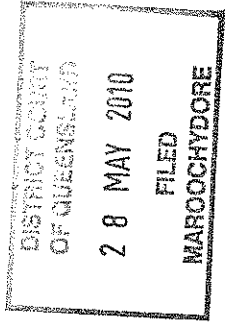


In the Planning and Environment Court
Held at Maroochydore

No. D32 of 2010



Between **KIN KIN COMMUNITY GROUP INC** Applicant

And **SUNSHINE COAST REGIONAL COUNCIL
(FORMERLY NOOSA SHIRE COUNCIL)** First Respondent

And **JOHN WALLACE SHEPPERSON** Second Respondent

And **NEILSENS QUALITY GRAVELS PTY LTD
ACN 010 620 916** Third Respondent

AMENDED ORIGINATING APPLICATION

Filed on: 28/05/2010

Filed by: **p&e Law**

Service address: 1 The Esplanade Cotton Tree Qld 4558

Telephone: 07 5479 0155

Facsimile: 07 5479 5070

Amended pursuant
to the order of the
Planning and
Environment Court
dated 21 May 2010

KIN KIN COMMUNITY GROUP INC of c/- p&e Law, 1 The Esplanade, Cotton Tree, Queensland applies to the Planning and Environment Court at Maroochydore for the following declarations and orders pursuant to sections 456 and 818 of the Sustainable Planning Act 2009:

The following declarations:

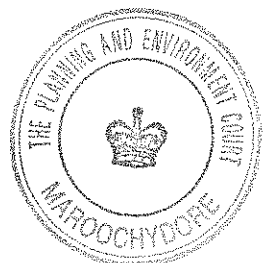
A The decision of the First Respondent made on 21 July 1987 that "Council approve TPC 1899 J. Shepperson for an Extractive Industry on Portion 259, Murrays Road, via Kin Kin, subject to the conditions contained in the Shire Planner's report dated 4th June, 1987", was unlawful.

AMENDED ORIGINATING APPLICATION

Filed on behalf of the Applicant

Form PEC-3

p&e Law
1 The Esplanade
Cotton Tree Qld 4558
Telephone: 07 5479 0155
Facsimile: 07 5479 5070
Ref: M Griffin:1801 (00081745)



B. The consent order made by the Local Government Court on 13 May 1988 in Local Government Appeal No. 1 of 1987 ("the Approval") was made without jurisdiction.

And the following orders:

- A. The consent order made by the Local Government Court on 13 May 1988 in Local Government Appeal No. 1 of 1987 is vacated.
- B. The decision of the First Respondent made on 21 July 1987 that "Council approve TPC 1899 J. Shepperson for an Extractive Industry on Portion 259, Murrays Road, via Kin Kin, subject to the conditions contained in the Shire Planner's report dated 4th June, 1987" is void and set aside.
- C. No construction or excavation work is to be carried out on the Land unless and until an effective development permit for that work is obtained.
- D. Such further or other orders as the Court considers appropriate.

OR ALTERNATIVELY:

The following declaration:

- E. The Approval has lapsed pursuant to sections 4.13(18) and 8.10(8B) of the Local Government (Planning and Environment) Act 1990 and there is no lawful approval for use of the Land for the purpose of an extractive industry;

And the following orders:

- F. No construction or excavation work is to be carried out on the Land unless and until an effective development permit for that work is obtained.
- G. Such further or other orders as the Court considers appropriate.

OR ALTERNATIVELY:

The following declarations:

- H. The use of the Land for the purpose of an extractive industry, as approved by the Approval and subject to the conditions of the Approval, is limited to the use and the area of land particularised in the application for town planning consent for extractive industry – hard rock quarry dated 31 March 1987 ("the Application").
- 1 Use of the Land for the purpose of an extractive industry, other than in accordance with the Approval is unlawful.
 - 2 The decision of the First Respondent to approve the Kin Kin Quarry Management Statement and Development Plan dated July 1991 is *ultra vires* and unlawful.
 - 3 The decision of the First Respondent to approve the Quarry Management Plan Kin Kin Quarry dated 20 March 2005 is *ultra vires* and unlawful.



- 4 There is no lawful approval for any extension of the term of the Approval beyond the term specified in the Approval.

and the following orders:

- 5 The decision of the First Respondent to approve the Kin Kin Quarry Management Statement and Development Plan dated July 1991 is void and set aside.
- 6 The decision of the First Respondent to approve the Quarry Management Plan Kin Kin Quarry dated 20 March 2005 is void and set aside.
- 7 No construction or excavation works are to be carried out on the Land other than in accordance with the Approval.
- 8 Such further or other orders as the Court considers appropriate.

The grounds relied on are:

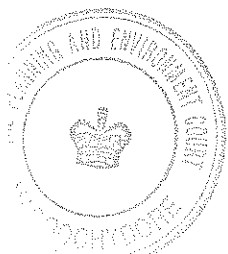
- 1 This is an application for declarations and orders pursuant to sections 456 and 818 of the *Sustainable Planning Act 2009* ("SPA").
- 2 Pursuant the order of the Planning and Environment Court dated 21 May 2010, the issues in dispute in this proceeding are limited to those matters set out in the Amended Originating Application, Amended Statements of Facts Matters and Contentions and Replies thereto (including further and better particulars of such pleadings) as are filed in this proceeding.

The Land

3. The land the subject of this application is:

- (a) and was at all material times, owned by the Second Respondent;
- (b) situated at 259 Murrays Road, Kin Kin in the state of Queensland and described as Lot 259 on Crown Plan MCH187, County of March, Parish of Noosa ("the Land");
- (c) 60.02 hectares in area; and
- (d) in the First Respondent's relevant planning scheme, Noosa Plan 2006:
 - (A) in a Rural Zone in the Boreen Point, Kin Kin and Cootharaba Locality;
 - (B) in an Area of Ecological Significance on the Strategy Map;
 - (C) affected by Biodiversity, Natural Hazard (Landslide) Bushfire Hazard and Natural Resources Overlays.

4. The Applicant is an incorporated body whose members ~~are residents who~~ live or work in the vicinity of the Land.



The Application

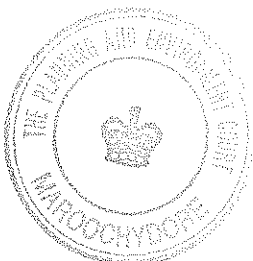
5. On or about 31 March 1987 the Second Respondent applied to the First Respondent for town planning consent for an Extractive Industry – Hard Rock Quarry to be established on the Land which was described as Portion 259 in the application (“the Application”).

The Application was deemed not to have been made

6. Pursuant to by-law 2 of Chapter XLIV, Part B, Division 2 of the town planning scheme for the Shire of Noosa gazetted on 4 May 1985 (“the 1985 Planning Scheme”), the Application was deemed not to have been made when the Application was submitted to the First Respondent.

Particulars:

- (a) By-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme, which was in force at the time of the Application, sets out the requirements for an application for consent. The requirements include that the application truly set forth the particulars enumerated in sub-paragraphs (2) (a) to (d) inclusive of by-law 1.
- (b) By-law 2 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme states that “[a]n application made pursuant to by-law 1 of this Division shall be deemed not to have been made unless the requirements of that by-law have been complied with in full”.
- (c) Sub-paragraph (2)(d) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires an application for consent to be addressed to the Shire Clerk and truly set forth the particulars enumerated in sub-paragraphs (2)(d)(i) to (xiv) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme inclusive.
- (d) Sub-paragraph (2)(d)(i) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires the application to truly set forth, *inter alia*, the real property description of the land.
- (e) Sub-paragraph (2) (d) (iv) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires the application to truly set forth the use desired to be made of the land.
- (f) Sub-paragraph (2)(d)(viii) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires the application to truly set forth a site plan and layout plan and an elevation of any buildings or other structures proposed to be erected on the land.
- (g) Sub-paragraph (2)(d)(xii) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires the application to truly set forth the



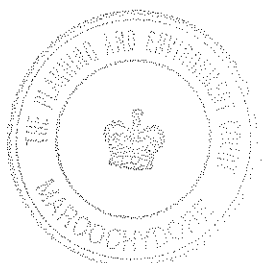
number of carparking spaces to be provided on site with the locations and dimensions of these indicated on the layout plan.

(h) Sub-paragraph (2)(d)(xiii) of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires, in the case of an application for consent to carry out an extractive industry on any land, the application to be accompanied by plans showing the matters enumerated in sub-paragraphs (2)(d)(xiii)(A) – (H) inclusive, being:

- (A) sufficient detail to enable the Council to understand the nature of the proposed excavation;
- (B) the limits of the area proposed to be excavated
- (C) the existing contours of the land;
- (D) the depth and circumstances of the proposed excavation;
- (E) the estimated depth and circumstances of the overburden present;
- (F) the location of any existing or proposed buildings;
- (G) the distance of the proposed excavation from adjacent streams, watercourses or drains;
- (H) the proposed method of removal of ponded stormwater from any excavation and the location of the discharge point of such stormwater.

(i) The particulars of the proposal shown on the Application included:

- (A) extraction and crushing equipment;
- (B) a site office of approximately 3 metres by 3 metres;
- (C) a crusher of approximately 3 metres by 10 metres;
- (D) an excavation area of approximately 10 hectares or 17% of the Land;
- (E) heavy earthmoving equipment and rock crusher;
- (F) ten vehicle parking spaces;
- (G) four employees.
- (H) attached to, and forming part of, the Application were maps and plans showing “the location of the proposed extraction” and the “area to be extracted”.
- (I) the Application also stated that “[t]he proposed excavation is no closer than 100 metres from adjacent significant watercourses and streams”



- (i) The Application did not comply in full with By-law 1 of Chapter XLIV, Part B, Division 2 of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme.

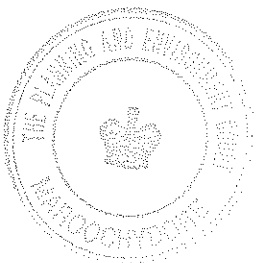
Further particulars:

(A) The Application did not truly set forth:

- (i) the real property description of the land to be used for an extractive industry, additional further particulars of which are:
- a. the Application did not include the real property description of the land for the proposed quarry access road, being Portion 258 Parish of Noosa; and
 - b. no application was made to construct and use the access road through Portion 258 Parish of Noosa along which material was to be carried from the quarry site to a public road;
- (ii) the use desired to be made of the land, additional further particulars of which are:
- a. the description of the proposed use did not include the access road;
 - b. an elevation of buildings or other structures to be erected on the land;
 - c. the locations and dimensions of carparking spaces on the layout plan;
- (iii) sufficient detail to enable the Council to understand the nature of the proposed excavation;
- (iv) the depth and circumstances of the proposed excavation;
- (v) the estimated depth and circumstances of the overburden present;
- (vi) the proposed method of removal of ponded stormwater from any excavation and the location of the discharge point of such stormwater.

First Respondent's Jurisdiction to Consent to the Application

7. The jurisdiction of the First Respondent to consent to the Application was subject to by-law 6 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme and was limited to "consideration of an application for consent made pursuant to this Division".



8. The Application was not an application for consent made pursuant to Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme and the First Respondent had no jurisdiction to consent to the application subject to conditions, or at all.

Particulars:

- (a) the Application was deemed not to have been made, as particularised in paragraph 6 above.

Application Defective and Incompetent

9. The Application was defective and incompetent with respect to the land to which the extractive industry use applied.

Particulars:

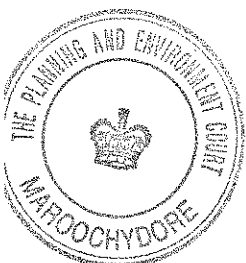
- (a) The Application failed to include an application for consent for the proposed haul road through portion 258 referred to in the Application at 10(F), and, consequently, the Application did not include all of the land to which the proposed "use" (as defined the 1985 Planning Scheme) applied;
- (b) Where a change of use is contemplated, the proposed use must be stated in detail in one application and all the land involved in the use must be the subject of the application.

Public Notice of the Application

10. Before deciding the Application the First Respondent was required to comply with the procedure for processing applications for re-zoning or consent prescribed in section 33(18) of the *Local Government Act 1936-1985*.
11. The First Respondent did not comply with the procedure for processing applications for re-zoning or consent prescribed in section 33(18) of the *Local Government Act 1936-1985* before deciding the Application.

Particulars:

- (a) The steps taken by the First Respondent in purported compliance with section 33(18) of the *Local Government Act 1936-1985* were a nullity because at the time the First Respondent purported to process the Application, the Application was deemed not to have been made as particularised in paragraph 6 above;



- (b) By discussion with the Second Respondent and by letter dated 6 May 1987 the First Respondent requested further details about the Application from the Second Respondent;
- (c) By letter dated 13 May 1987 the Second Respondent provided certain details of the Application to the First Respondent, attaching a plan showing locations of the excavation area, siltation pond, and the crusher and office sites ("the further details").
- (d) Not all of the details requested by First Respondent were provided by the Second Respondent;
- (e) The further information obtained by the First Respondent was information required to be included with the Application pursuant to by-law 1 of Chapter XLIV Part B Division 2 of the 1985 Planning Scheme, and included information not provided in the Application;
- (f) The further information sought and obtained by the First Respondent was not sufficient to satisfy the requirements of by-law 1 of Chapter XLIV Part B Division 2 of the 1985 Planning Scheme;
- (g) The further information was sought and obtained by the First Respondent after the time for public inspection of the Application and objections to the granting of the Application had closed on 1 May 1987. According to the dates of the relevant correspondence, the further information did not exist for the purpose of public inspection or objections.

12. By reason that:

- (a) the Application was deemed not to have been made, as particularised in paragraph 6 above;
- (b) the First Respondent had no jurisdiction to consent to the Application, as particularised in paragraphs 7 and 8 above;
- (c) the Application was defective and incompetent with respect to the land to which the extractive industry use applied, as particularised in paragraph 9 above;
- (d) the First Respondent's purported compliance with section 33(18) of the Local Government Act 1936-1985 was a nullity, as particularised in paragraphs 10 and 11 above;

the decision of the First Respondent to approve the Application was unlawful.

Particulars:

- (A) On 21 July 1987, the First Respondent resolved to approve the Application subject to conditions ("the Council Approval").



The Approval

13. The Second Respondent commenced an appeal to the Local Government Court in respect of the Council Approval.

Particulars:

- (a) Local Government Appeal 1 of 1987

14. By a consent order made by the Local Government Court, the Council Approval was varied with respect to a number of conditions and in all other respects the conditions of the Council Approval were confirmed ("the Approval").

Particulars:

- (a) Order of the Local Government Court in Local Government Appeal 1 of 1987 made on 13 May 1988.

15. The jurisdiction of the Local Government Court to make the consent order issuing the Approval was subject to the First Respondent having jurisdiction to approve the Application, save that the Local Government Court had discretion to make directions pursuant to section 33(18C) of the *Local Government Act 1936-1985*.

16. The Local Government Court did not direct that by-law 1 of Chapter XLIV Part B Division 2 of the 1985 Planning Scheme had been complied with.

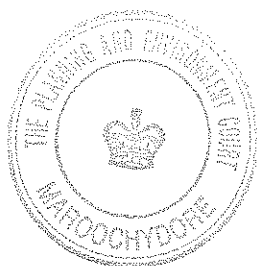
17. The Local Government Court did not direct that section 33(18) of the *Local Government Act 1936-1985* had been complied with.

18. Absent a direction by the Local Government Court pursuant to section 33(18C) of the *Local Government Act 1936-1985* that:

- (a) by-law 1 of Chapter XLIV Part B Division 2 of the 1985 Planning Scheme had been complied with, the consent order made by the Local Government Court issuing the Approval was made without jurisdiction; and
- (b) section 33(18) of the *Local Government Act 1936-1985* had been complied with

the consent order made by the Local Government Court issuing the Approval was made without jurisdiction.

7. On 21 July 1987, the First Respondent resolved to approve the Application subject to conditions. That approval was varied by order of the Local Government Court on 13 May 1988 ("the Approval").



IN THE ALTERNATIVE, if the Approval was lawful:

The Approval Lapsed

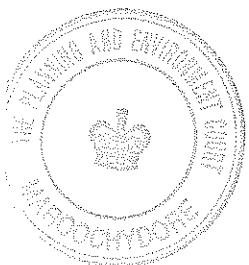
19. The Local Government (Planning and Environment) Act 1990 commenced in substance on 15 April 1991.
20. Pursuant to subsection 8.10(8) of the Local Government (Planning and Environment) Act 1990, each approval, consent or permission granted by a local authority prior to commencement of the Act, is to continue to have force and effect as if it were an approval, consent or permission made pursuant to the Act.
21. Pursuant to subsection 8.10(8B) of the Local Government (Planning and Environment) Act 1990, a consent referred to in subsection (8) does not lapse pursuant to s 4.13(18) of the Act until four years after the commencement of the Act.
22. The Approval is a town planning consent, being approval of an application for town planning consent and being consent number TPC 1899.
23. To the extent the Approval was valid, it continued to have force and effect as if it were a consent made pursuant to the Local Government (Planning and Environment) Act 1990.
24. Pursuant to subsection 4.13(18) of the Local Government (Planning and Environment) Act 1990, a permit issued for an application for town planning consent lapses where:
 - (a) the use of land or the use or erection of a building or other structure on land, the subject of the approval in respect of which the permit was issued, has not been commenced within 4 years of the date of issue of the permit or such extended period or periods as the local government upon application being made to it therefor approves; or
 - (b) a use of any premises established pursuant to the permit has ceased for a period of at least 12 months.
25. Four years after the commencement of the Local Government (Planning and Environment) Act 1990 the extractive industry use had not commenced and the Approval lapsed.

Particulars:

- (a) The First Respondent was aware that the lapsing provisions under the new Local Government (Planning and Environment) Act 1990 "would not automatically revoke approval after 4 years from date of approval but rather 4 years from Proclamation of Act";
- (b) The Second Respondent, as lessor, entered into a lease with the First Respondent, as lessee, in July 1996 in relation to the Land which at that time was described as Lot 259 on Crown Plan MACH187 ("the Lease");



- (c) The terms of the Lease included:
- (A) Clause 12: "The tenant may use the land only for the purpose of quarrying, crushing and removal of rock and gravel for road construction and other purposes."
 - (B) Clause 17: "The tenant will conduct the works in accordance with all relevant statutes, regulations and local laws and the conditions attaching to extractive industry permit TPC1899 dated 21st July, 1987 as amended by Order of the Local Government Court of Queensland dated 13th May, 1988 copies of which are contained in Annexure 'B' hereto."
- (d) The commencement date of the Lease was 1 July 1995;
- (e) By letter dated 29 January 1996, the Second Respondent's solicitors advised the First Respondent that "... Council has not complied with the upgrading section of the extraction permit and therefore [the Second Respondent] requires that further removal of gravel from the site be suspended until such time as the terms of the extraction permit are complied with";
- (f) The First Respondent's letter to the Second Respondent's solicitors dated 21 November 1997 confirmed that the works requiring upgrading of the intersection of Sheppersons Lane and Kin Kin Road, upgrading the existing timber bridge within Sheppersons Lane and widening and upgrading Sheppersons Lane from the intersection with Kin Kin Road to the access point to the site had been completed;
- (g) Use of the Land as approved by the Approval could not lawfully commence other than in accordance with the conditions of the Approval;
- (h) Use of the Land could not commence under the Deed of Licence entered into between the First and Second Respondents on 25 March 1994 as the licence gave rights which were not approved under the Approval, being:
- (A) access over Portion 258 for the purposes of removing rock to test its suitability for use in road construction; and
 - (B) access to the dam on Portion 258 to use the water in the production process and construction of the internal access roads.
- (i) The Neilsen Plan (below) states at page 3, s 1.3 (Background) that "Readymix did not proceed with the development" and that "[s]ubsequently, Noosa Council undertook quarrying on a campaign basis in 1996 and 1999";
- (ii) The Second Respondent's solicitors' letter to the First Respondent dated 16 January 2008 states that "[the] Quarry has not been used since the permit has been issued however there has been considerable preliminary work carried out with relation to the implementation of the Quarry with



Council and Government Departments”; and that “[a]s work has not yet commenced on the Quarry, our client requests that the term of the Extractive Industry Permit be extended by a period of thirty (30) years from 12 May 2003”.

26. The Approval lapsed on 15 April 1995, or alternatively, if the use ever lawfully commenced, the Approval lapsed after the use ceased for a period of 12 months from 29 January 1996.

IN THE ALTERNATIVE, if the Approval was lawful and did not lapse:

The Excavation Area is Limited by the Approval

27. Excavation on the Land is limited to the area of land shown on the plans accompanying the Application which is approximately 10 hectares or 17% of portion 259.

Particulars:

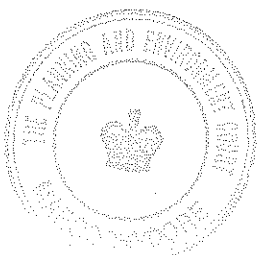
- (a) Subsection (2) (d) (viii) (B) of by-law 1 of Chapter XLIV, Part B, Division 2 of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme requires an application for consent for an extractive industry to be accompanied by plans showing “the limits of the area proposed to be excavated”.
- (b) The Application was accompanied by plans showing “the location of the proposed extraction” and the “approximate outline of area to be extracted”.
- (c) The Application included a statement “EXCAVATION AREA – APPROX 10 HECTARES – APPROX. 17% OF SITE”.

28. Condition 2 of the Approval required:

- (a) detailed management plans to be submitted to the First Respondent for approval by the Shire Engineer and Shire Planner addressing, *inter alia*, the extent of the proposed excavations; and
- (b) that no construction or excavation works are to be commenced, without prior approval of the Shire Engineer, until such times as management plans are approved.

~~8. As at May 1991, the rights given by the Approval had not been exercised and the use had not commenced.~~

29. On or about 15 July 1991, The Readymix Group submitted a Management Statement and Development Plan in relation to quarry operations on the Land to the First Respondent (“the Readymix Plan”).



30. The Readymix Plan stated that *"Given the Kin Kin deposit's significance as a future source of construction material, it is proposed to that the site be fully developed as a quarry site"*.

12. ~~There is no approval for the Land to be fully developed as a quarry site.~~

31. The Readymix Plan included a drawing of the Proposed Layout of the Kin Kin Quarry (Drawing Number KK.1) showing the "Extraction Area Boundary". The Extraction Area Boundary shown on drawing KK.1 is significantly beyond *"the location of the proposed extraction"* and significantly greater than the *"area to be extracted"* shown on the plans attached to the Application. The excavation area described in the Readymix Plan significantly exceeds the excavation area of approximately 10 hectares or 17% of the Land, as specified in the Application.

Particulars

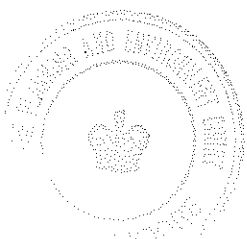
- (a) The Application and attached plans particularising the *"the location of the proposed extraction"* the *"area to be extracted"*
- (b) "Extraction Area Boundary" shown on plan KK.1
32. The First Respondent had no power to approve a plan of management for development of the Land beyond the extent approved by the ~~Land~~ Local Government Court.

Particulars:

- (a) The Application was required by by-law 1 of Chapter XLIV, Part B, Division 2 of by-law 1 of Chapter XLIV, Part B, Division 2 of the 1985 Planning Scheme to show the limits of the area proposed to be excavated ;
- (b) The limits of the area proposed to be excavated were shown on the plans attached to the Application and limited to approximately 10 hectares or 17% of the Land, as specified in the Application;
- (c) The Approval approved the Application, including the limits of the area of land proposed to be excavated.
33. The decision of the First Respondent to approve the Readymix Plan was *ultra vires* and unlawful.

Particulars

- (a) The limits of the area proposed to be excavated, as detailed in the Application, and as approved by the Local Government Court, were approximately 10 hectares or approximately 17% of the Land;



- (b) The Readymix Plan states that the proposed Kin Kin Quarry Layout Plan [being Drawing KK.1] shows the extent of the proposed workings. The Readymix Plan also includes Lot 258 on Plan MCH187 for the proposed access road.
- (c) The Readymix Plan provides for initial use of a mobile crushing plant, but notes that the longer term requirements will necessitate a permanent crushing plant; primary, secondary and tertiary crushers; screening plant; and sundry conveyors and associated quarry equipment.
- (d) The increased limits of the area of land proposed to be excavated, the proposed access road, and the further plant and equipment proposed be used as specified in the Readymix Plan were not part of the Application which was purportedly approved by the First Respondent and the Local Government Court.
- (e) An application for an extractive industry use over the Land and Lot 258 MCH187 at the time of the Readymix Plan required a consent application to be made under the First Respondent's planning scheme which came in force on 15 December 1990, and required public notification of the application.

34. No works were conducted on the Land by The Readymix Group.

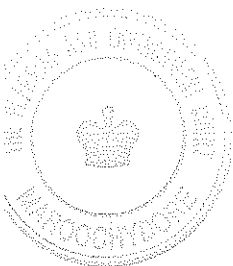
Particulars

- (a) The document entitled *Business Plan – Council Quarries (Ringtail Creek and Sheppersons Quarries) 1998-2001* headed "Adopted 10th September 1998" states at page 20 that, "Readymix closely investigated the viability of implementing a major hard rock supply, but finally rejected the site because of rock quality problems. ... The permit was then taken over by Council under a lease arrangement with the owner."
- (b) The Neilsen Plan at page 3, section 1.3 (Background) states that "Readymix did not proceed with the development".
- (c) The letter from the Second Respondent's solicitors to the First Respondent dated 16 January 2008 states that "[t]he Quarry has not been used since the permit has been issued ..." and that "... work has not yet commenced on the Quarry ...".

35. On 3 October 1996, the First Respondent entered into a lease with the Second Respondent over the Land for the purpose of quarrying, crushing and removal of rock and gravel for road construction and other purposes ("the Lease"). The Lease terms did not include processing the extracted material.

36. The Neilsen Plan (detailed below) states at clause 1.3 that the ~~Second~~ First Respondent undertook quarrying on a campaign basis in 1996 and 1999, and that approximately 50,000 tonnes in total were extracted for local roadwork.

37. The Lease was fully surrendered on 19 March 2008.



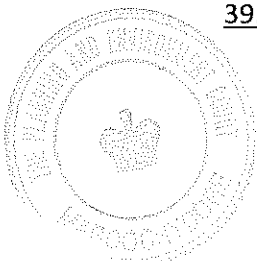
38. No other extractive industry operations were or have been conducted on the Land either before or since that undertaken by the First Respondent between approximately 1996 and 1999.

Particulars

- (a) No quarrying was undertaken by Readymix and the extractive industry use had not commenced as at 16 January 2008, as particularised in paragraph 34 above ;
- (b) The Noosa Council memoranda dated 17 January 2003 and 8 April 2003 regarding the production figures for Sheppersons quarry record that no annual production was recorded for the quarry for the period 29 June 2000 to 4 April 2003.
- (c) The letter from the Third Respondent to the Second Respondent dated 14 August 2003 states that "... the [Council] extraction had amounted to little more than a scraping from the overall deposit some 15,000 tonnes maybe".
- (d) The letter from the Second Respondent's solicitors to the First Respondent dated 5 September 2003 states that, "[t]he Council entered into a lease with our client on 1st July 1995 and since that time there has been little activity with possibly 15,000 tonnes being extracted".
- (e) The Neilsen Plan at page 2, section 1.1 states that "[t]his quarry was previously operated by Noosa Shire Council"; and at page 3, section 1.3 states that, "Readymix did not proceed with the development. Subsequently, Noosa Council undertook quarrying on a campaign basis in 1996 and 1999."
- (f) The letter from the Second Respondent's solicitors to the Third Respondent dated 16 January 2008 states that "[o]ur client is also concerned that approximately 5 years of the life of the [extension of the] permit has expired without the quarry being in operation".
- (g) The letter from the Second Respondent's solicitors to the First Respondent dated 25 March 2008 states that "... Neilsen Developments Pty Ltd have exercised the option with John Wallace Shepperson to operate the Quarry on his land", and that "the exercise of the option is subject to the surrender of the Lease which is registered in the Department of Natural Resources under dealing number 701583859".

The Neilsen Plan

39. On or about 20 March 2005, a Quarry Management Plan ("the Neilsen Plan") was lodged with the First Respondent by the Third Respondent.



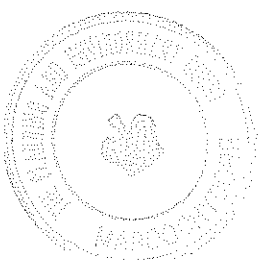
- (a) The Neilsen Plan identifies the following operations proposed to be conducted on the Land:
- (A) Resource: Andesitic volcanics;
 - (B) Product: crushed rock base and sub base pavement materials; asphalt and sealing aggregates; concrete aggregates; ballast; amour rock, crusher dust, soil aggregate road base, rip rap, shoulder materials, processed fill, drainage materials;
 - (C) Duration of extraction: in excess of 30 years, over four stages;
 - (D) Extraction rate: None is indicated;
 - (E) Plant and equipment: crushing and screening plant, processing plant;
 - (F) Hours of operation: General: 6.00 am to 6.00 pm Monday to Friday and 7.00 am to 5.00 pm Saturday; Blasting: 7.00 am to 6.00 pm Monday to Friday. No operations on Sundays, Easter Friday, Easter Monday, Anzac Day or Christmas Day;
 - (G) Haulage route: via the Quarry Access road to Sheppersons Lane, then via Pomona-Kin Kin Road to the Bruce Highway;
 - (H) Ancillary activities: offices, weighbridge, stores, truck and machinery compounds, stockpile pads, employee amenities, workshops, electricity transformers, water storages, fuel storage, laboratory, truck washdown facility, haul roads, erosion and sediment control devices, pumps, dust control devised and security measures

40. The Neilsen Plan:

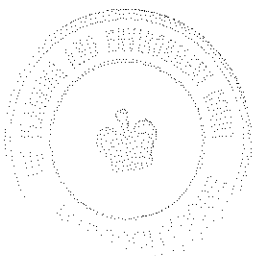
- (a) proposes activities on the Land not proposed in the Application or approved by the Approval;
- (b) proposes development on the Land on materially different scale than approved by the Approval; and
- (c) proposes an excavation area significantly exceeding the excavation area approved by the Approval.

Particulars

- (d) The proposed extractive industry use as detailed in the Application was purportedly approved subject to conditions;
- (e) The Neilsen Plan includes a site access road across Lot 258 MCH187 which was not included in the Application and has not been approved;
- (f) The Neilsen Plan includes an excavation of an area of land significantly greater than the area of land to be excavated as particularised in the Application and purportedly approved;



- (g) The relevant provisions of the 1985 Planning Scheme required the Application to truly set forth the height and number of storeys of proposed buildings or other structures; an elevation of any buildings or other structures proposed to be erected on the land; a description of any machinery or plant employed or proposed to be employed in the particular development; the location of any existing or proposed buildings; and sufficient detail to enable the Council to understand the nature of the proposed excavation;
- (h) The only proposed building included in the Application and purportedly approved was a site office. The Neilsen Plan includes a site office, amenities building, workshop, laboratory, equipment compound, fuel storage, truck washdown facility and weighbridge;
- (i) The Neilsen Plan includes a processing plant consisting of a receiving bin, feeder, scalping screens, primary jaw crusher, surge bin, secondary cone crushers, tertiary crushers, shaping crushers, product screens, surge bin, product stockpiles, pugmill, associated control/switch rooms and interconnecting conveyors which are to be roofed and fitted with a wind shield. Other than a 3m x 10m crusher, these were not included in the Application nor purportedly approved;
- (j) The Neilsen Plan includes a large siltation pond which was not included in the Application nor purportedly approved;
- (k) The Neilsen Plan includes four water storage dams which were not included in the Application nor purportedly approved;
- (l) The scale of the development purportedly approved by the Approval is the limit of the area of land proposed to be excavated as shown on the plans attached to the Application. The depth and circumstances of the proposed excavation were not included in the Application, as required by the 1985 Planning Scheme and were not approved;
- (m) The scale of development exceeds the scale of development particularised in the Application which was publicly advertised and purportedly approved; those particulars included 4 employees. An email from Mario Panuccio of the Third Respondent to April Patane of the Applicant dated 18 September 2009 states that "[Neilsens] expect on average about twenty jobs permanently located at the site, and direct sub contract employment of up to another two dozen";
- (n) In the course of negotiations between the First Respondent and the Second Respondent regarding upgrade of roads necessitated by the quarry development, the Second Respondent's town planning consultant advised the Second Respondent's solicitors by memorandum dated 9 September 1987 that the initial volume of material to be removed would be on average a maximum of 12 tonnes per trip and 10 trips per day;
- (o) The letter from the Third Respondent's consultants, Groundwork, to the Third Respondent dated 6 August 2003 states that "[w]ithin [the Readymix



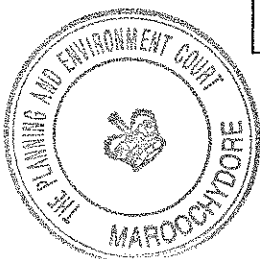
Plan], an annual production rate of 140,000 tonnes per annum is estimated for the quarry. Nielsen's (sic) should be aware that this figure may be interpreted by Council to represent the scale of the project. An increase in this figure may be considered to be a material change of use by the Council." The Third Respondent's letter to the Second Respondent's solicitors dated 14 August 2003 states that "[w]e would not enjoy being limited to 140,000 tonnes of product per annum";

41. The Neilsen Plan does not satisfy conditions 2 and 6 of the Approval in that it does not include the detailed management plans required to be submitted to the First Respondent for approval pursuant to that condition.

Particulars:

- (a) the Neilsen Plan did not comply with the requirement for a detailed management plan addressing the "extent of proposed excavations", because the extent of the excavations presented in the Neilsen Plan was inconsistent with the extent of the proposed excavations specified in the Application;
 - (b) the Neilsen Plan did not address "the proposed access locations", but purported to rely on access through "Lot 258", for which there was no lawful approval.
42. By the specific requirements of condition 6 of the Approval, the quarry was required to be operated in accordance with the provisions of the Town Planning Scheme, By-laws, Policies and Acts. The Neilsen Plan did not address the relevant provisions of the Town Planning Scheme, By-laws and Policies in force at the relevant time, and the First Respondent could not be satisfied on the basis of the Neilsen Plan that the quarry would be operated in accordance with the provisions of the Town Planning Scheme, By-laws and Policies in force at the relevant time, including
- (A) the transitional Town Planning Scheme for the Shire of Noosa; and
 - (B) the Shire of Noosa Strategic Plan gazetted 5 September 1997.
43. The First Respondent had no power to approve the Neilsen Plan because the Neilsen Plan:
- (a) did not comply with conditions 2 and 6 of the Approval as particularised in paragraphs 41 and 42 above ;
 - (b) proposed development of the Land beyond the extent approved by the Land Local Government Court as particularised in paragraphs 27 and 40 above.

26 The decision of the First Respondent to approve the Neilsen Plan was ultra vires and unlawful.

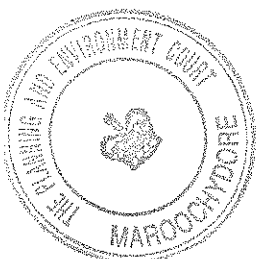


The Extension to the Term of the Approval

44. The term of the Approval, pursuant to the order of the ~~Land~~ Local Government Court was 30 years, expiring in 2018.
45. The First Respondent had the discretion to extend the term of the Approval pursuant to condition 10 of the Approval.
46. On 27 November 2003, the First Respondent resolved to approve an application to extend the term of the Approval, subject to conditions ("the Extended Approval").
47. The Extended Approval extended the currency of the Approval for a period of 15 years expiring in May 2033.
48. Condition 1 of the Extended Approval required the preparation of an updated management plan to the satisfaction the First Respondent within six months of the issue of the Extended Approval.
49. The Neilsen Plan did not satisfy the conditions of the Extended Approval because:
- ~~(a) it was not prepared to the satisfaction the First Respondent within six months of the date of issue of the Extended Approval as required by condition 1 of the Extended Approval; and~~
 - (b) it did not include the detailed management and other plans required by conditions 2, 5 and 9 of the Extended Approval.

Particulars

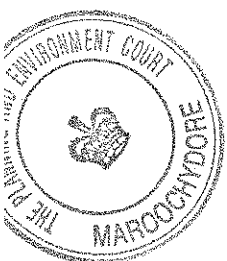
- (A) Condition 2, dot point 4, of the Extended Approval requires the updated Management Plan to include a "Traffic Management Plan (truck access) with predictions/procedures for the next 30 years".
- (B) The Traffic Management Plan in the Neilsen Plan does not include a prediction of the volume of truck movements entering or leaving the site, or type of truck configurations as required by Condition 2.4 of the Extended Approval.
- (C) The EMP does not demonstrate compliance with AS00014 (or other relevant standard) as required by Condition 5 of the Extended Approval.
- (D) Condition 9 of the Extended Approval requires detailed staged Sediment and Erosion Control Plans to be prepared for the site, in accordance with the Institution of Engineers Australia 'Engineering Guidelines for Queensland Soil and Sediment Control' (June 1996) and in particular using Checklist No 3 from that document.
- (E) The Neilsen Management Plan does not contain a detailed staged Sediment and Erosion Control Plan as required by condition 9 of the Extended Approval.



HAVING REGARD TO EACH OF THE MATTERS PLEADED ALTERNATIVELY ABOVE:

50. Unlawful use of the Land for an extractive industry should not be permitted in the exercise of the court's discretion, for reasons including the following:

- (a) The extractive industry use is unregulated, or not properly regulated, by the Approval or subsequent approvals relying on the Approval with respect to:
 - (A) road use, traffic generation, traffic routes, traffic hours, road safety, traffic impacts and the adequacy of roads;
 - (B) economic and employment impacts, including impacts on local businesses and local tourism;
 - (C) impacts on property values, amenity and lifestyle;
 - (D) impacts on existing rural uses adjoining and in the vicinity of the Land.
- (b) The proposed use is of a potentially significant scale and intensity, such as was not intended or sought in the Application, or publicly notified;
- (c) The unsuitability of the local road network for heavy vehicles;
- (d) The unlawful exclusion of the public from the public notification process, as particularised in paragraphs 10, 11 and 12 above;
- (e) The inadequacy of steps taken by the First Respondent with respect to:
 - (A) properly obtaining further information about the quarry, including information necessary to meet the mandatory requirements for the Application and public notification of the Application;
 - (B) providing information to the public relevant to whether the proposed quarry would adversely affect any person, such as may cause a reasonable person to make an objection to the proposed quarry.
- (f) In February 2006, in reliance on the Approval, including the "scale and intensity" of the use purportedly approved by the Approval, the Third Respondent obtained a development permit and registration certificate for Environmentally Relevant Activities from the Environmental Protection Agency.
- (g) The development permit and registration certificate for Environmentally Relevant Activities obtained from the Environmental Protection Agency rely on the Approval in order to have force and effect.
- (h) To the extent that the development permit and registration certificate for Environmentally Relevant Activities obtained from the Environmental



Protection Agency regulate any matter, those documents rely on the Approval to regulate the scale and intensity of the extractive industry use.

- (i) The Approval does not regulate the scale and intensity of the extractive industry use with respect to:
 - (A) the quantity of material to be extracted; or
 - (B) quarry truck movements on local roads; or
 - (C) the adequacy of the local road network to carry quarry traffic.
- (i) The scale and intensity of the extractive industry use is material to the impacts of the extractive industry use as particularised in paragraph 50(a) above.
- (k) Information about the quantity of material proposed to be extracted from the quarry was not obtained from the Second Respondent by the First Respondent until after the time for public objections to the Application had closed, and such information did not form part of the Application as publicly notified.
- (l) Publicly available State and Council mapping has never included the proposed excavation area of the Land in an extractive or key resource area; it is mapped either as environmental protection or separation area.
- (m) The impacts of the quarry with respect to the matters particularised in paragraph 50(a) have never been the subject of any, or any proper, independent assessment or report that was considered by the First Respondent before the Approval was issued.
- (n) The unlawful use of the Land commenced in January 2010 relying on an approval issued in 1988, since which time there have been changes in the legislation governing assessment of development approvals for extractive industries.

Relief sought

51. In all of the circumstances, and in the exercise of the Court's discretion, the Applicant seeks the appropriate set of declarations and orders from the alternatives set out above to ensure that only lawfully approved works are carried out on the Land.

This pleading was settled by Michael Labone of Counsel



.....*p & e Law*.....
p&e Law
Solicitors for the Applicant
Dated: 28 May 2010

To: The First Respondent, Sunshine Coast Regional Council, 9 Pelican Street,
Tewantin, Queensland, 4565

And to: The Second Respondent, John Wallace Shepperson, 150 Sheppersons Lane,
Kin Kin, Queensland, 4571

And to: The Third Respondent, Neilsens Quality Gravels Pty Ltd, ACN 010 620 916,
MG1 Brisbane, Level 1, 200 Mary Street, Brisbane, Queensland, 4000; and
Lot 3 Johnstone Road, Brendale, Queensland, 4500

**This application is to be heard by the Court at Maroochydore on the 12th day of
February 2010 at 9.30 am/pm.**

Registrar

