Land and Environment Court New South Wales

Case Title:	Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2)
Medium Neutral Citation:	[2013] NSWLEC 156
Hearing Dates:	24-25 September 2013
Decision Date:	9 October 2013
Jurisdiction:	Class 4
Before:	Biscoe J
Decision:	(1) Declaration that the respondent's land at 34 Stuart Street and 36 Stuart Street, Manly is classified as community land under the Local Government Act 1993. (2) Order that the respondent be restrained from selling, exchanging or otherwise disposing of the said land so long as it is classified as community land under the Local Government Act 1993. (3) Declaration that the respondent's land at 36 Stuart Street, Manly is subject to a trust for a public purpose. (4) The respondent is to pay the applicant's costs. (5) Liberty to apply on three days notice. (6) The exhibits may be returned.
Catchwords:	JUDICIAL REVIEW – claim to prevent council selling land on basis that under Local Government Act 1993 it is classified as community land, which council has no power to sell - re land vested in council as at 1 July 1993, whether 1994 resolution classifying it as operational land beyond power because deemed to be community land under cl 6(2)(b) Sch 7 – whether presumption rebuttable and rebutted –

whether advance public notice of 1994 resolution as required by s 34 - re land acquired by Council after 1 July 1993 by agreement as contemplated by local environmental plan and Land Acquisition (Just Terms compensation) Act 1919, whether 1998 resolution classifying it as operational land beyond power because inconsistent with terms of trust or instrument executed by transferor as provided in s 31(3)(b) – whether advance public notice of 1998 resolution as required by s 34 – whether resolutions invalid under *Project Blue Sky* principles – whether Council has defence under s 54 on basis of power to issue conclusive certificate as to classification given that s 53 land register records the subject land as operational – whether proceedings barred by time limitation in s 729 – whether relief should be refused in the Court's discretion.

Legislation Cited:

Conveyancing Act 1919

Environmental Planning and Assessment Act 1979 s 26(1)(c)

Interpretation Act 1987 ss 3, 34(1)

Land Acquisition (Just Terms Compensation) Act 1991 ss 3,5, 20(1)(b), 21(1)(b), 23, 24, 25, 30, 36, 55(f), 56

Lands Acquisition Act 1955 (Cth) s 5(1)

Local Government Act 1993, Part 2 (ss 25-54B) of Chapter 6, ss 186, 188, 674, 729 cl 6 of Sch 7

Real Property Act 1900 s 42

Manly Local Environmental Plan 1988

Manly Local Environmental Plan 2013

New South Wales Legislative Assembly Parliamentary Debates (Hansard) 27 November 1992

Cases Cited:

Azevedo v Secretary, Department of Primary Industries & Energy (1992) 35 FCR 284

Bathurst City Council v PWC Properties Pty Ltd [1998] HCA 59, (1998) 195 CLR 566

Broadcast Australia Pty Ltd v Noonan [2011] NSWSC 1524, (2011) 188 LGERA 1

Dominic Wykanak v Rockdale City Council NSWLEC, Pearlman J, 2 July 1998 (unreported)

Flaherty v Columbia Nursing Homes Pty Ltd [2007] NSWLEC 148, (2007) 152 LGERA 383

Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49

Macquarie Bank Ltd v Fociri Pty Ltd (1992) 27 NSWLR 203

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355

PWC Properties Pty Ltd v Bathurst City Council [1996] NSWLEC 183, (1996) 91 LGERA 344

R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council [2009] HCA 12, (2009) 237 CLR 603

Sharples v Minister for Local Government [2010] NSWCA 36, (2010) 174 LGERA 129

Sharples v Minister for Local Government [2008] NSWLEC 328, (2008) 166 LGERA 302

Smith v Wyong Shire Council [2003] NSWCA 322, (2003) 132 LGERA 148

Transport Infrastructure Development Corp v Parramatta City Council [2005] NSWLEC 742, (2005) 143 LGERA 415

Warringah Council v Edmondson [2001] NSWCA 1

Category:	Principal judgment
Parties:	Save Little Manly Beach Foreshore Incorporated (Applicant) Manly Council (Respondent)
Representation	
- Counsel:	I King, J Doyle and J Longworth (Applicant) C Leggat SC, M Seymour and J McKelvey (Respondent)
- Solicitors:	Woolf Associates (Applicant) Marsdens Law Group (Respondent)
File number:	40549/13

JUDGMENT

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INTRODUCTION

1 On 10 December 2012 the respondent, Manly Council, resolved to sell its two parcels of land on the Sydney Harbour foreshore at Little Manly Beach

known as 34 Stuart Street and 36 Stuart Street, Manly (together, **the Land**). On each of No 34 and No 36 there is a dwelling house (the one on No 34 is heritage listed) and, at the rear, a substantial area opening onto the beach that for years has been used by the public for recreational purposes.

2 The applicant, Save Little Manly Beach Foreshore Incorporated, claims that the Land is classified as "community" land under the *Local Government Act* 1993 (**LG Act**), and seeks to restrain the sale of the Land while it is classified as community land. Under the LG Act all public land must be classified as either "community" land or "operational" land. Councils have no power to sell land that is classified as community land: s 45(1). Because of the different ways in which the LG Act provides for the classification of land acquired by a council before and after 1 July 1993 (the date the LG Act commenced), it should be noted that the Council acquired No 34 in 1977 and No 36 in 1998. The applicant brings the proceedings pursuant to the open standing provisions of s 674 of the LG Act.

3 The Council's defences are that:

(a) The Land is classified under the LG Act not as community land but as operational land. There are a number of sub-issues:

(i) whether the presumption in cl 6(2)(d) of Sch 7 of the LG Act that No 34 was community land was rebuttable and rebutted;

(ii) whether a 1994 Council resolution classifying No 34 as operational land was beyond power under cl 6(3) of Sch 7;

(iii) whether a 1998 Council resolution classifying No 36 as operational land was beyond power under s 31(3)(b) because it was inconsistent with the terms of a trust or an instrument executed by the transferor applying to it;

(iv) whether both resolutions were ineffective because no advance public notice of them was given as required by s 34;

(v) whether those resolutions, if defective, were invalid under the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355.

(vi) whether a 2008 Council resolution reclassifying No 36 from operational land to community land was merely aspirational and therefore ineffective.

(b) The Council has power under s 54 to issue a conclusive certificate as to classification and s 54 gives conclusive effect to the Council's land register under s 53, which currently records the Land as operational land.

(c) The proceedings are time barred by s 729.

(d) The Court should exercise its discretion to grant relief by refusing to do so.

4 I do not accept the Council's defences. In my opinion, for the reasons that follow, the Land is classified as community land under the LG Act, the 2012 sale resolution is invalid, and relief should be granted.

ZONING

5 The Land was zoned Open Space under the Manly Local Environmental Plan 1988 (**1988 LEP**). The objectives of this zone were:

> (a) to ensure there is provision of adequate open space areas to meet the needs of all residents and provide opportunities to enhance the total environmental quality of the Municipality;
> (b) to encourage a diversity of recreation activities suitable for youths and adults;
> (c) to identify, protect and conserve land which is environmentally sensitive, visually exposed to the waters of Middle Harbour, North Harbour and the Pacific Ocean and of natural or aesthetic significance at the water's edge;
> (d) to facilitate access to open areas, particularly along the foreshore, to achieve desired environmental, social and recreation benefits;
> (e) to conserve the landscape, particularly at the foreshore and visually exposed locations, while allowing recreational use of those areas; and
> (f) to identify areas which –
> (i) in the case of areas shown unhatched on the map are now used for open space purposes; and
> (ii) in the case of land shown hatched on the map are proposed for open space purposes.

6 Development permitted with development consent in the Open Space zone was highly restricted to the following:

> Agriculture; boating facilities; car parking ancillary to a use permitted in this item; child care centres; drainage; forestry; golf courses; marinas; parks; public baths; public dressing pavilions; racecourses; recreation areas; refreshment rooms; roads; sports clubs; sports grounds; surf life saving clubs; tennis courts; utility installations other than gas holders or generating works or both.

7 A 1995 amendment to the 1988 LEP reduced the area of land within the Open Space zone and rezoned land not required for open space purposes as residential. This amendment did not affect the Land, which retained its Open Space zoning.

8 Currently, under the Manly Local Environmental Plan 2013 (**2013 LEP**), which replaced the 1988 LEP, the Land is zoned RE1 Public Recreation,

which is similar to the Open Space zone under the 1988 LEP. The objectives of this zone are:

- To enable land to be used for public open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.
- To protect, manage and restore areas visually exposed to the waters of Middle Harbour, North Harbour, Burnt Bridge Creek and the Pacific Ocean.
- To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.

USE OF THE LAND

9 Council leased the Land for residential purposes for many years but, in the case of No 36, not since 2008. Council also leased the rear of No 34 to the tenant of No 34 for the conduct of a boat storage business.

10 Jacqueline French, the president of the applicant, gave the following affidavit evidence, which I accept, of what she described as the "park use" of the Land:

> 23. Annexed and marked "S" are two aerial photographs taken in about 2010 of Little Manly Beach which depict no. 34 Stuart Street with boats stored on the land and the adjacent property at 36 Stuart Street.
> 24. From March 1994 when I commenced living in Manly I have observed the rear garden of 34 Stuart St has been used as a dinghy storage area for the community and for recreational purposes such as sunbaking, picnics, people sitting on the Farrell memorial bench, boat rigging and games.
> 25. I observe the following in relation to the current usage of nos. 34 and 36 Stuart Street, Manly:
>
> (a) No. 34 is used in part as a dwelling house on the front third of the property fronting Stuart Street;

(b) Dinghies and kayaks are stored on No. 34 as shown on the aerial photographs annexure "S" above;

(c) People rig their dinghies and prepare their kayaks on both No. 34 and No. 36 Stuart Street;

(d) There is erected on No. 34 what is called the "Farrell" memorial which comprises a V shaped structure with a bench and in front of the bench there is a black anchor;

(e) People use about one third of the land at No. 34 and No. 36 as parkland including having picnics on the land, sunbathing on the land, children play ball games on 34 and 36, people sit on the concrete wall adjacent to the sand on the beach;

(f) I also observe that divers use the wooden seat adjacent to the boat ramp and also the grass on No. 34 to unload their gear from their vehicles and they often stand and mill around on No. 34 Stuart Street while either waiting to leave on their boat trips or after returning, socialising while standing and waiting.

11 David Parsons gave affidavit evidence of use, which I accept, including the following:

4. From 1977 when Council purchased No. 34 the house on the front part of the land was fenced off and the back half of the property was used by the public; there was no fence between the back part of No. 34 and the adjoining land to the west; beyond the fenced off house the remainder of the property was occupied by the dinghy enclosure and the remainder was grassed.

5. From about 1977 up to and including 1993 and beyond and to the current date I have observed the following usage of No. 34:

(a) People stored their dinghies and kayaks previously in the enclosure and now in the racks erected on the land;

(b) There was and is a tap and hose on No. 34 so people could, do and have hosed their kayaks and dinghies and other persons often would use the tap for cleaning off either themselves or their gear such as divers cleaning their gear;

(c) I notice fishermen use the tap with a hose to wash their boats down;

(d) Some people would run their outboard motors through the hose flushing the outboard motors;

(e) Some people back their trailers onto the grass and wash their boats down;

(f) Some people drag the hose over to their boats and wash the boats down;

(g) Some people brought their own hoses to the tap which was attached to the wall on the boundary between No.

34 and No. 36 and was originally inside the caged area; in about 2000 the caged area was taken down and racks were put in and the tap was freely available to anybody to use; previously it was also available because the cage usually was not locked during the day or was left open often during the day and only locked over night;

(h) From the late 1970's people have picnicked on No. 34 including with rugs and chairs;

(i) There is a retaining wall at the end of No. 34 onto the beach; people often sit on the retaining wall overlooking the beach.

(j) Adjoining No. 34 to the west used to be sand and is now and has been since before 1993 asphalt; there also used to be a fence between No. 34 and No. 36; in 1998 this was changed to a small brick wall running about three quarters down the block between No. 34 and No. 36;

(k) From the 1970's people have sunbaked on No. 34 and when No. 36 more recently became available people also sunbake on that area of land;

(l) On No. 34 is a stone memorial about 5 foot high at an angle on one side of 90 degrees and 45 degrees on the other with a bench in between and an anchor opposite; people often sit on the bench. This has been there since the 1980's;

(m) From the 1970's people including family groups with children have used No. 34 and in the last few years No. 36 to sit or picnic or throw balls and play other games.

LOCAL GOVERNMENT ACT 1993

12 Part 2 (ss 25-54B) of Chapter 6 of the LG Act is entitled "Public Land". "Public land" is defined in the Dictionary to the LG Act as meaning any land, including a public reserve, which is vested in or under the control of a council (subject to certain presently immaterial exceptions). Sections 25 and 26 require all public land to be classified as either "community" or "operational":

25 All public land must be classified

All public land must be classified in accordance with this Part.

> **26 What are the classifications?**
>
> There are 2 classifications for public land—"community" and "operational".
>
> **Note.** On the commencement of this Part, certain land that is vested in or under the control of a council is taken to have been classified as community land by the operation of clause 6 of Schedule 7.

13 Division 2 (ss 35-47F) of Part 2 of Chapter 6 imposes a host of restrictions on the use and management of community land. An important restriction is in s 45(1), which provides:

> A council has no power to sell, exchange or otherwise dispose of community land.

14 The two methods of classifying or reclassifying public land are by a local environmental plan (**LEP**) or, subject to restrictions, a council resolution. Section 27 provides:

> **27 How are the classifications made?**
>
> (1) The classification or reclassification of public land may be made by a local environmental plan.
>
> (2) The classification or reclassification of public land may also be made by a resolution of the council under section 31, 32 or 33.

15 No LEP has classified or reclassified the Land.

16 The classification by resolution of land as community land or operational land is regulated differently according to whether the land was already vested in the Council as at 1 July 1993 (as No 34 was) or was acquired by the Council after that date (as No 36 was). That was the date that the LG Act commenced.

17 The classification by resolution of land vested in a council *as at* 1 July 1993 (such as No 34) is governed by the transitional provisions of the LG Act in cl 6 of Sch 7. On that date land zoned for use under an

environmental planning instrument as open space (as No 34 was) is taken to have been classified as community land: cl 6(2)(d). Clause 6 provides:

6 Classification of existing public land

(1) This clause applies to all public land within a council's area **as at** the commencement of Part 2 of Chapter 6 (the ***relevant commencement***).

(2) On the relevant commencement, the following land that is vested in or under the control of a council **is taken to have been classified as community land**:

(a) land comprising a public reserve,

(b) land subject to a trust for a public purpose,

(c) land dedicated as a condition of a development consent under section 94 of the *Environmental Planning and Assessment Act 1979*,

(d) **land** reserved, **zoned** or otherwise designated **for use under an environmental planning instrument as open space**,

(e) land controlled by a council that is vested in the corporation constituted by section 8 (1) of the *Environmental Planning and Assessment Act 1979.*

(3) Within 1 year after the relevant commencement, a council may, **by resolution**, classify, as community land or operational land, any public land that is vested in it or under its control **and that is not classified by subclause (2)**.

(4) A resolution under subclause (3) to classify public land that is not owned by the council must not be made without the consent of the owner.

(5) On the making of a resolution under subclause (3) that classifies public land as operational land, the land is discharged from any trusts, estates, interests, dedications, conditions, restrictions and covenants affecting the land or any part of the land, subject to the terms of the resolution, but is not discharged from:

(a) any reservations that except land out of a Crown grant relating to the land, and

(b) reservations of minerals (within the meaning of the *Crown Lands Act 1989*).

(6) The classification of public land by resolution under subclause (3) may be changed only by a local environmental plan or, in the case of land that has been classified as operational land, by a resolution under section 33.

(7) Any public land that may be classified by resolution under subclause (3) and that is not classified within 1 year after the relevant commencement is taken to have been classified as community land.

(8) The provisions of this clause are in addition to, and do not limit the operation of, the other provisions of this Act with respect to the classification of land.

(emphasis added)

18 Importantly, a council has no power by resolution to classify land that is taken to have been classified as community land by cl 6(2): cl 6(3). The applicant contends that the 1994 resolution classifying No 34 as operational land offended this provision.

19 The classification by resolution of land acquired by a council *after* 1 July 1993 (such as No 36) is governed by s 31. The applicant contends that the 1998 resolution classifying No 36 as operational land offended s 31(3)(b). As at 1998, s 31 provided (it has since been amended):

> **31 Classification of land acquired after the commencement of this Division**
>
> (1) This section applies to land that is acquired by a council **after** the commencement of this Division, other than:
>
> (a) land to which the *Crown Lands Act 1989* applied before the acquisition and continues to apply after the acquisition, and
> (b) land that is acquired for the purpose of a road.
>
> (2) Land acquired by a council is taken, on its acquisition, to have been classified under a local environmental plan as community land **unless, on or before its acquisition**, the council **resolved** that the particular land concerned be classified as operational land.
>
> (3) **A council must not resolve under this section that land be classified as operational land if**:
>
> (a) the land is classified as community land immediately before its acquisition, or
> (b) **the resolution would be inconsistent with any other Act, the terms of any trust applying to the land or the terms of any instrument executed by the donor or transferor of the land**.

(emphasis added)

20 Operational land may be reclassified by resolution as community land. Section s 33(1) provides:

> A council may resolve that public land classified as operational land is to be reclassified as community land.

21 Importantly, there is no reverse power to reclassify by resolution community land as operational land. Reclassification of community land as operational land can only be achieved by a local environmental plan: s 27(1) (an example is contained in *Dominic Wykanak v Rockdale City Council* NSWLEC, Pearlman J, 2 July 1998 (unreported)). A local environmental plan that reclassifies community land as operational land may make provision to the effect that the land is by operation of the plan discharged from any trusts affecting the land or any part of the land (except for presently immaterial exceptions): s 30. As stated earlier, no local environmental plan has classified or reclassified the Land as operational land.

22 By s 34, a council must give advance public notice of a proposed resolution to classify or reclassify public land:

> **34 Public notice to be given of classification or reclassification by council resolution**
>
> (1) A council must give public notice of a proposed resolution to classify or reclassify public land.
> (2) The public notice must include the terms of the proposed resolution and a description of the public land concerned.
> (3) The public notice must specify a period of not less than 28 days during which submissions may be made to the council.
>
> ...

23 The Council raises s 54 as a defence. Section 54 provides for a council on application to issue a conclusive certificate (when produced) of the classification of public land. Section 53 requires a council to keep a register of all land vested in it or under its control (including the classification of the land):

53 The council's land register

(1) A council is required to keep a register of all land vested in it or under its control.

(2) The register must include the following:

- the name (if any) by which the land is known
- the address or location of the land
- the reference to title of the land
- the name of the owner of the land
- whether or not the land is Crown land
- **the classification under this Part of the land**
- whether or not there is a plan of management for the land
- the zoning (if any) of the land under an environmental planning instrument
- particulars of any agreement (including any lease or licence) entered into by the council with respect to the land.

54 Certificate as to classification of land

(1) A person may apply to the council for a certificate as to the classification of any public land.

(2) The application must be in the approved form and be accompanied by the approved fee.

(3) The council is to issue a certificate to the applicant stating the classification of the public land as at the date of the certificate.

(4) The production of the certificate is taken for all purposes to be **conclusive proof** of the matter certified.

(emphasis added)

24 Section 729, which the Council also raises as a defence, imposes a time limit for bringing certain proceedings. It bars a challenge to the validity or effectiveness of a council decision on the ground that, in making or purporting to make the decision, the council failed to comply with a statutory procedural requirement, unless the proceedings are commenced within three months after the date of the decision:

729 Proceedings alleging non-compliance with a procedural requirement

The validity or effectiveness of a decision of a council may not be questioned in any legal proceedings on the ground that, in making or purporting to make the decision, the council failed to comply with a procedural requirement of this Act or the regulations

> (including a requirement as to the giving of notice) unless the proceedings are commenced within 3 months after the date of the decision.

COUNCIL RESOLUTIONS

25 On 2 May 1977 the Council acquired No 34.

26 On 1 July 1993 the relevant Part of the LG Act commenced.

27 On 21 June 1994 the Council resolved to classify No 34 as operational land.

28 In the context of an owner initiated acquisition in a case of hardship, on 4 May 1998 the Council resolved to acquire No 36 by compulsory process pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991.

29 On 21 September 1998 the Council resolved that No 36 be classified as operational land. The Council also resolved to reaffirm its intention to reclassify No 36 as community land and, following adoption of a plan of management, to review its classification.

30 On 22 September 1998 the Council acquired No 36 by agreement.

31 On 23 April 2007 the Council resolved to reject rezoning of all the properties at 34, 36, 38 and 40 Stuart Street. That was a decision not to change their open space zoning under the 1988 LEP.

32 On 18 February 2008 the Council resolved to reclassify No 36 from operational to community land. It also resolved that at an appropriate time it would seek vacant possession of No 36 and proceed to demolish the dwelling.

33 On 12 December 2011 the Council resolved that it: "commits to establishing a new park and community resource at nos. 34 and 36 Stuart Street Manly and progresses this matter forthwith by undertaking at least the following:...3. Budget and commence a consultation and planning process for the new parkland with a view to construction during winter, 2012".

34 On 23 April 2012 the Council resolved:

> That the draft budget be varied to include provision for $50,000 for making the Community Park at Little Manly a reality, including the demolition of the building(s) on 36 Stuart Street Manly, making the site safe and available for open space purposes.

35 On 10 December 2012 the Council, by a bare majority, resolved to rezone and sell Nos 34 and 36, as part of the following resolutions:

> 1. properties 34, 36 and 38 Stuart Street Manly be zoned for Environmental Living E4 under the Draft Manly Comprehensive LEP;
> 2. Council proceed to create a three metre wide right of way at the rear of 34 and 36 Stuart Street to enable public access to the beach from the Craig Avenue Carpark; and the Dingy Storage facility located at the rear of 34 be retained as an on-going concern with existing use rights attached and requiring the purchaser of 34 to maintain the facility. And the General manager to consult with the Heritage Committee regarding the Farrell Family memorial and anchor;
> 3. Council approach the owners of 38 Stuart Street to seek agreement for a right of way at the rear of their property to link up with that proposed for 34 and 36;
> 4. following the creation of the right of way at the rear of 34 and 36 Stuart Street, these properties be sold and proceeds go to repay the loan on 40 Stuart Street, and the General Manager to determine the timing for these divestments;
> 5. the General Manager be authorised to do all things necessary to implement the above points one to four, including the execution of any documents and the affixing of the Council Seal upon them; and
> 6. 40 Stuart Street remain zoned for open space.

COUNCIL'S SECTION 33 LAND REGISTER

36 The Council's land register maintained under s 33 has always recorded No 34 as operational land. After No 36 was acquired, the register recorded No 36 as operational land until 22 May 2008. On that date the register was changed to record No 36 as community land and to insert the comment: "Reclassified to Community Council Motion 18 February 2008". Thus, the Council treated as effective its 18 February 2008 resolution reclassifying No 36 as community land.

37 In March 2013 the Council changed the register to again show No 36 as operational land, notwithstanding that the comment quoted above remained on the register. There is evidence that this change occurred on the instruction of the Council's Deputy General Manager because he understood that the community classification of No 36 was a mistake (for reasons not pressed in these proceedings). If No 36 was classified as operational land prior to the 2008 resolution, then Council's only challenge in these proceedings to the effectiveness of the 2008 resolution is that the register is correct because the 2008 resolution was merely "aspirational" and, consequently, had no effect. As discussed below, in my opinion, the 2008 resolution was not aspirational.

34 STUART STREET

38 The Council purchased No 34 on 2 May 1977. There was a house and a fibro boatshed on it. On 10 May 1977 the Council resolved to demolish the boatshed and provide a screened open boat storage area. As recorded in Council minutes of 13 February 1995, No 34 was acquired as part of an overall plan for redevelopment of Little Manly Cove.

1994 resolution classifying No 34 as operational land

39 On 21 June 1994 the Council resolved to classify No 34 as operational land.

Whether 1994 resolution beyond power: cl 6(2)(d) Sch 7 presumption that community land

40 All land vested in the Council as at 1 July 1993 is taken to be community land if it was zoned under an environmental planning instrument as open space: cl 6(2)(d) of Sch 7 of the LG Act. As at 1 July 1993, No 34 was already vested in the Council and was zoned as open space under the 1988 LEP. Accordingly, No 34 is taken to have been classified as community land as at that date. There is no power to reclassify by resolution such land as operational land: cl 6(3) of Sch 7.

41 The Council seeks to avoid the conclusion that the 1994 resolution was beyond power by submitting that No 34 is not to be taken to be community land as at 1 July 1993 – and therefore the 1994 resolution was effective – because the cl 6(2)(d) presumption is a rebuttable presumption and the presumption is rebutted by evidence that the Council intended that No 34 operate as operational land. More particularly, the Council submits that:

(a) The statutory purpose of the transitional provisions in cl 6 of Sch 7 is roughly to allocate parks and reserves as community land and temporary assets or investments as operational land. This proposition is largely reliant on a statement in the Second Reading Speech, New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard) 2 November 1992 at 10390, that: "Community land will ordinarily

comprise public parks and reserves. Operational land will ordinarily comprise land held as temporary assets or investments, or land which a council uses to carry out its functions".

(b) The presumption of community land created by the transitional provisions is fictitious, which leads to the conclusion that it is rebuttable.

(c) The presumption is rebutted in this case because the evidence favours a finding that No 34 was always intended to be operational land since it was held as a temporary asset or investment pending plans to put it and the surrounding area to use as open space, consistently with long term leasing of No 34 for private purposes and the carrying out of the business activity of dinghy storage thereon.

42 I do not accept the Council's submissions for a number of reasons. First, the rebuttability submission assumes that land vested in a council as at 1 July 1993 can be operational land solely on the basis of its past use, without either an LEP or a resolution classifying it as operational land. This is contrary to ss 25 – 27 whereby all public land must be classified in accordance with Part 2, either by an LEP or, subject to restrictions, a resolution. Indeed, if the Council's rebuttability submission is correct (contrary to my opinion), then the 1994 resolution was unnecessary as the land was already operational land.

43 Secondly, it is a question of construction whether a deeming provision is only in the nature of a rebuttable presumption; that is, whether a certain state of affairs will be presumed unless and until the contrary is proved: *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203 at 207-208 per Gleeson CJ (Cripps JA agreeing). A construction that the cl 6(2)(d)

presumption is rebuttable would result in considerable uncertainty in determining the classification because it cuts across the detailed statutory scheme for classifying public land as either community or operational. Given that result, in my view such a construction would require clear words – which are absent.

44 Thirdly, in my opinion, cl 6(2) of Sch 7 does not create a statutory fiction. In *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 the High Court rejected an attempt to read down a statutory deeming provision which provided that the date of lodging an application for registration of a trade mark shall be "deemed" to be the date of registration. Windeyer J, observed that a statutory deeming provision simply states the way in which a matter or thing is to be adjudged: at 65-67. Sometimes it creates a "fiction", often it does not. It creates a fiction if it demonstrates an abnormality of terminology by extending the meaning of a term to a matter or thing that the term would not in ordinary parlance denote. In my opinion, cl 6(2) of Sch 7 imports an exclusive definition, not a departure from ordinary parlance. The terms "operational land" and "community land" are creations of the LG Act and do not have an ordinary parlance meaning; that is, a real world meaning outside the LG Act. Moreover, there was no suggestion in *Hunter Douglas* that a deeming provision is rebuttable if it creates a statutory fiction.

45 Fourthly, in my view, there is no ambiguity, obscurity, manifest absurdity or unreasonableness in cl 6 of Sch 7 as to what is taken to be community land that would justify recourse to the quoted statement from the Second Reading Speech to interpret it (s 34(1) *Interpretation Act* 1987).

46 Fifthly, in any case I do not think that the statement in the Second Reading Speech supports the Council's construction. The word "ordinarily" in the statement is significant. The statement is subject to the terms of cl 6(2) of

Sch 7 and whether (if at all) the statutory powers of classification or reclassification are exercised. Clause 6(2) of Sch 7 deems that as at 1 July 1993, specified types of public land vested in or under the control of a council – including, relevantly, land zoned as open space under an environmental planning instrument – is community land. A council has no power by resolution to change that classification: cl 6(3). Nothing in the Second Reading Speech suggests that the statutory presumption is rebuttable.

47 Sixthly, I cannot see how the relevant statutory presumption in cl 6(2)(d), that land zoned open space under an environmental planning instrument is taken to be community land, is capable of being rebutted.

48 Even if the cl 6(2)(d) presumption that the Land was community land based on its zoning under the 1988 LEP is rebuttable (contrary to my opinion), I do not accept that the evidence on which the Council relies in fact rebuts it in this case.

No advance public notice of 1994 resolution: s 34(2)

49 Even if there was power to reclassify by resolution No 34 as operational land (contrary to my opinion), advance public notice of the 1994 resolution was required in accordance with s 34. There was an advance public notice of sorts but it did not meet the requirement of s 34(2) that it include a description of No 34. Consequently, in my opinion, the 1994 resolution was ineffective.

36 STUART STREET

50 The Council purchased No 36 on 22 September 1998. As the acquisition was after 1 July 1993, the Council was empowered to classify it by

resolution, on or before its acquisition, as operational land or community land: s 31(2).

1998 resolution classifying No 36 as operational land

51 On 21 September 1998 the Council resolved that:

(a) in accordance with s 31, No 36 be classified as operational land; and

(b) "that Council reaffirm its intention to reclassify 36 Stuart Street as community land, and following adoption of a Plan of Management, Council to review the classification of the land".

2008 resolution reclassifying No 36 as community land

52 The applicant challenges the effectiveness of the 1998 resolution. It is convenient to first address the Council's 2008 resolution because if it is effective then it does not matter if the 1998 resolution was ineffective.

53 On 18 February 2008 the Council resolved to: "Reclassify the open space land at No 36 Stuart Street from operational to community land". Such a reclassification resolution was authorised by s 33(1).

54 In oral submissions the Council made clear that the only defence it presses to the effectiveness and validity of the 2008 resolution is that, as a matter of construction, it was merely "aspirational", and therefore was ineffective to change the classification of No 36 (the Council disclaimed reliance on any proposition that the 2008 resolution had not been publicly notified in accordance with s 34). The Council argues that to be an effective reclassification resolution, it should have been worded to the effect that No 36 "be reclassified from operational to community land".

55 I disagree. In my opinion, the language of the 2008 resolution clearly enough operates as a reclassification and is not merely aspirational. It is unnecessary to go further but that conclusion is fortified by Council's change to its s 33 register shortly afterwards reclassifying No 36 as community land and including a comment in the register to the effect that the 2008 resolution had reclassified No 36 as community land: above at [36]. It is also fortified by subsequent Council minutes evidencing that the Council otherwise treated the resolution as having reclassified No 36 as community land. For example, on 15 June and 9 November 2009 the General Manager of the Council advised that the 2008 resolution instantaneously changed the classification from operational to community.

56 Since No 36 is classified as community land pursuant to the 2008 resolution, in future it could only be reclassified as operational land through an LEP. Such an LEP could provide that No 36 is discharged from any trusts, including the applicant's alleged trust for a public purpose: s 30(1).

57 Given these conclusions, it does not matter if the applicant's challenge to the effectiveness of the 1998 resolution classifying No 36 as operational land is successful. Nevertheless, I will proceed to consider those challenges.

No advance public notice of 1998 resolution: s 34(2)

58 The first challenge is that, as the council concedes, advance public notice of the 1998 resolution to classify No 36 as operational land was not given in accordance with s 34(2). Consequently, in my opinion, that resolution was ineffective and No 36 is taken to have been classified as community land: s 31(2A).

Power to make 1998 resolution: s 31(3)(b) inconsistency with terms of trust or instrument executed by transferor

59 The second challenge is under s 31(3)(b) which provided:

> **31 Classification of land acquired after the commencement of this Division**
>
> ...
>
> (3) A council must not resolve under this section that land be classified as operational land if:
>
> ...
>
> (b) the resolution would be inconsistent with any other Act, the terms of any trust applying to the land or the terms of any instrument executed by the donor or transferor of the land.

60 The applicant submits that under s 31(3)(b) the 1998 resolution to classify No 36 as operational land was beyond the Council's power because it was:

(a) inconsistent with the terms of an instrument executed by the transferor of No 36, being the transferor's notice under s 23(1) of the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**) requiring acquisition of No 36. The relevant term is the statement in the notice that one of the grounds for the application was that: "The land has been designated for acquisition by Manly Council for a public purpose"; and

(b) inconsistent with the terms of a trust for a public purpose applying to the land by virtue of its acquisition by agreement in the context of the Just Terms Act.

61 The Council submits that there was no trust for a public purpose as at 1 July 1993 for the following reasons:

(a) Section 20(1)(b) of the Just Terms Act provides that, on acquisition, the land is "freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land".

(b) Land acquired by compulsory process for a public purpose is not forever marked with the character of being required to be used for that purpose: *Broadcast Australia Pty Ltd v Noonan* [2011] NSWSC 1524, (2011) 188 LGERA 1 at [64] – [71].

(c) Although the process of compulsory acquisition was engaged by the service of a s 23 notice on the Council, the process of acquisition was by negotiated contract and not compulsory acquisition. This means that the acquisition was by virtue of the LG Act and could be for any of the widely described functions of the Council (see ss 186-187). Also, the contract for sale does not refer to a trust for a public purpose and the fact that the acquisition was subject to an existing tenancy is inconsistent with it coming into the Council's hands as trust property.

(d) The contemporaneous documents demonstrate that the Council did not want to create burdens on the land that limited its capacity to generate income, which is inconsistent with an intention to receive trust land. The intention to part with exclusive possession is also inconsistent with a trust for exclusively public purposes.

(e) *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59, (1998) 195 CLR 566 is distinguishable, because the transfers there were for a

nominal consideration: *Transport Infrastructure Development Corp v Parramatta City Council* [2005] NSWLEC 742, (2005) 143 LGERA 415 at [51] – [58] per Bignold J.

62 The Council disputes that the notice served under s 23 of the Just Terms Act is "an instrument" for the purposes of s 31(3)(b) of the LG Act. The Council submits that:

(a) an "instrument" is, compatibly with the definition in the *Interpretation Act* 1987, usually a formal legal document created under an Act: s 3. A notice under s 23 of the Just Terms Act is not an "instrument";

(b) any "instrument" capable of creating binding obligations on the soon to be registered proprietor must be one that survives registration of title under s 42 of the *Real Property Act* 1900. Thus, there is good reason why an "instrument" referred to in s 31(3)(b) of the LG Act should be limited to one under the *Conveyancing Act* 1919.

(c) even if the s 23 notice was an "instrument", the Council submits that it is not clear that it expressed "terms" with which the Council could not act "inconsistently" when it resolved to acquire No 36 as operational land in 1998.

63 By cl 13(1) of Part 3 of the 1988 LEP, the owner of land in the open space zone could, by notice in writing, require the Council to acquire the land. Clause 13(3) provided:

> Land to which this clause applies may be developed for any purpose, with the consent of the council, until that land is acquired by the public authority concerned where the council is satisfied that the carrying out of that development will not adversely affect

the usefulness of the land for the purposes for which it has been reserved.

64 The Just Terms Act focuses heavily on the public purpose for which land is compulsorily acquired by an authority of the State. It provides: :

> **3 Objects of Act**
>
> (1) The objects of this Act are:
>
> ...
>
> (d) to require an authority of the State to acquire land designated for acquisition for a **public purpose** where hardship is demonstrated, and
>
> (e) to encourage the acquisition of land by agreement instead of compulsory process.
>
> ...
>
> **5 Acquisition of land to which Act applies**
>
> (1) This Act applies to the acquisition of land (by agreement or compulsory process) by an authority of the State which is authorised to acquire the land by compulsory process.
>
> (2) This Act does not apply to any such acquisition if the land is available for public sale and the land is acquired by agreement.
>
> ...
>
> **20 Effect of acquisition notice**
>
> (1) On the date of publication in the Gazette of an acquisition notice, the land described in the notice is, by force of this Act:
>
> ...
>
> (b) freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land.
>
> ...

(emphasis added)

65 Division 3 (ss 21-27) Part 2 of the Just Terms Act provides for owner-initiated acquisition in cases of hardship where land is designated for acquisition for a public purpose:

21 Definition of "land designated for acquisition for a public purpose"

(1) For the purposes of this Division, land is designated for acquisition by an authority of the State for a **public purpose** if:

...

(b) the land is reserved by an environmental planning instrument for use exclusively for a purpose referred to in section 26 (1) (c) of the *Environmental Planning and Assessment Act 1979* and the instrument (or some other environmental planning instrument) specifies that authority as the authority required to acquire the land.

...

23 Owner who suffers hardship may require authority of the State to acquire land designated for acquisition

(1) The owner of land to whom this Division applies may require an authority of the State, by notice in writing given to that authority, to acquire that land under this Act if:

(a) the land is designated for acquisition by that authority for a **public purpose**, and

(b) the owner considers that he or she will suffer hardship if there is any delay in the acquisition of the land under this Act.

(2) The authority of the State must (subject to this Division) acquire the land within 90 days after the owner gives that authority notice under this section (or such longer period as that authority and the owner may agree on in writing).

(3) If there is more than one owner of the land concerned, the notice under this section must be given by all the owners. It is sufficient if any one of those owners will suffer hardship.

(4) An authority of the State is not required to acquire (under this Division) more land than it requires for the **public purpose** for which the land was designated or more interests in the land than it requires for that purpose.

(5) A notice under this section must be in the form prescribed by the regulations or (if no such form is prescribed) in the form approved by the Minister.

24 Hardship

(1) An authority of the State is not required to acquire land under this Division unless it is of the opinion that the owner will suffer hardship (within the meaning of this section) if there is any delay in the acquisition of the land under this Act.

(2) An owner of land suffers hardship if:

(a) the owner is unable to sell the land, or is unable to sell the land at its market value, because of the designation of the land for acquisition for a **public purpose**, and

(b) it has become necessary for the owner to sell all or any part of the land without delay:

(i) for pressing personal, domestic or social reasons, or

(ii) in order to avoid the loss of (or a substantial reduction in) the owner's income.

...

25 Method of acquisition under this Division

(1) Land required to be acquired under this Division is to be acquired by compulsory process.

(2) However, nothing in this Division prevents the land concerned from being acquired by agreement instead of compulsory process within the period required by this Division.

(3) Division 1 (Pre-acquisition procedures) does not apply to an acquisition of land under this Division.

(emphasis added)

66 Section 30 provides for agreement for compulsory acquisition:

30 Compulsory acquisition with consent of owners

(1) An authority of the State and the owners of land may agree in writing that the land be compulsorily acquired by that authority.

(2) The provisions of Division 1 (Pre-acquisition procedures) and Part 3 (Compensation for acquisition of land) do not apply to any such compulsory acquisition if the owners have agreed in writing on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition.

67 Section 36 empowers this Court to remedy or restrain the use or proposed use of land acquired by compulsory process in a manner inconsistent with the public purpose for which it was acquired:

36 Adverse use of acquired land

(1) If a person is using, or proposes to use, land acquired by an authority of the State by compulsory process in a manner inconsistent with the **public purpose** for which the land was acquired, the Land and Environment Court

may, on the application of that authority, make such order as it thinks fit to remedy or restrain that use.

(2) Without limiting the powers of the Land and Environment Court under subsection (1), an order made under that subsection may:

(a) restrain the use of any building, work or land, or

(b) require the demolition or removal of any building or work, or

(c) require the reinstatement, as far as practicable, of a building, work or land to the condition it was in immediately before the relevant use.

(3) The Land and Environment Court may, at its discretion, by interlocutory order, restrain the continuation of the relevant use of the land pending the determination of an application under subsection (1).

(emphasis added)

68 The public purpose for which land is compulsorily acquired is also central to the determination of compensation under the Just Terms Act. For example, s 56(1)(a) requires that the determination of market value must disregard any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired (see also ss 55(f) and 56(1)(b)).

69 Section 21(1)(b) of the Just Terms Act directs attention to s 26(1)(c) of the *Environmental Planning and Assessment Act* 1979 which provides:

(1) Without affecting the generality of section 24 or any other provision of this Act, an environmental planning instrument may make provision for or with respect to any of the following:

...

(c) reserving land for use for the purposes of open space, a public place or public reserve within the meaning of the *Local Government Act 1993*...

70 No 36 was zoned open space under the 1988 LEP. The objectives of that zone have been set out above at [5].

71 The factual background to the acquisition of No 36 may be summarised as follows:

(a) On 16 April 1998 the solicitors for the owner of No 36 wrote to the Council requiring it to acquire No 36 under s 23 of the Just terms Act. One of the enclosed documents was the owner's s 23(1) notice which said that, pursuant to s 23(1), the Council was requested to acquire No 36 and that the grounds for the application were:

> 1. The land has been designated for acquisition by Manly Council for a public purpose; and
> 2. I as owner of the land consider that I will suffer hardship if there is any delay in the acquisition of the land.

(b) The notice also stated that "the land is reserved by an environmental planning instrument for use exclusively for a purpose referred to in s 26[(1)](c) of the Environmental Planning and Assessment Act 1979…".

(c) On, it seems, 4 May 1998 the Council wrote to the Department of Urban Affairs and Planning re No 36 stating:

> It is Council's view that this acquisition represents a significant regional open space acquisition and requests the Department to consider contributing towards its acquisition and conversion into public open space

(d) On 4 May 1998 the Council resolved to acquire No 36 by compulsory process pursuant to the Just Terms Act. It also resolved that its solicitors write to the solicitors and owners of No 36 advising that Council was intending to treat the application as one pursuant

to cl 13 of the 1988 LEP and proposed to acquire No 36 under the Just Terms Act; and that a Notice of Intention to acquire No 36 by compulsory process be served on the owners.

(e) On 2 June 1998 the Council wrote to the owner of No 36 enclosing, as required by the Just Terms Act, a Proposed Acquisition Notice and a Claim for Compensation. The former stated that the Council "requires your interest in the land located at Manly for a public purpose".

(f) A letter of 29 July 1998 from the Director-General of the Department of Local Government to the Council stated:

> … the Council might note that under section 24(2) of the that Act nothing in the Division prevents the land concerned being acquired by negotiation instead of compulsory process within the period specified in section 23(2) of the Act. Compensation would, it appears, be determined in accordance with section 26 whether acquired be negotiation or by compulsory process.

(g) On 22 September 1988 the Council acquired No 36 by agreement with the owner, as contemplated by cl 13 of the 1988 LEP and ss 3, 25, and 30 of the Just Terms Act the contract of sale included the following special condition:

> For the purposes of Section 30 of the Land Acquisition (Just Terms Compensation) Act 1991 (as amended) the Vendor and the Purchaser agree that this contract contains all relevant matters concerning the acquisition of the property by the Purchaser and the compensation to be paid for such acquisition.

72 I turn to the instrument issue under s 31(3)(b). The ordinary English meaning of "instrument" is "a formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form": per French J in *Azevedo v Secretary, Department of Primary Industries & Energy* (1992) 35 FCR 284 at 299-300, adopting the definition in the Shorter Oxford English Dictionary. In *Flaherty v Columbia Nursing Homes Pty Ltd* [2007] NSWLEC 148, (2007) 152 LGERA 383 at [23] Jagot J similarly said that the ordinary meaning of "instrument" is a "formal legal document". I accept that the owner's s 23 notice to acquire No 36 was an "instrument" executed by the transferor within the meaning of s 31(3)(b), that it was a term of this instrument that the land was designated for acquisition for the Council's public purpose use as open space, and that the 1998 resolution was inconsistent with that term. Accordingly, there was no power to make this resolution.

73 I turn to the trust issue under s 31(3)(b). The leading case on the meaning of the expression "trust for a public purpose" in cl 6(2)(b) Sch 7 of the LG Act is *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59, (1998) 195 CLR 566 (***PWC***). In 1979 land had been transferred to the council for the purpose of a public carpark pursuant to a condition of it's the Council's development consent for a supermarket on adjacent land. Therefore, as at 1 July 1993 the land was vested in the council and taken to be community land under cl 6(2) of Sch 7. In 1994 the council resolved to classify the carpark land as operational land. In 1996 the council advertised for expressions of interest for the purchase of the carpark site for retail/commercial purposes. Soon afterwards successful proceedings to stop the sale were commenced in relation to two of the lots comprising the carpark site. The High Court held that the council had no power to so resolve because the land was subject to a "trust for a public purpose" within cl 6(2)(b) and was therefore taken to be community land (and

therefore by s 45 there was no power to sell the land); and that reclassification of such community land as operational land could be achieved only by an LEP pursuant to s 27(1): at [1], [9], [12], [13], [21], [23], [25], [49]. Although the High Court said that the Council provided the vendors of the parcels "with a nominal sum, bearing in mind that the construction of the carpark was likely to increase the value of the land retained by the vendors" (at [17]), it also noted that one of the two lots the subject of the proceedings was transferred for a consideration of $800 (ie apparently not a nominal sum): at [9]. The High Court explained the concept of "a trust for a public purpose" in cl 6(2)(b) Sch 7 to the LG Act and said at [44], [48], [67] (omitting citations):

> 44. The determinative consideration is that the term "trust" in the expression "land subject to a trust for a public purpose" in cl 6(2)(b) of Sch 7 of the Act is not to be understood wholly in its technical sense.
>
> ...
>
> 48 Clause 6(2)(b) is concerned with land which, on the commencement of the Act, is to be taken to be classified as community land because it then was vested in or under the control of a council and was "subject to a trust for a public purpose". The phrase "for a public purpose" as it appears in such a statute is "a wide phrase" and should not be "read narrowly". In relation to the obligations imposed upon local government authorities with respect to land vested in them, the phrase has had a lengthy history. This involves the use of "trust" in a sense broader than a trust of a public nature which qualified as a charitable trust within the spirit and intendment of the Elizabethan statute.
>
> ...
>
> 67. The term "trust" in cl 6(2)(b) of Sch 7 is apt to include those governmental responsibilities which, whilst not imposing a trust obligation as understood in private law, may fairly be described as a "statutory trust" which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. The trust was "not a trust for persons but for statutory purposes". It would be no answer to the existence of such a constraint that there was lacking a beneficial owner of the nominated lots with standing in a court of equity to enforce observance by the Council of the dedication of the nominated lots to the provision of parking spaces. It had been within the competence of the Attorney-General to seek to restrain action incompatible with "the due exercise of the powers of the [C]ouncil or the due discharge of its duties".

74 Thus, the phrase "trust for a public purpose" in cl 6(2)(b) of Sch 7 is wide. It means not a trust for persons but a trust for a governmental statutory purpose, which binds the land and controls what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple.

75 The present case in relation to No 36 is concerned with the meaning of the expression "any trust applying to the land" in s 31(3)(b). In my view, in this local government legislative context that expression is wider than, and includes, land subject to a trust for a public purpose in cl 6(2)(b). The contrary was not submitted. Therefore, *PWC* is authoritative in the present context.

76 In *PWC* the trust for a public purpose arose from the terms of a condition of a development consent. In the present case, the question is whether a trust for a public purpose arose from the acquisition of No 36 by agreement as contemplated by the Just Terms Act. In my opinion, it did. No 36 was acquired for a public purpose by agreement as contemplated by the Just Terms Act and the 1988 LEP. Pre-acquisition notices passing between the transferor and the Council pursuant to the Just Terms Act stated that it was acquired for a public purpose, and the Council sought funding from the State Government on that basis.

77 The applicant submits that land acquired by compulsory process for a public purpose is not forever marked with the character of being required to be used for that purpose, citing *Broadcast Australia Pty Ltd v Noonan* [2011] NSWSC 1524, (2011) 188 LGERA 1 at [64] - [71]. That case was not decided under the Just Terms Act but under similar but not identical Commonwealth legislation, the *Lands Acquisition Act* 1955. The Commonwealth Act provided that the Commonwealth could acquire land

for a "public purpose" by agreement or by compulsory process. It defined "public purpose" relevantly as "a purpose in respect of which Parliament has power to make laws": s 5(1). A right of access had been compulsorily acquired over the defendant's land for the purpose of providing access to a television station and was vested in the plaintiff: at [16]. A question arose as to whether the acquired right was only able to be used for the public purpose for which it was acquired: at [46]. Bergin CJ in Eq noted that counsel on both sides had submitted that there is no case in which it has been claimed that land acquired for public purpose may only be used for that public purpose: at [65]. It is apparent that counsel did not bring *PWC* to her Honour's attention. Bergin CJ in Eq observed that there was nothing in the Commonwealth Act which expressly prohibited or authorised use of the land for a purpose other than that for which it was acquired; and said that whether there was a prohibition depended upon, inter alia, the enabling statute: at [66] - [67]. On balance, her Honour concluded that the use of the right of access was not restricted to the public purpose for which it was acquired: at [71].

78 *Broadcast Australia* is distinguishable because in that case (a) the court was not concerned with the interpretation of a statutory provision that gave primacy to a statutory trust over a resolution (such as s 31(3)(b) or cl 6(2)(b) of Sch 7 of the LG Act), but with a different question of actual use; (b) the court was not referred to the *PWC* decision and did not consider whether the land was subject to a statutory trust; (c) the court was concerned with a different statute; and (d) s 36 of the Just Terms Act empowers this Court to remedy or restrain a "person" (which I think includes the acquiring authority) from using land acquired by compulsory process in a manner inconsistent with the public purpose for which it is acquired.

79 Under the LG Act a local council may acquire land that is to be made available for any public purpose, but that power is restricted by s 188(1) which provides: "A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale". The rationale for s 188(1) is that re-sale is not a legitimate local government purpose: *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* [2009] HCA 12, (2009) 237 CLR 603 at [38] – [39]. Having compulsorily acquired land for a public purpose, it would be anomalous if a council could the next day (or at any time) change its mind and resell it in order to make a profit. This tends to support the proposition that such land is subject to a trust for a public purpose. Although in the present case the acquisition ultimately was by agreement, in my opinion it still attracted a trust for a public purpose. The agreement was joined at the hip to the Just Terms Act and its compulsory process for a number of reasons. First, the Just Terms Act applies to the acquisition of land by agreement or compulsory process by an authority of the State authorised to acquire the land by compulsory process: s 5. Secondly, encouragement of acquisition by agreement is an object of the Just Terms Act: s 3(e). Thirdly, if agreement is not reached, the sanction is that the compulsory process of the Just Terms Act applies. Fourthly, in this case the agreement only came about as the result of an owner initiated acquisition process under the Just Terms Act. Fifthly, in this case the agreement was one contemplated by s 30 of the Just Terms Act for it contained a special condition expressly referable to s 30: see [71(g)] above.

80 The Council submit that *PWC* is distinguishable because the transfers of land in that case were for a nominal consideration, citing *Transport Infrastructure Development Corp v Parramatta City* Council [2005] NSWLEC 742, (2005) 143 LGERA 415. In the latter case the respondent council in 1956 purchased land for valuable consideration in the open

market and thereafter continuously used it for the purpose of public carparking. In 1994 the council resolved that the land be classified as operational land in accordance with the LG Act. In 2004 the applicant compulsorily acquired the land from the council. Bignold J held that as at 1 July 1993 the land was not "subject to a trust for a public purpose" within the meaning of cl 6(2)(b) of Sch 7 because the long and deliberate use of the land for public carparking purposes and the council's recognition of the utility (from a town planning perspective) of that use did not provide the requisite foundation for the creation or existence of a relevant trust obligation binding the land. His Honour distinguished *PWC* having regard to the different circumstances in which the council in the case before him acquired the land (by purchase for full valuable consideration): at [48] – [53]. The Council fastens on Bignold J's comment that the trust in *PWC* was created by the fact that it was acquired for "nominal consideration" and for the town planning purposes recognised by the condition on the grant of development consent: at [48]. I agree that *PWC* was distinguishable but I do not read the *PWC* decision as turning on the question of nominal consideration. As I have earlier noted, the High Court identified the amount of valuable consideration paid for one of the two lots the subject of those proceedings, and said that insofar as nominal consideration was paid for other lots the vendors received the benefit of a likely increase in value of their retained land. The latter is equivalent to valuable consideration. *Transport Infrastructure Development* is also distinguishable because it was not concerned with whether an acquisition for a public purpose contemplated by the Just Terms Act could give rise to a trust for a public purpose.

81 In my opinion, the circumstances of the acquisition of No 36 pursuant to cl 13 of the 1988 LEP and as contemplated by the Just Terms Act impressed it with a trust that it be held by the Council for the public purpose of open space; that trust endured at the time of the 1998

resolution to classify it as operational land; and the 1998 resolution was inconsistent with the terms of the trust. Accordingly, by s 31(3)(b) the 1998 resolution was ineffective.

82 If I am in error, it is of no consequence because, as I have earlier held, the Council's 2008 resolution reclassified No 36 as community land.

INVALIDITY OF 1994 AND 1998 RESOLUTIONS: *PROJECT BLUE SKY*

83 Notwithstanding absence of power and failure to give the statutory advance public notice, the Council submits that the 1994 and 1998 resolutions respectively classifying Nos 34 and 36 as operational land were valid under the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355.

84 I do not accept the submission. As I have held, the 1994 resolution was outside the ambit of the Council's statutory power. It is a principle of construction that where there has been a breach of a legislative provision, the test of validity is whether "it was a purpose of the legislation that an act done in breach of the provision should be invalid": *Project Blue Sky* at [91], [93]; *Smith v Wyong Shire Council* [2003] NSWCA 322, (2003) 132 LGERA 148 at [6]-[7] per Spigelman CJ; *Sharples v Minister for Local Government* [2008] NSWLEC 328, (2008) 166 LGERA 302 at [80] - [87] per Biscoe J; *Sharples v Minister for Local Government* [2010] NSWCA 36, (2010) 174 LGERA 129. Absence of power is a more fundamental defect than a breach of a legislative provision, and is therefore outside a strict application of *Project Blue Sky*: *Smith* at [135]; *Sharples* per Biscoe J at [80]. *Project Blue Sky* was concerned with the validity of an act that was within the statutory power granted to the defendant Authority (the making of broadcasting standards) but in breach of a statutory provision that regulated the exercise of the power (that it be performed consistently with

international agreements). The High Court held that the fact that the provision regulated the exercise of functions already conferred on the Authority rather than imposed essential preliminaries to the exercise of the functions strongly indicated that it was not a purpose of the Act that a breach was intended to invalidate any act done in breach. The absence of power in the present case is even more fundamental for it is based on an absence of power to make the resolutions in any circumstances. In my opinion, that is a strong, if not irresistible, indication that it was a purpose of the LG Act to invalidate the resolutions.

85 My conclusion that the resolutions are invalid is consistent with *PWC*. There the High Court held that if land answered the description of community land in cl 6(2) of Sch 7, then the council, by purporting by resolution to classify it as operational land, "dealt with it in a fashion beyond its power": at [1]. The High Court affirmed the decision below to restrain the council from dealing with the land unless it was reclassified in accordance with the LG Act. Significantly, there was no suggestion that *Project Blue Sky* principles could save the resolution.

SECTION 54 DEFENCE

86 The Council's s 53 register currently records the Land as operational land. I do not accept the Council's submission that s 54 is intended to provide a council's register with enforceable status or that conclusive force should be given to the register. There is nothing in the legislation to indicate that the register is conclusive. A s 54 certificate, on production, is conclusive evidence. Such a certificate would be based on the register, but it is the certificate not the register that is conclusive under s 54.

87 Nor do I accept the Council's submissions that it is a defence to these proceedings that, since the register currently records the Land as

operational land, the Council could, on application, issue a s 54(3) certificate that the Land is classified as operational land, which, by force of s 54(4), would, on production, be taken for all purposes to be conclusive proof of the matter certified. The Council submits that there is a conflict between s 54(4) and cl 6(2)(d) Sch 7 (by which No 34 was "taken to be" classified as community land as at 1 July 1993), requiring resolution by the Court. In my opinion, no such defence arises nor is resolution of any such alleged conflict required. No certificate under s 54(3) has been issued, let alone produced, and therefore no question of conclusiveness of a certificate arises. A hypothetical future certificate is irrelevant. If the Court determines that the Land is community land, the Council, acting bona fide, could not issue a s 54(3) certificate that the Land is operational land and should rectify its register to show its correct classification as community land.

SECTION 729 TIME BAR DEFENCE

88 The Council submits these proceedings are barred by the three months time limit in s 729, which it is convenient to repeat:

> **729 Proceedings alleging non-compliance with a procedural requirement**
>
> The validity or effectiveness of a decision of a council may not be questioned in any legal proceedings on the ground that, in making or purporting to make the decision, the council failed to comply with a procedural requirement of this Act or the regulations (including a requirement as to the giving of notice) unless the proceedings are commenced within 3 months after the date of the decision.

89 I have held that (a) under cl 6(2)(b) of Sch 7 No 34 was deemed to be community land on acquisition and the Council's 1994 resolution classifying No 34 as operational land was beyond the Council's power; (b) under s 31(3)(b) the 1998 resolution classifying No 36 as operational land was beyond the Council's power; (c) the Council's 2008 resolution

reclassifying No 36 from operational to community land was effective; and (c) there was no advance public notice of the resolutions in accordance with s 34.

90 The protection afforded to a council decision by s 729 is only in respect of a ground of challenge that a council failed to comply with a "procedural requirement", which expressly includes "a requirement as to the giving of notice". Section 729 should be given effect according to its terms: *Warringah Council v Edmondson* [2001] NSWCA 1 at [16]. Section 729 therefore protects the 1994 and 1998 resolutions to the limited extent that the applicant's questioning of their validity or effectiveness is based on a failure to give advance public notice as required by s 34.

91 The absence of power to make the 1994 and 1998 resolutions classifying Nos 34 and 36 as operational land under, respectively, cl 6 Sch 7 and 31(3)(b) is not a failure to comply with a "procedural requirement". Accordingly, s 729 does not affect those successful challenges. This conclusion is fortified by *PWC* where it was held that a council has no power by resolution to reclassify land deemed to be community land under cl 6(2) Sch 7, and that the council in that case be restrained from dealing with land unless reclassified. There was no suggestion in *PWC* that s 729 saved the resolution.

92 Section 729 is irrelevant to the 2008 resolution reclassifying No 36 as community land. The validity or effectiveness of that resolution was not questioned in the proceedings, let alone on the ground of failing to comply with a procedural requirement of the LG Act. On the contrary, the applicant embraced the 2008 resolution. The only question raised in the proceedings concerning that resolution was the Council's construction submission that it was merely "aspirational", which I have not accepted.

93 For these reasons, the s 729 defence fails (except in respect of the s 34 public notice question).

DISCRETION

94 The Council submits that the Court should decline, in its discretion, to grant relief because of the following discretionary factors:

(a) Delay: the Council resolutions classifying No 34 and No 36 as operational land were passed in, respectively, 1994 and 1998.

(b) The Council paid $75,000 for No 34 in 1977 and $1.3 million for No 36 in 1988.

(c) The dwelling on No 34 has a heritage listing and the Council does not have an intention to demolish it.

(d) No 34 was leased from 1978 to 2008.

(e) Weight should be given to the Council's s 53 land register.

(f) The intention of the Council to treat the Land as operational land is trumped by a deemed statutory fiction.

(g) The Council has a sound "political vision" reflected in its 2012 resolution, involving the sale of Nos 34 and 36 to repay a loan on 40, the rezoning of Nos 34, 36 and 38 to Environmental Living, the creation of a three metre right of way at the rear of Nos 34 and 36 enabling public access to the beach from a carpark, and retention of the dinghy storage facility on No 34.

95 As to factor (a), I do not consider that the delay in relation to the 1994 and 1998 resolutions is a strong factor given that the sale decision was only

made months before the proceedings were commenced; the absence of advance public notice of the resolutions as required by the LG Act; the evidence of use that is consistent with a community land classification; and (in relation to No 36) statements by the Council general manager to the effect that the 2008 resolution had taken effect and No 36 was community land. Factors (b), (c) and (d) are not strong. As for factor (e), the land register is not conclusive and if it is in error it should be corrected. As for factor (f), I have earlier explained why there is no statutory fiction: even if there is, I do not think it is a weighty consideration.

96 That leaves for consideration factor (g), the "political vision" factor, on which the Council seems to principally rely. Council's political vision is said to be reflected in its 10 December 2012 resolution set out above at [35], its March 2013 planning proposal to the Department of Planning and Infrastructure to rezone Nos 34, 36 and 38 to E4 - Environmental Living, and its earlier briefing or discussion papers where the fate of these properties was discussed. In short, the Council submits that through a democratic process it has formulated a sound political vision as to how to deal with Nos 34 and 36 and the nearby properties, and the Court should therefore exercise its discretion to decline to grant relief.

97 The Court, as a judicial review court, is concerned with the lawfulness of the Council's decision to sell Nos 34 and 36. It has no relevant merits review jurisdiction. The Council's "political vision" is a merits consideration put forward in the context of discretion. It is a highly unusual, perhaps unprecedented, submission. It is generally unwise, I think, for a judicial review court to take into account, one way or the other, the merits of a public authority's "political vision" as a discretionary factor when considering whether to grant relief for an unlawful step taken towards achieving its political vision, however sound the authority contends its political vision is. Even more so where, as here, the "political vision" is

politically controversial, as evidenced by the fact that its 2012 sale resolution was passed by a bare majority, and by objections in numerous public submissions and a petition and at a public meeting. Moreover, there is a fundamental misapprehension underpinning the Council's 2013 planning proposal to the Department where it states: "In relation to the intended disposal of 34 and 36 Stuart Street, the land is classified as Operational land under the provisions of the Local Government Act and reclassification of this land is not considered to be required in this Planning Proposal to enable disposal of the land". I do not give weight to the "political vision" factor.

98 The Council also faintly presses, as a discretionary consideration, that the status of the Land is only "hypothetical" and that the relief sought "resolves no actual dispute". This is self-evidently incorrect and I do not accept it. It is also of some small weight on discretion, as the applicant submits, that the Council should have had a heightened awareness of the restrictions in the LG Act concerning classification and reclassification of public land since the 1996 decision of this Court in *PWC Properties Pty Ltd v Bathurst City Council* [1996] NSWLEC 183, (1996) 91 LGERA 344, (upheld by the Court of Appeal and the High Court), as mentioned in *Dominic Wykanak v Rockdale City Council* NSWLEC, 20 July 1998 (unreported) per Pearlman J at 2.

99 In my opinion, it is appropriate to exercise the discretion by granting relief.

ORDERS

100 The orders of the Court are as follows:

(1) Declaration that the respondent's land at 34 Stuart Street and 36 Stuart Street, Manly is classified as community land under the *Local Government Act* 1993.

(2) Order that the respondent be restrained from selling, exchanging or otherwise disposing of the said land so long as it is classified as community land under the *Local Government Act* 1993.

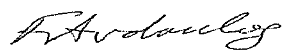
(3) Declaration that the respondent's land at 36 Stuart Street, Manly is subject to a trust for a public purpose.

(4) The respondent is to pay the applicant's costs.

(5) Liberty to apply on three days notice.

(6) The exhibits may be returned.

I CERTIFY THAT THIS AND THE **47** PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE P.M. BISCOE.



Associate

Date 9 October 2013