Wingecarribee Local Environmental Plan 2010

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Zone E4 General Industrial

1 Objectives of zone

- To provide a range of industrial, warehouse, logistics and related land uses.
- To ensure the efficient and viable use of land for industrial uses.
- To minimise any adverse effect of industry on other land uses.
- To encourage employment opportunities.
- To enable limited non-industrial land uses that provide facilities and services to meet the needs of businesses and workers.
- To allow non-industrial land uses, including certain commercial activities, that, because of the type, scale or nature of the use, are appropriately located in the zone and will not impact the viability of business and commercial centres in Wingecarribee.
- To ensure new development and land uses incorporate measures that take into account the spatial context and mitigate potential impacts on neighbourhood amenity and character and the efficient operation of the local and regional road system.

2 Permitted without consent

Environmental protection works; Home-based child care; Home occupations

3 Permitted with consent

Depots; Freight transport facilities; Garden centres; General industries; Goods repair and reuse premises; Hardware and building supplies; Industrial retail outlets; Industrial training facilities; Landscaping material supplies; Light industries; Local distribution premises; Neighbourhood shops; Oyster aquaculture; Plant nurseries; Rural supplies; Specialised retail premises; Take away food and drink premises; Tank-based aquaculture; Timber yards; Vehicle sales or hire premises; Warehouse or distribution centres; Any other development not specified in item 2 or 4

4 Prohibited

Agriculture; Air transport facilities; Airstrips; Amusement centres; Business premises; Camping grounds; Cemeteries; Correctional centres; Crematoria; Eco-tourist facilities; Exhibition homes; Exhibition villages; Farm buildings; Forestry; Health services facilities; Heavy industrial storage establishments; Highway service centres; Home occupations (sex services); Industries; Open cut mining; Residential accommodation; Restricted premises; Retail premises; Schools; Sex services premises; Tourist and visitor accommodation; Water recreation structures; Wharf or boating facilities

Land and Environment Court of New South Wales

Terra Ag Services Pty Limited v Griffith City Council [2017] NSWLEC 167 (7 December 2017)

Last Updated: 7 December 2017

Land and Environment Court
New South Wales

Case Name:	Terra Ag Services Pty Limited v Griffith City Council
Medium Neutral Citation:	[2017] NSWLEC 167
Hearing Date(s):	30 November 2017
Date of Orders:	7 December 2017
Decision Date:	7 December 2017
Jurisdiction:	Class 1
Before:	Preston CJ
Decision:	The Court orders: (1) The appeal is upheld. (2) The decision and orders of Senior Commissioner Martin of 6 July 2017 are set aside. (3) The proceedings are remitted to be determined according to law. (4) The respondent is to pay the applicant's costs of the appeal.
Catchwords:	APPEAL – appeal against a Commissioner's decision on questions of law – refusal of development consent for rural supplies business – part of development held to be for prohibited purpose of "heavy industrial storage establishment" – whether development for one or more purposes – acceptance that development for more than one purpose – failure to characterise development as a whole – constructive failure to exercise jurisdiction to determine and give reasons for finding that development not for sole purpose of "rural supplies" – constructive failure to exercise jurisdiction to determine whether use for heavy industrial storage establishment subservient to use for rural supplies – constructive failure to exercise jurisdiction to determine and give reasons for finding whether part of development met each element of definition of "heavy industrial storage establishment" – not established that wrong test applied in determining whether goods or materials needed separation from other development – construction of definition of "heavy

	industrial storage establishment" – no error in not construing by reference to name of development being defined – no error in construction of phrase "for commercial purposes" because phrase not construed at all – construction of zone objectives – error in having regard to objectives of zone in characterising the purpose of development
Legislation Cited:	Land and Environment Court Act 1979 s 56A(1) Griffith Local Environmental Plan 2014
Cases Cited:	Abret Pty Ltd v Wingecarribee Shire Council (2011) 180 LGERA 343; [2011] NSWCA 107 Baulkham Hills Shire Council v O'Donnell (1990) 69 LGRA 404 Beale v GIO of NSW (1997) 48 NSWLR 430 Botany Bay City Council v Pet Carriers International Pty Ltd (2013) 201 LGERA 116; [2013] NSWLEC 147 Chamwell v Strathfield Council (2007) 151 LGERA 400; [2007] NSWLEC 114 Cheetham v Goulburn Motorcycle Club Inc (2017) 223 LGERA 43; [2017] NSWCA 83 Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155 Deputy Commissioner of Taxation v Dick (2007) 226 FLR 388; [2007] NSWCA 190 El Boustani v Minister administering Environmental Planning and Assessment Act 1979 (2014) 199 LGERA 198; [2014] NSWCA 33 Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 Housing Commission of NSW v Tatmar Pastoral Co Ltd [1983] 3 NSWLR 378 Kovacevic v Queanbeyan City Council [2016] NSWCA 346 Matic v Mid-Western Regional Council [2008] NSWLEC 113 Mike George Planning Pty Ltd v Woollahra Municipal Council (No 3) [2014] NSWLEC 123 Newcastle City Council v Royal Newcastle Hospital (1957) 96 CLR 493; [1957] HCA 15 People for the Plains Inc v Santos NSW (Eastern) Pty Ltd (2017) 220 LGERA 181; [2017] NSWCA 46 Shire of Perth v O'Keefe (1964) 110 CLR 529; [1964] HCA 37 Tovir Investments Pty Ltd v Waverly Council [2014] NSWCA 379 Wacal Developments Pty Ltd v Realty Pty Ltd (1978) 140 CLR 503; [1978] HCA 30
Texts Cited:	Herzfeld, Prince and Tully, Interpretation and Use of Legal Sources – The Laws of Australia (2013, Thomson Reuters) Pearce and Geddes, Statutory Interpretation in Australia (2004, 8th ed, LexisNexis)
Category:	Principal judgment
Parties:	Terra Ag Services Pty Limited (Applicant) Griffith City Council (Respondent)
Representation:	Counsel: Mr A Pickles SC and Dr S Berveling (Applicant) Mr J Lazarus (Respondent)

	Solicitors: McCabes Lawyers (Applicant) Pikes & Verekers Lawyers (Respondent)
File Number(s):	2017/230950
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Land and Environment Court of New South Wales
Jurisdiction:	Civil
Citation:	[2017] NSWLEC 1355
Date of Decision:	6 July 2017
Before:	Martin SC
File Number(s):	2016/233562

JUDGMENT

1. Terra Ag Services Pty Ltd ('the applicant') lodged a development application with Griffith City Council ('the Council') for consent to establish a rural supplies business on land at 894 Kidman Way, Griffith ('the land'). The Council refused the application. The applicant appealed to this Court. The appeal was heard by Martin SC, who delivered judgment on 6 July 2017, dismissing the appeal: *Terra Ag Services Pty Ltd v Griffith City Council* [2017] NSWLEC 1355.
2. The Senior Commissioner held that the proposed development was to be characterised as being for the purpose of a "heavy industrial storage establishment", which is a prohibited development in the applicable B6 Enterprise Corridor Zone under Griffith Local Environmental Plan 2014 ('Griffith LEP'). A consent could therefore not be granted and the Senior Commissioner dismissed the appeal.
3. The applicant appealed against that decision under s 56A(1) of the *Land and Environment Court Act 1979* ('the Court Act'). An appeal under s 56A(1) is limited to error on a question of law. The applicant raised as grounds of appeal that the Senior Commissioner erred in various ways in characterising the proposed development as being for the prohibited development of "heavy industrial storage establishment". The grounds of appeal were that the Commissioner erred on a question of law in:

    (1) applying the wrong test and/or asking the wrong question in determining whether there were two separate and independent uses;
    (2) failing to give reasons for finding that part of the proposed development required separation from other development (and hence that the development was heavy industrial storage establishment);
    (3) alternatively to ground (2), applying the wrong test and/or asking the wrong question in determining whether the goods or materials (stored in part of the proposed development) needed to be separated from other development (and hence that the development was heavy industrial storage establishment);
    (4) failing to take into account mitigation or amelioration measures to be adopted in determining whether the goods or materials needed to be separated from other development;
    (5) failing to construe all the words of the definition of "heavy industrial storage establishment" in context, including the descriptor "heavy industrial"; and
    (6) misconstruing the objectives of the B6 Enterprise Corridor Zone as seeking "to co-locate particular kinds of activity together" and "to encourage activity which does not have external impacts of such a kind that separation from other development is required."

The proposed development

4. The Senior Commissioner found (at [5]) that the proposed development included:

"• the construction of an administration building approximately 535m² in area and comprising ten offices, a boardroom, staff room, amenities and a sales and display area.
• The construction of a shed measuring 72.0 metres x 50.0 metres and approximately 3600 m² in area and a height of 13 metres to the ridge-line. This shed is to be used for the unloading, storage, mixing, blending and loading of fertilisers used in the agricultural sector.
• The construction of a second shed measuring 35 metres x 77.35 metres approximately 2707 m² in area and a height of 8.0 metres to the ridge line. This shed is to be used for the storage of chemicals, some of which constitute dangerous goods."

5. The Senior Commissioner estimated (at [7]) the proportions of various parts of the development to be as follows:

"The estimated proportion of the total development which each category of use of the site will comprise is: the showroom, sales and office building – 8%; the fertiliser storage shed – 52%; the chemical and general storage shed – 40%: [Ex K p.2]."

6. The Senior Commissioner described (at [8]) the business to be operated in the following terms:

"One of the documents provided to the Council in support of the application was a report by SLR Global Environmental Solutions which reviewed State Environmental Planning Policy No. 33 documentation, which report was dated 3 February 2017 [appended to [Ex M] as item 8]. This report states:

> The site will be used for the sale of agricultural material (chemicals and fertilisers) to local farms. The site will hold sufficient quantities of chemicals that are required for Terra Ag to supply their customers' needs. It is understood that the quantities of chemicals stored are based on Terra Ag's experience with operating their current facility in Griffith.
> In addition to this, the site will hold and supply bulk quantities of fertilisers to local farms. On occasion and on request by Terra Ag's customers, some fertilisers may be mixed or blended before being distributed to provide the best product that suits [the] customers' needs and requirements. The volume of mixed and blended fertiliser will be less than 20,000 tonnes per annum [1.3.2]."

7. The Senior Commissioner noted that "a large amount of stock is required to be kept onsite to ensure it is available to customers when they require it. This is particularly the case as the stock is brought to Griffith from the docks in Melbourne" (at [10]).
8. The Senior Commissioner found (at [9]) that:

"The impact from the storage and handling of fertiliser will be minimised through the use of an enclosed shed. Whilst other fertiliser storage and handling facilities generally store fertiliser undercover but unload, mix and load material in the open or under just an awning, the Applicant proposes to undertake all these operations inside the shed in an attempt to control and minimise the potential for dust or odour nuisance on nearby residential and sensitive receptors. There is also proposed to be landscaped screening along the Site's eastern and southern boundaries: Ex B at [2.7]."

The characterisation question

9. The land was within the B6 Enterprise Corridor Zone under Griffith LEP. The objectives of the zone are:

"• To promote businesses along main roads and to encourage a mix of compatible uses.

• To provide a range of employment uses (including business, office, retail and light industrial uses).
• To maintain the economic strength of centres by limiting retailing activity.
• To provide for residential uses, but only as part of a mixed use development.
• To ensure residential development is associated with and ancillary to a primary business."

10. The Land Use Table for the zone specifies, in item 2, the development that may be carried out without consent (none of the three nominate developments are relevant); in item 3, development that may be carried out with consent (none of the nominate developments are relevant but the category of innominate development is potentially relevant, being "any other development not specified in item 2 or 4"); and in item 4, development that is prohibited (none of the nominate developments are relevant except for "heavy industrial storage establishment").
11. The effect of the Land Use Table is that the proposed development would be permitted with consent for an innominate purpose if it is not for the purpose of any development specified in item 4 as being prohibited, which relevantly in this case involves the development not being a "heavy industrial storage establishment".
12. The development of "heavy industrial storage establishment" is defined in the Dictionary to Griffith LEP to mean:

"a building or place used for the storage of goods, materials, plant or machinery for commercial purposes and that requires separation from other development because of the nature of the processes involved, or the goods, materials, plant or machinery stored, and includes any of the following:
(a) a hazardous storage establishment,
(b) a liquid fuel depot,
(c) an offensive storage establishment."

13. The applicant contended that the development was for the purpose of "rural supplies", which is an innominate development permitted with consent. "Rural supplies" is defined in the Dictionary to Griffith LEP to mean:

"a building or place used for the display, sale or hire of stockfeeds, grains, seed, fertilizers, veterinary supplies and other goods or materials used in farming and primary industry production."

14. The note to the definition of "rural supplies" says that "Rural supplies are a type of retail premises". "Retail premises" are defined in the Dictionary to the Griffith LEP to mean:

"a building or place used for the purpose of selling items by retail, or hiring or displaying items for the purpose of selling them or hiring them out, whether the items are goods or materials (or whether also sold by wholesale), and includes any of the following:
(a) bulky goods premises,
(b) cellar door premises,
(c) food and drink premises,
(d) garden centres,
(e) hardware and building supplies,
(f) kiosks,
(g) landscaping material supplies,
(h) markets,
(i) plant nurseries,
(j) roadside stalls,
(k) rural supplies,
(l) shops,
(m) timber yards,
(n) vehicle sales or hire premises,
but does not include highway service centres, service stations, industrial retail outlets or restricted premises."

The Senior Commissioner's reasoning

15. The Senior Commissioner accepted that the proposed development would involve two uses, one use of part of the development and another use of the rest of the development. The Senior Commissioner did not specifically determine which parts were used for which uses. It would seem from certain statements in the judgment that one or other or both of the sheds (the fertiliser storage shed and the chemical and general storage shed) were characterised as being for the purpose of "heavy industrial storage establishment" and the use of the rest of the development as being for a rural supplies purpose. This lack of precise findings on these issues is raised in various grounds of appeal.
16. The Senior Commissioner found that the use for the purpose of "heavy industrial storage establishment" was not subservient to the use for a rural supplies purpose. Accordingly, the Senior Commissioner found that the proposed development was for a purpose that was prohibited in the zone.
17. Because the language and logic of the Senior Commissioner in coming to these conclusions were challenged as revealing errors of law, I will set out below the relevant section of the judgment on "Discussion and Findings" at [65]-[77]:

    "Having considered the evidence and the submissions of the parties, I accept the parties' argument that the proposed development can be characterised as having more than one purpose. However, crucially, I prefer the Council's argument in this respect: no one use is dominant or servient. I find that the part of the proposed development which is used for the purpose of heavy industrial storage is not subordinate to a dominant purpose of rural supplies, as was submitted by the Applicant.
    In my view, it cannot be said that the delivery, storage, measuring and, where required, blending of fertilisers and chemicals is a servient use to the dominant use of a rural supplies business. This situation is unlike that presented in the *Chamwell* case, as in this case the proposed development could function without the fertiliser storage or chemical storage of the scale proposed. Adopting the Council's submission, 'those facilities at that scale may well be considered to be desirable by the applicant but they are not an essential part of it like the entrance driveway, the vehicle manoeuvring areas or the car parking spaces'.
    With respect to whether or not there is a dominant or servient purpose, I respectfully adopt the finding of Glass JA in *Foodbarn* extracted at [56] above.
    I find that one of the uses arising from the proposed development is a heavy industrial storage establishment, for the reason that the proposed development comprises a building, used for the storage of goods or material, for commercial purposes, that requires separation from other development because of the nature of the processes involved, or the goods or materials stored.
    While the Council provided many examples in its submissions which in its view demonstrate the requirement for separation, thus satisfying that aspect of the definition, in my view one of the more forceful examples of this requirement for separation lies in the requirement for dangerous goods to be setback in accordance with the relevant Australian Standards [Ex B at [2.8]].
    The Applicant's position with respect to the safety of the fertiliser product is that this is a matter for the relevant authority, to ensure that the proposed methods of storage and transport are acceptable. The planning task before the Court is not in my view discharged by deferring responsibility for the question of storage and handling of fertilisers and chemicals to the various regulators. While the role of the regulators is essential, the approach advocated by the Applicant does not deal with the fundamental question of permissibility which largely turns on the need for separation of the proposed development from other development.
    Further, the fact that separation from sensitive receptors (or protected places) can or may be achieved does not in my view operate so as to render the development no longer a **heavy industrial storage facility**. It remains so characterised, notwithstanding that any risk is or may be able to be mitigated (for example, through separation and management practices).
    The definition of heavy industrial storage establishment in the GLEP is silent as to the

role or relevance, if any, of mitigation measures. This is in contrast, for example, to the impact of mitigation in SEPP 33, where a "potentially hazardous storage industry" is expressly characterised as an industry which will have particular impacts but for the implementation of particular ameliorative measures.

I do not agree with Mr Mead, the Applicant's town planner, that the size of the sheds is irrelevant. I find that the size of the sheds and amount of chemicals and fertilisers used go directly to the question of the need for separation, as well as informing my finding that there is no dominant or servient purpose.

The GLEP has sought to co-locate particular kinds of activity together. I accept the Council's argument that the objectives of the B6 Enterprise Corridor zone are to encourage activity which does not have external impacts of such a kind that separation from other development is required.

With respect to the Applicant's submission that the proposed development has similar characteristics to the other sites visited, as set out in [34] – [36] above, I accept Ms McCabe's evidence that those operations had been approved under previous instruments, with different definitions and zonings. The analysis of the use did not arise with respect to those developments, in the manner in which it has here, where the proposed development would be located near sensitive areas.

I accept the Council's submission that the definition of 'heavy industrial storage establishment' does not, in the description of the essential elements of the purpose, use the phrase 'offensive or hazardous'. The definition includes a much wider range of storage premises than those which are offensive or hazardous. That being my conclusion, the fact that the Applicant's experts have concluded that the site is unlikely to present an unacceptable risk to surrounding receptors, provided specific design and management controls are implemented [Ex M at [5]], does not stop the proposed development from being prohibited development.

The correct analysis, in my view, is not to ask whether it is offensive or hazardous industry, but to ask whether one of the uses is a heavy industrial storage establishment, and whether that use is ancillary or subordinate to a rural supplies purpose. Using that analysis, I find that the proposed development is characterised as a ⬅ **heavy industrial storage facility** ➡ which is not subservient to another purpose. It is therefore prohibited in the zone."

Ground 1: whether development for more than one purpose

18. The applicant submitted that the fundamental error of the Senior Commissioner in characterising the purpose of the proposed development was that she characterised the component parts of the development without asking whether those parts served a single purpose. The Senior Commissioner started the task of characterisation by making the assumption that the development can be characterised as having more than one purpose (see at [65]). From that starting point, the Senior Commissioner asked two questions: first, whether one of the uses is a heavy industrial storage establishment (see first question posed in [77] and the analysis in [68]-[77]) and secondly, whether that use is subordinate (or subservient) to the use for a rural supplies purpose (see the second question posed in [77] and the analysis in [65]-[67]).
19. The applicant submitted that the Senior Commissioner erred in so approaching the characterisation question. The Senior Commissioner never asked the "primordial question" of whether the different activities that would be carried out in undertaking the proposed development were for separate planning purposes. The Senior Commissioner instead assumed that the two storage activities in the two sheds were for separate purposes without, first, inquiring and, secondly, finding that they were for separate purposes. The question of whether use for one purpose is subordinate becomes relevant only once the "primordial question" has been answered affirmatively.
20. The applicant submitted that the nature of the use needs to be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose, citing *Chamwell v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114 at [34]. The characterisation of the purpose of a use of land should 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 activities: *Chamwell v Strathfield Council* at [36].

21. The applicant submitted that in characterising the development proposed in the application the whole of the application (i.e. all of the components of the project as a whole) must be considered. The applicant referred to *People for the Plains Inc v Santos NSW (Eastern) Pty Ltd* (2017) 220 LGERA 181; [2017] NSWCA 46 at [142], [143] where the Court of Appeal found that the trial judge had erred in not characterising the development project as a whole but instead bifurcated the project into separate parts and then characterised the purpose of each part. The applicant submitted that the Senior Commissioner had made the same error in this case.
22. The applicant noted that the development application sought consent for development of a rural supplies business, comprising the individual activities described by the Senior Commissioner at [5]. In particular, there were two sheds, the fertiliser storage shed to be used for the mixing, blending and storage of fertilisers that are to be sold and the chemical and general storage shed to be used for the storage of chemicals that are the raw ingredients used to mix and blend the fertilisers or that themselves are to be sold. While each shed had a distinct character, they both served the same purpose, that of a rural supplies business, which was operated from the administrative and retail building. The storage of chemicals and fertilisers was not an end in itself, but one of the means by which the rural supplies business was operated. The applicant submitted that the development as a whole was for the purpose of "rural supplies". This was the end to which the land would serve and the character imparted to the land on which the proposed development would be carried out: *Chamwell v Strathfield Council* at [27], [28].
23. The applicant submitted that the Senior Commissioner failed to consider the development as a whole in undertaking the task of characterising its purpose, but instead separated it into the individual activities carried out in the different buildings and then characterised the purpose of each part of the development. This was evidenced in the Senior Commissioner's reliance on the gross floor area of each building to be used for the different activities (at [7]).
24. The applicant submitted that the Senior Commissioner made the assumption, without deciding, that either the two sheds were independent uses from each other or the two sheds were a separate use from the retail component. The Senior Commissioner lost sight of the fact that the ultimate purpose of the storage use of the two sheds was for the retail sale of the fertilisers and chemicals stored to customers. The purpose of rural supplies is a form of retail premises.
25. The applicant submitted that the error in characterisation was revealed in the Senior Commissioner's inquiry of whether one use was subordinate to another. In [66], the Senior Commissioner separated the activities carried out in the two sheds from the retail activity in the administration building. She said that "it cannot be said that the delivery, storage, measuring and, where required, blending of fertilisers and chemicals is a servient use to the dominant use of a rural supplies business". The Senior Commissioner considered that "the proposed development could function without the fertiliser storage or chemical storage of the scale proposed" and that "those facilities...are not an essential part" of the proposed development.
26. The applicant submitted that in these statements the Senior Commissioner asked herself the wrong question. It mattered not whether the rural supplies business "could" function without the activities of delivery, storage, measuring and blending of fertilisers and chemicals in the two sheds. The correct question was, whether on the facts of the development as proposed, the two sheds were proposed to be operated for a purpose separate and independent from the rural supplies purpose. The applicant also noted that the Senior Commissioner's use of language (e.g. "could") highlighted the absence of an actual finding that the different activities proposed were for separate planning purposes.
27. The Council submitted that the Senior Commissioner's approach to the task of characterisation was orthodox. The Council noted that it was only in the event that the proposed development (or any part thereof) could not be characterised as a "heavy industrial storage establishment" that it would become permissible. It was therefore legitimate, and indeed it was demanded by the structure of the Land Use Table for the B6 Enterprise Corridor Zone, to determine whether the development was for the prohibited development of "heavy industrial storage establishment" because, if so, it could not be for any innominate purpose permitted with consent, including "rural supplies": *Abret Pty Ltd v Wingecarribee Shire Council* (2011) 180 LGERA 343; [2011] NSWCA 107 at [57], [62], [67],

[68] and *Botany Bay City Council v Pet Carriers International Pty Ltd* (2013) 201 LGERA 116; [2013] NSWLEC 147 at [32], [49], [50], [52].

28. The Council submitted that the Senior Commissioner did make a finding that the proposed development could be characterised as having more than one purpose. This finding was expressed in the first sentence of [65] and implied in the next two sentences of [65]. Having found that the development was for more than one purpose, the Senior Commissioner then determined whether part of the proposed development comprised a "heavy industrial storage establishment", concluding that it was at [68] and [77], and next determined whether that part of the development was subordinate to the "rural supplies" use, concluding that it was not at [73]. The second conclusion was based on findings that the proposed development could function without the fertiliser storage or chemical storage of the scale proposed (at [66]) and the size of the sheds and the amounts of chemicals and fertilisers used (at [73]).
29. The Council submitted that this conclusion that the use of the sheds for heavy industrial storage establishment was not subordinate to the use for a rural supplies purpose was consistent with the statement in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404 at 409-410 that "when one use of the land is by reason of its nature and extent capable of being an independent use it is not deprived of that quality because it is 'ancillary to', or related to, or interdependent with, another use".
30. The Council submitted that once the Senior Commissioner had determined that the development was for two or more purposes, one of which was prohibited and the others permissible, the relevant inquiry was that stated in *Botany Bay City Council v Pet Carriers International Pty Ltd* at [68] that:

    "whether the prohibited purposes are subsumed in the permissible purpose so that it is legitimate to disregard the prohibited purposes and treat the permissible purpose as that for which the land is being used, or whether they are independent of each other so that the land is being used for both prohibited and permissible purposes."

31. The Senior Commissioner answered that inquiry in favour of the Council, in the second way, that is to say that the uses are independent of each other and the land would be used for both prohibited and permissible purposes.
32. The Council submitted no error was revealed by the Senior Commissioner's choice of language, such as that the proposed development "could" function without the fertiliser or chemical storage. Such language was used in previous judicial decisions including *Chamwell v Strathfield Council* (e.g. at [31] "could not function" and [44] "not capable of"), *Abret Pty Ltd v Wingecarribee Shire Council* (e.g. at [53] "not capable of") and *People for the Plains Inc v Santos NSW (Eastern) Pty Ltd* (e.g. at [92] "could not function"). The Council submitted that, although couched in the language of ability or possibility, the Senior Commissioner did make a finding that the proposed development has more than one purpose.
33. I find that the Senior Commissioner did err by failing to ask and determine, at the outset of the characterisation task, whether the whole of the land would be used for one purpose or instead for two or more purposes. This question needed to be asked and answered before the question of whether, if there were to be more than one purpose, use for one purpose was subordinate to use for another purpose could arise.
34. The Senior Commissioner stated at the start of her discussion of the characterisation task in [65] that: "Having considered the evidence and the submissions of the parties, I accept the parties' argument that the proposed development can be characterised as having more than one purpose". This is but a bald statement of acceptance. There is no analysis or explanation of how or why the proposed development "can be" characterised as having more than one purpose. The ensuing discussion in the judgment does not provide this analysis or explanation but instead addresses the posterior questions of the characterisation of the "more than one purpose" and whether one purpose is subordinate to another purpose.
35. Moreover, the Senior Commissioner was incorrect in stating that both parties had argued that the proposed development can be characterised as having more than one purpose. The applicant's primary argument of the hearing before the Senior Commissioner was that the whole of the proposed development was for only one purpose, which was "rural

supplies". Indeed, the Senior Commissioner recorded this primary submission in [45] of the judgment:

"The Applicant through its advocate Dr Berveling contends that the proposed development can only be properly characterised as 'rural supplies' as defined within the GLEP. Drawing upon the decision of Preston CJ in *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114, the Applicant relies upon the principles that in planning law, a use must be for a purpose [*Chamwell* at [27]], and 'purpose' is not concerned with the nature of the buildings that will be used to serve that purpose (see generally *Chamwell*)."

36. The Senior Commissioner went on to record in [48]:

"The Applicant then sought to demonstrate how the proposed development – characterised as a rural supplies industry – is on all fours with the facts in the Chamwell case, in order to establish that all the proposed activities on the site: the construction of the chemical and fertiliser sheds, the driveway and the car park, the landscaping, are all for the purpose of rural supplies. They are indivisible elements of the one integrated business. Following the logic of Chamwell, the Applicant says that this interrelationship means that all elements of the undertaking are characterised as rural supplies."

37. The Senior Commissioner was correct in recording that the applicant's primary argument was that the proposed development can only be properly characterised as rural supplies. This was clearly articulated in the applicant's written outline of submissions provided to the Senior Commissioner. The Senior Commissioner drew on those written submissions in the summary of the applicant's argument in the judgment. The applicant also articulated its argument in oral submissions that the proposed development needed to be characterised as a whole, not split into separate parts, and when characterised as a whole, the proposed development was for one purpose only, which was "rural supplies".
38. It is true that the applicant did make an additional argument that if, contrary to the applicant's primary argument, use of parts of the development (such as the sheds) could be characterised as being for a different purpose, that use is subordinate to the dominant purpose of rural supplies and that the dominant purpose should be regarded as the purpose for which the whole site is used. The Senior Commissioner recorded that the applicant made this additional argument immediately after recording the applicant's primary argument that "the proposed development can only properly be characterised as 'rural supplies'". She recorded in [45] that the applicant contended:

"In addition, 'where part of the premises is used for a purpose which is subordinate to the purpose of the use of another part, it is legitimate to disregard the subordinate purpose and to treat the dominant purpose as that for which the whole is being used': Beazley JA in Abret Pty Limited v Wingecarribee Shire Council (2011) 180 LGERA 343; [2011] NSWCA 107 at [54]; Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 at 161."

39. Similarly, the Senior Commissioner recorded this alternative submission in [48]: "Moreover, even if the use (of the sheds) could be seen to be for a different purpose, they are subordinate to the main purpose of rural supplies business."
40. The Senior Commissioner's choice of words and phrases in the opening of these statements (such as "in addition", "moreover", and "even if") reveals that she appreciated that the applicant's argument, assuming that the proposed development could be characterised as having more than one purpose, was in the alternative to the applicant's primary argument that the proposed development can only be characterised as being for the one purpose of "rural supplies".
41. The Senior Commissioner constructively failed to exercise jurisdiction to determine, and to give reasons for the determination of, the applicant's primary argument that the proposed development was for only one purpose of "rural supplies".
42. I summarised the concept of a constructive failure to exercise jurisdiction in *El Boustani v Minister administering Environmental Planning and Assessment Act 1979* (2014) 199

LGERA 198; [2014] NSWCA 33 at [156]- [157]:

"In *Resource Pacific Pty Ltd v Wilkinson*, Basten JA (with whom Beazley JA agreed) noted at [9] that:

> The term 'constructive failure to exercise jurisdiction' is used to describe a situation where the court has purported to resolve the parties' dispute but has not in fact done so. Thus, particularly with a court or tribunal required to provide reasons for its decision, it may become apparent from those reasons that a material issue has simply not been addressed or that material evidence has been overlooked.

In *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257 at [11], Basten JA (with whom McColl JA and I agreed) also observed that:

> a mistake in understanding the facts, applying the law and reasoning to a conclusion could amount to a constructive failure to exercise jurisdiction if it revealed 'a basic misunderstanding of the case brought by an applicant, [so that] the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way': *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [88] (Kirby J), referred to in *Goodwin v Commissioner of Police* [2012] NSWCA 379 at [20]."

43. In this case, the bald statement of acceptance of the parties' argument that the proposed development can be characterised as having more than one purpose; the failure to identify the evidence said to have been considered in accepting the parties' argument or making any findings on that evidence; the incorrect statement that both parties had argued that the proposed development can be characterised as having more than one purpose; the evident failure, which that incorrect statement reveals, to consider the applicant's submission that the proposed development can only be properly characterised as for the one purpose of rural supplies; and the failure to give reasons for the bald statement of acceptance that the development has more than one purpose and the rejection of the applicant's submission to the contrary that the development was for only one purpose, together reveal a constructive failure to exercise jurisdiction. This undermined the lawfulness of the Senior Commissioner's conclusion that the proposed development can be characterised as having more than one purpose, as well as the posterior conclusions that depended on that conclusion, including that one use was for the purpose of "heavy industrial storage establishment".
44. The error in approach in determining whether the development could be characterised as involving uses for more than one purpose affected the Senior Commissioner's characterisation of the purpose of the uses. The Senior Commissioner started the task of characterisation from the assumption that part of the development (seemingly the two sheds) would be used for a different purpose from the purpose for which other development (seemingly the administration building) would be used. The Senior Commissioner then sought to determine whether that different purpose for which the sheds would be used fell within the purpose of "heavy industrial storage establishment". This approach inappropriately confined and compartmentalised the characterisation task. The use of the sheds needed to be considered in the context of the whole use proposed by the applicant of the whole site.
45. The error in approach is the same as that identified in *People for the Plains Inc v Santos NSW (Eastern) Pty Ltd* at [142], [143] of not characterising the proposed development as a whole but instead separating the development into separate parts and characterising the purpose of each part without regard to the role and function that the part serves for the whole development.
46. In determining whether a proposed development of the land will be for a particular purpose, an inquiry into how that purpose can and will be achieved is necessary. The development of land involves "the physical acts by which the land is made to serve some purpose": *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493; [1957] HCA 15 at 499-500, 508.

47. In the present case, the applicant proposed to develop the land for a rural supplies business. The purpose was to be achieved through erection of the three buildings and construction of other facilities on the land. A rural supplies business involves the sale of, among other goods and materials, fertilisers and agricultural chemicals used in farming and primary industry production. The particular type, nature and volume of the fertilisers and chemicals to be sold depend on customers' needs. Hence, processes such as blending and mixing of fertilisers and chemicals to meet customers' needs are important means by which the applicant operates its rural supplies business. Storage of the raw ingredients for and the final products of such processes is also an important means by which the applicant operates its rural supplies business. The nature of the different activities on the land might be different but the activities could still be seen to serve the end of enabling the rural supplies business to be carried on.
48. The Senior Commissioner failed to undertake this examination of how the proposed development of the rural supplies business as a whole was to be achieved, including the physical acts, such as the buildings, processes and activities, by which the land is made to serve that rural supplies purpose.
49. The Senior Commissioner's approach to characterisation of the purpose also asked the wrong question. It was not to the point to ask whether a rural supplies business "could function without the fertiliser storage or chemical storage of the scale proposed". That was not the development proposed by the applicant. The correct question was to characterise the purpose of the development that was actually proposed by the applicant.
50. The Senior Commissioner also constructively failed to exercise jurisdiction in determining whether, if there were uses for more than one purpose, any one use was dominant or servient to another use. The Senior Commissioner stated her conclusion that "no one use is dominant or servient" a number of times (see, for example, [65], [66], [73] and [77]) but did not embark on the analysis and reasoning required to exercise the function of determining the issues. The statements given for her conclusion are not reasons at all.
51. The first statement in [65] is that "I prefer the Council's argument in this respect: no one use is dominant or servient". This is a statement of conclusion, not an analysis of the issue or a reason for preferring the Council's argument.
52. The statement in [66] that: "In my view, it cannot be said that the delivery, storage, measuring, and where required, blending of fertilisers and chemicals is a servient use to the dominant use of a rural supplies business" is a conclusion, not a reason. The Senior Commissioner follows on to distinguish the proposed development from the development in the *Chamwell* case. The distinguishing factor was said by the Senior Commissioner to be that "the proposed development could function without the fertiliser storage or chemical storage of the scale proposed". I have noted earlier that this was the wrong question. The correct question required addressing the development actually proposed by the applicant, including "the delivery, storage, measuring and, where required, blending of fertilisers and chemicals", and asking whether those activities (if for the purpose of heavy industrial storage establishment) were subordinate to use for the purpose of rural supplies. The Senior Commissioner's final sentence in [66] evidences similar misdirection. The Senior Commissioner stated:

    "Adopting the Council's submission, 'those facilities at that scale may well be considered to be desirable by the applicant but they are not an essential part of it like the entrance driveway, the vehicle manoeuvring areas or the car parking spaces'."

53. The question of whether one use is subordinate to another use is not to be answered by ascertaining whether the nature of the first use makes it necessarily "an essential part" of the second use. This is to again ask the wrong question. If the first use is essential to being able to undertake the second use, it may more readily be able to be concluded that the first use is subordinate to the second use. But the converse does not necessarily follow. It depends on the facts and circumstances of the proposed development of the land.
54. In this case, the Senior Commissioner was required to, but failed to, address the question of whether the particular part of the development that was said to be for the purpose of "heavy industrial storage establishment", seemingly being the facilities for fertiliser storage or chemical storage of the scale proposed by the applicant, was subordinate to the use of the rest of the land for the purpose of rural supplies. Whether the rural supplies use "could

function" without the heavy industrial storage establishment use or whether the heavy industrial storage establishment use was or was not "an essential part" of the rural supplies use was not determinative in answering the correct question.

55. The statement in [67] that: "With respect to whether or not there is a dominant or servient purpose, I respectfully adopt the finding of Glass JA in *Foodbarn* extracted at [56] above" is neither a finding nor a reason. The dicta of Glass JA in *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 at 161, which the Senior Commissioner quoted at [56], is not a finding at all. It is dicta explaining the legal consequence where land is used for two or more purposes, none of which subserves the other, and one is prohibited. The adoption of such dicta about legal principle could not resolve the factual issue "with respect to whether or not there is a dominant or servient purpose" in the case before the Senior Commissioner. This statement in [67] is not a reason at all.
56. The statement in [73] that "the size of the sheds and amount of chemicals and fertilisers used go directly to the question of the need for separation, as well as informing my finding that there is not dominant or servient purpose" does not explain how the size of the sheds and the amount of chemicals and fertilisers used informs the finding that there is no dominant or servient purpose. It is a statement of conclusion, not a reason.
57. Finally, the statement in [77] that "I find that the proposed development is characterised as a **heavy industrial storage facility** which is not subservient to another purpose" is a statement of conclusion, not a reason.
58. Together, these statements reveal a constructive failure to exercise jurisdiction to determine whether, if the development could be characterised as being for more than one purpose, the use for the purpose of heavy industrial storage establishment was subservient to the use for the purpose of rural supplies.
59. I uphold the first ground of appeal.

Ground 2: failure to give reasons for definition being satisfied

60. The second ground of appeal is that the Senior Commissioner failed to give reasons for finding, or alternatively constructively failed to exercise jurisdiction to determine as a fact, what aspect of the proposed development required separation from other development.
61. The Senior Commissioner found in [68] "that one of the uses arising from the proposed development is a heavy industrial storage establishment". The only reason given by the Senior Commissioner for the finding was a recital of parts of the definition of "heavy industrial storage establishment". The Senior Commissioner's stated "reason" was that:

    "the proposed development comprises a building, used for the storage of goods or material, for commercial purposes, that requires separation from other development because of the nature of the processes involved, or the goods or materials stored."

62. The applicant submitted that the Senior Commissioner did not consider or explain what were "the processes involved" or "the goods, materials, plant or machinery stored" that would cause the purported need for separation from other development. The Senior Commissioner's statement was not a reason at all, just a restatement of the definition of "heavy industrial storage establishment".
63. The applicant submitted that the Senior Commissioner's reason did not meet the three fundamental elements of a statement of reasons articulated in *Beale v GIO of NSW* (1997) 48 NSWLR 430 at 443-444:
    (a) to refer to relevant evidence, including where conflicting evidence of a significant nature is given, referring to the existence of both sets of evidence;
    (b) to set out any material findings of fact and any conclusions or ultimate findings of fact reached, including where one set of evidence is accepted over a conflicting set of significant evidence, setting out the findings as to how one was accepted over the other; and
    (c) to provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found, which should be understandable and preferably logical as well.
64. The applicant submitted that there was expert evidence of the separation requirements for fertilisers and chemicals. This evidence was contested. None of it was considered by the

Senior Commissioner in her reasons for concluding that one of the uses is a heavy industrial storage establishment. The Senior Commissioner failed to set out the evidentiary basis or material findings of fact for her conclusion.

65. The Council accepted that the Senior Commissioner's stated "reason" in [68] recited the language of the definition of "heavy industrial storage establishment" but submitted that the conclusion must be read with the Senior Commissioner's summary of the parties' submissions at [45]-[64] and the findings that she made in later paragraphs of the judgment at [69] and [77] and, in particular, her consideration of the separation requirement at [69]-[73]. The reasoning in those paragraphs is sufficient to explain how the Senior Commissioner arrived at the conclusion that one of the uses was a "heavy industrial storage establishment".
66. The Council responded to the applicant's submission about the need to refer to the contested expert evidence on the separation of fertilisers and chemicals, saying that it was unnecessary for the Senior Commissioner to do so in light of the conclusion she reached about the separation requirement at [69]-[73].
67. The Council further submitted that, insofar as the Senior Commissioner did not address and give reasons for finding that each element of the definition of "heavy industrial storage establishment" was satisfied, the Senior Commissioner did not make an error of law in not doing so because those matters were not the subject of submissions by the applicant. The Council submitted that it is not open to the applicant on this appeal to complain that reasons were not given for the decision of matters that were not the subject of submissions made to the Senior Commissioner in a way which called for a reasoned consideration of them, citing *Housing Commission of NSW v Tatmar Pastoral Co Ltd* [1983] 3 NSWLR 378 at 385-386 and *Mike George Planning Pty Ltd v Woollahra Municipal Council (No 3)* [2014] NSWLEC 123 at [5d].
68. The Council submitted that the applicant bore the onus of showing that the proposed development, or any part of it, did not fall within the definition of "heavy industrial storage establishment". This is because the structure of the Land Use Table for the B6 Enterprise Corridor Zone makes the proposed development permitted with consent only if it is for a purpose not specified as being prohibited development. The applicant therefore had to established that the proposed development was not for the prohibited purpose of "heavy industrial storage establishment". This involved showing why the proposed development did not satisfy the elements of the descriptive criterion of the definition.
69. The Council submitted that the applicant did not make submissions that the nature of the processes involved or the nature of the goods, materials, plant or machinery stored did not require the buildings in which they would be stored to be separated from other development. The Council noted that it had argued, in its written submissions in the court below, that parts of the proposed development (notably the fertiliser and chemical sheds) required separation from other development because of the nature of the processes involved or the goods or materials being stored. The Council gave examples from parts of the applicant's evidence before the Court (see [28] of Council's written submissions in the court below).
70. In the court below, the applicant responded briefly in oral submissions in reply that the Council's approach appeared to have been that, if anywhere in the documents the words "separation" or "distance" had been used, that was seized upon by the Council as a potential reason to show the need for separation. That was submitted to be excessive. But in any event, the applicant submitted it was irrelevant because "it comes back to whether or not the purpose of the storage sheds is for storage, and then to make it heavy industrial storage establishment, or if it's for the purpose of rural supplies". The applicant then referred to one of the examples given by the Council that the fertiliser shed will provide acoustic shielding for noise from plant and machinery within the shed. The applicant disputed that the need for shielding for noise purposes causes a building to require separation under the definition.
71. On this appeal, the applicant in turn responded to the submissions of the Council. The applicant submitted that nothing in the Senior Commissioner's summary of the applicant's submissions in [45]-[53] of the judgment supported the Senior Commissioner's conclusion in [68]. The only relevant part of the Senior Commissioner's summary of the Council's submissions in [54]-[64] was the reference in [61] to the "multiple examples of where the proposed development requires separation from other development" listed by the Council.

However, the Senior Commissioner did not in that summary in [61] make findings adopting any of the examples listed. The Senior Commissioner did not do that until [69] where she adopted but one of the many examples provided by the Council:

"While the Council provided many examples in its submissions which in its view demonstrate the requirement for separation, thus satisfying that aspect of the definition, in my view one of the more forceful examples of this requirement for separation lies in the requirement for dangerous goods to be setback in accordance with the relevant Australian Standards [Ex B at [2.8]]."

72. The applicant submitted that this "more forceful example" is a reference in the statement of environmental effects regarding setback provisions in the Australian Standards for goods rather than separation requirements for developments. Hence, it did not assist in determining whether the buildings used for storage of goods required separation from other development, which was the essential question under the definition of "heavy industrial storage establishment".
73. The applicant submitted that this showed that the Senior Commissioner erred in confusing the need for separation of goods with the need for separation of certain development from other development. The Senior Commissioner's statement in [69] about the requirement of separation of goods is therefore not a reason for her conclusion in [68] about the requirement for separation of one development from another development.
74. I find that the Senior Commissioner has constructively failed to exercise jurisdiction to determine whether part of the proposed development is a heavy industrial storage establishment. The inference that there has been such a constructive failure is more readily able to be drawn from the inadequacy of the reasons given.
75. The definition of "heavy industrial storage establishment" provides a descriptive criterion specifying the elements that need to be satisfied in order for development to be a heavy industrial storage establishment, including: first, there must be a building used for the storage of goods, materials, plant or machinery; second, the use for that storage must be for commercial purposes; third, that building requires separation from other development; and fourth, that separation must be because of the nature of the processes involved or the goods, materials, plant or machinery stored.
76. The Senior Commissioner needed to make findings that each of these elements in the descriptive criterion were satisfied in order to be able to conclude that part of the proposed development was a heavy industrial storage establishment. The Senior Commissioner did not do so.
77. As to the first, the Senior Commissioner did not expressly make findings about what goods, materials, plant or machinery would be stored in each building. The Senior Commissioner did summarise the proposed development in [5] as involving one shed "to be used for the unloading, storage, mixing, blending and loading of fertilisers used in the agricultural sector" (which she later referred to as "the fertiliser storage shed") and a second shed "to be used for the storage of chemicals, some of which constitute dangerous goods" (which she later referred to as "the chemical and general storage shed").
78. The Senior Commissioner also noted in [8] that "sufficient quantities of chemicals" and "bulk quantities of fertilisers" will be held onsite. She noted that "the volume of mixed and blended fertiliser will be less than 20,000 tonnes per annum".
79. In [73], the Senior Commissioner stated that the "amount of chemicals and fertilisers used go directly to the question of the need for separation", but did not specify what was the amount of chemicals and fertilisers used or how that amount generates the need for separation.
80. Otherwise, however, the Senior Commissioner did not specify what were the particular goods, materials, plant or machinery that would be stored in either shed, the nature of the particular goods, materials, plant or machinery stored, or the quantities of goods, materials, plant or machinery that would be stored at any one time.
81. As to the second, the Senior Commissioner made no finding about whether the use of either shed for storage of the particular goods, materials, plant or machinery would be for "commercial purposes". The Senior Commissioner did not identify what would be "commercial purposes". The Senior Commissioner failed to address this element at all.

82. As to the third, the Senior Commissioner did not identify which "building" required separation from other development or the "other development" from which the building was required to be separated. The conclusion in [68], which was couched in the language of the definition of "heavy industrial storage establishment", merely referred to the "proposed development comprises a building...that requires separation from other development". Neither the building nor the other development was identified.
83. In [73], the Senior Commissioner found that "the size of the sheds" goes "directly to the question of the need for separation". Presumably, "the sheds" are the fertiliser storage shed and the chemical and general storage shed. But the Senior Commissioner did not explain how "the need for separation" arose. Which shed is the "building" that requires separation from other development? Is it the fertiliser storage shed or the chemical and general storage shed or both sheds? What is the "other development" from which either shed or both sheds need to be separated?
84. The Senior Commissioner does not identify the other development from which the relevant building is required to be separated. The definition required the Senior Commissioner to identify the "other development". Is it other development on the site, such as the administration building? Is it other development on other sites surrounding the proposed development site and, if so, what development and on what site?
85. As to the fourth, the Senior Commissioner did not identify with particularity what was the nature of the processes involved or the goods, materials, plant or machinery stored. The Senior Commissioner referred in general terms to "the delivery, storage, measuring and, where required, blending of fertilisers" (see, for example, [66]), but did not identify or describe what was "the nature" of those processes and why that nature required the building on which those processes would be carried out to be separated from other development. Indeed, the Senior Commissioner's description of the proposed development earlier in the judgment might have supported a finding that the nature of the processes carried out in the sheds did not in fact require them to be separated from other development. The Senior Commissioner found in [9] that:

    "The impact from the storage and handling of fertiliser will be minimised through the use of an enclosed shed. Whilst other fertiliser storage and handling facilities generally store fertiliser undercover but unload, mix and load material in the open or under just an awning, the Applicant proposes to undertake all these operations inside the shed in an attempt to control and minimise the potential for dust or odour nuisance on nearby residential and sensitive receptors. There is also proposed to be landscaped screening along the Site's eastern and southern boundaries: Ex B at [2.7]."

86. The Council submitted that the ordinary meaning of "separation" would include separation by the walls and roof of the building: the enclosure of the shed separates the processes undertaken and the goods and materials stored in the shed from other development. This might be so, but such questions required reasoned consideration on the facts of the case.
87. As I have noted above, the Senior Commissioner did not make any findings about what would be the particular goods, materials, plant or machinery that would be stored in the buildings, only referring generically to "fertilisers" and "chemicals, some of which constitute dangerous goods". The fact that there would be mixing and blending of fertilisers suggests that there would also be plant or machinery in the buildings used for the mixing and blending processes. The Senior Commissioner did not make any findings about what would be the nature of the goods, materials, plant or machinery stored in the buildings or why that nature required the buildings to be separated from other development.
88. The Senior Commissioner referred in [69] to the "more forceful" example provided by the Council of "the requirement for dangerous goods to be set back in accordance with the relevant Australian Standards". The Senior Commissioner did not identify precisely the dangerous goods that would be stored in any building. The Senior Commissioner simply noted that some of the chemicals to be stored in the chemical and general storage shed constitute dangerous goods. The Senior Commissioner did not identify the nature of the dangerous goods, including why they have been classified as dangerous goods. The nature of the chemical and the reason for classification of the chemical as a dangerous

good may or may not require any building in which such a chemical is stored to be separated from other developments. These questions required reasoned consideration.

89. The Senior Commissioner's reasons reveal that the Senior Commissioner failed to undertake, according to law, the task of determining whether part of the proposed development met each of the elements of the descriptive criterion in the definition of "heavy industrial storage establishment". There was, therefore, a constructive failure to exercise jurisdiction.
90. The Council submitted, however, that the applicant cannot complain on this appeal that the Senior Commissioner did not give reasons on these elements of the definition, because they were not the subject of submissions made to the Senior Commissioner in a way which called for a reasoned consideration of them. I do not agree.
91. First, the issue of whether the development, or part of the development, was to be categorised as a heavy industrial storage establishment (a use prohibited in the zone) was the first and foremost contention in the case. The Council raised the issue as its first contention that the development application be refused in its Statement of Facts and Contentions. The Senior Commissioner recorded this is in her opening paragraphs of the judgment (at [2] and [3]):

    "The heart of this appeal is one of characterisation: is the proposed development on the Site permissible within the current zoning? The Applicant says it is a 'rural supplies business', permissible with consent; the Council says the correct characterisation is that of a 'heavy industrial storage establishment', a use that is prohibited in the B6 Enterprise Corridor Zone.
    The matters in dispute in this case can thus be framed as follows: as a matter of characterisation, is the proposed development permissible under the relevant statutory planning controls? If it is, are there any merit reasons why consent should not be granted?"

92. The answer to that characterisation question depended, because of the structure of the Land Use Table, on whether or not the development was for the purpose of "heavy industrial storage establishment" and that depended on whether the development fell within the definition. The Senior Commissioner could not come to her final conclusion that the development, or any part of it, was for the purpose of heavy industrial storage establishment without deciding that the development, or part of the development, met each of the elements of the descriptive criterion in the definition of "heavy industrial storage establishment".
93. Hence, the primary and fundamental nature of the issue of whether the development, or part of it, was to be characterised as being for heavy industrial storage establishment called for reasoned consideration of the issue by the Senior Commissioner, including of whether and why the development satisfied the elements of the descriptive criterion of the definition.
94. Second, the Council itself made submissions that the elements of the descriptive criterion of the definition were satisfied. The Council submitted that separation of the buildings in which goods and materials will be stored (the fertiliser shed and chemical shed) from other development was required because of the nature of the processes involved or the goods or materials stored, giving examples from the evidence. This submission in itself called for a reasoned consideration of the matters raised. The applicant rebutted the Council's submissions, joining issue that the buildings needed to be separated from other development. The fact that the applicant's response was brief and did not comprehensively rebut every submission made by the Council was not evidence that the issue was no longer in dispute. The applicant's position remained the same: it disputed that the development could be characterised as a heavy industrial storage establishment. Nothing in the applicant's conduct, including the submissions it made, could be construed as not calling for a reasoned consideration of whether or not the development fell within the definition of "heavy industrial storage establishment".
95. I uphold the second ground of appeal.

Ground 3 and 4: test for separation from other development

96. The third and fourth grounds of appeal concern the Senior Commissioner's reasons for determining that part of the development needed to be separated from other development. In ground 3, the applicant contended that the Senior Commissioner applied the wrong test and/or asked herself the wrong question in determining whether the goods or materials needed to be separated from other development. In ground 4, the applicant contended that the Senior Commissioner erred in failing to take into account mitigation or amelioration measures in determining whether the goods or materials needed to be separated from other development.
97. The applicant noted that the Senior Commissioner expressed her view in [69] that "one of the more forceful examples of this requirement for separation lies in the requirement for dangerous goods to be setback in accordance with the Australian Standards" in the definition of heavy industrial establishment. The Senior Commissioner referred to the statement in the Statement of Environmental Effects and incorporated Chemical Storage Report that the types and volumes of dangerous goods to be stored on the premises comply with the required separation distances to protected places in the relevant Australian Standards. The applicant submitted that whilst a requirement for dangerous goods to be setback in accordance with the relevant Australian Standards might be a reason to separate goods, it does not provide a reason to separate one development from another development. The Senior Commissioner confused her requirement for separation of goods from protected places with the requirement in the definition of heavy industrial storage establishment for separating developments from one another. They are not the same thing. The applicant gave the example that dangerous goods proposed to be kept onsite required a separation of 3, 5 or 8 metres from "protected places" as defined in the relevant Australian Standards. This is not the same as saying that such goods cannot be stored in a building next door to another development.
98. The applicant did not press ground 4 as a separate ground of appeal, but nevertheless contended that the error raised in ground 4 underscored the error raised in ground 3.
99. The applicant submitted that, just as the Senior Commissioner observed at [71] that "the fact that separation from sensitive receptors (or protected places) can and may be achieved" (such as by means of compliance with the Australian Standards) does not alter the characterisation of the use, it must equally be the case that the fact that goods of a certain kind might have to be stored in accordance with a standard does not mean that those goods necessarily require separation from other development as meant by the definition of "heavy industrial storage establishment". Applying the Senior Commissioner's logic, service stations, which store liquid fuel, albeit for retail sale, would also be regarded as heavy industrial storage establishments and, on that basis, could not be permitted adjacent to residential development.
100. The Council submitted that the applicant has misstated the effect of the Senior Commissioner's reasons in [69] of the judgment. The requirement in the relevant Australian Standards for dangerous goods to be setback was regarded by the Senior Commissioner as one of the more forceful examples of the requirement for separation, among the many provided by the Council in its submissions. The Council submitted that it is implicit in the Senior Commissioner's sentence that she took into account the other examples provided by the Council, which the Senior Commissioner referred to in [61] of the judgment. The Council submitted that those numerous examples demonstrated the requirement for separation from other development, including matters such as enclosing the relevant building, providing appropriate separation distances, in addition to acoustic, dust and other odour mitigation measures. The fact that the development incorporates these separation and other measures demonstrates that it is the nature of the use that creates the need for separation from other development, whether that be on the same site or on an adjoining or nearby land.
101. The Council submitted that the Senior Commissioner did not confuse the test for separation under the Australian Standards with the test for separation in the definition of heavy industrial storage establishment. Rather, the Senior Commissioner used the evidence on one to assist in applying the other. The Statement of Environmental Effects and Chemical Storage Report were relevant because they found that the nature of the chemicals stored in the buildings did require separation from protected places, which include dwellings, but that there would be no impacts on residents in the area due to the more than required separation distances under the Australian Standards to protected places. This evidence

was applicable to the test in the definition of heavy industrial storage establishment of whether a building is required to be separated from other development because of, inter alia, the goods or materials stored in the building.

102. The Council submitted that the Senior Commissioner applied this evidence about the separation requirements under the Australian Standards to the definition of heavy industrial storage establishment in this permissible way. This was evidenced by the Senior Commissioner's language in [69] where the Senior Commissioner refers to the evidentiary examples of separation, including under the Australian Standards, as "satisfying that aspect of the definition", meaning the definition of "heavy industrial storage establishment".
103. I do not consider the applicant has established that the Senior Commissioner applied the wrong test and/or asked the wrong question in determining whether part of the proposed development was a heavy industrial storage establishment.
104. It is true that the correct question to be asked was that required by the terms of the definition of "heavy industrial storage establishment". The Senior Commissioner needed to determine whether part of the proposed development met each of the elements of the descriptive criterion in the definition, including that the relevant building, used for the storage of the relevant goods and materials, required separation from other development because of the nature of the processes involved or the relevant goods and materials stored. That question could not be answered by reference to any requirements for dangerous goods to be setback in accordance with the relevant Australian Standards. Put another way, the fact that certain dangerous goods may be required to be setback from some other goods, people or places under some Australian Standard cannot, without further analysis and reasons, be determinative that a building in which those dangerous goods are stored required separation from other development. The test for separation for dangerous goods under the Australian Standards is not interchangeable with and cannot be transposed to become the test for separation under the definition of "heavy industrial storage establishment". The Senior Commissioner needed to address and apply the test under the definition, not the test under the Australian Standards.
105. However, I am not persuaded that the Senior Commissioner did substitute the test in the Australian Standards for the test in the definition of "heavy industrial storage establishment". Although the language of the judgment is not clear (including in [69]), I consider the preferable reading is that the Senior Commissioner used the evidence that the type and volume of dangerous goods to be stored on the premises complies with the setback provisions in the Australian Standards to establish, for the purpose of the element of the definition of "heavy industrial storage establishment", that the buildings were required to be separated from other development because of the nature of the goods stored in those buildings. There still was no reasoned consideration in the manner and to the extent that I consider was required (see my findings on ground 2), but what reasoning was given does not establish that the Senior Commissioner erred in applying the wrong test.
106. I reject the third ground of appeal.

Ground 5: construction of definition

107. The fifth ground of appeal is that the Senior Commissioner erred in her construction of the definition of "heavy industrial storage establishment" in two ways: first, by failing to construe the words "heavy industrial" in the name of the development of "heavy industrial storage establishment" and, secondly, the words "storage for commercial premises" in the text of the definition itself.
108. In relation to the first, the applicant submitted that, in the circumstances of Griffith LEP generally and the definition of "heavy industrial storage establishment" particularly, it is legitimate to have regard to the name of the particular type of development being defined to ascertain the meaning of that development. That approach was followed in *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [20], [21] and [54].
109. The applicant submitted that the words "heavy industrial" are adjectives to the nominal phrase "storage establishment" and import a heavy industrial nature to the storage establishment. The words "heavy industrial" give a strong textual indicator of the intent of the definition. The applicant referred to the definition of "heavy industry" in Griffith LEP as meaning:

"a building or place used to carry out an industrial activity that requires separation from other development because of the nature of the processes involved, or the materials used, stored or produced, and includes:
(a) hazardous industry, or
(b) offensive industry.
It may also involve the use of hazardous storage establishment or offensive storage establishment."

110. The applicant referred to the statement in *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [44] that "the sense in which 'includes' is to be understood turns on its context". The applicant submitted that contextually the terms "hazardous industry" and "offensive industry", included within the definition of heavy industry, are not merely examples thereof, but actually colour its definition. See also *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388; [2007] NSWCA 190 at 391-392. Similarly, the applicant submitted the terms "hazardous storage establishment", "liquid fuel depot" and "offensive storage establishment" referred to in the definition of "heavy industrial storage establishment" colour the definition of "heavy industrial storage establishment".
111. Contextually, the applicant submitted that a "heavy industrial storage establishment" is a storage establishment associated with heavy industry, which by its definition also requires separation from other developments. The definition of "heavy industrial storage establishment" in Griffith LEP is not so broad as to contemplate any storage of hazardous goods, but it is intended to capture storage at an industrial scale.
112. The applicant also submitted that the context in which the defined term is used needs to be considered, citing *Kovacevic v Queanbeyan City Council* [2016] NSWCA 346 at [51], [58] and *Matic v Mid-Western Regional Council* [2008] NSWLEC 113 at [7]- [9]. That context includes how the defined term is used in the Land Use Table for various industrial zones. Heavy industrial storage establishments go hand in hand with heavy industries in the Land Use Table, both being permitted (such as in the IN3 Heavy Industrial Zone) or both being prohibited (such as in the INI General Industrial Zone). So too in the applicable B6 Enterprise Corridor Zone, both heavy industrial storage establishments and industries (including heavy industries) are prohibited.
113. In the context where Griffith LEP only permits "heavy industrial storage establishments" on land within the IN3 Heavy Industrial Zone, the applicant submitted that service stations, rural supplies and other purposes which may have elements of storage would not be regarded as heavy industrial storage establishments, which are permitted only in the zone defined for heavy industry.
114. In relation to the second, the appellant submitted that the Senior Commissioner ignored the fact that "storage for commercial purposes", one of the elements in the definition of heavy industrial storage establishment, is different from storage for retail purposes.
115. The applicant submitted that, pursuant to the Griffith LEP, rural supplies is a subgenus of retail premises. Retail premises necessarily involves storage and possibly large areas of storage, such as in the following types of premises: bulky goods premises; garden centre; hardware and building supplies; landscape material supplies; rural supplies and timber yard.
116. The applicant submitted that storage of goods in retail premises is not for the purpose of storage, but instead it is for the purpose of "selling items by retail, or hiring or displaying for the purpose of selling them or hiring them out" (the definition of retail premises in Griffith LEP). Many of these retail premises and other uses (such as service stations, airports, heliports, resource recovery facilities) store goods, materials, plant or machinery, which requires separation from other development. It would ignore the contextual reading of the definition to suggest that every retail use that involves an element of storage could be regarded as being for the purpose of a heavy industrial storage establishment.
117. The applicant submitted that the storage involved in the proposed development was for a retail purpose, not for a commercial purpose. Whilst retail purposes are a subset of commercial purposes, not all commercial purposes are retail purposes; they are not the same. Definitions in Griffith LEP of industrial activity, heavy industrial storage establishment and others refer specifically to "commercial purposes" and others refer specifically to "retail purposes".

118. The applicant alternatively submitted that the storage in the buildings was not for a commercial purpose at all. Storage was not an end in itself. The applicant's business was not the storage of goods, materials, plant or machinery. Adapting the words of *Shire of Perth v O'Keefe* (1964) 110 CLR 529; [1964] HCA 37 at 534, storage is not the end which is seen to be served by the applicant's particular use of the premises. The applicant stood to make no money from the storage of goods and materials. Rather, the money was to be made by the retail of goods and materials, whether in their original state or when blended or mixed, from the premises. Hence, it was not any use of the premises for storage of goods or materials that was for commercial purposes, but instead the use for the purpose of selling the goods or materials by retail that was for commercial purposes.
119. The applicant, therefore, submitted that the Senior Commissioner erred in her construction of heavy industrial storage establishment by ignoring "heavy industrial" and ignoring the fact that "storage for commercial purposes" is different from storage for retail purposes or that there was no storage for commercial purposes at all.
120. The Council rebutted the applicant's submission that the first limb of the definition of "heavy industrial storage establishment" takes colour from the specified uses listed after the word "includes" (that is, a hazardous storage establishment, a liquid fuel depot and an offensive storage establishment).
121. The Council referred to the statement in *Cheetham v Goulburn Motorcycle Club Inc* (2017) 223 LGERA 43; [2017] NSWCA 83 at [47] that:

    "Further, the verb 'includes' is apt to serve an illustrative or an expansionary function. If the items specified would not ordinary be understood to fall within the descriptive criterion, the effect may be expansionary. If, on the other hand, they naturally fall within the descriptive criterion, they may be understood as illustrations."

122. The Council noted that the definition starts with the word "means" and then adds the word "includes". In *Cheetham v Goulburn Motorcyle Club Inc* at [48] Basten JA quoted the statement by Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources – The Laws of Australia* (2013, Thomson Reuters) at [25.1.1070] that:

    "The words 'means' and 'includes' are sometimes used in combination, in the form 'X means Y and includes Z. That exhaustively defines X to mean Y but makes it clear, by way of clarification or extension, that this includes Z."

123. The Council referred to the statement to a similar effect by Pearce and Geddes, *Statutory Interpretation in Australia* (2004, 8th ed, LexisNexis) at [6.64] that:

    "To say that 'X' means ABC and 'includes' DEF is an acceptable format as it indicates that X has a limited meaning but that to avoid doubt certain matters are to be taken to fall within the scope of that designated meaning."

124. The Council submitted that, contrary to these orthodox principles of statutory construction, acceptance of the applicant's submissions would involve reading the word "includes" as serving neither an illustrative nor an expansive function, but rather the impermissible function of confining the descriptive part of the definition. It would involve reading down the first limb of the definition by reference to specific inclusions which are plainly not intended to limit the preceding elements of the definition. The word 'includes' is a word of expansion, not of limitation.
125. The Council also rebutted the applicant's submission that the language of the defined term itself ("heavy industrial") gives colour to the definition. The Council submitted that it is impermissible to do so where (as here) it would involve reading down a definition which otherwise widened the ordinary meaning of the defined term: *Wacal Developments Pty Ltd v Realty Pty Ltd* (1978) 140 CLR 503; [1978] HCA 30 at 507; *Tovir Investments Pty Ltd v Waverly Council* at [20]-[21].
126. The Council submitted that the applicant's submission would require the Court to read into the first limb of the definition words such as "storage at an industrial scale", for which there is neither textual nor contextual support.
127. The Council submitted that the meaning of the definition of "heavy industrial storage establishment" is not to be interpreted by how that type of development is used in the Land

Use Table for each of the industrial zones.

128. In response to the applicant's second point concerning the words "for commercial purposes", the Council submitted that the numerous types of retail premises referred to by the applicant would not be regarded as being for the purpose of heavy industrial storage establishment, not because they are not for commercial purposes, but because of the nature of the processes involved or the goods, materials, plant or machinery stored in the building used for retail premises. The definition requires a causal link between the nature of the processes involved or the goods, materials, plant or machinery stored, on the one hand, and the requirement for separation on the other. In other words, the Council submitted, it is not merely facilities that involve storage for commercial purposes that require separation from other development that are included in the definition.
129. The Council also submitted that the applicant had not raised the matters regarding the use for storage not being for commercial purposes in a way which called for a reasoned consideration of them.
130. I do not consider the applicant has established that the Senior Commissioner erred in construing the definition of "heavy industrial storage establishment" in the ways submitted by the applicant. First, in the circumstances of this definition, I do not consider it should be construed by reference to the name given to the particular type of development being defined: *Wacal Development Pty Ltd v Realty Developments Pty Ltd* at 507. The meaning of the particular type of development of "heavy industrial storage establishment" is given a special meaning by the text of the definition, not by the name given to the particular type of development.
131. The text of the definition uses both the word "means" and the word "includes". That form of definition exhaustively defines the particular type of development of "heavy industrial storage establishment" to mean what is stated in the descriptive criterion of the definition but then makes it clear, by way of clarification or extension, that this includes the three specific types of development listed. If the three specified developments could not ordinarily be understood to fall within the descriptive criterion, the effect is expansionary, but if they naturally fall within the descriptive criterion, they may be understood as illustrations. Either way, though, the inclusion of the three specified developments does not change the meaning of the descriptive criterion.
132. Second, the inclusion of the three specified developments does not assist in determining whether the proposed development falls within the definition of "heavy industrial storage establishment". No one suggested that the proposed development fell within any of the three specified developments. The only question was whether the proposed development met the descriptive criterion. The answer to that question did not depend on whether the three specified developments ordinarily fell within or without the descriptive criterion.
133. Third, I do not consider, in the circumstances of this definition, that assistance is gained by reference to how the defined type of development is used in the Land Use Table for the industrial zones. The fact that the Land Use Table couples heavy industrial storage establishments and heavy industries as both being permitted or prohibited does not assist in construing the meaning of the defined term of "heavy industrial storage establishment" as being limited to a building or place in which the process involved or the goods, materials, plant or machinery stored is of a heavy industrial nature or scale.
134. Rather, I consider that any limitation on the buildings or places used for the storage of goods, materials, plant or machinery that can be characterised as being heavy industrial storage establishments must derive from the definition itself, not from how the defined term is used in the Land Use Table.
135. In relation to the second point, the Senior Commissioner never addressed the element of the descriptive criterion of the definition of whether a building would be used for the storage of goods, materials, plant or machinery "for commercial purposes". For the reasons I gave earlier, the Senior Commissioner was required to give reasoned consideration to each element of the definition, including that the building was used for storage of goods or materials for commercial purposes. The Senior Commissioner's failure to do so involved a constructive failure to exercise jurisdiction in determining whether the proposed development fell within the definition of "heavy industrial storage establishment". This was the error of law, not any error in construction of the phrase in the definition. The Senior Commissioner cannot have made any error in construing the phrase in the definition if she never construed or applied the phrase.

136. I do not uphold the fifth ground of appeal.

Ground 6: construction and use of zone objectives

137. The sixth ground of appeal is that the Senior Commissioner misconstrued the objectives of the relevant zone. The Senior Commissioner said in [74] that the Griffith LEP had "sought to co-locate particular kinds of activities together" and "the objectives of the B6 Enterprise Corridor Zone are to encourage activity which does not have external impacts of such a kind that separation from other development is required".
138. The applicant submitted that the Senior Commissioner was in error in so finding. There is no reference in the objectives of the B6 Enterprise Corridor Zone to "co-locating particular kinds of activity". The objectives of the zone include statements about providing for a range of uses. This is done in the Land Use Table. Items 2 and 3 of the Land Use Table include a variety of nominate developments permitted without or with consent but an even wider variety of innominate developments has been permitted with consent. The applicant submitted, therefore, that it cannot be said that Griffith LEP sought to co-locate particular kinds of activity together. Similarly, the applicant submitted, the zone objectives do not "encourage activity which does not have external impacts of such a kind that separation from other development is required".
139. The Council rebutted the applicant's submission that the Senior Commissioner erred in construing the zone objectives in these ways. The Council submitted that the zone objectives include encouraging "a mix of compatible uses", providing a range of employment uses, and providing for residential uses, but only as part of a mixed use development. These objectives evidence an intention to accommodate a mix of development within the zone, but of development that is compatible with one another. The Council submitted that it is logical to say, as the Senior Commissioner did, that the zone objectives encourage development that does not have external impacts of such a kind that separation from other development is required.
140. The Council further submitted that, even if the Senior Commissioner did misconstrue the zone objectives, such error was not material to her conclusion that the proposed development was a heavy industrial storage establishment. Assuming that the Senior Commissioner was otherwise correct in concluding that one of the proposed uses is a heavy industrial storage establishment, and that that use was not subservient to another purpose, it is unclear how the Senior Commissioner's statement concerning the zone objectives at [74] could have conceivably impacted upon the outcome of the appeal. Conversely, if the Senior Commissioner was incorrect in concluding that one of the uses is a heavy industrial storage establishment, her statement concerning the zone objectives was equally immaterial in that conclusion.
141. I consider that the error of the Senior Commissioner was not in misconstruing the objectives of the zone, but rather in having regard to the objectives of the zone in determining whether the proposed development fell within the definition of "heavy industrial storage establishment". That involved misdirection and asking the wrong question. The requirement for separation of a building used for the storage of goods, materials, plant or machinery from other development was only that fixed in the descriptive criterion in the definition, namely because of the nature of the processes involved or the goods, materials, plant or equipment stored. The objectives of the zone in which the proposed development would be carried out are irrelevant to determining whether the proposed development met or did not meet that requirement in the descriptive criterion of the definition.
142. The Senior Commissioner misdirected herself by inquiring and determining that the proposed development was not activity of the kind that the objectives of the B6 Enterprise Corridor Zone encouraged, which she found to be activity that does not have external impacts of such a kind that separation from other development is required. Whether or not the proposed development was activity of that kind was irrelevant to the question required by the definitional criteria of the definition.
143. I do not accept, as the Council submitted, that the Senior Commissioner's discussion of the zone objectives was immaterial to her conclusion that the proposed development was a heavy industrial storage establishment. The section of the judgment in which the discussion of the zone objectives occurs only concerns the question of the characterisation of the development as a heavy industrial storage establishment. The discussion occurs in her

addressing of the need for separation of the buildings used for the storage of goods and materials from other development. The apparent purpose of the Senior Commissioner's reference to the zone objectives was to bolster her finding that the proposed development had external impacts of a kind that required separation from other development. The discussion was therefore material to her conclusion that the development was a heavy industrial storage establishment.

144. I uphold the sixth ground of appeal, not for the error of law raised by the applicant but instead for the error of law in applying the wrong test and asking the wrong question concerning the zone objectives.

Conclusion and orders

145. The appeal should be upheld and the decision and orders of the Senior Commissioner set aside. The proceedings should be remitted to be determined according to law. As the Senior Commissioner will soon be retiring, the proceedings will need to be determined by another Commissioner or Judge of the Court.
146. The usual order for costs in a s 56A appeal is that costs follow the event. There is no circumstances or conduct of the parties that would justify making a different order as to costs.
147. The Court orders:

    (1) The appeal is upheld.
    (2) The decision and orders of Senior Commissioner Martin of 6 July 2017 are set aside.
    (3) The proceedings are remitted to be determined according to law.
    (4) The respondent is to pay the applicant's costs of the appeal.

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