the offsite impact of odours, by maximising landfill gas capture and energy recovery, and*

*(c) if the development relates to a new or expanded landfill:*

*(i) whether the land on which the development is located is degraded land such as a disused mine site, and  
(ii) whether the development is located so as to avoid land use conflicts, including whether it is consistent with any regional planning strategies or locational principles included in the publication EIS Guideline: Landfilling (Department of Planning, 1996), as in force from time to time, and*

(d) *whether transport links to the landfill are optimised to reduce the environmental and social impacts associated with transporting waste to the landfill.*

(2) *In this clause:*

*putrescible waste means general solid waste (putrescible) within the meaning of clause 49 of Schedule 1 to the Protection of the Environment Operations Act 1997*

100 The Minister and the council made no submission that the proposal did not meet the criteria in cl 123, other than those in cl 123(1)(c)(ii). In particular, whether the location of the proposal avoids land use conflicts as the experts held different opinions on whether the FMP Project is consistent with regional planning strategies and the locational principles in the Landuse Guidelines.

101 Appendix E of the DGs Report reviewed the Preferred Project against the criteria in cl 123 of the Infrastructure SEPP and stated that the proposal "is generally consistent with the criteria, particularly in relation to resource recovery".

102 Section 5.5 of the DGs Report considers landuse conflicts and concludes:

*Some form of economically viable development is required to facilitate the rehabilitation of the site. However, the Department considers that the proposal, at this scale, does not strike the appropriate balance between development and protection of the visual environment or amenity of surrounding residents. To the contrary, the Department considers the proposal could lead to increased potential for land use conflict and result in both unacceptable visual impacts and unacceptable risks to the amenity of surrounding residents (in terms of noise).*

103 The scale of the proposal has been significantly reduced from that assessed in the DGs Report and refused by the Minister. In particular, the amount of waste proposed to be landfilled on the site has decreased from 7.8 million tonnes to 4.3 million tonnes. The visual impacts of the final landform are now agreed to be acceptable and the experts agree that the proposal can comply with the relevant noise criteria. Other impacts such

as air quality and traffic are also agreed to comply with the relevant criteria.

104 We accept Mr Sanders opinion that land use conflict manifests itself in impacts such as noise, air quality and traffic. Land use planning relies on objective criteria to measure these impacts and to determine whether they are reasonable. We also accept that compliance with these objective criteria does not mean that there is no effect or change in amenity. For example, the purpose of noise criteria is to limit adverse effects on residential amenity as a result of noise. This does not mean that there will be no effect but that if there is compliance with the criteria, the impact will be reasonable.

105 The proposal can meet the objective criteria for noise, air quality and traffic. We also accept Mr Sanders evidence that it effectively meets the locational criteria in the Landuse Guidelines. Therefore, based on these objective measures the impact on amenity will be reasonable. However, the Minister submits "the wide ranging concept of "amenity" contains many aspects that are very difficult to articulate and may include the "atmosphere", aesthetics, and the subjective views of residents". (See *Vacuum Oil Company Pty Ltd v Ashfield Municipal Council* (1957) 2 LGRA 8, *New Century Developments Pty Ltd v Baulkham Hills Shire Council* (2003) 127 LGERA 303, *Ferro Constructions Pty Ltd v Brisbane City Council* (1968) 19 LGRA 282, *Blick v Ashfield Municipal Council* (1957) 3 LGRA 131 and *Broad v Brisbane City Council* (1986) 59 LGRA 296)

106 This broader concept of residential amenity is strongly linked to the existing and desired future character of an area and to the community's perception of whether a proposal is consistent with this character. The Minister submits:

*Notwithstanding any compliance with noise controls, contamination management guidelines or air quality requirements, land use conflicts still arise. The loss of amenity and the project's antithesis towards the rural residential quality of the local area is the fundamental concern. It is a fundamental consideration in the*

*determination of the project that the Court determines the overall suitability of the project site for the intended land use having regard to its environs. Local residents have a legitimate expectation that the project site would by now have been rehabilitated and returned to rural country. It has not. Further, that expectation, should the project be approved, will not be realised for another 25 years and a new use (landfill operations) will be introduced and will generally operate for that period. The project is simply "out of place" in the current, and future anticipated rural residential landscape (for the period of its operational life), as identified in the geographic-specific planning controls applying to the site and its environs. Simply because the final landform of the project site will be unobjectionable on planning grounds does not mean that the quarter of a century operation period ought to be subservient in importance to the anticipated final outcome. The operation period is a significant period of time and unacceptable land use conflicts will persist during that period.*

- 107 LEP 2010 applies to the site and SREP 25 applies to the surrounding area. The project is prohibited in the RU2 zone under LEP 2010. It is permissible with consent as a "waste resource and management facility" in the RU2 zone under cl 121(1) of the Infrastructure SEPP. Development for the purpose of extractive industry is also permissible on the site with consent under SREP 9.
- 108 Section 3 of the DGs Report notes that under s 75I of the EPA Act, it is to include a copy of or reference to the provisions of any environmental planning instrument that would (but for Part 3A) substantially govern the carrying out of the project and that have been taken into consideration in the environmental assessment of the project. The Report states that the Project has been assessed against the relevant provisions of several planning instruments and concludes that it is not consistent with the aims of SREP 25 or the zone objectives of LEP 2010. It does not refer to any inconsistency with the other planning instruments.
- 109 Section 5.3 of the DGs Report further considers the projects consistency with SREP 25 and LEP 2010 which it states are the "key strategic planning documents in relation to scenic quality and rural landscape". It discusses the final landform then proposed and concludes "the proposal is inconsistent with the key strategic planning documents in relation to scenic

quality and rural landscape, in particular failing to maintain relevant scenic qualities”.

- 110 The final landform of the proposal has changed significantly from that considered in the DGs Report. The experts agree that the final landform now proposed and the future agricultural use of the site would be consistent with the objectives for the RU2 Zone. The final landform will also be consistent with the primary aim of SREP 25 to enhance the landscape quality of the Orchard Hills area.
- 111 For the reasons that are discussed below, we have found that the visual impact is acceptable in both the operational and final stages of the project. We acknowledge that during the operational stage the industrial use of the site will result in a degree of inconsistency with the objectives for the RU2 zone. However, this is to be expected given that extraction and landfill are not permissible uses under the RU2 zone. This inconsistency needs to be balanced against the proposal’s permissibility and consistency with the Infrastructure SEPP and SREP 9. It also needs to be considered against factors such as the current degraded condition of the site, the existing approval for clay/shale extraction and council’s submission that this extraction should continue and be intensified. These factors are also inconsistent with the objectives of the zone.
- 112 We endorse the DGs comments that some form of economically viable development is required to facilitate the rehabilitation of the site. We note that the concerns raised in relation to land use conflicts in the DGs Report centred on the scale of the development then proposed and the “increased potential for land use conflict and result in both unacceptable visual impacts and unacceptable risks to the amenity of surrounding residents (in terms of noise)”. We find that the scale of the development now proposed strikes the appropriate balance between development and protection of the visual environment and amenity of surrounding residents. We therefore find that the proposal avoids land use conflicts to the extent that refusal of the application is not reasonable.



## Visual impact

- 113 The Minister and council originally raised contentions with the visual impact of the final landform of the proposal. Following the amendments in the FMP Project to the project, the visual impacts during the operational stages of the proposal remained in dispute.
- 114 The experts agree that the visual impact of the establishment phase and the final landform proposed in the FMP Project Report are acceptable. They also agree that there would be no visual impacts arising from the buildings in the recycling and processing area.
- 115 The key disagreement between the experts is the visual impact during the operational life of the project. They agree “in some stages of the operation after the establishment phase, there would be visibility of some of the activities on site associated with the construction and later deconstruction of interim acoustic bunds and the creation of the final landform”. They did not agree on the likely period over which this visibility would occur or on its acceptability.
- 116 In Dr Lamb’s opinion, the visibility of the activities would progressively decline from the establishment stage by reshaping and revegetating the bund walls and there would be minimal viewing from the Vines Estate by the 10<sup>th</sup> year.
- 117 Dr Lamb prepared photomontages to illustrate the visual impacts of the proposal at different stages from five vantage points, including positions in Luddenham Road and the Vines Estate. In Dr Lamb’s opinion, the current landform is out of character with its rural setting. The project will progressively reduce the visual impact of the existing landform and would be acceptable throughout its operational stages.
- 118 Ms Brown and Mr Berzins consider that some operational activities on site would be visible for 12 to 15 years. In their opinion, elements of the

operation would result in adverse visual impacts, as “the site will present as an industrial undertaking inconsistent with its rural and residential setting”. They acknowledge that the existing landform is inconsistent with this setting and that further excavation on the site under the existing consent would prolong this visual impact.

- 119 The experts agree that the visual impact of the contingency stockpile would be acceptable and it would not be visible from the Vines Estate if it is screened by vegetation and its maximum height does not exceed 54m AHD. However, Ms Brown and Mr Berzins questioned whether adequate space was allocated for the amount of material to be stored in the stockpile. Mr Berzins also raised concerns about the viability of the landscaping.

### **Findings**

- 120 The DGs Requirements required an assessment of the visual impacts of the project on the amenity of the surrounding area with particular attention to the adjoining residential areas as well as a detailed description of the measures that would be implemented to minimise the potential visual impacts of the project. The DGs Requirements also required an assessment of rehabilitation and final landform, including a detailed description of how the site would be progressively rehabilitated and integrated into the surrounding landscape.
- 121 The DGs Report on the Preferred Project notes that a significant number of submissions raised concerns with the visual impact of the proposal. The DGs Report concluded that “the visual impact assessment is inadequate and fundamentally flawed.....given the scale of the final landform which would reflect a mesa type shape of around 6 city blocks in footprint, and between 4-5 stories high (14m), the visual impacts of the proposal are considered unacceptable. This is directly related to the scale of the proposal....”

- 122 Although the scale of the project was reduced in the MP Project, Ms Brown and Mr Berzins considered the visual impacts of the final landform remained unacceptable.
- 123 As a result of the changes to the proposal in the FMP Project, in particular the reduction in the height and slope of the northern bund wall, the experts now agree that the visual impact of the final landform is acceptable. However, Ms Brown and Mr Berzins raised concerns about the impact during the operational life of the project. Particularly, that elements of the industrial use of the site will be visible for a considerable period of time and that this is inconsistent with its rural residential locality.
- 124 Dr Lamb prepared photomontages to illustrate the visual impact of the proposal during various stages. The appropriateness of the vantage points chosen, the stages selected and the accuracy of the photomontages was not disputed by the experts nor was Dr Lamb cross examined on them. We accept that they therefore represent the likely visual impact of the proposal.
- 125 In considering these photomontages, we accept Dr Lamb's evidence that the proposal will progressively decrease the existing adverse visual impact of the site when viewed from the surrounding area. From the establishment stage there will be an improvement through the reshaping of the northern bund and through landscaping. The northern bund will start to be removed by year 2 and will be almost gone by year 10. The north eastern bund will be completely removed by year 15. The final landform is 44m AHD in the vicinity of the existing northern bund, which is 3-4 metres above natural ground level. It will be gently graded up from the northern boundary reflecting a natural landform.
- 126 While industrial activities may be visible from residences in the Vines Estate for up to 10-15 years during some operational stages of the Project, these will be largely screened by vegetation and have minimal visual impact. There is no evidence to conclude that there is an inadequate area

provided for the contingency stockpile. Additional information was specifically provided by Mr Grace on the contingency stockpile to address this issue. There is no evidence that demonstrates that the maximum height of the stockpile would exceed 54m AHD. Similarly, there is no evidence to conclude that the proposed landscaping would not grow or be maintained throughout the project.

- 127 All the experts agree that the existing site has an adverse visual impact and is inconsistent with the character of the area. The landform is a result of illegal dumping that appears to have occurred on the site from about 2002 until 2007 when clean up notices were issued to the previous owner who has subsequently sold the site and gone into receivership. To date, no clean up of the site has occurred. The objectors' concerns about the illegal dumping, the resultant landform, and its contamination are clearly valid. The community may be justified in expecting that the site should have been remediated by now under the existing consent. However, this has not occurred and the site is unlikely to be remediated without some form of development occurring over a period of time.
- 128 The council's preferred position is that the clay/shale resource (14.4 million tonnes) should be extracted from the site. Depending upon the rate of extraction per annum this could take between 36 to 110 years to complete and would maintain industrial activity on the site during this period. The proposal is for industrial use of the site over a lesser period. Although, the proposed industrial use is more intensive than the use of the site for only clay/shale extraction, it will not necessarily result in a greater visual impact during its operation, as any industrial use of the site is likely to require acoustic barriers and reshaping of the existing bunds.
- 129 The scale of the proposal has been significantly reduced from that assessed in the DGs Report and refused by the Minister. In particular, the reduction in the amount of waste proposed to be landfilled has resulted a significant change to the final landform from the "Mesa type shape" described in the DGs Report to a gently graded landform consistent with

the character of the area. We do not consider that the visual impact during the operational stage would warrant refusal of the application, particularly given that the proposal provides for the progressive rehabilitation of the site and results in a final landform which all the experts agree is acceptable.

### **Clay/Shale Resources**

- 130 The council contends that the proposal does not propose efficient management or extraction of the clay/shale resource on the site and that a significant amount of the resource will be sterilised by the emplacement of waste. The Minister did not raise issue with the amount or manner in which the clay/shale resource is proposed to be extracted from the site.
- 131 SREP 9 identifies the site as representing a clay/shale resource of regional significance, but does not distinguish between or specify the types of clay/shales present on the site.
- 132 The in-situ materials present at the site include clay and weathered shale, light-firing clay/shale, and darker or non light-firing shale. Mr Berzins, Mr Thomson and Mr Dyer agree the non light firing clay/shale are in abundance in the region and that it is only the light firing clay/shale that is scarce and that it is the most valuable due to its greater demand by brick makers. However, Mr Berzins and Mr Thomson also consider that the non light firing clay/shale should be maximised as it is also used for brick making.
- 133 In response to the MP Project, Mr Mackenzie indicated that CSR was concerned that the clay/shale resources on the site should remain available for the Sydney brick and tile industry. CSR was concerned that the MP Project would result in a substantial quantity of the resource being sterilised by landfilling and thereby permanently lost to the brickmaking industry. Mr Berzins shared these concerns.

- 134 The MP Project proposed extraction to 37m AHD. In response to the concerns raised about the amount of clay/shale resource to be excavated, the project was amended. The FMP Project now seeks to extract clay/shale down to a level of 28m AHD and has reduced the area to be filled with waste. However, Mr Berzins and Mr Thomson consider that the level of excavation should be to 17m AHD, in order to maximise the extraction of both the light and the non light clay/shale resource.
- 135 Mr Dyer considers that the stripping ratio of 1.92 between 28m AHD and 17m AHD make it economically unfeasible to extract the light firing clay/shale below 28m AHD. Mr Berzins and Mr Thomson agree with the stripping ratio but consider the other clay/shale material should be excavated.

### **Findings**

- 136 The DGs Requirements did not identify resource extraction as a matter to be addressed nor did it specifically refer to SREP 9. Although the DGs Report briefly discusses SREP 9, it does not comment on the importance of the resource on the site or the level of extraction. It was not a reason for refusal by the Minister.
- 137 SREP 9 aims to identify land containing extractive material of regional significance, in proximity to the Sydney Metropolitan area and protect the ability for extractive industries to realise their full potential. SREP 9 permits extraction on land where such industrial activity would otherwise be prohibited. Nothing in SREP 9 permits the disposal of waste. While the site is identified as having clay/shale resource of regional significance it is unclear whether this resource includes material other than the light firing clay/shale.
- 138 The key disagreement between the experts centred on whether the clay/shale resource of regional significance is both the light firing and non light firing clay/shale and whether the depth of excavation maximises the extraction of the regional resource.

- 139 While the non light firing clay/shale is a resource, we do not accept that the site has been identified in SREP 9 in order to maximise its extraction. The agreed evidence of the experts is that the non light firing clay/shale are in abundance in the region and that it is only the light firing clay /shale that is scarce. Mr Dyer gave evidence, which was not disputed by Mr Thomson or Mr Berzins, that there is some 129 years supply of non light firing clay shale currently available. Mr Dyer also gave evidence that there are large stock piles of the non light firing material. Further, the evidence of Mr Mackenzie and that contained in the letter from Austral indicate that the light firing clay/shale is more sought after for brick making.
- 140 In our opinion, the regional resource for which the site was identified in SREP 9 and for which an otherwise prohibited activity can be carried out, is the light firing clay/shale. It is the extraction of this resource which should realise its full potential by the project.
- 141 R W Corkery & Co Pty Limited carried out an evaluation of the clay/shale resources on the site in May 2004 (Corkery Report). The experts accept the methodology and calculations in this report. The Corkery Report evaluated four areas on the site to a depth of 17m AHD (Areas 1 - 4). The project area (Cells 1, 2 and 3) represent only a proportion of the area evaluated in the Corkery Report. The experts agree that based on the Corkery Report the extractable clay/shale resource to 17m AHD in Area 1 - 4 is 14.4 million tonnes. Of this the amount of extractable light firing clay/shale is about 4.8 million tonnes.
- 142 The FMP Project proposes to extract a total of over 5 million tonnes of clay/shale, of which just over half will be dispatched from the site and just under half will be used on site for cell lining and capping. The material to be exported from the site includes some 2.38 million tonnes of the light-firing clay/shale. A further 1.2 million tonnes of light-firing clay/shale will remain recoverable in future as it will not be sterilised by waste filling.

- 143 The experts agree that the amount of the light-firing clay/shale to be recovered by the Project and that remains recoverable is approximately 85% of the light-firing shale resource down to RL 28 or (75% down to RL 17) in Areas 1 - 4.
- 144 There is a further amount of clay/shale deposit (about 9ha) to the south of Area 4 that has not been included in any of the calculations, which would remain recoverable.
- 145 Due to the stripping ratio, extraction below 28 m AHD will not recover an economically feasible amount of light firing clay/shale. While the non light firing clay/shale could be extracted, this is not the important regional resource and extraction to this level would prolong the industrial use of the site.
- 146 Council submits that even if the project in theory “maximises” the extraction of light firing clay, neither the FMP Project Report nor the proposed conditions contain a binding commitment or requirement for its removal or sale to the brick industry. Given the interest in the site’s clay/shale resource expressed by Mr Mackenzie and in the letter from Austral, it would appear unlikely that a “valuable resource” would not be extracted and on sold. These concerns could also be addressed by a condition requiring a minimum amount of extraction of light firing clay/shale, although this was not requested by council during the preparation of the draft conditions.
- 147 We note that the letter from the Department of Trade and Investment accepts that the project will recover an acceptable amount of the clay/shale resource. The letter states:

*The proposed modifications to the Project application would increase the amount of light fired clay/shale extracted from cells 1, 2 and 3 within the site. The facility would contribute to recycling in the area as well as provide a repository for wastes in the general community. The modifications to the project do not appear to result in the sterilisation of the clay/shale resource, due to the*



*progressive rehabilitation work detailed in the application and the nature of the recycling facility which allows for its further decommissioning and removal.*

*Accordingly, NSW Trade & Investment – Mineral Resources supports the approach to Resource recovery on the Orchard Hills site as it maintains access to valuable clay/shale resources. The Division also encourages complimentary uses of extractive resource sites which contribute to the general community.*

- 148 We are satisfied that the FMP Project represents an appropriate utilisation of the available resource of light-firing clay/shale, and that that material is the resource of most significant value at the site.

### **Resource extraction and waste emplacement**

- 149 Council contends that the proposal to simultaneously use the facility for resource extraction and waste emplacement will cause interactions that will result in unacceptable impacts.
- 150 The proposal involves a progressive operation wherein quarrying activities are carried out in a staged manner with filling of waste materials occurring at the same time in sub-sections of each of the major cells where extraction of clay/shale materials has been completed. This is shown diagrammatically in a series of staged drawings presented as Figures 2.10 to 2.15 in the FMPP Report.
- 151 As clay/shale extraction in each of the sub-cells is completed, a low permeability engineered compacted clay liner will be established, and then a leachate drainage layer (including leachate collection pipes) would be placed over the surface of the engineered liner. Waste materials will then be placed into the sub-cell. The wastes will first have been screened to remove recyclable and recoverable materials, and to ensure that the materials being placed in the cells satisfy the general solid waste (non-putrescible) classification.
- 152 Mr Grace and Dr Dever agree that it is common practice to conduct simultaneous excavation and landfilling at a landfill site; they noted that the

active landfill cell should be kept separate from the extraction activities at all times, and that this is also common practice. Mr Thomson acknowledged that he was not a landfill expert and accepted that the further evidence of Mr Grace and Dr Dever had addressed a number of his concerns about the resource extraction and waste emplacement methodology.

- 153 In his oral evidence, Mr Thomson identified two outstanding concerns being the batter slopes and the height of the stock piles. Mr Thomson acknowledged that it was feasible in engineering terms to amend the batter slope to 1 in 3 and limit the stock piles to 54m AHD. However, he was concerned that a change to the batter slope and use of an excavator which reached above the stock pile might affect the acoustic impacts of the proposal. Ms Brown and Mr Berzins also raised concerns about the potential exceedance of the height of the stockpiles and their visual impact, which we have discussed earlier.
- 154 The acoustic experts, Mr Clarke and Mr Cooper, subsequently provided a written confirmation that the noise modelling assumed a 1 in 3 batter slope and that the use of an excavator above the top of the stockpile will not have any unacceptable acoustic impact.
- 155 Dr Dever stated that the usual practice in relation to the design of landfill developments was for the consent authority to approve a concept design and then for the detailed engineering design of the emplacement cells to be approved by the Environment Protection Authority (EPA) prior to issue of the Environmental Protection Licence (EPL).
- 156 Dr Dever and Mr Grace were satisfied with the level of detail in the FMP Project Report. They agree that the project can be carried out in accordance with the concept design in the FMP Project and that a detailed design will be approved the EPA prior to issue of the EPL.

## Findings

- 157 Council submits that the figures in the FMP Project are “conceptual” and that further engineering plans will be required at a later stage. These further plans may result in changes and impacts that have not been assessed.
- 158 We accept the evidence of Dr Dever and Mr Grace that while it is possible to prepare the detailed design at the development approval stage this is not the usual practice and is not necessary to understand the impacts of the proposal.
- 159 Changes such as those to the batter slope are matters of detail. It is not necessary to have more detailed engineering drawings to understand and assess the impacts of what is proposed. The experts have agreed on the appropriate criteria for matters such as noise and visual impact. These criteria have been included as conditions of approval. Any further detailed design must also comply with these criteria.
- 160 The Court is satisfied that it is common practice for waste filling and extraction activities to take place simultaneously within the same facility, and that the interactions between the two activities, and subsequent environmental impacts have been adequately assessed and can be managed through the proposed conditions of approval.

## Traffic

- 161 The Minister and the council did not raise contentions in relation to traffic or transport, other than the extent of road works required to be undertaken by the applicant. The Minister’s contention (contention 9) proposed the inclusion of a condition requiring the council be paid a quarterly contribution for road maintenance of “4 cents per kilometre per tonne of material trucked either to or from the site along the 3.25 kilometre section of Patons Lane and Luddenham Road, between the site and Mamre Road” (levy).

162 Mr Hausfeld, Mr Meijer and Mr Hazell agree that, if a levy is required, it should only be applied to the 1.9km length of Luddenham Road from Patons Lane to Mamre Road on the basis that Patons Lane is being upgraded to cater for the design traffic loading of the proposal during its 25 years of operation.

163 Mr Hazell considers that a levy is not required as the applicant is undertaking upgrading works on Luddenham Road and Patons Lane. Mr Hausfeld and Mr Meijer also prefer upgrading works rather than a levy as these can be carried out prior to the commencement of operations, whereas a levy would pay for road works at the completion of operations.

164 The council contends (contention 8) that the proposal will significantly increase traffic movements and that conditions should be imposed which include:

- investigation of the existing bridge over South Creek on Luddenham Road to assess its capacity to accommodate the anticipated heavy vehicle traffic loadings from the proposed development and upgrade the bridge if necessary (condition 31).
- upgrade of Patons Lane and its ongoing maintenance for the life of the development (conditions 35(a) and 36).
- upgrade of Luddenham road by:
  - the provision of a 50mm thick asphalt overlay for 1.45km south of Mamre Road, and
  - pavement reconstruction for 450m north of Patons Lane (condition 35(b)).
- Upgrade the intersection of Mamre Road and Luddenham Road if B-Double vehicles are to be used (condition 35(c)).

165 The applicant has agreed to the proposed conditions, except for the requirement to provide the asphalt overlay for 1.45 km south of Luddenham Road. The applicant also does not accept the imposition of

levy in addition to the required road works. Council is not seeking a levy and this has not been included in the conditions filed by the parties on 2 March 2012.

- 166 The experts agree that the proposal will increase the percentage of heavy vehicle traffic from 5% to 12% of total traffic on Luddenham Road. In Mr Hausfeld and Mr Meijer's opinion, the pavement of Luddenham Road has not been constructed for these traffic loads and will require upgrading during the life of the development.
- 167 Mr Hazell referred to the testing that had been undertaken on behalf of the applicant of the existing condition of Luddenham Road (Fugro PMS Report). This indicates that the 1.45km section of Luddenham Road south of Mamre Road exceeds council's design standards and has a pavement life of 25 years, with or without, the additional traffic generated by the development. The 450m section of Luddenham Road north of Patons Lane will fail in a year, with or without, the development.
- 168 The applicant has agreed to upgrade the 450m section. In Mr Hazell's opinion, it would be unreasonable to also require the applicant to upgrade the other 1.45km, particularly as its design is adequate. However, if a contribution is required this should be based on the proportion of traffic generated by the development, which the experts agree is 10%. This would equate to an agreed amount of \$31,200.
- 169 Mr Hausfeld and Mr Meijer did not contest the methodology in the Fugro PMS Report for determining the design traffic loading but raised concerns about its conclusions on the strength of the existing pavement. They consider the applicant should carry out the required works to both sections of Luddenham Road.

## **Findings**

- 170 The DGs Requirements identified traffic and transport as a key issue to be considered in the Environmental Assessment. The DGs Report did not

raise any unacceptable traffic and transport impacts nor was it a reason for refusal by the Minister.

- 171 The community submissions raised concerns about the increase in traffic but these were not contended by the Minister or the council, other than in relation to land use conflicts. However, no expert evidence was provided that indicated that the increase in traffic was beyond what is expected for Luddenham Road, which is classified as a sub arterial road. Mr Hausfeld and Mr Meijer accepted the road's classification but considered it functioned as a low order regional road. However, their main concern was to ensure that the increase in traffic from the development would not result in maintenance costs to council.
- 172 The applicant has agreed to upgrade the 450m section of the road north of Patons Lane. It has also agreed to upgrade Patons Lane and maintain it through the life of the development. However, both these works are necessary for the development to proceed. Particularly, the upgrade to Patons Lane, which provides access principally to the development site.
- 173 The key disagreement between the council and the applicant is whether a condition should also be imposed requiring an upgrade to the pavement of 1.45km of Luddenham Road south of Mamre Road. The council is not seeking the imposition of the levy, which would pay for works to Luddenham Road at the conclusion of the development. Rather, the council is seeking to have the upgrading works to Luddenham Road done prior to the development to ensure that it can carry the expected increase in traffic without requiring significant maintenance during the life of the development.
- 174 We accept the evidence of Mr Hazell that Luddenham Road is a sub-arterial road and should be designed to cater for heavy vehicles. Furthermore, based on the test results in the Fugro PMS report the pavement design of the 1.45km section of Luddenham Road south of Mamre Road is likely to exceed council's standards. However, over time

the vehicles generated by the development will result in damage and increased maintenance to the road. It is therefore appropriate that the development be required to pay for these works based on the proportion of traffic it generates, either through an upfront monetary contribution or a levy.

#### **Other issues raised by objectors**

- 175 The objectors raised a number of issues which were initially contended by the Minister and/or the council but were resolved through the amendments to the project application, the agreement of the experts or by the imposition of conditions. These issues include the need for the project, noise impacts and contamination. Although the issues are resolved between the parties they remain outstanding concerns of the objectors and are briefly discussed below:

##### *Need for the Project*

- 176 The DGs Report deals with the need for the Preferred Project (Section 5.1). It concludes that “the Project is generally consistent with the State Government’s waste policies in terms of waste recovery and recycling, given there is already a concentration of landfill capacity in Western Sydney, the Department does not consider there is a demonstrable need for a project of this scale, in this particular area at this time”.
- 177 The concerns raised in the DGs Report related to need for a landfill project of the scale then proposed. The landfill capacity has been reduced from the 7.8 million tonnes initially proposed to 4.3 million tonnes in the FMP Project. The Minister and the Council no longer contend that there is no demonstrated need for the project. The significant reduction in scale has alleviated this concern.

##### *Noise, air quality and leachate*

- 178 The DGs Report deals with the potential noise impacts of the Preferred Project (Section 5.1). It concludes that “Given the proximity of the residents in the Vines Estate, the Department considers there is an

unacceptable level of uncertainty and risk as to whether the noise impact can be adequately managed over the life of the proposal.”

- 179 The Consolidated Acoustic Report prepared by Wilkinson and Murray dated February 2012 (Acoustic Report) for the FMP Project proposes a range of noise measures (section 9) which include earth mounds at the boundaries and within the site, the containment of fixed recycling and reprocessing equipment within acoustic enclosures and moveable barriers. It also proposes real time noise monitoring to be conducted from the Vines Estate and the preparation of noise management plans.
- 180 Following the provision of the Acoustic Report, Mr Cooper and Mr Clarke agreed that the proposal would meet the relevant criteria. The Minister and the council no longer contend that the project would result in unacceptable noise impacts.
- 181 Similarly the experts on leachate and air quality reached agreement and these issues were not pressed by either the Minister or the council.

#### *Contamination*

- 182 The previous owner of the site constructed the bund walls (which are between 5 and 19m high) and included illegally imported materials. The walls included virgin excavated natural material (VENM), soil, C&D wastes and some natural materials excavated from the site itself. Investigations by Douglas Partners confirmed that C&D wastes including asbestos-containing materials are present in the south-western and eastern bund walls. No asbestos materials were found in the other bund walls.
- 183 Issues relating to the presence of asbestos contamination in the bund walls were not raised as a significant concern in the submissions made in response to the MP Project. Neither the Minister nor the council raised it as a contention, although some works were proposed to the bund walls. Contamination was also not raised as an issue in the DGs Report or as a reason for refusal by the Minister.



184 The FMP Project includes amendments which were made in response to concerns about the visual impact and final landform of the earlier project. The amendments include a considerable reduction in the height and volume of the bund walls. As a result of these amendments, the Minister and the council raised contentions in relation to asbestos contamination, which was also raised as a significant concern in the community's submissions in response to the FMP Project.

185 During the hearing, the issues in dispute between Mr Clay and Mr Nash which related to the level of investigation and the timing of any further investigation were resolved by the Applicant's agreement to a condition which requires an Asbestos and Contamination Management Plan which includes, inter alia, a Section B Site Audit Statement under the *Contaminated Land Management Act* (CLM Act) and a regime for the issue of Section A Site Audit Statements under the CLM Act. A condition was also agreed which limits the amount of special waste (asbestos) that can be placed in the landfill.

### **Public interest**

186 The Minister and the applicant made competing submissions as to whether the proposal was in the public interest. These submissions state:

#### ***Minister's submissions***

*The Court must consider the public interest in its assessment of the project (Minister for Planning v Walker (2008) 161 LGERA 423 at [39]).*

*According to the evidence of Ms Brown, approval of the project would not be in the public interest (exhibit 4, pp 17 – 24).*

*Although noting the project is not a Part 4 development application, it has been held that the community responses are aspects of the public interest within the meaning of s.79C(1)(e) in securing the advancement of one of the express objects of the EPA Act, namely, "to provide increased opportunity for public involvement and participation in environmental planning and assessment" (New Century Developments at [58]). Because that*

object applies equally to Part 3A, the community responses are also aspects of the public interest in the context of the project.

*In New Century Developments, the Court held at [61] that the consent authority must not “blindly accept” the subjective fears and concerns expressed in the public submissions and that whilst such views must be taken into consideration, there must be evidence that can be objectively assessed before a finding can be made of an adverse effect upon the amenity of the area.*

*Here, however, some of the concerns raised by members of the public are supported by expert town planning evidence given in the proceedings (as detailed above, namely land use conflicts, visual impact and contamination evidence led by the first respondent [and the second respondent]). Accordingly, there are objective, specific, concrete and observable likely adverse consequences to the community if the project is approved (see New Century Developments at [61] and [63]). Some of the fears and concerns of residents are rational and therefore have justified foundation (see New Century Developments at [62]).*

*The decision in New Century Developments and the findings made particularly at [64] are clearly distinguishable from the present project. That is, to the extent that the “fears and concerns” of residents repeat matters raised by Ms Brown in her expert evidence, those “fears and concerns” deserve significant weight in the Court’s assessment of the project.*

*The evidence of Mr Mike George, the representative of RAID, must also be recalled. He gave evidence on site on 3 August 2011 and in Court on 23 February 2012. The community’s opposition to the project is not from a small group of residents who are likely to suffer direct amenity impacts, but rather the opposition is from an entire community who had expected the site would by now have been rehabilitated and integrated as rural country in this rural residential area. That community opposes the introduction of an intensive industrial use (which includes an entirely new intensive industrial use, namely land filling) for another 25 years. Ms Brown summarises the pertinent matters raised in public submissions in her report. The local residents with respect correctly identify that the current and future intended land use for the locality seen through the prism of geographic or site specific planning controls is a rural residential landscape. The Court would refuse the application on the ground that it is not in the public interest.*

### **Applicant’s submissions**

*The interests of the objectors are a legitimate element of the public interest but there are a number of other facets of the broader public interest involved with the site. The first is the public interest in remediating the site. The second is the public interest in extracting the scarce light firing clay shale resource on the site. The third is the public benefit in reprocessing and recycling waste.*

*The fourth is the public interest in satisfying the demand for land fill. The fifth is returning the land to agricultural use.*

*Again it is a matter of balancing the public interest. The Council advocates remediation and extraction from 40 to 110 years. The residents advocate remediation and nothing else. The applicant proposes a balance. Remediation, improvement in visual impact, extraction of scarce resources, reprocessing and recycling, land filling and return of the site to its zoned use in a final landform which is visually acceptable and in character.*

*The applicant submits that the public interest is well served by the proposed project.*

## Findings

187 The key difference between these submissions is that the Minister focuses on the community concerns as representing the public interest, whereas the Applicant deals with the broader aspects of public interest. The Minister's submissions also give weight to the issues of visual impact and land use conflict raised in the community submissions on the basis that these issues are supported by expert evidence.

188 Clause 8B of the Regulations requires the DGs Report to include:

*(b) any aspect of the public interest that the Director General considers relevant to the project,*

*.....*

*(d) copies of submissions received by the Director General in connection with public consultation under Section 75 H or a summary of the issues raised in those submissions.*

189 Section 5.6 of the DGs Report considered the public interest aspects of the Preferred Project. It states:

*Generally, the 'public interest' relates to the overall welfare of the community as a result of a proposal. The Department considers there are two levels of public interest to assess in relation to this project. Firstly, the interest of the broader community of Sydney and NSW in relation to resource recovery, and secondly, the welfare of the community surrounding the site.*

*The Project involves recycling and resource recovery of significant amounts of waste that would otherwise go directly to landfill. The Department acknowledges that the proposal is generally consistent with the State Government's waste policies in this regard, and would*

*serve the broad public interest by diverting waste away from landfill for the majority of the project's life.*

*However, as discussed earlier in 'project need', the Department does not agree with the Proponent's claims that a non-putrescible landfill of this scale is needed in this particular region, at this time. Therefore the Department does not consider this particular project, at this scale, serves the broader public interest in this regard.*

*The submissions reveal that the community surrounding the site believe that there is insufficient justification for a landfill / waste facility of this scale at Patons Lane Orchard Hills, and the project is 'not in their interest'. Further, the proposal under consideration has been unanimously opposed by the community's own Council and Council staff.*

*Following submission of the Preferred Project report, the Environmental Assessment predicts that the Project would comply with all necessary amenity criteria (e.g. noise and air quality, with the exception of one exceedance). The Department acknowledges the efforts the proponent made following the public exhibition to address potential exceedances. Whilst accepting the technical findings of the assessment, as explained above, the Department is still not confident that the Project will operate without incident, particularly in relation to noise. The risk is high. In addition, if approved, the project would require close regulatory scrutiny over a sustained period, which is a significant impost on government at both a State and local level.*

*The Department further acknowledges that it is in the public interest to rehabilitate the site, and that there are a number of unfortunate legacy issues to deal with on the site as well. However, whilst the project represents a particular means of rehabilitating the site, as discussed above, the Project would result in an unsightly final landform, inconsistent with the surrounding landscape, which is unacceptable. As discussed in section 5.2, this is a negative outcome of the project that the community would have to endure in perpetuity.*

#### *Conclusion*

*The Department has considered the issue of the public interest closely. The assessment reveals there are no obvious amenity benefits to the surrounding residents as a result of the Project, only impacts in the short, mid and long term. On balance, the Department does not consider the public benefit of an additional resource recovery facility outweighs the impacts that the proposal would have on the surrounding community. As a consequence, the Department does not consider the Project is in the public interest.*

- 190 The DGs Report recognises the public benefit of providing a resource recovery facility and of rehabilitating the site but considers these benefits are outweighed by the concerns relating to the need for a project of the scale then proposed, which is also not supported by the community, as

well as the potential to exceed controls, such as noise and the unacceptable final landform.

- 191 As discussed above, the FMP Project has largely addressed the concerns raised in the DGs report. It has significantly reduced the amount of landfill and consequently the need for the project is no longer raised as a contention. The impacts such as noise, air quality and contamination are also agreed by the experts to be within acceptable limits and are no longer pressed as contentions. The final landform is also agreed by the experts to be acceptable.
- 192 Nevertheless, the community submissions are a relevant consideration in their own right and as an important aspect of the public interest.
- 193 As discussed above, there have been a significant and increasing number of submissions made in response to each exhibition of the Project. The FMP Project attracted 18,210 community submissions. The applicant notes that of these, 15 were individual submissions and the majority were proforma letters. The proforma letter described the development as being “to establish an industrial waste resource management facility”. It made no reference to the other proposed uses or to the existing approval for the site or to its current condition.
- 194 Nonetheless, we acknowledge that the community is opposed to the proposed development. If the number of submissions and the strong community opposition were the only aspect of public interest that we had to consider, then there may be strong reasons why the application should be refused.
- 195 Although the application is under Part 3A of the Act, the consideration of Lloyd J in *New Century Developments* provides guidance as to the appropriate weight to be given to community submissions. His Honour at [61] - [64] states:

61 In circumstances such as the present case, however, the consent authority must not blindly accept the subjective fears and concerns expressed in the public submissions. Whilst such views must be taken into consideration, there must be evidence that can be objectively assessed before a finding can be made of an adverse effect upon the amenity of the area (Dixon at [53]). In *Broad, de Jersey J* explained (at 304) that whilst the court is clearly entitled to have regard to the views of residents of the area, those views will be accorded little, if any, weight if there is no objective, specific, concrete, observable likely consequence of the establishment of the proposed use.

62 A fear or concern without rational or justified foundation is not a matter which, by itself, can be considered as an amenity or social impact pursuant to s 79C(1) of the EP&A Act (*Newton v Wyong Shire Council, NSWLEC, McClelland J*, 6 September 1983, unreported, *Jarasius v Forestry Commission of New South Wales* (1990) 71 LGRA 79 at 93 per Hemmings J; *Perry Properties Pty Ltd v Ashfield Municipal Council* (2000) 110 LGERA 345 at 350 per Cowdroy J). Where there is no evidence to support a rational fear it will be irrelevant that members of the community may have modified their behaviour arising from such an unjustified fear (Dixon at [71]).

63 It follows that in forming an opinion on the probable impact of a proposed development on the amenity of an area, tangible or otherwise, a court would prefer views from residents which are based upon specific, concrete, likely effects of the proposed development. This is consistent with the statement of Mason P in *Fairfield City Council v Liu* at [2] that "... the demonstrable social effect of a particular ...use is relevant under s 90(1)(d) [now section s 79C]" (see also Dixon at [48]).

64 The assessment of the specific objections raised by the local residents shows that the concerns raised by them, objectively assessed, must be afforded little weight. As is shown by the consideration of the specific objections, discussed above, they appear to have little basis in fact.

- 196 The Minister submits that the residents' concerns regarding land use conflict and visual impact are supported by expert evidence and therefore have a justified foundation and should be given weight. For the reasons we have discussed above, we have found that neither the visual impact of the proposal nor the potential land use conflicts would warrant its refusal.
- 197 The community raise concerns regarding a number of other matters such as noise, air quality, traffic and contamination. These issues were resolved by expert evidence and not pressed by either the Minister or the council as reasons for refusal, other than as contributing to potential land use conflicts by impacting on residential amenity. As discussed above, we accept that the proposal will effect the amenity of the area. However, the

experts have agreed that the effect, when measured against the established objective criteria, is acceptable.

- 198 We note that the proposed truck movements will impact on the amenity of 202 Luddenham Road, which adjoins Patons Lane. However, the truck movements are not beyond what is anticipated for a sub arterial road and the Acoustic Report concluded that the operational traffic noise levels at this property (the potentially most affected) are well within the relevant criteria. A condition is proposed which requires that landscaping be provided, if agreed to by the owner, to minimise visual and acoustic impacts of the proposal. The condition should also include the requirement for fencing.
- 199 The issues raised in the community submissions would therefore not, of themselves, warrant refusal of the application.
- 200 Consistent with the DGs Report and the submissions of the applicant, the public interest is broader than the community submissions and requires a balancing of the competing issues. While we acknowledge the strong community concern regarding the project, we consider that the significant changes that have been made to the project address the concerns raised in the DGs Report. On balance, we find that the benefits in the FMP Project of progressive remediation, extraction of clay/shale resources, reprocessing and recycling, land filling and the return of the site to a final landform which is visually acceptable and in character with the local area outweigh the impacts during the life of the proposal on the surrounding community. We therefore find that the proposal is in the public interest.

#### **Other issues raised by council**

- 201 In its submissions, council raised concerns that an approval of the FMP Project would not ensure that proper planning outcomes are achieved or provide terms of approval that are enforceable. Council's submissions are largely based on the premise that while the real and potential impacts of the proposal are known the method of dealing with these impacts relies on

further management plans and the implementation of conditions of consent. Council submits that "certain aspects of the proposal, its conduct and management (i.e. what is to be done and how it is to be done) are yet to be formulated". Any consent would therefore be uncertain and difficult to enforce. The Minister did not make a similar submission.

- 202 The applicant is seeking consent for the development in the FMP Project Report and its supporting documents. Both the Minister and the council originally raised contentions in relation to the provision of further information, however these were not pressed as the required information was provided. The information that forms the project application has been assessed by the relevant experts and relevant public authorities that have recommended conditions of approval. These conditions include the relevant criteria that the development is to meet and the requirement for management plans which provide greater detail as to how the development is to operate to ensure that the criteria are met.
- 203 The management plans are to be prepared by independent experts, in consultation with relevant authorities and approved by the Director General prior to the commencement of site establishment. These management plans cover matters such as contamination and asbestos, air quality and greenhouse gas, soil water and leachate, noise, traffic and rehabilitation.
- 204 A number of these management plans are included in the recommended conditions of approval provided by the OEH. The applicant submits that management plans are a usual requirement for a landfill/extraction development and that there is nothing unusual about the recommended conditions of the OEH. We accept this submission.
- 205 The Court's Practice Direction for Class 1 Appeals and the Directions made on in relation to the conduct of the hearing required the Minister to prepare Draft conditions of approval prior to the hearing. These conditions were amended during and after the hearing in response to expert evidence and agreements between the parties. Council has been part of this



process, and it has had the opportunity to raise any concerns about the certainty or enforceability of any of the proposed conditions.

- 206 The conditions, other than the conditions discussed below, are agreed between the parties. The disputed conditions include the documents that should be included in Schedule 6 and we accept that further amendments need to be made to this and other conditions before any consent can be granted.

## **Conditions**

- 207 The parties filed conditions on 2 March 2012. The following conditions are in dispute:

### **Schedule 3, Condition 6 – Engineering Plans**

- 208 Condition 6 requires detailed engineering plans to be prepared and certified by a registered NPER3 engineer prior to commencement of site establishment. It specifies a number of matters which the plans must include. Council submits that condition 6(e) should be included to require the amended staging plans to be accompanied by further assessment reports. Further, council proposes a new condition 6A which requires these documents to be submitted to the Director General. The Minister and the applicant oppose these changes.
- 209 Council's comment: In relation to 6(e), the changes to the project as a result of the amended staging plans are not known, and have not been provided. The application is uncertain in that regard. The amenity impacts resulting from the changes should be assessed. In relation to condition 6A, the plans should be provided prior to the pre-site establishment audit to ensure consistency with all other application documents.
- 210 Minister's comment: It is inappropriate to require further assessment post-approval, as it is too uncertain.

- 211 Applicant's comment: The effect of conditions 6(e) and 6A as proposed by the Council is that the detailed engineering plans cannot be inconsistent with the FMP Project Report. For this reason, no changes to the acoustic, visual, groundwater/leachate reports can flow from the engineering plans.

### **Findings**

- 212 As discussed in the section on the resource extraction and waste emplacement, we accept the evidence of Mr Grace and Dr Dever, that it is the usual practice to require further detailed engineering design. The plans must be consistent with the FMP Project Report and must comply with the other conditions of consent, which include a height limit for the contingency stockpile and noise criteria. Further assessment of these matters is therefore not required. None the less, the wording of Condition 6(e) should be amended to be clearer and incorporate any relevant requirements in the Joint Report on Extraction/Emplacement Methodology (Ex 21).

### **Schedule 3, Condition 7 and 8 (9 and 10) – Site Rehabilitation and Performance Bond**

- 213 The Minister and the applicant propose different versions of the condition. The key difference between these different versions is that the Minister requires a bond, prior to operation, for the area within the Project Site Boundary. The applicant proposes a bond for the area of the site which is the subject of extraction or filling works from time to time.
- 214 Minister's comment: The financial assurance required under the EPL is primarily for the purposes of covering the costs of incidents such as an emergency pollution incident or other matters arising under the licence. The Minister considers it important to have a bond specifically directed towards rehabilitation, whilst recognising that this bond ought to be calculated taken into account the financial assurance required under the EPL and in consultation with OEH.

215 As the bond relates to rehabilitation, the bond should be calculated based on the total area to be rehabilitated. The area proposed to be rehabilitated is shown on Figure 2.22 Final Landform and Landscaping (amended) and essentially covers the whole site. For this reason, the Minister seeks to include the two plans at schedule 8 which clearly show both the level of site disturbance and the proposed rehabilitation. It is not appropriate for the bond to be calculated for “the area of the site which is the subject of extraction or filling works” as the proposed rehabilitation extends to almost the entire site including, importantly, the bunds.

216 In relation to timing, the Minister seeks that the whole of the bond be provided upfront with it being refunded gradually over the course of the project when rehabilitation works are completed. This is important for two reasons:

- The site is already in a disturbed state and the proposal is to rehabilitate the whole of the site. It is nonsensical to make the bond payable having regard to “those parts of the site which are being extracted or landfilled at any one time” as those parts of the site are already disturbed.
- The payment of the bond upfront provides incentive to the proponent to complete rehabilitation works as it will result in a partial and ultimately total refund of the bond. Progressive payment of the bond according to the extracting/filling works to be carried out would mean that no bond is ever payable with respect to the bunds and that the bond would grow over time despite increased rehabilitation occurring. The bond should be highest when there is the most rehabilitation work to be done (in the first few years of the project) and lowest when there is the least rehabilitation work to be done (at the end of the project).

217 Council’s comment: Council concurs with the Minister, that financial assurance for the rehabilitation works, which is held pursuant to the conditions of approval (as distinct from the licence) is necessary. The bond

must be adequate to cover the cost of implementing the rehabilitation works at any stage of the project. The financial assurance should not be limited to the areas of 'active extraction and emplacement' because rehabilitation is also required for parts of the site which are utilised through the life of the project, such as the recycling area and other parts of the site.

- 218 Applicant's comment: The applicant will be required to pay a financial assurance as a condition of the EPL. The *Protection of the Environment Operations Act* (POEO Act) provides that such assurance may include rehabilitation works. It is unreasonable to require the Applicant to pay two separate financial assurances for the same project. The extent of the bond should relate to those parts of the site which are being extracted or landfilled at any one time. The applicant's position is that it will be unreasonable to require the applicant to outlay the \$3 million bond for 25 years (which will have a consequential cost impact) in circumstances where the project will be worked on sequentially and the project should be bonded according to the stages worked from time to time.

## Findings

- 219 We accept the Minister's version. The Minister recognises that there will be a requirement for a bond as part of the EPL and that this will be taken into consideration in determining the bond required under Condition 7 so that the Proponent is not required to bond the rehabilitation of the site twice. The bond required by Condition 7 is to ensure that the site is progressively remediated to provide the final landform and landscaping in Figure 2.22 of the FMP Project Report. The progressive remediation of the site was a key determining factor in our consideration of the project.
- 220 As a result of previous activities, the site is degraded and requires remediation. The bond should therefore apply to the whole project site including the bunds. A significant proportion of the rehabilitation work will occur in the establishment phase and as the site is progressively rehabilitated the bond can be reduced.

**Schedule 3, Condition 13 (14) – Surrender of existing development consent(s)**

- 221 The council and the applicant proposed different versions of the condition. The key difference is whether the existing development consent for works to Patons Lane (DA03/0627) should be surrendered.
- 222 Council's comment: The development consent for Patons Lane is required to be surrendered because the impact on Patons Lane by the FMP Project Report gives rise to the need for further works due to the additional truck movements. The Applicant's traffic expert agreed that works to Patons Lane should be undertaken in accordance with design specifications different to those in the Patons Lane consent. Condition 35(a) sets out the requirements for the Patons Lane road works. The Applicant does not oppose those conditions. The road work approval for those works will supersede the current approval for Patons Lane works. Council seeks the surrender of the consent, as it would not be good administrative practice to have two sets of approvals/specifications in existence with respect to similar works on the same road.
- 223 Applicant's comment: This dispute relates to an amendment to the condition sought by the Council but not the Minister. The applicant proposes to construct Patons Lane pursuant to the existing development consent. This consent permitted upgrading of Patons Lane and construction of a new intersection with Luddenham Rd. The intersection works have been completed and the applicant's proposal is and has always been to complete the works under that consent as indicated in the FMP Project Report. None of the contentions raised in the proceedings argue that this should not be allowed to be done and the evidence does not suggest that a new consent (or a modification to the consent) is required. A modification to the consent for Patons Lane will be done if necessary, however the Applicant's position is that the section 138 Roads Act approval can deal with the updated design specifications as part of that approval.

## Findings

- 224 We accept the applicant's submission. The development consent for Patons Lane has been commenced as the intersection with Patons Lane has been constructed. There are mechanisms, other than the surrender of the consent, to address council's concern about the different design specifications and administrative practices. These include the imposition of a condition under s 80A of the EPA Act requiring the modification of DA03/0627 or, in the absence of any submissions to the contrary, through the s 138 Roads Act approval.

### **Schedule 3, Condition 16 (17) - Project duration**

- 225 The council and the Minister propose a different version of the condition to that proposed by the applicant. The key difference is whether the duration of the consent should be 25 years, including or excluding the 6 months establishment stage.
- 226 Minister and council's comment: The FMP Project Report defines the project life as 25 years and the Project has been assessed on this basis. Council notes that the project life in the last version of the project was 24 years. The FMP Project Report does not explain that it seeks an increase from the previously proposed 24 years to 25 years project life, it is silent on this point. There is no evidence as to why the 24 years proposed in July 2011 is now sought to be increased to 25 years.
- 227 The hours of operation set out in the conditions have not changed since the commencement of the proceedings. There is no evidence that the impact of the hours of operations condition is such as to require, effectively, an extended period for the life of the development. The applicant has had ample time to recalculate the length of time required to complete the project, and provide evidence as to this, but has not done so.
- 228 Applicant's comment: the FMP Project Report has been prepared on the basis that the 25 year operation period commences following completion of the site establishment period. The change from 24 years in the MP Project

Report to 25 years in the FMP Project Report is to take into account the additional extraction that will be taking place in Cell 2 (ie from RL 37 to RL 28). Further restriction of the life of the consent in circumstances where condition 23 reduces the hours of operation from those proposed in the FMP Project Report is unreasonable.

### **Findings**

229 We accept the applicant's version of the condition. The different period proposed in the MP Project of 24 years and that proposed in the earlier Preferred Project of 30 years are of little relevance to the current application for which consent is sought. The difference between the proposed conditions is a six months period. The FMP Project Report, including its staging is based on a 25 year period, excluding the six month establishment phase. The Project application has been assessed on this basis. A shorter period would require changes to the stages for extraction, emplacement and rehabilitation, which are not before the Court.

### **Schedule 3, Condition 23A – Resource extraction condition**

230 Council seeks to impose a new condition which would require amendments to the proposal to maximise excavation of the clay/shale resource (17m AHD). This issue has been discussed above. The condition is not imposed.

### **Schedule 4, Condition 24 (25) – operating hours for heavy vehicles**

231 The Minister and the council propose a different version of the condition to that proposed by the applicant. The key difference is whether heavy trucks should be able to exit the site up to 15 minutes after the operating hours approved for the site.

232 Minister and Council's comments: All activities on the site should cease in time for heavy vehicles to be ready to exit the site no later than 5pm on weekdays and 2pm on a Saturday to minimise amenity impacts on surrounding residents. This will also ensure compliance with operating hours conditions.

- 233 Applicant's comments: The Applicant says vehicles exiting the site by 5.15pm on weekdays and 2.15pm on Saturdays is consistent with the requirement in condition 23 that allows operations of the site (including parts of the site remote from the site gate) to be carried out until 5pm and 2pm respectively. The hours of operation are already reduced from those proposed in the FMP Project Report and ought not be further reduced by a condition which would, in the case of parts of the site remote from the exit gate, effectively require operations to cease earlier than required by condition 23.

### **Findings**

- 234 We accept the Minister and council's version of the condition. All activities on the site should cease in time for heavy trucks to leave the site by the specified closing time to ensure that impacts on the surrounding area are minimised and the operating hours are complied with.

### **Schedule 5, Condition 5 – Landfill environmental management plan**

- 235 The Minister and council propose that the Landfill environmental management plan (LEMP) be approved prior to the commencement of site establishment. The applicant seeks to amend the condition to require the approval prior to the approval in the EPL to permit the land filling of waste.
- 236 Council and Minister's comments: The consent has been structured to provide that all management plans and reports are provided either prior to site establishment or prior to operation (both defined terms) to assist in the effective management of the consent. The applicant's amendment creates an additional point at which the plan is to be prepared. Given the interrelationship between the various plans and the complexity of the activities on site, the Minister and Council would prefer the plan to be provided prior to site establishment works commence. Furthermore, the site establishment works entail emplacement of waste into the landfill and as such a comprehensive LEMP should be provided prior to this time.



- 237 Applicant's comments: The Site Establishment works comprise works other than landfilling. Any landfilling that is to occur during Site Establishment must be the subject of an EPL. The amendments sought by the applicant ensure that the LEMP will be prepared prior to landfilling whilst still allowing the applicant to commence other Site Establishment works in the interim.

### **Findings**

- 238 We accept the council and Minister's version of the condition. There is likely to be interrelationship between the LEMP and other management plans and it simplifies the consent process if the management plans are prepared at consistent (and defined) stages.

### **Schedule 6 – Documents comprising the project**

- 239 Condition 2 requires that the Proponent shall carry out the works generally in accordance with specific documents, including the documents listed in Schedule 6. The parties disagree on the documents that should be included in Schedule 6.
- 240 Minister and council's comment: For abundance of caution, all documents that may have any relevance to the current proposal, including previous versions of the Preferred Project Report, the statements of evidence and joint reports should be included in this list as many of them include commitments from the Applicant or additional drawings or details which the Applicant commits to or relies on to describe the works. Experts have relied on this in order to be satisfied. The documents in this schedule will be provided to the auditor as per condition 9 as part of the process of determining what documents or parts of documents comprise the project. Documents that are no longer relevant will be disregarded in the auditing process.
- 241 Applicant's comment: The MP Project Report (with the exception of Appendices 1 and 3) has been superseded by the FMP Project Report and is no longer necessary to reference, likewise with the Overview of

Amendments to the MP Project Report. By including these documents, it adds an unnecessary review for the auditor. Further, the applicant says that all relevant conditions flowing from the various joint reports have already been accommodated in these conditions of consent, and therefore the joint reports do not need to be included and by doing so is likely to lead to confusion.

## Findings

- 242 In principle, we accept the Applicant's submission. Condition 2 requires the works to be carried out generally in accordance with specific documents in Schedule 6. The FMP Project Report and its supporting information are the application for which the consent is sought. Neither the council nor the Minister pressed the contention that further information was required. The documents therefore adequately describe the Project and its operation and are what have been assessed to determine its impacts. To include in Schedule 6, earlier versions of the Project, which have now been superseded by the FMP Project Report, would create uncertainty as to what is proposed.
- 243 We accept that the joint reports should not be included in Schedule 6 and that any relevant requirements should be included as conditions. However, we are not satisfied that this has been done. Notably, some conditions refer to a joint report, such as Schedule 3 - Condition 6, or some joint reports refer to the requirement for conditions, such as real time noise monitoring (Ex 15, item 2). The Parties need to demonstrate that the relevant conditions recommended in the joint reports have been included as conditions. It is not sufficient to refer to joint reports that make general recommendations or that have been superseded.
- 244 Similarly if there are further commitments, drawings or details in the earlier documents that the council or the Minister consider form part of the project, these should be included as conditions.

### Other conditions

245 There are other changes to the conditions which we will provide to the parties.

### Conclusion

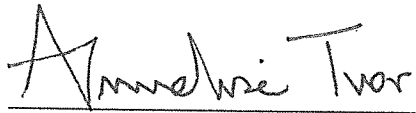
246 We have considered and acknowledge the strong community concern regarding the proposal, however, the significant changes that have been made to the project address the DGs Requirements, the concerns raised in the DGs Report, the reasons for refusal by the Minister and the contentions between the parties.

247 These changes include a significant reduction in the amount of waste proposed to be landfilled and a final landform which is consistent with the character of the area, as well as increased clay/shale extraction.

248 We note the current degraded condition of the site and the comments in the DGs Report that some form of economically viable development is required to facilitate rehabilitation of the site. We have also been mindful of council's position that extractive industry on the site should continue to maximise the clay/shale resource, which would further prolong the use of the site for industrial activities.

249 We have considered the proposal within the context of the relevant environmental planning instruments and their strategic objectives for the area. On balance, we find that the benefits in the FMP Project of progressive remediation, extraction of clay/shale resources, reprocessing and recycling, land filling and the return of the site to a final landform which is visually acceptable and in character with the local area outweigh the potential impacts during the life of the proposal. The experts agree that these impacts, such as noise, traffic and air quality, are acceptable when measured against the established objective criteria.

250 We therefore find that the Project Application may be approved with the modifications in the FMP Project Report and subject to the agreed conditions, amended as discussed above. We will make Directions, in consultation with the parties, for the provision of the final amended conditions, following which orders will be made in chambers.



**Annelise Tuor**  
**Commissioner of the Court**



**David Johnson**  
**A/Commissioner of the Court**

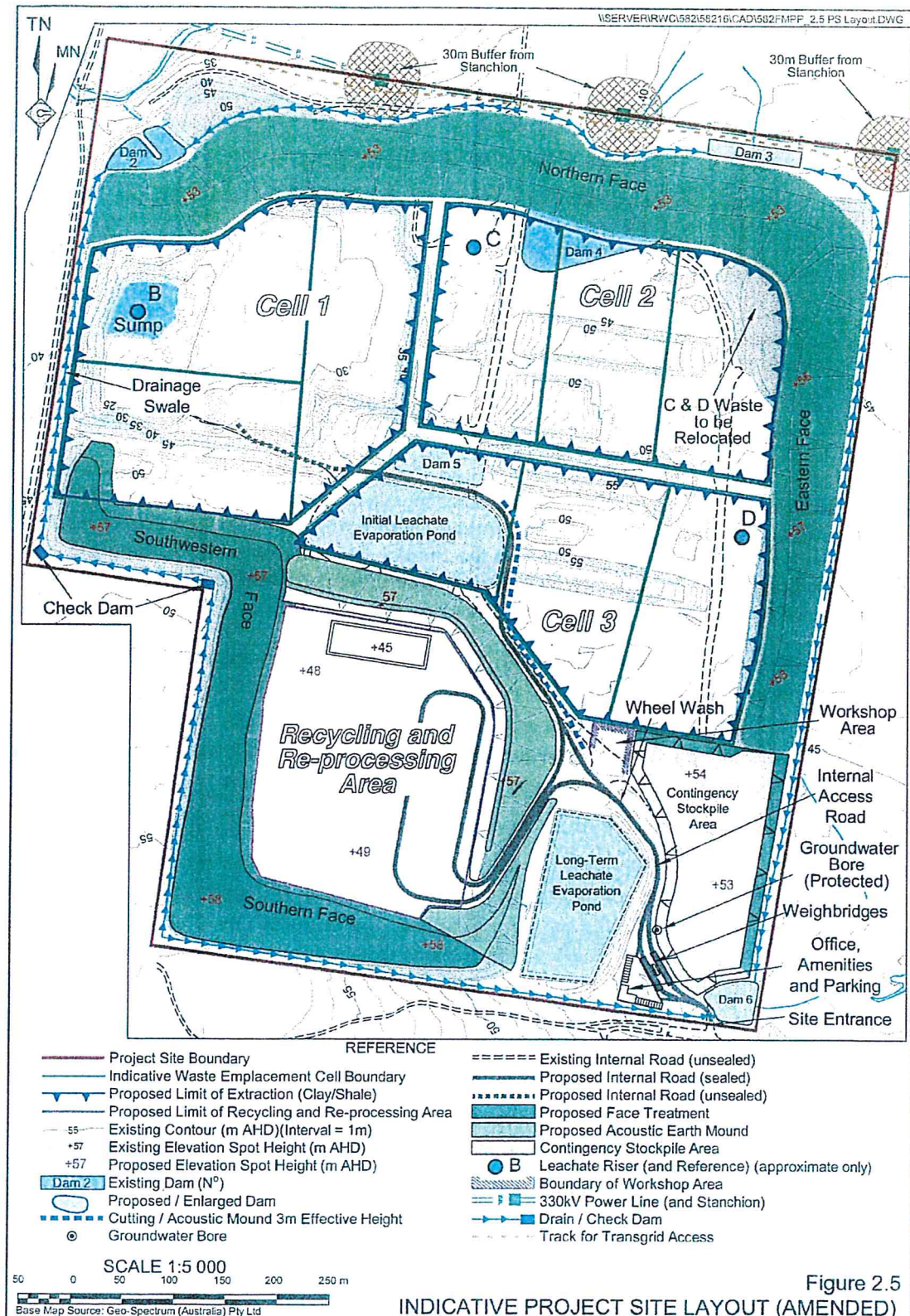
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# Attachment 1

FURTHER MODIFIED PREFERRED  
PROJECT REPORT  
Report No. 582/16

- 15 -

DELLARA PTY LTD  
Orchard Hills Waste and  
Resource Management Facility



R. W. CORKERY & CO. PTY. LIMITED



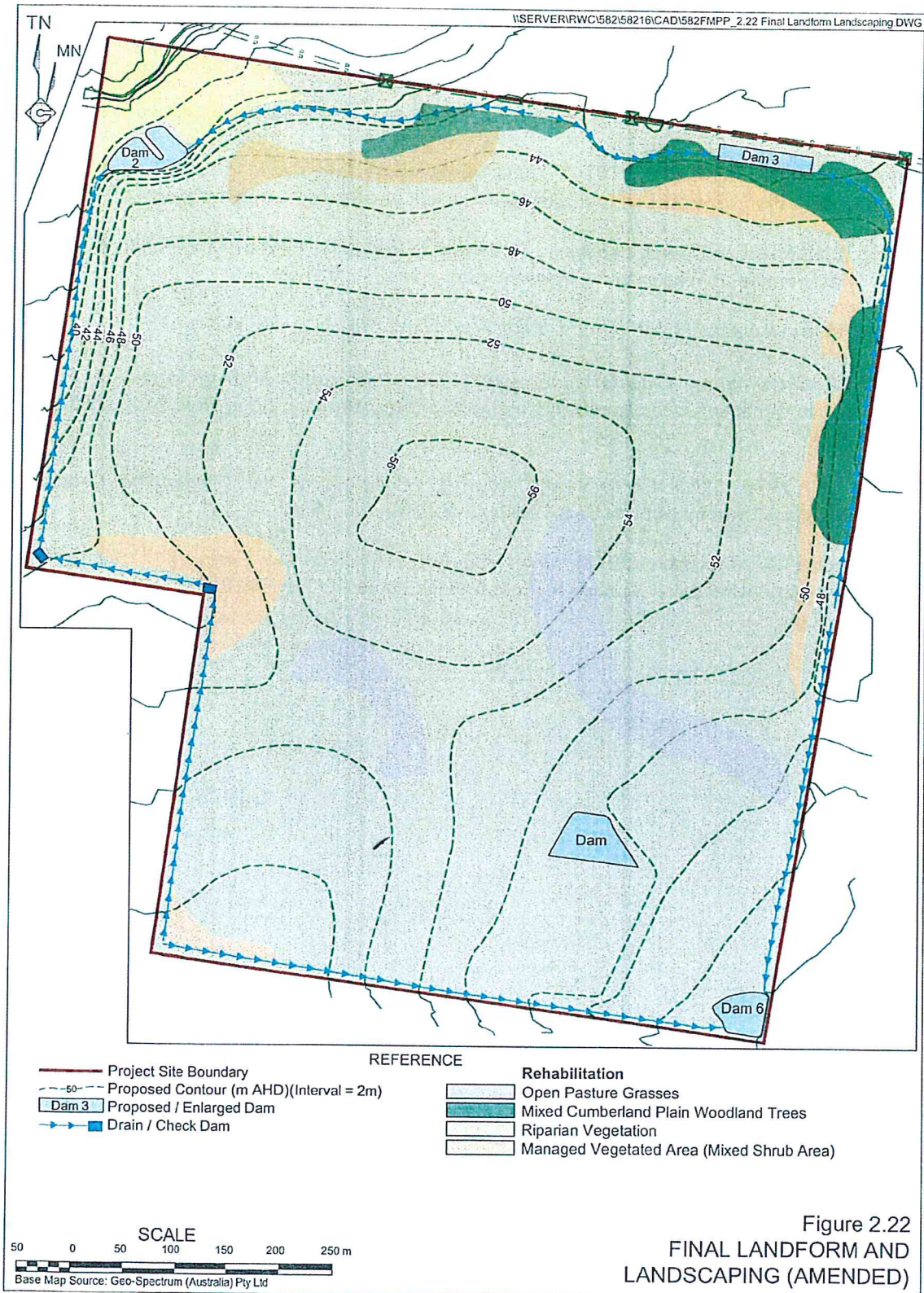


## Attachment 2

FURTHER MODIFIED PREFERRED  
PROJECT REPORT  
Report No. 582/16

- 75

PTY LTD  
Orchard Hills Waste and  
Resource Management Facility

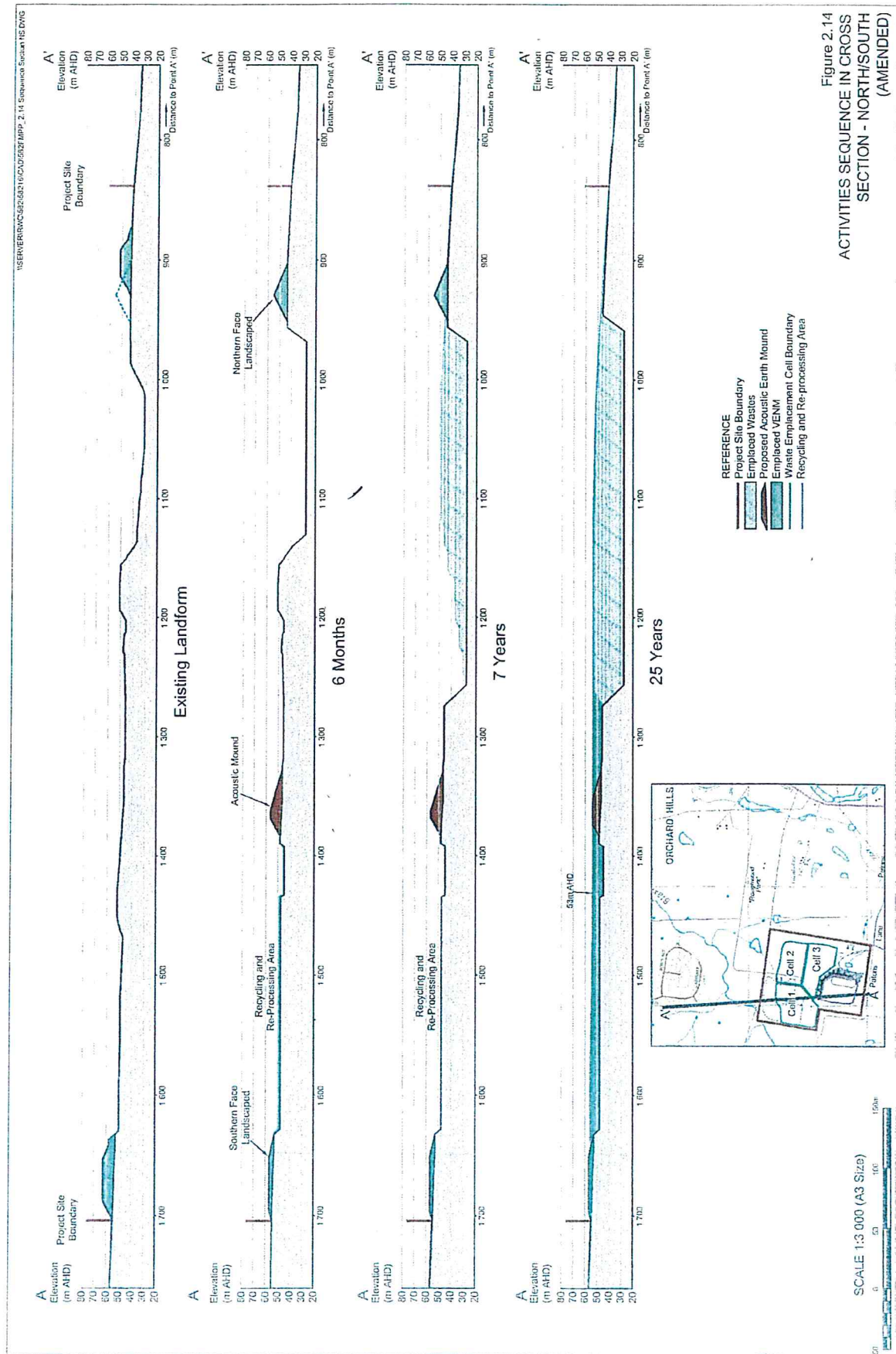


R. W. CORKERY & CO. PTY. LIMITED





# Attachment 3





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