COURT: SUPREME COURT OF TASMANIA

CITATION: *Walker v Clarence City Council* [2025] TASSC 33

PARTIES: WALKER, Bradley James
WALKER, Ewa
v
CLARENCE CITY COUNCIL
STAGE B DEVELOPMENTS PTY LTD
(ACN 634 292 970)

FILE NO: 2635/2020

DELIVERED ON: 13 June 2025

DELIVERED AT: Hobart

HEARING DATES: 29, 30 November 2021 – Geason J

(Written submissions – 11 June; 3, 16 July 2024)
12 August 2024
(Written submissions – 19, 30, August; 20 September; 4 October 2024)
10 October 2024 – Porter AJ

JUDGMENT OF: Porter AJ

CATCHWORDS:

Administrative law – Judicial review – Reviewable decisions and conduct – Decisions to which legislation applies – Meaning of decision – Generally – "Spent" decisions with no legal effect not reviewable – Local council determination to amend sealed plan – No legal effect until Recorder of Titles effects changes to Register – Recorder with no role of approval or independent consideration – Council's decision not without legal effect.
Local Government (Building and Miscellaneous Provisions) Act 1993, s 104.
Banks v Transport Regulation Board (1968) 119 CLR 222; *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43, 252 CLR 480*; Burgess v Director of Housing* [2014] VSC 648, considered.
Aust Dig Administrative Law [1005]

Administrative law – Judicial review – Grounds for review – Generally – When need to establish materiality of error arises – Implied materiality in relation to particular grounds of error of law and irrationality – Materiality may arise in the exercise of the discretion to grant relief – Local council hearing to amend sealed plan – Questions of non-disclosure of opponent's evidence and denial of opportunity to be heard – No material breaches of procedural fairness or errors of law established.
LPTD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12, 98 ALJR 610, considered.
Darnell v Stonehealth Pty Ltd [2022] FCAFC 76, FCR 597, applied.
Aust Dig Administrative Law [1028]

Real property – Torrens title – Indefeasibility of title – Amendment or variation of title record – Extent of Recorder's powers – Local council determination to amend sealed plan – Amendments effected by Recorder making changes to the Register – Amendment removed a restrictive covenant – Where registered proprietor of dominant land sought judicial review of council's decision – Title of registered proprietor of the servient tenement indefeasible on changes being made – Where no exceptions to indefeasibility – Where Recorder not a party to proceedings – Recorder unable to exercise any power of correction – Whether grant of relief futile.
Local Government (Building and Miscellaneous Provisions) Act 1993, s 104.
Land Titles Act 1980, ss 139, 141, 143C, 163.
Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles [2023] TASFC 6 followed.
Aust Dig Real Property [1236]

Local Government – Powers, functions and duties of councils generally – Particular powers and functions – Other matters – Power to amend sealed plans – Power to require as a condition that any person who benefits from the amendment is to make compensation of money or land to a person who is injured by it – Where council caused amendment to be made by removal of restrictive covenant – Condition of doing so that registered proprietor of servient tenement pay monetary compensation to registered proprietor of dominant tenement – No power to make that condition conditional on the happening of future events.
Local Government (Building and Miscellaneous Provisions) Act 1993, s 104(3).
Aust Dig Local Government [169]

REPRESENTATION:

***Counsel*:**

Applicants:	B McTaggart SC
First Respondent:	D Morris
Second Respondent:	A Spence SC

Solicitors:

Applicants:	Butler McIntyre and Butler
First Respondent:	Simmons Wolfhagen
Second Respondent:	Page Seager Lawyers

Judgment Number:	[2025] TASSC 33
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Serial No 33/2025
File No2635/2020

BRADLEY JAMES WALKER and EWA WALKER v CLARENCE CITY COUNCIL and STAGE B DEVELOPMENTS PTY LTD (ACN 634 292 970)

REASONS FOR JUDGMENT **PORTER AJ**
13 June 2025

Introduction

1 This is an application for judicial review. Unfortunately, it has a lengthy history. On 31 August 2021, after something of a protracted process, the first respondent, Clarence City Council, (the Council) approved a petition lodged by the second respondent (Stage B) for the amendment of a sealed plan pursuant to s 104 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* (the *LGBMP Act*). The effect of the amendment was to remove a restrictive covenant from the schedule of easements. The applicants live next to the affected land. They had the benefit of the covenant and objected to the amendment being made. When the Council made its decision, it also made a conditional order for the payment of $10,000 in compensation to the applicants.

2 On 7 September 2021 Stage B lodged the necessary documents relating to the amendment with the Recorder of Titles. On 10 September 2021, the Recorder advised Stage B's agents that the Plan had been "accepted amended pursuant to the … Request", and he sent a certified copy of the Plan "in the amended form in which it had taken effect."

3 On 3 November 2020 the applicants sought judicial review of both aspects of the Council's decision on a number of grounds involving jurisdictional error. The hearing of the application for review took place on 29 and 30 November 2021 (sic) before Geason J. The later interim fate of Geason J was set out by Blow CJ in *Ding v De Wit* [2024] TASSC 6, a judgment handed down on 1 March 2024. In short, on 2 November 2023 Geason J was served with a police family violence order and subsequently charged with summary offences. On 12 December 2023, the Attorney-General tabled in the House of Assembly an undertaking signed by Geason J by which he promised not to sit in respect of any matters except in the extent that the Chief Justice might request.

4 In *Ding*, Blow CJ noted that he considered it inappropriate to make any such requests while the charges against Geason J were pending. Geason J did not respond to a request disqualifying himself in various matters to enable them to proceed in his absence. At the time of Geason J's undertaking, he had not delivered judgment in this matter. Early in 2024, to reflect the words of Blow CJ, circumstances remained such that it was very clear Geason J would be unable to give judgment within a reasonable time hence.

5 Accordingly, on 2 May 2024 Stage B applied for a reconstitution of the Court and on 15 May, the parties agreed to such an order, with the substituted judge to make such directions as they saw fit. The matter was then allocated to me. I ascertained that the applicants and Stage B both wanted to make further written submissions, with the applicants then requesting a listing for the purposes of oral argument. That took place in August 2024, with further written submissions to be lodged in accordance with directions made at the hearing. In those submissions, the applicants raised two issues which, until then, had not been mentioned at all. That necessitated a further hearing. Geason J resigned on 18 November 2024.

Background

6 The sealed plan is SP 141337 (the Plan). The applicants are the registered proprietors of the property at 23 Raleigh Court, Howrah; lot 43 on the Plan. Stage B is the registered proprietor of the property at 21 Raleigh Court, Howrah; lot 42. The Plan relates to a 69-lot subdivision approval for

which was granted in October 2003. The schedule of easements to the Plan contained covenants that bound the owners, including successive owners, of several lots. The covenants were expressed to be with the intent that the burden ran with and bound each lot. In respect of both lot 42 and lot 43 there was a covenant in terms that there was to be no construction of more than one residential dwelling on the lot.

7 This covenant was removed in respect of lot 42 – 21 Raleigh Court – by the Council's amendment and the subsequent action of the Recorder. The power to amend sealed plans is to be found in s 103 of the *LGBMP Act*. Section 103(1) provides that when a Plan has taken effect, it may be amended by the council of its own motion, or on the application of any person having an interest in land subject to the plan. In the first scenario the council must give notice to all persons appearing by the registers under the *Land Titles Act 1980* (the *LTA*) to have an estate or interest at law affected by the proposed amendment, while in the second the applicant must serve a copy of the petition on such persons: see ss 103(2) and (3). By subs (4), any person affected by the proposed amendment may ask to be heard in support or opposition.

8 Section 104 of the *LGBMP Act* provides for hearings in relation to amendments of plans. The features of that section are as follows:

- At the end of 28 days after the last notice or petition is served as required, the council may, if no person has asked to be heard in opposition, "cause the amendment to be made"; or if a person has asked to be heard, is to appoint a day for hearing any petitioner and those who have been asked to be heard – s 104(1)(a) and (b).
- A hearing is to be conducted by the council or a council committee who may hear persons or have been asked to be heard, and obtain the assistance of legal practitioners, architects engineers and surveyors – s 104(2).
- On the conclusion of the hearing, the council may "cause the amendment to be made with or without modification" – s 104(3)(a) – and require as a condition of so doing "that any person who benefits the amendment (sic) is to make compensation in money or land to a person who is injured by it." – s 104(3)(b).

9 Of some relevance is that compensation is also separately dealt with in s 105 of the *LGBMP Act*. Subsection (1)(a) provides that subject to subs (2), a person adversely affected by an amendment is entitled to compensation *by the council* if having asked to be heard under s 103(4), the person gave the council notice of the claim at or before the hearing. By subs (2) if compensation is payable under subs (1) , the council may recover against the petitioner and any person heard or asking to be heard in support of the amendment to the extent to which they benefited by the amendment.

10 As noted, the applicants were objectors to Stage B's petition. This objection was notified to the Council by a legal practitioner, Mr Don Armstrong, acting on behalf of the applicants. Several other representations were also received by the Council in relation to the petition. The course of events leading up to the Council's decision is rather detailed and does not need to be set out for present purposes. Issues of procedural fairness raised by the applicants are bound up in this course of events and will be dealt with later.

11 The applicants' petition was heard on 30 June 2020 by a committee of the Council, as is provided for s 104(2) of the *LGBMP Act*. The committee comprised Aldermen Chong (as chair), Blomeley and Walker (apparently no relation) – the "Committee". The Committee reserved its decision. Correspondence subsequently took place between Council officers and the parties, and again there is no need to detail any of that at this stage. On 24 August 2020, the Committee provided its recommendations to Council. As they are simply reflected in the Council's determination, I will move on.

12 On 31 August 2021, after considering the petition and the recommendations of the Committee, Council resolved that the Committee's recommendations be adopted. Pursuant to its power under s 104(3)(a) of the *LGBMP Act*, the Council determined to cause the amendment of the Plan so as to remove from the schedule of easements as it related to lot 42, the words "(b) Not to construct more than one residential dwelling on the lot." Council imposed a condition of causing the amendment to be made that Stage B "make compensation to Mr Walker" (sic) in the sum of $10,000. That condition itself was conditioned so that compensation might not ultimately be payable. That is the subject of a ground of review.

13 Council's resolution was notified to the parties on 2 September 2020. The notice included a statement that Council would "now prepare the application for submission to the Land Titles Office". As noted above, Stage B lodged the necessary documents with the Recorder of Titles on 7 September 2021. The covering document was a "Request to Amend Sealed Plan No 141333". On 10 September 2021, the Recorder advised Stage B's agent that he had "accepted this Plan, amended pursuant to the Request", and sent a certified copy of the Plan "in the form in which it has taken effect."

14 On 22 September 2020, the applicants sought reasons for the Council's determination. They were advised by the Council's in-house lawyer, by email of the next day, that it was thought the correspondence by which the determinations had been notified provided detail of the reasoning "by reference to the three potential triggers for the payment of compensation…, in addition to the removal of the covenant itself". The applicants were advised that the matter would need to be listed as an agenda item for Council.

15 After the filing of this application for judicial review, lawyers for the applicants pursued the Council for reasons – eventually through its solicitors – and not having succeeded, filed an interlocutory application on 9 February 2021 pursuant to s 35(2) of the *Judicial Review Act 2000* (the *JRA*). After a contested hearing, Holt AsJ made an order that the Council provide the applicants with a statement of reasons. Those reasons were provided on 24 February 2021. The reasons occupy about five pages, and I will refer to relevant parts as necessary.

16 There are seven grounds in the amended application for judicial review. They can be grouped. Grounds 1 and 2 complain of procedural unfairness; ground 1 relates to the suggested receipt and consideration of material without it being disclosed to the applicants while ground 2, in essence, alleges unfairness in not affording the applicants proper opportunity to obtain valuation evidence in relation to the issue of compensation. Grounds 3 and 4 respectively allege a failure to take into account relevant considerations and taking into account irrelevant considerations. Ground 6 complains that there was no evidence or other material to justify the decision. Grounds 5 and 7 concern the making of the order for compensation itself.

17 Before dealing with the grounds, there are preliminary questions which should be considered. They are inter-related. It is Stage B's primary position that the Council's determination is "spent" and has been subsumed in what is described as the "determination of the Recorder of Titles to remove the covenant." It makes the obvious point that the Recorder is not a party to these proceedings, nor are there related separate proceedings in existence. The argument is that by virtue of the Recorder's actions, the Council's decision no longer has any legal consequences, and accordingly, relief under the *JRA* is unavailable.

18 It is suggested that in any case, relief under the *JRA* would be futile and should be refused in the exercise of the Court's discretion which resides in ss 27(1) and 38 of the *JRA*. The futility is said to arise because of the infeasibility provisions of the *LTA* and the Recorder's powers under that Act. The two questions are separate but related.

19 As will emerge in my consideration of the grounds, I do not need to finally resolve these matters but in discharge of my obligations and in deference to these arguments and the great length of time spent on them, I will deal with them as matters of substance.

Preliminary questions

The unavailability of relief – a spent decision?

20 The starting point for Stage B's argument is the High Court case of *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43, 252 CLR 480. The facts are that an injured worker commenced two proceedings under the *Accident Compensation Act* 1985 (Vic) in the County Court of Victoria, one seeking leave to bring proceedings for common law damages in respect of injury, and the other in respect of statutory compensation. The latter was transferred to the Magistrates Court.

21 The Act provided for the establishment and conduct of Medical Panels to provide an opinion on any medical question in respect of injuries. Section 68(4) provided that, for the purposes of determining any question or matter, the opinion of a Panel was to be adopted and applied by any court, body or person and that it must be accepted as final and conclusive.

22 A magistrate referred medical questions to a medical panel for determination. The panel's opinion was that the worker's condition neither resulted from nor had been materially contributed by the relevant workplace injury. In accordance with s 68(4), the magistrate adopted and applied the opinion of the panel and dismissed the claim. When the serious injury application came on for hearing in the County Court, the employer foreshadowed a contention that the Court was bound by the opinion of the panel, and that an issue estoppel arose. The worker sought relief from the Supreme Court in the nature of certiorari quashing the opinion of the medical panel. That application was dismissed, and the worker successfully appealed.

23 On the employer's appeal to the High Court, it was held that as the only legal effect of the opinion of the Panel was that given by s 68(4) and the effect was spent when the statutory compensation application was dismissed, the opinion sought to be quashed had no continuing legal consequences, and hence certiorari was not available.

24 The Court (French CJ, Crennan, Bell, Gageler and Keane JJ) said:

> "25 The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an 'apparent legal effect: *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159; [1996] HCA 44. An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent. An order in the nature of certiorari in those circumstances would be not simply inutile; it would be unavailable."

25 Later, their Honours said:

> "31 Because an order in the nature of certiorari to quash an opinion is limited to removing the legal consequences or purported legal consequences of an exercise or purported exercise of power, however, the Court of Appeal was also correct to ask a threshold question. That threshold question was whether the opinion of the Medical Panel, sought to be quashed by certiorari in the application made to the Supreme Court by the Worker, had any continuing legal consequences, given that the opinion was on medical questions arising in the statutory compensation application, which by then had been dismissed.
>
> …

> 40 The answer to the threshold question properly asked by the Court of Appeal is that the opinion of the Medical Panel sought to be quashed by an order in the nature of certiorari had no continuing legal consequences. The only legal effect of the opinion was that given to it by s 68(4) of the Act. That legal effect was spent when the question or matter, in respect of which the medical question was referred to the Medical Panel, was brought to a conclusion by the order dismissing the statutory compensation application. The Employer's foreshadowed reliance on the opinion having legal effect in the serious injury application would be of no avail.
>
> 41 The order in the nature of certiorari made by the Court of Appeal was not available to quash the opinion of the Medical Panel because that opinion had no continuing legal consequence which could be removed by that order. Despite the irony of this being relied on by the Worker as respondent and eschewed by the Employer as appellant, that is a sufficient reason to allow the appeal."

26 Stage B submits that the principles discussed in *Wingfoot* apply equally to proceedings for judicial review, that being the view apparently taken by Macaulay J in *Burgess v Director of Housing* [2014] VSC 648 and O'Bryan J in *OPENetworks Pty Ltd v Myport Pty Ltd* [2019] FCA 1659. Given that proceedings under judicial review legislation are generally taken to be akin to those for prerogative relief or relief in the nature of prerogative relief, I think that much can be accepted.

27 The case of *Burgess* became the focus of attention in this case, as did the case of *Banks v Transport Regulation Board* (1968) 119 CLR 222, an authority discussed by Macaulay J in *Burgess*. I will consider *Banks* first. The facts were that the Board was empowered by statute to grant, refuse, revoke or suspend a taxi licence. In relevant terms, no decision of the Board had any force or effect until it was reviewed by the Governor in Council. In such a review the Governor in Council could, within six months of the Board's decision, approve or disapprove the decision or make any determination which the Board might have made. The Board was required to give effect to every such order. The decision in question was a revocation.

28 By majority (Barwick CJ, Kitto, Taylor and Owen JJ) it was held that where a decision of the Board to revoke a licence was based upon erroneous grounds, a writ for certiorari would issue to the Board to quash it, notwithstanding it had been approved by an order of the Governor in Council; the order merely approved the Board's decision which then became effective.

29 At 242, Barwick CJ said that the terms of the provision indicated that:

> " … the function of the approval of the Governor in Council is to allow the decision of the Board which is approved itself to have force or effect. Upon such approval there is authority derived from the Board's decision to revoke the licence to which it relates."

30 At 246, Taylor J (with whom Kitto J agreed) said that if the decision of the Board was simply approved by the Governor in Council it is that decision which comes into operation by force of the legislation; "in other words, the condition for the operation of the Board's decision is fulfilled." But otherwise, his Honour said, where there is a disapproval or other determination, it may be necessary for the Board to act in such a way as to give effect to the disapproval or other determination. See also Owen J at 255 where his Honour said that in the case of an approval by the Governor in Council, that does no more than approve the Board's decision which becomes effective, and which is then to be put into force and effect by the Board: "It is that decision which then operates to revoke the licence."

31 After noting that the majority in *Banks* held that on the proper construction of the statute, it was the Board's decision that took effect, his Honour noted that *Banks* can be reconciled with and "seen as entirely consistent with the reasoning in *Wingfoot*" in that *Banks* dealt with a different class of decision. His Honour continued:

> "*Banks* concerned a situation where a second decision (or step) was required to give an anterior decision its legal effect. And in that case, even though the second step involved a fresh, considered decision, it was recognised on a construction of the relevant statute that it was the first decision that took legal effect, not the second, after the second decision was made."

32 The debate in *Burgess* related to two sets of two steps, all of which related to obtaining possession of rented premises; two taken by the Director of Housing and two by the Victorian Civil and Administrative Tribunal (VCAT). At [3], these steps were described by Macaulay J as follows:

> "(a) First, on 22 March 2013, the Director issued to Ms Burgess a notice to vacate the rented premises leased to her by the Director (the notice decision).
>
> (b) Secondly, VCAT made an order on 13 May 2013 granting possession of the premises to the Director after he applied for such an order based upon the notice to vacate (the possession order).
>
> (c) Thirdly, on 18 June 2013, the Director applied for a warrant of possession of the premises (the warrant application decision).
>
> (d) Fourthly, on the same date, VCAT issued the warrant (the issue of the warrant)."

33 A detailed analysis of the legislative framework undertaken by Macaulay J revealed, in short, the following. The Director could give to a tenant a notice to vacate rented premises after which application could be made to the Tribunal for a possession order. VCAT was required to make a possession order on the application of the Director if it was satisfied the Director was entitled to be issued a notice to vacate. Next, once a possession order had been obtained, application could be made to the principal registrar of the Tribunal in the event of a failure to comply with the possession order. When making a possession order VCAT was required to direct the registrar to issue a warrant of possession if one was requested.

34 At [124] Macaulay J explained:

> "Each [step], relevantly, alters legal rights and each terminates in a distinct legal result. The first if the notice decision which (upon an application being made) leads to a decision of VCAT, exercising its statutory power conditioned upon the existence of the notice, to either make or *not make* a possession order. The second is the warrant application decision which, if supported by the payment of the requisite fee, must result in (and is 'paired with') the issue of a warrant of possession." [Original emphasis]

35 His Honour's conclusions were as follows.

- The relevant effect of the issue of a notice to vacate was to confer a power on VCAT to decide whether the Director is entitled to possession.
- If made, a possession order of itself created its own sets of rights and obligations. It is an original decision made by VCAT upon certain findings of fact, and critically creates a legal obligation on the part of the tenant to vacate the premises and a corresponding entitlement in the Director to possess the premises.
- Requesting a warrant was a discrete supplementary process that may be deployed if the tenant did not vacate after the order was made, and which may never be required.
- The legal effect of the Director's notice of decision was spent when the possession order was made, and accordingly the threshold point raised by the Director, in that, respect was a valid one.

- This was not so in relation to the second set of steps relating to the issue of the warrant in that the case was a stronger and more obvious example of a case where the first step maintained its legal force.

- That was because there was no process of approval or independent consideration by VCAT of the Director's decision to request the warrant, analogist to the Governor in Council's review in *Banks.*

36 In the present case, Stage B relies on the outcome in *Burgess* as it relates to the first set of steps, while the applicants rely on the outcome in relation to the second set. Obviously, what is required is an analysis of the legislative scheme applicable in this case, not only as it relates to amendments to sealed plans, but in my opinion, as it relates to the subdivision process and the creation of sealed plans in the first instance. That is relevant context. The role of the Recorder in registering dealings also needs to be considered.

37 Subdivisions are dealt with in Part 3 of the *LGBMP Act*. Div 2 of Part 3 makes provision for plans of subdivision to be submitted to a council for approval; see in particular ss 84-85A inclusive. Div 3 of Part 3 provides for the creation and settlement of final plans with schedules of easements. Section 88 provides for the lodgement with a council of final plans by the owner; that is, the plan, a schedule of easements and other specified documents and information.

38 Section 89 requires a council to determine whether a final plan complies with the Part and the process is governed by subss (1AA)-(1AD). Section 89(1) provides that if satisfied that a final plan complies with the Part, the council is to -:

> "(a) Cause its seal to be affixed to the plan; and
>
> (b) cause the sealed plan to be lodged in the Office of the Recorder of Titles".

39 The next relevant step in the *LGBMP Act* is Division 4 entitled "Sealed plans". Section 94(1) provides as follows:

> "**94 Taking effect of sealed plan**
>
> (1) A final plan takes effect as a sealed plan when the Recorder of Titles signs and dates a memorandum on the plan that the plan is accepted –
>
> (a) without requiring any amendment; or
>
> (b) as a result of further discussion; or
>
> (c) upon an order of the Supreme Court; or
>
> (d) upon the making of an amendment agreed to by the owner and the council."

40 I have already set out the features of s 103 of the *LGBMP Act* which, by its terms, provides that when a plan has taken effect (that is, a sealed plan is accepted by the Recorder in accordance with s 94), "it may be amended by the council". I have also set out the features of s 104. It may be noted that the latter refers to the council being able to "cause amendments to be made", but apart from s 104(5), which provides for the Recorder to call in and cancel or correct any Certificate of Title affected by amendments, the *LGBMP Act* is silent as to the process after the decision has been made to cause the amendment.

41 The evidence in this case shows that five days after the Council's decision, Stage B's agents lodged with the Recorder a number of documents, together with payment of fees. Two documents are

of interest. There is a "Land Data Registration Branch – Lodgement Form", which contains a request to register "the undermentioned instruments in the order set out ….". The first "instrument" referred to is a "Request to Amend Sealed Plan 141333." The other listed "instruments" are fees and a copy of the Council's correspondence.

42 The Request to Amend Sealed Plan is set out on a Tasmanian Land Titles Office Blank Instrument Form and is described in those terms. The operative part states that "the Clarence City Council hereby requests that Sealed Plan 141333 be amended as follows: ….".[1] The document states that there is no change to the plan of survey and the following then appears:

> "**Schedule of Easements**
>
> Delete from the restrictive covenant shown on pages 3 and 4 of the schedule the following words:
>
> 'Not to construct more than one residential dwelling on the lot'
>
> where they appear on sheet 4."

The Common Seal of the Council is shown as being affixed on 31 August 2020 and it is signed by the Acting Corporate Secretary.

43 I have not been able to find any statutory basis for the instrument described as the Request. Its origin seems to be the *Land Titles Office Practice Book*, 3rd ed. In any event, it is common ground that the Request fits the definition of a "dealing" under s 3(1) of the *LTA*. Relevantly, that is defined as meaning any document in writing which is registerable or capable of being made registerable, "or in respect of which any recording in the Register is by this or any other Act required or permitted to be made ….".

44 That leads to s 33(11) which provides that the Recorder shall register a dealing by making such recording or alteration on the folio of the Register or registered dealing to be affected thereby as, in the Recorder's opinion, may be necessary to give effect to the dealing. Stage B argues that the Recorder's role in dealing with the request amounted to a separate decision, thus putting it in the same category as the second step in the first set of steps dealt with in *Burgess.*

45 Under the *LTA*, the duty of the Recorder is to keep a register. The way in which the Register is to be kept and managed are set out in s 33. The present focus is on the Recorder's role in having received a dealing for registration or in respect of which action is required. In *Registrar of Titles v Paterson* (1876) 2 App Cas 110 the Privy Council said that the Registrar was possessed of a discretion, since the duty was theirs to "prevent instruments from being registered which in law as well as fact ought not be placed on the register". See also *Ex Parte Bond* (1880) 6 VLR (L) 463; *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34 at 64. In *Gibb v Registrar of Titles* (Vic) (1940) 63 CLR 503 at 513, Starke J said the Registrar was not an automaton whose duty was to register all documents affecting title to land. On a similar note, Kitto J in *Pirie v Registrar General* (1962) 109 CLR 619 at 623 said that the Registrar-General was under a general duty to keep the register book clear of all notifications save those which are authorised by law.

46 But it is not Recorder's duty to require proof negativing any fraud or improper dealing, where there is nothing on the face of the documents submitted to suggest it or independent reasons for suspecting fraud or manifest breach of trust: *Ex parte Wisewould* (1890) 16 VLR 149; *Ex parte Equity Trustees Company* (1911) 17 ALR 154; *R v Registrar of Titles (Vict)* (1915) 20 CLR 379; *R v Registrar of Titles, ex-parte Briggs* [1913] VLR 549 at 551. In short, the Recorder's duty is to register

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[1] Strictly speaking, the request should one to give effect to the amendment agreed to by a council. It is the council which has the power to amend.

what appears to be on its face a valid instrument, and not to make extensive enquiries into its validity*:* *Canada Bay Council v Bonaccorso Pty Ltd* [2007] NSWCA 351, 71 NSWLR 424 at [45], [91].

47 The function of accepting and acting on a dealing in the nature presently under consideration, needs to be put in the context of the entire process. In the absence of acceptance by the Recorder and the noting of the amendment on the sealed plan accepted under s 94 of the *LGBMP Act*, the only right created is the right in a council or the petitioner – depending on how the amendment came about – to make a request. Once the "dealing" is accepted and acted on, legal rights are created.

48 The Recorder explained the situation in a letter to the applicants' solicitors dated 2 December 2020, responding to suggestions that the removal of the covenant may have been in error because of the invalidity of the Request, and the fact that conditions imposed by the Council for the removal of the covenant had not been satisfied. He explained that the Request "was duly executed, contained the required particulars for registration and was in registerable form", and he acted in accordance with a dealing received to register it and to amend the sealed plan.

49 The Recorder further explained that it was not his role to look behind the Request, and he could not have been on notice as to the need to satisfy any apparent pre-conditions in the face of lodgement of a dealing in registerable form, and there being no other dealing in the register to prevent him from doing so.

50 In my view, the present situation falls more within the one which existed in *Bank*s. It is akin to the *Burgess* "second set of decisions" category; that is, it was the Director's decision to request the warrant that was the operative decision. Putting the issue in the context of Div's 3 and 4 of Part 3 of the *LGBMP Act*, it is a council to whom Parliament entrusts the task of what is variously described as "amending" (s 103) or of "causing to be amended" (s 104) a sealed plan. That process involves a hearing and a determination. Plainly, Parliament is taken to be aware that the amendment can have no effect on the Register, and on titles issued pursuant to the lodgement and acceptance by the Recorder of a sealed plan, without the involvement of the Recorder. That involvement is to act on a request or notification of the amendment unless there is something patently wrong with the form or terms of the documents lodged, or the process as revealed by those documents.

51 To adopt Barwick CJ's wording in *Banks,* the function of the acceptance of the Recorder is to allow the decision of a council to have force or effect. Upon the acceptance, the authority to record the amendment to the sealed plan is derived from the council's decision. There is no process of approval or independent consideration of a council's decision. For those reasons, I would reject Stage B's submission that the Council's decision is spent and not amenable to judicial review. That, of course, is viewing the issue in isolation and without reference to the question of indefeasibility of title.

Futility of relief – indefeasibility of title?

52 As I foreshadowed, Stage B's submission is that even in the event that the effect of the Council's decision is not spent, futility arises in a different way. The argument is that nothing can be achieved by quashing Council's decision to amend the sealed plan because Stage B's title has been cleared of the restrictive covenant; because of s 40 of the *LTA* it has an indefeasible title and absent any exceptions to indefeasibility or relevant powers that might be exercised by the Recorder – noting that the Recorder is not a party to these proceedings – there is nothing that can now be done.

53 Section 40(2) provides that subject to subss (3) and (4) the title of a registered proprietor of land is indefeasible. By s 40(1), "indefeasible", in relation to the title of a registered proprietor of land, means subject only to such estates and interests as are recorded on the folio of the Register or registered dealing evidencing title to the land. The title certified is not historical or derivative; it is the title which registration has vested in the proprietor: *Breskvar v Wall* (1971) 126 CLR 376 at 385-386. The title cannot be assailed and is free from all other interests except previously registered ones, or

where an exception exists. With the exception of fraud, which was raised very late in these proceedings, the balance of s 40(3) is not relevant, and nor is subs (4).

54 The indefeasibility argument needs to be put in the context of the relief sought by the applicants in the event I conclude the decision to cause the amendment to be made ought be quashed, as provided for in s 27(1)(a) of the *JRA*. The applicants' first submission is that in addition to such an order, the Court should direct the Council to dismiss the petition. Section 27(1)(d) enables the Court to make an order directing any of the parties to do anything that the Court considers necessary to do justice between the parties. That provision is to be construed liberally, given the remedial nature of the legislation: *Minister for Immigration & Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 537. In some very clear cases it might be appropriate to order the decision-maker to make a determination different to the one under review – see *Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56 at 81 – but care needs to be exercised not to trespass into merits review. In the end, I did not understand the applicants to strongly press this proposal.

55 The applicants' alternative position is that the Court should quash the decision and remit the matter for rehearing by the Council. Additionally, as part of the first order, the Court should quash the decision with effect from the day on which it was made. In that scenario, the Council's request to the Recorder following its determination was unlawful in the sense that it was done without statutory authority. Of itself, that would not assist. For instance, titles issued in consequence of an unlawful subdivision remain valid: *Sutherland Shire Council v Moir* (1982) 49 LGRA 115. The applicants say that in the event the petition failed on the rehearing, they could then request the Recorder to amend the Register.[2] Because such a request does not follow a council decision to amend the sealed plan, that raises the extent of the Recorder's powers. Indefeasibility was perceived as an obstacle, but one which could be overcome.

56 The precise limits of the indefeasibility provisions were not explored. Indefeasibilty under the *LTA* needs to be looked at in light of Part 3 of the *LGBMP Act*, although it might be noted that rights and obligations created under that part are ineffective until the Recorder accepts the sealed plan or effects the amendments to the sealed plan. Stage B accepts that an express statutory power may affect indefeasibility, although counsel's submissions were confined to the *LTA*. Conceptually, a title derived from a sealed plan is defeasible because of the operation of s 104 of the *LGBMP Act.*

57 The applicants raised several answers to Stage B's submission which involve various provisions of the *LTA*. Ultimately an argument was put that the issue of indefeasibility does not arise at all. That argument hinges on the nature of restrictive covenants and arises from the proposition that a restrictive covenant is an interest in equity, not an estate in land at law: *Chiu v Healey* [2003] NSWSC 857 at [35]. Easements require registration for validity while recording or noting restrictive covenants does not establish or effect validity: *Fitt v Luxury Developments Pty Ltd* [2000] VSC 248 at [178].

58 The applicants argue that as the purpose of the recording of a restrictive covenant is to give notice of a claim of a benefit affecting the burden land – and not to establish the validity of the covenant, removal does not extinguish it. It remains in force and enforceable in equity. The argument then runs that Stage B purchased the land with a burden of the covenant, it was amended while it was the registered proprietor and as the land has not been transferred to a purchaser who was not on notice of the restrictive covenant, the principles of indefeasibility have not been infringed. (If that is correct, then arguably at least, the applicants have a caveatable interest: A Bradbrook & S MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants*, 3rd ed, at [17.29]-[17.34].)

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2 This course involves a fair degree of artificiality in the rehearing exercise, perhaps raising discretionary considerations.

59 Restrictive covenants and the question of entry on notation on the Register are dealt with in s 102 of the *LTA*. This and related sections seek to deal with the situation of restrictive covenants in the Torrens system. Section 102(7) provides that where registered land is to be made subject to a covenant enforceable in equity by and against the assigns of the respective proprietors, a dealing in an approved form could be used and lodged for registration. By subs (12), where a folio of the Register describes the land by reference to a sealed plan lodged with the Recorder under Part 3 of the *LGBMP Act*, any obligations set forth in the plan that could be recorded under this section shall have effect as if embodied in an appropriate dealing recorded on the folios of the Register comprising the titles of all lands appearing by the Register to be subject to the sealed plan.

60 Section 102(2)(b) provides that the burden of a covenant runs with freehold registered land if the covenant is set forth in a sealed plan which has taken effect under Part 3 of the *LGBMP Act*. By subs (3), any covenant which runs with freehold registered land may be enforced in equity notwithstanding any provision of the *LTA* but has no greater operation or effect under the section that it would have if the land which it intended to burden were not registered land and the registered proprietor were affected in equity by express notice of the covenant.

61 The argument that the restrictive covenant has not been extinguished is not sustainable. Such a covenant owes its existence to the plan of subdivision and to that incorporation in the final plan sealed by a council: see *LGBMP Act*, ss 87, 89. "[T]he notation [on the Register] is sufficient to incorporate the terms of the whole schedule of easements into the title of the registered proprietor.": *Clarke v Burnie City Council* [2008] TASSC 75 at [7]. It follows as matter of logic, that if the covenant is removed from the schedule of easements in the sealed plan by the council, the covenant ceases to exist. That cessation is reflected by what is to be found (or more particularly not found) in the Register. That outcome can be demonstrated by looking back to the history of restrictive covenants[3] and the simple situation of an agreement between a covenantor and a covenantee. If the parties agreed that rights and obligations under the covenant be discharged, it would be extinguished.

62 I would take the view that the plain language of ss 40(2) and (6)(b) of the *LTA* makes Stage B's title indefeasible within the meaning of that Act. With reference to the use of the word "interest" in s 40(1), 40(6)(b) defines the word as meaning "any covenant, the burden of which runs with freehold land and, as stated above, by virtue of s 102(2)(b) of the *LGBMP Act* the burden of a covenant runs with freehold registered land if it is set forth in a sealed plan which has taken effect under Part 3 of that Act. This is such a covenant.

63 In *R v The Recorder of Titles; Ex parte Horlock* [1991] TASSC 52, Cox J (as he then was) dealt with a situation which the Recorder had cancelled a restrictive covenant on the basis that the covenant did not run with the land. The result is not germane to this issue but in setting out the factual scenario, his Honour noted that as result of the cancellation of the covenant – (similar in terms to the one in this case) – the registered proprietor, with planning approval to subdivide, might build another dwelling on the lot. At [5] his Honour continued, "With the covenant now cancelled from his Certificate of Title, he has an indefeasible title unaffected by it (s 40)." Although in its context it is an observation, with respect it seems to me to be a correct statement of the law.

64 That leads to consideration of the Recorder's powers and to exceptions to indefeasibility. Section 139(1) gives the power to the Recorder, upon such evidence as it appears to be sufficient to "correct errors or supply omissions in the Register or any instrument or duplicate Register dealing, …

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[3] *Bradbrook and Neave's Easements and Restrictive Covenants*, above, at Ch 12.

." There are equivalent provisions in other jurisdictions and much has been written about these powers: *Part II: The substantive provision* (2010) 18 APLJ 132.[4]

65 The provision was the subject of close consideration by Brett J (with whom Wood and Pearce JJ agreed) in *Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles* [2023] TASFC 6 at [51]-[59]. At [55] his Honour noted his judgment in *Nightingale v Recorder of Titles* [2018] TASSC 56 as authority for the proposition that s 139 provided the Recorder with a general power to correct errors in the Register or instrument irrespective of the source of the error, but with a power to do so to be construed broadly subject to some implied limitation including the principle of indefeasibility. In that case his Honour noted there was some support for the proposition that powers such as those contained in s 139 should be read down so that the provision applied only to the correction of administrative errors made within the office of the Recorder, but said more recent cases and the application of general principle meant the provision should not be read down in that way.

66 In *Olympus* at [56] his Honour applied the decision of the Court of Appeal in *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395. There, at [183]-[185], Campbell JA, with whom McColl JA and Tobias AJA agreed, said in relation to the equivalent of s 139 that taken in isolation, and literally, the language would confer extremely wide powers of correction, and would include any error in the Register if it was inaccurate in any regard, regardless of why, how long ago the source of error arose and who might be effected by the correction. Campbell JA stated it was not possible for that literal reading to co-exist with the provisions of the Act that provide for indefeasibility; the application of the phrase such as "departmental errors and omissions" was not a substitute for applying the wording of the statute, construed as a whole and purposively.

67 In *Olympus* at [58] Brett J noted the summary of Kunc J in *Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791. Included in that summary were statements to the following effect. "Errors and omissions" are not confined to those attributable to the Registrar-General, (the Recorder in this State). If there is an error or omission, that does not lose its character as being capable of correction under the s 139 equivalent depending upon the identity of the person responsible. Further, the scope of power correction is to be ascertained by reference to whether the correction of the error would impinge upon a right to which indefeasibility attached.

68 The end result is that s 139 allows for more than the correction of mere departmental errors and omissions but no so as to impact on indefeasibility. The area for operation between those limits is not defined but relevantly, the outer limit of indefeasibility is clear. It follows that the applicants cannot call in aid s 139 of the *LTA*[5].

69 The applicants also rely on s 141 of the *LTA*. That provides that on the recovery of any land, estate, or interest, by any legal proceeding, from the person registered as proprietor of the land, the Court may direct the Recorder to cancel any folio of the Register, certificate of title, grant or registered dealing, or any recording in the Register relating to that land, and to substitute a new folio, certificate or recording as the circumstances may require. The Recorder is to give effect to such an order.

70 The argument is put on the basis that the section enables the power to be exercised "in light of the Court's decision in *legal proceedings to recover land*, or an estate or an interest in land.".

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[4] See also D Grinlinton & R Thomas, *Land Registration and Titles Security in the Digital Age:* New Horizons for Torrens, Informa Law 2020, Ch 9.

[5] Section 163 of the *LTA* was raised in argument by Stage B but not embraced by the applicants as a remedy. It enabled the Recorder to require a person to produce a Certificate of Title for it to be (among other things) corrected where the Recorder is satisfied that a recording was made in error or fraudulently or wrongfully obtained. This provision is seen to be akin to s 139 and also with the power not to be exercised so as to impinge on indefeasibility: see *Shab Holdings Pty Ltd v Registrar – General* (above) at [183]-[185], [193] and generally.

Unfortunately, as can readily be seen, that is not what the section says. The applicants cited *Casella v Casella* [1969] VR 49, which involved consideration of s 103(1) of the *Transfer of Land Act 1958* (Vic), said to be similar to s 141 of the *LTA*. But the preliminary words to s 103 were, "In any proceedings in the Court relating to any land or instrument or dealing, … if the Court directs the Registrar to cancel, correct [or to do other things in relation to - among other things - a certificate of title] necessary to give effect to any judgment, decree or order …, the Registrar shall obey such direction". In that case McInerney J held that an order could be made under s 103 even though the Registrar was not a party to the proceedings.

71 Application of the principles of statutory interpretation does not allow for s 141 of the *LTA* to be read in the same way as s 103 of the Victorian Act. Quite clearly, the exercise of the power under s 141 is contingent upon "the recovery of any land (etc) by any legal proceeding". Section 103 of the Victorian Act is a much broader provision which allows the direction to be made in any relevant proceedings in order to give effect to the judgment decree or order. That is the end of the matter.

72 The applicants also refer to s 143C as providing an answer. Subsection (1) enables the Recorder of his or her own motion to correct an error on a plan or an accompanying document deposited or lodged. For my part, I think the provision needs to be read literally and is concerned with the powers the Recorder may exercise upon the deposit or lodgement of a plan or accompanying document. However, in *Nightingale* (above) at [56], Brett J accepted that some of the powers also expressly extend to plans already lodged. With respect, I would take a different view,[6] but in any event it is clear from the discussion relating to ss 139 and 163 that the same limit of indefeasibility would apply to the exercise of the power under this section. *Nightingale* did not decide the contrary.

73 Lastly, the applicants rely on both s 144 of the *LTA* and s 104(5) of the *LGBMPA Act* for the proposition that the Recorder can properly be requested to amend the Register in the event Stage B fails on any rehearing. The former enables a person aggrieved by a refusal direction or order of the Recorder, to summon the Recorder to show cause why the action should not be set aside. However, it is based on the Recorder refusing to do an act which the Recorder s required or empowered to do under the *LTA* or any other Act. In my view, in the absence of any power or requirement to amend derived from elsewhere, this section has no operation. Section 104(5) simply enables the Recorder to call in any certificate of title affected by an amendment for cancellation or correction. This presupposes a determination to amend, and cannot therefore assist

74 That brings me to the question of fraud. As I have noted, that was raised very late in the proceedings; written submissions dated 19 August 2024. That, among other things, necessitated further submissions and ultimately an additional hearing. By s 40(3)(a) the title of a registered proprietor is not indefeasible in the case of fraud in which case the person defrauded has, except in circumstances not here relevant, all the rights and remedies that the person would have had if the land were not registered land.

75 Fraud, as an exception to indefeasibility means "dishonesty of some sort"; "actual fraud, personal dishonesty or moral turpitude": *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210, *Bahr v Nicolay (No 2)* (1988) 165 CLR 604 at 614. A person who presents for registration of a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon: *Assets Co Ltd* at 210. It is well established that fraud within the meaning of the provision can be fraud against the Registrar.

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[6] The context includes s 143A which necessitates compliance with the Recorder's requirements in relation to plans deposited or lodged. The Minister's second reading speech in October 1990 contains statements that the new Part XA, which includes s 143C, would provide the Recorder with the authority and power to requisition or reject plans which did not comply with the law. "It is anticipated this will help to eliminate work generated by the very high error rate made in plans and their accompanying documents." (sic)

76 As to the facts, it will be recalled that the Council determined to cause the amendment to be made and to require as a condition that Stage B pay to the applicants the sum of $10,000, but that obligation in turn was made conditional. One of the preconditions to the payment of the compensation was Stage B attempted to sell the property. It is an agreed fact that following the removal of the covenant, Stage B decided to sell the property, and on 30 September 2020 entered into a contract for sale. (This contract seems to have lapsed or at least remains uncompleted, but that is of no moment.) Further facts are contained in affidavits of Stage B directors Andrew Birch and William Stanford, the particular parts of which were objected to at the hearing in November 2021 by counsel for the applicants. The basis of the objections was relevance, and the evidence was taken as good for the time being. The applicants have now made those parts relevant. Neither deponent was cross-examined.

77 Mr Stanford deposes to a face-to-face discussion he had with Mr Walker on 3 August 2019 when Mr Walker came to his home. Mr Walker was cross-examined and admitted the visit, but denied the details deposed to by Mr Stanford which I need not set out. Nearly a year later, Mr Stanford found three separate notes in his letterbox which, when put together, read "21 Raleigh Crt has to stop or bad things will happen". There is nothing to connect the applicants to these notes as there were other objectors to the petition, but these are relevant to Mr Stanford's state of mind.

78 Mr Birch's affidavit reveals that Stage B was proposing to sell the property following the amendment and they wished to ensure that the question of compensation be sorted out. He contacted the Council by email on 8 September 2020 and asked about how to make the payment for compensation, saying, "Given the hostile actions of the neighbour … we don't really want any direct contact with him. Our preference would be either to deposit funds into a council account OR write a cheque for the amount so that council would be able to conclude the process by sending this payment". On behalf of the Council, its in-house lawyer Wes Young responded to Mr Birch on the same day suggesting he, Mr Young, think it over and get back to him. He added, "Option 3 might be to deal with Don Armstrong … make out a cheque to his trust account?" In his affidavit, Mr Stanford says that given the hostile interaction, when attempting to pay compensation they do not want to have any direct contact with Mr Walker. Accordingly, they contacted the Council. I note that for some unexplained reasons the amount of $10,000 was not paid until 30 November 2020, and then into the trust account of the firm of solicitors who had carriage of the contract for sale on behalf of Stage B.

79 The alleged fraud on the part of Stage B is that it, by its agents, Mr Birch and/or Mr Stanford did not inform the Recorder of the terms of the Council's decision to cause the amendment to be made, and that the condition on which the $10,000 was to be paid had been fulfilled, but the money had not been paid. As matters of fact, all of that seems to be correct but the question is whether the applicants have discharged the onus of establishing dishonesty. The rule in *Browne v Dunn* arises. As I have noted, neither Mr Birch nor Mr Stanford was cross-examined at the original hearing. No application was made to re-open for that to happen. Mr Stanford was not challenged on his version of the meeting and the fact that they acted dishonestly has not been put to either of them.

80 The law operates so that in these circumstances, it is usually unfair to reject evidence on which there has been no cross examination and no opportunity to deal with an allegation raised for the first time in closing argument. When determining whether to accept a serious allegation a court may take into account the lack of cross examination on the point and any explanation the witness might have been able to proffer if there had been cross examination. See J D Heydon, *Cross on Evidence*, 14th ed at [17460]. In the absence of any cross-examination of Mr Stanford, the court could accept his evidence about what happened. In any event, it is sufficient to note he said he found the discussion to be threatening. That is not inherently unlikely or irrational on its face and there is no reason to reject that much.

81 Put simply, the evidence establishes that Stage B through its directors accepted its liability to pay compensation but did not want to have to deal with Mr Walker in discharging that obligation. The

suggestion of a solicitor's trust account came from the Council. I am not satisfied that fraud is established, and so s 40(3)(a) of the *LTA* has no application.

82 The result of the indefeasible arguments is that Stage B's title is indefeasible and not subject to the exception of fraud. On the bases as argued, were the Council's decision to be quashed, then in the event the applicant succeeded on the rehearing, the Council would have no statutory authority to make a request to the Recorder because it has not determined to amend the sealed plan, and the Recorder has no powers of correction under the *LTA*. But I do not think the matter ends there. Relief may be refused on a discretionary basis if there is a lack of utility in making the order, or where events have overtaken the proceedings so as to render the issue moot; that is, it has lost any practical significance – *Bechara v Bates* [2021] FCAFC 34, 286 FCR 166 at [164] – or, putting it in another way, when no useful result could ensue: *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, 147 CLR 297 at [28] – [29].

83 I earlier mentioned that title derived from a sealed plan is defeasible because of s 104 of the *LGBMP Act*. (There is no doubt the operation of Torrens legislation can be affected by other statutes: see the discussion in *Canada Bay Council* (above) at [46]-[80].) To use this case as an obvious example, the applicants have been and are still able to petition for an amendment to the sealed plan to restore the covenant. If successful, and once the amendment is effected, Stage B's title becomes subject to that interest.

84 The applicants did not argue that based on an order quashing the decision from its making, an order could properly be made directing the Council to request the Recorder to, in effect, restore the notations on the sealed plan and the relevant folios of the Register to what they had been before the decision. Of course, I express no concluded view about the merits of this, but in that scenario, the initial request would have been made without lawful authority, and the authority of the Council to make the further request does not have to be found in section 104 but exists by virtue of the court order.[7] Putting that to one side, I am not entirely convinced that in the circumstances noted above, declaratory relief in appropriate terms would be of no benefit: *R v Anti-Discrimination Commissioner; Ex parte McDermott* [2000] TASSC 180, 9 Tas R 332 at [28]. Although not put in this way, there may well be utility in the applicants being armed with a declaration as to the integrity of the hearing and/or decision-making process. But because of the following, I do not need to further consider any of this.

The grounds of review

Grounds 1 and 2 – procedural fairness

85 Involved in these grounds is the question of the duty of the Committee to afford procedural fairness. This was mostly an area of common ground. The parties accept that generally the Committee was under such a duty. Counsel made references to the well-known passages from the judgments of Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550 at 584 and 612 respectively. Although their Honours differed as to the source or identification of the duty to afford procedural fairness – the common law as opposed to statutory implication[8] – both agreed that the application and content of the duty largely depended on the construction of a statute. What was appropriate depends on the circumstances of the case, which include the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting: Mason J at 584, Brennan J at 612-613.

86 Although Stage B suggested that the contents of the duty of the Committee "were quite constrained" by the statutory context, neither respondent sought to argue that the duty was excluded as

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7 If the "Request" is in order, the Recorder would seem to have little option but to accept it and effect the amendments.

8 A debate described in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, 246 CLR 636 at [97] as one proceeding on a false dichotomy and unproductive.

a matter of statutory construction. The need for the exclusion of the duty must be demonstrated by a "strong manifestation of … statutory intention": *Kioa v West* (above) per Mason J at 585. See also Brennan J at 612. In the present case, no mention was made of s 103(5) of the *LGBMP Act* which provides that if a council does not give notice of its intention to amend a sealed plan or an applicant does not serve on persons appearing to have an estate or interest at law affected by the proposed amendment as required by the section, "subsequent proceedings are not void." In the absence of any submissions as to the effect of s 103(5), I am reluctant to do much more than treat it as relevant context for the requirements of procedural fairness in relation to a hearing under s 104.

87 The two grounds raise different aspects of procedural fairness, both relating to the hearing rule. As noted, the first aspect is disclosure. The second relates to the conduct of the hearing itself, the complaint being that a reasonable opportunity was not afforded to the applicants to enable them to obtain and submit valuation evidence relevant to loss of amenity.

88 As to non-disclosure, Stage B submits that the material referred to in ground 1 was not relevant to the decision "and therefore does not afford a basis to assert jurisdictional error." Further, citing the well-known passage in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147,[9] counsel argues that even if there was a breach of the rules of natural justice, it would have made no difference to the result. Counsel described this as the concept of materiality, and referred to a number of High Court cases in a line of cases culminating in the most recent one of *LPTD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12, 98 ALJR 610.

89 In that case, in a joint judgment of Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ at [1]-[16] their Honours, clearly made the point that materiality is a precondition for jurisdictional error, and in doing so, succinctly set out several authoritative statements. Although, of course, the *JRA* is not concerned with jurisdictional error (apart from an absence of jurisdiction[10]), it pays to set out some of the statements made that relate to establishment of error and materiality, bearing that in mind.

90 In the paragraphs noted, their Honours said the following (omitting references and retaining emphases).

- It is now accepted that a statute which contains an expressed or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating a "threshold of materiality in the event of non-compliance" – [7].

- Where it is alleged that a decision is affected by a jurisdictional error which incorporates a requirement of materiality, there are two questions: has an error occurred; and if so, was that error material. The inquiry posited by each question is wholly backward-looking with both questions to be answered by a reference to the decision that was made and, depending on the nature of the error, how that decision was made; those are facts in respect of which the applicant bears the onus of proof on the balance of probabilities – [9]-[10].

- Where the jurisdictional error alleged is one concerned with the process of the decision-making such as a denial of procedural fairness, what must be proved will depend upon the precise error alleged having regard to relevant statutory provisions within the applicable legislative framework – [12].

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[9] Per Mason, Wilson, Brennan, Deane and Dawson JJ. What needed to be shown "was that the denial of natural justice deprived [the person] of the possibility of a successful outcome."

[10] *JRA*, ss 17(2)(c); 18(2)(c).

- The question is whether the decision that was in fact made *could*, not *would,* realistically "have been different had there been no error." Though the applicant must satisfy the court that the threshold of materiality is met to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous – [14].

- Where the error is a denial of procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision-maker would have approached the applicant's further evidence or submissions with an open mind – [15].

- In such cases, it is "no easy task" for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome; importantly, a court asked to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained – [15].

91 At [16], their Honours summarised the position as follows:

> "…[U]nless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met (and curial relief will be justified subject to any issue of utility or discretion)."

92 Under the *JRA* an applicant must establish that a breach of the rules of natural justice happened in relation to the making of the decision: s 17(1)(a). In *Re Minister for Immigration; Ex parte Lam* [2003] HCA 6, 214 CLR 1 at [38], Gleeson CJ said that fairness was not an abstract concept, it was essentially practical, and in terms of procedural fairness, the concern of the law was to avoid practical injustice. Practical injustice in that context can be demonstrated by nothing more than for instance, a failure to afford a fair opportunity be heard: *Minister for Immigration v WZARH* [2015] HCA 40, 256 CLR 326 at [45]-[46], [60]. Before questions of materiality arise, a breach must be established in that sense: see *Nathanson v Minister for Home Affairs* [2022] HCA 26, 276 CLR 80 at [95] per Edelman J.

93 In relation to statutory judicial review, it is established that at least some of the grounds provided for in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*) are subject to an implied test of materiality: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353, 384; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40. Those grounds are the equivalents of s 17(1)(e) – insofar that it includes taking an irrelevant consideration into account – and failing to take a relevant consideration into account[11]), and 17(1)(f) – error of law. Materiality is an element in establishing those grounds. In terms of more recent cases, see for instance *Mohammed t/as Billan Family Day Care v The Secretary, Department of Education, Schools & Employment (No 2)* [2020] FCA 1749 at [38] and *Li v Determining Authority* [2022] FCA 1448 at [124].

94 To the extent that other grounds of statutory review have not been definitively said to be subject to that test, the issue of materiality in any event arises in relation to the exercise of a discretion to grant relief under both ss 27 and 38 of the *JRA*. That was the view taken by the Full Court of the Federal Court in relation to the *ADJR Act* equivalent of s 17(1)(b) in *Darnell v Stonehealth Pty Ltd* [2022] FCAFC 76 at 291, FCR 597 at [148]. There, the Court (Markovic, Thomas and Stewart JJ) said

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[11] See *JRA*, ss 22(a) and (b).

they did not need to resolve whether it was a necessary element of the statutory review ground in s 5(1)(b) of the *ADJR Act* that any failure to observe legally required procedures be shown to be material to the decision in the sense described (in relation to establishing jurisdictional error) in cases such as *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, 264 CLR 12 and *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17, 273 CLR 506.

95 That was because, if materiality was not an element of establishing the review ground, "it is certainly a relevant matter when it comes to exercising the discretion to grant relief … ."[12] The cases their Honours referred to are within the line of authority leading to the definitive articulation in *LPTD* of the relevant principles. It follows, and I accept, that under the *JRA* the concept of materiality– however it arises – should be approached on the basis as stated in *LPTD*. In any event, it would seem that the "possibility of a successful outcome" test for the element of materiality as posited in *Stead* (above) – adopted in cases such as *WACO v Minister for Immigration* [2003] FCAFC, 131 FCR 511 at [58] – would produce the same result as the materiality test for jurisdictional error.

96 As earlier noted, ground 1 complains of the receipt and consideration by the Committee of material without disclosing its receipt to the applicants and affording them the opportunity to address it. That material, summarised in order of the chronology of events rather than as it is set out in the ground, is comprised of:

- a letter from a director of Stage B (Mr Stanford) sent by email to Alderman Chong dated 8 June 2020 which was also forwarded to a number of other aldermen, two of whom were later part of the Committee - ground 1(iii);
- an aerial photograph – described in the ground as a "map" – of the general area of Raleigh Court that seems to show the entirety of the subdivision and which, along with the agenda for the Committee hearing, was emailed by Council to the applicants and to Stage B on 24 June 2020 but not to Mr Armstrong - ground 1(i);
- a supplemental report of Stage B's expert valuer, Russell Cripps, dated 20 July 2020 (after the Committee had reserved its decision and had asked for further submissions on compensation) which was sent by Mr Stanford to the Council by email on 23 July 2020 - ground 1(ii);
- a letter dated 22 July 2020 from Stage B's planning consultant, Neil Shephard, to the Council with regard to the shared driveway access to 21 and 23 Raleigh Court, also sent by Mr Stanford on 23 July[13] - (ground 1(iv).

97 Ground 2 is a complaint that the Council failed to allow the applicants a reasonable opportunity to obtain and provide "expert valuation evidence in relation to injury and compensation." There are additional complaints set out in the ground, but they are effectively particulars of the essential grievance; a refusal of sufficient time to provide valuation evidence.

98 Both grounds call for a chronology from when Stage B lodged its petition to the point of the Council's decision. Regrettably, it is of some length and complexity, even kept to its bare minimum. In relation to the first stage up to the point at which the Committee reserved its decision, the facts are as follows:

(a) On 16 August 2019, Mr Armstrong notified the Council that he acted for Mr and Mrs Walker, that they objected to the proposal and wanted to be heard. He gave notice

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[12] The view that the preferable approach is one which is limited to determining whether a breach of procedural fairness has occurred and if so, whether relief should be refused as a matter of discretion, is of longstanding duration: *Nguyen v Minister for Immigration (No 2)* (1996) 68 FCR 463 per Merkel J at 478.

[13] Mr Cripps' report was attached to Mr Shephard's letter of 22 July and he commented on it.

under s 105(1)(a) of the *LGBMP Act* of a claim for compensation to be paid by the Council in the event the amendment was made.

(b) On 3 December 2019, Council provided Stage B (and Mr Shephard) a summary of the issues raised by representations received, and on 5 December 2019 Mr Shephard wrote to the Council addressing those issues.

(c) On 6 February 2020, Council sent Mr Shephard's letter to the applicants and requested a response by 21 February, with a copy of Mr Shephard's letter being sent to Mr Armstrong on 17 February 2020. Mr Walker himself sent a two-page response to Council.

(d) On 6 May 2020, Council wrote to Stage B noting the Council "as part of its deliberative processes has discretion to give consideration to the question of compensation that may arise" if the amendment is approved, and its expectation that the parties engage valuers "to establish the validity and value of injury, to assist Council in determining the amount of compensation that may reasonably be imposed." That letter was sent only to Stage B. Stage B engaged a valuer (Mr Cripps) who prepared a report dated 22 May 2020, which was provided to Council on 25 May 2020. That valuation was emailed to the applicants, but not until 24 June 2020.

(e) In the meantime, on 8 June 2020, Mr Stanford sent to Alderman Chong the letter referred to in the ground. Accompanying material was comprised of the petition, Mr Shephard's letter of 5 December 2019, Council's letter to Stage B of 6 May and the Cripps valuation report. (The evidence shows that the Committee decided not to consider this letter and the additional material before the hearing.)

(f) On 9 June, Council advised Stage B and Mr Armstrong of the date of the scheduled hearing, being 30 June 2020. The parties were requested to provide any additional information which they intended to rely on by no later than 22 June 2020. It was noted that all documentation provided would be circulated to all parties.

(g) On 22 June, Mr Walker sent to Council a letter in which he responded to Mr Shephard's letter of 5 December 2019.

(h) On 24 June, Council sent to the parties an "Agenda" for the hearing. This was sent to Mr Walker's personal email and to Stage B. Among the accompanying documents was the Cripps valuation, Shephard letter, and the aerial photograph. Mr Walker accepts having received the email but says he was not aware of it until after the hearing. The email of 24 June with the agenda was not sent to Mr Armstrong.

(i) On 26 June, Council sent by email to Mr Stanford and to Mr Armstrong the Council's Hearing Guide. The Council's position is that Mr Stanford's letter of 8 June with attachments, referred to in (e) above, was sent at the same time, with the advice that the Committee would not consider it before the hearing. (There is a dispute about the details of these communications, to which I will return.)

99 At the hearing on 30 June 2020, Mr Shephard made submissions on behalf of Stage B, while Mr Armstrong represented the applicants, with Mr Walker present, and made submissions on their behalf, with written outlines being provided by both parties. The applicants did not tender any reports or call any witnesses, but Mr Armstrong asked that he be able to make further submissions on the question of compensation later, to which the Committee agreed. The Committee reserved its decision.

100 The principles relating to disclosure and the relevant authorities are conveniently set out in Aronson, Groves & Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed at [9.140]-[9.160] and the authorities cited. Broadly, disclosure is a more specific requirement than that of notice of the hearing and obliges the decision-maker to alert the person entitled to be heard to the questions or critical issues to be addressed. The duty of disclosure is neither absolute nor unyielding and must accommodate the special features of the administrative process. A key factor is efficiency. The extent to which policy, expertise and independent inquiry are integral to the decision-making process will vary according to the subject matter, the variable nature of which issues can create a level of uncertainty in disclosure requirements.

101 Parties appearing before a tribunal of adversarial adjudication can usually expect to have access to all material that will be considered by the decision-maker. The key issues are whether the material will be considered by the decision-maker and, if so, whether the person affected has had an opportunity to address it. The obligation extends beyond material that is adverse, to all material that has substantive relevance to matters in issue. The receipt of material or representations from one party, not disclosed to another, may well offend the rules of procedural fairness.

Ground 1(iii)

102 I turn to Mr Stanford's letter to Alderman Chong of 8 June. I have already referred in the chronology to the accompanying material that was also sent. The letter itself provided "a brief summary" – as it was called – of Stage B's position. The points Mr Stanford made were as follows:

- Stage B were only looking to remove a covenant that prevented more than a single dwelling, where there being no record as to why this covenant exists;
- the covenant relating to building height appeared to limit the visual impact, which Stage B supported;
- removing the covenant makes it possible to develop the property in accordance with planning scheme requirements;
- under the planning scheme, large lots were no longer allowed within the general residential zone unless they were designated for multiple dwellings, and for this reason Council; had allowed the same covenant to be removed from other similar lots in the immediate area over the past few years.
- evaluation performed has shown that no financial loss to any neighbouring dwellings would occur as a result of the covenant being removed.

103 It seems the applicants' complaint relates only to Mr Stanford's letter and not any accompanying material. In argument, senior counsel for the applicant accepted that the Stanford letter "by itself is not a gamechanger" but submitted the failure to provide the Cripps' valuation was a material failure. Counsel went on to say that this first valuation report was not as significant; the focus was on Mr Cripps' second report, the subject of ground 1(ii).

104 In any event, the respondents submit that the letter was in fact disclosed before the hearing. However, there is an unresolved issue about the email sent by the Council on 26 June 2020 in relation to the letter. A Council officer, Tanya Doubleday, says she believes that on 26 June 2020 she sent to both Mr Stanford and Mr Armstrong the one email which attached a copy of the Stanford letter marked as "Addendum 1". That document is an annexure to her affidavit. The email Ms Doubleday says she sent is slightly different in its terms than the one Mr Armstrong says he received. Ms Doubleday was not cross-examined but is it plain to me she sent two emails.

105 The one Ms Doubleday says she sent to both, starts with a reference to Mr Stanford's letter and goes on to say that on legal advice, Committee members elected not to consider that material ahead of the hearing. It continues: "In order to provide for procedural fairness Council has now taken the decision to provide that material directly to Parties to the Hearing, … ". The email Mr Armstrong says he received has an opening paragraph stating that it had come to Council's attention that some members of the Committee had received "correspondence directly from interested parties". Otherwise, it is in identical terms to the other email. Mr Armstrong was not cross-examined.

106 The real question is whether the Stanford letter was sent with the email. Ms Doubleday's unchallenged evidence was that it was. The existence of a copy marked as "Addendum 1" may support this. On the other hand, Mr Armstrong's unchallenged evidence is that he was not provided with Mr Stanford's letter and was not aware he had made direct contact with Aldermen Heather Chong and others. Neither email makes any reference to attachments and that is not otherwise apparent. There is also no evidence that Mr Armstrong, having been alerted to correspondence being received by Committee members in those circumstances, made any enquiry about what it contained.

107 In this somewhat unsatisfactory situation, I am satisfied that Mr Armstrong was not sent the Stanford letter but was alerted to the fact of a unilateral communication. The question is whether the failure to send the letter was a material breach of the rules of procedural fairness. The making of an ex-parte communication will sometimes constitute such a breach. In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 58, Brennan J said the general rule is that information furnished by an ex-parte communication must not be taken into account without giving the parties whose interests might be affected by the information an opportunity to correct or contradict it.

108 The respondents argue that the matters outlined in Mr Stanford's summary were set out in Mr Shephard's letter of 5 December 2019 – to which Mr Walker had responded – and in his two-page written submission submitted to the Committee on the day of the hearing. There are also shortly stated conclusions drawn from the first valuation report sent with the agenda. The documents support the respondents' submissions. Further, there is no evidence that Mr Armstrong, having been alerted to correspondence being received in those circumstances, made any enquiry about what it contained. In addition, the applicants have not sought to dispute that the Committee members did not consider any of this material before the hearing.

109 In my view, the documents ought to have been provided to the applicants. The process was, in effect, an adversarial one with the petitioner on one side and the opponents/representors on the other. However, in all the circumstances, I am not satisfied that the failure amounted to a material breach of the rules of procedural fairness.

110 To the extent that this part of ground 1 relates to the material that accompanied the Stanford letter, that makes no difference to my conclusion. The letter of Mr Shephard dated 5 December 2019 had been sent to the applicants and a response received. The Cripps valuation report dated 22 May 2020 was sent on 24 June 2020 as part of the agenda papers, albeit not to Mr Armstrong. (Those papers were given to him at the hearing.) The Cripps report contains much descriptive information about the relevant titles and land. He noted that the two lots, 42 (Stage B's) and 43 (the applicants'), were subject to the same covenants. He said that removing the covenant from lot 42 "could also presumably be removed from Lot 43 simultaneously with the current application (sic)." Alternatively, an application to remove the same covenant from lot 43 would presumably be a formality if it were removed from lot 42. It therefore followed, he said, that any benefit to lot 42 would equally apply to lot 43. He went on to discuss the capacity for multiple dwelling on both.

111 His conclusion was that he could find no justifiable reason why the applicants' lot 43 would experience a diminution in value from the covenant being lifted from lot 42, provided that it did not in any way, prevent the same covenant from being removed from lot 43. It is clear that this opinion is of

little value as it wrongly contemplated that the applicants were interested in removing the covenant in respect of their own land and offered no opinion as to the value of any loss if the covenant was only removed from lot 42. This report was referred to by Mr Shephard in his presentation to the Committee. Mr Armstrong had the opportunity to address it at that time, or to explain the situation and to seek time in which to consider it before making any required submissions.

Ground 1(i)

112 This concerns the aerial photograph that was sent as part of the material with the agenda. The applicants' complaint seems to be not so much that it was not available to them, but the use to which it was put by the Committee. In other words, there was a failure to alert the applicants to the fact that what was depicted was to be treated as relevant to the Committee's consideration, and so deprived them of an opportunity to address the issue.

113 That requires an examination of the Council's reasons. Council concluded that Stage B's primary argument, (that the covenant should be removed due to inconsistency with the planning scheme), Council was, on its own, insufficient to justify removal of the covenant and the resultant loss of the applicants' amenity. Council then continued:

> "28 However, when the inconsistency argument of [Stage B] was considered alongside the clear change in the nature and development pattern of the surrounding properties in the sixteen years since the lot was created via the approval of the subdivision and the removal of similar covenants at the western end of the general area (although not on the same sealed plan) the argument for the amendment of the sealed plan is persuasive.
>
> 29 An examination of Attachment 2 of the Agenda [the aerial photograph] clearly shows that the immediate area contains some 40 residential dwellings on titles approximately half the size of the [Walkers'] property, including multiple dwellings. The question as to how many multiple dwellings would be permitted on [Stage B's] land, absent a covenant, would be dealt with under the Planning Scheme in the normal way with interested parties free to lodge a representation in respect of any development application if they so choose. The process is also the subject to its own appeal process by the Resource Management Planning Appeal Tribunal."

114 The applicants argue that the aerial photograph was included in the agenda documents "solely for identification purposes of the relevant property." There is no evidence of this. They further argue that the photograph was relied on by the Council as evidence of a change of surrounding circumstances of the neighbourhood, and that they had no notice that the Council intended to rely on the photograph as evidence critical to the making of a decision.

115 They rely on evidence (taken provisionally) of an expert in town planning, Ms Danielle Gray who, in a report dated 20 October 2021, opines that it is not possible or appropriate to arrive at the critical conclusion by only relying on the aerial photograph. She says that it is not possible to understand and recognise any change in area from a single image, and that to understand change, access should be had to multiple historical images in order to compare the progressive use and development.

116 This seems to me, with respect, to overstate the use the Council made of the photograph. In my view, the bases of the view of the changes in the area clearly came from other sources; in particular, Mr Shepard's submissions. He noted that the land was rezoned to Residential D from Residential B in about 1997 which meant a change in potential density from 4000 m^2 to 400 m^2 per lot. He said this was a strategic change that sought to promote development of the locality at a higher density. The result in 2004 was a 30 lot subdivision on both sides of Raleigh Court and an adjoining street into which Raleigh Court runs. The zone is now termed the General Residential Zone with large lots no longer allowed unless they are designated for multiple dwellings. In recent times the Council

allowed similar covenants to be removed from other similar lots in the nearby Low Density Residential Zone which are not on the same sealed plan

117 It is evident from the passages from the decision I have set out, that the only use of the aerial photograph was to show that in the immediate vicinity of the applicants' property, there were a considerable number of residential dwellings on blocks of land half the size of the applicants' property "including multiple dwellings".

118 That would be common knowledge, and the facts could hardly be controversial. Additionally, and in any event, that is the type of knowledge that participants in the process could reasonably expect a council to possess. In *Clarence City Council v South Hobart Investments Pty Ltd* [2007] TASSC 16 at [31], when speaking of the process of deciding whether or not to initiate an amendment of a planning scheme, previously provided for in s 33 of the *Land Use Planning Approvals Act 1993*, Underwood CJ observed that the statutory scheme contemplated that an elected council has an overall responsibility to make decisions with respect of such matters: "A council is expected to have a general knowledge of the requirements of its municipality". For those reasons I am not satisfied that any procedural unfairness occurred in relation to the aerial photograph.

Grounds 1(ii) & (iv)

119 These grounds relate to a second Cripps report and a further letter from Mr Shephard which the applicants say were not disclosed following the hearing and before the decision. They can be dealt with together. Unfortunately, that calls for another rather detailed chronology of events, some of which is also relevant to ground 2. After the Committee reserved its decision, much further correspondence took place. On 14 July 2020, the Council advised the parties by email that "as canvassed at the Hearing, the Committee would now like to receive written submissions in respect of the question of compensation as part of those deliberations." The deadline for those submissions was set at close of business on 28 July 2020. The parties were asked to address the following matters:

> "1 Identification of and quantum of a general loss of amenity for adjoining properties.
>
> 2 Identification of and quantum for a specific loss of amenity in respect to shared access with Mr Walker.
>
> 3 What orders the Parties seek with regards the matter for compensation generally.
>
> 4 The question of if any order for compensation should be tied to the future granting of a development application for multiple dwellings if the covenant were removed.
>
> 5 Any other relevant consideration in respect of the issue of compensation."

120 On 21 July 2020, Council received a response from Mr Armstrong. He advised that that the applicants were unable to obtain formal valuation advice "in the very short time proposed." He noted that his clients remained absolutely opposed to the removal of the covenant, that the question of compensation was not at the forefront of their consideration – their view being that no amount could reasonably compensate them for the likely impact – and doing the best they could, they estimated their loss to be in the vicinity of $100,000 to $150,000. Mr Armstrong pointed out the Cripps valuation provided by Stage B was of little or no assistance because of unsubstantiated assumptions, and said the following:

- the impacts on his clients were articulated at the hearing and were reflected in the valuation estimates he provided [in the letter];

- if the petition is allowed, his clients ask that compensation be paid within 14 days and otherwise accumulate interest at the rate of 10% per annum on a daily basis;
- the question of compensation should not be tied to any planning permit for future development; that was a separate process;
- "There is nothing further that I wish to put before the Committee at this stage."

121 On 22 July 2020 Mr Young (the Council's in-house lawyer) spoke to Mr Armstrong and told him that Council had offered an additional two weeks "for a revised submission to be made that would address the matter of valuation." On the same day Mr Young wrote to Mr Armstrong confirming that Council "agrees in principle to an extension of the time frame for submissions in respect of compensation due to issues associated with securing a valuation."

122 The next day, 23 July, by short email and without comment, Stage B sent to the Council a report prepared by Mr Cripps dated 20 July 2020, stated to be read in conjunction with his initial report of 22 May, and a letter from Mr Shephard dated 22 July 2020. Relevantly to ground 1, neither Mr Cripps' second report nor Mr Shephard's letter was provided to Mr Armstrong or the applicants.

123 Mr Cripps' second report deals with the issue of general loss of amenity to numbers 15, 17 and 19 Raleigh Court but does not mention the applicants' property, lot 43, in this context, at least in any relevant sense. The report specifically deals with lot 43 in terms of loss of amenity in relation to the shared access. As to that, Mr Cripps said it was plausible that an increase in traffic movements would occur, but it would have nominal impact. He said he could "find no justification to legitimately argue that an enhanced loss of amenity would occur if more than one dwelling can be constructed on 21 Raleigh Court and/or 23 Raleigh Court" and accordingly "no compensation was warranted in respect of any adjoining owner." (For some reason he still seems to have thought that the removal of the same restrictive covenant from the applicants' lot 43 was also mooted.)

124 In conclusion, he stated that there would be no additional general loss of amenity nor any specific loss of amenity resulting from increased driveway usage, and that no assessable compensation was able to be determined to any existing neighbour. Compensation, if assessed, should be paid immediately.

125 Mr Shephard's letter contained statements about Mr Cripps' second report. Mr Shephard observed that in essence he (Mr Cripps) adhered to his initial opinion. Mr Shephard accurately summarised Mr Cripps's opinion in respect of questions raised by the Council. As to the driveway issue, Mr Shephard said that to the extent impacts from use of the driveway may be relevant to consideration of compensation, he would make the following observations:

- the boundaries adjoining the driveway are fenced "providing an acceptable typical attenuation for internal driveways";
- development on the adjoining properties had been designed and undertaken in the knowledge that vehicle movements would occur along the driveway, which is constructed to a high standard – concrete, 5.5 m wide with kerb and channel – with landscaping strips along each side providing scope for additional screen planting if required by Council;
- enquiries of the Council's engineer confirmed that the driveway was more than satisfactory to service both lots for unit developments, if that eventuates.

126 The applicants say that both the second Cripps report and Mr Shephard's letter were materially relevant to the decision and required disclosure. They say the failure to provide an opportunity to make submissions about the documents was a substantial breach and not a trivial one.

The applicants bear the onus. The only direct evidence of what the applicants would have done if the documents were made available is from Mr Armstrong. But that evidence is expressly confined to the Cripps report. He says that if "such valuation" had been provided to him, he "would have sought instructions from Mr and Mrs Walker to respond to that valuation and would have made further submissions to Clarence City Council." In oral submissions to Geason J, senior counsel for the applicants enlarged Mr Armstrong's evidence to include the Shephard letter. [14]

127 The respondents accept that the documents were not disclosed but argue that this failure was not procedurally unfair but, in any event, any breach of the rules of procedural fairness was not a material one. Much of what the Council submits in these respects is more relevant to ground 2, but it says that the second Cripps report was no more than a response to the request for submissions relevant to the issue of compensation. Mr Shephard's letter, it is said, merely summarised the Cripps report and responded to an issue that had been raised by Mr Armstrong during the hearing about the amenity impacts of a shared driveway.

128 Stage B's proposition is in effect, that the issue the subject of the additional material was whether *any* award of compensation ought to be made. It submits that Mr Cripps' view, as expressed in both reports and endorsed by Mr Shephard, was that no award should be made. Mr Shepard's additional statements went to the aspect of the use of the driveway in the context of loss of amenity, and hence only the compensation issue.

129 Stage B's point is that any procedural unfairness cannot be material by virtue of the simple fact that Council resolved the issue against Stage B and found that an amount of compensation *should be* payable as a condition of making the amendment. Through Mr Shepard and Mr Cripps, Stage B's position was always that any loss of amenity was insufficient to justify an amount of compensation; the amount of compensation that might be payable was not addressed by them. Stage B argues that because the issue of whether compensation was required as a condition of making the amendment was resolved in failure of the applicants, it is not a case of whether disclosure could reasonably have brought about a different result.

130 As to establishing materiality of any breach, the applicants rely on the evidence of Danielle Gray. In her report of 20 October 2021, she addresses the question of loss of amenity as a result of the removal of the covenant. She sets out a number of matters said to be "undesirable impacts" "that the applicants believe will occur as a result, and her own view about from what matters the applicants' amenity and enjoyment is derived. There is much overlapping between those two categories.

131 Ms Gray does not agree there will be no additional general loss of amenity caused to any existing neighbour and does not agree there will be no additional specific loss amenity resulting from the increased usage of the shared driveway. She also addresses the suggestion of shrubbery being planted along the driveway and says that in her view planted landscaping has no effect on reducing, minimising, redirecting or "muffling "noise. She concludes by saying that the amount of $10,000 compensation "is grossly inadequate."

132 At this stage, I need to mention some issues to do with these grounds, the evidence adduced by the applicants and the arguments advanced on their behalf. Ground 1(ii) relates to the second Cripps report while ground 1(iv) relates to the Shephard letter to the extent that it addresses the driveway issue. The applicants submit that both non-disclosed documents could have had relevance to the "Decision", a term defined in the written submissions as the removal of the covenant as well as the amount of compensation.

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[14] Transcript p 80 at ll 30-35

133 An issue for the Committee, and hence the Council, was whether any loss of amenity generally, but specifically for the applicants, was of such a nature and extent that it outweighed arguments in favour of amendment. That involved the identification of factual matters which were pointed out in argument by Mr Walker in his February 2020 letter and by Mr Armstrong at the hearing, and which were, with respect, largely self-evident in any event. It involved the assessment of the nature and degree of those things. To the extent that expert evidence relevant to that issue was necessary, the area of expertise involved would be I think, urban planning, and possibly traffic engineering.

134 The issue of compensation would arise in relation to any suggested diminution in value of the applicants' property, clearly a matter for which expert valuation opinion evidence could assist. On the other hand, the quantum of compensation for loss of amenity was more a matter for the Council to assess, possibly assisted by expert identification of relevant possible and probable effects of the amendment. That would be an exercise not unlike a court assessing damages for pain and suffering.

135 Leaving that to one side, it is not clear from the evidence or the argument, precisely what Mr Armstrong meant by his words that he "would have sought instructions … to respond to [the Cripps] valuation and would have made further submissions." It would seem those words do not mean two separate actions; that is, it was not meant that an answering expert report would have been sought in addition to making further submission; at least providing a valuation of loss. The arguments in relation to ground 2 have some relevance here. Counsel for the applicants pointed out that in his letter of 16 August 2019, Mr Armstrong made a claim for compensation under s 105(1)(a) of the *LGBMP Act* for a reduction in property value. Of course, that provision contemplates an award of compensation *against a council* and one which can be determined after a decision to amend is made.

136 Without any direct evidence, counsel asserted that Mr Armstrong had in mind that in the event of an amendment, the applicant would pursue that claim for claim compensation; "that was how he ran the case … ." That is, if the amendment were to be made and the question of compensation arose, then his clients would go to the expense of getting a valuation report. He was content to run the case, at least up until the 14 July letter from the Council, on the basis that no amendment should be made because of the loss of amenity.

137 The argument continued as follows. Things changed with the 14 July letter seeking submissions on compensation by 28 July. The applicants were given 14 days to get their valuation evidence, because the Committee wanted to condition compensation on amending the plan rather than allowing the applicants to pursue the s 105 application.[15]

138 The point here is that it seems very difficult for the applicants to assert that they would have obtained valuation evidence had they known of Stage B's communications with the Council after 14 July, at the same time as saying that it was upon receipt of the 14 July letter that Mr Armstrong understood the need to obtain valuation evidence earlier than he might have otherwise.

139 In any event, it is not clear to what issue further submissions would have been directed. As I have shown, Mr Cripps does not, in truth, purport to "value" anything. The highest point is a statement that, due to an absence of loss of any specific or general amenity, no assessable compensation was able to be determined as due to any existing neighbour. The issue he raised was the absence of any loss of amenity, not the value to be placed on an established loss. The factual matters relating to loss of amenity were previously addressed by Mr Walker and by Mr Armstrong at the hearing, but as I have said, were in any event largely self-evident.

[15] There is no ground of review which complains about the failure to deal with the s 105 application.

140 Mr Cripps does speak of the nominal impact of extra vehicle movements in the driveway and in that respect, he suggests shrubbery. On this point, and including the Shephard letter, Mr Armstrong could have made further submissions on the driveway issue without the assistance of expertise – the simple point to be made was that there was a potential for much increased traffic on the driveway with, as Ms Gray points out in her report, shrubbery being inadequate as it does not block noise. I cannot see, with respect, that to make such an observation requires expertise.

141 The only other issue raised in the documents is Mr Shephard's statement that the Council engineer had confirmed the driveway was more than satisfactory to service both lots for unit developments if that eventuated. The structural integrity of the driveway was not an issue that seems to have been raised at the hearing, nor was not raised in the Council letter of 14 July 2020, and it does not feature in the Council's reasons.

142 Here again, for the reasons given earlier, the documents ought to have been provided to the applicants. In addition, in its letter of 9 June advising the parties of the hearing date, the Council stated that "as a matter of procedural fairness, all documentation provided would be circulated to all parties." That did not happen before the hearing, nor did it happen after the hearing, and it should have.

143 The real question is whether the applicants have established the materiality of the information in the documents concerned. I have already made some comments relevant to this issue. I think it is correct that to the extent the information in the documents related only to the issue of compensation, the Council decided that issue against Stage B. It is an inescapable conclusion that the driveway issue was part of the compensation assessment process.

144 It is also quite clear that given the terms of the letter of Council of 14 July 2020, the further information only went to the question of compensation, as distinct from the decision to amend the sealed plan by the removal of the covenant. It was not mentioned in that context, and generally, in the absence of specific reference to specific material in a tribunal's reasons, a court may infer that it was not considered: *MZAPC* (above) at [56]-[57]. Further, this is not a case where the process necessarily required the Committee to consider and deal with the material said to be adverse: see for instance, *Applicant VEAL of 2022 v Minister for Immigration* [2005] HCA 72, 225 CLR 88 at [27].

145 It follows that I am not persuaded that there is a realistic possibility that the decision to amend could have been differently decided had the information in the documents been provided, irrespective of whatever response that may have been made by the applicants.

Ground 2

146 This ground complains of procedural unfairness in respect of the decision by failing to allow the applicants "reasonable and sufficient time to obtain and provide expert valuation evidence *in relation to injury and compensation and thereby making an order as to an amount of compensation* without receiving and considering the evidence the Applicants sought to provide". I have added that emphasis because I regard ground 2 as also having been enlarged beyond its terms. In the applicants' written submissions, the argument was extended to include prejudice to them in their ability "to not only have compensation properly assessed, *but also in relation to their submission that the sealed plan ought not to be amended given the injury they would suffer*"[16]. [My emphasis]

147 On any reasonable view, the ground relates to evidence sought to be submitted in relation to the compensation issue only, and the applicants should be so confined. That view is supported by the particulars of the ground provided. They include failures to take into account that the applicants "had an arguable claim for compensation", that Stage B had been given the opportunity to provide expert

[16] Written submissions, 18 November 2021, at [78].

valuation evidence, and that Stage B had provided expert valuation evidence adverse to the applicants' case. And if there be any residual doubt about it, it is removed by the terms of correspondence from Mr Armstrong to the Council set out below.

148 To consider this ground yet another chronology is necessary. Following the communications and correspondence of 22 and 23 July 2020, the following exchanges occurred:

(a) On 29 July 2020, Mr Armstrong wrote to the Council stating that his clients had been unable to engage a valuer to provide a valuation within the timeframe discussed, suggesting that council proceed to consider the matter based on previous submissions, including his clients' estimates of impacts on property values. He added that "in the hopefully (unlikely) event that the Council accepts the petition against … firm opposition, an opportunity could then be given to provide formal valuation advice within an extended time frame."

(b) On 30 July 2020, Council responded through Mr Young asking Mr Armstrong how much longer he needed to secure a valuation and what steps he had taken to date. Mr Young said that the Committee wanted to convene and make a final decision that may or may not include the question of compensation, as opposed to making a decision in relation to the covenant and then having to potentially reconvene to address compensation. Mr Young added that Council was still open to a reasonable extension of time, but the matter had been "live for some time" and Stage B had been able to secure a valuation within the time frame.

(c) Mr Armstrong responded by saying that he had forwarded Mr Young's email to the applicants and would let him know when he had a response.

(d) On 3 August 2020, not having received any further information from the applicants, Mr Young sent an email to Mr Armstrong asking was there "any word" as he needed to instruct the Committee as to the next steps. Within a short time on the same day, Mr Armstrong replied that he had heard nothing from his client.

(e) On Wednesday 5 August 2020 Mr Young again emailed Mr Armstrong asking whether there was "any movement" as he needed to give advice on the progression of the matter if Mr Walker did not intend to provide a valuation. He said if he did not so intend, that he (Mr Young) would need to give advice about another potential extension of time "in the context of what's reasonable given the applicant has already done so and is awaiting the decision." He asked for an answer by the close of business Friday, so they could have a discussion about a further extension or "rule a line under it … ."

(f) On 11 August 2020, Council emailed Stage B to advise that no further information had been received from the applicants and that the Committee would continue to consider the petition.

(g) On 13 August 2020, Mr Armstrong requested an extension of 60 days to obtain a valuation report, saying that a number of valuers had been contacted but few were available to carry out an assessment in the near future, with the most favourable time frame being 60 days. He said if this was suitable to the Council, his clients were prepared to commission that report, and asked if he could be advised how the Council wished to proceed.

(h) On the same day at 8.58pm, Mr Young replied and said that "unfortunately" he had been instructed that a further extension of time would not be granted to seek a valuation. He said Council took the view that there had been ample time for his clients to avail themselves of the opportunity, having first raised the issue of compensation some weeks before the hearing; there was then an opportunity to make a representation on that point after the hearing, which "expired", and a further two weeks in which to engage a valuer.

(i) In that email of 13 August, Mr Young drew Mr Armstrong's attention to the previous email of 5 August 2020 and said "that Mr Walker had until COB last Friday to inform Council how he wished to proceed" and that with no response, "the Committee has now retired in order to make their decision … ." (sic)

(j) On 13 August 2020, at 9.02pm, Mr Armstrong replied, simply saying "Thanks Wes".

149 As previously noted, on 24 August 2020 the Committee provided its recommendations to Council that it cause the amendment of the sealed plan in accordance with the petition and to award compensation in the sum of $10,000.

150 As a general rule of fairness, parties must be given a sufficient opportunity to present their material and argue their case. That fairness requirement is satisfied if persons are given a sufficient or reasonable opportunity which they fail to use. In *Attorney-General v University of Tasmania* [2020] TASFC 12, the Full Court considered this aspect of procedural fairness as it related to a request for an adjournment of a hearing before the Planning Commission. At [48], Pearce J (with whom Marshall AJ agreed) said:

> "The failure to accede to a reasonable request for an adjournment can be procedurally unfair: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, 209 CLR 597 at 40. However that would generally be so only when the refusal deprives a party of a reasonable opportunity to present its case: see also *Sullivan v Department of Transport* [1978] FCA 48; (1978) 20 ALR 323 at 343 per Deane J. *The duty does not extend to ensuring that the party takes the best advantage of the opportunity to which it is entitled*. The failure to address and accede to the University's request, in the circumstances of this case, was not procedurally unfair and did not breach the Commission's obligation to afford natural justice." [Emphasis added]

151 The applicants' focus is on the time from the date of the hearing. I have already made some remarks about what it is asserted about Mr Armstrong's state of mind at that time. In their written submissions, the applicant suggests that at the hearing, Mr Armstrong requested an opportunity to obtain valuation advice. Of course, that was before the Council's 14 July letter. The only evidence of that "request" comes from his written submissions to Council, which conclude with the note: "*Need opportunity to obtain valuation advice."*

152 At the same time, although the two are not mutually exclusive, it is an agreed fact in these proceedings that the hearing, Mr Armstrong requested an opportunity to make further submissions; (there is also affidavit evidence to this effect from Ms Doubleday in the same terms). It is also asserted in argument that the 14 July letter sought valuation evidence. The terms of the letter are set out above and do not convey that; it is submissions that are requested.

153 The arguments against the applicants as put by the respondents have some merit. The applicants, through Mr Armstrong, must be taken to have known from August 2019 that at some stage they would need a report as to the diminution of property value in the event of the amendment. It is true that the 6 May 2020 letter did not go to the applicants or to Mr Armstrong, but that does nothing to alter the fact that ten months before the hearing, the applicants should be taken as being aware of the need to obtain expert evidence as to compensation, even if the view was taken that the issue would not be agitated until a decision on the amendment had been made.

154 If it is right that such a view did exist then it would seem contrary to the alleged request for an opportunity to obtain valuation evidence. It can reasonably be inferred that Mr Armstrong was aware of s 104, and although there may be an issue about whether a council can elect to deal with compensation under that provision in the face of a s 105(1)(b) claim, to simply assume that the compensation issue would not arise until after the amendment application resolved, would not have been a reasonably prudent approach.

155 There is also merit in the respondent's observations about the post-hearing correspondence. First, there is the 30 July communication from Mr Young asking Mr Armstrong how much further time he needed and advising that the Council was open to a reasonable extension of time. That communication kept alive the bifurcation of the amendment/compensation process. There was a delay of nearly two weeks before Mr Armstrong requested the 60 day extension, during which Mr Young wrote to Mr Armstrong about a response; see [117] (c), (d), (e) and (g) above. Finally, nothing was done in response to Mr Young's last email to Mr Armstrong, advising that the Committee would proceed to consider their decision, other than a mere acknowledgment.

156 I am not satisfied there was any procedural unfairness in the events after the hearing.

157 A particular matter of complaint raised under this ground is a failure to take into account the applicants' personal circumstances, and their explanation for delay. The evidence relevant to that matter is contained in par [8] of an affidavit of Mr Walker sworn on 6 August 2021, but nothing in it changes my view of things. He says:

> "During the period in which Council requested myself [sic] to obtain a valuation was overlapping [sic] a directions hearing, subsequent rescheduling of hearing, preparation of hearing and hearing for another separate matter that Clarence City Council was pursuing me for. The … Council was aware that I was extremely busy with the preparation for that matter and notwithstanding that provided me with limited time to obtain a valuation."

158 Lastly, during the course of the 2021 hearing the applicants extended the scope of the argument under this ground by arguing that there was procedural unfairness in that the Council itself was not appraised of all the material before the Committee. This argument is linked to ground 5(c) which alleges an improper exercise of power or error of law in that the Council was required to make its own decision on the application, but "merely 'endorsed' the 'decision' of its Committee." Discussion of this residual procedural fairness issue is best left until that ground is considered.

Ground 3 – failure to take into account relevant considerations

159 This ground is based on ss 17(2) and 20(b) of the *JRA*. For the ground to succeed it is not sufficient for an applicant merely to show that something relevant has not been adverted to in a decision-maker's reasons; it is necessary to show that the consideration said not to have been taken into account is one which the applicable legislation *binds* the decision-maker to take into account. The power to amend a sealed plan under s 104 the *LGBMP Act* is discretionary, and the legislation is silent as to what factors are to be taken into account in relation to the exercise of that power.

160 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (above) at 39-40, Mason J (with whom Gibbs CJ agreed) said that what factors a decision-maker is bound to consider is determined by construction of the statute conferring the discretion. If the relevant factors – those which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject, scope and purpose of the Act. Where factors that *may* be taken into account are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation.

161 His Honour went on to make it clear there was an element of materiality in this ground of review: "a factor might be so insignificant that the failure to take it into account could not have materially affected the decision: …. ."

162 The applicants say there are six relevant considerations not taken into account. Two questions arise in relation to each. The first is whether the Council was bound to take that consideration into account; the second is established that there was a failure in fact to take the consideration into account.

163 The first consideration is that a restrictive covenant is a proprietary right and should not be lightly removed. This point seems to reflect the approach that applies in relation to the extinguishment of "an overriding interest" (which includes a covenant that has the effect of imposing a restriction on the use of the land subject to it), as set out in the *Conveyancing and Law of Property Act 1884*, s 84C. This goes back at least to *In re Henderson's Conveyance* [1940] Ch 835, it now being established that a court should approach an application for extinguishment of an easement on the footing that it is a serious inroad upon the proprietary right which is vested in the owner of the dominant tenement: *Pearson v Richardson* [2012] TASSC 71, 21 Tas R 461 at [47] and the cases cited.

164 It should be borne in mind that the benefit of the type of restrictive covenant under consideration is created by the terms of a sealed plan approved by a council. It is that which causes the benefit and the burden to run with the respective lots. That same council has the power to amend it. However, I am prepared to assume in the applicant's favour, without deciding the point, that the removal of the covenant, as a "serious inroad upon a vested proprietary right", is a matter which the Council was bound to consider. But I am not satisfied that the matter is something which escaped the Council's attention. At par [6] of the reasons the Council said that it had "determined that there was an obligation to consider any matter in respect of the amendment … provided those matters were relevant and not vexatious or spurious…".

165 At par [10] the Council noted that, as part of Mr Armstrong's argument, it was put that the covenant was a restriction on title providing separate legally enforceable rights. In Mr Armstrong's written submissions to the Committee, he noted under the heading "Importance of covenants", that they provide legally enforceable rights. There is nothing to suggest the significance of the loss of the interest was ignored.

166 The next relevant consideration is that Stage B had failed to specify what developments should be proposed for the land if the petition was granted. In my view, such a failure is not something a council would be obliged to consider. In this case, the Council was able to take into account that a multi-dwelling development might eventuate but a failure to specify precisely what any development was to be, was not a relevant factor.

167 The next relevant consideration said to be ignored is that there was no imperative for the development; that it had been pursued solely for the purpose of Stage B making a profit. At first sight, this is in contradictory terms to the previous matter. It is best to read "development" as meaning the removal of a covenant. The only evidence about what Stage B proposed to do with the land is of events that occurred after the decision was made. As has been discussed, on 30 September 2019 Stage B entered into a contract for sale of the property. That was for some $405,000 more than it was purchased for in July 2019. The applicants would appear to be relying on an inference to be drawn from this.

168 The argument, based on what Farwell J said in *In re Henderson's Conveyance* (above) at 846, is that the power to amend ought not to be exercised to benefit one private individual at the expense of another. While that is what his Lordship said, he had earlier said something similar but went on to say he "was not suggesting there may not be cases where it would be right to remove or modify a restriction against the will of the person who holds the benefit of that – either with all that

compensation – in a case where it seemed necessary to do so because it prevents in some way the proper development of the neighbouring property, or some such reason of that kind; … ."

169 It can be expected that the Council had in mind that Stage B, as a developer, had the potential of some profit in its corporate mind. Indeed, at par [17] of the reasons the Council noted that Stage B sought the removal of a covenant presumably so they could make a future development application that would be permitted under the planning scheme. But the motivation of profit was not relevant to the decision. The motive of a petitioner is not something that a council would be bound to consider in the exercise under s 104.

170 The next "relevant" consideration is "the style, arrangement and appearance of the houses on the plan". The applicants put that the Council considered some 40 dwellings on the aerial photograph and concluded that the change in nature, development and density in the surrounding area, when taken with the conflict between the covenant and the planning scheme, justified the removal. The applicants argue that consideration of the dwellings was irrelevant, and what was relevant was whether there had been any change in the style, arrangement and appearance of the houses. Quite what is meant by that, and why it would be so, were not explained.

171 It is plain from the reasons that the Council considered took into account the change in the nature of the development pattern of the surrounding properties. That included noting that the immediate area contained some 40 residential dwellings on titles approximately half the size of the applicants' property, including multiple dwellings. I would have thought that multiple dwellings might be a matter of "appearance" but in any event, I am not satisfied that the suggested consideration was something which the Council was obliged to consider.

172 Next, is the suggested failure to consider the loss of amenity as relevant not only to the issue of compensation, but also to the decision whether to remove the covenant. Earlier in these reasons, I noted that an issue was whether any loss of amenity was of such a nature and extent that it outweighed arguments in favour of amendment. It follows that I accept loss of amenity is relevant to the decision itself, and in the context of the legislative scheme something which had to be taken into account. However, I am not satisfied that this issue was lost on the Council. In his written outline to the Committee, Mr Armstrong provided examples of the enforcement of restrictive covenants and stressed the importance of the covenant to his clients and other lot owners, and addressed the impacts if the covenant was removed.

173 More particularly, at par [32] of the reasons, the Council accepted that there was merit in the applicants' argument that there would be an impact on their quiet enjoyment of their title, "best described as a general loss of amenity". It also accepted that this future loss of general amenity operated in constant certain for specific loss of amenity in relation to the shared access. The Council continued:

> "But the Council is not persuaded that the loss of amenity alone is sufficient in this instance to refuse to amend the sealed plan by the amendment of the covenant".

174 The last matter said to be ignored is the potential loss of sale value of the applicants' property if the petition was granted. No argument was advanced as to why, under the legislation, a Council would be *obliged* to take such a factor into account. It seems to me that it is a matter that it would be entitled to consider but not one which it would be obliged to. I add that there was no evidence of the extent of any loss of sale value. As to that, I would repeat my comments made in respect of ground 2 in relation to the opportunity the applicants had from the start of the process to obtain and provide relevant evidence.

Ground 4 – taking into account irrelevant considerations

175 The approach to alleged failures to take into account relevant considerations applies equally to this ground. That means that an applicant must establish not only that the matter must have been irrelevant, but on a proper construction of the legislation, its consideration was *forbidden*. Irrelevancies which might invalidate a decision must be forbidden ones: see for instance *Ballantyne v Workcover Authority of New South Wales* [2007] NSWCA 239 at [113].

176 There are three matters identified as being irrelevant considerations. They are:

(a) the aerial photograph, or map, "as demonstrating the clear change in the nature, scope and development pattern of the adjoining land";

(b) the 40 residential dwellings referred to the reasons;

(c) that the question as to how many multiple dwellings would be permitted on the petitioner's land could be dealt with under the Planning Scheme.

177 I have already commented on the use of the aerial photograph. I have already set out the context in which the Council considered the 40 residential dwellings. Consideration of neither of those matters could, on any view, be regarded as being forbidden by the legislation. As to the third matter, it is correct the Council expressed that view. It was in the context of saying that an examination of the aerial photograph showed the immediate area contains some 40 residential dwellings, including multiple dwellings. The observation was a fair one, and to the extent that it may have influenced the Council's decision, it was not something that was a forbidden consideration.

Ground 5(a) & (b) – inadequate reasons

178 These grounds respectively complain that the Council (a), made a compensation order without providing the basis for how the compensation was accessed, and (b), failed to give any reasons for determining the compensation in the amount of $10,000. Ground 5(a) was argued on the basis that the failure amounts to an error of law or an improper exercise of power; the latter leading to s 20(g) of the *JRA*, which provides that an improper exercise of power includes an exercise of a power that is so reasonable that no reasonable person could so exercise the power.

179 The submissions rely on a statement by Gibbs CJ in *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 663-664. In effect, his Honour said that the absence of reasons does not mean the decision cannot be questioned; if the decision-maker does not give any reasons for the decision, the Court may be able to infer that there is no good reason.

180 The difficulty with the applicants' submission is the issue in respect of which they say the absence of reasons is such as to warrant relief. The issue is "the basis for how the compensation was assessed." Assessing compensation in this context is, like many other assessments which involve attributing a figure to loss or injury, a process of discretionary judgment. The exercise is one of fixing a figure based on matters which have been established or which involve an assessment of future possibilities and probabilities. It is possible to state the facts and assumptions on which the assessment is made, but it escapes me how attributing a final figure for "general" damages or compensation based on the stated facts and assumptions is capable of being explained. Bearing in mind this is not a merits review, I take the view the facts and factors upon which the assessment was made are adequately set out in the Council's reasons. The ground has no merit.

181 As to ground 5(b) the starting point is the Council's obligation to provide reasons, leaving to one side for the moment the operation of Pt 5 of the *JRA* – "Reasons for Decision". It is well established that an administrative tribunal is generally under no obligation to provide reasons for its

decisions, even those made in exercise in a statutory discretion and liable adversely to affect the interests, or defeat legitimate or reasonable expectations of others, unless the statute under which the decision was made expressly or impliedly so requires: *Public Service Board (NSW) v Osmond* (above); *Wingfoot* (above) at [43].

182 In this case, apart from Pt 5 of the *JRA*, the nature of a council's function in the statutory context was not addressed. I proceed on the basis that the function is an administrative and not a judicial one, albeit that it may involve some adversarial aspects. In my view *Osmond* must therefore prevail. That brings the discussion to where the provision of reasons is required under Pt 5. Section 29 enables a relevant person[17] to request the decision-maker to provide a written statement relating to the decision. The decision-maker must comply with the request in certain circumstances: s 30. The statement must contain reasons: s 31. If the decision-maker does not comply with the requests, the requester may apply to the Court for an order requiring the decision-maker to give the statement within a specified period. Of course, that happened in this case.

183 The question then is, to what extent do these requirement provisions affect the common law situation? There is authority of the Court of Appeal in Victoria that the inadequacy of reasons produced in response to a statutory request is not an error of law: *Sherlock v Lloyd* [2010] VSCA 122, 27 VR 434; *Colquhoun v Capitol Radiology Pty Ltd* [2013] VSCA 38, 39 VR 296. The provisions under consideration in those cases are those in the *Administrative Law Act 1978* (Vict). Although the relief provide for in that Act is relief in the form of prerogative relief, the "reasons" provisions are not relevantly distinguishable from those of the *JRA*.

184 To me, that is the end of the matter, although in any event, as Mr Morris for the Council pointed out, "reasons" is defined in the *JRA*. The concept means findings on material findings of fact relating to a decision, and a reference to the evidence rather than the material on which any such findings are based. An order of compensation is a matter of judgment, as I have explained, and is not a matter relating to a material question of fact. Were it to be necessary to go any further, I accept the Council's submission that the "path of reasoning", as described in *Wingfoot*, is readily discernible from the Council's reasons.

185 In all of this I have assumed that a failure to give reasons, or inadequate reasons, are matters which may mean "the decision involved an error of law" as specified in ss 17(f) and 18(f) of the *JRA*. I have serious doubts about that proposition. There is a clear conceptual distinction between an error of law in the decision- making process and an error of law relating to the provision of reasons. It is the decision, not the reasons, that is the subject of judicial review. Inadequate reasons do not amount to an error of law *in* the decision, although the question is one of law for the purposes of legislation in which that is a jurisdictional limitation on a right of appeal: *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCA 253, ALR 263 at [31]-[34], on appeal [2009] FCAFC 137, 179 FCR 554; *Transcon Holding Pty Ltd v Aged Care Quality and Safety Commissioner* [2023] FCAFC 60, 279 FCR 39 at [101].

186 I think that in its context, it would be straining too far the ordinary, literal meaning of "the decision involved", to say that no or no adequate reasons fall within ss 17(f) and 18(f) of the *JRA*.

Ground 5(c) – a decision of the Committee or the Council?

187 This ground requires separate consideration and is linked to the complaint of procedural unfairness that I earlier alluded to but reserved to the present discussion. The complaint is that the making of the decision was an improper exercise of the power, and involved an error of law in that the

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17 "[A] person who is entitled to make an application to the Court under s 17 relating to the decision."

Council itself was "required by law to make its own decision on the application … and [instead] merely 'endorsed' the 'decision' of its Committee."

188 The relevant facts are as follows. The Committee provided to Council what is described as a "Findings Report" dated 24 August 2020. It concludes with a three-part recommendation to Council which, in essence, is reflected in the final outcome. On 26 August, agenda papers were sent to Council. Which included an executive summary in relation to the petition, and a more formally drafted recommendation for Council's consideration. That summary stated that the purpose of the agenda item was "to consider a report and recommendation from the Clarence City Council petition to amend hearings committee in regard to the petition … ." The Report was an attachment to that document.

189 The Council's reasons which were delivered after the order of this Court pursuant to s 35 of the *JRA*, and the Findings Report, (the Report) are for all intents and purposes identical. The heading of the final "Recommendations" of the Committee Report have been changed to "Decision". Otherwise, generally the word "Council" has been substituted for "Committee", or the word "Committee" has been omitted with no material consequence to the way the reasons read.

190 On 31 August 2020, the Council passed a resolution in accordance with recommendations in the following terms:

> "A That Council endorses the Committee's findings and recommendations in respect of the Petition in their decision in respect of the order for the conditional grant of compensation.
>
> B That the considerations and observations included in the Findings Report provide the basis of and reasons for Council's decision in respect of the petition application.
>
> C That in accordance with Regulation 34(3) of the Local Government (Meeting Procedures) Regulations 2015, Council authorises for release:
>
> - The Council's decision (only) in respect to this item to relevant parties; and
>
> - The Committee's Findings Report to the petitioner and on request to each of the parties to the Hearing process."

191 Of course, s 104(2) specifically enables a hearing in respect of an amendment to be conducted by a council committee. Council committees to assist in a council's functions can be established by virtue of s 23 of the *Local Government Act* 1993. The applicants' point is that the Council cannot be said to have made its own decision as required by s 104(3). When distilled to its essence, this point seems to merge with the residual procedural fairness argument carried over from ground 2, and with the inadequate reasons point. That is because, as ultimately put, the complaint is about there being insufficient material and considerations in the Report to such an extent that the Council could not properly have decided whether to accept the committee's recommendation. That is more an issue of procedural fairness: see the discussion in *Judicial Review of Administrative Action and Government Liability* (above) at [9.220].

192 In *R v Davis; ex parte Calvary Hospital* [1999] TASSC 49 at [31], Underwood J said:

> "[W]hether the rules of natural justice are satisfied in a case where the exercise of [the hearing and determinative] powers are split between one or more persons will depend upon what information about the hearing is conveyed to the decision-maker in each case. The nature and complexity of the hearing and the accuracy and completeness of the information contained in the report will no doubt be significant factors in ascertaining whether the decision-making powers have been exercised in accordance with the rules of nature justice. Whether the separation of the hearing power from to

the determinative power will result in procedural fairness will depend upon the circumstances of each case."

193 The applicants rely on part of an oft cited passage from *White v Ryde Municipal Council* [1977] 2 NSWLR 909 at 923. In the particular passage, Reynolds JA stated that as a general proposition, it is plain that he who decides must hear, but that "this must be understood in the sense that the decision-maker has before him the evidence and submissions of those entitled to be heard", noting that it was by no means a universal requirement that the decision-making body must see and hear witnesses, much less actually hear submissions or representations.

194 In the type of case as exists here, the critical issue is the extent and accuracy of the information provided to the ultimate decision-maker. It is true that in the Report the Committee purported to "decide" the issues, but it ultimately put its views in terms of a recommendation. It was the Report with the recommendation that was considered by the Council.

195 The applicants make particular complaints about the lack of reference to the "valuations" the committee had received – presumably a reference to the reports of Mr Cripps – how they were taken into account in relation to the suggested loss of amenity, about how the Council was to decide appropriate compensation for loss of market value or interruption to amenity in light of the Committee's reasons, and about the omission of any reference to Mr Armstrong's suggested figure of $100,000 to $150,000 as appropriate compensation.

196 In this instance, I accept the applicants' arguments but only to the extent that they relate to the question of compensation. In my view, the issues and arguments about the amendment are adequately set out in the Report. However, that is not the case in relation to the compensation issue. There is no reference in the Report to the exchange of correspondence and the communications between Mr Young and Mr Armstrong after the hearing, and in particular, no reference to Mr Armstrong's letter of 21 July 2020; see par [120] above. There are no findings of fact and no statement of relevant considerations that would form the basis of, or influence, the sum arrived at. The Committee simply provided no explanation for any of this to the Council and the Council merely endorsed the Committee's decision in this respect. To that extent, ground 5(c) is made out.

Ground 6 – A "no evidence" ground

197 Although the ground refers to the "Decision" as a whole including the amendment, the arguments were confined to the issue of compensation. On that basis, I will address the evidence on which the decision to condition the amendment on the payment of $10,000 was made. This ground is based exclusively on the arguments about the aerial photograph and the finding that there had been "a clear change in the nature, scope and development pattern of the adjoining properties and the surrounding area since the imposition of the covenant, it was apparent that there had been a clear and significant change in those characteristics in the intervening sixteen years.": see pars [113]-[117] above. The applicants submit there was no evidence to establish that as a fact.

198 Section 17(2)(h) of the *JRA* provides for a ground of view where "there was no evidence or other material to justify the making of the decision." The establishment of the ground is governed by s 21, which provides that the ground is not made out unless:

"(i) the person who made, or proposes to make, the decision based, or proposes to base the decision, on the existence of a particular fact; and

(ii) the fact did not or does not exist".

199 In *Curragh Queensland Mining v Daniel* (1992) 34 FCR 212, the equivalents in the *ADJR Act* of s 17(2)(h) and 21, were held to have a cumulative effect. When "no evidence" is made out it is always an error of law. The cumulative nature of the provisions means an applicant must establish

both the error and, pertinent to this case, that the decision-maker based the decision on the existence of a particular fact that did or does not exist.

200 This issue was considered by the High Court in *Minister for Immigration and Multicultural Affairs v Rajamannikam* [2002] HCA 32, 210 CLR 22. That involved provisions in the *Migration Act 1958* (Cth) which were identical to the *ADJR Act*. As to the cumulative interpretation, the outcome was that two justices endorsed the cumulative approach, (Gleeson CJ) two did not (Gaudron and McHugh JJ), while the judgment of the fifth justice, (Kirby J), was inconclusive on the point and his Honour dissented as to the outcome. Accordingly, it seems that *Rajamannikam* did not overturn *Curragh*, and most cases since then have taken it as endorsing the cumulative interpretation; see generally *Judicial Review of Administrative Action and Government Liability* (above) at [5.300] 240 and the cases noted at p 240 fn 223.

201 On a different point, the majority in *Rajamannikam* saw the second limb of s 21 as limited to findings that were not just a basis for the decision, but a critical basis. Using the cumulative approach, the reference to no evidence in s 17(2)(h) should be taken as a reference to the "particular fact" as mentioned in s 21(b). Lastly, *Rajamannikam* is authority for the proposition that an applicant has to show that were it not for the particular factual error, the result would clearly have been different: Gleeson CJ at 39; Gaudron and McHugh JJ at [58].

202 The reference to a particular "fact" has been held to extend to a state of affairs; *Rajamannikam* (above) at [35]; *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204 at [49].

203 From the Council's reasons, I take the view that the "significant change" aspect was a critical fact for the purposes of the decision. That arises from pars [27] and [28]. Paragraph [28] is set out above, but it is convenient if I set both paragraphs out here.

> "27 In regard to Mr Shephard's primary argument the removal should be granted due to inconsistency with the Scheme, the Council is of the view that this also on its own was [referring to the impact on amenity] was an insufficient ground to justify the removal of the covenant and the resultant loss of a degree of the respondent's amenity.
>
> 28 However, when the inconsistency argument of [Stage B] was considered alongside the clear change in the nature and development pattern of the surrounding properties in the sixteen years since the lot was created via the approval of the subdivision and the removal of similar covenants at the western end of the general area (although not on the same sealed plan) the argument for the amendment of the sealed plan is persuasive."

204 The difficulty the applicants face is to prove that fact or state of affairs did not exist; that is, in short, that the "clear change" of what is described, did not exist. The applicants rely on the affidavit evidence of Ms Gray, part of which I referred to earlier in relation to ground 1(i). In addition, Ms Gray's report contains the following:

> "Without the comparison of multiple images showing progressive development, it is my view that an understanding of the change that has allegedly occurred cannot be arrived at. An opinion that change has occurred must be based on comparison. The single image does not provide the opportunity for comparison."

205 There is a high level of authority that any evidence that establishes the non-existence of the fact or state affairs is admissible in judicial proceedings, but any evidence that contradicts either evidence or material which was before the decision-maker, or an inference which was available to be drawn from that evidence or material, is not permitted: see *Szelagowicz v Stocker* 1994 (35 ALD 16 at 22) Full Court of the Federal Court, Davies and Enfield JJ, (with whom French J agreed); *Minister for*

Immigration and Multicultural Affairs v Tesic [2017] FCAFC 93, 251 FCR 23 per Reeves, Robertson and Rangiah JJ at [55].

206 I do not think that the passage from Ms Gray's report relied on establishes the non-existence of the "significant change" critical fact. Even looking at Ms Gray's report as a whole, her argument is about methodology, and she offers her view as to what can be derived from her own viewing of aerial photographs taken in the period 2003 to 2020. As such, it is either irrelevant or contradicts the evidence or material which was before the Committee.

207 I am not persuaded that there was "no evidence" upon which the "significant change" finding could have been made, and I am not satisfied that as a particular fact or state of affairs, it has been shown on admissible evidence, not to have existed. Accordingly, there is no merit in this ground.

Ground 7 – Conditions on the payment of compensation beyond power?

208 This ground asserts that the Council imposed conditions on the payment of compensation that were beyond the power bestowed by s 104(3) of the *LGBMP Act*. Reference is made to s 17(2)(c), (d) and (f) of the *JRA*, which respectively involve an absence of jurisdiction, an absence of authority of the enactment and an error of law. It is best if I set out s 104(3) in full:

> "104 **Hearing in respect of amendment of plans**
>
> …
>
> (3) On the conclusion of the hearing, the council may –
>
> (a) cause the amendment to be made with or without modification; and
>
> (b) require as a condition of so doing that any person who benefits the amendment is to make compensation in money or land to a person who is injured by it."

209 As earlier noted, having determined that the amendment should be made, and that it was a condition of causing that amendment to be made that Stage B make compensation "to Mr Walker (sic) in the sum of $10,000", the Council continued:

> "(a) The Applicant secures planning approval for the construction of multiple dwellings on Lot 42, or;
>
> (b) The Applicant secured an approval to sub-divide Lot 42;
>
> (c) The Applicant otherwise attempts to sell the property;
>
> (d) In the event of either (a) or (c) occurring the payment of compensation is not to occur until any and all appeal rights are either out of time or have been exhausted;
>
> (e) In the event of (c) the payment of compensation is to occur before the execution of the contract of sale in respect of Lot 42."

210 Although the word "or" only appears after (a), it is to be assumed that all paragraphs were disjunctive, and not that (b) to (e) were cumulative in their effect. The applicants argue that those conditions on the payment of compensation were not authorised by the legislation. In effect, they were conditions imposed on the condition which a council is empowered to make under s 104(3)(b).

211 Counsel for the respondents referred to cases in support of the proposition that, subject to the evident purpose or purposes of the legislation concerned, statutory authorities may impose conditions

on the exercise of a power, as long as the conditions are not inconsistent with the purpose for which the power is granted. Those words come from *Johns v Australian Securities Commission* (1993) 178 CLR 408, per McHugh J at 469-470. This, and a number of other authorities were referred to by Blow J in *Dorset Council v Resource Management Planning Appeal Tribunal* [2011] TASSC 7 at [19]-[20]. In that case, his Honour held that the statutory scheme did not enable the Resource Management Planning Appeal Tribunal, on appeal from a council, to impose conditions when granting a certificate of approval for a strata plan: see [21]-[24].

212 In *R v Resource Management and Planning Appeal Tribunal; ex parte North West Rendering Pty Ltd* [2005] TASSC 8, 138 LGERA 412. The statutory scheme enabled the Tribunal to require a person to refrain from a course of action that constituted contravention or potential contravention of the legislation concerned, or to preclude for a specified period the person from carrying out any use or development in relation to the land in question, or to require the person to make good a contravention then a period specified by the Tribunal. Evans J held that the Tribunal had the power to do so conditionally. At [22], his Honour said that a necessary incident of those powers is the power to make a suspended or conditional order.

213 In my view, none of these authorities assist the respondents in their argument. The principles which are explained are uncontroversial but have no application in the present case. Under s 104(3)(b), a council has the express power to cause an amendment to be made to a sealed plan, and (expressly) on condition that the person who benefits is to make compensation. The real question is whether there is any power to impose conditions on whether that compensation is ultimately payable or not. That is, in broader terms, to make the condition conditional.

214 It seems to me that the answer, as indicated in the cases referred to, is in the provision itself. The short answer to the respondents' arguments is that the power given by s 104(3)(b) is to impose a condition *on the making of the amendment*. There is no power, express or arising by reasonable implication, to impose a condition *on the condition* "to make compensation." A different analysis gives the same result. The section enables a council to condition the amendment on the payment of compensation to a person "who is injured by it." That is, a state of affairs arises by the making of the amendment. That requires a determination to that effect; that is, a person *is* injured by the amendment. It is that determination that gives a council the power to make the condition.

215 In conceptual terms, if it is determined that the person is not injured until some future event which might occur and at an unspecified time in the future, then the power to impose the condition in the first instance does not arise. Such an approach is not permitted by the section. I do not see how the condition to pay compensation can be imposed on a conditional basis, at least of the type involved in this case. I uphold ground 7.

216 I do not feel able to end the discussion on this issue without reference to what the Council did in this case. The Council's own "Policy and Procedures for Applications to Amend Sealed Plans", forwarded to the parties before the hearing, contains a statement that an amendment to a sealed plan approved by Council on the condition that compensation is payable, will not be executed by Council until such time as confirmation is received of the applicant party's agreement to pay and/or confirmation of the receipt of compensation.

217 Irrespective of whether my conclusion on this ground is right, I think it would be unwise to execute and provide the documents, or to do doing anything to effect the amendment. until such time as compensation has actually been "made". Acting on an agreement is problematic. Payment or the making of compensation is a condition of making the amendment and it seems clear to me that is a condition precedent. If the amendment is made and compensation has not been made beforehand – it might never be paid – then retrospectively the condition has not been fulfilled and the amendment could not have been made. There is no provision enabling a person in whose favour an award is made

to recover the amount. That is unlike s 105 which gives to a council, where it agrees to pay compensation, a right of recovery against the petitioner. Of note is that a s 105 award can be made after the amendment is effected.

Disposition

218 I have held that ground 5(c), as it relates to the condition of payment of compensation to the applicants, and ground 7 are made out.

219 The parties are agreed that the requirement to pay compensation as a condition of causing the amendment to be made, is severable from the decision as to the amendment itself. That appears to be a valid position to adopt. Essentially, the question is whether the decision would have been made without it. The flaw in the decision is not the condition requiring the payment of compensation, but the way in which the quantum of that compensation was arrived at, and the conditions imposed on the condition. Accordingly, that part is not an integral and essential element of the decision to cause the amendment to be made and to require as a condition of doing so, that Stage B pay the applicants compensation: see *Coco v The Queen* (1994) 179 CLR 427 at 443-444 and the *North West Rendering Pty Ltd* case (above) at [26].

220 That said, in my view the appropriate order is to quash the decision of the Council to the extent of the amount of compensation assessed and the conditions imposed on the payment of that compensation. That aspect should be remitted to the Council for determination in accordance with these reasons. There may be further or consequential orders which are appropriate. One issue that comes to mind is the constitution of a committee if Council were again to seek such assistance with carrying out its functions, or indeed the Council itself depending on quorum requirements. The application is granted and I will hear from counsel before making any further orders.