Land and Environment Court

New South Wales

Case Name:	Palm Beach Protection Group Incorporated v Northern Beaches Council
Medium Neutral Citation:	[2020] NSWLEC 156
Hearing Date(s):	20-23 October 2020
Date of Orders:	20 November 2020
Decision Date:	20 November 2020
Jurisdiction:	Class 4
Before:	Preston CJ
Decision:	The Court: (1) Declares that Northern Beaches Council has breached s 5.5(1) of the Environmental Planning and Assessment Act 1979 (the EPA Act) in considering and determining to approve on 17 December 2019 the activity of allowing dogs on-leash at Station Beach, Palm Beach by not examining and taking into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity; (2) Declares that Northern Beaches Council has breached s 5.7(1) of the EPA Act in granting approval on 27 August 2019 to the activity of conducting the dog off-leash area trial at Station Beach, Palm Beach for a period of 12 months, without having obtained or been furnished with, and having examined and considered, an environmental impact statement in respect of that activity; (3) Declares that Northern Beaches Council has breached s 5.7(1) of the EPA Act by: (a) not determining whether the activity of allowing dogs on-leash at Station Beach, Palm Beach, is likely to significantly affect the environment;

(b) granting approval on 17 December 2019 to the activity of allowing dogs on-leash at Station Beach, Palm Beach, without having obtained or been furnished with, and having examined and considered, an environmental impact statement in respect of that activity;
(4) Declares invalid, and quashes, the decision of Northern Beaches Council made on 27 August 2019 to conduct a dog off-leash area trial at Station Beach, Palm Beach for 12 months;
(5) Declares invalid, and quashes, the decision of Northern Beaches Council made on 17 December 2019 to allow dogs on-leash at Station Beach, Palm Beach;
(6) Directs the parties to file and serve submissions on the orders that the parties contend the Court should make by way of prohibitory or mandatory injunctions (if any) in accordance with the following timetable:
(a) The applicant to file and serve its submissions by 27 November 2020;
(b) The respondent to file and serve its submissions by 4 December 2020;
(c) The applicant to file and serve its submissions in reply by 11 December 2020;
(7) Grants leave to each party to relist the matter in order to fix a date for a hearing if a party wishes to have a hearing on the issue of the injunctive orders the Court should make.
(8) Orders the respondent to pay the applicant's costs of the proceedings.

Catchwords: JUDICIAL REVIEW − council decisions to conduct dog off-leash area trial and to allow dogs on-leash at beach − threatened seagrass population and threatened seahorse species and their habitats − application of Part 4 of Environmental Planning and Assessment Act 1979 (EPA Act) − whether decisions authorise use of land − purpose of use of land − whether for recreation area − whether development consent required − whether development for purposes of recreation area on a public reserve under the control of or vested in the council − whether continuance of a use of land for a lawful purpose − whether enlargement, expansion or intensification of use − whether use abandoned − whether use unlawfully commenced − development

consent not required for use − no breach of Part 4 of EPA Act

JUDICIAL REVIEW − council decisions to conduct dog off-leash area trial and to allow dogs on-leash at beach − threatened seagrass population and threatened seahorse species and their habitats − application of Part 5 of EPA Act − whether council decisions approve an activity − duty to examine and take into account environmental impact of activity − whether council breached duty in approving dog on-leash activity − duty to obtain, examine and consider EIS for activity likely to significantly affect environment − whether council breached duty in approving dog off-leash activity and dog on-leash activity − whether each activity likely to significantly affect the environment − breaches of Part 5 of EPA Act

Legislation Cited:

Companion Animals Act 1988 ss 13(6), 14(1)
Crown Land Management Act 2016
Crown Lands Act 1989
Environmental Planning and Assessment Act 1979 ss 1.5(1)(a), 4.2, 4.3, 5.1, 5.5, 5.7
Fisheries Management Act 1994 ss 221ZV, 221ZX
Local Government Act 1919 s 344
Local Government Act 1993 s 48, 632
Local Government (Town and Country Planning) Amendment Act 1945
Pittwater Local Environmental Plan 1994
Pittwater Local Environmental Plan 2014
State Environmental Planning Policy (Infrastructure) 2007
Warringah Local Environmental Plan 1985

Cases Cited:

Bailey v Forestry Commission of NSW (1989) 67 LGRA 200
BP Australia Ltd v Campbelltown City Council (1994) 83 LGERA 274
Burwood Council v Iglesias Ni Cristo (No 2) (2019) 242 LGERA 32; [2019] NSWLEC 159
Chamwell Pty Ltd v Strathfield Council (2007) 151 LGERA 400; [2007] NSWLEC 114
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000]

HCA 5
Council of the City of Sydney v Wilson Parking Australia Pty Ltd [2015] NSWLEC 42
Drummoyne Municipal Council v Maritime Services Board (1991) 72 LGRA 186
Drummoyne Municipal Council v Roads and Traffic Authority of NSW (1989) 67 LGRA 155
F Hannan Pty Ltd v Electricity Commission of NSW (1983) 51 LGRA 369
Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2) (2013) 195 LGERA 229; [2013] NSWLEC 38
Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974 (1986) 7 NSWLR 353
Hanly v Kleidienst 471 F2D 823 at 830 (2d CIR, 1972)
Herring Daw & Blake NSW Pty Ltd v Gosford City Council (1995) 87 LGERA 220
Hudak v Waverley Municipal Council (1990) 18 NSWLR 709
Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council (2019) 101 NSWLR 1; [2019] NSWCA 147
Jarasius v Forestry Commission of NSW (1988) 71 LGRA 79
King v Lewis (1995) 88 LGERA 183
Kivi v Forestry Commission of NSW (1992) 47 LGERA 38
Liverpool City Council v Roads and Traffic Authority & Interlink Roads Pty Ltd (1991) 74 LGRA 265
National Parks Association of NSW v Minister for the Environment (1992) 130 LGERA 443
Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council (2010) 210 LGERA 126; [2010] NSWLEC 48
Oshlack v Richmond River Council and Irongates Development Pty Ltd (1993) 82 LGRA 222
Oshlack v Rous Water (2013) 194 LGERA 39; [2013] NSWCA 169
Parks and Playgrounds Movement Inc v Newcastle City Council (2010) 179 LGERA 346; [2010] NSWLEC 231
Parramatta City Council v Hale (1982) 47 LGRA 319
Prineas v Forestry Commission of NSW (1983) 49

LGERA 402
Prineas v Forestry Commission of NSW (1984) 53 LGERA 160
Royal Agricultural Society (NSW) v Sydney City Council (1987) 61 LGRA 305
Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council [2017] NSWLEC 56
Rundle v Tweed Shire Council (1989) 68 LGRA 308
Snowy Mountains Brumby Sustainability and Management Group Inc v The State of NSW [2020] NSWLEC 92
South Sydney City Council v Hulakis & Teakdale Pty Ltd (1996) 92 LGERA 401
Steedman v Baulkham Hills Shire Council (No 2) (1993) 31 NSWLR 562
Sydney City Council v Ke-Su Investments Pty Ltd (1985) 1 NSWLR 246
Sydney City Council v Ke-Su Investments Pty Ltd (No 2) (1983) 51 LGRA 186
Timbarra Protection Inc v Ross Mining NL (1999) 46 NSWLR 55
Transport Action Group Against Motorways Inc v Roads and Traffic Authority (1999) 46 NSWLR 598; [1999] NSWCA 196
Vaughan-Taylor v David Mitchell-Melcann Pty Ltd (1991) 73 LGRA 366
Vumbaca v Baulkham Hills Shire Council (1979) 141 CLR 614; [1979] HCA 66
Warren v Electricity Commission of NSW (1990) 130 LGERA 565
Weal v Bathurst City Council (2000) 111 LGERA 181
Willoughby City Council v Minister administering the National Parks and Wildlife Act (1992) 78 LGERA 19

Category: Principal judgment

Parties: Palm Beach Protection Group Incorporated (Applicant)
Northern Beaches Council (First Respondent)
Department of Planning, Industry and Environment (Second Respondent)

Representation: Counsel:
Mr N Williams SC, with Mr C Ireland (Applicant)
Mr A Galasso SC, with Mr M Staunton (First

	Respondent) Solicitors: Dentons (Applicant) Wilshire Webb Staunton Beattie Lawyers (First Respondent) Submitting appearance (Second Respondent)
File Number(s):	2019/313791
Publication Restriction:	Nil

JUDGMENT

A council decides to allow dogs in a public place

1 Station Beach, on the Pittwater side of Palm Beach, and the adjacent land of the isthmus, named Governor Phillip Park, has been a reserve for public recreation for nearly a century. The current Northern Beaches Council (the Council) has the power to care and manage the reserve. The westward extent of the reserve is the Mean High Water Mark (MHWM). The land below MHWM is Crown land. Together, the reserve (land above MHWM) and the Crown land covered by tidal waters (land below MHWM) are a public place for various pieces of legislation.

2 In 2019, the Council twice resolved to allow the public to use this public place for recreation by the public in the companionship of their dogs. By the first resolution, on 27 August 2019, the Council resolved to:

> "A. Conduct a do off-leash area trial at Station Beach, Palm Beach for 12 months as outlined in the agenda report.
>
> B. Delegate authority to the Chief Executive Officer to enter into a licence agreement with the Department of Industry, Lands and Water for the trial.
>
> C. Declare Station Beach an off-leash area, for the purpose of the trial, under section 13(6) of the Companion Animals Act 1998 subject to the granting of a licence with the Department of Industry, Lands and Water.
>
> D. Investigate other beach locations prior to appointing a permanent dog off-leash area at Station Beach."

3 The agenda report referred to both an off-leash area and an on-leash area. The report described the boundaries of the dog off-leash area to be as follows:

> "- Eastern boundary (sic, western boundary), 3 metres east of the seagrass beds closest to and parallel to Station Beach. Denoted by three marker buoys

(attachment 10) and signage on the southern edge of the Station Beach beach wharf.

- Western boundary (sic, eastern boundary), to be along the edge of the Palm Beach Golf Course.

- Northern boundary to be the southern edge of Station Beach Wharf.

- Southern boundary approximately 110 metres north of the Beach Road entry."

4 These boundaries accorded with the recommendation of Ms Astles in a report dated April 2019 included as part of the Review of Environmental Factors dated 24 May 2019. Ms Astles had recommended, in order to mitigate the impacts of dog use on marine biodiversity, notably seagrasses, including the threatened population of *Posidonia australis*, and the threatened species of seahorse, White's seahorse, *Hippocampus whitei*, that the western boundary be fixed three metres eastwards of the seagrass beds closest to the beach and the southern boundary be moved northwards of a bed of *Posidonia* seagrass that comes close to the beach, thereby ensuring that dogs do not lawfully enter and damage seagrass beds.

5 As indicated in the resolution, the boundaries of the off-leash area would be physically indicated, by three marker buoys in the water and signage on the southern edge of the Station Beach wharf (signifying the western and northern boundaries) and signage at the southern end of the area (signifying the southern boundary).

6 The agenda report also referred to designating a smaller section of Station Beach to the south of the off-leash area, as an on-leash area. The on-leash area would be established between Beach Road (its southern boundary) and the southern boundary of the off-leash area (its northern boundary). The eastern boundary was the golf course. There was no western boundary. This would have the consequence that there was no legal restriction on dogs on-leash entering the water and the *Posidonia* seagrass bed close to the beach in this on-leash area.

7 In terms, however, the Council resolution of 27 August 2019 did not approve the on-leash area. Each of the parts of the resolution referred only to the off-leash area, not an on-leash area, and parts B and C of the resolution are only applicable to an off-leash area not an on-leash area.

8 The agenda report proposed that the off-leash area (as well as the on-leash area) operate on certain days and at certain times:

> "- 4.00pm to 10.30am, Monday to Sunday (Australian Eastern Standard Time, non-daylight saving time).
>
> - 5.30pm to 10:30am, Monday to Friday (Australian Eastern Daylight Time, daylight-saving time, summer)
>
> - Dogs prohibited on Station Beach outside these days and times."

9 The Council's decision of 27 August 2019 was challenged by a resident action group opposed to allowing dogs on Station Beach, the Palm Beach Protection Group Inc (the Group). The Group commenced these judicial review proceedings on 8 October 2019.

10 Partly for this reason and partly because the Council had not been able to obtain a licence from the Department of Industry, Lands and Water to use the submerged Crown land, on 17 December 2019, the Council passed a second resolution to:

> "1. Allow dogs on-leash at Station Beach, Palm Beach as outlined in the report (including as to specified location, days and time).
>
> 2. Note that this resolution and Council Resolution 267/19 have the effect of amending the former Pittwater Council Dog Control Policy (NO0 30).
>
> 3. Authorise the Chief Executive Officer to do all things necessary to give effect to this resolution including to erect and remove signage."

11 The agenda report referred to the Council's first resolution to conduct a dog off-leash area trial, noted that a licence had not yet been obtained from the Department, and proposed the interim measure of allowing an on-leash area pending the issue of a licence. The boundaries of the on-leash area were described as:

> "- Northern boundary to be the southern end of Station Beach Wharf (as adopted for the Station Beach dog off-leash area trial).
>
> - Southern boundary to be the southern edge of Beach Road (as adopted for the Station Beach dog off-leash area trial).
>
> - Eastern boundary to be the western boundary of the Palm Beach Golf Club Ltd lease area as identified in Council's lease with Club."

12 There is inconsistency in the description of the location of the southern boundary of the on-leash area. The location of "the southern edge of Beach Road" is different to the location of the southern boundary "as adopted for the

Station Beach dog off-leash area". The latter location was at a point " approximately 110 metres north of the Beach Road entry", not at the southern edge of Beach Road.

13 There was no western boundary, so that there was no limit on how far westwards into Pittwater estuary dogs on-leash could walk or swim. The days and times would be the same as were adopted for the off-leash area trial:

> "- 4.00pm to 10.30am, Monday to Sunday (Australian Eastern Standard Time, non-daylight saving time).
>
> - 5.30pm to 10:30am, Monday to Friday (Australian Eastern Daylight Time, daylight-saving time, summer)
>
> - Dogs prohibited on Station Beach outside these days and times."

14 The agenda report noted that:

> "Council will continue to pursue a licence as contemplated by the off-leash resolution. Should a licence be granted by the Department and agreed to by Council, the Station Beach dog off-leash area trial would commence in accordance with the off-leash resolution and would replace the option outlined in this report."

15 The Group amended its summons to challenge this second decision.

The council decisions are challenged

16 The Group contends that the Council's two decisions are invalid on two sets of grounds. The first ground is that each decision authorises the carrying out of development in breach of s 4.2 or s 4.3 of the *Environmental Planning and Assessment Act 1979* (EPA Act) (the unlawful development ground).

17 The Group argues that the use of the beach and adjacent water authorised by each Council decision is development that is prohibited or permitted only with development consent. The Council and the public who carry out the use will therefore be in breach of s 4.2 or s 4.3 of the EPA Act, which prohibit any person carrying out development that either is prohibited or is permitted with consent where no consent has been granted.

18 The Group seeks in its further amended summons declarations that the use of land is prohibited or permitted only with consent (prayers for relief 2 and 3 for the first decision and 4B and 4C for the second decision), orders restraining the carrying out of the use (prayers for relief 4 for the first decision and 4G for the

second decision), and orders setting aside the Council's decisions as invalid (prayers for relief 1 for the first decision and 4A for the second decision).

19 The second ground on which the Group contends the Council's decisions are invalid and enable the carrying out of the use in breach of the EPA Act is in the alternative to the first ground. If the use authorised by the Council's decisions is not either prohibited or permitted only with consent, but instead is permitted without consent, the Group contends that the environmental impact of the use needed to be assessed under Part 5 of the EPA Act (the inadequate EIA ground).

20 The Group contends that the use of the beach and adjacent waters authorised by each Council decision is an activity, each Council decision was an approval, and the Council was a determining authority whose approval was required in order to enable the activity to be carried out. The Group contends that the Council was required by s 5.5 of the EPA Act to consider the environmental impact of the activity before granting approval, but the Council failed to do so in making the second decision. The Group contends that the Council was required by s 5.7 of the EPA Act to consider an environmental impact statement in respect of the activity before granting approval, but the Council failed to do so in making either the first or second decisions.

21 The Group seeks in its further amended summons declarations that the Council breached s 5.7 of the EPA Act in making the first decision (prayer for relied 3A) and the second decision (prayer for relief 4E); the Council breached s 5.5 in making the second decision (prayer for relief 4D); and the first and second decisions are accordingly invalid (prayers for relief 3B and 4F).

22 The Council contests both grounds. It contends that neither decision authorised a use of land, such as to be either a development under Part 4 or an activity under Part 5 of the EPA Act. Hence, there can be no illegal development in breach of s 4.2 or s 4.3 of the EPA Act or failure to consider the environmental impact of an activity in breach of s 5.5 or s 5.7 of the EPA Act.

The effect of the council decisions

23 Resolution of the grounds of challenge requires understanding the effect of each of the Council's decisions.

24 The context in which both decisions were made was an order that had been made by the Council under s 14(1) of the *Companion Animals Act 1998* that dogs are prohibited on "all beaches" in the former Pittwater local government area, which includes Station Beach at Palm Beach.

25 The principal object of the *Companion Animals Act* is "to provide for the effective and responsible care and management of companion animals": s 3A. In addition, "it is declared that the protection of native birds and animals is an objective of animal welfare policy in the State": s 4. A "companion animal" is defined to include a dog: s 5(1) definition of "companion animal".

26 The *Companion Animals Act* prescribes various responsibilities for identification and registration of companion animals (Part 2) and for control of dogs (Part 3). One of the responsibilities for control of dogs concerns dogs in public places. Section 13 (1) provides:

> "A dog that is in a public place must be under the effective control of some competent person by means of an adequate chain, cord or leash that is attached to the dog and that is being held by (or secured to) the person."

27 A "public place" is defined widely to mean:

> "(a) any pathway, road, bridge, jetty, wharf, road-ferry, reserve, park, beach or garden, and
>
> (b) any other place,
>
> that the public are entitled to use."

28 A dog is not considered to be under effective control of a person if the person has more than 4 dogs under his or her control: s 13(4).

29 Section 13 does not apply to certain dogs and in certain circumstance, including:

> "a dog accompanied by some competent person in an area declared to be an off-leash area by a declaration under this section (but only if the total number of dogs that the person is accompanied by or has control of does not exceed 4)": s 13(5)(a).

30 An area can be declared by a local authority to be an off-leash area under s 13(6), which provides:

> "A local authority can by order declare a public place to be an off-leash area. Such a declaration can be limited so as to apply during a particular period or periods of the day or to different periods of different days. However, there must at all times be at least one public place in the area of a local authority that is an off-leash area."

31 A "local authority" for a place is defined in s 6(1) to be "the council in the area of which the place is located." The Council is the local authority for Station Beach.

32 The entitlement for a person to have a dog in a public place under s 13, whether on-leash or off-leash in a public place declared to be an off-leash area, is subject to s 14. Section 14 prohibits dogs in specified public places, such as children's play areas, food preparation or consumption areas, school grounds and child care centres, and other types of public places where the local authority has made an order that dogs are prohibited, such as recreation areas, public bathing areas, shopping areas and wildlife protection areas. Section 14(1) provides:

> "Dogs are prohibited in the following places (whether or not they are leashed or otherwise controlled)—
>
> (a) *Children's play areas* (meaning any public place, or part of a public place, that is within 10 metres of any playing apparatus provided in that public place or part for the use of children).
>
> (b) *Food preparation/consumption areas* (meaning any public place, or part of a public place, that is within 10 metres of any apparatus provided in that public place or part for the preparation of food for human consumption or for the consumption of food by humans).
>
> (c) *Recreation areas where dogs are prohibited* (meaning any public place, or part of a public place, provided or set apart by a local authority for public recreation or the playing of organised games and in which the local authority has ordered that dogs are prohibited and in which, or near the boundaries of which, there are conspicuously exhibited by the local authority at reasonable intervals notices to the effect that dogs are prohibited in or on that public place or part).
>
> (d) *Public bathing areas where dogs are prohibited* (meaning any public place or any part of a public place that is used for or in conjunction with public bathing or public recreation (including a beach), in which the local authority has ordered that dogs are prohibited and in which, or near the boundaries of which, there are conspicuously exhibited by the local authority at reasonable intervals notices to the effect that dogs are prohibited in or on that public place).
>
> (e) *School grounds* (meaning any property occupied or used for a purpose connected with the conduct of a government school or non- government school under the *Education Act 1990*, other than any property used for a residence or the curtilage of a residence).

(f) *Child care centres* (meaning any property occupied or used for a purpose connected with the conduct of an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*, other than any property used for a residence or the curtilage of a residence).

(g) *Shopping areas where dogs are prohibited* (meaning a shopping arcade or shopping complex, including any part of it that is used by the public for parking or access to shops, in which or part of which the local authority has ordered that dogs are prohibited and in which, or near the boundaries of which, there are conspicuously exhibited by the local authority at reasonable intervals notices to the effect that dogs are prohibited there). This paragraph does not apply to any shop or part of a shop.

(h) *Wildlife protection areas* (meaning any public place or any part of a public place set apart by the local authority for the protection of wildlife and in which the local authority has ordered that dogs are prohibited for the purposes of the protection of wildlife and in which, or near the boundaries of which, there are conspicuously exhibited by the local authority at reasonable intervals notices to the effect that dogs are prohibited in or on that public place)."

33 Another responsibility for control of dogs in Part 3 is for an owner of a dog that defecates in a public place to immediately remove the dog's faeces and properly dispose of them: s 20(1). Proper disposal includes disposal in a rubbish receptacle designated for the purpose by the local authority: s 20(2).

34 Pursuant to the power in s 14(1), the former Pittwater Council, who was the local authority at the time, ordered that dogs are prohibited in specific public places, being certain recreation areas, public bathing areas and wildlife protection areas, under s 14(1)(c), (d) and (h). These orders were made in the Dog Control Policy, Council Policy − No 30, first adopted on 3 March 1997. The Dog Control Policy was amended on two occasions, 17 October 2011 and 4 November 2013. Of relevance to the present case, the Council ordered that dogs are prohibited on "all beaches". The public place of a beach is not restricted to the land above MHWM but includes the land below MHWM covered by tidal waters that commonly is considered to be part of the beach.

35 It is against this background that the Council came to make its decisions in August and December 2019. The Council wished initially to conduct a dog off-leash area trial on Station Beach but later sought to allow dog on-leash use of Station Beach as an interim measure until the dog off-leash area trial could be commenced. In order to allow either on-leash or off-leash use by dogs of Station Beach, the order under s 14(1) in the Dog Control Policy that dogs are

prohibited on all beaches, which included Station Beach, needed to be revoked or varied. Do the Council's decisions achieve this?

36 The first decision of 27 August 2019 does not refer to the order in the Dog Control Policy prohibiting dogs on all beaches or seek to amend that order. In express terms, the resolution only seeks to "declare Station Beach as an off-leash area, for the purpose of a trial, under section 13(6) of the *Companion Animals Act 1998* subject to the granting of a licence with the Department of Industry, Lands and Water." (part C of the resolution). The reference to "a trial" is a reference to part A of the resolution to "conduct a dog off-leash area trial at Station Beach, Palm Beach for 12 months as outlined in the agenda report."

37 There are doubts as to the legal effectiveness of this resolution. First, the power in s 13(6) to declare a public place to be an off-leash area is able to be exercised where dogs are able to be in a public place, although needing to be leashed by reason of s 13(1). A local authority cannot declare a public place to be an off-leash area where dogs are able to be unleashed if dogs are prohibited in that public place. Hence, where a local authority has ordered under s 14(1) that dogs are prohibited in a public place, the local authority must first revoke or vary that order that dogs are prohibited in that public place before the local authority can by order under s 13(6) declare the public place to be an off-leash area.

38 The Council's resolution of 27 August 2019 does not in express terms revoke or vary the order in the Dog Control Policy that dogs are prohibited on all beaches before purporting to declare Station Beach to be an off-leash area. Nevertheless, the Council submitted that such revocation or variation of the order in the Dog Control Policy that dogs are prohibited on all beaches should be implied precisely because revocation or variation of the order in the Dog Control Policy is a necessary step in the Council being able to declare Station Beach to be an off-leash area. Although the Council did not record its intention to revoke or vary the order in the Dog Control Policy prohibiting dogs on all beaches, by declaring Station Beach to be an off-leash area where dogs can be off-leash, the Council impliedly has revoked or varied the order prohibiting dogs on Station Beach.

39 The Group contests the Council's submission, saying that it was necessary for the Council in the terms of its resolution to revoke or vary the order in the Dog Control Policy prohibiting dogs on all beaches, including Station Beach, before it could exercise the power in s 13(6) to declare Station Beach an off-leash area.

40 Second, the power in s 13(6) is to be exercised "by order" declaring a public place to be an off-leash area. The Council's resolution of 27 August 2019 is a resolution but not an order.

41 Third, the Council's exercise of the power under s 14(6) is conditional. Part C of the resolution makes the Council's declaration of Station Beach as an off-leash area "subject to the granting of a licence with the Department of Industry, Lands and Water." The Council needed to obtain a licence because it wished to conduct the dog off-leash area trial partly on Crown land below MHWM. The consent of the Crown, as owner of the land, was necessary to be able to conduct the trial on Crown land below MHWM. Such consent is given in the form of a licence under s 5.21(1) of the *Crown Land Management Act 2016* to use or occupy Crown land for the purposes the Minister thinks fit. The Council had applied for a licence for the trial, but has not been granted a licence and there is no indication that it will be granted a licence for the trial. In this circumstance, the condition on which the Council's exercise of the power in s 13(6) was made subject has not been, and may never be, satisfied.

42 For these three reasons, the Council's resolution of 27 August 2020 may be legally ineffective to declare Station Beach to be an off-leash area.

43 The second decision of 17 December 2019 in express terms only seeks to " allow dogs on-leash at Station Beach, Palm Beach as outlined in the report (including as to specified location, days and times)" (part A of the resolution). The resolution does "note that this resolution and Council resolution 267/19 have the effect of amending the former Pittwater Council Dog Control Policy (No 30)" (part B of the resolution). However, that is recorded as a "note" that " this resolution" has this effect of amending the Dog Control Policy and not a resolution expressly amending the Dog Control Policy. The only operative part

of the resolution is in part A. In terms, that allows dogs on-leash on Station Beach.

44 The Council submitted that this resolution necessarily implies the Council revoked or varied the order in the Dog Control Policy prohibiting dogs on all beaches, including Station Beach. The Council, as the relevant local authority, does not have power to allow dogs on-leash in any public place. Any entitlement for people to have dogs in a public place has a separate source. The responsibility of an owner of a dog to keep the dog under effective control by means of an adequate chain, cord or leash that is attached to the dog presupposes that the owner can otherwise have the dog in a public place. Hence, the Council's resolution, although expressed in terms of allowing dogs on-leash at Station Beach, is in effect recording the result of a partial revocation or variation of the Dog Control Policy that prohibited dogs on all beaches, so that dogs are no longer prohibited on Station Beach.

45 The Group again contests the Council's submission, saying that it was necessary for the Council expressly to resolve to revoke or vary the order in the Dog Control Policy prohibiting dogs on all beaches so that it no longer applied to Station Beach. The consequence, the Group submitted, is that the Council's resolution of 17 December 2019 is legally ineffective to allow dogs on-leash on Station Beach.

What use has been enabled by the council decisions?

46 Assuming, however, that the Council's resolutions of 27 August 2019 and 17 December 2019 are effective to allow dogs on Station Beach, the next question is: What use of Station Beach has been enabled by the Council's decisions?

47 The first decision of 27 August 2019 authorised the Council to "conduct a dog off-leash area trial at Station Beach, Palm Beach for 12 months, as outlined in the agenda report" (part A of the resolution). The agenda report summarised the background to the proposed dog off-leash area trial. The Council, at its meeting on 26 June 2018, considered a proposal for a "Station Beach Unleashed Dog Trial" and resolved to invite a dog lobby group, Pittwater Unleashed, "to help develop the parameters for the Station Beach trial prior to

being placed on public exhibition" (part C of the resolution) and for the public consultation process to begin within 12 weeks (part D of the resolution).

48 The agenda report noted the Council's consultation with various State government agencies. The Department of Industry, Land and Water informed the Council that if Station Beach was chosen to trial an off-leash dog swimming area, the Council would need to obtain a conditional licence. The Department required that a Review of Environmental Factors (REF) be included with the licence application. A REF was accordingly prepared. The agenda report noted public consultation occurred between 16 November 2018 to 28 February 2019.

49 The agenda report referred to the REF dated 28 May 2019, noting key information, including that:

> "- The trial is unlikely to have any significant or long-term negative environmental impacts providing that the mitigation measures are implemented (most have been resolved simply by the design of the trial).
>
> - The main potential impacts (of the trial) are to the aquatic environment including water quality and marine biodiversity. The shallows approaching the beach contain extensive seagrass beds including the endangered population of Posidonia australis.
>
> - The key environmental considerations for the trial include limiting impacts to seagrass and monitoring of water quality.
>
> - The potential impacts for nearby residents include noise, increase in traffic flow and traffic congestion."

50 The agenda report noted that the Council sought community feedback on the REF from 14 June to 12 July 2019. The agenda report noted that: "A key matter raised was about whether or not Council could implement the REF's mitigation measures." The agenda report stated that:

> "A practical trial option arising from the REF 2019 is to establish an off-leash boundary three metres from the edge of the seagrass beds and that dog activity is permitted east of this line on restricted days and times. This option provides the most effective arrangement for Council to implement the mitigation measures required."

51 The agenda report noted the comments on the REF by the Department of Industry, Lands and Water and the Department of Primary Industries, Fisheries. The Department of Industry, Lands and Water reiterated that if Council wished to proceed with a trial a licence application would need to be submitted along with the results of community engagement, the REF, a management plan about

how potential impacts identified in the REF will be addressed and Fisheries' consent.

52 The discussion in the agenda report to this point did not outline any parameters for the trial; it merely set the background. The agenda report then did recommend the Council conduct a dog off-leash area trial and outlined the main aspects:

> "Following consideration of the advice from the State Government agencies, the findings of the REF 2019 and community feedback, it is recommended that a licence be sought to conduct a dog off-leash area trial at Station Beach for 12 months. The main aspects of the trial are:
>
> Off-leash area days and times
>
> 4:00pm to 10:30am, Monday to Sunday (Australian Eastern Standard Time, non-daylight saving time).
>
> 5:30pm to 10:30am, Monday to Friday (Australian Eastern Daylight Time, daylight saving time, summer).
>
> Dogs prohibited on Station Beach outside these days and times.
>
> Off-leash area boundaries (Attachments 8,9)
>
> Eastern boundary, three metres east of the seagrass beds closest to and parallel to Station Beach. Denoted by three marker buoys (Attachment 10) and signage on the southern edge of the Station Beach wharf.
>
> Western boundary to be along the edge of the Palm Beach Golf Course.
>
> Northern boundary to be the southern edge of the Station Beach wharf.
>
> Southern boundary approximately 110 metres north of the Beach Road entry.
>
> On-leash area (Attachments 8, 9)
>
> An on-leash area is established between Beach Road and the southern boundary of the off-leash area and to be in effect on the same days and times as the off-leash area."

53 Attachments 8 and 9, referred to in the off-leash area boundaries, mapped the boundaries of the dog off-leash area at high tide and low time respectively on aerial photographs. Both attachments marked the four boundaries of the off-leash area as described in the agenda report. The boundaries of the area were the same, although the western boundary would appear to be different at low tide than high tide due to the recession of tidal waters. The western boundary was shown to have four marker buoys (not three as described) distributed along a red dotted line showing the "extent of off-leash dog area," with a notation "off-leash boundary 3 metres from edge of the seagrass bed and

running parallel to the beach. Approximate length of boundary 520m." The attachments showed two locations for "signs, bins, bag dispenser", one on the southern side of the Station Beach wharf (at the northern boundary) and another at Beach Road where it joins the beach. The latter location corresponded with the southern boundary of the on-leash area.

54 Attachment 10 was a photo of the marker buoys proposed to be used to mark the western boundary.

55 This description of the "main aspects of the trial", and the attachments, did not in terms incorporate any mitigation measures recommended in the REF other than those measures regarding the boundaries of the off-leash area, the days and times of the off-leash area, and signage, bins and bag dispensers. The REF summarised the recommended mitigation measures in s 5.2.3 and stated that "Table 5-2 outlines measures that would be implemented to manage and mitigate potential impacts to marine biodiversity." (p 23). Many of the mitigation measures concerning the boundaries of the dog off-leash area and signage, bins and bag dispensers were incorporated in the terms of the recommendation in the agenda report and the Council's resolution. However, some key mitigation measures were omitted, including:

> "- Install signs informing users that dogs must not be allowed to run through seagrass beds
>
> - Carry out water quality monitoring during the trial event.
>
> - Install signs educating site visitors about *C. taxifolia* [an invasive seagrass], including how to minimise its spread in the area should be placed at both ends of the site.
>
> - Undertake monitoring of the seagrass and White's seahorse on a monthly basis during the trial to assess potential impacts of the activity;
>
> - Increased compliance patrols by Council officers to ensure compliance with permitted dog access areas and times."

56 The result is that the Council's resolution of 27 August 2019 to conduct a dog off-leash area trial at Station Beach for 12 months as outlined in the agenda report enabled a use of Station Beach by people with their unleashed dogs within the boundaries of the off-leash area described and on the days and times specified, but without implementation of the mitigation measures of installation of signage other than the minimum signage identifying the

boundaries and terms of usage of the off-leash area, undertaking monitoring of water quality, seagrass and White's seahorse, or increased compliance patrols by the Council.

57 The second decision of 17 December 2019 authorised the Council to "allow dogs on-leash at Station Beach, Palm Beach, as outlined in the report (including as to specified location, days and times" (part 1 of the resolution). The agenda report stated its purpose as being "to provide an update on the implementation of Council resolution 267/19 − Station Beach Dog Off-Leash Area Proposed Trial and to allow dogs on-leash at Station Beach on specified days and at specified times pending the enactment of that resolution." The report noted that the Council, pursuant to part B of the 27 August 2019 resolution, had submitted a licence application "to conduct a dog off-leash area trial at Station Beach to the Department in September 2019, but a licence is yet to be granted to the Council."

58 The report noted that until a licence is received, the dog off-leash area trial cannot commence. In the meantime, the Dog Control Policy, which is still in force, applies so that "all beaches are prohibited areas for dogs" and "signage notices to the effect that dogs are prohibited are erected at Station Beach." The report recommended that:

> "Given the delays to the implementation of the Off-Leash Resolution, Council may wish to consider the partial removal of the prohibition of dogs on Station Beach. Should this occur as outlined in this report, this would allow dogs on-leash at Station Beach on the specified days and at the specified times provided they are controlled in accordance with the requirements of the *Companion Animals Act* 1998.
>
> This could allow an option pending the issue of a licence by the Department. If so, it is considered that this could be as follows:
>
> - On-leash area boundaries (Attachment 1):
>
> - Northern boundary to be the southern edge of the Station Beach wharf (as adopted for the Station Beach dog off-leash area trial).
>
> - Southern boundary to be the southern edge of Beach Road (as adopted for the Station Beach dog off-leash area trial).
>
> - Eastern boundary to be the western boundary of the Palm Beach Golf Club Ltd's lease area as identified in the Council's lease with club.
>
> - On-leash area days and times (being the same as adopted for the Station Beach dog off-leash area trial):

> - 4:00pm to 10:30am, Monday to Sunday (Australian Eastern Standard Time, non-daylight saving time).
>
> - 5:30pm to 10:30am, Monday to Friday (Australian Eastern Daylight Time, daylight saving time, summer).
>
> - Dogs prohibited on Station Beach outside these days and times.
>
> Council will continue to pursue a licence as contemplated by the Off-Leash Resolution. Should a licence be granted by the Department and agreed to by Council, the Station Beach dog off-leash area trial would commence in accordance with the Off-Leash Resolution and would replace the option outlined in this report."

59 Attachment 1 mapped the boundaries of the on-leash area on an aerial photograph. The northern boundary was the southern side of the Station Beach wharf and the eastern boundary was the western edge of the golf course, both being the same as for the off-leash area. The southern boundary was, however, different. Instead of being around 110m north of the Beach Road entry, as it was for the off-leash area, the southern boundary was at the southern edge of Beach Road. This was the southern boundary of the on-leash area proposed in the agenda report for the 27 August 2019 but not expressly adopted by the resolution of 27 August 2019. No western boundary was shown for the on-leash area, in contrast to the off-leash area.

60 The report noted that if the Council approves the recommendation, the project could be commenced by "installation of signs that outline the conditions relating to the presence of dogs at Station beach and a map" and "installation of two dog bag dispensers, bags and relevant signage."

61 The report did not recommend adoption of the mitigation measures recommended in the REF, concerning the boundaries of the area (indeed the southern boundary was moved southwards and there was no western boundary contrary to the recommended mitigation measures in the REF), installation of signage other than the minimum signage identifying the boundaries and terms of usage of the on-leash area, undertaking monitoring of water quality, seagrass or White's seahorse, or increased compliance patrols by the Council.

62 The result is that the Council's resolution of 17 December 2019 to allow dogs on-leash at Station Beach as outlined in the report enabled a use of Station Beach by people with their leashed dogs within the boundaries described and

on the days and times specified, but without implementation of these mitigation measures.

The unlawful development ground

The Group's argument that the use is unlawful

63 The Group contends that each Council decision authorises a use of land, which is a type of development under Part 4 of the EPA Act: see s 1.5(1)(a).

64 The Group submits the first decision of 27 August 2019 authorised a use of Station Beach and the adjacent waters within the boundaries and on the days and at the times specified for the dog off-leash area trial. To implement the trial, the Council would erect signs, bins and bag dispensers and install marker buoys to delineate the western boundary. The Council's decision allowed people to use the beach and adjacent waters within the boundaries of the designated dog off-leash area with their unleashed dogs, a use that had been prohibited since 1997 when the Council had by order declared dogs to be prohibited on all beaches, which included Station Beach. The use by people with their unleashed dogs in the dog off-leash area is distinct from the use by people without dogs. The Council would facilitate and enforce this use, including by emptying and servicing the bins and bag dispensers and implementing compliance patrols to ensure people are complying with the dog off-leash area boundaries, days and times. The doing of the acts, matters or things, both by the Council and by people with their unleashed dogs, constitutes the use of the land above and below MHWM within the boundaries of the dog off-leash area. The use of land is a type of development: see s 1.5(1)(a). The doing of the acts, matters or things constitutes the use of land and the carrying out of development: see s 1.5(3).

65 Similarly, the Group submits, the second decision on 17 December 2019 authorised a use of Station Beach and adjacent waters within the boundaries and on the days and at the times specified for the dog on-leash area. To implement the use, the Council would erect signs, bins and bag dispensers. The Council's decision allowed people to use the beach and adjacent waters within the boundaries of the designated dog on-leash area, a use that had been prohibited since 1997 when the Council had by order declared dogs to be

prohibited on all beaches, which included Station Beach. The use by people with their leashed dogs in the dog on-leash area is distinct from the use by people without dogs. The Council would facilitate and enforce this use, including by emptying and servicing the bins and bag dispensers and implementing compliance patrols to ensure people are complying with the dog on-leash area boundaries, days and times.

66 The doing of these acts, matters or things, both by the Council and by people with their leashed dogs, constitutes the use of the land above and below MHWM within the boundaries of the dog on-leash area. The use of land is a type of development: s 1.5(1)(a). The doing of the acts, matters or things constitutes the use of land and the carrying out of development: s 1.5(3).

67 The land to be used under both decisions straddles two zones under the applicable Pittwater Local Environmental Plan 2014 (PLEP), Zone RE1 Public Recreation on the landward side of the beach above MHWM and Zone E2 Environmental Conservation on the waterside of the beach below MHWM. The Group contends that the use of land authorised by the two decisions is not permitted without consent in either zone.

68 In the RE1 zone, five purposes of development are permitted without consent, being building identification signs; environmental protection works; horticulture; markets and roads. In the E2 zone, only environmental protection works are permitted without consent. None of these purposes of development is applicable to the uses authorised by the Council's decisions. The use of land in the RE1 zone, essentially the beach above MHWM, involves recreation by the public with their dogs, either off-leash (the first decision) or on-leash (the second decision) and the installation of appropriate signage, bins and bag dispensers. The use of the land in the E2 zone, the land below MHWM covered by tidal waters, similarly involves recreation by the public with their dogs, either off-leash or on-leash (depending on the decision) and the installation of the three marker buoys in the water (for the off-leash use). Such use and installation of signs, bins, bag dispensers and marker buoys are not environmental protection works, as defined in the Dictionary to the LEP. " Environmental protection works" are defined to mean:

> "works associated with the rehabilitation of land toward its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration work and the like, but does not include coastal protection works."

69 The Group contends that the use of land authorised by each Council decision is not for any of the nominate purposes permitted with consent in either the RE1 zone or the E2 zone. In the RE1 zone, the nominate purposes of development permitted with consent are:

> "Aquaculture; Centre-based child care facilities; Community facilities; Environmental facilities; Information and education facilities; Kiosks; Public administration buildings; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Respite day care centres; Restaurants or cafes; Signage; Take away food and drink premises; Water recreation structures."

70 In the E2 zone, the nominate purposes permitted with consent are " Environmental facilities; Oyster aquaculture; Recreation areas; Roads."

71 Of these nominate purposes, the only potentially applicable purpose is " recreation areas". "Recreation area" is defined in the Dictionary to PLEP to mean:

> "a place used for outdoor recreation that is normally open to the public, and includes—
>
> (a) a children's playground, or
>
> (b) an area used for community sporting activities, or
>
> (c) a public park, reserve or garden or the like,
>
> and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor)."

72 The Group contends that the use authorised by each Council decision does not meet this definition. The first decision authorised an experimental off-leash dog trial and associated monitoring and assessment which is different to the utilisation of land for a children's playground, for community sporting activities or as a public park, reserve or garden. The second decision authorised the permanent use of the beach for dogs on a leash, without any limitation as to number, type or behaviour of dogs, and with no western boundary for the on-leash area.

73 The Group contends, therefore, that the use authorised by each Council decision is for an innominate prohibited purpose in each zone. In the RE1 zone, prohibited development is any development not specified in item 2 (as

permitted without consent) or item 3 (as permitted with consent). In the E2 zone, prohibited development includes specified nominate purposes, none of which is applicable, and "any other development not specified in item 2 or 3." As the use authorised by the Council's decisions is not for a purpose of development specified in item 2 or 3 of the Land Use Table for the RE1 zone or E2 zone, the use is prohibited.

74 The Group then argues that the Council's decisions and the uses of land that the decisions authorised breach s 4.3 of the EPA Act. Section 4.3 of the EPA Act prohibits a person carrying out on land development that is prohibited by an environmental planning instrument such as PLEP. The use of the land above and below MHWM within the boundaries of both the dog off-leash area and the dog on-leash area, by both the Council and people with their unleashed dogs (the first decision) or leashed dogs (the second decision), involves carrying out development that is prohibited in each of the RE1 zone and the E2 zone. Insofar as the development of the dog off-leash area trial is yet to commence, the breach of s 4.3 is a threatened or apprehended contravention of the EPA Act: s 9.44(1)(a)(ii). The Council has said it will carry out the trial as soon as it receives a licence from the Department to use the submerged Crown land. The carrying out of the development of the dog on-leash area, which is currently occurring, is a contravention of s 4.3 of the EPA Act.

75 The Group also contends that the Council, in making each of the decisions of 27 August 2019 and 17 December 2019, acted without power under the EPA Act by purporting to authorise the carrying out of development, the use of the dog off-leash area trial (the first decision) and the use of the dog on-leash area (the second development), which was prohibited by PLEP.

76 In the alternative, if the use of land authorised by each Council decision could be categorised as being for the purpose of recreation area, a purpose permitted with consent in the RE1 zone and the E2 zone, the Group contends that the Council's decisions and the uses of land that the decisions authorised breach s 4.2 of the EPA Act. Section 4.2 of the EPA Act prohibits a person carrying out on land development that needs consent unless a consent has been obtained and is in force and the development is carried out in accordance with the

consent. The use of the land above and below MHWM within the boundaries of both the dog off-leash area and the dog on-leash area, by both the Council and people with their unleashed dogs (the first decision) or leashed dogs (the second decision), involves carrying out development for the purpose of recreation area, which is only permitted with consent, but no consent has been obtained. Insofar as the development of the dog off-leash area trial is yet to commence, the breach of s 4.2 is a threatened or apprehended contravention of the EPA Act, as the Council has said it will carry out the trial as soon as it receives a licence from the Department to use the submerged Crown land. The carrying out of the development of the dog on-leash area, which is currently occurring, is a contravention of s 4.2 of the EPA Act.

77 The Group also contends that the Council, in making each of the decisions of 27 August 2019 and 17 December 2019, acted without power under the EPA Act by purporting to authorise the carrying out of development for the purpose of recreation area, that is permitted only with consent but without actually granting consent to a development application for that development.

78 The Group also relied on cl 5.7(2) of PLEP, which provides:

> "Development consent is required to carry out development on any land below the mean high water mark of any body of water subject to tidal influence (including the bed of any such water)."

79 Land below MHWM is in the E2 zone. Each Council decision authorises a use of land below MHWM by people with their dogs off-leash (the first decision) or on-leash (the second decision), yet neither decision constituted the grant of consent under the EPA Act for that use of land below MHWM. Accordingly, the carrying out of each development on land below MHWM involves an apprehended or threatened breach of s 4.2 of the EPA Act (the use authorised by the first decision) or an actual breach of s 4.2 of the EPA Act (the use authorised by the second decision). The Council also acted without power by purporting to authorise the carrying out of development on land below MHWM otherwise than by granting consent to a development application for that development.

The Council's argument that use is lawful

80 The Council contested the Group's argument that the use of either the dog off-leash area or the dog on-leash area is in breach of the EPA Act. In summary, the Council contends that:

(a) The Council's decisions do not authorise any use of land;

(b) If they do, the use of land is for the purpose of recreation area, which is permitted with consent on land within the RE1 zone and the E2 zone;

(c) However, development for that purpose may be carried out without consent on a public reserve under the control of or vested in the Council, under cl 65(3) of State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP); and

(d) Alternatively, consent is not required to be obtained as the use of land involves the continuance of a use of land for a lawful purpose under s 4.68(1) of the EPA Act.

81 I will elaborate on each of these arguments.

82 As to the first argument, the Council contends that the decisions of 27 August 2019 and 17 December 2019 did not in fact authorise any use of land. Instead, the decisions merely revoked or varied the order made under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches, so as to allow dogs off-leash in the dog off-leash area (the first decision), or on-leash in the dog on-leash area (the second decision) on Station Beach on the days and at the times specified in the decisions. The second decision also involved declaring the specified part of Station Beach to be an off-leash area under s 13(6) of the *Companion Animals Act*.

83 The Council submits that the entitlement of the public to use the public place of Station Beach with their dogs, whether leashed or unleashed, exists independently from any decision of the Council under s 14(1) or s 13(6) of the *Companion Animals Act*. An order under s 14(1)(c) or (d) that dogs are prohibited in a specified public place restricts the public's entitlement to use the public place with their dogs. The revocation of that order reinstates the entitlement to use that public place with their dogs. Section 13(1) regulates the public's use of the public place with their dogs by requiring the dogs to be leashed. An order under s 13(6) declaring a specified public place to be an off-leash area relaxes the regulation in s 13(1) that the dogs be leashed.

Importantly, the Council submits, the Council's decisions revoking or varying the order under s 14(1) prohibiting dogs on all beaches and declaring part of Station Beach to be an off-leash area under s 13(6), did not themselves grant the public any entitlement to use the public place with their dogs. Accordingly, the decisions did not authorise any use of land, and hence the carrying out of development.

84 The installation of signs, bins and bag dispensers involves giving effect to the revocation or variation of the order prohibiting dogs on all beaches and the declaration of the public place as an off-leash area. An order under s 14(1)(c) and (d) prohibiting dogs in specified public places requires, in order to be effective, that notices be conspicuously exhibited by the local authority (here the Council) at reasonable intervals to the effect that dogs are prohibited in or on the public place. The Council had erected such notices at Station Beach after it had ordered in 1997 that dogs are prohibited on all beaches. The revocation or variation of that order under s 14(1)(c) and (d) required that those notices be removed and replaced by notices to the effect that dogs are allowed off-leash (the first decision) or on-leash (the second decision).

85 The installation of bins and bag dispensers involves discharging the Council's duty under s 20(2) of the *Companion Animals Act* to provide sufficient rubbish receptacles for the proper disposal of faeces of dogs that defecate in the public place that, by reason of the Council's decisions, will be commonly used for exercising dogs, whether off-leash (the first decision) or on-leash (the second decision).

86 The Council submits that the erection of notices was also authorised by the Council's power under s 632 of the *Local Government Act 1993*. The Council has power to erect a notice regulating the taking of any animal into a public place or the use of any animal in the public place: s 632(2)(c) and (d).

87 The Council submits that in relation to the land above MHWM, which is part of Governor Phillip Park, the Council has the control and management of the land as a public reserve under the *Local Government Act, Crown Land Management Act 2016* and the Draft Governor Phillip Park Palm Beach Plan of Management, prepared under the *Crown Lands Act 1989*, and adopted under the former

Pittwater Council on 9 December 2002, although not by the Minister. The plan of management refers to the general maintenance of Governor Phillip Park, including the installation of bins as part of the recreation facilities and amenities.

88 The Council submits, therefore, that the decisions of 27 August 2019 and 17 December 2019 did not authorise the installation of the signs, bins and bag dispensers; the authority to do this lay elsewhere, in the *Companion Animals Act* and the *Local Government Act.*

89 As to the second argument, the Council contends that if the Council's decisions could be seen to have authorised a use of land, the use is properly to be characterised as being for the purpose of recreation area, which is permitted with consent in both the RE1 zone and the E2 zone. "Recreation area" is defined in PLEP as "a place used for outdoor recreation that is normally open to the public". The definition continues to give some specific places that are recreation areas, including "a public park". However, these specified places are inclusions and do not limit the ambit of the chapeau.

90 The Council submits that Station Beach is currently "a place used for outdoor recreation that is normally open to the public" as well as being "a public park". The use of land enabled by each Council decision will continue to be "a place used for outdoor recreation that is normally open to the public" and "a public park". It matters not that the use of land enabled by the Council's decisions involves the public using the place for outdoor recreation with their dogs (whether unleashed or leashed) while before the decisions were made the public could only use the place for outdoor recreation without their dogs. Characterisation of the purpose of the use of land should be done at a level of generality which is necessary to cover the individual activities, not in terms of the detailed activities: *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114 at [36] and *Royal Agricultural Society (NSW) v Sydney City Council* (1987) 61 LGRA 305 at 310.

91 As to the third argument, the Council contends that cl 65(3) of the Infrastructure SEPP overrides the requirements of PLEP to obtain consent for development for the purpose of recreation area. Clause 65(3) provides:

"Any of the following development may be carried out by or on behalf of a council without consent on a public reserve under the control of or vested in the council—

(a) development for any of the following purposes—

(i) roads, pedestrian pathways, cycleways, single storey car parks, ticketing facilities, viewing platforms and pedestrian bridges,

(ii) recreation areas and recreation facilities (outdoor), but not including grandstands,

(iii) visitor information centres, information boards and other information facilities,

(iv) lighting, if light spill and artificial sky glow is minimised in accordance with the Lighting for Roads and Public Spaces Standard,

(v) landscaping, including landscape structures or features (such as art work) and irrigation systems,

(vi) amenities for people using the reserve, including toilets and change rooms,

(vii) food preparation and related facilities for people using the reserve,

(viii) maintenance depots,

(ix) portable lifeguard towers,

(b) environmental management works,

(c) demolition of buildings (other than any building that is, or is part of, a State or local heritage item or is within a heritage conservation area)."

92 The development enabled by the Council's decisions is for one of these purposes, being "recreation areas". The purpose of "recreation areas" has the same meaning as it has in the Standard Instrument (Local Environmental Plans) Order 2006 made under the EPA Act: see cl 5(1) of the Infrastructure SEPP. This is the same meaning as in PLEP.

93 The Council submits that the land above MHWM at Station Beach, in the RE1 zone, is a public reserve under the control of or vested in the Council, being part of Governor Phillip Park. Governor Phillip Park consist of an amalgamation of three Crown Reserves. The first reserve (reserve 56217), being the southern area of the isthmus, was gazetted as a reserve for public recreation on 22 June 1923, the second reserve (reserve 61141), being the northern area of the isthmus, was gazetted as a reserve for public recreation on 17 May 1929, and the third reserve (reserve 64883), being most of Barrenjoey headland, was gazetted as a reserve for public recreation on 29 March 1934.

94 The Council submits that so too the land below MHWM at Station Beach, in the E2 zone, can be seen to be a public reserve under the control of or vested in the Council. The term "public reserve" is defined in cl 64 of the Infrastructure SEPP to have the same meaning as it has in the *Local Government Act.* The Dictionary to the *Local Government Act* defines "public reserve" to mean:

> "(a) a public park, or
>
> (b) any land conveyed or transferred to the council under section 340A of the *Local Government Act 1919*, or
>
> (c) any land dedicated or taken to be dedicated as a public reserve under section 340C or 340D of the *Local Government Act 1919*, or
>
> (d) any land dedicated or taken to be dedicated under section 49 or 50, or
>
> (e) any land vested in the council, and declared to be a public reserve, under section 37AAA of the *Crown Lands Consolidation Act 1913*, or
>
> (f) any land vested in the council, and declared to be a public reserve, under section 76 of the *Crown Lands Act 1989*, or
>
> (g) Crown managed land that is dedicated or reserved—
>
> (i) for public recreation or for a public cemetery, or
>
> (ii) for a purpose that is declared to be a purpose that falls within the scope of this definition by means of an order published in the Gazette by the Minister administering the *Crown Land Management Act 2016*,
>
> being Crown managed land in respect of which a council has been appointed as its Crown land manager under that Act or for which no Crown land manager has been appointed, or
>
> (h) land declared to be a public reserve and placed under the control of a council under section 52 of the *State Roads Act 1986*, or
>
> (i) land dedicated as a public reserve and placed under the control of a council under section 159 of the *Roads Act 1993*,
>
> and includes a public reserve of which a council has the control under section 344 of the *Local Government Act 1919* or section 48, but does not include a common."

95 The Council argues that the land below MHWM covered by tidal waters at Station Beach is "a public park" (within paragraph (a)) or "a public reserve of which the Council has control under s 344 of the *Local Government Act 1919* or s 48" of the *Local Government Act 1993* (within the concluding phrase of the definition). The term "public park" is not defined in the *Local Government Act.* The Council submits that it bears its ordinary meaning, which is wide enough to include the land below MHWM covered by tidal waters.

96 Section 48 of the *Local Government Act 1993* provides:

> "(1) Except as provided by section 2.22 of the *Crown Land Management Act 2016*, a council has the control of—
>
> (a) public reserves that are not under the control of or vested in any other body or persons and are not held by a person under lease from the Crown, and
>
> (b) public reserves that the Governor, by proclamation, places under the control of the council.
>
> (2) If any doubt arises as to whether any land comes within the operation of this section, or as to the boundaries of a public reserve, the Governor may, by proclamation, determine the matter."

97 The Council submitted that the land below MHWM at Station Beach can be considered to be a public reserve that is not under the control of or vested in any other body or persons and is not held by a person under lease from the Crown.

98 Section 344 of the former *Local Government Act 1919* provided that:

> "(1) The council shall have the care, control and management of—
>
> (a) public reserves which are not under the care of or vested in any body or persons other than the council, and are not held by any person under lease from the Crown ; and
>
> (b) public reserves which the Governor by proclamation places under the care, control, and management of the council.
>
> (2) If any doubt arise as to whether any land comes within the operation of this section, or as to the boundaries of any public reserve, the Governor may by proclamation determine the matter."

99 Although this wording in s 344 of the 1919 Act is slightly different to the wording in s 48 of the 1993 Act, the Council submits it had the same effect. The Council argues that the land below MHWM at Station Beach is a public reserve not under the care of or vested in any body or persons other than the Council and is not held by any person under lease from the Crown.

100 The Council submits that the Council does have specified powers and responsibilities of care, control and management of the land below MHWM under various statutes, including the *Local Government Act* (such as ss 22, 23 and 632) and the *Companion Animals Act* (such as ss 13, 14 and 20).

101 The Council submits, therefore, that the land below MHWM at Station Beach is "a public reserve under the control of or vested in the Council" and hence cl 65(3) of the Infrastructure SEPP applies to this land.

102 Clause 8 of the Infrastructure SEPP provides that, if there is an inconsistency between the Infrastructure SEPP and any other environmental planning instrument, such as PLEP, the Infrastructure SEPP prevails to the extent of the inconsistency. As a consequence, the Council submits, cl 65(3) of the Infrastructure SEPP, which permits development for the purpose of recreation areas, amongst other purposes, to be carried out without consent, prevails over the provisions of PLEP that require development consent to be obtained for that development on land above and below MHWM, namely cl 2.3 and the Land Use Table for the RE1 zone and the E2 zone (read with s 4.2 of the EPA Act) and cl 5.7 of PLEP.

103 As to the fourth argument, the Council submits that, if cl 65(3) of the Infrastructure SEPP does not relieve the Council from the requirement under PLEP to obtain consent to carry out development for the purpose of recreation area on land above and below MHWM at Station Beach, s 4.68(1) of the EPA Act has that effect instead. Section 4.68(1) provides:

> "(1) Nothing in an environmental planning instrument operates so as to require consent to be obtained under this Act for the continuance of a use of a building, work or land for a lawful purpose for which it was being used immediately before the coming into force of the instrument or so as to prevent the continuance of that use except with consent under this Act being obtained."

104 The Council submits that the land at Station Beach that is to be used for the dog off-leash area trial (enabled by the first decision) or in the dog on-leash area (enabled by the second decision) was used immediately before each decision was made for the lawful purpose of recreation area. The use of land enabled by each Council decision is a continuance of that use of land for the lawful purpose of recreation area. The detailed activity of use by people with their dogs, whether unleashed or leashed depending on the decision, might be different from use by people without dogs, but this does not cause the use to be for a different purpose. The Council reiterated its submission that characterisation of the purpose of the use of land is to be done at a level of generality which is necessary and sufficient to cover the individual activities carried on, not in terms of the detailed activity. Use of the land at Station Beach by people with or without their dogs is properly to be characterised as being for the same purpose of recreation area. As a consequence, the use of the land at

Station Beach by people with their dogs, enabled by the Council's decisions of 27 August 2019 and 17 December 2019, is a continuance of the use of the land for the lawful purpose of recreation area. Accordingly, PLEP does not operate to require consent to be obtained for the continuance of that use.

105 The Council accepted that s 4.68(1) does not authorise "any enlargement or expansion or intensification of the use therein mentioned": s 4.68(2)(c). However, the Council contends the use of Station Beach enabled by the Council's decisions of 27 August 2019 and 17 December 2019 do not involve any enlargement, expansion or intensification. There is no evidence that more people will use the land at Station Beach for the purpose of a recreation area with their dogs than people did without their dogs. Of course, the number of dogs will increase; before the Council's decisions dogs were prohibited on Station Beach while after the Council's decisions dogs are permitted on Station Beach, whether unleashed or leashed. But this does not establish that more people will use Station Beach after the Council's decisions than the numbers of people who used Station Beach before the Council's decisions.

The Group's response to the Council's arguments

106 The Group maintained its arguments that each Council decision does authorise a use of land at Station Beach and that the purpose of such use cannot be characterised as being for the permissible purpose of recreation area. The Group thereby joined issue with the Council's first two arguments.

107 As to the third argument, the Group contended that cl 65(3) of the Infrastructure SEPP does not apply to the use of land at Station Beach authorised by the Council's decisions for three reasons.

108 First, the use of land at Station Beach is not one that is "carried out by or on behalf of a Council", as required by the chapeau of cl 65(3). The use of the land at Station Beach has been authorised by the Council's decisions of 27 August 2019 and 17 December 2019, but will be carried out by others, the public, except for the installation of signs, bins and bag dispensers, as well as marker buoys for the dog off-leash area trial. The use of the land does not, therefore, come within cl 65(3), which creates a category of facilities, such as toilets and

change rooms, sports fields, cricket pitches etc, that a Council may establish in a public reserve.

109 Secondly, the particular permitted purpose relied upon by the Council of recreation areas (in cl 65(3)(ii)) is not the purpose for which the land at Station Beach will be used. A "recreation area" is "a place used for outdoor recreation that is normally open to the public". That is to say, a place used by the public for outdoor recreation. The public refers to humans, not dogs. The use of a beach for exercising dogs, whether off-leash or on-leash, is not a use for the purpose of a recreation area. It matters not that the dogs might be accompanied by people.

110 Thirdly, cl 65(3) does not apply to land below MHWM, as that land is not "a public reserve under the control of or vested in the Council", as required by the chapeau of cl 65(3). The land below MHWM at Station Beach is not a "public reserve" as that term is defined in the *Local Government Act.* It is not a "public park", only the land above MHWM at Station Beach is a public park, being part of the public reserve of Governor Phillip Park. That park does not extend below MHWM. The land below MHWM is also not "a public reserve of which a council has the control under s 344 of the *Local Government Act 1919* or s 48" of the *Local Government Act 1993*. The land below MHWM is Crown land under the care, control and management of the Crown. The Council does have some limited powers under limited statutes with respect to Crown land below MHWM, such as zoning and development control under the EPA Act (exemplified by the E2 zoning of the land below MHWM and the requirement in cl 5.7 for development consent for development on land below MHWM) and regulating or prohibiting dogs in public places under the *Companion Animals Act.* However, the availability of such limited powers with respect to a public reserve does not cause the public reserve to be "under control of or vested in the Council". That the Council has no such control but rather the Crown does have control over the land below MHWM at Station Beach is illustrated by the Council having to apply for a licence under s 5.21 of the *Crown Lands Management Act* to occupy and use the Crown land below MHWM for the dog off-leash area trial.

111 The consequence, the Group submits, is that cl 65(3) does not apply so as to overcome the requirement of PLEP to obtain consent for the use of the land at Station Beach, both above and below MHWM, authorised by the Council's decisions of 27 August 2019 and 17 December 2019 or, alternatively, for the use of the land below MHWM enabled by the Council's decisions.

112 As to the fourth argument, the Group contested that the use of the land at Station Beach authorised by the Council's decisions is a continuance of the current use of the land for the purpose of a recreation area for four reasons.

113 First, the Group reiterated that the use of Station Beach authorised by the Council's decisions is for a different purpose than the use of Station Beach immediately before the Council's decisions. The use immediately before the Council's decisions was a use by people of Station Beach for outdoor recreation without their dogs, while the use after the Council's decisions will be a use of Station Beach for exercising their dogs, either off-leash or on-leash depending on the decision. The latter use of the land differs in kind from the former use of the land. The Group referred to the statement in *Royal Agricultural Society (NSW) v Sydney City Council* at 310 that while the test for characterising the purpose of a use is not so narrow as to require characterisation of purpose in terms of the detailed activities which have taken place, "it is not so general that the characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities etc as a class have made of the land."

114 Secondly, the Group submitted that, if the use of the land authorised by the Council's decisions could be characterised as being for the purpose of recreation area and a continuance of the current use of the land for that purpose, the use of the land authorised by the Council's decisions is an enlargement, expansion or intensification of the current use of the land. Prior to the Council's decisions of 27 August 2019 and 17 December 2019, dogs were prohibited on Station Beach. Any lawful use by the public of Station Beach for outdoor recreation was without their dogs. The Council's decisions authorised use of Station Beach by the public with their dogs, whether unleashed or leashed. The Council's decisions thereby effected an enlargement in the area

of Station Beach used for exercising dogs, from no area at all to the areas of the dog off-leash area or dog on-leash area. The Council's decisions also allowed an increase in the number of dogs that could lawfully be exercised in the dog off-leash area or on-leash area, which is also an enlargement: see *South Sydney City Council v Hulakis & Teakdale Pty Ltd* (1996) 92 LGERA 401 at 407, 409.

115 The Council's decisions also effected an intensification of the use of Station Beach. Intensification of the use is shown by the increase in the number of dogs being exercised on the beach (from nil to around 100-150 dogs per day), the installation of signs, bins and bag dispensers for the use of the beach by dogs, and the increase in environmental impacts due to the number of dogs on the beach: *South Sydney City Council v Hulakis & Teakdale Pty Ltd* at 404; *Council of the City of Sydney v Wilson Parking Australia Pty Ltd* [2015] NSWLEC 42 at [216]; *Burwood Council v Iglesias Ni Cristo (No 2)* (2019) 242 LGERA 32; [2019] NSWLEC 159 at [69], [97].

116 Thirdly, the Group submitted that there had been an abandonment of the use of Station Beach by the public with their dogs for two reasons. The first reason is that the Council in 1997 had made an order under s 14(1) of the *Companion Animals Act* in the Dog Control Policy prohibiting dogs on all beaches, which included Station Beach. The Group submitted that the Council's making of this order in the Dog Control Policy prohibiting dogs on all beaches not only had the effect that the lawful use of Station Beach by people with their dogs was given up and thereafter ceased but also evidenced an intention that this use of Station Beach be given up: see *Hudak v Waverley Municipal Council* (1990) 18 NSWLR 709 at 713. The Council's order in the Dog Control Policy rendered use by the public of Station Beach with their dogs contrary to the law. The prior lawful use of the beach by people with their dogs ceased. The fact that some people may have unlawfully used the beach with their dogs afterwards is not to the point. Any such unlawful use by people with their dogs did not continue the prior use.

117 The second reason is that, in the period 2000-2014, use of Station Beach for dog exercise was not permitted without consent or with consent. On 30 August

2000, the former Pittwater Local Environmental Plan 1993 was amended by Pittwater Local Environmental Plan 1993 (Amendment No 42). Of relevance, Amendment No 42 amended the Land Use Table for zone 6(a), being land above MHWM that is currently zoned RE1 under PLEP. Development permitted without consent in zone 6(a) included "any land use set out under the heading 'Permissible Uses Exempt' in any relevant plan of management." A development permitted only with development consent in zone 6(a) was "any land use set out under the heading 'Permissible Uses Requiring Development Consent' in any relevant plan of management". The phrase "relevant plan of management" was defined to mean, for a particular parcel of land within zone 6(a), "a plan of management (being a plan prepared and adopted by the council under the *Local Government Act 1993* or the *Crown Lands Act 1989*) for that parcel."

118 The former Pittwater Council had prepared under the *Crown Lands Act 1989* a plan of management for Governor Phillip Park Palm Beach, which the Council adopted on 9 December 2002, but the Minister did not adopt this plan of management under s 114 of the *Crown Lands Act* and still has not adopted it. The plan of management is not, therefore, a plan adopted under the *Crown Lands Act* as referred to in these purposes of development permitted without consent or with consent in the 6(a) zone.

119 The draft plan of management does not set out any land uses under the heading "Permissible Uses Exempt"; there is no column with that heading. The draft plan of management does set out land uses under the different heading of "Permissible Uses Not Requiring Development Consent (these may require approval under Pt 5 of the EPA Act 1979)". Only one land use set out under this heading is of relevance, "Unleashed dog exercise/training area". That land use, however, could not lawfully be carried out on Station Beach at the time because of the extant order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches.

120 The draft plan of management set out land uses under the heading " Permissible Uses Requiring Development Consent". However, there are no

land uses set out under this heading of relevance to any use of Station Beach by people exercising their dogs.

121 The upshot is that, from the time of commencement of Amendment No 42 on 30 August 2000, land within zone 6(a), which included land above MHWM at Station Beach, could not be used for public recreation by people exercising their dogs either without or with development consent. This situation continued until Pittwater Local Environmental Plan 1994 was repealed by PLEP on 30 May 2014.

122 The land below MHWM at Station Beach was zoned 7(a) (Environmental Protection "A") under Pittwater Local Environmental Plan 1994. In that zone, there was no purpose for which development could be carried out without development consent. There were four purposes for which development could be carried out only with development consent but the only potentially relevant purpose was "passive public recreation". The Group submitted that an unleashed dog exercise area on land below MHWM covered by tidal waters would not fall within this purpose of "passive public recreation".

123 The consequence is that land below MHWM at Station Beach within zone 7(a) could not be used for public recreation by people to exercise their dogs either without or with consent. This situation continued from 1994 when Pittwater Local Environmental Plan 1994 came into force until it was repealed in 2014 by PLEP.

124 The Group submitted, therefore, that the Land Use Table for zone 6(a) and 7(a) under Pittwater Local Environment Plan 1994 indicates an intention on the part of the Council not to continue any use of land at Station Beach in those zones by people exercising their dogs.

125 Fourthly, the Group submitted that the above actions of the Council rendered use of the land above and below MHWM at Station Beach by people exercising their dogs unlawful. Such use was not permitted without consent or with consent on land below MHWM in the 7(a) zone, now the E2 zone, since 1994 and on land above MHWM in the 6(a) zone, now the RE1 zone, since 2000. Such use by people exercising their dogs on Station Beach was also rendered

unlawful by the Council's order in the Dog Control Policy in 1997 prohibiting dogs on all beaches.

126 The Group submitted that if, notwithstanding the unlawfulness of this use by people exercising their dogs on Station Beach and adjacent waters, some people nevertheless exercised their dogs on the beach, such unlawful use could not be rendered lawful except by one of the means in s 4.69(1) of the EPA Act, being the commencement of an environmental planning instrument which permits the use without the necessity for consent under the EPA Act being obtained or the granting of consent to that use. The Group submitted that neither event occurred. Clause 65(3) of the Infrastructure SEPP did not apply to the use of land either above or below MHWM at Station Beach, for the reasons the Group gave earlier. The Infrastructure SEPP was not, therefore, an environmental planning instrument which permitted that use without the necessity for consent being obtained. No development consent has been granted for the use. Hence, neither limb of s 4.69(1) is satisfied.

127 As a consequence, s 4.68(1) cannot operate to allow a continuance of the use of the land above or below MHWM on Station Beach by people exercising their dogs.

The use is not unlawful

128 I find in summary:

(e) each Council decision enables a use of the land above and below MHWM at Station Beach by the public;

(f) the use of the land enabled by each Council decision is to be characterised as being for the purpose of recreation area, which is permitted in the RE1 zone and the E2 zone with consent;

(g) cl 65(3) of the Infrastructure SEPP does not apply to allow the use of the land for the purpose of recreation area to be carried out without consent as:

(i) the use of the land for the purpose of recreation area will not be carried out by or on behalf of the Council but rather by the public; and

(ii) the use of the land below MHWM in the E2 zone will not be on a "public reserve";

(h) the use of the land enabled by each Council decision is:

(iii) a continuance of the use of the land above and below MHWM at Station Beach for the purpose of recreation area for which the land was being used immediately before the coming into force of PLEP, so that consent is not required to continue that use under s 4.68(1) of the EPA Act, and

(iv) not established to be an enlargement, expansion or intensification of the use mentioned in (i), so that consent is not required under s 4.68(2);

(i) the use of the land for the purpose of recreation area for which the land was used immediately before the coming into force of PLEP is:

(v) not established to be abandoned under s 4.68(3), and

(vi) not established to have been unlawfully commenced under s 4.69(1);

(j) as a consequence of the above findings, consent is not required for the use of the land enabled by each Council decision.

129 I will explain my reasons for these findings.

The Council's decisions enable a use of land

130 Each of the Council's decisions of 27 August 2019 and 17 December 2019 enables a use of the land above and below MHWM at Station Beach within the designated dog off-leash area or dog on-leash area. The use of the beach enabled by the first decision is by people with their unleashed dogs and the use of the beach by the second decision is by people with their leashed dogs. The decisions themselves do not authorise each use in the sense of granting consent under the EPA Act to the use of the land, but the decisions make each use possible. The provisions of ss 13 and 14 of the *Companion Animals Act* and the Council's order in the Dog Control Policy that dogs are prohibited on all beaches, which included Station Beach, had the effect of restricting the public's use of Station Beach as a recreation area so that the public could use the beach for outdoor recreation only without their dogs. The Council's decisions of 27 August 2019 and 17 December 2019 enabled the public to use the beach for outdoor recreation with their unleashed dogs (the first decision) or leashed dogs (the second decision). Those Council decisions, although made exercising powers under the *Companion Animals Act*, made possible the public' s use of the beach with their dogs. The use of the beach so enabled by the

Council's decisions is a use of land within the meaning of paragraph (a) of the definition of "development" in s 1.5 of the EPA Act.

The use of land is for the purpose of recreation area

131 The use of land enabled by each Council decision is properly to be characterised as being for the purpose of recreation area. Both the land above and below MHWM at Station Beach are a place used for outdoor recreation that is normally open for the public. The land above MHWM has long been reserved as a reserve used for public recreation. The adjacent land below MHWM covered by tidal waters, although not reserved for public recreation, nevertheless has been used by the public for outdoor recreation in conjunction with the public reserve above MHWM. Together, the land above and below MHWM at Station Beach satisfy the description in the chapeau of the definition of "recreation area" of being "a place used for outdoor recreation that is normally open to the public". This is sufficient for the use of land above and below MHWM at Station Beach to be for the purpose of "recreation area".

132 In addition, the use of the land above MHWM could also be classified as being for one of the included examples of recreation area of a public park or reserve, within paragraph (c) of the definition of "recreation area". The land above MHWM at Station Beach has been reserved as a reserve for public recreation and is known as Prince Phillip Park. The land below MHWM cannot be classified as a public park or reserve within paragraph (c), as is explained further below. This does not matter for present purposes, however, as land below MHWM at Station Beach is a place used for outdoor recreation that is normally open to the public within the chapeau of the definition of "recreation area".

133 The use of the land above and below MHWM at Station Beach, enabled by each Council decision, being the use by the public of the beach and adjacent waters with their unleashed or leashed dogs, depending on the decision, is still a use for outdoor recreation of a place that is normally open to the public. The public is still using the beach and adjacent waters for other outdoor recreation, regardless of whether or not they bring their unleashed or leashed dogs with them. Of course, if the public brings their dogs with them, the dogs can also

use the beach and adjacent waters for outdoor recreation: the dogs can run, swim or otherwise exercise. But the use by dogs of the beach and adjacent waters does not displace the use by the dogs' owners and other members of the public of the beach and adjacent waters for outdoor recreation.

134 Hence, the use of the land above and below MHWM at Station Beach, both before and after each Council decision, is properly to be characterised as being for the purpose of recreation area. The detailed activities carried out before may be different to those carried out after the Council's decisions, in that people used the beach and adjacent waters without their dogs before but with their dogs after the Council's decisions, but this is not a change in the purpose of the use. The characterisation of the purpose of the use is to be done at the appropriate level of generality, sufficient to cover the individual activities, but not in terms of the detailed activities: *Royal Agricultural Society (NSW) v Sydney City Council* at 310; *Chamwell Pty Ltd v Strathfield Council* at [36]. Kirby P's observations in *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989) 16 NSWLR 50 at 59 as to the approach to characterisation of an existing use are also apt to the historic use by the public of Station Beach:

> "Nevertheless, the general approach to be taken is one of construing the use broadly. It is to be construed liberally such that confining the user to precise activity is not required. What is required is the determination of the appropriate *genus* which best describes the activities in question."

135 The way the public uses the beach and adjacent waters has undoubtedly changed over the almost a century that the beach has been a public reserve. The public's current use of the adjacent waters with watercraft such as jet skis, kayaks, surf skis and stand-up paddle boards, or for windsurfing or kite surfing, all launched from the beach, would have been unknown in earlier times. The changes in the particular ways people use the beach and adjacent waters does not change the purpose of the use − it was and remains a use for the purpose of recreation area.

136 The use of the land for recreation area is permissible but only with consent on land above MHWM in the RE1 zone and land below MHWM in the E2 zone. It

is common ground that development consent has not been granted to use the land for the purpose of recreation area.

The Infrastructure SEPP does not apply

137 Clause 65(3) of the Infrastructure SEPP does not apply to obviate the need for development consent to use the land for the purpose of recreation area. True it is that cl 65(3) allows development for the purpose of recreation area to be carried out without consent, notwithstanding the requirement in PLEP that consent be obtained for that development on land in the RE1 zone and the E2 zone. But in order for this overriding of the need for consent to occur, the development for the purpose of recreation area must first "be carried out by or on behalf of the Council" and, secondly, be carried out on "a public reserve under the control of or vested in the council". These two requirements are not met in this case.

138 The use of the land above and below MHWM at Station Beach for the purpose of recreation area is by the public. The definition of recreation area refers to a place used for outdoor recreation that is normally open to the public. This entails the public using the place for outdoor recreation. The Council's decisions enable this very use by the public of the beach and adjacent waters for outdoor recreation. The Council itself does not use the place for outdoor recreation. The Council might erect signs or install bins and bag dispensers, and might maintain and service these facilities, but it does not itself carry out any use for outdoor recreation at the place.

139 This conclusion is clear for the second decision of 17 December 2019. The Council merely declared a designated part of Station Beach to be a dog on-leash area. As I have earlier found, this decision may have involved an implied revocation or variation of the order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches, so as to allow dogs in the designated on-leash area of Station Beach. The consequence of this decision revoking or varying the order prohibiting dogs on the beach is that the conspicuously exhibited signs prohibiting dogs would need to be replaced by signs allowing leashed dogs in the dog on-leash area and bins and bag dispensers would need to be installed as the place will become one commonly used for exercising dogs (see

s 20(2) of the *Companion Animals Act*). But the Council's installation of such signs, bins and bag dispensers does not involve the Council carrying out the use of the place for the purpose of recreation area. The signs are to notify the public of the terms on which the public and not the Council can use the place with their dogs and the bins and bag dispensers are to facilitate use by the public and not by the Council of the place with their dogs.

140 The first decision of 27 August 2019 is similar in effect. The Council declared a designated part of Station Beach to be a dog off-leash area. As I have earlier found, this decision may have involved an implied revocation or variation of the order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches, so as to allow dogs in the designated dog off-leash area of Station Beach, and a declaration under s 13(6) of the *Companion Animals Act* declaring this designated area to be an off-leash area. A consequence of this decision revoking or varying the order prohibiting dogs on the beach and declaring the beach to be an off-leash area is that the conspicuously exhibited signs prohibiting dogs would need to be replaced by signs allowing dogs off-leash in the off-leash area and bins and bag dispensers would need to be installed as the place would become one commonly used for exercising dogs.

141 The difference between the first decision and the second decision is that the Council described the first decision as involving a dog off-leash area trial for 12 months. But this description as a trial does not cause the Council to carry out the use of the land within the dog off-leash area for the purpose of recreation area. As I have earlier found, the only actions that the Council approved it undertaking was to install signs, bins and bag dispensers, and the three or four marker buoys in the water to delineate the western boundary of the dog off-leash area. The installation of these signs, bins, bag dispensers and marker buoys is not the use of the land for the purpose of recreation areas by the Council; that use is by the public with their unleashed dogs in the area designated by the signs and marker buoys, on the terms notified in the signs, and facilitated by the facilities of the bins and bag dispensers. The terms of the Council's first decision did not require the Council to undertake the mitigation measures recommended in the REF of monitoring the public's use of the dog off-leash area with their unleashed dogs or undertaking increased compliance

patrols to enforce the public's compliance with the terms of use of the dog off-leash. The Council's first decision does not require the Council itself to carry out the use of the dog off-leash area for the purpose of recreation area.

142 The result is, therefore, that the use of either the dog off-leash area or on-leash area for the purpose of recreation area, enabled by the Council's first and second decisions respectively, will not "be carried out by or on behalf of" the Council, but rather by the public with their dogs. The first requirement in cl 65(3) of the Infrastructure SEPP is not satisfied.

143 The second requirement in cl 65(3) is also not satisfied for land below MHWM at Station Beach. The development for the purpose of recreation area must not only be carried out by or on behalf of the Council, but the Council must carry out that development on "a public reserve under the control of or vested in" the Council. This second requirement is met for the land above MHWM at Station Beach, as it has been reserved as a public reserve under the control of or vested in the Council. But the second requirement has not been satisfied for the land below MHWM at Station Beach. That land is Crown land. It is owned by the Crown and under the control and management of the Crown. It is not under the control of or vested in the Council.

144 The term "public reserve" is defined in cl 64 of the Infrastructure SEPP to have the same meaning as it has in the *Local Government Act 1993.* That definition includes within the meaning of public reserve "a public park" and "a public reserve of which the Council has control under s 344 of the *Local Government Act 1919* or s 48" of the *Local Government Act 1993.*

145 A "public park" is not defined, but its meaning takes colour from its context in the definition of "public reserve", other definitions in the Dictionary to the *Local Government Act*, and the *Local Government Act* generally.

146 All of the lands referred to in the definition of "public reserve" are public lands vested in or owned by a council or placed under the control of a council. "Public land" is defined in the Dictionary to the *Local Government Act* to mean:

> " any land (including a public reserve) vested in or under the control of the council, but does not include—
>
> (a) a public road, or

(b) land to which the *Crown Land Management Act 2016* applies, or

(c) a common, or

(d) a regional park under the *National Parks and Wildlife Act 1974.*"

147 Land to which the *Crown Land Management Act 2016* includes all Crown land. "Crown land" is defined in s 1.7 of the *Crown Land Management Act 2016* to mean:

> "Subject to this Division, each of the following is Crown land for the purposes of this Act—
>
> (a) land that was Crown land as defined in the Crown Lands Act 1989 immediately before the Act's repeal,
>
> (b) land that becomes Crown land because of the operation of a provision of this Act or a declaration made under section 4.4,
>
> (c) land vested, on and from the repeal of the Crown Lands Act 1989, in the Crown (including when it is vested in the name of the State)."

148 The land below MHWM covered by tidal waters at Station Beach is Crown land under this definition. The owner of Crown land is the Crown: see paragraph (a) of the definition of "owner" in the Dictionary to the *Local Government Act 1993*.

149 The consequence of the land below MHWM at Station Beach being Crown land is that it is not public land under the *Local Government Act 1993.* Only public land can be a public reserve under the *Local Government Act 1993.* This is evident from the definition of "public land", which includes a public reserve, as well as from the lands included in the definition of "public reserve", which are all public land. There are certain categories of Crown land that can be a public reserve within the definition in the *Local Government Act 1993,* but in order for this to occur the Crown land needs variously to be vested in the council, or declared to be a public reserve and placed under the control of the council, or the council needs to be appointed as the Crown land manager. None of these actions have been taken in relation to the Crown land below MHWM at Station Beach.

150 This construction of "public reserve" as including only "public land" as defined, which excludes Crown land under the *Crown Land Management Act 2016,* fits with the scheme of the *Local Government Act 1993.* Part 2 of the *Local Government Act 1993* deals with "public land" as defined. Public land may be classified as community land or operational land. Community land is required to

be used and managed in accordance with, amongst other things, a plan of management applying to the land (s 35). A plan of management for community land must identify, amongst other things, the category of the land (s 36(3)(a)). One of the categories of community land is "park" (s 36(4)(a)). A "park" is defined in the Dictionary to mean, in relation to land, "an area of open space used for recreation, not being bushland". Such an area of open space, however, has to be community land, which in turn has to be public land vested in or under the control of the council. The Crown land below MHWM at Station Beach is not public land vested in or under the control of the Council and hence cannot be a "park", one of the categories of community land.

151 The closing phrase of the definition of "public reserve" takes the matter no further. This phrase includes a public reserve of which the Council has the control under either s 48 of the *Local Government Act 1993* or s 344 of the former *Local Government Act 1919.* Section 48 of the *Local Government Act 1993* provides that a Council has the control of:

> "(a) public reserves that are not under the control of or vested in any other body or persons and are not held by a person under lease from the Crown, and
>
> (b) public reserves that the Governor, by proclamation, places under the control of the council."

152 The second category can be quickly dismissed in this case: the land below MHWM at Station Beach has not been placed by proclamation by the Governor under the control of the Council. The first category is also not applicable. The Crown land below MHWM at Station Beach is not a "public reserve" for the reason given earlier that it is not "public land", which excludes land to which the *Crown Land Management Act 2016* applies. It is also "under the control of or vested in" the Crown, being "any other body or persons". Hence, it does not meet the description in paragraph (a) of being a public reserve that is not under the control of or vested in any other body or person.

153 Section 344 of the *Local Government Act 1919* was expressed in similar terms to s 48 of the *Local Government Act 1993.* The Council did not have the control under s 344 of the Crown land below MHWM at Station Beach for similar reasons. The Governor had not by proclamation placed the land in the care,

control and management of the Council, so paragraph (b) did not apply. The land was under the care of or vested in the Crown, so that paragraph (a) did not apply. Although the legislative scheme was different under the *Local Government Act 1919,* a similar conclusion can also be reached that the Crown land below MHWM at Station Beach was not a "public reserve". A "public reserve" was defined in s 4(1) of the *Local Government Act 1919* to mean " public park and any land dedicated or reserved from sale by the Crown for public health, recreation, enjoyment or other public purpose of the like nature, but does not include a common". The land below MHWM at Station Beach was never dedicated or reserved from sale by the Crown for public health, recreation, enjoyment or other public purpose of the like nature. It has remained simply Crown land. It was also not a public park. Hence, s 344 did not apply to the Crown land below MHWM at Station Beach.

154 The Council's reference to various provisions in the *Local Government Act 1993* and the *Companion Animals Act* under which the Council has power to regulate acts, matters and things in a public place, which includes land below MHWM at Station Beach, also does not assist. The ability to erect notices under s 632 of the *Local Government Act 1993* relating to the taking of an animal into or the use of an animal in a public place, or the ability to prohibit dogs in specified public places or to declare a place to be an off-leash area under s 14(1) and a 13(6) of the *Companion Animals Act* respectively are insufficient for the Crown land below MHWM at Station Beach to be under the control of or vested in the Council.

155 In conclusion, cl 65(3) of the Infrastructure SEPP does not apply to the use of the land above or below MHWM at Station Beach for the purpose of recreation area, so as to enable that use to be carried out without consent.

There is a continuance of a lawful use

156 The use of the land above and below MHWM at Station Beach for the purpose of recreation area can, however, be carried out without consent as a continuance of a use for that purpose under s 4.68(1) of the EPA Act.

157 The effect of s 4.68(1) is that nothing in PLEP operates so as to require consent to be obtained under the EPA Act for the continuance of a "use of…

land for a lawful purpose" for which the land was being used immediately before the coming into force of PLEP or so as to prevent the continuance of that use except with consent under the EPA Act being obtained.

158 The words "use...for a lawful purpose" in s 4.68(1) of the EPA Act require that " the actual use immediately before the coming into effect of the relevant planning instrument...be a lawful use": *Steedman v Baulkham Hills Shire Council (No 2)* (1993) 31 NSWLR 562 at 570. Ascertaining whether the use is lawful involves tracing the history of the use back in time to establish that when the use commenced it was for a lawful purpose and that the use has continued to be for a lawful purpose up to the point in time immediately before the coming into force of the environmental planning instrument that has the effect of prohibiting that use: *Steedman v Baulkham Hills Shire Council (No 2)* at 567, 569; *BYT Nominees Pty Ltd v North Sydney Council* (2008) 161 LGERA 77; [2008] NSWLEC 164 at [27].

159 PLEP came into force 30 days after publication on the legislation website on 30 May 2014. Immediately before PLEP came into force, the land above and below MHWM at Station Beach was actually used by the public for the purpose of recreation area. By reason of the order made by the Council in 1997 under s 14(1) of the *Companion Animals Act,* dogs were prohibited on Station Beach. The public could not, therefore, lawfully use Station Beach for outdoor recreation with their dogs, but they nevertheless could use and did use the land for outdoor recreation without their dogs. This use by the public of Station Beach for outdoor recreation was a use for the purpose of recreation area.

160 This use by the public of Station Beach for recreation area was lawful. This use had commenced nearly a century ago in the 1920s, when the land above MHWM at Station Beach had been variously reserved, including for the purpose of public recreation.

161 From about 1915, golf was played on a makeshift course on the sand isthmus between Barrenjoey headland and the nascent village of Palm Beach. During 1922, Warringah Shire Council and the newly formed Palm Beach Progress Association approached the NSW Lands Department seeking to have the isthmus converted into a public recreation area.

162 On 22 June 1923, 26 acres of Crown land on the southern end of the isthmus was reserved for public recreation (Reserve 56217), with the southern boundary commencing on the northern side of Beach Road at its intersection with the high water mark of Pittwater and running along that side of Beach Road easterly to the high water mark of the South Pacific Ocean; the eastern boundary from that high water mark northerly about 20 chains; the northern boundary from that point westerly to the high water mark of Pittwater; and the western boundary from that high water mark southerly to the point of commencement, but excluding an area of about 3 roods, being Reserve 56219 reserved for police purposes (NSW Government Gazette, 22 June 1923, pp 2836-2837). Reserve 56219 was later (on 22 February 1999) revoked for police purposes and instead reserved for public recreation and added to Reserve 56217. Reserve 56217 was named in 1923 as Governor Phillip Park and a new nine hole golf course was set out in the reserve.

163 On 17 May 1929, the remainder of the isthmus north of Reserve 56217 was gazetted as a reserve for public recreation (Reserve 61141), extending 24 chains to the northern ends of the beaches on both sides of the isthmus and east and west to their high water marks (NSW Government Gazette, 17 May 1929, p 2114).

164 On 29 March 1934, most of Barrenjoey headland (Reserve 64483) was added to the reserve (NSW Government Gazette, 29 March 1934). Warringah Shire Council became the trustee of the entire reserve (NSW Government Gazette, 28 March 1952, p 1153). In 1995, the administration of Barrenjoey headland passed to the National Parks and Wildlife Service, including the northern end of Station Beach.

165 After 1923, as the historian Dr Pickett chronicles in his affidavit on 7 September 2020, the land below MHWM covered by tidal waters was used in conjunction with the land above MHWM reserved for public recreation. Together, the land above and below MHWM at Station Beach has been used for public recreation from before there was any requirement in planning law to obtain consent to carry out this use.

166 The first time planning law controlled the use of land and the purposes for

which land may be used was when Pt XIIA Town and Country Planning Schemes was inserted into the *Local Government Act 1919* by the *Local Government (Town and Country Planning) Amendment Act 1945.* Division 7 of Pt XIIA regulated "interim development", being development of land in the period from the date the Minister directed the preparation of a planning scheme (which was taken to be 12 July 1946) up to the date when the relevant planning scheme was prescribed and came into operation. The first planning scheme that applied to the former Shire of Warringah, amongst other local government areas, was the County of Cumberland Planning Scheme, which commenced on 27 June 1951. Interim development was development of land in this interim period: see *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56 at [46]-[52].

167 Development of land was defined in s 342T(1) to include:

> "the erection of any building, and the carrying out of any work, and any use of the land or building or work thereon for a purpose which is different from the purpose for which the land or building was last being used."

168 This definition limiting development not to be simply use of land (as is now the case under the EPA Act) but rather to be use of land for a different purpose was important: *Vumbaca v Baulkham Hills Shire Council* (1979) 141 CLR 614; [1979] HCA 66.

169 The use of the land above and below MHWM at Station Beach for the purpose of recreation area, which had commenced in the 1920s, did not change in this interim period. Continuance of the use of the land for the same purpose of recreation area was therefore not development and consent was not required to continue the use for the same purpose.

170 The County of Cumberland Planning Scheme zoned land in the former Shire of Warringah but not the waterway of Pittwater. Clause 26 of the County of Cumberland Planning Scheme specified the purposes for which a building could be used without consent or only with consent and the purposes for which a building could not be used in each of the zones in the land use table. Clause 29(1) and (2) provided that land included in a zone could not be used for any purpose for which a building in the same zone could not be used or could not be used without consent for any purpose for which a building on the same zone

could be used only with consent. The Council did not identify what, if any, zone the land above MHWM at Station Beach fell into, but asserted that in any event no controls applied to the land so as to prohibit use of the land or require consent to use the land for the purpose of recreation area. Similarly, as the waterway of Pittwater was not included in any zone, there was no regulation of the use of land below MHWM at Station Beach.

171 Clause 32 dealt with existing uses: "An existing building or existing work may be maintained and may be used for its existing use and an existing use of land may be continued…": see *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* at [53]-[56]. The effect was that the existing use of the land above MHWM at Station Beach for the purpose of recreation area could be continued. As the County of Cumberland Scheme did not apply to the unzoned land below MHWM at Station Beach, the existing use of that land for that purpose could also continue.

172 Warringah Planning Scheme Ordinance, which commenced on 7 June 1963, replaced the County of Cumberland Planning Scheme for the Shire of Warringah. It zoned land in the Shire of Warringah but not the waterway of Pittwater. The land above MHWM at Station Beach was zoned 6(a) Open Space − Existing Recreation. Purposes for which a building may be used without consent was "any purpose authorised by Part XIII" of the *Local Government Act 1919.* Part XIII dealt with public recreation. Use of the land above MHWM at Station Beach for the purpose of recreation area was therefore permitted without consent.

173 Clause 30 dealt with existing uses and was in the same terms as cl 32 of the County of Cumberland Planning Scheme, including allowing an existing use of land to be continued. This provision protecting existing use of land did not apply to an existing use of land commenced after 12 July 1946 in contravention of the interim development provisions of Division 7 of Part XIIA of the *Local Government Act 1919* or the County of Cumberland Planning Scheme (see cl 34(1)): *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* at [58]-[63].

174 The effect of these provisions of Warringah Planning Scheme Ordinance was

that the existing use of land above MHWM at Station Beach for the purpose of recreation area, which had commenced before 12 July 1946, was able to be continued. As the Warringah Planning Scheme Ordinance did not apply to the unzoned land below MHWM at Station Beach, the use of that land could also continue.

175 On 1 September 1980, the EPA Act commenced. The EPA Act repealed and replaced Pt XIIA of the *Local Government Act 1919.* Warringah Planning Scheme Ordinance was deemed to be an environmental planning instrument under the EPA Act. The provisions of Div 10 of Pt 4 of the EPA Act applied to protect a use of a building, work or land for a lawful purpose that is an existing use (under ss 106 and 107 of the EPA Act) or other lawful use (under s 109 of the EPA Act). The existing use of the land above MHWM at Station Beach for the purpose of recreation area was thereby able to be continued. The use of the land below MHWM at Station Beach for the purpose of recreation area was also able to be continued as that land continued to be unzoned.

176 Warringah Local Environmental Plan 1985, made on 11 October 1985, repealed and replaced Warringah Planning Scheme Ordinance. The land in the Shire of Warringah was zoned but the waterway of Pittwater remained unzoned: *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* at [78]-[79]. Land above MHWM at Station Beach continued to be zoned 6(a) Existing Recreation. Development for the purpose of recreation area was permitted in the 6(a) zone only with development consent. By reason of ss 107 and 109 of the EPA Act, however, nothing in Warringah Local Environmental Plan 1985 operated so as to prevent or require consent to be obtained for the continuance of the existing use of the land above MHWM at Station Beach for the purpose of recreation area. Warringah Local Environmental Plan 1985 did not apply to the unzoned land below MHWM at Station Beach, so that use of that land for the purpose of recreation area was also able to be continued.

177 Pittwater Local Environmental Plan 1994, made on 4 February 1994, incorporated the provisions of Warringah Local Environmental Plan 1985 into a local environmental plan for the local government area of Pittwater. Pittwater had by this time separated from Warringah. At the time that Pittwater Local

Environmental Plan 1994 came into force, it zoned land in Pittwater local government area but not the waterway of Pittwater. This omission was corrected by Pittwater Local Environmental Plan 1993 (Amendment No 1), gazetted on 29 July 1994, so that the waterway of Pittwater became zoned for the first time: *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* at [86]-[89].

178 As earlier indicated, Pittwater Local Environmental Plan 1994 zoned land above MHWM at Station Beach as 6(a) and land below MHWM at Station Beach as 7(a) Environment Protection. On the Group's argument, the use of either land for the purpose of recreation area was not permitted without or with consent, and hence was prohibited, in the 6(a) zone and the 7(a) zone. On the Council's argument, a plan of management had been adopted by the Council but not the Minister for land in the 6(a) zone at Station Beach, so that use of that land for the purpose of recreation area was permitted either without or with consent, as the use fell within one of the purposes of land use set out in the relevant plan of management under the headings of those permissible uses. On the Council's argument, the use of land below MHWM at Station Beach for the purpose of recreation area was permitted with consent in the 7(a) zone as it fell within the permissible use of "passive recreation area".

179 It is not necessary to decide whether the Group's or the Council's argument is correct as, either way, the existing use of the land above and below MHWM at Station Beach was able to be continued as an existing use (under s 107) or another lawful use (under s 109). By ss 107 and 109 of the EPA Act, nothing in Pittwater Local Environmental Plan 1994 (as amended) operated to prevent or require consent to be contained for the continuance of the existing use of the land above and below MHWM at Station Beach for the purpose of recreation area.

180 PLEP, which commended on 27 June 2014, repealed and replaced Pittwater Local Environmental Plan 1994. As previously noted, under PLEP land above MHWM at Station Beach was zoned RE1 and land below MHWM was zoned E2. Development for the purpose of recreation area was permitted with consent in both the RE1 and the E2 zone. I have earlier found that the use of the land

above and below MHWM at Station Beach was and still is for the purpose of recreation area. Nevertheless, by s 109 of the EPA Act, nothing in PLEP operated to require consent to be obtained for the continuance of the existing use of land above and below MHWM at Station Beach for the purpose of recreation area.

181 The result of this tracing of the history of the use of the land above and below MHWM at Station Beach up to the date of the coming into force of PLEP is that the use of that land for the purpose of recreation area was commenced lawfully and continued to be lawful, including under s 109 (now s 4.68) of the EPA Act.

182 Hence, the use of the land for the purpose of recreation area immediately before the coming into force of PLEP in 2014 was for a lawful purpose. This use of the land for the purpose of recreation area continued after the coming into force of PLEP in 2014 up to, and indeed after, the Council's decisions of 27 August 2019 and 17 December 2019. The public are still using the land above and below MHWM at Station Beach for outdoor recreation.

183 I have found earlier that the Council's decisions of 27 August 2019 and 17 December 2019 enabled a use of the land above and below MHWM at Station Beach for the purpose of recreation area. This use of land will be by the public for outdoor recreation with their dogs, either unleashed or leashed depending on the decision. While this activity of people using the beach and adjacent waters for outdoor recreation with their dogs differs in detail from the activity that people had carried out before the Council's decisions of using the beach and adjacent waters for outdoor recreation without their dogs, the purpose of the use in each case is the same, being for the purpose of recreation area. The Council's decisions merely enabled the public to use the beach and adjacent waters for outdoor recreation in an additional way, by bringing their dogs with them if they wished. People can still, and many do, use the beach and adjacent waters for outdoor recreation without dogs, but those people who wish to can now also bring their dogs with them when they use the beach and adjacent waters for outdoor recreation.

184 Viewed this way, the use of the land above and below MHWM at Station Beach enabled by the Council's decisions of 27 August 2019 and 17 December 2019

is a continuance of the use of that land for the purpose of recreation area. The Council's decisions enabled a change in the detailed activities of the use carried out on the land but not a change in the purpose of the use of the land.

There is not an enlargement, expansion or intensification of use

185 The change in the detailed activities of the use of the land enabled by the Council's decisions did not involve an enlargement, expansion or intensification of the use of the land for the purpose of recreation area. The date for determining whether there is an enlargement, expansion or intensification of a use of a building, work or land for a lawful purpose, or an increase in the area of building, work or land actually physically and lawfully used, is the date on which s 109(2) (now s 4.68(2)) of the EPA Act commenced, being 3 February 1986: see *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366 at 371-372, 373 , 375-376; *Steedman v Baulkham Hills Shire Council (No 2)* at 572; *King v Lewis* (1995) 88 LGERA 183 at 195, 197, 201; *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* (2019) 101 NSWLR 1; [2019] NSWCA 147 at [22], [27].

186 Determining whether a use has been enlarged, expended or intensified requires consideration of the nature and purpose of the use. In this case, the use of the land is for outdoor recreation by the public. In order for there to be any enlargement, expansion or intensification of this use of the land, it is the public's use of the land that must be enlarged, expanded or intensified.

187 The evidence does not establish that the public's use of the land above and below MHWM at Station Beach for the purpose of recreation area has been enlarged, expanded or intensified as a result of the Council's decisions compared to the public's use of that land for that purpose at 3 February 1986, (when s 109(2) commenced), 27 June 2014 (when PLEP commenced) or even immediately before the Council's decisions of 27 August 2019 and 17 December 2019. The evidence does not establish that the number of people using the beach and adjacent waters at Station Beach for outdoor recreation has increased as a consequence of the Council's decisions compared to the number of people who used the beach and adjacent waters for outdoor recreation before the Council's decisions at any of these dates. The evidence

does establish that the number of dogs on the beach and in the adjacent waters has increased after compared to before the Council's decisions, but this does not assist in comparing the relative numbers of people using the beach and adjacent waters for outdoor recreation. People with dogs might simply have displaced people without dogs, with the relative numbers of people using the beach and adjacent waters for outdoor recreation remaining the same.

188 Similarly, the evidence that the numbers of dogs in the parts of Station Beach designated as a dog off-leash area or on-leash area has increased after compared to before the Council's decisions does not assist in comparing the area of land actually physically and lawfully used by people for the purpose of recreation area after and before the Council's decisions. People actually physically and lawfully used those parts of Station Beach for the purpose of recreation area, although without their dogs, before the Council's decisions at any of the relevant dates and people are still using those parts of Station Beach for the purpose of recreation area, although many now do so with their dogs as a result of the Council's decisions. The area of land used for the purpose of recreation area remains the same, only the detailed activities of the use of that area of land have changed.

189 The Group's argument that there has been an enlargement, expansion or intensification of the use of the beach and adjacent waters is to a large extent dependent on its earlier argument that the use after the Council's decisions is different in kind to the use before the Council's decisions. The Group had argued that the use of land for exercising dogs, whether off-leash or on-leash, enabled by the Council's decisions, was a use for a different purpose than the use for recreation area that had been carried out before the Council's decisions. Founded on this argument, the Group adduced evidence of the increase in the number of dogs on the beach and in the adjacent waters and the increased area of land within which dogs are present after compared to before the Council's decisions. I have earlier rejected the Group's argument that the use of land enabled by the Council's decisions is for a different purpose than recreation area. Both the use before and the use after the Council's decisions are for the same purpose of recreation area. The details of the activities of the use before and after the Council's decisions may have changed, from people

using the beach and adjacent waters for outdoor recreation without their dogs to doing so with their dogs, but that change in the detailed activities of the use does not effect a change in the purpose of the use.

190 As a consequence, it matters not that the number of dogs that people have on the beach and in the adjacent waters may have increased after compared to before the Council's decisions; what matters is whether the number of people using the beach and adjacent waters has increased or the area of the beach and adjacent waters used by people has increased. The evidence does not establish that either the number of people or the area of land used has increased as a consequence of the Council's decisions.

191 An analogy might assist to explain this point. People have used the beach and adjacent waters at Station Beach for outdoor recreation without and with watercraft for nearly a century. In the early decades of the reservation of the land above MHWM for public recreation, the number of people using watercraft may have been comparatively few, and even then the types of watercraft used may have been limited. In more recent decades, the number of people using watercraft and the types of watercraft they use have increased. The use of jet skis, kayaks and surf skis, stand-up paddle boards, windsurfing or kitesurfing in recent decades would have been unknown in earlier times. This change in the ways in which people use the beach and adjacent waters for outdoor recreation, and the equipment they use in doing so, has effected neither a change in the purpose of the use of the land from the purpose of recreation area, nor an enlargement, expansion or intensification of the use of the land for the purpose of recreation area. For the latter to occur, there would need to be an increase in the number of people using the beach and adjacent waters or the area of beach and adjacent waters that people use, not simply people using the beach and adjacent waters for outdoor recreation in different ways and with different equipment.

192 In the same way, the change in the way people use the beach and adjacent waters for outdoor recreation by bringing their dogs with them, while before the Council's decisions they were not allowed to bring their dogs with them, does not effect an enlargement, expansion or intensification of the use of the land for

the purpose of public recreation.

The use has not been abandoned

193 The use of the land above and below MHWM at Station Beach for the purpose of recreation area has not been abandoned under s 4.68(3) of the EPA Act and was not unlawfully commenced under s 4.69(1) of the EPA Act.

194 The Council's order in 1997 under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches, which includes Station Beach, prevented people lawfully using Station Beach for outdoor recreation with their dogs, but this did not effect an abandonment of the use of Station Beach for the purpose of recreation area, under s 4.68(3) of the EPA Act. The order merely had the effect of preventing people using the beach for outdoor recreation in a particular way, that is with their dogs, but they could still use the beach for outdoor recreation in every other way. Where a use of land for a lawful purpose is carried out in a number of different ways, the cessation of use of only one way in which the land is used for that purpose does not cause the use for that purpose to be abandoned. The land continues to be used for the purpose by carrying out the use in the other ways.

195 This is the corollary of my earlier finding that the use of Station Beach enabled by the Council's decisions was a continuance of the use of the beach and adjacent waters for the purpose of recreation area, notwithstanding that the use enabled by the Council's decisions involved people once again being able to use the beach and adjacent waters for outdoor recreation with their dogs, in addition to the ways in which the people had used the beach and adjacent waters for outdoor recreation before the Council's decisions. The detailed activities of the use of the land might have changed but not the purpose of the use of the land for recreational area.

196 So too, the Council's order in 1997 prohibiting dogs on Station Beach might have precluded one of the detailed activities of the use of the land − people could no longer use the beach and adjacent waters for outdoor recreation with their dogs − but it did not preclude any other of the detailed activities of the use of the land − people could still use the beach for outdoor recreation without their dogs. The use of the land for the purpose of recreation area therefore

continued, unaffected by the Council's order prohibiting dogs on all beaches.

197 Pittwater Local Environmental Plan 1994 also did not effect or evidence an abandonment of the use of the land above or below MHWM at Station Beach for the purpose of recreation area. The Group relied on Pittwater Local Environmental Plan 1994 as revealing an intention on the part of the Council to give up use of the land above MHWM in the 6(a) zone and the land below MHWM in the 7(a) zone for exercising dogs. The uses of land in the 6(a) zone permitted without and with consent depended on the uses permitted in any adopted plan of management, but there was no adopted plan of management in force that permitted a use of the land above MHWM at Station Beach for exercising dogs. None of the uses of land below MHWM at Station Beach in the 7(a) zone permitted without or with consent allowed the land to be used for exercising dogs. The Group argued that Pittwater Local Environmental Plan 1994 thereby revealed an intention on the part of the Council who had prepared it, to give up any use of the land above or below MHWM at Station Beach for exercising dogs.

198 This argument fails for the same reason I gave in relation to the order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches. Even assuming that Pittwater Local Environmental Plan 1994 could be seen to reveal an intention on the part of the Council to give up use of land above and below MHWM at Station Beach by people exercising their dogs (although I do not so find), that would establish a giving up of only one of the detailed activities of the use of that land for the purpose of recreation area, not the giving up of the use of the land for the purpose of recreation area itself. The public were able to and did in fact continue to use the land for the lawful purpose of recreation area during the whole time Pittwater Local Environmental Plan 1994 was in force, including during the period from 2000 after Amendment No 42 commenced to 2014 when Pittwater Local Environmental Plan 1994 was repealed and replaced by PLEP. The fact that Pittwater Local Environmental Plan 1994 did not expressly permit without or with consent the use of the land for exercising dogs had no effect on the continuance of the use of the land for the purpose of recreation area.

The use was not unlawfully commenced

199 Any use of Station Beach by people with their dogs in contravention of the Council's order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches or the Land Use Table of Pittwater Local Environmental Plan 1994 did not cause the use of the land for the purpose of recreation area to be unlawfully commenced, under s 4.69(1) of the EPA Act.

200 As I have earlier explained, the use of land above and below MHWM at Station Beach for the purpose of recreation area commenced nearly a century ago, before planning law required consent to be obtained to carry out use for that purpose on the land. The use of the land for that lawful purpose has continued to date.

201 Neither the order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches nor the Land Use Table for the 6(a) zone and 7(a) zone in Pittwater Local Environmental Plan 1994 not permitting without or with consent the use of land in those zones for exercising dogs, caused the use of the land above and below MHWM at Station Beach for the purpose of recreation area to be unlawful or to have been unlawfully commenced. Unlawfulness in this context of the existing use and continuing use provisions of the EPA Act means unlawfulness under the planning law (EPA Act) and not the general law: *Sydney City Council v Ke-Su Investments Pty Ltd (No 2)* (1983) 51 LGRA 186 at 204-205 (not disturbed on appeal, see *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246) and see *Steedman v Baulkham Hills Shire Council (No 2)* at 569, 572, 580.

202 The order under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches could not make the use by the public of Station Beach for the purpose of recreation area unlawful under the EPA Act, regardless of whether people complied with or breached the order prohibiting dogs on the beach. Similarly, any use by some members of the public of Station Beach to exercise their dogs in contravention of the order cannot cause the use of the land for the purpose of recreation area to be unlawful or unlawfully commenced.

203 Pittwater Local Environmental Plan 1994, insofar as the Land Use Table for the 6(a) zone and 7(a) zone did not permit use of land in those zones by people exercising their dogs, did not make unlawful the use of land in those zones at

Station Beach for the purpose of recreation area. Use of the land for that purpose was either an existing use or a continuing use immediately before Pittwater Local Environmental Plan 1994 came into force, so that it did not prevent or require consent for the continuance for the use of the land for that purpose.

The unlawful development ground is rejected

204 In conclusion, the Group has not established that the use of the land above or below MHWM at Station Beach enabled by the Council's decisions of 27 August 2019 and 17 December 2019 will be in breach of ss 4.2 or 4.3 of the EPA Act. I reject the Group's unlawful development ground.

The inadequate EIA ground

The Group's argument that the EIA is inadequate

205 The Group contends that each Council decision authorises a use of land, which is a type of activity under Part 5 of the EPA Act: see s 5.1(1), definition of " activity", paragraph (a). Part 5 controls all activity which is considered to be " development" for the purposes of the EPA Act except for activity that is controlled by Pt 4 of the EPA Act: *Herring Daw & Blake NSW Pty Ltd v Gosford City Council* (1995) 87 LGERA 220 at 224. If contrary to the Group's argument the use of land authorised by the Council's decisions is not development controlled by Pt 4 of the Act by being development that either is permitted with consent or is prohibited, the use of land would not be excluded from being an activity under paragraphs (g) or (h) of the definition of "activity". The exclusion in paragraph (g) requires that development consent actually be required under Part 4 of the EPA Act. Paragraph (g) will not apply if development consent is not required by any environmental planning instrument, such as PLEP, or if another environmental planning instrument overrides any such requirement for development consent to be obtained (such as cl 65(3) of the Infrastructure SEPP), or if the activity can be continued as an existing use or other lawful use without obtaining consent (under ss 4.66 or 4.68 of the EPA Act). The use of land at Station Beach is therefore an "activity".

206 The Group contends that each Council decision involved a form of authorisation so as to be an "approval": see s 5.1(1) definition of "approval". At

the least, both decisions involved revoking or varying the order the Council had made under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches so as to allow dogs off-leash (the first decision) or dogs on-leash (the second decision) at Station Beach. Each decision, by relaxing or lifting the prohibition on dogs being on beaches, was a form of authorisation that enabled people lawfully to use Station Beach with their dogs.

207 The Group contends the Council was the "determining authority" whose approval was required to enable the activity authorised by the two decisions to be carried out: see s 5.1(1) definition of "determining authority".

208 As a consequence, Part 5 of the EPA Act applied so as to impose a duty on the Council to consider the environmental impact of the activity authorised by each Council decision. The duty was twofold: the first under s 5.5 and the second under s 5.7.

209 Section 5.5(1) provides:

> "For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity."

210 The Group contends that the first duty under s 5.5 required the Council, in its consideration of each activity enabled by each Council decision, the dog off-leash area trial and allowing dogs on-leash on Station Beach respectively, to not only examine but also take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

211 The Group noted that the Council had obtained a review of environmental factors (REF) in support of its application for a licence from the Department of Industry, Land and Water to conduct the dog off-leash area trial on the Crown land below MHWM. That REF was discussed in and attached to the agenda report to the Council's meeting on 27 August 2019 and was considered by the Council in making its first decision to conduct the dog off-leash area trial at Station Beach. However, no review of environmental factors or other environmental impact assessment was obtained, examined or taken into account by the Council in making its second decision on 17 December 2019 to

allow dogs on-leash at Station Beach. The report to the Council meeting on 17 December 2019 did not refer to or attach the REF on the earlier activity of the dog off-leash area trial. Under the heading "Environmental considerations", the report to the Council meeting on 17 December 2019 merely stated: "If approved, the change would be managed in accordance with the Council's policies and relevant legislation such as the *Companion Animals Act 1998*".

212 In short, the Group submits "the on-leash activity was not accompanied by any environmental assessment documentation at all and there was no environmental assessment of it, whatsoever."

213 The Group contests the Council's suggestion that the REF prepared in respect of the first activity of the dog off-leash area trial at Station Beach was sufficient environmental assessment of the second activity of allowing dogs on-leash on Station Beach. First, the evidence does not establish that either in the report or at the Council meeting of 17 December 2019, the Council examined and took into account the REF in its consideration of the second activity. Second, the two activities are different and have different environmental impacts. The REF in respect of the first activity is not an assessment of the environmental impacts of the second activity. The differences in the activities include: the first activity allowed dogs off-leash while the second activity allows dogs on-leash; the first activity is a trial for 12 months while the second activity is permanent; the boundaries of the area of the first activity include a western boundary 3 metres landwards of the eastern extent of the seagrass beds and a southern boundary north of the *Posidonia australis* seagrass meadow while the second activity has no western boundary and the southern boundary is 110 metres further south so as to include the *Posidonia australis* seagrass meadow within the area; and the first activity was limited by conditions designed to protect the seagrass meadows from damage and to monitor the impacts on the seagrass and stop the trial if damage was found (recommended in the REF), while the second activity had no such conditions or monitoring. The Group submits that the environmental impact assessment of the first activity cannot therefore be an environmental impact assessment of the different, second activity.

214 The Group contends, therefore, that the Council breached s 5.5(1) by failing, in

its consideration of the activity of allowing dogs on-leash at Station Beach, to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

215 Section 5.7(1)(a) provides:

> "A determining authority shall not carry out an activity, or grant an approval in relation to an activity, being an activity that is a prescribed activity, an activity of a prescribed kind or an activity that is likely to significantly affect the environment, unless—
>
> (a) the determining authority has obtained or been furnished with and has examined and considered an environmental impact statement in respect of the activity—
>
> (i) prepared in the prescribed form and manner by or on behalf of the proponent, and
>
> (ii) except where the proponent is the determining authority, submitted to the determining authority in the prescribed manner..."

216 The Group contends that the second duty under s 5.7 required the Council not to grant approval to either the first activity of the dog off-leash area trial at Station Beach or the second activity of allowing dogs on-leash at Station Beach, unless the Council had obtained and been furnished with and had examined and considered an environmental impact statement (EIS) in respect of each activity. The Council did not do so. No EIS was obtained, examined or considered by the Council in respect of either activity. Only an REF was prepared, obtained and considered by the Council in respect of the first activity, but no EIS documentation at all was prepared, obtained or considered in respect of the second activity.

217 The Group contends that an EIS was required for each activity because each activity is likely to significantly affect the environment. In particular, both the dog off-leash trial activity and the dog on-leash activity are likely to significantly affect the environment by reason of each activities impacting on the threatened *Posidonia australis* seagrass population in Pittwater or the threatened seahorse species *Hippocampus whitei* (White's seahorse).

218 Section 221ZX of the *Fisheries Management Act 1994* provides that, for the purpose of Pt 5 of the EPA Act, an activity is to be regarded as an activity likely to significantly affect the environment if it is likely to significantly affect threatened species, populations or ecological communities listed under the

Fisheries Management Act. The *Posidonia australis* seagrass population in Pittwater is listed as a threatened population and White's seahorse is listed as a threatened species under the *Fisheries Management Act*. If an activity is likely to affect threatened species, populations or ecological communities, an EIS prepared under Pt 5 of the EPA Act is to include or be accompanied by a species impact statement (SIS): s 221ZX(3) of *Fisheries Management Act*.

219 The Group submits the statutory requirement to obtain an SIS (or an EIS incorporating an SIS) where there is likely to be a significant impact on threatened species, populations or ecological communities, is an essential precondition to the validity of the decision-making process under the EPA Act and raises a jurisdictional fact: *Timbarra Protection Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [94], [108]. The Court is required to decide the jurisdictional fact on the evidence before it: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [22].

220 The Group submits that, in the statutory test of whether an activity "is likely to significantly affect the environment":

(k) the word "likely" means a real chance or possibility rather than more probable than not: *Jarasius v Forestry Commission of NSW* (1988) 71 LGRA 79 at 94; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* (1989) 67 LGRA 155 at 163; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186 at 196; *Oshlack v Richmond River Council and Irongates Development Pty Ltd* (1993) 82 LGERA 222 at 233; *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* (2010) 210 LGERA 126; [2010] NSWLEC 48 at [84]; and

(l) the word "significantly" means important or more than ordinary: *Jarasius v Forestry Commission of NSW* at 94; *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* at [84].

221 In assessing whether an activity is likely to significantly affect threatened species, populations or ecological communities listed under the *Fisheries Management Act*, the factors in the seven part test in s 221ZV of that Act need to be taken into account.

222 The Group called evidence from Dr Sharon Cummins, an aquatic ecologist, who opined that each of the first and second activities is likely to significantly

affect the threatened *Posidonia australis* seagrass population and White's seahorse. Dogs would have three types of impacts:

(m) dog footprints will create innumerable small "potholes" in the surface of soft-sediments which will change the microtopography of the sediments, affecting seagrass seed distribution and microclimate for germination;

(n) dogs will spread non-indigenous invasive species, such as the algae *Caulerpa taxifolia*; and

(o) dogs and their owners will trample on benthic unvegetated invertebrate habitat and compact sediment.

223 Dr Cummins opines that the use of Station Beach by dogs in the off-leash trial area will cause loss, fragmentation and further degradation of *Posidonia australis* seagrass meadows. It will cause loss of *Posidonia australis* within the trial area, which will diminish the stability of adjacent meadows of seagrass within which White's seahorse is likely to occur. In particular, Dr Cummins concluded "continued use by dogs off-leash at Station Beach at the current levels..., over a period of months, is likely to cause a decrease in the extent of the seagrass, including *P. australis*, further fragmentation of the seagrass meadow and changes in assemblages of benthic organisms in seagrass and soft-sediment habitats." Instead of ameliorating the likely impacts, the placement of marker buoys three metres to the east of the seagrass meadow would cause scouring of the soft sediment substratum to the detriment of the seagrass, associated with the rope or chain required to fix the marker buoys in place.

224 Dr Cummins applied the seven part test in s 221ZV of the *Fisheries Management Act* to conclude that the activity of the dog off-leash trial is likely to significantly affect the threatened *Posidonia australis* population in Pittwater and the threatened species of White's seahorse.

225 The Group contends, therefore, that the Council breached s 5.7(1) of the EPA Act in granting approval to the first activity of the dog off-leash area trial at Station Beach without having obtained, examined or considered an EIS (containing an SIS) in respect of that activity.

226 The Group similarly contends that the second activity of allowing dogs on-leash

at Station Beach is likely to significantly affect the threatened *Posidonia australis* seagrass population in Pittwater and the threatened species of White's seahorse. Dr Cummins opines that the dog on-leash activity is highly likely to impact on many species of seagrass, including the *Posidonia australis* seagrass, and White's seahorse. In particular, Dr Cummins concluded:

> "In my opinion, interactions between dogs and sediment/seagrass habitats both on and off-leash on Station Beach on a daily basis will result in damage to those habitats and, as a consequence, their ecological communities, by depleting the edge of the seagrass habitat along the landward side of the trial area and causing further loss and fragmentation of the meadow.
>
> For these reasons, it is my opinion as an ecologist that the 'on-leash' access to Station Beach (south) by dogs should be discontinued and that the off-leash trial should not be allowed to go ahead."

227 The Group submits that the second activity, as approved by the Council on 17 September 2019, does not involve any conditions to protect the seagrass meadows from damage or to monitor the seagrass meadows and stop the activity if damage is found. As a consequence, there is an increased likelihood that the second activity will significantly affect the *Posidonia australis* seagrass population in Pittwater and White's seahorse.

228 The Group also referred to the evidence of extensive noncompliance with the restriction that dogs be on-leash; there were many instances of dogs walking, running, swimming and otherwise exercising off-leash on the beach and in the adjacent waters and on days and times not permitted. Dr Cummins referred to her own observations as well as the literature that non-compliance with the restrictions on dog exercise areas is prevalent. The Group submits that such noncompliance with the Council's decision to allow dogs on-leash at Station Beach in a specified area and on specified days and times should have been anticipated and affects the likelihood of the activity significantly affecting the environment, including the threatened *Posidonia australis* seagrass population in Pittwater and the threatened species of White's seahorse.

229 The Group contends, therefore, that the Council breached s 5.7(1) of the EPA Act in granting approval to the second activity allowing dogs on-leash at Station Beach without having obtained, examined and considered an EIS (containing an SIS) in respect of that activity.

The Council's argument that the EIA was adequate

230 The Council contests that either the dog off-leash area trial or allowing dogs on-leash at Station Beach is a use of land, so as to be an "activity" as defined in s 5.1(1) of the EPA Act, for the same reason it had submitted that each is not a use of land within the definition of "development" in s 1.5 of the EPA Act.

231 The Council also contests that the Council's decisions of 27 August 2019 and 17 December 2019 constituted an "approval" of the dog off-leash trial or dogs on-leash at Station Beach, as that term is defined in s 5.1(1) of the EPA Act. The Council reiterated its submission that the Council's decisions merely involved exercises of power under the *Companion Animals Act,* being a revocation or variation of the order prohibiting dogs on all beaches under s 14(1) and a declaration of a dog off-leash area under s 13(6) for the first decision and a revocation or variation of the order prohibiting dogs on all beaches under s 14(1) for the second decision. Neither decision involved the grant of "a consent, licence or permission or any form of authorisation", so as to be an "approval".

232 As a consequence, the Council submits, it was not a "determining authority" as defined in s 5.1(1) of the EPA Act as its approval was not required in order to enable either the dog off-leash trial or dogs on-leash at Station Beach.

233 The Council did accept that the approval of the Department of Industry, Land and Water was required to enable the dog off-leash trial to be carried out on the Crown land below MHWM at Station Beach. The Council required a licence to be able to use and occupy the Crown land below MHWM. The Department required the Council to prepare and furnish the Department with the REF in support of the Council's application for a licence. The Council submitted, however, that this application of Pt 5 of the EPA Act to the Department's consideration of whether to issue a licence to the Council to use and occupy Crown land below MHWM has no bearing on whether Pt 5 applies to the Council's decisions to conduct the dog off-leash area trial or to allow dogs on-leash on Station Beach.

234 In the alternative, if Pt 5 of the EPA Act does apply, the Council contends that, in relation to the first activity of the dog off-leash area trial, the Council:

(p) carried out an environmental impact assessment of the dog off-leash area trial, in the form of the REF, pursuant to s 5.5(1) of the

EPA Act and cl 228 of the Environmental Planning Assessment Regulation 2000 (EPA Regulation);

(q) considered the REF to the fullest extent possible; and

(r) concluded that the dog off-leash area trial was not an activity likely to significantly affect the environment, so that an EIS was not required.

235 The Council notes that the duty in s 5.5(1) to examine and take into account "to the fullest extent possible" the environmental impacts of an activity must be read is if the word "reasonably" was inserted before "possible": *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* (1986) 7 NSWLR 353 at 366; *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598; [1999] NSWCA 196 at [68]; *Oshlack v Rous Water* (2013) 194 LGERA 39; [2013] NSWCA 169 at [32], [173]; *Snowy Mountains Brumby Sustainability and Management Group Inc v State of NSW* [2020] NSWLEC 92 at [42].

236 The Council submits that the REF considered the potential impacts of the activity of the dog off-leash area trial on the environment, including the threatened *Posidonia australis* seagrass population in Pittwater and the threatened species of White's seahorse. The REF concluded that:

> "- The proposed trial is unlikely to have any significant or long-term negative environmental impacts providing the mitigation measures outlined in the REF are implemented and enforced during the trial;
>
> - Strict implementation of the proposed mitigation measures is required to mitigate potential impacts on environmentally sensitive species (including seagrasses and the White's seahorse) (potentially) from the proposed dog off-leash trial at Station Beach." (p 34 of REF).

237 The Council submits that its consideration of the REF is evident in its adoption of the recommended mitigation measures to move the western boundary three metres landwards of the eastern extent of the seagrass beds (and to install marker buoys to delineate this boundary) and move the southern boundary 110 metres northwards to be clear of the *Posidonia australis* seagrass bed close to the shore. The Council submits that mitigation measures that are incorporated as part of the description of an activity, as opposed to mitigation measures imposed by way of conditions of approval of an activity, can be taken into account in assessing whether an activity is likely to significantly affect the environment: *Newcastle and Hunter Valley Speleological Society Inc v Upper*

Hunter Shire Council at [83]. In this case, the Council adopted the recommendations in the REF to move the western and southern boundaries of the dog off-leash area, so as to reduce the impact on seagrass beds.

238 The Council submitted that other mitigation measures recommended in the REF, such as monitoring of water quality, seagrasses and White's seahorse, increased compliance patrols by Council officers to ensure compliance with permitted dog access areas and times, and discontinuance of the trial on the basis of noncompliance by dog owners or detection of impacts on water quality, seagrasses or White's seahorse, were also adopted by the Council. However, as I have found earlier, this was not correct: the Council's resolution of 27 August 2019 did not adopt these other mitigation measures, including monitoring, enforcement of compliance and discontinuance of the trial in the event of noncompliance, but only those measures relating to moving and delineating the boundaries of the dog off-leash area.

239 The Council submits, therefore, that the Council discharged its duty under s 5.5(1) of the EPA Act, in considering the first activity of the dog off-leash area trial, to examine and take into account to the fullest extent possible the environmental impacts of that activity.

240 The Council submits further that the Council's determination that the activity of the dog off-leash area trial was not likely to significantly affect the environment, including the threatened *Posidonia australis* seagrass population in Pittwater and the threatened species of White's seahorse, was reasonably available to it on examination of the REF. The REF had so concluded and that conclusion, on the evidence and the analysis in the REF, was reasonable.

241 Insofar as the question of whether an EIS or SIS is required under s 5.7(1) of the EPA Act and s 221ZK of the *Fisheries Management Act* is a jurisdictional fact which the Court must decide for itself on the basis of the evidence before it, the Council submits that the evidence before the Court supports a negative answer to the question. The REF itself concluded that the activity is unlikely to have any significant or long-term negative environmental impacts provided the mitigation measures outlined in the REF are implemented and enforced during the trial. The REF was reviewed by Dr Marcus Lincoln-Smith, an ecologist

called by the Council, who also concluded that the activity was not likely to significantly affect the environment generally or the threatened *Posidonia australis* seagrass population in Pittwater or the threatened species of White's seahorse. Dr Lincoln-Smith's conclusions were based on implementing the mitigation measures of monitoring, enforcement of compliance, and discontinuance of the trial if there was noncompliance.

242 The Council submits, therefore, that the Council did not breach s 5.7(1) of the EPA Act by failing to obtain, examine and consider an EIS in respect of the activity of the dog off-leash area trial at Station Beach.

243 The Council contends that, to the extent that the second activity of dog on-leash use of Station Beach is subject to Pt 5 of the EPA Act, there was no additional requirement for the Council to consider the environmental impacts of that activity beyond the EIS that had already been undertaken with respect to the first activity of the dog off-leash area trial. The Council's assessment of the first activity was adequate and its determination that that activity was not likely to significantly affect the environment was reasonable. The same Councillors (with the exception of Councillor Harrison) voted in the second decision on 17 December 2019, some three and a half months after the first decision on 27 August 2019.

244 The Council submits that the dog on-leash use of Station Beach would restrict the movement of dogs compared with the dog off-leash area trial by the fact that dogs would be leashed. The movement of dogs would necessarily be constricted and controlled. Similarly, the ability for dogs to swim would be limited, if at all. Accordingly, a dog on-leash use of Station Beach is not a new "use" to that proposed by the dog off-leash trial, but a less intense and expansive version of that "use". Any impact was appropriately examined to the fullest extent possible at the time the Council considered the dog off-leash use, and no further or other consideration was required to discharge the duty imposed by s 5.5(1) of the EPA Act: see *Snowy Mountains Brumby Sustainability and Management Group Inc v The State of NSW* at [63].

245 The Council submits that, on the evidence before the Court, the dog on-leash use of Station Beach is not likely to significantly affect the environment

generally or the threatened *Posidonia australis* seagrass population in Pittwater or the threatened species of White's seahorse particularly. Dr Lincoln-Smith opined that the scale of any impact of the dog on-leash use of Station Beach would be relatively small and limited to physical damage associated with human and dog footprints, which could be adequately addressed by aligning access rules with those already proposed for the dog off-leash area trial. Dr Lincoln-Smith noted that at this stage there is not information available to demonstrate any impact. Impacts will be the subject of ongoing monitoring for which appropriate action can be taken as required.

246 The Council submits, therefore, that the Council also discharged its duty under s 5.5(1) in respect of the second activity of allowing dogs on-leash on Station Beach and did not breach its duty under s 5.7(1) by failing to obtain, examine and consider an EIS in respect of the second activity.

The Council breached its EIA duties under Pt 5 of the EPA Act

Part 5 applies to the use of Station Beach

247 The use of Station Beach for a dog off-leash area trial and to allow dogs on-leash are each an activity for which an approval of the Council is required to enable the activity to be carried out.

248 The use of the land above and below MHWM at Station Beach, in the designated dog off-leash area (enabled by the first decision of 27 August 2019) and in the designated dog on-leash area (enabled by the second decision of 17 December 2019), are each a "use of land" within paragraph (a) of the definition of "activity" in s 5.1, for the same reason as they are a use of land in paragraph (a) of the definition of "development" in s 1.5 of the EPA Act.

249 The exclusions in paragraphs (g) and (h) of the definition of "activity" in s 5.1 do not apply. Paragraphs (g) and (h) refer not to the generality of any provision in an environmental planning instrument, such as PLEP, requiring development consent to be obtained for development permitted only with consent or preventing the carrying out of development that is prohibited, but rather to the particularity of any requirement that development consent be obtained to carry out the activity concerned or that prevents that activity from being carried out: *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* at 372, 374, 377. If an activity

is an existing use under s 4.68, nothing in an environmental planning instrument prevents or requires consent to be obtained for the continuance of the activity. In these circumstances, the activity will not be one "for which development consent under Pt 4 is required" (within paragraph (g)) or one "that is prohibited under an environmental planning instrument" (within paragraph (h)).

250 In this case, although PLEP specifies that development for the purpose of recreation area is permitted only with consent on land in the RE1 zone and the E2 zone, the use of the land at Station Beach for the purpose of recreation area is able to be continued without consent needing to be obtained pursuant to s 4.68(1) of the EPA Act. Continuance of the use of the land at Station Beach for the purpose of recreation area is therefore not one for which development consent under Pt 4 is required, notwithstanding the provisions of PLEP that otherwise would require consent to be obtained for the carrying out of a use of land for that purpose.

251 The Council's decisions of 27 August 2019 to conduct the dog off-leash area trial at Station Beach and of 17 December 2019 to allow dogs on-leash at Station Beach are "approvals" as defined in s 5.1(1) of the EPA Act, in that they permit or authorise each activity. The concept of "approval" is defined in s 5.1(1) "in the widest of terms" and includes "a consent, licence or permission or any form of authorisation": see *Jarasius v Forestry Commission of NSW* at 95. The Council's decisions of 27 August 2019 and 17 December 2019 come within that definition. Each decision revokes or varies the order the Council had made in 1997 under s 14(1) of the *Companion Animals Act* prohibiting dogs on all beaches, so as to allow dogs either off-leash or on-leash in the designated areas on Station Beach. The first decision of 27 August 2019 also declares the designated area to be an off-leash area under s 13(6) of the *Companion Animals Act*. Each decision enables each activity to be carried out at Station Beach.

252 The Council is the "determining authority" as defined in s 5.1(1) of the EPA Act in that its approval is required in order to enable each activity, of conducting the dog off-leash area trial or allowing dogs on-leash at Station Beach, to be

carried out. Only the Council, as the relevant local authority, had power under the *Companion Animals Act* to revoke or vary the order under s 14(1) so as to allow dogs on Station Beach, whether off-leash or on-leash, and to declare under s 13(6) the designated area of Station Beach to be an off-leash area.

253 Accordingly, Pt 5 of the EPA Act applied to the Council's consideration of the activities of conducting the dog off-leash area trial and allowing dogs on-leash at Station Beach.

Duty to consider environmental impacts of activities

254 The purpose of Pt 5 of the EPA Act is to require determining authorities to consider the environmental impact of every activity to which Pt 5 applies. The level of environmental impact assessment varies depending on the activity, but every activity is required to be subject to some form of environmental impact assessment. As Meagher JA noted in *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* at 377:

> "the whole purpose of Part V is to subject each and every activity to its own particular and precise evaluation…The clear purpose of Part V is the protection of the environment, and it must be construed so as to further that purpose…".

255 Similarly in *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* at 360, Samuels JA observed:

> "The purpose of ss 110, 111 and 112 [now ss 5.1, 5.5 and 5.7] is to ensure that the possible effects upon the environment of a proposed activity are fully considered before the final decision is made... The purpose of s 110 [s 5.1] is to define various activities which, independently of one another, may attract the requirements of s 112 [s 5.7]."

256 Accordingly, the duties in Pt 5 to consider the environmental impact of an activity apply independently to each and every activity. Environmental impact assessment of one activity does not suffice as environmental impact assessment of another activity (*Liverpool City Council v Roads and Traffic Authority & Interlink Roads Pty Ltd* (1991) 74 LGRA 265), absent statutory entitlement to do so (such as was considered in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598).

257 To achieve this purpose, Pt 5 imposes two duties on determining authorities to consider the environmental impact of each and every activity before carrying out the activity or granting an approval to the activity. The overarching duty is in

s 5.5(1); this duty to "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of" the activity, applies to every consideration by the determining authority of the activity. The duty in s 5.7(1) is two fold. The first is an implied duty to determine whether an activity is likely to significantly affect the environment. This implied duty is always applicable. The second is an express duty, triggered by an affirmative answer to the threshold question required to be asked by the implied duty. If an activity is likely to significantly affect the environment, the determining authority is under an express duty not to carry out the activity or grant an approval to the activity unless it has obtained or been furnished with, and has examined and considered, an EIS in respect of the activity.

258 In discharging these duties in s 5.5 and s 5.7 of the EPA Act to consider the likely impact of an activity on the environment, the determining authority is required to take into account the factors in cl 228 of the EPA Regulation. These factors are to be considered in discharging both of the duties under s 5.5 and s 5.7: see *Prineas v Forestry Commission of NSW* (1983) 49 LGERA 402 at 412 (Land and Environment Court), this finding not being disturbed on appeal in *Prineas v Forestry Commission of NSW* (1984) 53 LGERA 160 (Court of Appeal).

259 Clause 228(1) and (2) of the EPA Regulation provide:

> "(1) For the purposes of Part 5 of the Act, the factors to be taken into account when consideration is being given to the likely impact of an activity on the environment include—
>
> (a) for activities of a kind for which specific guidelines are in force under this clause, the factors referred to in those guidelines, or
>
> (b) for any other kind of activity—
>
> (i) the factors referred to in the general guidelines in force under this clause, or
>
> (ii) if no such guidelines are in force, the factors referred to subclause (2).
>
> (2) The factors referred to in subclause (1)(b)(ii) are as follows—
>
> (a) any environmental impact on a community,
>
> (b) any transformation of a locality,
>
> (c) any environmental impact on the ecosystems of the locality,
>
> (d) any reduction of the aesthetic, recreational, scientific or other

environmental quality or value of a locality,

(e) any effect on a locality, place or building having aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance or other special value for present or future generations,

(f) any impact on the habitat of protected animals (within the meaning of the Biodiversity Conservation Act 2016),

(g) any endangering of any species of animal, plant or other form of life, whether living on land, in water or in the air,

(h) any long-term effects on the environment,

(i) any degradation of the quality of the environment,

(j) any risk to the safety of the environment,

(k) any reduction in the range of beneficial uses of the environment,

(l) any pollution of the environment,

(m) any environmental problems associated with the disposal of waste,

(n) any increased demands on resources (natural or otherwise) that are, or are likely to become, in short supply,

(o) any cumulative environmental effect with other existing or likely future activities,

(p) any impact on coastal processes and coastal hazards, including those under projected climate change conditions."

260 A number of points can be made about the duty in s 5.5(1) of the EPA Act:

(s) The duty in s 5.5(1) is imposed "for the purpose of obtaining the objects of this Act relating to the protection of the environment" and has effect "notwithstanding any other provisions of this Act or the provisions of any other Act or any instrument made under this or any other Act". Cripps J in *F Hannan Pty Ltd v Electricity Commission of NSW* (1983) 51 LGRA 353 at 365-366 noted the importance of s 5.5 (then s 111): "It is difficult to over-estimate the importance of s 111. The real intention of the legislature is made evident from the terms of s 111 itself. Compliance with its requirements is... pivotal to a proper working of Part 5 of the EPA Act". This statement was not disputed on appeal in *F Hannan Pty Ltd v Electricity Commission of NSW* (1983) 51 LGRA 369 and was later endorsed in *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* at 366. Compliance with the duty under s 5.5 is mandatory, not directory: *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* at 366; *Jarasius v Forestry Commission of NSW* at 96.

(t) The "activity" whose environmental impacts are to be considered by the determining authority is the particular activity proposed by the proponent: "The proponent must have the privilege of

selecting what he proposed to develop": *Prineas v Forestry Commission of NSW* (Court of Appeal) at 164. Similarly, "the nature and scope of a particular activity was necessarily delimited by the way in which the body proposing to carry out the activity (the proponent) described it and stated its objects and the manner of achieving those objects": *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* at [154].

(u) The duty is to "examine and take into account" the environmental impact of an activity. Both verbs require positive action by the determining authority. Examination of the environmental impact of an activity involves inspection, inquiry or investigation of the environmental impact (see Macquarie Dictionary definition). Taking into account involves not merely consideration of the environmental impact but also some responsiveness and reflectiveness to the environmental impact in the determining authority's decision-making. In *Willoughby City Council v Minister administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 at 29, Stein J observed: "The obligation imposed on a determining authority under s 111, to examine and take into account to the fullest extent reasonably practicable all matters likely to affect the environment, imposes a positive obligation to conduct a proper examination. It requires more than merely adverting to a relevant matter and this would be regarded as paying no more than 'lip service' to the obligation".

(v) The examination and taking into account of the environmental impact of an activity must be undertaken by the determining authority "in its consideration" of the activity: see, by analogy, *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 339.

(w) The phrase "to the fullest extent possible" sets a high standard, but one that is tempered by reasonableness, so that the phrase is to be read "as if the word 'reasonably' was inserted before ' possible'": *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* at 366. See also *Jarasius v Forestry Commission of NSW* at 96; *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* at [68]; *Oshlack v Rous Water* at [32].

(x) The duty imposed by s 5.5(1) is not restricted to any time frame, at least in relation to a determining authority that carries out an activity. A matter affecting or likely to affect the environment that first came to the attention of a determining authority after it had commenced to carry out the activity could not be ignored on that account: *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* at [70].

(y) The "environment" affected or likely to be affected by the carrying out of the activity is not only the site on which the activity is to be carried out but also "the geographic location in which it is to be carried out and the area of which it is physically a part": *Kivi*

v Forestry Commission of NSW (1992) 47 LGRA 38 at 47. It is permissible to go beyond the area in which the activity is proposed to be carried out and look at the whole undertaking of which the activity forms a part to understand the cumulative and continuing effect of the activity on the environment: *Kivi v Forestry Commission of NSW* at 47; *Jarasius v Forestry Commission of NSW* at 92; *Bailey v Forestry Commission of NSW* (1989) 67 LGRA 200 at 212.

261 A number of points can also be made about the duty under s 5.7(1) of the EPA Act:

(z) The duty on the determining authority under s 5.7(1) serves two important legislative purposes. First, it ensures that the determining authority will be well equipped with the necessary information on the environmental impact of the activity in order to make a fully informed and well-considered decision of whether it should carry out the activity or grant approval to carry out the activity. Second, it ensures that the relevant information with respect to the environmental impact of the activity will be made available to the public at large so that the public, conformably with the objects of the EPA Act, may participate in the decision-making process: *Warren v Electricity Commission of NSW* (1990) 130 LGERA 565 at 570.

(a) The duty on the determining authority under s 5.7(1) is mandatory and gives rise to a jurisdictional fact that the Court must determine for itself on the evidence before the Court of whether or not the activity is likely to significantly affect the environment: *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* (2013) 195 LGERA 229; [2013] NSWLEC 38 at [289]-[300] and see also *Parks and Playgrounds Movement Inc v Newcastle City Council* (2010) 179 LGERA 346; [2010] NSWLEC 231 at [132].

(b) Section 5.7(1) imposes an implied duty on the determining authority to determine the threshold question of whether an activity is likely to significantly affect the environment: *Bailey v Forestry Commission of NSW* at 211; *Rundle v Tweed Shire Council* (1989) 68 LGRA 308 at 330; *National Parks Association of NSW v Minister for the Environment* (1992) 130 LGERA 443 at 451; *Willoughby City Council v Minister administering the National Parks and Wildlife Act* at 29.

(c) The “activity” that is to be assessed in order to determine the likely significant effect on the environment is the activity described by the proponent, including any ameliorative measures incorporated as an integral part of the description of the activity, but not including any conditions that might be imposed by the determining authority on any approval granted to the activity: *Drummoyne Municipal Council v Maritime Services Board* (1991)

72 LGRA 186 at 192; *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* at [83].

(d) Whilst a proponent has the privilege of selecting what it proposes to be the activity, the activity cannot be a sham or a cover for a quite different type of activity: *Prineas v Forestry Commission of NSW* (Court of Appeal) at 164. A proponent also cannot segment a large or cumulative activity into smaller components, sometimes termed "salami slicing", in order to establish that each smaller component is not likely to significantly affect the environment and thereby bypass the obligation to prepare an EIS.

(e) The determining authority can also select the activity it proposes to assess for the purposes of s 5.7(1). However, the determining authority is not permitted to misdescribe the activity for the purposes of avoiding the duty imposed on it by s 5.7(1) and cl 228 of the EPA Regulation and thereafter use that misdescription to provide the parameters of the assessment required by s 5.7(1) and cl 228 of the EPA Regulation: *Liverpool City Council v Roads and Traffic Authority & Interlink Roads* at 273.

(f) The word "likely" means only a "real chance or possibility" and not "more probably than not": *Jarasius v Forestry Commission of NSW* at 94; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* at 163; *Bailey v Forestry Commission of NSW* at 211.

(g) The word "significantly" means "important" or "more than ordinary" (*Jarasius v Forestry Commission of NSW* at 93-94) and "a significant effect must be an important or notable effect on the environment, as compared with an effect which is something less than that, that is, non-significant or non-notable": *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* at 163; see also *Bailey v Forestry Commission of NSW* at 211 where Hemmings J summarised the test to determine whether an activity is likely to "significantly" affect the environment as being "whether it is 'important', 'notable', 'weighty' or 'more than ordinary'".

(h) Determining whether the activity is likely to "significantly" affect the environment requires consideration of both the potentially affected environment and the degree of the effects of the activity. In identifying the potentially affected environment, the affected area, whether local, regional, State, national or global, and its resources and biological components, including listed threatened species, populations and ecological communities and their habitats, need to be considered. Significance varies with the context or setting of the proposed activity. In the case of a site-specific activity, significance will usually depend on the effects on the site and the geographical area in which the site is located. In evaluating the degree of the effects, both short-term and long-term effects, and the factors in cl 228 of the EPA Regulation are

relevant to be considered. Other factors include the unique characteristics of the geographical area, such as proximity to an area that is ecologically significant; the degree to which the activity is likely to adversely affect a threatened species, population or ecological community; and whether the activity is related to other activities with individually insignificant but cumulatively significant impacts, so that it is reasonable to anticipate a cumulatively significant impact on the environment.

(i) Determining whether an activity is likely to "significantly" affect the environment includes examining at least two relevant factors: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area": *Hanly v Kleidienst* 471 F2d 823 at 830 (2d Cir, 1972) cited in *Bailey v Forestry Commission of NSW* at 211-212 and *Rundle v Tweed Shire Council* at 331-332.

(j) The word "affect" refers to "having an effect on". Effects involve changes to the environment caused by the activity. Effects include both direct, indirect and cumulative effects. Direct effects caused by the activity occur at the same time and place as the activity. Indirect effects caused by the activity may be later in time or farther removed in distance from the activity. A cumulative impact is an impact on the environment which results from the incremental impact of the activity when added to past, present and reasonably foreseeable future activities. Effects include ecological (such as effects on natural resources and on the components, structures and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or health effects. Effects include those described in cl 228(2) of the EPA Regulation.

(k) The "environment" includes not only those areas that are likely to be directly affected by the activity but also those areas that are likely to be indirectly affected. To this end, the environment includes not only the area in which the activity is proposed but also the geographical locality of which the area is physically a part: *Kivi v Forestry Commission of NSW* at 47.

The Council breached s 5.5 of the EPA Act with respect to the dog on-leash activity

262 I find that the Council breached s 5.5(1) of the EPA Act in its consideration and approval on 17 December 2019 of the activity of allowing dogs on-leash at Station Beach.

263 First, as a matter of fact, the Council did not even address the duty under s

5.5(1) before granting approval to the activity of allowing dogs on-leash at Station Beach. The report to the Council meeting on 17 December 2019 did not refer to the duty in s 5.5(1) to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity of allowing dogs on-leash at Station Beach, either in its terms or by reference to its substance. The report did not undertake any examination of any matters affecting or likely to affect the environment by reason of the activity. The only reference to "environmental considerations" in the report, uninformatively states: "If approved, the change would be managed in accordance with the Council's policies and relevant legislation such as the *Companion Animals Act 1998*". The report failed to refer to any of the factors in cl 228 of the EPA Regulation that are required to be taken into account when consideration is being given to the likely impact of an activity on the environment.

264 The report to the Council meeting on 17 December 2019 does not attach any other document that undertakes the required environmental assessment under s 5.5(1) or cl 228 of the EPA Regulation. The report does refer to the Council's first decision on 27 August 2019 approving the activity of the dog off-leash area trial at Station Beach and the report to that meeting on that activity. However, those references to the Council's decision and report do not import the assessment of the environmental impact of that activity that was undertaken in the REF or the report to the Council meeting on 27 August 2019. As I find below, the assessment that was undertaken of the likely environmental impact of the activity of conducting the dog off-leash area trial would not suffice to discharge the duty to assess the likely environmental impact of the different activity of allowing dogs on-leash at Station Beach. But the present point is that the report to the Council meeting on 17 December 2019 did not even attempt to apply the assessment of the likely environmental impact of the activity of the dog off-leash area trial in order to assess the likely environmental impact of the activity of allowing dogs on-leash.

265 The Council called no evidence to establish that at its meeting on 17 December 2019 there was any information other than the report to the meeting that was put before the Council, either in writing or verbally, assessing the environmental

impact of allowing dogs on-leash at Station Beach or that there was any discussion at the meeting on that topic. The minutes of the Council's meeting of 17 December 2019 only record the terms of the resolution of the Council and who voted for and against it.

266 I find on the evidence that the Council, in its consideration of the activity of allowing dogs on Station Beach, did not examine or take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity.

267 Secondly, if the Council could be seen to have brought to mind the assessment of the likely environmental impact of the activity of the dog off-leash area trial when it considered the activity of allowing dogs on-leash at Station Beach (which I do not find as a fact occurred), any such consideration did not discharge the Council's duty under s 5.5(1) to consider the environmental impact of the activity of allowing dogs on-leash at Station Beach. Such consideration was of a different activity, was neither an examination nor a taking into account, was not to the fullest extent possible, and was not a consideration of all matters affecting or likely to affect the environment by reason of the activity. I will explain each of these points.

268 The duty under s 5.5(1) to consider the environmental impact of an activity applies to each and every activity that a determining authority considers. An environmental assessment under 5.5(1) of one activity does not suffice to discharge the duty under s 5.5(1) to consider the environmental impact of another activity. Each and every activity requires its "own particular and precise evaluation" of the environment impact of the activity: *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* at 377 and see *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act (NSW) 1974* at 360.

269 In this case, the activities of conducting the dog off-leash area trial and allowing dogs on-leash at Station Beach are different in a number of respects:

(l) the first activity allows dogs off-leash while the second activity allows dogs on-leash;

(m) the first activity is a trial for 12 months while the second activity has no time limitation (the indication in the report that it would be replaced if a licence was granted to permit the first activity of the

dog off-leash area trial to proceed was not incorporated in the terms of the Council's decision approving the second activity of allowing dogs off-leash); and

(n) the boundaries of the first activity include a western boundary 3 metres landwards of the eastern extent of the seagrass beds and a southern boundary north of the *Posidonia australis* seagrass meadow, while the area of the second activity has no western boundary and has a southern boundary 110 metres further south so as to include the *Posidonia australis* seagrass meadow within the area.

270 Although not incorporated as conditions of the approval of the first activity, the REF for the first activity proposed other mitigation measures intended to protect the seagrass meadows from damage, including monitoring of the impacts of the trial on the seagrass meadows, increasing compliance patrols to enforce compliance with the trial's access areas, days and times, and stopping the trial if damage to the seagrass meadows is detected or noncompliance is recorded, while no such protective or mitigative measures were proposed to be implemented for the second activity.

271 Accordingly, the environmental assessment of the first activity of conducting the dog off-leash area trial, in the form of the REF, was an assessment of the environmental impact of the first activity, not of the second activity of allowing dogs on-leash at Station Beach, and did not comply with the requirements of s 5.5(1) of the EPA Act and cl 228 of the EPA Regulation to assess the likely environmental impact of the second activity: *Liverpool City Council v Roads and Traffic Authority & Interlink Roads* at 274.

272 The duty under s 5.5(1) required the Council, "in its consideration of an activity", to "examine and take into account" all matters affecting or likely to affect the environment by reason of that activity. This requires that the examination and taking into account of relevant matters be undertaken "in" the consideration of the activity: *Parramatta City Council v Hale* at 339. The Council's earlier examination and taking into account of the environmental impact of the first activity of conducting a dog off-leash area trial, therefore, could not discharge the duty under s 5.5(1) to examine and take into account the environmental impact of the second activity of allowing dogs on-leash, as such earlier consideration by the Council was not undertaken "in its consideration" of the

second activity.

273 The Council's consideration of the second activity of allowing dogs on-leash at Station Beach did not involve either an examination or a taking into account of the environmental impact of that activity. As to examination, s 5.5(1) "imposes a positive obligation to conduct a proper examination" of the environmental impact of the particular activity: *Willoughby City Council v Minister administering the National Parks and Wildlife Act* at 29. In this case, there was no examination of the environmental impact of the activity of allowing dogs on-leash at Station Beach at all, but rather only an examination of the environmental impact of conducting a dog off-leash area trial at Station Beach. As to taking into account, because the Council did not examine the environmental impact of the activity of allowing dogs on-leash at Station Beach, it also could not take into account the environmental impact of that activity. The Council did not have a sufficient understanding of all matters affecting or likely to affect the environment by reason of that activity and their significance to the decision required to be made under s 5.5(1), or undertake a process of evaluation sufficient to warrant the description of the matters being taken into account: *Weal v Bathurst City Council* (2000) 111 LGERA 181 at [13], [80].

274 The failure to take into account all relevant matters affecting or likely to affect the environment by reason of the activity of allowing dogs on-leash at Station Beach is demonstrated by the terms of the Council's decision to approve that activity. The REF for the first activity of conducting a dog off-leash area trial had recommended, in order to prevent and mitigate environmental harm to the seagrasses, fixing a western boundary 3 metres landwards of the eastern extent of the seagrass beds and the southern boundary north of the *Posidonia australis* seagrass meadow (which is part of the threatened *Posidonia australis* seagrass population in Pittwater). The Council's decision to approve the activity of allowing dogs on-leash at Station Beach was inconsistent with these recommended boundaries. No western boundary was fixed, so that there was no restriction on dogs and their owners entering and harming the seagrass beds, and the southern boundary was moved 110 metres southwards, so that dogs and owners could enter and harm the threatened *Posidonia australis* seagrass meadow close to the shore.

275 The REF for the first activity of conducting a dog off-leash area trial had also recommended other protective or mitigative measures, including monitoring of damage caused to the seagrass, increased compliance patrols to enforce compliance with the trial's access areas, days and times, and stopping the trial if damage to seagrass is detected or noncompliance by dog owners is recorded. The Council's decision approving the second activity of allowing dogs on-leash at Station Beach did not impose, by way of conditions of approval, any requirements to implement or enforce any of these protective or mitigative measures.

276 To approve the activity of allowing dogs on-leash in an area and on terms that are inconsistent with these recommended protective and mitigative measures evidences a failure to take into account all matters affecting or likely to affect the environment by reason of the activity: *Parramatta City Council v Hale* at 335, 339; *BP Australia Ltd v Campbelltown City Council* (1994) 83 LGERA 274 at 279; *Weal v Bathurst City Council* at [80].

277 The Council's examination and taking into account of the environmental impact of the activity of allowing dogs on-leash at Station Beach did not attain the standard required of being "to the fullest extent possible". Although this standard is tempered by the notion of reasonableness, the Council did not even achieve this standard of examination and taking into account "to the fullest extent reasonably possible". The Council could reasonably and practicably have examined and taken into account the environmental impacts of the particular activity of allowing dogs on-leash at Station Beach, but did not do so.

278 The Council's consideration of the activity of allowing dogs on-leash at Station Beach also failed to examine and take into account "all matters affecting or likely to affect the environment" by reason of that activity. The Council did not consider any of the factors in cl 228 of the EPA Act required to be taken into account when consideration is being given to the likely impacts of an activity on the environment. The Council needed to, but failed to, focus and frame its consideration of the likely environmental impact of the activity of allowing dogs on-leash at Station Beach by reference to these factors. The Council's consideration of the environmental impact of the different activity of conducting

a dog off-leash area trial at Station Beach was not sufficient. The Council, in the process of evaluation required by s 5.5(1), needed to have an understanding of the relevant factors in cl 228 as they applied to the particular activity of allowing dogs on-leash at Station Beach and the significance of the decision to be made about them: *Weal v Bathurst City Council* at [13], [80].

279 For these reasons, even if the Council brought to mind the earlier environmental assessment of the activity of conducting a dog off-leash area trial at Station Beach when it considered the activity of allowing dogs on-leash at Station Beach, it nevertheless breached its duty under s 5.5(1) to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity of allowing dogs on-leash at Station Beach.

The Council breached s 5.7 of the EPA Act with respect to the dog off-leash activity

280 The Group does not allege that the Council did not consider the environmental impact of the first activity of conducting the dog off-leash area trial, including by way of the REF, as required by s 5.5(1) of the EPA Act. The REF found that the trial "is unlikely to have any significant or long term negative environmental impacts providing the mitigation measures outlined in this REF are implemented and enforced during the trial". At its meeting on 27 August 2019, the Council considered the REF and the finding of no likely significant effect on the environment in determining to grant approval to the first activity. In doing so, the Council complied with the implied duty in s 5.7(1) to consider whether the first activity was likely to significantly affect the environment.

281 The Group does challenge, however, the finding that the first activity is not likely to significantly affect the environment. The Group contends that, on all of the evidence before the Court, the first activity in fact is likely to significantly affect the environment. The Group contends that the Council thereby breached the express duty in s 5.7(1) by granting approval to the first activity without having obtained, examined and considered an EIS in respect of the activity.

282 I agree for two sets of reasons. First, the actual finding in the REF of no likely significant effect on the environment was not adopted by the Council, so that

the Council did not in fact find that the activity of conducting the dog off-leash area trial that the Council approved was not likely to significantly affect the environment. Second, as a matter of jurisdictional fact, the activity of conducting the dog off-leash area trial that the Council approved was likely to significantly affect the environment. I will explain each of these sets of reasons.

283 As to the first reason, the finding in the REF that the proposed trial is unlikely to have any significant or long term negative environmental impacts was conditional upon "the mitigation measures outlined in this REF [being] implemented and enforced during the trial". The REF continued:

> "Strict implementation of the proposed mitigation measures is required to mitigate potential impacts on environmental sensitive species (including seagrasses and the White's seahorses (potentially)) from the proposed dog off -leash trial at Station Beach" (p 34).

284 The Council's decision approving the first activity did adopt the mitigation measures recommended in the REF concerning the boundaries of the dog off-leash area and the days and times that dogs are allowed off-leash in that area, but did not impose conditions of approval requiring implementation and enforcement of the other mitigation measures outlined in the REF. The terms of the Council's decision of 27 August 2019 are plain: the Council resolved simply to "conduct a dog off-leash area trial at Station Beach, Palm Beach for 12 months as outlined in the agenda report". The agenda report described "the main aspects of the trial" only in terms of the off-leash area boundaries, days and times. Neither the Council's resolution nor the agenda report incorporated as conditions on which the dog off-leash area trial was required to be conducted the mitigation measures outlined in the REF.

285 The condition on which the finding in the REF of no likely significant effect on the environment was dependent, therefore, was not satisfied. Without the Council adopting the REF's recommendation for implementation and enforcement of all of the mitigation measures outlined in the REF, the finding in the REF of no likely significant effect on the environment was not adopted by the Council.

286 The question raised by s 5.7(1) of whether the activity of conducting the dog off -leash area trial is likely to significantly affect the environment needed to be

answered with respect to the activity that was actually approved by the Council, not the activity with the mitigation measures outlined in the REF that was not approved by the Council. The breach of s 5.7(1) arises from the Council granting approval to an activity that is likely to significantly affect the environment, not from the Council not granting approval to an activity that is not likely to significantly affect the environment.

287 As to the second reason, when a proper assessment is made of the activity that was actually approved by the Council, the conclusion can readily be reached that that activity is likely to significantly affect the environment.

288 First, the effects of the activity of conducting the dog off-leash area trial include a range of impacts on the seagrass meadows, including areas of the threatened *Posidonia australis* seagrass population in Pittwater, and the habitat for the threatened species of White's seahorse. The impacts will be direct, such as by dogs and humans trampling, disturbing or damaging seagrasses and their surrounding soft sediment habitats. The REF identifies direct impacts as including trampling by people and dogs on seagrass plants leading to a loss of seagrass canopy through damaged leaves and, over long periods of time, a shortening of seagrass blades and seagrass plants having fewer shoots; dislodgment of flowers and fruits during reproductive seasons before they are mature leading to mortality; and disruption of the microtopography of sediments affecting seeding distribution (pp 20-21).

289 The impacts will also be indirect, such as by increased turbidity and sedimentation, decreased water quality, and colonisation of disturbed areas by invasive marine plants, such as *Caulerpa taxifolia*. The REF identifies indirect impacts as including increased disturbance of sediments (by trampling) leading to greater turbidity and lower light penetration, adversely affecting seagrass growth and the habitat of White's seahorse; introduction of nutrients and pathogens from dog faeces, both in the water column and in the immediate vicinity of the seagrass, during low tides when seagrass may be exposed; and spread of invasive species, such as *Caulerpa taxifolia*, by dogs (pp 20-21).

290 The impacts can occur immediately or over the short-term or long-term. Direct impacts can be experienced immediately or in the short-term, while indirect

impacts can be experienced in the short-term or long-term. An example of delayed effects on the environment are edge effects on seagrass beds caused by trampling by dogs and people, leading to incremental damage to seagrass and soft sediment habitats and colonisation by invasive species.

291 These impacts might be mitigated to some extent by the terms on which the activity of conducting the dog off-leash area trial at Station Beach was approved. The Council fixed the boundaries within which the dog off-leash area trial was to be conducted, including a western boundary 3 metres landwards of the eastern extent of seagrass beds closest to the shore and a southern boundary north of the *Posidonia australis* seagrass meadow close to the shore, so as to reduce the risk of dogs and people trampling, damaging or disturbing individual seagrass plants and beds. That risk nevertheless remains. The evidence of Dr Cummins is that both dogs and people do not comply with restrictions on dog off-leash use, including staying within the boundaries of the designated dog off-leash area. Dr Cummins said that this is evidenced in the literature and in her observations of Station Beach in January, March, May and June 2020. Dr Cummins concludes in her affidavit of 4 August 2020:

> "Given my observations about the lack of compliance with dog-leashing regulations and Station Beach and the findings of other studies of compliance in Australia…and overseas…, it is my opinion that there is no buffer zone design which is likely to be adequate to prevent dogs interacting with the sediment/seagrass habitats off Station Beach during the off-leash trial." (at [33])
> .

292 Both Ms Astles and the REF were alert to this risk of noncompliance with dog access areas and times; it was the basis for their respective recommendations for increased enforcement to ensure compliance with dog access areas, days and times.

293 The assessment of whether the activity of conducting the dog off-leash area trial at Station Beach is likely to significantly affect the environment needs, therefore, to be undertaken having regard to how the activity is likely to be carried out in practice. In circumstances where the activity approved by the Council does not include implementation and enforcement of the mitigation measures outlined in the REF, including increased compliance patrols by Council officers to ensure compliance with permitted dog access areas, days

and times, the activity to be assessed is one where noncompliance with the dog access areas, days and times is prevalent. The carrying out of that activity is likely to impact on individual seagrass plants and beds outside of the dog off-leash area by dogs and people not staying within the boundaries of the dog off-leash area.

294 The effects of that activity will also not be mitigated by implementation and enforcement of any of the other mitigation measures outlined in the REF, as none of these measures formed part of the activity that was approved by the Council. The REF recommended that the Council prepare a management plan (incorporating a monitoring program) for the proposed trial. At a minimum, the management plan should include all mitigation measures outlined in the REF and summarised in Table 6.1 (p 31). In relation to marine biodiversity, hydrology, water quality and sediment, Table 6.1 in the REF set out the mitigation measures for moving and delineating the boundaries of the dog off-leash area (which were adopted by the Council) as well as the following:

> "- Increased compliance patrols by Council officers to ensure compliance with permitted high tide swimming periods.
>
> - Carry out a seagrass, the White's seahorse and water quality monitoring during the trial event to assess potential impacts of the activity.
>
> - Install signs educating site visitors about *C. taxifolia*, including how to minimise its spread in the area should be placed at both ends of the site.
>
> - Monitor water quality through the trial period.
>
> - Install signs informing users that dogs must not be allowed to run through the seagrass beds.
>
> - Include erosion information on beach signage.
>
> - Increased compliance patrols by Council officers to ensure compliance with permitted dog access areas and times."

295 None of these mitigation measures were adopted by the Council as conditions on which it granted approval to the activity of the dog off-leash area trial. The Council also did not adopt the recommendation in the REF that the Council prepare a management plan incorporating a monitoring program. The REF had concluded that strict implementation of the proposed mitigation measures was required in order to mitigate potential impacts on the environmentally sensitive seagrasses and White's seahorse from the activity of the dog off-leash area trial (p 34), but the Council did not adopt this recommendation in granting

approval.

296 The Department of Primary Industries (Fisheries), in its comments on the REF in its letter of 14 August 2019, stated that it had no objections to the dog off-leash area trial proceeding provided that it was conducted on certain conditions, which were specified in the letter. Some of these conditions concerned fixing and delineating the boundaries of the dog off-leash area and the days and times of access to the area. Other conditions concerned installation of multiple signs providing information not only about dog access areas, days and times but also the ecological importance of seagrass beds and the endangered status of *Posidonia australis*; implementation of a seagrass monitoring program, increased compliance patrols to ensure compliance with dog access areas, days and times; and carrying out a fresh environmental assessment, including comparing multiple alternative locations for a dog off-leash area, before approving a permanent dog off-leash area at Station Beach. Again, the Council did not adopt these recommended conditions, other than those concerning the dog access areas, days and times, in granting approval to the dog off-leash area trial.

297 The consequence is that the direct and indirect environmental impacts of the activity of the dog off-leash area trial approved by the Council will not be mitigated by implementation and enforcement of the mitigation measures outlined in the REF or recommended by the Department of Primary Industries (Fisheries).

298 The evidence of Dr Lincoln-Smith, the ecologist called by the Council, is not to the contrary. Indeed, Dr Lincoln-Smith did not positively opine that the activity of conducting the dog off-leash area trial would not be likely to significantly affect the environment. The conclusions Dr Lincoln-Smith expressed in his affidavit of 12 June 2020 were limited to:

> "(a) The REF, including Ms Astles' field studies and reviewed by NSW DPI (Fisheries) provide a firm basis for assessing the likely impacts of the off-leash dog trial.
>
> (b) The REF and NSW Fisheries identify a variety of mitigative measures, including:
>
> - Restricted times of access.

- Informative signage and provision for collection and disposal of dog wastes.

- Implementation of a quantitative monitoring program (including seagrass surveys and water quality monitoring).

- Provision for discontinuation of the trial on the basis of non-compliance by dog-walkers, or detection of impacts to seagrasses or water quality.

(c) The design of the trial is consistent with the precautionary principle and provides for protection to Type 1 Key Fish Habitat and matters regarding threatened species and populations." (at [103])

299 Dr Lincoln-Smith's oral evidence was to similar effect. Critically, Dr Lincoln-Smith's opinions are based on his belief that the Council approved the dog off-leash area trial on conditions requiring implementation and enforcement of the mitigation measures recommended in the REF and by NSW DPI (Fisheries), particularly implementation of a monitoring program and compliance measures (see for example his oral evidence at T 21/10/20 pp 100-101). Unfortunately, other than the mitigation measures relating to the dog off-leash trial's areas, days and times of access, the activity of conducting the dog off-leash area trial that was approved by the Council did not include these protective and mitigative measures. Dr Lincoln-Smith's opinion of the likely impacts of the activity is therefore based on an incorrect assumption.

300 Secondly, these effects of the activity of conducting the dog off-leash area trial are "likely" in the sense that there is a real chance or possibility of the effect occurring. The direct impacts, such as trampling, dislodgment of seagrass flowers and fruits, and disruption of the microtopography of sediments, are an inevitable consequence of having dogs and people walking, swimming and otherwise being present on the land below MHWM covered by tidal waters at Station Beach.

301 The REF notes that the average distance between the water's edge and seagrass edge at spring high tide is 20.96 metres compared to 4.53 metres at spring low tide, with the average depth of seagrass being 1.42 metres and 0.04 metres respectively. The beach width at spring high tide is narrow (average 9.32 metres) and wide at spring low tide (average 30.65m), confirming that the seagrass habitat and its surrounding soft sediment habitat is more accessible to dog and human encounter at low tide (p 20).

302 The REF notes that the likelihood of disturbance caused by dogs swimming

during high tide at the scale of individual seagrass plants is low. However, the likelihood of disturbance by dogs swimming during low tide at the scale of individual plants and beds for the seagrass *Posidonia australis* is “very high”, as it has low capacity to respond to disturbance, while the likelihood of disturbance for the seagrasses *Zostera muelleri* and *Halophila ovalis* is “ moderate to high” at the scale of individual plants, as they occur in shallower water and are likely to be trampled (p 21).

303 The likelihood of the indirect impacts earlier identified is less than the likelihood of the direct impacts, by reason of the impacts being indirect. Nevertheless, the occurrence of the indirect impacts is still a real chance or possibility, and hence “likely” for the purpose of s 5.7(1) of the EPA Act.

304 Thirdly, these direct and indirect impacts of the activity of conducting the dog off-leash area trial at Station Beach are likely to be “significant”, “important”, “ notable”, “weighty”, or “more than ordinary”.

305 The context or setting of the activity is the ecologically significant and sensitive marine environment off Station Beach. The REF records:

> “The largest bed of seagrass in Pittwater Estuary is located off Station Beach, covering an area of 879,000m2 and representing 47% of the total area of seagrass within the estuary. Seagrass at Station Beach estuarine area is dominated by a mix of *P. australis* and *Z. muelleri* covering an area of 719,000m2, 92.7% of all mixed plants in Pittwater.
>
> *P. australis* in Pittwater Estuary is part of the Hawkesbury-Manning Bioregion, and is listed as a threatened ecological community under the EPBC Act. The seagrass in Pittwater Estuary is the largest community in the bioregion by area, making up 56.3% of the seagrass in the Hawkesbury Estuary. The seagrass beds off Station Beach is the largest continuous bed of seagrass in Pittwater Estuary.
>
> Astles (2019) calculated that the potential dog swimming area covers approximately 35,901m2 including the beach and out into the water (in line with the end of the wharf). Approximately 28,720m2 of this area (approximately 65% of the total study area contains seagrass).
>
> Seagrass located within the potential dog swimming area was calculated to be 2.11% of the total seagrass bed off Station Beach with which it forms a continuous bed of seagrass. In relation to the spatial area of *P. australis* and *Z. muelleri* within the dog swimming area, it covers an area of approximately 3,633m2 that represents 0.46% and 0.49% of the total spatial area of *P. australis/Z. muelleri* in Pittwater Estuary and Station Beach respectively.” (at p 19).

306 As earlier noted, the severity or intensity of the direct and indirect impacts of

the activity of conducting the dog off-leash area trial on the environment is increased by the unique characteristics of the environment within which the activity is proposed to be carried out. Some of the seagrass beds off Station Beach are areas of the threatened *Posidonia australis* seagrass population in Pittwater. *Posidonia australis* seagrass beds generally occur to the west of the mixed seagrass beds of *Zostera muelleri* and *Halophila ovalis* but in the south in a section near Beach Road a *Posidonia australis* seagrass bed displaces the mixed seagrass beds and comes close to the shore. These seagrass beds, particularly the *Posidonia australis* seagrass beds, are essential habitat of the threatened species of White's seahorse. The carrying out of the activity of conducting a dog off-leash area trial in this ecologically significant and sensitive marine environment is more likely to significantly affect the environment than if the same activity were to be carried out in a less ecologically significant and sensitive marine environment.

307 In determining whether an activity is likely to significantly affect a threatened species, population or ecological community listed under the *Fisheries Management Act,* the factors in the seven part test in s 221ZV are to be taken into account. The REF itself did not undertake such an assessment of significance for either the threatened *Posidonia australis* seagrass population in Pittwater or the threatened species of White's seahorse, but instead relied on the assessments of significance undertaken by Ms Astles. Ms Astles' assessments of significance in her report in section 5.2.1 (for the threatened *Posidonia australis* seagrass population in Pittwater) and section 5.2.3 for the threatened species of White's seahorse) do not ask the correct question and are contingent on determining the level of disturbance.

308 The assessments do not ask the correct question of whether the activity (which is inadequately defined and described in the report) is likely to have a significant effect on the threatened population or threatened species or their habitats, but instead focuses only on those factors in the seven part test that are relevant to a threatened population or threatened species. Consideration of merely those factors is necessary, but not sufficient. There may be other factors and circumstances relevant to the inquiry which are not specifically contained in any of the factors in the seven part test. A positive or negative

answer to any one of the factors in the seven part test does not mandate a like answer to the question of whether there is likely to be a significant effect on the threatened species, population or ecological community: *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* at [85]-[86].

309 In any event, Ms Astles did not directly answer the question raised in each factor she considered for the threatened population or threatened species. For the threatened *Posidonia australis* seagrass population in Pittwater, Mr Astles answered the question raised by the only factor that she considered (paragraph (b)) by saying that "the risk of extinction of the local population of *P. australis* from disturbance by dogs swimming alone is low". This answer is unhelpful. The question raised by paragraph (b) is whether the proposed activity is likely to have an adverse effect on the lifecycle of the species that constitutes the endangered population such that a viable local population of the species is likely to be placed at risk of extinction. Ms Astles' answer is to the second part of this question, although not in the terms of that part of the question, but does not address the first part of the question. Ms Astles' answer also only focuses on one aspect of the activity of conducting a dog off-leash area trial, being " dogs swimming alone", and not the whole activity. Ms Astles does not elsewhere address whether the whole activity is likely to significantly affect the threatened *Posidonia australis* seagrass population in Pittwater.

310 Finally, Ms Astles qualifies her answer that the risk of extinction of the local population of *Posidonia australis* is low by saying that this "depends on the level of disturbance occurring as per section 4.3 of this report". Section 4.3 of her report identifies the factors contributing to the level of disturbance by dogs and their owners, but does not come to any conclusion as to what is the level of disturbance. This is the reason for Ms Astles qualifying her answer to the question of whether the activity is likely to significantly affect the *Posidonia australis* seagrass population in Pittwater. The likely significant effect of the activity all depends on the level of disturbance of the activity, but Ms Astles did not know what that level of disturbance would be. Here is what Ms Astles said about the uncertainty concerning the level of disturbance:

> "Whether the interaction between dogs, their owners and seagrass habitats is substantial enough to cause damage to this seagrass and the surrounding soft

> sediments depends on the intensity of dog activity, frequency, duration and timing, spatial extent, level of compliance to rules and the cumulative effects with other human disturbances in the area. Intensity would be determined by the number and size of dogs using the area, type of activity they engaged in (eg walking, running, swimming, see Figure 5) and whether their owners also participated in the activity with their dog in the habitats. Frequency, duration and timing relates to how many week days or weekend days per month the dog swimming area was used, whether this varies during school holidays, public holidays and between winter and summer, how many days the DSA was used per day and any differences [in] the use between morning and evening. Spatial extent relates to where in the dogs swimming area dogs and their owners spend most of their time (eg shallow versus deep). Level of compliance relates to the extent to which dog owners use the DSA during low tide and/or outside the designated area. Finally there are other human disturbances having an impact on the seagrass and soft sediment habitats along Station Beach (eg propeller, mooring, and anchor scarring) and therefore any additional impacts that may be caused by dogs swimming need to be included in assessing the cumulative pressures on the habitats in the area (Grech et al, 2011).
>
> An appropriately designed study that specifically collects data for these factors would be needed to determine the level of disturbance by dogs within the DSA at Station Beach compared to control areas. During three site visits made to Station Beach for this report, dogs and their owners were observed on the beach despite the fact that there are signs prohibiting dogs on the beach. The number of dogs observed per visit over a three hour period was 2, 3 and 3 and there was evidence of other dogs based on fresh footprints in the sand along the beach. Dogs were medium to large in size and all the dogs were off their leash. This indicates that compliance to the rules of a DSA might be a significant issue. There are approximately 50,000 dogs in the Pittwater area (Northern Beaches Council pers.comm.) so the potential for more dogs to be using this area is substantial." (pp 11-12)

311 As Ms Astles was unable to determine the level of disturbance caused by the activity, she was unable to assess the likely significance of the effects of the activity on any threatened population or threatened species.

312 For the threatened species of White's seahorse, Ms Astles merged the questions raised by two factors (paragraphs (a) and (d)) but did not directly answer the questions raised by the factors, instead engaging in a general discussion of the subject matter of the factors. Again, Ms Astles' discussion of the factors is qualified by her statement that the likely impact "depends on the level of disturbance (see section 4.3 above)". That section, as earlier noted, does not determine the level of disturbance but instead merely raises questions about what is the level of disturbance.

313 Nowhere in the discussion of either the threatened *Posidonia australis* seagrass population in Pittwater or the threatened species of White's seahorse

does Ms Astles directly answer the question of whether the activity of conducting the dog off-leash area trial is likely to significantly affect the threatened population or the threatened species. The discussion skirts around that threshold question.

314 There is, however, some indication that Ms Astles considered the activity might have a sufficiently significant effect on the threatened population and the threatened species as to be unacceptable. In her conclusion in the report, Ms Astles recommends:

> "(a) Given the widespread damage to the seagrass bed from other human disturbances off Station Beach, any further damage from disturbances by dog swimming should be avoided. This would be consistent with the conservation advice for *P. australis* ecological community in Pittwater from the Commonwealth of Australia Department of the Environment (2015)...
>
> (b) Serious consideration should be given to whether the introduction of a dog swimming area at Station Beach adjacent to the largest seagrass bed in the Pittwater Estuary is consistent with the intent of the legislative and policy commitments provided in section 2.1.1. of this report and Northern Beach Council own Draft Pittwater Waterway Strategy." (p 27)

315 Ms Astles recommended implementation of mitigation measures, summarised in paragraph (e), only if the "dog swimming/activity" is permitted, a course Ms Astles had recommended against in paragraphs (a) and (b).

316 Dr Cummins undertook her own assessment of whether the activity of conducting the dog off-leash area trial is likely to significantly affect the environment and concluded that it would:

> "In my opinion the impacts associated with access to sediment/seagrass habitats within the proposed Trial Area by dogs (set out above) are very likely to have a significant impact on many species, including *P. australis, Zostera* and White's seahorse, in those habitats immediately adjacent to Station Beach. By contrast, the sediment/seagrass habitats found in adjacent areas at similar depths that are not exposed to such activities will not suffer this impact. A key reason for me coming to this opinion is that the on-leash [sic off-leash] use will in my opinion by very likely to significantly alter the distribution (ie percentage cover and size of patches of mostly *P. australis* and *Zostera*) and species composition (eg diversity and the presence/absence of non-native species such as *Caulerpa taxifolia*) of sediment/seagrass habitats and their ecological communities (including the White's seahorse), in relation to sediment/seagrass habitats found in adjacent areas at similar depths that are not exposed to such activity. Based on the literature I refer to in this affidavit, in my opinion, this is very likely to diminish the capacity of the soft sediment and seagrass habitats within the Trial Area, and the ecological communities to recolonise after disturbance (if at all) and affect the stability of the *P. australis* meadow further from the shore." ([62] of Dr Cummins' affidavit of 27 March 2020]).

317 Dr Cummins later applied the seven part test in s 221ZV of the *Fisheries Management Act* to assess whether each activity of conducting the dog off-leash area trial or allowing dogs on-leash at Station Beach is likely to significantly affect the threatened *Posidonia australis* seagrass population in Pittwater or the threatened species of White's seahorse. Dr Cummins concluded:

> "Considering the 'seven part tests' set out in Annexure A, together with the matters set out in my affidavit of 27 March 2020, does not cause me to change any reasoning or conclusion of my earlier affidavit, but rather confirms, for me, the conclusions I have expressed in that earlier affidavit that the on-leash use and the proposed off-leash use are each likely to have a significant impact on the environment by reason of the potential impacts on each of the following:
>
> (a) The *Posidonia australis* seagrass population in Pittwater;
>
> (b) The seahorse species *Hippocampus whitei* (White's seahorse)." ([7] of Dr Cummins' affidavit of 2 April 2020).

318 In both her written and oral evidence, Dr Cummins maintained that this likely significant effect on the threatened population and threatened species would occur, notwithstanding that the boundaries of the dog off-leash area are clear of the *Posidonia australis* meadows, because off-leash dogs will not stay within the boundaries of the off-leash area. Dr Cummins referred to studies reporting low rates of compliance with dog access areas, days and times, which accorded with her own observations at Station Beach.

319 As I have earlier noted, Dr Lincoln-Smith did not expressly state that the activity of conducting the dog off-leash area trial would not be likely to significantly affect the environment generally, or the threatened *Posidonia australis* population in Pittwater or the threatened species of White's seahorse particularly. Dr Lincoln-Smith's opinions about the environmental effects of the dog off-leash activity were based on his understanding that the activity involved implementation and enforcement of all of the mitigation measures recommended in the REF and by the Department of Primary Industry (Fisheries), which was not the case.

320 Finally, the intensity of the impacts of the activity of conducting the dog off-leash area trial is also increased by the impacts being cumulatively significant, both in terms of aggregation of the direct and indirect impacts of the activity as well as in terms of the impacts of that activity being accumulated with the

impacts of other existing uses, including propeller, mooring and anchoring scarring and shading. Ms Astles noted in her report that:

> "The potential impacts of dogs and their owners in seagrasses and soft sediment intertidal habitats listed above would add to these existing impacts. Therefore, the overall cumulative impact on these intertidal habitats off Station Beach from multiple human activities needs to be taken into consideration… when assessing the effects of allowing dogs swimming on the beach" (p 8).

321 Unfortunately, neither Ms Astles nor the REF assessed this overall cumulative impact on these intertidal habitats off Station Beach.

322 In conclusion, on all of the evidence, the activity of the dog off-leash area trial approved by the Council is likely to significantly affect the environment. In these circumstances, the Council breached s 5.7(1) of the EPA Act by granting approval to the activity without having obtained or been furnished with, and having examined and considered, an EIS in respect of the activity.

The Council breached s 5.7 of the EPA Act with respect to the dog on-leash activity

323 I have earlier found that the Council breached s 5.5(1) of the EPA Act by failing, in its consideration and approval of the activity of allowing dogs on-leash at Station Beach, to examine and take account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity. This finding also means that the Council breached the implied duty under s 5.7(1) of the EPA Act to consider whether that activity was likely to significantly affect the environment. The Council simply never addressed the environmental impact of that activity. The report to the Council meeting on 17 December 2019 did not consider the environmental impact of the activity or assess whether the activity was likely to significantly affect the environment generally or the threatened *Posidonia australis* seagrass community in Pittwater or the threatened species of White's seahorse particularly. No other information assessing the environmental impact of the activity was put before the Council at the meeting and there is no evidence that the Council discussed that topic at the meeting.

324 The Council thereby breached the implied duty in s 5.7(1) by not considering whether the activity of allowing dogs on-leash at Station Beach, to which the Council granted approval on 17 December 2019, is likely to significantly affect

the environment.

325 I also find that, as a matter of jurisdictional fact, the activity of allowing dogs on-leash at Station Beach, that was approved by the Council, is likely to significantly affect the environment.

326 First, the activity that was approved by the Council is in an area and on terms that are inconsistent with the mitigation measures recommended in the REF and by the Department of Primary Industries (Fisheries) for the dog off-leash area trial. The REF, adopting the recommendations of Ms Astles, and the Department of Primary Industries (Fisheries) recommended that the western boundary of the dog off-leash area be moved 3 metres landwards of the eastern extent of the seagrass beds and the southern boundary be moved northwards to be clear of the *Posidonia australis* seagrass meadow, that these boundaries be clearly signposted and delineated, that dog owners be warned not to allow their dogs to move outside of the boundaries of the dog off-leash area, and that compliance with the dog off-leash area be strictly enforced. These protective and mitigative measures relating to the boundaries of the dog off-leash area were seen to be fundamental to mitigating the risk of harm to the seagrasses and their soft sediment habitat off Station Beach.

327 The Council's decision of 17 December 2019 approved the dog on-leash activity in an area that is inconsistent with these protective and mitigative measures. The on-leash area has no western boundary at all, so that there is no restriction on dogs and their owners trampling, damaging or disturbing seagrasses and their soft sediment habitat off Station Beach, and a southern boundary 110 metres south, so that the *Posidonia australis* seagrass meadow close to the shore is within the area and readily able to be accessed by dogs and their owners. Without limiting the boundaries of the area as recommended by Ms Astles, the REF and Department of Primary Industries (Fisheries), the adverse environmental impacts on individual seagrass plants and beds and their soft sediment habitat, and on the threatened *Posidonia australis* seagrass population in Pittwater and White's seahorse, are very likely to occur.

328 The activity of allowing dogs on-leash at Station Beach approved by the Council also did not adopt the other mitigation measures recommended by Ms

Astles, the REF and the Department of Primary Industries (Fisheries), including preparation of a management plan (incorporating a monitoring program); installing informative signage not only notifying of the dog on-leash access areas, days and times but also educating site visitors about the ecological significance and endangered status of seagrass in Pittwater and the threats to it; monitoring of water quality, seagrass and White's seahorse to assess the impacts of the activity; increasing compliance patrols by Council officers to ensure compliance with permitted dog access areas, days and times; and stopping the activity if monitoring records environmental damage or there is noncompliance with dog access areas, days and times. None of these mitigation measures recommended for the dog off-leash activity were adopted for the dog on-leash activity. The Council approved the activity of allowing dog on-leash in the area and on the days and times described in the report to the Council meeting on 17 December 2019, but otherwise did so unconditionally.

329 Secondly, the effects of the activity as approved will include all of the direct and indirect impacts of the activity of conducting the dog off-leash area trial that have earlier been identified. Insofar as the boundaries of the dog on-leash area do not exclude dogs and their owners accessing and hence trampling, damaging or disturbing areas of seagrass and its soft sediment habitat, including the threatened *Posidonia australis* seagrass beds, the impacts of the dog on-leash activity may be greater than those of the dog off-leash activity.

330 The fact that the activity requires dogs to be on-leash, rather than off-leash, may not be a mitigating factor. There is no evidence that dogs on-leash will have less impact than dogs off-leash. Indeed, the impact might be greater because not only the dog but also the dog owner holding the dog on-leash will access the marine environment, doubling the impact of trampling, damaging or disturbing seagrass and its soft sediment habitat.

331 It is possible that the requirement that dogs be on-leash might limit the western extent to which dogs on-leash might move, as the water becomes deeper to the west and the dog owner holding the leash may not wish to enter deeper water, but this assumes compliance with the restrictions that dogs be on-leash. As both Ms Astles in her report and Dr Cummins in her evidence record,

noncompliance with restrictions that dogs be on-leash is prevalent.

332 This has been the experience of allowing dogs on-leash at Station Beach so far. Dr Cummins observed in her inspections of Station Beach in January and March 2020 that compliance with the dog leashing requirement was "low". Over the five survey days in January and March 2020, Dr Cummins observed that of the 299 dogs observed on the beach, 53% were off-leash. She estimated 40% of the 299 dogs walked or swam (depending on the tide) on-leash or off-leash in the seagrass meadows with their owners (at [69], [70] of Dr Cummins' affidavit of 27 March 2020). Dr Cummins observed owners walking their dogs, both off-leash and on-leash, into the water when the tide allowed this. At other times, she observed dog owners leading their dogs, both off-leash and on-leash, onto the seagrass beds beyond the 3 metre buffer zone that had been proposed for the dog off-leash area trial (but not for the dog on-leash activity). She observed dogs, both off-leash and on-leash, walking and swimming within the seagrass beds ([66], [67] of Dr Cummins' affidavit of 27 March 2020).

333 These observations of noncompliance were corroborated by Dr Cummins' later surveys, over 4 days, in May and June 2020. Dr Cummins observed 338 dogs on the beach over 4 days in May and June 2020, of which 77% of dogs did not comply with the dog on-leash access area, day or time requirements. Specifically, 65% of dogs were off-leash on the beach and 9% were on-leash but outside the on-leash area access days and times. Of the 338 dogs she observed at Station Beach in May and June 2020, she estimated that 42% entered the water and 14% walked, ran or swam (depending on the tide) on-leash or off-leash within seagrass and surrounding soft sediment habitat, sometimes with their owners ([8], [9] of Dr Cummins affidavit of 4 August 2020).

334 Dr Cummins concluded, from these observations in January, March, May and June 2020, that:

> "The results show that compliance to the rules of the Station Beach On-Leash Dog Area Concept Plan is a significant issue. Of the total number of dogs (638 dogs) that I observed on Station Beach over the 9 survey days, 77% (484 dogs) did not comply with the regulations of the Station Beach On-Leash Dog Area Concept Plan. Moreover, the number of off-leash dogs I observed on the beach each day has increased significantly since the January/March 2020 survey period. Similarly, when McGuire et al (2018) examined differences in space use of dogs along multiple beaches west of Melbourne, she found that

> regardless of the dog management regulations, unleashed dogs were more common that leashed dogs on beaches (overall, 23.8% were leashed of 2,698 dogs observed)." (at [15] of Dr Cummins' affidavit of 4 August 2020).

335 In the absence of conditions of approval of the dog on-leash activity requiring strict implementation and enforcement of the on-leash requirement (the approval of the dog on-leash activity did not impose such conditions), the likelihood is that many dogs will be allowed to roam off-leash, with no limitation on their accessing seagrass beds and their soft sediment habitats anywhere off Station Beach.

336 Adverse effects on these seagrass beds and the soft sediment habitats are therefore to be expected by reason of the dog on-leash activity. Impacts observed by Dr Cummins of dog use of Station Beach in her surveys in January and March 2020 and again in May and June 2020, include numerous dog and human footprints on the sand at low tide, often as deep indentations in soft sediment and seagrass habitat, and dogs defecating on the sand, in the water and on seagrasses ([71]-[72] of Dr Cummins' affidavit of 27 March 2020, and [9]-[10] of Dr Cummins' affidavit of 4 August 2020).

337 The other direct and indirect impacts of dogs and humans trampling, damaging and disturbing individual seagrass plants and beds and their soft sediment habitats, which I have earlier described, are likely to occur.

338 Thirdly, these adverse effects of the activity of allowing dogs on-leash at Station Beach are "likely", in the sense that there is a real chance or possibility of the effects occurring by reason of the activity.

339 Fourthly, these adverse effects are likely to be "significant", in the sense that they are "important", "notable", "weighty" or "more than ordinary", for the same reasons that the adverse effects of conducting the dog off-leash area trial are likely to significantly affect the environment. The reasons I gave for reaching that conclusion are equally applicable here. I note that Dr Cummins in her evidence found that the dog on-leash activity is likely to significantly affect the environment:

> "For the reasons above, it is my opinion that dogs on-leash at Station Beach, with the ability of those dogs to access the sediment and seagrass areas off the beach, are highly likely to have a significant impact on many species, including *P. australis, Zostera* and White's seahorse in those habitats

> immediately adjacent to Station Beach. By contrast, the sediment/seagrass habitats found in adjacent areas at similar depths that are not exposed to such activities will not suffer that impact. A key reasons for me coming to this opinion is that the on leash use will in my opinion be very likely to significantly alter the distribution (ie percentage cover and size of mostly *P. australis* and *Zostera*) and species composition (eg diversity and the presence/absence of non-native species such as *Caulerpa taxifolia*) of sediment/seagrass habitats and their ecological communities (including the White's seahorse), in relation to sediments/seagrass habitats found in adjacent areas at similarly depths that are not exposed to such activity.
>
> Given the widespread damage to the seagrass meadow off Station Beach from numerous human disturbances, and that seagrasses are important foundation species in shallow marine ecosystems and provide critical ecosystem services (including stabilising sediments, sequestering carbon and providing habitat and an energy source for a diverse fauna), and that recovery after disturbance is not assured and may take a long time to occur (if at all), the current use of Station Beach by dogs, in my opinion, should cease to avoid any further harm to the seagrass and the White's seahorse. This would be consistent with conservation advice for the *P. australis* ecological community in Pittwater from the Commonwealth of Australia Department of the Environment and Energy (2018)." (at [73], [74] of Dr Cummins' affidavit of 27 March 2020).

340 As earlier quoted, Dr Cummins also found, after applying the seven part test in s 221ZV of the *Fisheries Management Act,* that the dog on-leash activity is likely to significantly impact the threatened *Posidonia australis* seagrass population in Pittwater and the threatened species of White's seahorse ([7] of Dr Cummins' affidavit of 2 April 2020).

341 Dr Lincoln-Smith queried some of the statements of opinion of Dr Cummins, but he did not positively assert that the dog on-leash activity is not likely to significantly affect the environment. At most, he said that he had not seen information establishing that the dog on-leash activity at Station Beach has caused environmental impacts. For example, Dr Lincoln-Smith said:

> "In my opinion, dogs on-leash currently have potential to affect seagrasses within the available designated for on-leash access, but at this stage there is no information available to demonstrate any impact" ([99] of Dr Lincoln-Smith's affidavit of 12 June 2020).

342 In oral evidence, Dr Lincoln-Smith similarly said:

> "I do accept that the field studies that Dr Cummins undertook this year show extensive use of Station Beach by dogs, many of which were off-leash. I think that is really useful information. However, there were no concurrent ecological studies, other than taking photographs of trampling. So we don't actually know what impact that had to the seagrasses in terms of a quantitative assessment." (T 21/10/20 p 101).

343 Of course, this lack of information on the impact of the current dog on-leash

activity at Station Beach is an inevitable consequence of the Council not having obtained, examined and considered any environmental assessment of the impact of that activity on the environment before granting approval to the activity and the Council having approved the activity without imposing any conditions requiring monitoring of the impact of the activity on the environment. It is a case of "if you don't look, you will not find".

344 Dr Lincoln-Smith's opinions about the potential impact of the dog on-leash activity in the future are also qualified by his belief that the mitigation measures proposed in the REF and by the Department of Primary Industries (Fisheries) will be implemented and enforced, see for example his conclusion at [103] of his affidavit of 12 June 2020). This belief is incorrect, as the Council approved the on-leash activity with no conditions requiring implementation and enforcement of these mitigation measures.

345 I find, therefore, as a jurisdictional fact, that the activity of allowing dogs on-leash at Station Beach, which was approved by the Council on 17 December 2019, is likely to significantly affect the environment generally and the threatened *Posidonia australis* seagrass community in Pittwater and the threatened species of White's seahorse particularly. The Council breached s 5.7(1) of the EPA Act in granting approval to this activity without having obtained or been furnished with, and having examined and considered, an EIS in respect of the activity.

Conclusion and orders

346 I have found that the Council:

(o) has not breached s 4.2 or s 4.3 of the EPA Act by making the decision on 27 August 2019 to conduct the dog off-leash area trial at Station Beach or the decision on 17 December 2019 to allow dogs on-leash at Station Beach;

(p) has breached s 5.5(1) of the EPA Act, in considering and determining to approve on 17 December 2019 the activity of allowing dogs on-leash at Station Beach, by not examining and taking into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity;

(q) has breached s 5.7(1) of the EPA Act, in granting approval on 27 August 2019 to the activity of conducting the dog off-leash area

trial at Station Beach without having obtained or been furnished with, and having examined and considered, an EIS in respect of that activity;

(r) has breached s 5.7(1) of the EPA Act by:

(vii) not determining whether the activity of allowing dogs on-leash at Station Beach is likely to significantly affect the environment; and

(viii) granting approval on 17 December 2019 to the activity of allowing dogs on-leash at Station Beach without having obtained or been furnished with, and having examined and considered, an EIS in respect of that activity.

347 Declarations to the effect of these findings in paragraphs (b), (c) and (d) should be made.

348 The Group also seeks orders quashing or setting aside the Council's decisions of 27 August 2019 and 17 December 2019 as being invalid for jurisdictional error and being of no legal force or effect. The Council does not contest the Court making such orders if a breach of the EPA Act be found by the Court. Such orders are appropriate. The decisions were made in breach of s 5.5 and s 5.7 of the EPA Act and are invalid.

349 The Group seeks injunctive orders restraining the carrying out of each activity. Such injunctive orders are problematic. The use of Station Beach for either the dog off-leash activity or the dog on-leash activity is carried out primarily by the public, an undifferentiated and changing group of people. An injunction restraining the carrying out of either activity needs to be directed to some identifiable persons, but this is not possible where the persons carrying out the activity are simply members of the public.

350 At best, a prohibitory injunction might be directed to the Council restraining it from carrying out either activity, although this would only operate to restrain the Council from doing those acts, matters and things that the Council was intending to do, such as installing signs, bins, bag dispensers and marker buoys.

351 Alternatively, an injunction might be issued against the Council ordering it to take specified action to prevent the public carrying out either activity. The Council submitted that, if the Court is minded to make such a mandatory

injunction against the Council, the parties should be given the opportunity to address the Court on the appropriateness of doing so and the terms of any mandatory injunction, as care needs to be taken in crafting a workable order. I agree.

352 In these circumstances, I find that it is appropriate to make declarations of breach of the EPA Act and orders setting aside the Council's decisions of 27 August 2019 and 17 December 2019, but defer deciding whether to make any prohibitory or mandatory injunctions until the parties have had an opportunity to address the Court.

353 The Court:

(1) Declares that Northern Beaches Council has breached s 5.5(1) of the *Environmental Planning and Assessment Act 1979* (the EPA Act) in considering and determining to approve on 17 December 2019 the activity of allowing dogs on-leash at Station Beach, Palm Beach by not examining and taking into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity;

(2) Declares that Northern Beaches Council has breached s 5.7(1) of the EPA Act in granting approval on 27 August 2019 to the activity of conducting the dog off-leash area trial at Station Beach, Palm Beach for a period of 12 months, without having obtained or been furnished with, and having examined and considered, an environmental impact statement in respect of that activity;

(3) Declares that Northern Beaches Council has breached s 5.7(1) of the EPA Act by:

(s) not determining whether the activity of allowing dogs on-leash at Station Beach, Palm Beach, is likely to significantly affect the environment;

(t) granting approval on 17 December 2019 to the activity of allowing dogs on-leash at Station Beach, Palm Beach, without having obtained or been furnished with, and having examined and considered, an environmental impact statement in respect of that activity;

(4) Declares invalid, and quashes, the decision of Northern Beaches Council made on 27 August 2019 to conduct a dog off-leash area trial at Station Beach, Palm Beach for 12 months;

(5) Declares invalid, and quashes, the decision of Northern Beaches Council made on 17 December 2019 to allow dogs on-leash at Station Beach, Palm Beach;

(6) Directs the parties to file and serve submissions on the orders that the

parties contend the Court should make by way of prohibitory or mandatory injunctions (if any) in accordance with the following timetable:

(u) The applicant to file and serve its submissions by 27 November 2020;

(v) The respondent to file and serve its submissions by 4 December 2020;

(w) The applicant to file and serve its submissions in reply by 11 December 2020;

(7) Grants leave to each party to relist the matter in order to fix a date for a hearing if a party wishes to have a hearing on the issue of the injunctive orders the Court should make.

(8) Orders the respondent to pay the applicant's costs of the proceedings.

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