



Land and Environment Court of New South Wales

CITATION :	Gales-Kingscliff Pty Ltd v Tweed Shire Council (No. 2) [2007] NSWLEC 817
PARTIES :	APPLICANT Gales-Kingscliff Pty Ltd RESPONDENT Tweed Shire Council
FILE NUMBER(S) :	10775 of 2007
CORAM:	Preston CJ
KEY ISSUES:	Practice and Procedure :- oral motion by Council for leave to amend its statement of facts and contentions to raise further issue after hearing of proceedings - application for leave not in compliance with Practice Note Class 1 - Development Appeals - Council's original statement of facts and contentions did not put in issue that vegetation on subject land was an endangered ecological community - Council previously had opportunity to raise new issue and declined to do so - new issue would involve substantial evidence, time and cost to hear - not conducive to proper case management and not proportionate to allow Council to raise new issue - leave to amend statement of facts and contentions refused

LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 s 97 Land and Environment Court Rules 1996 Pt 1 r 5A Threatened Species Conservation Act 1995
CASES CITED:	Gales-Kingscliff Pty Ltd v Tweed Shire Council [2007] NSWLEC 683
DATES OF HEARING:	23 November 2007
EX TEMPORE JUDGMENT DATE :	23 November 2007
LEGAL REPRESENTATIVES:	<p>APPLICANT Mr T Robertson SC SOLICITORS Woolf Associates</p> <p>RESPONDENT K Gerathy (Solicitor) SOLICITORS Home Wilkinson Lowry</p>

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

PRESTON CJ

23 NOVEMBER 2007

10775 OF 2007

GALES-KINGSCLIFF PTY LTD V TWEED SHIRE COUNCIL (No. 2)

JUDGMENT

1 **HIS HONOUR:** The Council seeks by oral motion before the Court today to have leave to amend its statement of facts and contentions and hence the issues in these proceedings to raise a further issue in the following terms:

“Whether a condition should be imposed on the development application to fence the remnant vegetation that follows the property boundary along the northern and western boundaries.

Particulars

(a) The vegetation is the endangered ecological community Swamp Oak Floodplain Forest.

(b) Grazing is a threatening process listed by the Scientific Committee.

(c) The vegetation has significance in its own right as native vegetation to be protected by reference to the Tweed Vegetation Management Strategy and the State Environmental Planning Policy No 71.

(d) Clause 2(1)(a) and (g) of SEPP 71.”

2 The Council 's application is opposed by the applicant. In order to understand the application, it is important to put the application into its historical context.

Pleading and joinder of issues to be tried

3 The applicant lodged a development application on or about 8 February 2007 with the Council to use land it owns at Chinderah, being lot 1, DP 1075645, Tweed Coast Road, Chinderah, for the purpose of livestock grazing.

4 On 31 July 2007, the relevant officers of the Council wrote a report assessing the development application for the Council 's planning committee on 31 July 2007. That report recommended that the development application be refused "as the proposed development is prohibited". The report did note, under the head of consideration under s.79C(1)(b) of the likely impacts of the development on the environment, that:

"The key impact relates to threatened species. The proposed development has been assessed by Council 's Senior Ecologist/Conservation planner who has recommended fencing to ensure the livestock is kept out of the Swamp Oak Floodplain Forest. Appropriate conditions can be recommended should the use be deemed permissible."

5 I note here that the reference to the Council 's senior ecologist/conservation planner is a reference to Dr Kingston, a person to whom I will refer later in these reasons.

6 The Council adopted the recommendation and refused the development application. In the notice to the applicant of refusal of the development application dated 2 August 2007, the Council gave as the sole reason for refusal:

"1. The proposed development is prohibited."

7 On 9 August 2007, the applicant appealed to this Court against the Council 's refusal under s 97 of the *Environmental Planning and Assessment Act* 1979. Such an appeal is in class 1 of the Court's jurisdiction.

8 There was an application by the applicant for expedition, although ultimately this was not pursued. Nevertheless, the consequence of that application for expedition was that the matter came before the Court before the first return date by way of e-Court. The Registrar vacated the first call over by telephone on 10 September 2007. The Registrar noted that the Council was foreshadowing that it would raise a point of law as to the interrelationship between the relevant local environmental plan and State Environmental Planning Policy No. 71. The Registrar directed that the Council file statement of facts and contentions by 5 September 2007. The matter was stood over to 11 September before the Registrar.

9 On 6 September 2007, the Council prepared its statement of facts and contentions. They were filed in Court on 11 September 2007. The statement of facts and contentions was signed by the senior town planner for the Council . The proposal was identified as being the grazing of thirty to fifty head of cattle and an unspecified number of horses on the land. The site was identified by lot number and area. The site was described in the following terms:

"The site is generally cleared of native vegetation and for

the most part is dominated by a mixture of exotic pasture grasses which appears to have been regularly slashed. There is a significant strip of swamp oak vegetation along the north and western boundary.”

10 It then referred to adjoining land and the uses of such land.

11 The statement of facts identified the relevant statutory controls. They were Tweed Local Environmental Plan 2000. The particular clauses were identified. In addition, State Environmental Planning Policy No 71 was identified, although only clause 13 was identified as being of particular relevance. Under Part B Contentions, the Council identified the following:

“4. Point Of Law

1. Pursuant to cl 13 of SEPP 71, Item 2 of the development control table for the 5(a) - Special Uses Zone has no effect.

2. If the answer to question 1 is, ‘yes’, is the proposed development prohibited?

Note: If the answer to question 1 is, ‘no’, the Council concedes that the proposed use is permissible having regard to compatibility with adjacent uses and with uses allowed (with or without consent) in adjacent zone.

5. The proposal is inconsistent with Draft LEP 14 which proposes to rezone the land industrial. Agriculture is prohibited in the industrial zone.”

12 No other matters of fact were raised. In particular, the Council raised no issue in relation to whether there is vegetation on the site which constitutes any endangered ecological community, including that of swamp oak floodplain forest, or whether the proposed use of the land would have an adverse impact on such a community and, if so, what measures should be undertaken to mitigate any adverse impacts.

13 It is also evident that the statement of facts and contentions does not identify the Tweed vegetation management strategy as being a relevant policy document, and does not identify the clauses which the Council now seeks to rely upon under State Environmental Planning Policy 71, namely cl 2(1)(a) and (g) of SEPP 71 and, although not stated in the written proposed issue, nevertheless stated from the Bar table, cl 8(a) and (g) of SEPP 71.

14 Furthermore, the note underneath the point of law positively asserts that if the question of construction is against what the Council contended, then the proposed use is permissible and is compatible with adjacent uses and with uses allowed in adjoining zones.

15 This statement of facts and contentions needs to be understood in the context of the Court’s Practice Note governing class 1 appeals and, hence,

this particular appeal. Practice Note Class 1 - Development Appeals, para 8, specifies that the respondent consent authority is to file and serve a statement of facts and contentions in accordance with sch B. Schedule B of the Practice Note sets out the requirements for statements of facts and contentions by a respondent consent authority. It specifies that the statement is to be divided into two parts, Part A Facts and Part B Contentions.

16 In Part A Facts, the respondent authority is required to identify the site, including topography and vegetation, and to identify the applicable statutory controls and the relevant provisions: see para 4(b) and (d) of sch B. The Part B Contentions are required to:

“identify each fact, matter and circumstance that the respondent contends require or should cause the Court, in exercising the functions of the consent authority, to refuse the application or to impose certain conditions”: see para 5 of sch B.

17 Furthermore, in Part B Contentions, the respondent consent authority is to:

(a) focus on issues genuinely in dispute,

(d) where it contends the application must be refused, identify the factual and/or legal basis for that contention;

(g) identify the nature and extent of each environmental impact relied upon to support any contention and, if practicable, quantify that impact;

(h) identify any contentions that may be resolved by conditions of consent.

18 Once the respondent consent authority has filed its statement of facts and contentions, a direction may be made for the applicant to respond to that statement of facts and contentions if appropriate. This is provided for in the usual directions that would be made at the first directions hearing: see sch D, para A3. The statement of facts and contentions in reply is to not to repeat any facts not in dispute.

19 Through this process of filing a statement of facts and contentions in chief and then a statement of facts and contentions in reply, there can be a joinder of issue on both facts and contentions.

20 Parties are then bound by their statement of facts and contentions unless and until they seek the leave of the Court to amend their statements of facts and contentions. Paragraph 31 of the Practice Note states:

“Parties require leave of the Court to amend their

statements of facts and contentions...Leave is to be sought by notice of motion accompanied by a short affidavit in support explaining the reasons for leave being sought."

21 On 11 September 2007, the Court directed the applicant to file its statement of facts and contentions in reply by 21 September 2007. On 26 September 2007, the applicant filed its statement of facts and contentions. In the Part A Facts, the applicant referred to the officers report to the Tweed Shire Council planning meeting dated 31 July 2007 where it was stated that the draft LEP 14 did not affect the assessment of the application as its implementation at the site is not certain or imminent, that the use of the land for agriculture is not undesirable in the short-term, and that the application be recommended for refusal on the basis only that is prohibited. The statement of facts also referred to the fact that the Council's notice of refusal dated 2 August 2007 identified as the sole reason for refusal that the proposed development was prohibited.

22 In Part B Contentions, the applicant responded to the Council's point of law noting the provision that defines permissible uses in the 5A Zone Tweed Local Environment Plan 2000 as those uses which are compatible with permissible uses in adjoining zones, is not a flexible zone provision as referred to in cl 13 of SEPP 71.

23 In relation to para 4 of the Council's contentions, the applicant joined issue stating that the making of draft LEP 14 is neither imminent nor certain.

24 Again it can be seen that the applicant's statement of facts and contentions did not put in issue that the vegetation on the subject land was an endangered ecological community, or that the proposed development would have an impact on that community, or that any mitigation measures need to be imposed to mitigate any such impact. Moreover, there were no additional statutory documents referred to beyond those that were referred to by the Council .

25 On 11 September 2007, the proceedings were fixed for hearing on 16 October 2007. At the appearance before the Registrar, the parties noted that para 4 raised a point of law. Paragraph 5 of the Council 's statement of facts and contentions concerning the draft local environment plan was noted to be a merit issue. No other merit issue was raised before the Registrar. The matter was set for hearing on 16 October 2007 on that basis.

Trial on issues pleaded and joined

26 The matter came on for hearing before me on 16 October 2007. As I record in the principal judgment in the proceedings, the Council did not press para 5 of its statement of facts and contentions concerning the draft local environmental plan. Accordingly, the only issues in the proceedings were the first two points of law raised in para 4 of the Council 's statement of

facts and contentions: *Gales-Kingscliff Pty Ltd v Tweed Shire Council*[2007] NSWLEC 683 at [3].

27 As I also noted in the principal judgment, the parties were agreed at that hearing that if the Court concluded that the development was permissible and not prohibited, then the appeal should be upheld and development consent granted. It was understood that appropriate conditions of consent would need to be imposed. However, there was not seen to be any contested conditions issues in relation to these merit issues. Accordingly, the proceedings were adjourned for a week in order for the parties to discuss and propose standard conditions of consent: see *Gales-Kingscliff Pty Limited v Tweed Shire Council* [2007] NSWLEC 683 at [46].

Council raises new issue after trial

28 Unfortunately, the parties disagreed about the conditions that were appropriate for the Court to impose. The Council proposed four conditions of consent:

“1. The development shall be completed in accordance with the Statement of Environmental Effects and Plan Nos Figure 1 - Subject Site prepared by Darren Gibson Planning and dated 6 February 2007, except where varied by the conditions of this consent.

2. Fencing shall be erected surrounding the Endangered Swamp Oak (*Casuarina glauca*) vegetation that follows the property boundary along the northern and western boundaries. Such fencing shall be designed to prevent cattle and horses from entering this vegetation and causing damage.

3. This consent authorises use of the land for livestock grazing for a maximum of 50 head of cattle and 20 head of horses at any one time.

4. This consent is time limited to a period of five years only.”

29 The Council 's draft conditions of development consent were filed in Court on 23 October 2007.

30 The applicant responded with its version of the draft conditions of development consent, which were filed in Court on 25 October 2007. The applicant agreed with conditions 1 and 3 proposed by the Council , but disagreed with conditions 2 and 4. The applicant proposed that condition 2 should be deleted and condition 4 should be amended to read:

“4. This consent is time limited to a period of ten years or the commencement of development pursuant to a development consent for any other use of the whole of

the property, whichever is the latter.”

31 The disagreement in relation to condition 2 has, at its heart, the Council’s contention that the vegetation along the northern and western boundaries is part of the endangered ecological community of Swamp Oak Floodplain Forest, listed under the *Threatened Species Conservation Act* 1995. The Council contends that the proposed development, namely livestock grazing, is a threatening process identified by the Scientific Committee in its description of the endangered ecological community. In addition, the Council contends that the vegetation is of a community type identified in the Tweed Vegetation Management Strategy as being of high ecological sensitivity and high ecological status. Finally, the Council contends that the vegetation is of significance and needs to be considered and conserved by appropriate measures pursuant to cls 2 and 8 of State Environmental Planning Policy No 71.

32 The parties embarked on a course of engaging multiple experts to deal with the Council’s proposed condition 2. This process has escalated to a point where there are two experts who have filed reports for the Council, being Mr Peter Parker, a flora and fauna consultant, and Dr Mark Kingston, a senior ecologist/conservation planner with Tweed Shire Council. Dr Kingston relies for his expert opinion on other experts’ reports, including that of Coffey & Partners who undertook in 2004 groundwater monitoring work on the site; flood modelling work undertaken by Mr Danny Rose, the Council’s flooding and stormwater engineer, as to the inundation frequency for the subject site; and personal communications from Dr Marty Hancock, the Council’s floodplain officer, as to drainage and waterlogging of the subject site.

33 Both Mr Parker and Dr Kingston also rely upon the Council’s Tweed Vegetation Management Strategy and the mapping work that was undertaken as part of that strategy which identified the site as having particular vegetation communities and particular ecological significance.

34 The applicant relied on three experts: Mr Greg Elks, a botanist and ecologist; Dr Andrew Smith, an ecologist; and Dr Pam Hazleton, a soil scientist. As I will indicate shortly, the applicant indicated that if leave were to be granted for the Council to rely upon the new issue, it would need to respond to the Council’s evidence included by attachment or by reference in Dr Kingston’s report and Mr Parker’s report. This would include responding to the Coffey & Partners’ report, Mr Rose’s flood modelling, and Mr Hancock’s statements as to the drainage and waterlogging, as well as responding to the Tweed Vegetation Management Strategy. Accordingly, there would be a further bevy of experts.

35 There was joint conferencing between the experts who had filed reports, but not those whose reports were included by reference or attachment, and that joint conferencing resulted in a draft joint conference report. That joint conference report raises some nineteen issues, including issues relating to whether the subject vegetation on the land is part of yet another

endangered ecological community and whether it could be classified in yet a different way.

Need for leave to amend the issues

36 The matter came on today for the final hearing of the matter to determine the appropriate conditions that should be imposed. I raised at the outset with the Council the need for the Council, if it wished to put in issue the matters raised by its proposed condition 2 concerning the significance of the vegetation, including whether it was an endangered ecological community, to obtain leave to amend its statement of facts and contentions. As I have earlier noted, without leave of the Court, neither the Council nor the applicant is entitled to rely upon facts and contentions different to those that had been articulated in the facts and contentions filed in accordance with the Court's directions.

37 I have set out above the statements of facts and contentions of both the Council and the applicant. It is clear that the issue now proposed by the Council to be raised was not raised in the statement of facts and contentions that it filed, nor, of course, in the statement of facts and contentions filed by the applicant in reply. If the Council wishes to rely upon the matters relating to the significance of the vegetation and the impact the proposed development would have on it, it would be necessary to seek leave to amend its statement of facts and contentions and, hence, the issues in the proceedings.

Council's application for leave to amend the issues

38 Accordingly, the Council sought by oral motion to amend its statement of facts and contentions to add the contention that I have earlier set out in this judgment.

39 Paragraph 31 of the Practice Note states what would be obvious in any event, and that is that the party seeking leave to amend its statement of facts and contentions needs to provide an explanation of the reasons for seeking the amendment and, of course, for seeking it at the time it is done.

40 The Council's oral explanation from the Bar table for not having raised the contention in its statement of facts and contentions or subsequently seeking leave to amend to raise it at any time until today is that the Council officers did not consider the issue to be controversial or that the applicant would oppose a condition in terms of the draft condition proffered by the Council and which I have set out earlier. Such a statement is, of course, no explanation at all. If the Council had wished to raise this issue, even simply as a condition to be imposed to mitigate the impact the proposed development would have on the vegetation, it was incumbent upon the Council to do so in its statement of facts and contentions.

41 The matters that are now in issue would clearly have needed to have been raised in both Part A Facts and Part B Contentions.

42 In Part A Facts, the description of the site should have included a

description of the vegetation as including vegetation that is of an endangered ecological community, whether it be Swamp Oak Floodplain Forest or any other endangered ecological community, or whether it is of a vegetation community listed under the Tweed Vegetation Management Strategy as having a high ecological significance.

43 In so far as a conclusion that vegetation is of a community described by the Scientific Community as an endangered ecological community involves an analysis of various descriptors, including floristic, edaphic, physiographic and locational descriptors, the facts the Council contended made the vegetation part of the community ought to have been stated in that Part. For example, very real issues have been raised between the parties as to the soils, the levels of the land, whether the land is part of or associated with a floodplain, the floristic species present on the land, amongst other factors. A statement of the facts in Part A Facts would have enabled the applicant in its statement of facts and contentions in reply to either admit or dispute each fact and, if disputed, state what it says was the contrary fact.

44 Furthermore, in the Part A Facts, under the heading of Statutory Controls, it would have been relevant for the Council to have identified not merely that State Environmental Planning Policy No 71 was relevant but the particular provisions of that policy which were relevant. As I noted earlier, the only provision the Council identified was cl 13. It did not identify either cl 2 or cl 8 of the policy to be relevant. Furthermore, the Council did not identify the Tweed Vegetation Management Strategy as being relevant. Nor, of course, did it identify the *Threatened Species Conservation Act 1995* as being a relevant statute applicable to the land and that would need to be considered by the Court.

45 In Part B Contentions, the Council, if it had wished to raise the contention that a condition of consent ought to be imposed to mitigate any adverse impact livestock grazing might have on the vegetation that might comprise an endangered ecological community, or that might be identified under the Tweed Vegetation Management Strategy, ought to have done so as a contention that could be resolved by conditions of consent. This would also include identifying each fact, matter and circumstance that the Council contended, required or should cause the Court to impose the condition at all or in the terms put forward by the Council .

46 Again, if that had been done, the applicant would have been able to respond to that contention and either propose an alternate condition or taken issue with the particular facts, matters and circumstances pleaded by the Council in support of its contention.

47 If, of course, the Council had raised any of these matters in its statement of facts and contentions, that would have led to a direction by the Court to file draft conditions of consent which would have included this particular condition. This would be done as part of the usual directions under Sch D, para G(14), which would have then enabled the applicant to respond with its own suggested conditions pursuant to Sch D, para G(15). Of course, such a

direction was not made because at no time did the Council raise in its statement of facts and contentions, or in its appearances before the Court at the interlocutory appearances, any issue in relation to the vegetation being of significance and warranting a condition requiring the imposition of conditions to exclude the use of livestock grazing from parts of the land.

Applicant opposes Council 's application to amend the issues

48 The applicant opposes leave being granted because of the prejudice it would suffer in being able to meet the case that is now put by the Council in the evidence that has been foreshadowed. In particular, the applicant says that issues concerning topography, salinity, waterlogging and flooding have been raised for the first time in the evidence of Dr Kingston. Dr Kingston's evidence in relation to those four issues relies upon the evidence of others, namely Coffey & Partners, Mr Rose and Mr Hancock, as I have earlier indicated. The applicant says that in order to meet that evidence it would need to engage its own experts to respond. It could not leave unchallenged that evidence because it is potentially decisive against the applicant's case that the topography, salinity, waterlogging and flooding factors relevant to the site are not consistent with the Scientific Committee's description of the particular Endangered Ecological Community of Swamp Oak Floodplain Forest.

Leave to amend issues should be refused

49 In my judgment, leave should not now be granted to the applicant to raise the new issue for the following reasons.

50 First, the Council failed to raise the issue as it should have done if it wanted to raise it in its statement of facts and contentions.

51 Secondly, no adequate explanation has been provided to the Court as to why the issue was not raised in the Council 's statement of facts and contentions. As I have noted in the chronology above, the Council officers had raised the issue in the assessment report which went to the Council prior to its determining to refuse development consent. The Council therefore knew of the issue, yet it failed to include it in the statement of facts and contentions. This must be taken to be a deliberate decision not to put that fact or contention in issue. The matter was before the Court on a number of occasions and the only issue that the Council sought to be determined by the Court was that raised in its contentions relating to whether the development was prohibited. The explanation proffered that the Council officers did not consider the issue to be contentious is not adequate. As I have noted above, even if the issue only went to the matter of conditions, the practice note still would require the Council to have raised it in its statement of facts and contentions. I have set out above the manner in which the Council properly should have raised it, even assuming it only went to conditions.

52 Moreover, an assertion that vegetation on a site is an endangered ecological community under the *Threatened Species Conservation Act* and

thereby warrants exclusion from it of the development, is on its face obviously contentious. No person could reasonably consider otherwise. It also has to be remembered that these parties are engaged in litigation on a number of matters concerning different parcels of land in the Tweed local government area. A conclusion that vegetation on this land is an endangered ecological community could have repercussions for other land in similar circumstances owned by the applicant. It is unreasonable to believe that there would be no precedent effect and that the contention that vegetation on the site was an endangered ecological community would not be contentious.

53 Thirdly, the matter was fixed for hearing and the hearing was run on the sole basis of the issues pleaded in relation to whether the development was prohibited, and judgment was delivered on this basis. At no time before the hearing, or at the hearing, or prior to judgment was it foreshadowed that the Council would seek to raise new merit issues going to whether development should be excluded from part of the site on the basis of vegetation on part of the site being an endangered ecological community and the development having an unacceptable impact on it.

54 Fourthly, the Council raises the issue late in the proceedings, after judgment has been delivered on the issues that the parties had put in issue between them.

55 Fifthly, the issue as framed by the Council that I have set out above extends beyond the evidence that has been filed to date. I have noted that the particulars given by the Council are not limited to excluding livestock grazing from the vegetation on the basis that the vegetation is an endangered ecological community of Swamp Oak Floodplain Forest. The particulars also assert that the vegetation has significance independently as native vegetation to be protected under Tweed Vegetation Management Strategy and under State Environmental Planning Policy No 71.

56 In relation to the Tweed Vegetation Management Strategy, it lists the vegetation as swamp she-oak closed forest to woodland (mapping code 601) and identifies the vegetation as being of high ecological sensitivity and high ecological status. No evidence to date has been filed in relation to how that Vegetation Management Strategy was undertaken, the criteria used to identify the vegetation as swamp she-oak closed forest to woodland (mapping code 601) or the criteria used to identify any such vegetation to be of high ecological sensitivity and high ecological status.

57 The Council's evidence of Mr Parker and Dr Kingston relies upon the Tweed Vegetation Management Strategy but does not go behind it. The applicant, however, would be entitled to challenge the validity of the Tweed Vegetation Management Strategy and the classification of the vegetation as swamp she-oak closed forest to woodland (mapping code 601) or as being of high ecological sensitivity and high ecological status. This, of course, would require further evidence.

58 Furthermore, no evidence has been filed in relation to cl 2 or cl 8 of State

Environmental Planning Policy No 71, other than to refer to it in passing. However, no thorough analysis has been done by either parties' experts.

59 Sixthly, the evidence filed by the Council to date, if it were to be admitted, would require further witnesses to be called than those who are the deponents of the reports to date. It would involve calling the relevant authors of the Coffey & Partners' report, Mr Rose on flood modelling, and Mr Hancock in relation to waterlogging and drainage. There would then need to be a response from the applicant and one would imagine at least one expert to respond to each of these persons. The result would be potentially a further six witnesses to the number of witnesses that have already filed reports to date, which is five.

60 Seventhly, the last two points show that the hearing could not continue to date, being the date fixed for the finalisation of this matter. There would need to be an adjournment perhaps for some considerable time in order to enable an analysis of the evidence that has been filed to date and the preparation of reports.

61 Eighthly, all of this would result in considerable cost to both parties in order to inquire into the issues raised by the Council's proposed contention. It has to be remembered that this application is only to use the land for the purpose of livestock grazing. The statement of environmental effects stated that between thirty and fifty cattle were proposed to be grazed and an unspecified number of horses. The agreed proposed condition fixes the maximum number of cattle at fifty and the maximum number of horses at twenty at any one time. Even with seventy stock, we are dealing with a small development. The development application did not propose clearing of any trees or vegetation on the land. There is no proposal to carry out any works on the land. There is no proposal to erect any buildings on the land. It is simply an application for use for the purpose of grazing a modest number of stock.

62 In that context, one returns to see what would be involved if the Council's contention were now to be allowed. The cost to the parties that would be involved in continuing to obtain expert evidence and to run a hearing is out of proportion with the nature of the development that is being proposed.

63 Ninthly, the application, as I have noted, does not propose to remove any vegetation from the land. There is no proposal to cut down any of the trees in the vegetation strips, for example. This is relevant because the Council's issue seeks to exclude the use from a part of the land in order to protect the vegetation. Whilst it is feasible that cattle or horses grazing in and amongst the vegetation might have an adverse effect on regenerating vegetation, the extent of impact from that activity must be seen to be less than if the application had been to clear or remove vegetation from the land.

64 The consequence if the development were to be approved as the use only of the land for the purpose of grazing but without any authorisation to clear vegetation would be that the applicant would be precluded from clearing or removing any of the vegetation. So that result will occur by

operation of law.

65 Finally, the Court has an overriding obligation under Pt 1 r 5A of the *Land and Environment Court Rules* 1996 to ensure the just, quick and cheap resolution of the real issues in the proceedings. This involves ensuring proper case management. It would not be conducive in the circumstances and history of this matter to allow the Council to raise what can be seen to now be an issue that will involve substantial evidence and many hearing days when it had not at any earlier time raised the issue. It would be out of proportion to what is being sought. It would not be conducive to the just, quick and cheap resolution of the matter.

66 For those reasons, I decline to allow the Council to amend its statement of facts and contentions to raise the issue that I have earlier set out above.

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