Conflict Management within the NSW Planning System:

Resolving land use conflicts associated with major developments in urban areas

An Undergraduate Thesis by Ashley Pikkat
ABSTRACT

Many levels of government are attempting to influence the design of cities by promoting urban consolidation. In Sydney this is occurring through the New South Wales Government’s Metropolitan Strategy. This Strategy predicts that Sydney’s population will grow by 1.1 million inhabitants between 2005 and 2031 and, to accommodate this increase, 640,000 new dwellings will be needed. The Strategy aims to site 60-70% of this new housing stock within existing urban areas. This push towards urban consolidation is resulting in many ‘large scale’ residential, commercial and retail developments, in existing urban areas, throughout Sydney.

Major developments within urban areas can be highly problematic and more often than not controversial, with conflicts occurring between various stakeholder groups. The processes for managing conflicts and the weighting given to relevant considerations can vary substantially between similar proposals. The tactics employed by the various stakeholders and even the attitudes of the relevant consent authority can impact significantly on the decision making process.

This thesis provides an analysis of land use conflicts associated with major residential, commercial and retail developments within urban areas. Triggers for conflict are identified and the NSW development control system is analysed with respect to its effectiveness in dealing with conflicts. Two case studies are examined to compare and contrast different assessment mechanisms and conflict management systems available in the NSW planning system with suggestions made for improvement.
ACKNOWLEDGEMENTS

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- A big thanks to the people I interviewed including Jeff Lawrence, Andrew Maegee, Shaun Gorland, Corrie Swanepoel and John Mant. Your interviews provided very valuable insights on certain aspects of my topic area;
- Similarly, thanks to the very helpful counter staff at both Ku-ring-gai and Sutherland Council’s for hastily arranging access to DA files and helpfully obliging when I had any questions;
- I would also like to thank my brother and sister cooking me dinner and providing help (where possible), particularly in the last few stressful weeks of collating this thesis;
- Finally, a very special thanks to my loving parents for their support and dedication throughout both my university studies and life.
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<td>Alternate Dispute Resolution</td>
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<td>DAs</td>
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<td>Development Assessment Officer</td>
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<td>Development Control Plans</td>
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<td>Director Generals Requirements</td>
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<td>Department of Planning</td>
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<td>EA</td>
<td>Environmental Assessment</td>
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<td>FSR</td>
<td>Floor Space Ratio</td>
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<td>Gross Floor Area</td>
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BACKGROUND

a) Urban Consolidation Policies & Land Use Conflicts:

Many levels of government are attempting to influence the design of cities by promoting urban consolidation. In Sydney this is occurring through the New South Wales Government’s Metropolitan Strategy. This Strategy predicts that Sydney’s population will grow by 1.1 million inhabitants between 2005 and 2031 and, to accommodate this increase, 640,000 new dwellings will be needed. The Strategy aims to site 60-70% of this new housing stock within existing urban areas. This push towards urban consolidation is resulting in many ‘large scale’ residential, commercial and retail developments, in existing urban areas, throughout Sydney. (NSW Government Department of Planning 2005).

Major developments within urban areas can be highly problematic and more often than not controversial, with conflicts occurring between various stakeholder groups. The processes for managing conflicts and the weighting given to relevant considerations can vary substantially between similar proposals. The tactics employed by the various stakeholders and even the attitudes of the relevant consent authority can impact significantly on the decision making process.

Opposition to these developments can come from local residents, environmental groups, local businesses, resident action groups and government bodies. These stakeholders are concerned about a wide range of issues including but not limited to environmental impacts, social impacts, amenity impacts, property values, and changes to the character of the neighbourhood. Groups supporting these developments can include residents, business owners and development companies. These groups are often financially driven and see some sort of financial gain to be made. (Awakul and Ogunlana 2002); (Dear 1992); (Costello and Dunn 1994); (Hiller 2000) & (Kotevska 2001).

The role of presiding over these conflicts falls on Local Councils, the State Government, various planning panels and to a lesser extent the Courts. These authorities attempt control and mediate the development process in order to reach the best possible outcome. Whilst this is a commendable aim, it often doesn’t translate into best practice decision making in the development process. In the NSW context, reduced planning powers in development assessment and the shift to increasingly performance based planning controls has added further volatility and complexity to the decision making process for these type of developments. The final outcome
whether approval, refusal or approval with onerous conditions, can therefore differ substantially, even when comparing similar developments, assessed under identical legislation, within the same local government area (Hiller 2000) & (Walton 1997).

b) Context of the Thesis:

This thesis provides an analysis of land use conflicts associated with major residential, commercial and retail developments within urban areas. Triggers for conflict are identified and the NSW development control system is analysed with respect to its effectiveness in dealing with conflicts. Two case studies are examined to compare and contrast different assessment mechanisms and conflict management systems available in the NSW planning system with suggestions made for improvement.

RESEARCH AIMS & OBJECTIVES

The aim of this thesis can be summed up with the following questions:

- What are the current mechanisms for managing land use conflicts under Part 3A and Part 4 of the Environmental Planning & Assessment Act 1979?
- Are these mechanisms effective in dealing with land use conflicts?
- What are the best conflict management practices from both systems of assessment?

More specifically the objectives of this thesis are to:

1. Outline and describe the triggers for land use conflicts from the perspective of the relevant stakeholder groups;
2. Identify and critically analyse the conflict management processes, currently undertaken in the New South Wales planning system, using data from both interviews and the relevant literature;
3. Identify and critically analyse conflicts associated with major residential, commercial and retail forms of developments, situated within urban areas, using data from interviews, the relevant literature and selected case studies assessed under Part 3A and Part 4 of the Act;
4. Identify and outline the best practice management strategies for land use conflicts in relation to major residential, commercial and retail based developments situated in urban areas; and
5. Consider and make recommendations on how the NSW planning system could be improved to better manage conflicts associated with these forms of development.

THEORETICAL/CONCEPTUAL CONTEXT

a) Influential Authors and Ideas:

Theories and ideas contained within the available literature were helpful in providing a broad understanding of the relevant considerations for the thesis. The literature focused on a number of important areas in relation both the development assessment and conflict management. A significant amount of the literature focused on the causes of land use conflicts and their associated impacts on the relevant stakeholders. Mechanisms for conflict prevention and conflict resolution also featured prominently, with insights provided from both the local context and the international perspective.

One concept discussed heavily in the literature is the notion of the public interest and its relevance in assessment process. In particular, the literature emphasized the difficulties associated with determining the public interest, especially when multiple publics are involved. A number of writers also debated the effectiveness of the NSW development assessment systems in addressing the public interest (Farrier & Stein 2006); (Ghanem 2008); (Kotevska 2001); (Mant 2009); (Pearson & Williams 2009); (Ratcliff, Wood & Higginson 2009).

A large number of journal articles focused on the reasons for land use conflicts. Decreased property values was a primary cause of conflict according to a number of writers (Dear 1992); (Fischel 2001); (Lober 1995); (Kotevska 2001). Another prominent trigger for conflicts, outlined in the literature, was the potential amenity impacts of a proposed development (Awakul and Ogunlana); (Dear 1992). A lack of both trust and public involvement in the development process were two more triggers featuring prominently in the literature (Awakul and Ogunlana 2002); (Baxter, Eyles & Elliot 1999). Another major cause of land use conflicts from the literature was the potential for a development to change the character of a neighbourhood (Kotevska 2001). Some of other triggers mentioned include siting, safety, moral values, equity, politics and potential environmental harm (Awakul and Ogunlana 2002); (Fischel 2001); (Kotevska 2001); (Lober 1995); (Ibitayo and Pijawka 1999); (Stein 1996);

In relation to contentious forms of conflict, the literature focused primarily on hazardous land use developments such as rubbish tips and offensive land use developments such as brothels, fast food businesses and methadone clinics. The information on contentious land uses provided a broad understanding of the triggers for conflict and the good and bad management practices. In
particular, case studies within the literature demonstrated the effectiveness of various conflict management practices in conjunction with these hazardous forms of development (Baxter, J, Eyles, J & Elliot, S 1999); (Costello, L & Dunn, K 1994); (Dixon 1993); (Ibitayo & Pijawka 1999); (Kotevska 2001); (Lober 1995).

The literature also thoroughly addressed conflict management in the development assessment process. In particular, Kotevska (2001) provides a thorough analysis of current and potential management strategies when dealing with offensive land uses including places of worship, a methadone clinic, adult bookshops and fast food restaurants. The author considers both the available literature and also a number of Sydney based case studies conducted as part of a thesis. Planning legislation, the development control system and alternate dispute resolution feature prominently as management strategies.

b) Relevance of the Available Literature to the Topic:

As mentioned above, most of the literature focuses on conflicts associated with hazardous and offensive land uses. This thesis will add to the current body of knowledge in a number of ways. Firstly, it will provide a lot of information about the issues and management strategies associated with major urban based developments. Secondly, it will provide up-to-date information about the NSW planning system taking into account recent changes such as the Environmental Planning & Assessment Amendment Act 2008. Finally, from an analytical point, this thesis will provide a good comparison against management strategies identified in the current literature.

METHODOLOGY

a) Data Sources and Collection:

In compiling this thesis both primary and secondary data sources were used. Primary data was qualitative in nature and was obtained through both formal recorded interviews and informal conversations. Interviews were conducted with planning staff from local councils, a resident action group and a planning lawyer.

Secondary data was obtained from a range of sources. Books and journal articles provided information and analysis in relation to the triggers for conflict, the management of conflict, the NSW planning system and the international context. Newspapers such as the Sydney Morning Herald and the Wentworth Courier provided information about the selected case studies including a running commentary.
Internet sources were useful in providing information from resident action groups, government policy documents, councils, the Land & Environment Court, developers and the media. Internet sources were also useful in providing information on the selected case studies. In particular, the NSW Department of Planning website contained a lot of useful information in relation to the Ashington case study. This information included the Director Generals Environmental Assessment Requirements, the proponent’s environmental assessment, a response by the proponent to the objectors concerns and a number of assessment reports conducted by the Department of Planning.

Council Development Assessment (DA) files were another significant source of information. DA files for the Kirrawee case study were thoroughly examined and provided useful information about:

- The development assessment process for the case study;
- The attitudes and perspectives of the councillors and council staff towards the development;
- The number of objectors and their primary concerns;
- The number of supporters and their reasons for support; and
- The tactics employed by all stakeholders in the assessment and determination process.

A final source of data for the thesis was Woollahra Municipal Council. Whilst employed at the Council I was able to obtain some valuable information in relation to the Ashington case study.

**b) Case Study Selection:**

The Ashington case study, in Double Bay, was selected whilst the author was working at Woollahra Council. At the time, the case study was very contentious within the community and discussed frequently amongst the Development Assessment Officers within the Council. This case study was also one of the primary factors resulting in the choice of thesis topic.

The process of selecting the other case studies was long and arduous. This was due to the strict selection requirements set by the author and dictated by the topic. The basic criterion for the case study selection was as follows:

- First and foremost, the developments needed to be controversial with at least a few planning issues (preferably with the involvement of a resident action group);
• The developments also needed to be large scale and based around residential, commercial or retail uses. Further to this, the development needed to be determined and the assessment needed to be conducted by a local council under Part 4 of the Act;
• The developments also needed to have gone through mediation or an IHAP (or both). In addition, they needed to have gone through a court case; and
• Finally, the developments needed to be situated close to a town centre.

After these criterion were identified, case study selection occurred by a process of elimination. The requirement for the involvement of an IHAP or mediation substantially narrowed down the choice of councils. After identifying the relevant Sydney based Councils, the process of selection was as follows:

• Firstly, recent IHAP determinations on Liverpool and Canada Bay Council’s websites were reviewed with individual developments compared against the criteria;
• Secondly, relevant Councils were called and the criteria were discussed with either a duty planner or an assessment officer. Emails outlining the criteria were sent when requested; and
• Finally, resident action groups were called with discussions taking place about the developments they were opposing. They were then asked if they had any developments meeting the criteria.

During this process a lot of dead ends were met with multiple Councils stating they haven’t recently determined any developments that matched the criteria. Annoyingly, in few instances, a development would meet all but one of the critical criteria.

After an extensive search two additional case studies were selected. The first case study was in the Wahroonga which is in the Ku-ring-gai council LGA. This case study was recommended by a resident action group and had been through multiple council refusals and court determinations. Unfortunately, this case study had to be dropped due to the word limits of this thesis. The other case study was situated in Kirrawee which forms part of the Sutherland Shire Council LGA. This case study was identified and recommended by the Manager of Development Assessment at the council. The proposal involved a large (mixed use) residential, commercial and retail development, on a vacant site, just outside the town centre. The development had been subject to a deemed refusal with the developer appealing to the Land & Environment Court. The Council strenuously defended the refusal in the court case and the appeal was dismissed.
c) Selection of the Interviewees:

As well as the case studies, a number of interviews were conducted with experts in the field of development assessment. This process first involved the formulation of interview questions which were then submitted for approval by the UNSW FBE Human Research Ethics Advisory Panel. Approval was granted by the panel, on 23 September 2009, subject to some minor conditions. The approval reference is (No. 95094).

Following this, interviews were arranged with senior planning staff at Campbelltown and Ku-ring-gai Councils. The purpose of these interviews was twofold. Firstly they were used to gain an understanding of current development assessment procedures at the respective councils. Secondly, the interviews provided an opportunity to discuss potentials changes to improve both Part 3A and Part 4 development assessment, with respect to conflict management.

A further interview was arranged with John Mant who is both a planning lawyer and a member of a resident action group for the Ashington case study. This interview was conducted for two main reasons. Firstly, it was used to discuss the Ashington case study, from an objector’s point of view, in relation to community consultation. Secondly, it was used to discuss the potential to improve the conflict management process in both Part 3A and Part 4 development assessment.

d) Thesis Production:

The data collected for the thesis was critically analysed between the months of August and October 2009. The data was collated and inserted into the relevant chapters during this period. The final touch ups on the thesis including formatting, editing of text and the presentation of graphics occurred in October 2009, immediately prior to submission.

STRUCTURE

Following from the introduction, the thesis is made up of five chapters. The prominent features, discussed in chapters 1 to 5, relate primarily to the central theme of conflict prevention and conflict resolution in the NSW development assessment system.

Chapter 1 – Triggers for Conflicts and Impacts on the Stakeholder Groups

This chapter provides a broad overview of the underlying factors which result community concern and involvement in the development process. These concerns, grouped under a number of headings, provide insight into deficiencies in both the development process and the approaches taken by developers, when lodging development applications.
Chapter 2 – Conflict Management Provisions in the NSW Planning System

This chapter examines the effectiveness of the NSW development control system in dealing with land use conflicts. Conflict management mechanisms under Part 3A and Part 4 of the Act are discussed and comparisons are drawn between both systems. Important concepts such as public participation and the public interest are also explored in this chapter.

Chapter 3 – An Overview of Conflict through Case Studies (Part 4 – vs – Part 3A)

Two highly contentious urban based developments are examined in this chapter with one assessed under Part 3A and the other assessed under Part 4 of the Act. Common points of conflict are outlined and the assessment processes are then discussed for both developments.

Chapter 4 – Analysis of Conflict Management (Part 4 – vs – Part 3A)

This chapter contains a thorough analysis of conflict management strategies used in both case studies. Comparisons are then drawn between the case studies with regards to their conflict management abilities and best practices are identified. A further analysis is then provided comparing the conflict management abilities of Part 3A and Part 4 in general terms with suggestions made of improvement.

Chapter 5 – Potential Improvements to the NSW Planning System

The overall findings of the research are outlined in this chapter. A list of recommendations is made in relation to potential ways to improve the development control system in NSW and scope for further research is outlined.
CHAPTER 1 – TRIGGERS FOR CONFLICT AND IMPACTS ON THE STAKEHOLDER GROUPS

1.1 Introduction

Conflicts over major property developments occur due to a real or perceived impact on one or more of the stakeholder groups. When a stakeholder group stands to benefit or lose something as a result of the proposed development they feel the need to become involved in the process (Dear 1992). According to the available literature, triggers for land use conflicts, both in general terms and more specifically major developments, can be complex and wide ranging. This chapter describes these triggers for land use conflicts and in doing so outlines some of the deficiencies in the planning system.

1.2 Triggers for conflict

a) Development location:

One of the primary triggers of a conflict over a major development is its location. The proximity to a person’s home, or the perceived incompatibility of a use with the surrounding area, can both be causes for concern to certain stakeholder groups (Kotevska 2001). When referring to location, Lober (1995) puts forward the notion that there is an inverse relationship between distance and opposition. An individual who lives a substantial distances from a proposed development will perceive a much lower risk from the development. The nature of the proposed use also plays a major role with hazardous land uses more likely to cause opposition (Ibitayo and Pijawka 1999).

b) Environmental impacts:

The environmental impacts of a proposed development are another major cause for conflict. This is particularly the case for hazardous developments such as landfill sites or large hydro electric dams (Awakul and Ogunlana 2002).

Opponents to a development may have a genuine and strong environmental concern however this is often not the case. Instead certain stakeholders may have a point of objection which they do not wish to be made public knowledge for one reason or another. As a result they use the environmental banner to maintain an objection whilst masking their real reason for concern. Some examples can include decreased property values (Fischel 2001) or dislike of lower class citizens if an affordable housing development is proposed (Stein 1996).
c) **Substantial non-compliance with planning controls (over development):**

When submitting a proposal, developers often show blatant disregard for the local planning controls in terms of, for example, height and Floor Space Ratios. A developer may do this unintentionally due to a lack of knowledge of the relevant planning controls. For the most part, however, this is done deliberately as a tactic to obtain a more favourable outcome. In particular, this tactic is used if the developer believes that the local planning controls are very flexible or not well enforced (Walton 1997).

This tactic is also used by the developers in what is known as an **ambit claim**. Put simply, an ambit claim is a form of negotiation whereby a developer lodges a substantially non-compliant proposal then, through a series of negotiations, makes concessions until the amended proposal is considered acceptable. By doing this the developer might end up with a better outcome than if they had lodged a more compliant proposal in the first place. As a tactic, this is effective as the impacts of the amended proposal are perceived to be a lot less severe than the original proposal. Furthermore, the developer appears to be making substantial concessions, through negotiations, even though they may recognise that the original proposal would never be approved. According to Mant (2008) the use of ambit claim as a tactic is made more prevalent by negotiation and review mechanisms with development assessment systems.

d) **Property values:**

A decrease in property values to a neighbourhood is another major concern cited by a large number of sources (Dear 1992); (Fischel 2001); (Lober 1995); (Ibitayo and Pjawka 1999); (Kotevska 2001). Decreased property values are more often than not the principal concern of opponents to a large range of developments (Dear 1992). Objecting on the grounds of decreased property values is considered to be ill mannered. As a result, opponents will often mask their reason for concern using other factors such as amenity concerns and the environment.

e) **Amenity impacts, neighbourhood character & cultural values:**

Amenity impacts are used to describe a wide range of nuisance based concerns. Generally speaking, they can include:

- Noise impacts such as traffic noise;
- Scale and bulk impacts such as sense of enclosure and overshadowing,
- Privacy impacts such as overlooking into windows;
- Increased traffic generation; and
- Health impacts when relating to proposals such as recycling centres (Awakul and Ogunlana 2002); (Lober 1995).
Neighbourhood character can be described as “the pleasantness of the urban environment, the relationship of a place with its surrounds but also intangible values such as peoples quality of life, emotions and senses” (Kotevska 2001, p.10). Neighbourhood preservation is especially important to local residents when it relates to a heritage building or heritage conservation area. These factors can be very important to the local community but often not easily distinguishable to a person foreign to the area. Further to this, a change to neighbourhood character can also be classed as an amenity impact (Kotevska 2001).

Conflicts relating to neighbourhood character tend to occur when a new demographic of people start to move into an older community. The long established community members often have strong social and cultural ties to the area and become resistant to change. Awakul and Ogunlana (2002) emphasise that social and cultural variables can have a major impact on the way individuals behave, the way they perceive themselves and the way the react to external stimuli in their environment. Thompson (2007) further asserts that long standing community members often become concerned when they see new shops and unfamiliar faces in their community. A proposal which has the potential to result in an undesirable change of the character of an area will therefore be heavily opposed by the local residents. Objectors will often argue on the grounds of neighbourhood character preservation. This is done to in an attempt to keep undesirable people out of an area whilst avoiding being branded as racist. Some common examples of developments perceived to a threat include mosques and social housing developments (Rose 2004); (Stein 1996); (Thompson 2007).

f) Safety and security:

A proposed development can trigger safety and security concerns if an opponent feels in some way threatened. Threats can relate to factors such as increased crime, for example burglary or increased likelihood of being injured, for example motor vehicle accidents. Whilst some safety concerns are real and genuine, most threats associated with proposed developments are perceived or greatly exaggerated. Often the media plays a major role in this by sensationalising crime or violence within a community (Thompson 2007).

With certain forms of development however, safety and security are substantial issues and often a primary trigger for conflict. According to Dear (1992), safety and security are primary concerns for opponents to proposed human service facility developments.

g) Trust, Equity & Public Consultation:

Trust relates to the relationship between stakeholders and it is a very important factor in determining the likelihood of a conflict over a proposed development. “In many cases opposition
to facilities is motivated in part because residents do not trust proponents” (Baxter, Eyles & Elliot 1999, p.503). The level of trust between stakeholders is heavily linked to public participation. If the public is neglected in the decision making process they will feel distrust towards the developer. Furthermore, once distrust has developed it is very hard to regain (Baxter, Eyles & Elliot 1999); (Dixon 1993).

A lack of public consultation and participation in the development process also leaves residents feeling frustrated. They feel that their needs are being ignored and they are being in some way manipulated. When this occurs, the frustration can often turn into strong opposition to the development (Awakul and Ogunlana 2002).

Another interrelated trigger for conflict is a lack of equity. This occurs when a stakeholder feels that the process or outcome of a proposed development is set in a way which heavily benefits one or more stakeholders at the expense or other stakeholders. It can relate to “the general tenets of environmental equity/environmental justice; and the more specific principles of social, spatial, and procedural equity” (Baxter, Eyles & Elliot 1999, p.504).

**h) Politics & Power:**

Major and contentious developments are often hijacked by politicians trying to play ‘populist politics’. This involves politicians use their power to make a decision about a development which is popular with the public. In these instances, planning considerations are frequently ignored by the councillors in the DA determination process. This can result in an approval or refusal of a contentious development depending on the opinion of the general public.

**1.3 Conclusion**

This chapter has a provided a broad overview of the underlying factors which result in community concern and involvement in the development process. These triggers offer insight into deficiencies in both the development process and the approaches taken by developers, when lodging development applications. Whilst these complicated concepts are only examined briefly, they provide an adequate background for discussions in the following chapters.

The next chapter will examine the NSW development control system in relation to its effectiveness in dealing with land use conflicts. Conflict management mechanisms under Part 3A and Part 4 of the Act will be discussed with comparisons drawn between both systems. Important concepts such as public participation and the public interest will also be explored.
CHAPTER 2 – CONFLICT MANAGEMENT PROVISIONS IN THE NSW PLANNING SYSTEM

2.1 Introduction

This chapter examines the effectiveness of the NSW development control system in dealing with land use conflicts. The assessment process for both Part 3A and Part 4 of the Act are outlined and conflict management mechanisms under both systems are then discussed. Important concepts such as public participation and the public interest are also explored in this chapter.

In relation to format, the assessment systems are examined separately, in a sequential order, under the following general headings:

- The Process & Assessment Requirements.
- Avoiding Conflict Pre-Lodgement.
- Conflict Avoidance & Conflict Resolution Prior to Determination.
- Conflict Resolution Post-Determination.

Given the size and complexity of the NSW planning system, it is not possible to discuss all relevant factors associated with development assessment under Part 3A and Part 4 of ‘the Act’. A number of aspects will be acknowledged very briefly but not discussed further in this thesis. A key criterion for selecting features to be discussed was their relevance to major and controversial residential, commercial and retail developments. This is beneficial as it narrows the focus of the chapter and limits its length.

2.2 Development Assessment System (Part 4 of the Act)

a) Introduction: - Setting the Context & Criteria:

Part 4 of the Act titled ‘development assessment’ prescribes the assessment requirements for a class of development known as ‘local development.’ This part of the Act encompasses a very broad range of development types, and the majority of development proposals in NSW fit within its framework. Development consent is usually granted by local Councils under this part, however, the Minister for Planning becomes the consent authority in some limited circumstances (Williams 2007a).
Categories of Part 4 development assessed by local Councils include complying development, integrated development, designated development and advertised development. Complying development and designated development will not be further discussed in this thesis as they have very different assessment requirements and appeal rights when compared with other types of development assessed by Councils under Part 4 of the Act. Furthermore, most major residential, commercial and retail developments (i.e. the two case studies) are not classed as either designated or complying development.

In addition, development assessed by the Department of Planning, under Part 4 of the Act will not be discussed.

Finally, the use of the Land & Environment Court as a conflict prevention and conflict resolution mechanism will not be analysed in depth. Only a brief overview will be provided of some of the key aspects. This is a purely a result of the word limit of this thesis.

b) The Process & Assessment Requirements under Part 4:

The development assessment process under Part 4 of the Act is very complex and heavily influenced by the nature and the scale of a development and the preferences of individual councils. As a result of these factors, the assessment overview provided below does not fit the exact process of every council in NSW. It does, however, provide a general guideline of the stages in the DA assessment and approval process.

The first step in DA assessment process can actually occur prior to the lodgement of the DA in what is known as a ‘pre-development application meeting’. During this meeting Council advises the applicant about the relevant planning considerations for both the site and their individual proposal. Following this, the next step in the process is the lodgement of the DA with the Council. At this point, the Council has the choice to accept or reject the DA based on whether or not sufficient information is provided. After lodgement, a development assessment team leader usually takes control of the application and determines referral and notification requirements. For complex applications, a review meeting may take place to determine the appropriate internal and external referral bodies. At the same time the development is notified with letters sent to surrounding neighbours and the proposal is advertised in the local newspaper. The notification period lasts for a minimum of 14 days, during which time the community can lodge a written submission about the proposal. During the notification period referrals bodies also start to conduct their assessments before providing referral response reports to the council Development Assessment Officer (DAO).
Near the end of the notification the assessment officer begins his or her assessment. At this point the assessment officer may request amended plans or write a recommendation for refusal, to be signed off by the team leader, if the application is unsatisfactory. Alternatively, if the proposal is satisfactory and no objections are received the assessment officer can write a recommendation for approval which is checked and signed off by a Team Leader.

When considering the merits of a DA under Part 4, the development assessment officer is required to consider Section 79C of the Act. This section of the Act provides all the relevant factors the council must take into account (where relevant) in determining a development application. Such factors include:

- Environmental planning instruments (EPIs) and exhibited draft EPIs;
- Development Control Plans (DCPs);
- The Regulation;
- The suitability of the site;
- The likely impacts of the development with regards to factors such as economic and environmental impacts;
- Any submissions; and
- The public interest.

It is up to the DAO and the Council to determine how much weight should be given to each of these heads of consideration. This can become complicated when assessing the merits of an individual DA, as these considerations sometimes contradict each other. If this happens, the consent authority must decide which considerations should be given greater weight. This is often a very difficult task, particularly when taking into account the public interest (Farrier & Stein 2006).

If objections are received or the development is very significant, the assessment and determination process can take a number of different paths including:

- Approval with delegation if the objection can be satisfied by a condition of consent;
- Approval with delegation after amended plans are received (if the plans address the objection);
- Referral of the DA assessment report to some form of Alternative Dispute Resolution mechanism such as mediation to try to resolve the issues. If this works the DA is normally approved by delegation;
- Referral of the DA assessment report to some form of council planning panel or committee for final assessment and determination; and
• Referral of the DA assessment report to a Joint Regional Planning Panel (JRPP) for final assessment and determination if the DA is regionally significant.

Following the determination, a number of different merit appeal mechanisms exist. For DAs determined by a Council, the applicant can apply to have the Council review the determination under s.82A of the Act. In addition to this, the applicant can appeal the determination to the Land & Environment Court. In relation to DAs determined by a JRPP, the applicant has appeal rights to the Land & Environment Court.

Under the 2008 amendments to the Act, two new appeal mechanisms have been assented to but not commenced in proper. The first mechanism is known as a s.96D review which is very similar to, and expected to replace, s.82A reviews. The second review mechanism is known as a Planning Arbitrator. It is intended that the arbitrator would act as an alternative to the Land & Environment Court with the applicant able to choose between the two.

With the exception of “designated development”, objectors currently have no merit appeal rights to any panel or court. However, this lack of merit appeal rights is subject to change as a result of the 2008 amendments to the Act. If they commence in proper, these amendments will give objectors merit appeal rights in certain limited circumstances. In the case of a council determination, objectors can apply for the application to be reviewed by a JRPP. For JRPP determinations, the objector can apply for a review by the PAC.

In addition to merit appeal rights, objectors and any other concerned community member (literally “any person”) can commence Class 4 judicial review proceeds in the Land & Environment Court. The applicant also has judicial review rights to the Land & Environment Court.

c) Avoiding Conflict Pre-Lodgement:

Pre-DA Meetings:

The first form of conflict prevention in the development assessment process occurs prior to the lodgement of a development application with council – a consultation meeting known as a ‘pre-development application meeting.’ This meeting generally takes place to discuss a proposed concept or to compare multiple proposed concepts put forward by the developer.

Pre-DA Meetings provide an opportunity for a developer to meet with council staff to discuss the:

• Applicable development controls for a specific site;
- Development constraints of the site;
- Development potential of the site; and/or
- Merits of a concept or multiple concepts if more than one is proposed.

Council staff have a number of roles in the Pre-DA process. They are required to provide guidance when formulating a proposal, to identify issues that need to be addressed by the applicant and to provide comments on the merits and drawbacks of multiple concepts to identify high value proposals (The University of New South Wales Faculty of the Built Environment 2005).

As a form of conflict prevention for major developments, Pre-DA meetings are useful in two significant but interrelated ways. Firstly, in the case of poor design, the advice given at the meeting can act as a ‘wakeup call’ to a developer that the current concept will more than likely be refused by council and potentially refused by the Land & Environment Court in the event of an appeal. The developer then has the opportunity to lodge a redesigned concept which is less contentious and less likely to result in negative impacts on the neighbours or the community. In effect, this can prevent the need for a major battle over a development application with a lot of time and money saved from the perspective of the developer, the council and any objectors.

Secondly, by providing guidance early, a good design might become more economically viable as a lot of time and money is being saved in the design and assessment processes. On the other hand, if the developer has spent a lot of money on a bad design and then lodged it with council, he or she might not be aware until the very end of the assessment process that the design will cause a number of significant issues. At this point, it may not be economically viable to resubmit a more compliant and less contentious design.

In addition to this, the developer may be unwilling to redesign, even if it is economically viable, due to conflict with Council and/or objectors. Further, and often in conjunction to the last point, the developer might have a strong connection with their current proposal and develop an egotistical complex whereby they would identify redesigning as a loss or weakness on their part. They may become stubborn and refuse to redesign even if a less contentious proposal was economically viable (Stein 1992).

Whilst the Pre-DA system is efficient and effective conflict prevention tool, the potential exists to improve its function for major and contentious developments. In a recorded interview, a Council Planner commented that the Pre-DA process should be a compulsory requirement for certain types of major residential, commercial and retail development (Ku-ring-gai Council 2009, Interview., 7 October). This would be beneficial as it would necessitate awareness, on the part of
the developer, of the likely contentious issues upfront. In other words, the developer would be aware of the planning controls, the council’s perspective and the community’s perspective about appropriate development for the site.

**d) Conflict Avoidance & Conflict Resolution Prior to Determination:**

After the lodgement of a DA, conflict prevention and conflict resolution can occur at number of points during the council development assessment process. These include neighbourhood notification, facilitation, negotiation, mediation, conditions of consent, council planning panels and independent hearing and assessment panels. In addition, two conflict resolution mechanisms exist at the point of determination, – joint regional planning panels and council development control committee meetings.

**i) Neighbour Notification:**

Neighbourhood notification is the process of informing surrounding neighbours and the wider community about a proposed development. A development is required to be notified if it is identified as ‘advertised development’ by ‘the Regulation,’ by an EPI or by a DCP. In NSW, most council’s have adopted an advertising and notification DCP to specify the types of development which are required to be notified.

For major and controversial developments, the notification process is often very broad as the relevant council may be required, by a planning instrument/DCP, to inform everyone who could be potentially affected by the development. To maximise community awareness, a number of different approaches are generally used. As an example, Woollahra, Sutherland, Ku-ring-gai and Campbelltown Councils all use the following processes of notification for major developments:

- The immediate neighbours (and sometimes the wider community) are informed about the development by letter sent through Australia Post;
- An advertisement is placed in the local newspaper with information about the proposed development;
- A sign is erected at the development site; and
- The council website is updated to contain information about the development.

These forms of notification generally contain a brief description of the proposed works, the duration of advertising, the process for making a submission and methods to find out more information about the proposal. In addition, the neighbour notification letters normally contain scanned A4 copies of the plans.
For most Councils’, the minimum public submission period is 14 days, however, the minimum period is often extended for major or controversial forms of development. Ku-ring-gai Council, for example, extends their public submission period to 30 days for major developments as required by their notification DCP. This is done to give community members sufficient time to formulate a response.

As a form of conflict prevention and conflict resolution, neighbourhood notification is useful in four primary ways:

- Firstly, as outlined in Chapter 1, a lack of both trust and public involvement are considered to be two significant triggers for land use conflict in the development process. Neighbourhood notification helps to alleviate this by informing residents about a proposed development. It provides concerned residents with the means to find out more information about the development by calling or arranging a meeting with an assessment officer at Council. As the public feels involved in the process, they are more likely feel at ease about the development and trust in the Council to make the right decisions;

- Secondly, notification allows residents to outline issues with the development by writing an objection to the Council. These concerns are then addressed in the assessment report and the points of contention can sometimes be addressed through amended plans or by way of condition;

- Thirdly, Councils also have an online “DA Tracking” system for the sole purpose of providing the community with a mechanism to track the progress of a DA as it is assessed. This allows concerned community members to remain informed without having to call or visit the council.

- Finally, unresolved objections can trigger the use of other conflict resolution mechanisms such as council planning panels, mediation and/or independent hearing and assessment panels (IHAPS) where objectors have a chance to verbally address the decision makers.

One significant issue with the current notification practices is access to information. The notifications letters only contain A4 size black and white plans which can be very difficult to interpret. In addition to this, the applicant’s statement of environmental effects and supporting reports are not included in the notification letters. When objectors wish to find out more information, the current practice, with a lot of NSW councils, is to come into the council chambers to view the plans and supporting documents. This is frequently inconvenient for a potential objector working a full time 9 to 5 job. In addition, this process is often made even more difficult as the DA file sometimes needs to be requested. This can take up to 3 weeks. Furthermore, a lot of the DA information cannot legally be photocopied, and when it can be, it is often very expensive.
Recently, a number of councils’ have set about improving the community’s access to DA information. As an example, Sutherland Shire Council now provides electronic copies of architectural plans, statement of environmental effects and other support reports on their website. Ku-ring-gai Council has also indicated that they intend to do this in the near future (Ku-ring-gai Council 2009, Interview, 7 October).

ii) Negotiation, Mediation & Facilitation:

Many contentious developments in NSW are assessed and determined using an adversarial approach with applicants and objectors putting forward arguments and the consent authority determining a winner and a loser. There are, however, a number of less adversarial conflict resolution mechanisms becoming increasingly common within the local government development control system. In particular, mechanisms such as negotiation, mediation and facilitation are being implemented at a number of Councils to resolve disputes in a less adversarial manner. These dispute resolution mechanisms are grouped collectively under the banner of Alternative Dispute Resolution (ADR).

These three approaches to ADR are all very similar in context. They basically consist of detailed discussions between an applicant, the council and any objectors with concessions made in an attempt to reach a compromise which is acceptable to all parties.

Of these three approaches, the simplest and the most frequently used method is negotiation. During the DA assessment, negotiation is usually carried out by the development assessment officer and consists of informal discussions with the applicant, the objector(s) or both. An example of effective negotiation might include a developer agreeing to amend their plans to resolve an objector’s concerns.

In addition to negotiation, some Council’s have elected to implement a system of mediation to resolve conflicts in the development process. Mediation is an assisted form of negotiation with a neutral mediator chairing a meeting with the applicant and any objectors. During the meeting, the mediator attempts to clarify the issues of concern for all parties. Following this, the mediator then attempts to engage in a problem solving process using a number of different approaches. The basic aim of the mediation is to reach a solution agreed on by all parties (Kotevska 2001).

During the process the mediator remains value neutral and does not make a decision or put pressure on any stakeholder to make a decision. To achieve this, external mediators are sometimes used as they are removed from both the local politics of the area and from a decision making role with the council (Kotevska 2001).
The use of mediation has a number of benefits for both the developer and the objectors. For the developer, the benefits include:

- A chance to amend the application to resolve objectors concerns;
- A faster assessment of the DA with the issues resolved early in the process; and
- An improved chance of receiving approval by the council.

For objectors, mediation is beneficial as it allows them to meet with the developer to discuss their concerns in a face to face format. Also, if they didn’t go through mediation, there is a chance the determining body might approve the application without satisfying the objectors concerns. The mediation would therefore provide an additional conflict resolution mechanism (Sutherland Shire Council 2009b).

Another less commonly used ADR mechanism is Facilitation. Like mediation, facilitation involves the applicant, objectors and a facilitator sitting around a table to discuss and potentially resolve key points of conflict with a DA. As an ADR technique, facilitation is used to both resolve existing disputes and to prevent conflicts from escalating. According to a Land & Environment Court working party into development assessment, Gosford City Council operates a very effective facilitation program. This program and its benefits are discussed in the case study below.

**A Case Study of Facilitation at Gosford City Council**

**The Process:**

Gosford City Council offers facilitation meetings for developments where more than 3 objections are received. The facilitation meetings are voluntary and only occur when:

1. All stakeholders agree to meet; and
2. The Development Assessment Officer believes facilitation can resolve the dispute.

The facilitation occurs during the DA assessment process and is chaired by a Council officer trained in Facilitation by the Australian Commercial Dispute Centre. When selected for a dispute, the trained officer is excluded from further involvement in the assessment of the DA.

The role of the facilitator is to create an environment conductive to discussion and negotiation between stakeholders. The basic aim of the facilitation session is to reach an agreed resolution about the key points of contention. During the facilitation, the facilitator does not represent the views of council. In addition, the facilitator does not try to use persuasion to influence the views of any stakeholders.

If an agreement is reached, a report is submitted by the facilitator to the assessment officer. The assessment officer then considers its findings in his or her DA assessment report. When facilitation meetings are
successful, the council assessment officer is often able to determine the DA at a delegated level, instead of having it go to a council committee meeting. If no agreement can be reached, however, the assessment officer continues to assess the DA under the normal assessment process.

The benefits:
The facilitation program has been trumpeted as a great success. A Council survey found that, of the 75 facilitations conducted in 1999, almost 80% were considered successful with parties reaching either a partial or complete agreement.

The problems:
One downside to the facilitation process has been that some DA’s have been delayed by 1 or 2 weeks. Gosford Council considers this to be justifiable due to the fact that it reduces the number of DA’s which need to be dealt with at council committee meetings.


As well as the benefits outlined in the Gosford case study, council facilitation offers a number of other advantages in relation to conflict resolution. In particular it:

- Resolves disputes early in the development process helping to prevent them from becoming more entrenched;
- Reduces the number of appeals brought to the Land & Environment Court; and
- It is a lot less expensive than court proceedings and court ADR;

Furthermore, when facilitated DAs do end up in the Court, the number of contentious issues is often reduced (Cripps, Lloyd, Wood, Chapman, Fielding & Tangney 2001).

iii) Council Planning Panels:

Councils also frequently have development assessment panels made up of a number of senior council staff. These panels meet on a semi regular basis, (often once per fortnight), to discuss and determine more complex and controversial DAs. When deciding on the merits of a particular development, the panel first considers the DAOs report. The panel then hears arguments from the applicant and any objectors before making a decision on the application. The criteria triggering these panels can include factors such as:

- Estimated cost of works;
- Objections which cannot be resolved by way of condition;
- Specific types of development considered to be major (e.g. new residential flat buildings); and
• A request by the applicant to have the DA heard by the panel.

In terms of conflict resolution, these panels provide a number of advantages over delegated determination. With, for example, the Woollahra Council panel system, the advantages include:

• Reduced potential for corruption as the determination is based on the majority vote of three managers. Delegated determinations, on the contrary, are determination by a sole council figure head such as a team leader;
• Applicants and objectors are given access to the assessment officer’s report 1 week prior to the meeting. This affords both parties with an adequate opportunity to formulate a response to the findings in the report;
• Applicants and the objectors are able to discuss the assessment report and their concerns with the panel during the meeting; and
• The, process is more transparent as the final assessment and recommendation is made in front of the applicant and the objectors.

One criticism of council planning panels is that they do not comply with all of the principles of due process. This issue is further discussed below under the heading ‘Council Development Control Committee Meetings.’

iv) Council Development Control Committee Meetings:

Another determination option within Councils occurs at a Council committee level. These committees are made up of a number of elected Councillors. Similar to planning panels, Council committees meet on a semi regular basis to discuss and determine DAs. The criterion triggering the involvement of Council development control committees is usually similar to the criteria for council planning panels. However, in addition to these criteria, Councillors can call a DA to the committee meeting for any number of reasons. Frequently councillors will do this after being lobbied by the applicant or an objector.

To help them assess a particular development, the Councillors are given a development assessment report written by a qualified Development Assessment Officer, by an IHAP (see below) or by both. The Councillors then hear submissions from the applicant and any objectors before debating the application then voting on its determination.

Although they operate in a similar manner to Council planning panels, council Development Control Committee Meetings are heavily criticised in relation to both their public participation and their conflict resolution capacities. Broadly speaking, criticisms relate to conflicts of interest,
lobbying, lack of expert knowledge and the fact that the meetings do not comply with the principles of due process. These issues are discussed below.

As just mentioned, one criticism of Councillors is that they often lack expert knowledge about development assessment. This is due to the fact that councillors are not required to work or hold a university degree in any profession relating to town planning or property development. Given their lack of qualifications, it has been argued that Councillors do not possess the skills to make decisions on complex DAs (Stokes 2004). As a result of this, Councillors can make flawed decisions, in relation to s.79C of the Act, when determining DAs. This can be to the detriment of the applicant or objectors and it is a very poor outcome in relation to conflict resolution.

A second major criticism of council development control committees relates to conflicts of interest (both real and perceived). There are two distinct problems relating to conflict of interest. Firstly, the structure of Local Government provides the ability for councillors to work in legislative, executive and judicial roles. The inherent problem with this is highlighted by a recent annual report by Independent Commission Against Corruption (ICAC) which stated:

   “Local councillors are responsible – sometimes at the same time – for making plans and regulating development, advocating for constituents, and making decisions on individual development applications. This combination of three, often conflicting functions is unique to local government and presents its own particular problems” (The Independent Commission Against Corruption 2003, p.45).

In effect, the councillors can create or amend the planning controls within LEPs and DCPs and the same councillors can then determine DAs assessed against these documents. This runs contrary to the legal rule ‘nemo debet esse judex in propria causa’ which, when translated means, “no one should be judge in his own cause” (The Free Dictionary 2009, p.1). Basically the mind of the councillor could be prejudiced when assessing and determining a DA. This is because the councillor is more likely to give improper consideration to a planning control which he or she made (Stokes 2004).

The second situation where a conflict of interest arises is in relation to the ability of a Councillor to benefit from property development. This can occur either by a direct bribe for development approval (pecuniary) or the approval of a DA submitted by a family member or friend (non-pecuniary).

Another issue with conflict of interest is the fact that it can sometimes be very difficult for a councillor to determine whether his or her involvement in a DA would constitute a conflict of interest. This is particularly the case for a non-pecuniary conflict of interest as the definition is quite vague and open to interpretation. A councillor could form the opinion that his or her
involvement in a DA does not constitute a conflict of interest; however an applicant or objector, using the same definition, could reasonable come to the opposite conclusion (Stokes 2004).

These issues are compounded by the fact that councillors have the flexibility to make substantial compromises, with certain aspects of a DA, to be traded with improvements with other aspects of the application. When this flexibility is applied to a controversial development the issue is made even worse and the community can become very suspicious about improper conduct.

<table>
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<th>Public Inquiry into Warringah Council</th>
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<td>In 2001, Warringah Council was brought to the attention of both the ICAC and the Department of Local Government, by dissatisfied residents, alleging improper conduct by the Councillors including corruption. This community dissatisfaction continued to grow and by the end of 2002, 17% of the 1140 complaints, to the Department of Local Government related to Warringah Council. Following this groundswell of complaints, the Minister for Local Government appointed a Commissioner to hold a public inquiry into the alleged misconduct at Warringah Council. The commissioner found that the problem related to the fact that the Mayor had significant links to the property development industry and another council was working as a real estate agent. Both of these councillors were on the Development Control Committee and were influential in approving a number of controversial developments. During the inquiry, the Commissioner noted that submissions were very persuasive and a wide range of community members made representations. The report concluded that, in the opinion of the wider community, the Councillors were incapable of fulfilling their responsibilities. The Council was then sacked and an administrator was appointed. What is significant about this case is that no instances of misconduct or corruption were every proven by the Commission. The Councillors were sacked on the basis of perceptions of conflict of interest. Furthermore, this case highlights a sizeable problem with the use of Councillors in determining development applications.</td>
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<td>(Stokes 2004); (Daly 2003).</td>
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Another issue with council committees, in relation to conflict resolution, is the ability of the councillors to be lobbied. Being representatives of the community and a member of a political party, councillors can be lobbied by applicants, by objectors and by politicians and councillors within the same political party. This presents two problems. Firstly, councillors can be given blatantly incorrect information which can lead them to call a DA to the council meeting and determine it based on this incorrect information. Secondly, as a member of a political party, Councillors can be pressured to vote along party lines instead of coming to their own conclusion of the merits of a DA (Mant 2009).
Finally, Council Development Control Committee Meetings do not comply with the principles of due process. Although applicants and objectors are provided access to the DA assessment report prior to the meeting, either party can make an unfounded allegation during the meeting and the other party might not have an opportunity to respond to the allegations. Another point raised by Mant (2009) is the fact that the meeting occurs in a parliamentary like forum. The councillors do not meet privately after the objector(s) presentations to discuss issues raised in the submission(s). As a result, they do not provide objectors detailed written responses addressing their concerns. As well as these two non-compliances, there are a number of additional non-compliances, with the due process principles, outlined above in the other criticism in this subsection.

Given the arguments presented above, there is a dire need to revise Council Development Control Committee Meetings to improve their transparency, reduce the potential for conflict of interest and restore the public’s trust in the process. A number of authors have suggested improvements which could be implemented, which would eradicate or substantially reduce the problems outlined above. Stokes (2004) suggests that Councillors should be prohibited from sitting on such committees if they fall into a number of categories of employment. Basically, a councillor would not be allowed to sit on the committee if they currently, or have previously, been employed as a real estate agent, a property valuer, a builder, an architect or a property developer. This prohibition would also apply if an immediate family member works in one of the above listed professions. This change would likely reduce corruption and both real and perceived conflicts of interest. Furthermore, decisions by the councillors would be more likely to be based on the merits of the application. The system would still remain fair as people working in these professions could still work as councillors, only outside of development control.

Another idea, put forward by the author of this thesis, would be to designate mutually exclusive roles for councillors. This would work by limiting councillors to work in either plan making or development assessment (but not both). Furthermore, they would be prohibited from switching roles, for their entire duration working as a councillor. This would provide a separation of powers and which would be beneficial in reducing a number of issues associated with conflict of interest.

Two final options to improve Development Control Committees could include a greater use of IHAPs and the introduction of 3rd party merit appeals. These options are both advocated by Mant (2009) and are further discussed later in this chapter under the heading: ‘Independent Hearing & Assessment Panels’.
v) Independent Hearing & Assessment Panels:

Since 1997, a number of councils within Sydney have started to adopt Independent Hearing & Assessment Panels (IHAPs) as another conflict resolution mechanism in development assessment. IHAPs consist of a panel of external consultants hired by the Council to discuss contentious DAs, usually with unresolved objections. The panel listens to verbal submissions from both the applicant and objectors before making a recommendation on the DA. This recommendation is then sent to the councillors, alongside the development assessment report, for further discussion and determination.

Sutherland Shire Council has established an IHAP in 2003 with great success. The Sutherland IHAP process and its benefits and problems are discussed below.

A Case Study of the Sutherland Shire Council IHAP

The Process:

The Sutherland Shire Council IHAP is made up of a general panel of 18 professionals practicing in areas such as architecture, urban design, town planning and law. To be selected for the panel, members must be external from the council and not work or consult within the Sutherland LGA.

From this general panel, three (3) professional representatives and one (1) community representative are selected to conduct a hearing with individual hearings held on every 3rd Tuesday following the full council meeting. The professionals used in a hearing are selected by the Council and the public not made aware of their identities until the hearing begins.

Panel members receive a copy of the council Development Assessment Officer’s report, the applicant’s documentation and all objections at least 5 days prior to the meeting. They are then able to conduct a site inspection at 2.30pm on the day of the meeting. The applicant and objectors are notified about the meeting by letter and are provided access to the assessment officer’s report. To be allowed to address the panel, objectors are required to have written a formal objection and they must also register their intent to speak prior to the meeting.

The meeting is facilitated by one of the panel members who is designated the chairperson. This chairperson directs proceedings and asks relevant questions. During the meeting, the objectors are given a chance discuss their concerns with the panel members. The applicant is then able to address the panel and respond to any comments made by the objectors.

After hearing the submissions, the meeting is adjourned and the panel members retire to further discuss the items and prepare recommendations and a commentary explaining the reasons for the recommendations. The IHAP can make one of four different recommendations including approval, refusal, deferral or delegation to the Director.
The panels’ recommendations along with the assessment report are then either delegated or sent to the full council meeting for further consideration and determination.

The benefits:
Sutherland Shire Council cites a number of benefits as a result of the implementation of the IHAP in relation to both public participation and conflict resolution. Some particularly significant benefits include:

- Improved transparency in decision making as a result of an independent review of council’s decisions;
- Improved processes of discussion and debate due to the fact that the meeting is chaired by professionals;
- Reduced community intimidation when speaking;
- Improved public knowledge of the development assessment process;
- More rational decisions based on merit due to the expertise of the panel; and
- A reduction in the abilities of applicants and objectors to lobby councillors.

The Council conducted a survey of the panel three months, one year and two years after it was initially implemented. The results from the survey found:

- That community members who had experienced the old system and the IHAP preferred the IHAP;
- That 85% of participants were felt at ease in expressing their views at the meetings; and
- That 54% of participants thought the process was transparent and 46% thought the decision was fair.

The Council also conducted a number of reviews of the IHAP shortly after it was implemented. In relation to consistency with recommendations, the reviews found that the IHAP agreed with staff recommendation for 90% of the applications. Furthermore, in 80% of cases both the IHAP and the Councillors agreed with the staff recommendation.

The problems:
The Council found a number of problems with the panel including an increase to the time taken to determine applications, an increase to the staff workload and an increase to the Council’s operating costs. Politics also played a significant role in the IHAPs effectiveness. In particular, the reviews found that endorsement of IHAP recommendations by the Councillors dropped from 91% to 72% following an election.

(Barber n.d.); (Sutherland Shire Council 2009a); (Mant 2009); (Vergotis 2005).
As well as the benefits outlined in the Sutherland Case Study, IHAPs have a number of additional benefits in relation to conflict resolution. Mant (2009) argues that IHAPs comply with the principles of due process. According to Mant, these principles include the right “to be heard, to know the case…, to have a decision by an independent hearing body, to question and respond, to have written reasons, and… to appeal on the merits” (Mant 2009, p.4). In sustaining this argument Mant comments that:

“Those attending a hearing will have seen the staff assessment report. All the original written objections are available to the panel. A proper hearing is conducted. People express a point of view; sworn evidence is not required” (Mant 2009, p.6).

One criticism of IHAPs is that they are still determined by elected representatives who are open to lobbying and making decisions with considering the merits of an application. Ghanem (2008), for example, claims that the majority of IHAP recommendations in NSW councils are ignored by the Councillors. Mant (2009) disputes this criticism by pointing out that if Councillors ignore the IHAP recommendations too frequently they can be accused of corruption and risk political sanctions.

A perusal of IHAP recommendations and council committee determinations on Liverpool Council website was conducted to ascertain the validity of both arguments. The perusal revealed that between 2006 and 2009, the council determination was consistent with the IHAP recommendation with the overwhelming majority of decisions. This point is further strengthened by the findings in the Sutherland Council case study outlined above.

Although a strong advocate, Mant (2009) believes that IHAPs could be further improved with respect to their ability to resolve conflict and prevent irresponsible decisions by the Councillors. To achieve this Mant proposes two key changes. Firstly, the courts should strongly consider awarding costs in class 1 appeals where the Council recommended against the IHAP but the Court reached the same conclusions as the IHAP. This would put pressure on the councillors to make a determination on planning grounds. Secondly, Mant believes that objectors should have third party appeal rights with court heavy cost penalties against the third party to prevent vexatious appeals. (Mant 2009); (Mant 2009, Interview., 2 October).

vi) Joint Regional Planning Panels:

The 2008 amendments to the Act have introduced new assessment and determination bodies known as Joint Regional Planning Panels (JRPPs). These panels have commenced operations and are being used to determine regionally significant development. According to the JRPPs website, regionally significant development generally includes development valued over $10 million but
less than $100 million. It also includes infrastructure, ecotourism and crown development valued at over $5 million. Designated development and certain forms of coastal development are also included in the definition (NSW Government Joint Regional Planning Panel 2009).

**Objector merit appeals**

It is intended that Joint Regional Planning Panels will also be used as an appeal mechanism for objectors. The implications of this in relation to conflict resolution will be discussed below, in subsection (e) of this chapter.

JRPPs operate in a very similar way to council development control committee meetings with a few key differences. Firstly, the panels are made up of five representatives with three being State members appointed by the Minister and two being Local members appointed by the Council. Secondly, the State Members are required to have expertise in one of a number of different fields. These fields include planning, architecture, law, the environment, heritage, transport, engineering, tourism and government and public administration. The local members have slightly different eligibility requirements with councils able to appoint one non qualified councillor and one qualified member. The qualified local member must have expertise similar to the state members with the council able to appoint a councillor, an external consultant or a member of council staff. However, it should be noted that the JRPP procedures manual strongly recommend against the use of council staff for conflicts of interest reasons (NSW Government Department of Planning 2009b).

For DA’s determined by JRPPs, the council assessment procedures are generally the same as existing. The council staff conduct an assessment, of a nominated DA, and make recommendations. Following this, the assessment report is handed over to the JRPP for final assessment and determination. The JRPP meeting procedures are very similar to that of the council committee meetings with a hearing being held in a parliamentary format. The applicant and objectors can address the panel and ask questions. The panel then makes a final determination on the DA which can then be appealed, by the applicant, to the Land & Environment Court (Mant 2009); (NSW Government Department of Planning 2009b).

According to the Minister for Planning, Kristina Keneally, the primary role of JRPPs will be to “stand in the shoes, that previously would have been occupied by a council or the minister, and make decisions on projects significant to the region” (NSW Government Department of Planning 2009c, par.8). In other words, they are effectively used to remove the ability of Councillors and Council staff to determine some major types of development.
The JRPP website states that the panels enhance the integrity of the NSW development assessment process in four main ways including increased transparency, increased accountability, increased efficiency and increased rigour (NSW Government Joint Regional Planning Panel 2009).

At a glance these purported advantages appear to be reasonable and correct. However, the structure and procedures for JRPPs, as provided by the Act, the Regulation and the Department of Planning, may have undermined these benefits. Furthermore, these alleged benefits are diminished even further when compared against the Part 4 assessment system, prior to the 2008 round of amendments, as demonstrated below.

In relation to transparency, the JRPP website claims assessment process will be improved because development determinations will be based on ‘merit’ and with the public in attendance.

In reality, however, the JRPPs could have several significant problems linked to transparency (or lack thereof). Firstly, the state members are appointed by the Minister, for a term of three years, with eligibility for reappointment. This becomes an issue when a JRPP is determining a development highlighted as being ‘significant’ by the Minister for Planning. The state representatives could potentially restrain from opposing such a development as it could jeopardize their eligibility for reappointment (Ghanem 2008).

A second transparency issue occurs at the Panels’ determination stage. Section 5.11 and 5.12 of the guide specifies that, in situations where the panel makes a determination contrary to the assessment officer’s recommendation, reasons are to be provided in the minutes. The guide does not specify the level of detail required to be provided in the reasons. Given that the meetings occur in a parliamentary like forum, it is possible that the reason could be contained in a single sentence. This could potentially give rise to accusations of corruption or improper consideration (Mant 2009).

Conflict of interest is another major transparency issue with JRPPs. Unlike IHAPs, the JRPP members are allowed to operate private consultancies within the region in which their respective panel operates. This increases the likelihood of, for example, an associate of a panel member making an objection to the panel. The result being that both the real and perceived conflicts of interest are amplified, and this is further compounded by the fact that:

- the panel members are often well known within the community and easily lobbied;
- the panel members are not rotated and the same members determine all developments sent to the JRPP;
• State politicians are eligible to sit on the panels; and
• the panel members have high levels of discretion to determine some very significant and valuable developments.

To reduce conflicts of interest, the panel members are required to abide by a code of conduct similar to that of local councillors. However, this will do little to prevent allegations of corrupt conduct, which are inevitable given the substantial monetary value of the developments being determined by the panel (Local Government & Shires Association of NSW 2009); (Mant 2009).

In relation to accountability in decision making, the JRPP website claims that the panels will run ‘without interference from government’. As before, this argument could fall down on a number of counts. Firstly, state panel members are appointed by the Minister for a three year term. The Minister has the ability to both dismiss panel members and reappoint them after their three year term has expired. In addition, local members can be Councillors. This is a problem as Councillors can be influenced by their affiliated political party.

A second accountability issue relates to the fact that the JRPP meetings occur in a parliamentary like forum. Under the JRPP code of conduct, the Councillor(s) are expected to form their own views on the merits of a proposal. This can create a situation whereby a Councillor’s view, can be contrary to the views of his or her political party, when considering a DA on its merits. In this situation, the Councillor would be pressured to vote in a manner consistent with their political party (Mant 2009).

A final and most significant accountability flaw relates to the Ministers powers to influence the design of the panel. Put simply, the Minister has the ability, under the Act and the Regulation, to amend the operating procedures of the panel. This allows the Minister to make any number of changes at whim, which could create a permanent perception of indirect Ministerial control. This argument is further strengthened by the fact that no mechanism exists whereby the powers given to the panel can be questioned (Ghanem 2008). This can create a large number of problems as outlined throughout this section.

With regards to rigour, the JRPP website states that the assessment process will be improved because “qualified experts will determine applications – bound by legislation, regulations, Operational Guidelines and a Code of Conduct” (NSW Government Joint Regional Planning Panel 2009).
It is acknowledged that qualified experts have an important role in the DA assessment process. When coupled with a technocratic decision making style, however, this characteristic presents a number of issues in relation to public participation, conflict resolution and the public interest. These include:

- Bias towards approval – Panel members are often employed in professions such as planning and architecture and therefore may have an unconscious bias towards development progress;
- Bias towards expertise – given their employment experience and legitimised university education, professionals frequently give more weight to their opinions, over and above the opinions of the public. In the case of JRPPs, the members are more likely to down play objectors concerns if they believe a development has merit;
- Narrow expertise – there is no requirement for a range of different experts to be placed on individual panels. It is therefore possible to have members stacked in only 1 or 2 fields of expertise.

(Ghanem 2008); (Kotevska 2001).

Given these three features, Ghanem argues that JRPPs are not “equipped to weigh up competing values, such as environmental, economic and social considerations” (Ghanem 2008, p.144). Further to this, panel members are put in the role of interpreting and executing the public interest, on behalf of the community, eroding the democratic decision making process. Over and above this, democracy is further reduced as most panel members are unelected and the state holds the majority vote. When combined these factors result in development decisions which are more likely to consider the needs of the state or region over the needs and desires of the local community (Kiely 2009); (Lipman & Stokes 2008).

Despite the above listed issues, there is one substantial benefit of JRPPs in relation to conflict prevention and conflict resolution. This benefit relates to the fact that Councils have regained the ability to assess certain types of development which were previously classed as ‘Major Projects’ under Part 3A. This specifically relates to major residential, commercial and retail developments with an estimated value of between $50 million and $100 million. Prior to the implementation of JRPPs, major developments were automatically called in, to be assessed under Part 3A, if they had a capital investment value of over $50 million (NSW Government Joint Regional Planning Panel 2009). Whilst in some respects this is an improvement, there are one distinct issue being the fact that the determination power is in the hands of the JRPP – who can disregard the council recommendation (refer to section 2.3 of this chapter for further discussion).
**e) Conflict Resolution Post-Determination:**

**Environmental Planning & Assessment Amendment Act 2008**

The 2008 round of amendments to ‘the Act’ were assented by the Parliament in June 2008. Although the Amended Act has been assented to, many of its provisions have not yet legally commenced. This is a result of the Department of Planning’s use of a staged implementation process. Currently Part 2A of Amendment Act 2008 called ‘Other planning bodies’ has been commenced (in part). In particular, the provisions relating to the PAC and JRPPs. However the provisions relating to the Planning Arbitrators have not commenced (and may not commence).

In addition, a number of provisions relating to the development assessment processes have not commenced. The Department of Planning have issued draft DA guidelines for comment addressing matters such as the removal of ‘stop the clock’ provisions. The guidelines place an emphasis on the front end of the process, for example, the requirement for more detailed information in Statement of Environmental Effects by type of DA. This will hopefully improve communication of the requirements and reduce conflict potential. Planning Arbitrators have not been addressed in these draft guidelines adding weight to possibility that they may not be introduced. As a result of this, and given the word limit of this thesis, Planning Arbitrators and Section 96D reviews will not be discussed in detail.

**i) Section 82A Reviews:**

Under the currently commenced provisions of the Act, a dissatisfied applicant has three primary options for appeal on the refusal of a development application. One of these three options is what’s known as a Section 82A review of determination. The review basically consists of a reassessment of the development application by the Council. The review is conducted by a separate development assessment officer, within the council, who again considers the proposal on its merits. The assessment process remains the same and objectors have the same general participation rights. To be accepted by council, the development must:

- be ‘substantially the same’ as the refused DA;
- be lodged within 12 months of determination;
- not be subject to an appeal or determination by the Land & Environment Court; and
- Not be designated, integrated, complying or crown development.

This review mechanism has a number of benefits in relation to conflict management. In particular, the merits of the development are assessed again from the perspective of a different assessment officer. This is useful in cases where the applicant comes to the conclusion that the original assessment officer used a ‘flawed logic’ in determining the original DA. The applicant can advise the council, in their opinion, why the proposal is acceptable in its current form without
amending the plans or resorting to the court. New evidence could also become available which would make the application meritorious. An added benefit of this is a substantial time and cost saving for all parties as the need for a court appeal is avoided.

Despite their benefits, Section 82A reviews have received some criticism. Mant (2008) points out that a probity issue is created for both the council and any objectors due a ‘substantially the same development’, being determined, by the same organisation, with a different result. He further asserts that they can be used as an addition point for ambit claim by developers.

**ii) The Land & Environment Court:**

Another appeal mechanism used by dissatisfied applicants is the Land & Environment Court (LEC). The court comprises of both Judges and Commissioners who have jurisdiction over seven classes of matters. Of these seven classes, the most commonly used appeal mechanisms are known as Class 1 ‘merit appeals’ and Class 4 ‘judicial review’. Under Class 1, an applicant can appeal to the LEC if they are unsatisfied with:

- the original council determination;
- the determination of a Section 96 application or a Section 82A review; and
- the Conditions of Consent (if the development is approved).

During the appeal, the Court hears the matter afresh and ‘stands in the shoes’ of the original decision maker. The court is not bound by evidence and it has both the same powers and the same responsibilities of the Council when assessing and determining a DA. During the proceedings, the court can call and examine evidence from objectors, applicants and a range of experts (Lipman 2004).

One important feature of the LEC is that it is generally consistent, in assessing and determining developments of similar type, nature and scale. This is a result of four factors. Firstly, the Commissioner or Judge is not an elected representative. As a result of this, the influence of lobbying and politics, on the decision making process is greatly reduced. This can be argued to be either a positive or negative feature in relation to conflict management, depending on the circumstances of the individual case. From an objectors view point, the ability to lobby the decision maker is greatly reduced and decision is more likely to be made on technical grounds.

The second factor leading to a greater consistency in decision making is the application of planning principles. According to Pearson & Williams (2009), these principles can best be described as:
(a) The statement of a desirable outcome when considering whether to grant consent to a development proposal;
(b) The chain of reasoning aimed at reaching a planning decision; or
(c) A list of appropriate matters to be considered in making a planning decision (Pearson & Williams 2009, p.30).

The Commissioner or Judge presiding over an individual DA, will apply these planning principles, where relevant, to achieve a better planning based outcome. In applying these principles, however, there is a danger of neglecting the unique and individual merits of a particular DA ( Pearson & Williams 2009).

The third factor leading to more consistent decision making by the LEC is the use of experts. Unlike Councillors, Judges and Commissioners are required to be professionals with expertise in at least one field. In addition to this, the LEC has the power to appoint court experts in appropriate cases. These experts are paid by for by both the applicant and the council and are therefore more likely to give more accurate technical advice (Lipman 2004).

The final factor creating consistency relates to accountability. Judges and Commissioners are required to provide detailed written reasons for their decisions. This both holds the Judge or Commissioner accountable and provides an assurance to the public that the issues have been thoroughly considered (Mant 2009).

For objectors, class 1 proceedings provide several conflict prevention and conflict resolution mechanisms including on-site hearings, conciliation conferences and adjudicated decisions made by a Judge or Commissioner. During class 1 proceedings, on-site hearings generally occur at or near the beginning of the case. All parties meet at the development site, and each has a chance to discuss their concerns with the appointed Judge or Commissioner. The primary advantage of an on-site hearing is the fact that context is provided to some of the issues. Basically, the Judge or Commissioner can more clearly comprehend the primary concerns, from the perspective of each stakeholder group.

Another conflict resolution mechanism used in the LEC is a Section 34 conciliation conference. This is a consensual dispute resolution mechanism where parties identify issues and then consider options to resolve the issues. The conference occurs at the very beginning of proceedings and is run by a Commissioner. During the conference, the Commissioner acts in an advisory role rather than a determinative role. The parties to the conference have an implied duty to act in good faith and attempt to negotiate the issues. If the parties are able to reach an agreement, the Commissioner can then dispose of the proceedings as agreed upon. There is, however, one restriction being that the agreement must be one which “the court could have made in the proper
exercise of its functions” (Preston 2007, p.124). In other words, the decision needs to be one which the Commissioner could have legally made.

If no agreement can be reached, the appeal goes back to the court and a hearing is fixed. A written report is provided to the court by the Commissioner presiding over the conciliation conference. This report outlines the facts and the issues according to the Commissioner. The court then determines the appeal in an adversarial manner (Preston 2007).

Conciliation conferences have a few main advantages. First and foremost, the parties are coming to a mutual agreement rather than having a decision forced upon them. As a result of this, the parties are far more likely to accept the final decision. A second advantage of conciliation conferences is the fact that they can save a lot of time and substantially reduce court associated costs. Thirdly, even if parties don’t come to an agreement, the number of issues can often be reduced in the ensuing adversarial case. Furthermore, in situations where parties cannot reach an agreement, they are more likely to accept the final decision of the Commissioner or Judge (Preston 2007).

There are, however, two significant problems with conciliation conferences. Firstly, the Council appointed member often lacks the delegated power to come to certain agreements and hence resolve the dispute. Secondly, the Commissioner who conducted the conciliation can be given the power to adjudicate the proceedings if the conciliation fails. This only occurs when all parties agree to it, but it can cause a whole raft of issues, particularly in relation to confidential information discussed during the conference (Preston 2007).

iii) Judicial Review:

One mechanism of appeal for objectors and literally any other person is Class 4 Judicial review proceedings. This appeal system works on the grounds that the consent authority has made a decision on a DA illegally. This can occur if the decision maker:

- Followed an incorrect procedure to arrive at a decision; or
- Did not legally have the power to make the decisions.

When determining a DA, a decision lacking legal power can occur in cases where a consent authority has not considered a relevant matter, as outlined in Section 79C of the Act. In this situation, if an objector commencing Class 4 proceedings, the Court could dismiss an appeal if it is considered unsatisfactory on planning grounds. Judicial review is useful as it holds the decision maker accountable for their decision. However, the use of Judicial review proceedings can be
abused by objectors as a tactic to cause a delay for a developer. This can have the effect of reducing the profitability of the development (Farrier & Stein 2006).

An applicant can also commence Class 4 proceedings in two situations. Firstly, the applicant can commence judicial review against a decision made by council. Secondly, the applicant can commence judicial review proceedings against a decision by a Judge or Commissioner of the Land & Environment Court. In the case of a decision by a Commissioner, the Appeal can be made to a Judge of the LEC. If the decision maker was a Judge in the LEC, the appeal can be made to the Court of Appeals. As merit appeal rights do not exist past the initial LEC court case, this is the only means of further appeal for an applicant (Farrier & Stein 2006).

iv) Joint Regional Planning Panels:

The 2008 Amendment Act has created new objector merit review provisions which have not yet legally commenced. These review provisions are referred to as “neighbourhood reviews” and are proposed to be heard by the JRPPs. An objector will be able to appeal a Council DA decision within 28 days of determination. However, this only applies to certain forms of development and in very limited circumstances. For residential classes of development, the approved DA must exceed two storeys in height, or contain 5 or more separate dwellings with a site area greater than 2000m². In both of these situations, the approved DA must also exceed a height or FSR development standard by more than 25% and the objector must own land within 1km of the subject site. Similar provisions apply for commercial, retail and mixed use developments (Ghanem 2008); (Pearson & Williams 2009).

In terms of conflict management, there are a number of issues associated with the use of JRPPs for objector merit appeals including:

- Firstly, legal representation at the review may be restricted or prohibited by the Regulation [as discussed in more detail in (below in subsection (v))];
- Secondly, the appeal may not be subject to the same judicial rigour as is the case with the LEC. This becomes very apparent when considering the fact that the amendments to the Act do not require the JRPPs to provide reasons for their determination. This also has significant implications for any future Class 4 proceedings;
- Thirdly, consistency in decision making is likely to be reduced when compared with the court which relies on planning principles and previous judgments; and
- Finally, there is no right of merit appeal to the LEC for either the applicant or objectors, to decisions made by a JRPP acting as a review body. The only option to proceed to the court will be Class 4 Judicial Review (Ghanem 2008); (Pearson & Williams 2009).
v) The Planning Assessment Commission:

The amendment Act has also inserted new provisions (not yet commenced), for the PAC to be used as an objector merit review mechanism. The Commission will conduct objector merit reviews for DAs determined by JRPP. This will occur in circumstances where a JRPP was the original determining body but not in instances where it is used as an objector merit review body. An objector will be able to appeal a DA decision from a JRPP within 28 days of determination. Circumstances in which an objector can only lodge a merit appeal to the PAC are limited. The requirements are basically the same as those outlined from JRPPs (Ghanem 2008); (Kiely 2009).

In relation to conflict prevention and conflict resolution, the use of the PAC will have many of the same problems as the JRPPs. First and foremost, the right to legal representation has been threatened. Ghanem (2008), when discussing this issue, makes reference to Section 52 of the Act which, up until recently stated:

Where this Act confers a right on a person to be heard, that persons shall be entitled to be heard personally or by an Australian legal practitioner or agent (NSW Legislation 1979).

Section 52 of the Act now reads:

Except as provided by this Act or the regulations, if this Act confers a right on a person to be heard, that persons shall be entitled to be heard personally or by an Australian legal practitioner or agent (NSW Legislation 1979).

This may result in less principled decision making and furthermore, it violates the right to procedural fairness, which is a foundation of the legal system. This is especially the case for objectors who often have limited monetary resources, when compared to a developer (Ghanem 2008). The other primary issues, with the PAC as a review mechanism, are outlined in points 2-4 of subsection (iv) above.

2.3 Development Assessment System (Part 3A of the Act)

a) Introduction: - Setting the Context & Criteria:

Part 3A of the Act was introduced in the August 2005 round of amendments to the Act. It created a separate streamlined assessment and approvals regime for assessing and carrying out certain major projects. Part 3A was implemented in an attempt to consolidate, simplify and fast track these major projects by removing red tape. To be declared a major project, a proposed
development must either meet the requirements of a SEPP or be declared to be of state or regional significance by the Minister for Planning (Williams 2007a).

Development assessment under Part 3A is usually undertaken by the Department of Planning or the Planning Assessment Commission, with the Minister for Planning making the final determination. The Minister can however, delegate out the role of determination to another person or panel (Farrier & Stein 2006).

The planning system under Part 3A is very complex with very flexible assessment procedures. The assessment requirements and the assessment process can be altered based on the type of development, the requirements set by the Director General and the attitude of the Minister for Planning. For the purpose of this thesis, neither designated development nor critical infrastructure development will be discussed here. Both of these forms of development have different public participation and appeal rights compared other major projects assessed under Part 3A. Furthermore, most major residential, commercial and retail developments (i.e. the two case studies) are not classed as either designated or critical infrastructure development.

b) The Process & Assessment Requirements under Part 3A:

The development assessment process under Part 3A of the Act is very complex and heavily influenced by the nature and the scale of a development and the assessment requirements decided on by the Director General and the Minister for Planning. The overview provided below outlines the general steps in the assessment and determination process without going into extensive detail about each step.

Before the Part 3A assessment process can begin, the proponent must lodge an application to the Director General containing an overview of the project and any information required under Section 75E of the Act. The Minister for Planning must then form an opinion as to whether the project should be assessed under Part 3A. If the Minister is satisfied the development is declared a Part 3A project.

Once the project is declared Part 3A, the Director General is required to notify the proponent of the environmental assessment requirements for the project. In preparing the environmental assessment requirements, the director must refer to a set of guidelines and consult with any relevant public authority. At this point the Minister has the option of requiring a concept plan to be lodged for the project (Farrier & Stein 2006); (NSW Government Department of Planning 2009d). A concept plan is a less detailed description of the project and is used to resolve complex
issues at the front end of the project. Concept plans are discussed in the box following the initial overview.

The purpose of the environmental assessment requirements is to outline any key issues which will need to be addressed, by the proponent, in their Environmental Assessment. The requirements are presented to the proponent in a report titled the ‘Director-Generals Requirements’ (DGR). The DGR will also outline any consultation requirements the proponent will be required to undertake in their assessment. Furthermore, the DGR may require a ‘statement of commitments’. This is a list of measures the proponent is willing to take mitigate and manage the environmental impacts of the development (NSW Government Department of Planning 2009d). Put simply, the statement of commitments is a set of conditions which will form part of the development consent (if the project is approved).

Once received, the proponent uses the DGR to create a report, or a series of reports, addressing the relevant considerations. The proponent may also be required to modify their initial concept to meet the requirements of the DGR. When the environmental assessment (EA) is finalised, the proponent will submit the report(s) to the Director General. With complex projects, the Director General will frequently consult with relevant authorities to determine whether the assessment adequate addresses the DGR. If the EA fails to adequately address the DGR, the proponent will required to prepare a revised EA (NSW Government Department of Planning 2009d).

Once the Director General is satisfied with the EA, the project is then exhibited for a minimum of 30 days. During this period, the relevant authorities and the local Council are notified. Advertisements are placed in the local newspaper and surrounding neighbours are also notified by a letter in the mail. Further to this, the EA is made available for public inspection at the local council, at the Department of Planning offices and on the Department of Planning’s website. Whilst the project is on exhibition, any member of the public can make a submission, about the project, to the Department of Planning (NSW Government Department of Planning 2009d).

After the exhibition period finishes, the Director General provides copies of submissions to the proponent and may require the proponent to:

- Modify the statement of commitments to minimise the environmental impact;
- Provide a report responding to the issues raised by the objectors; and/or
- Amend the proposal to address the issues raised.

Where changes are required (or proposed) to the project, a preferred project report is generally required. This report outlines the changes to the project and describes how the preferred project
option addresses the submissions. If the changes are significant, the Director General may require the preferred project report available for public comment (Farrier & Stein 2006); (NSW Government Department of Planning 2009d).

At this point, the Director General will prepare an environmental assessment report on the EA or the preferred project option. Once finalised, this report and a number of other documents are provided to the Minister for Planning for final consideration and Determination. The reports submitted to the Minister generally include:

- The proponent’s EA and/or preferred project report;
- A statement relating to the compliance of the project with the DGR;
- Any advice received from public authorities;
- Any report prepared by the PAC;
- A reference to any State Environmental Planning Policies (SEPPs) with substantial relevance to the project;
- Details about any other EPIs which would have substantially governed the project if it was carried out under Part 4 of the Act (compliance with these EPIs and their relevance is considered in the Director Generals report);
- Any draft conditions if the Director General is recommending approval;
- and Any other matters the Director General considers appropriate (Farrier & Stein 2006); (NSW Government Department of Planning 2009d).

Once this information is received, the Minister will consider the relevant reports and make a determination on the project. When making the determination the Minister is required by Section 75J(2) of the Act to consider:

- The findings in the Director Generals environmental assessment report;
- The findings in any report prepared by the PAC; and
- Advice by the relevant Minister if the proponent is a public authority.

Section 75J(3) of the Act also provides that the Minister may (but is not required to) consider any EPIs which would have substantially impacted on the project if it was assessed under Part 4 or Part 5 of the Act (NSW Legislation 1979).

After considering Section 75J, the Minister for Planning can then either approve or refuse the project. Conditions are attached to the consent letter if the project is approved. The proponent is then notified of the determination and a copy of both the determination and the Director Generals report are put on the Department of Planning’s website.
Concept Plans Assessment & Determination

As outlined above, the Minister for Planning can require the proponent to submit a concept plan at the point when the Director General issues the DGR. A concept plan is a simplified description of the project which outlines:

- The scope of the proposed works;
- The stages of the development (if a staged development is proposed); and
- Any other relevant matters as determined by the Director General.

Concept plans are required for particularly complex developments. The basic purpose of a concept plan is to resolve major issues at the front end of a project and provide certainty for long term projects. This is particularly relevant with staged developments as critical matters are dealt with in the first application and subsequent approvals are simplified.

The process for assessing a concept plan is very similar to a regular application. The primary difference being that the assessment is carried out using less detailed information. Furthermore, when determining a concept plan, Section 75O of the Act requires the Minister for Planning to take into account the same considerations as a non-concept plan project.

The EA requirements are the same as for a regular Part 3A project. The key difference being that the Minister for Planning can require further assessment, following the approval of the concept plan. However, this further assessment is not required and if it occurs, it can be streamlined. In instances where further assessment does occur it is effectively limited to obtaining further information from the proponent and/or setting out detailed conditions.

(Carr 2007); (Farrier & Stein 2006); (NSW Legislation 1979); (Watts 2006).

\[\text{c) Conflict Avoidance & Conflict Resolution Prior to Determination:}\]

Unlike Part 4, there are substantially fewer conflict avoidance and conflict resolution mechanisms under Part 3A. There are, for example, no conflict prevention mechanisms prior to lodgement of the application. The only exception to this would be if a developer voluntarily decides to undertake some form of public consultation after anticipating that it will be required by the DGR. This is evidenced in one of the case studies in Chapter 3.

\[\text{i) Revoking of Part 3A Declaration:}\]

The use of Part 3A to assess a development is often triggered by one of a number of factors including:

- An estimated capital value of over $50 million (now $100 million with JRPPs)
- The type of land use proposed; and
- A high number of jobs created (e.g. over 100 tourism jobs directly created).
A developer can use these automatic call-in requirements to their advantage. As an example, a developer could modify their project, or deliberately alter some figures, so that a numerical requirement is reached and the project is must be assessed under Part 3A. This status can, however, be revoked for certain forms of development, by the Minister for Planning, under of s.75ZA(2) of the Act. The effect of this being that the project would then be assessed under either Part 4 or Part 5. With certain developments this would mean that the Local Council would be the assessment and determining authority for the development.

This provision of the Act can be used as an informal means of conflict prevention, in certain circumstances, where a stakeholder suspects that the development does not meet a Part 3A requirement. This relates primarily to developments that are either valued at close to $100 million, or where the estimated job creation is close to the minimum requirements. In these instances the council and the community can write submission and lobby the Minister for Planning, during the exhibition period, to have the Part 3A status revoked.

As a conflict prevention mechanism, this would only operate where the council or an objector could prove, by a way of a professional report, that the development does not meet a specific Part 3A requirement. It is of most use when stakeholders suspect that the developer has made a substantial error or deliberately fudged a figure, to gain the Part 3A status. An example of this mechanism being used is provided in one of the case studies in Chapter 4 of this thesis.

As a form of conflict prevention this mechanism is very weak for a number of reasons. Firstly, it works on the presumption that having the project assessed under Part 4 would result in a better outcome for the concerned stakeholder. Secondly, it only applies in some very limited circumstances. Thirdly, the evidence proving the error needs to be strong (as demonstrated in the case study). Finally (and most significantly), even when an error is proven, the Minister can determine that the development should still be assessed under Part 3A, if he or she believes it is of state or regional significance.

ii) Director Generals Environmental Assessment Requirements:

After accepting a project and reviewing the preliminary information, the Department of Planning issues the Director General’s Environment Assessment Requirements (DGR) for the project. As a conflict prevention and conflict management mechanism, the DGR is beneficial in a number ways as outlined below.
Firstly, in preparing the environmental assessment requirements, the Director General must consult with any relevant public authority including the local council. This consultation process is useful as it provides the Director General with a broad understanding of the key issues, with the initial proposal, from the perspective of most of the relevant stakeholders. With regards to a council, for example, these issues would generally relate to non-compliances with their LEP and DCPs, community opinions and general impacts on the municipality.

These key issues can then be put into the Director Generals Environmental Assessment Report and the proponent is then required to address these key issues. As an example, the DGR for the Ashington Development in Double Bay required the proponent to address the nature and extent of the non-compliances with the Woollahra LEP 1995 and the Double Bay Centre DCP 2002. Further, the DGR also required the proponent to address all amenity impacts (NSW Government Department of Planning 2009e). With the key issues outlined early in the design and assessment process, it can be a lot easier and cheaper for the proponent to amend the design to address the key issues.

The requirement of the proponent to address the key issues is also given some weight by the Act. In particular, Section 75H(2) provides that the Director General may require the proponent to submit a revised environmental assessment if it doesn’t adequately address the DGR. Further to this, the Minister can reject the project entirely, if the proponent refuses to revise the project (NSW Legislation 1979).

Another benefit of the DGR is that the Director General can require the proponent to submit a statement of commitments. This is a set of conditions, written by the developer, which describe how environmental impacts will be managed. If the development is approved, these commitments are put in the conditions of consent and must be adhered to by law. The statement of commitments is beneficial as it allows the Department of Planning to more comprehensively understand the impacts of the proposal and how they are going to be adequately mitigated or managed. As an example, the DGR for the Ashington Development required the proponent to demonstrate how construction impacts will be managed, if the project was approved (NSW Government Department of Planning 2009e).

In relation to conflict management, another benefit of the DGR is that it allows the Director General to set specific consultation requirements, tailored to the individual projects. The Director General can, for example, require the proponent to hold community consultation meetings. This affords concerned community members with an opportunity to discuss the project directly with the developer. The benefit of this being that concerned community members can get a better understanding of the project, as opposed to just looking at plans and reports. They can more
clearly articulate whether or not they would be adversely affected by it and react accordingly. If they believe it is going to affect them they can discuss their concerns directly with the proponent or lodge an objection. On the other hand they may determine it will have no impact and doing nothing at all. A further benefit of this consultation requirement is that the proponent is made aware of the communities concerns. The proponent then has an opportunity to amend the design to address the concerns.

Despite these benefits, there are a number of deficiencies in the DGR process with regards to conflict management. One moderate concern relates to the fact that the Director General is not required to consult with the public about the preliminary proposal. As a result, the requirements in the DGR do not necessarily reflect the views of the local community in which the project is located. Whilst not a major issue, community input at this early stage would be beneficial as the community concerns would be outlined at the front end of the assessment, often during the proponents design process. The proponent would also be more open to address the communities concerns, at this early stage, given the additional cost considerations of redesigning in the later stages of the assessment process.

Another concerning feature relates to the discretionary nature of the DGR. In preparing the DGR the Director General must consult with any relevant public authority to get a thorough understanding of the issues associated with initial concept. After consulting with a public authority, the Director General has the power to ultimately decide which issues should be included in the DGR. The Act also provides that the Director General must consider a set of draft guidelines when deciding what to include in the DGR. The guideline is also very discretionary with the Director General deciding the relevant aspects to apply to a project (Carr); (Williams 2007a).

These discretionary features ultimately allow the Director General to dictate how environmental assessment is done and what matters are required to be considered by the proponent. There is effectively no certain, from the communities view point, about what the assessment process of individual projects. For example, the DGR for two very similar projects may have very different community consultation requirements (Ratcliff, Wood & Higginson 2009).

Public consultation requirements are a good example of the problems associated with the discretionary nature of the DGR. Give his very wide ranging powers, the Director General could decide that stakeholder consultation is not required or only very minimal consultation is required. With the Ashington development, (discussed in chapters 3 and 4), the Director Generals Requirements specified that the proponent was required to:
“14. Consultation – Undertake an appropriate and justified level of consultation in accordance with the Departments Major Project Community Consultation Guidelines October 2007” (NSW Department of Planning 2009e).

This requirement is very vague and open to the interpretation of the proponent. Furthermore, the guide is equally unhelpful when discussing adequate consultation stating:

“The account of the consultation process included in the environmental assessment may be considered adequate if it demonstrates that:

1. Those individuals and organisations likely to have an interest in the proposal had enough opportunity to express their views...
2. Information regarding the nature of the proposal had been accurately and widely distributed...
3. Community and stakeholder feedback was encouraged and recorded...
4. Consultation with community and stakeholders was inclusive and the proponent has:
   - Got to know and understand the communities it needs to engage;
   - Acknowledged and respected their diversity;
   - Accepted different views, but ensured that dominant special interest groups are not the only voices heard
   - Aimed for accessibility:
     - Chose engagement techniques that offer opportunities to participate across all relevant groups
     - Considered the timing, location and style of engagement events and strategies (NSW Government Department of Planning 2007, p.3-4).

The guide also gives examples of types of acceptable consultation but does not specify what is required for any specific development types. It could therefore be argued, by a proponent, that a simple community survey, combined with advertisements in the local paper and information on the developer’s website is adequate consultation. There is no requirement in the guide for community consultation meetings, even with major developments. However, on the other hand, it also can be argued that the developer would still risk a failure to meet the DGR by doing this.

The use of the DGR to require concept plan assessment and approval is another significant issue with regards to conflict management. Although the environmental assessment requirements still apply to concept plans, the detail provided is very basic. Concept plans are designed to be used for very complex developments to resolve major issues upfront and provide certainty to the developer. This becomes a problem when carrying out community consultation, as required by the DGR. More specifically, the lack of detail required to be provide in the concept plan makes it difficult for community members to determine the
impacts of the project. If concerned, the community members can only provide very broad comments. The fact that their comments are very broad means they lose their effect and hold a lot less weight in the assessment (Ratcliff, Wood & Higginson 2009).

iii) Exhibition:

After accepting a proponents’ environmental assessment, the Act requires that a project must be exhibited for a period of 30 days with relevant authorities and landowners notified. During this period, the EA is made available for public inspection and any member of the public can make a submission, about the project, to the Department of Planning (NSW Government Department of Planning 2009d).

As a form of conflict prevention and conflict resolution, project exhibition is useful in two major ways. Firstly, as outlined in Chapter 1, a lack of both trust and public involvement are considered to be two significant triggers for land use conflict in the development process. Project exhibition helps to alleviate this by informing residents about a proposed development. It provides concerned residents with the means to find out more information about the development by going to their local council or reviewing the project on the Department of Planning’s website. As the public feels involved in the process, they are more likely feel at ease about the development and trust in the Department of Planning to make the right decisions.

Secondly, project exhibition allows residents to outline issues with the development by writing an objection to the Department of Planning. After the exhibition period finishes, the Director General can then require that the proponent address the objectors concerns if he considers then significant. In doing this the Director General can require that the proponent:

- Modify the statement of commitments to minimise the environmental impact;
- Provide a report responding to the issues raised by the objectors; and/or
- Amend the proposal to address the issues raised.

Where changes are required (or proposed) to the project, a preferred project report is generally required. This report outlines the changes to the project and describes how the preferred project option addresses the submissions. If the changes are significant, the Director General may require the preferred project report available for public comment (Farrier & Stein 2006); (NSW Government Department of Planning 2009d).
iv) Planning Assessment Commission:

The 2008 amendments to the Act have introduced a new assessment and determination body known as Planning Assessment Commission (PAC). The commission has commenced operations and is being used to review and determination body certain developments, assessed under Part 3A. The PAC is comprised of independent experts, appointed by the Minister, with one full time chairperson, and between three and eight members. Members are required to have similar expertise as those constituting JRPPs. However, with the exception of the Chairperson, the PAC is prohibited from employing full time staff and therefore relies on support staff. Members are appointed for a period of 3 years and are eligible for reappointment. The Minister does not control decision making by the PAC, or its members. The Minister can, however, control the procedures of the PAC (Ghanem 2008); (Pearson & Williams 2009).

When requested by the Minister, the PAC will provide general advice about certain Part 3A projects and it will also act an independent review mechanism (as evidenced in chapter 3). Basically, the current function of commission of inquiry will be replaced by the PAC (Keily 2009).

The commission also has the power to determine certain forms of development including concept plans (when delegated by the Minister). In terms of conflict of interest, one distinct advantage of this delegation power relates to political donations. The PAC will be required to determine projects where a developer has made political donations, within the previous two years (in excess of $1000). Further to this, the PAC will be required to determine developments where the Minister has a pecuniary conflict of Interest (Keily 2009).

Operating as a consent mechanism, the PAC has many of the same issues as the JRPPs in relation to transparency, accountability and rigour. At a glance, the problems include:

- Panel representatives can be concentrated in one 1 or 2 fields of expertise. This is a major issues considering the size and complex nature of developments being determined;
- Given the representatives are appointed by the Minister, the PAC lacks the same level of independence as the LEC. Furthermore, appointment by the Minister could create the perception that panel members are under the Ministers control or more likely to determine consistently with the Ministers views (especially given their eligibility for reappointment);
- Applicants have no LEC appeals rights to decisions made by the PAC (in situations where the PAC has held a public hearing); and
• Finally (and most significantly) the Ministers powers to influence the design of the panel. Put simply, the Minister has the ability, under the Act and the Regulation, to amend the operating procedures of the panel. This allows the Minister to make any number of changes at whim, which could create a permanent perception of indirect Ministerial control.

Further to this (with exception to the public hearings and as a review panel), the PAC is not required to make any decisions in a public arena. The applicant, the council and members of the public do not have the ability to have their concerns directly heard by the PAC. This has the effect of further eroding the principles of democracy (Ghanem 2008).

v) Independent Planning Assessment & Review Panels:

Both the Minister for Planning and the Director General have the power to appoint independent panels to provide advice on certain planning matters. This can include the use of a planning administrator or panel to exercise the function of a local Council which is not performing to the expectation of the Minister. A recent example of this is the Ku-ring-gai Planning Panel which was inserted into the Council, to determine DA’s which would otherwise be determined by the Councillors (NSW Government Department of Planning 2009f).

The Minister can also use these panels to provide advice on certain major projects, assessed under Part 3A. In the past, this has included the use of IHAPs to provide advice on these Part 3A projects. With the 2008 amendments to the Act, it can be assumed that the PAC will be performing this advisory role in most cases. A good example of the use of independent panels can be found in the Ashington case study in Chapter 3. In this case study, both the PAC and the Government Architect are used as review mechanisms for the project.

d) Conflict Resolution Post-Determination:

Note on Appeal rights:
The discussing on appeal rights, provided below, does not take into critical infrastructure or designated development for reasons discussed in the subsection (a) of this section.

i) The Land & Environment Court:

Similar to development assessed by Council under Part 4, dissatisfied proponents, to Part 3A developments, have appeals rights to the LEC. However, proponents appeal rights are somewhat reduced as no LEC merit appeal rights exist if:
• the proponent is a public authority; or
• the PAC has held a public hearing on a project prior to determination.

The court operates in the same way as with Part 4 developments [discussed above in subsection (e) of section 2.2], with the same benefits and disadvantages for conflict management.

Objectors to a Part 3A project have no merit appeal rights (with the exception of designated development). The only avenue for objector appeal a Part 3A project to the LEC is through Class 4 Judicial Review proceedings as discussed below.

ii) Judicial Review:

Objectors (and literally any person) can appeal a DA decision to the LEC using Class 4 Judicial Review proceedings. This mechanism of appeal works on the grounds that the consent authority has made a decision on a DA illegally. The benefits of (and situations where) an objector can use these proceedings are generally the same as that of Part 4 development. Refer to subsection (e) of section 2.2 for a more thorough analysis of Judicial Review.

2.4 Conclusion

This chapter has examined the effectiveness of the NSW development control system in dealing with land use conflicts. Conflict management mechanisms under Part 3A and Part 4 of the Act were discussed and comparisons were drawn between both systems. Important concepts such as public participation and the public interest were also explored in this chapter. The information in this chapter provides a thorough background of the relevant assessment process and conflict management tools which will be further analysed in case studies in Chapter 3 and Chapter 4.

The next chapter will examine two highly contentious urban based developments with one assessed under Part 3A and the other assessed under Part 4 of the Act. Common points of conflict are outlined and the assessment processes are then discussed for both developments.
CHAPTER 3 – AN OVERVIEW OF CONFLICT THROUGH CASE STUDIES (PT 4 – VS – PT 3A)

3.1 Introduction

Two highly contentious urban based developments are examined in this chapter with one assessed under Part 3A and the other assessed under Part 4 of the Act. Common points of conflict are outlined and the assessment processes are then discussed for both developments. The general aim of this chapter is to provide an overview of the objectors concerns, the assessment process and the development issues according to the assessment and determination bodies. This provides a background for Chapter 4 which evaluates conflict prevention and conflict resolution mechanisms in the assessment and determination processes for both developments.

The format used for analysing both case studies is very similar but variations were required as a result of differing assessment systems and court appeals. The case studies are examined in sequence with the following general format:

- Details of the site & the proposal;
- The key points of contention (according to the various stakeholders);
- The assessment process (compliance with EPI’s, key issues & the determination process);
- Land & Environment Court Appeals (if any); and
- The future of the site.

3.2 Case study 1 – Ashington (Double Bay)

a) Details of the Site & the Proposal:

i) Original Proposal:

On 23 May 2008 a Major Project Application (MP 08-0100) was lodged with the NSW Department of Planning for the demolition of an existing hotel and the construction of mixed use residential, commercial, retail and boutique hotel development, at 33 Cross Street Double Bay. More specifically, the proposed works consisted of:

- Demolition of both the hotel and the retail façade to the ground floor;
- Reconfiguration of existing basement car park to comprise of 74 residential and 33 hotel car spaces;
• Construction of a number of buildings including:
  o A podium of between 3-5 storey’s in height;
  o A 6 storey tower in the north-west corner of the site;
  o A 15 storey tower in the south-east corner of the site; and
  o A 15 storey tower in the south-west corner of the site.

The proposed uses for the new building were as follows:

• A new boutique hotel contain 66 rooms situated in the podium;
• Approximately 1375m² of retail space to the ground floor comprising of restaurants, cafes and specialty shops;
• A new hotel restaurant and bar on level 4;
• A new pool on level 4;
• A total of 39 hotel residencies proposed to be situated in the two towers and the podium; and
• A piazza accessible to the public linking Cross Street, Transvaal Avenue and Galbraith Walkway.

ii) Preferred Project Option:

Following a series of public consultation meetings, the developer lodged their preferred projection option on 21 August 2009. The preferred project option made changes to the design to address the submissions and minimize the environmental impacts of the proposal. Key changes included:

• A reduction in the height of the eastern tower (from 15 storeys down to 11 storeys);
• An increase to the floor plate of the western tower by 90m² (storey height remained the same);
• An increase to the total number of parking spaces from 107 to 135 spaces. The parking arrangement was also reconfigured to include 35 hotel spaces, 68 residential spaces and 32 retail spaces dedicated for public use;
• An increase in the number of hotel residencies (from 39 to 44 units);
• Increase in the number of hotel rooms (from 66 to 69);
• Change to the façade treatment; and
• New noise attenuation measures.

A comparison of the two designs is provided on page 54 (refer to Image 3.1 and 3.2)
Image 3.1  The Original Proposal.  Source: The Department of Planning.

Image 3.2  The Preferred Project Option.  Source: The Department of Planning.
iii) Existing Buildings, Physical Features & Site Topography:

The Site is situated in the Double Bay Town Centre and has an irregularly shape with a total area of 3674m². The site currently contains the Stamford Plaza hotel (as shown in image 3.3). The hotel was constructed in 1990 and ceased operating in March 2009. The hotel is 6 storeys high and when operating consisted residential suites and facilities.

iv) The Surrounding Environment:

The site is surrounded on all sides by a mixture of residential, commercial and retail development of varying heights and designs.

Properties to the north of the site are zoned residential and consist of low rise residential dwellings (refer to image 3.6). Directly east of the site lies Transvaal Avenue with consists predominantly of small terraces used for retail shops, commercial offices and cafes. The southern edge of the site adjoins Cross Street. On the opposite side of Cross Street development consists of commercial uses and retail uses including cafés and restaurants. Development west of the site includes a mixture of residential, commercial and retail uses.
Image 3.4  Aerial image of Double Bay. Source: Google Earth.

Image 3.5  Woollahra LEP Heritage Map (The blue line indicates Transvaal Avenue Heritage Conservation Area). Note the proximity to the subject site. Source: Woollahra Council.
b) The Key Point of Contention:

From the beginning of the design process, the proposal received negative feedback from the media and from a variety of stakeholders including residents, business owners and Woollahra Council. These groups had many concerns about the proposal.

Woollahra Council was unanimous in its opposition to both the original proposal and the preferred project option. The council put considerable effort into blocking the proposal, making multiple submissions to the Department of Planning, holding community information meetings and enlisting the help of local residents to write objections to it.

Similar to Council, most residents and business owners were opposed to the development. One of the main points of conflict for all three groups was the height, scale and bulk of the proposed towers both in the original proposal and in the preferred project option. This was considered a problem for a large number of reasons which can be summarized as follows:

- The towers would be out of character with the Double Bay town centre which is predominantly 3 – 5 storey’s, with a ‘village atmosphere’.
• Overshadowing, as the towers would cast a shadow over large sections of the town centre.
• View loss – the architectural montages demonstrated that the two towers would cause substantial public and private view loss towards the harbour.
• Visual privacy, as they would create overlooking into the private open space areas of neighbouring dwellings.
• The proximity of the south eastern tower to the Transvaal Avenue Heritage Conservation Area – that this tower would have a detrimental impact on the significance of the single storey federation semi-detached cottages within the heritage conservation area (refer to image 3.5 on page 56).
• That the towers would be substantially in breach of the objectives and controls within the Woollahra LEP and the Double Bay Centre DCP, and would compromise the integrity of Councils controls, which were designed with extensive community consultation. The towers would basically set a precedent for future development within the town centre.
• Traffic and parking – the proposal did not provide adequate parking for visitors and shoppers and would result in an increase in traffic congestion.
• The substantial reduction in hotel suites when compared with the existing Stamford Plaza hotel. In the preferred project option Ashington proposed 44 suites whereas the Stamford Plaza had 144 suites. This was a concern because it would reduce tourist numbers in Double Bay and the proposal therefore lacked economic benefits for the town centre.

There were a small proportion of businesses and residents who supported the proposed development. Reasons for support were primarily based around the presumption that it would provide local jobs and boost the economy. These arguments were heavily contested by the objectors.

c) The Assessment Process:

i) Site Zoning & Permissibility:

The site is zoned 3 (a) under the Woollahra LEP 1995 – a general business zone which allows for a diversity of both retail and commercial uses, with attached residential housing. The original proposal and the preferred project option were both permissible within the zone.

ii) Director Generals Environmental Assessment Requirements:

The Department of Planning issued Ashington with the ‘environmental assessment requirements’ on 28 August 2008 after reviewing the developers ‘Preliminary Assessment’. The Department raised a number of concerns about the potential impacts of the proposed development. Of particular relevance, the proponent was required to address:
• The nature and extent of any non-compliance with relevant EPIs, including justifications for why non-compliances should be accepted. An emphasis was put on both the Woollahra LEP 1995 and the Double Bay Centre DCP 2002.

• The visual impact of the development in the context of the surrounding development and any impact on surrounding heritage items.

• Problems associated with the height, bulk and scale of the two towers when compared with surrounding development. In particular, the proponent was required to mitigate potential impacts on the surrounding development with respect to sunlight, privacy and views. A comparative height study and a view analysis were also required.

• Council Planning Controls and RTA guidelines with respect to access and on-site car parking were also required to be addressed.

The proponent was also required to undertake appropriate community consultation complying with the Department of Planning document titled ‘Guidelines for Major Project Community Consultation (October 2007).’

The proponents’ first attempt at the Environmental Assessment (EA) was considered adequate by the Department and it was placed on public exhibition in April 2009.

iii) The Preferred Project Option (Compliance with Council EPIs & DCPs):

Ashington lodged their preferred project option on 21 August 2009 with a number of changes in the design, to address public submissions and to minimize the environmental impact of the proposal. Whilst the preferred project option made some positive changes to the proposal, it still resulted in a number of significant numerical non-compliances with the Woollahra LEP 1995 and Double Bay Centre DCP 2002. These numerical non-compliances are illustrated in Table 3.1.

Table 3.1 – Non-compliances with council planning controls

<table>
<thead>
<tr>
<th></th>
<th>Existing Building</th>
<th>Original Proposal</th>
<th>Preferred Project Option</th>
<th>Woollahra LEP/DCP Controls</th>
<th>PPO Non-compliance % of Max Permissible</th>
<th>PPO % Increase Over Existing</th>
</tr>
</thead>
<tbody>
<tr>
<td>GFA</td>
<td>13,487m²</td>
<td>19,545m²</td>
<td>19,545m²</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>FSR</td>
<td>3.67:1*</td>
<td>5.32:1</td>
<td>5.32:1</td>
<td>2.5:1</td>
<td>213%</td>
<td>145%</td>
</tr>
<tr>
<td>HEIGHT</td>
<td>22.12m</td>
<td>52.44m</td>
<td>52.15m</td>
<td>16.5m</td>
<td>316%</td>
<td>235%</td>
</tr>
<tr>
<td>Parking</td>
<td>173</td>
<td>107</td>
<td>135**</td>
<td>169</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

* The difference between the GFA and FSR calculation is a result of a change to the definition of GFA between Woollahra LEP 25 and the current Woollahra LEP 95.
The on-site parking complies due to the fact that Woollahra Council previously accepted a monetary contribution for the lack of 50 spaces with the Stamford Plaza Hotel development.

The maximum height of the preferred project option was 52.15 metres or 15 storeys. This was 2.3 times higher than the existing hotel and over 3 times higher than the maximum building height permissible under the Double Bay Centre DCP 2002. The floor space ratio of the preferred project option was 5.32:1. This was substantially greater than the 3.67:1 FSR of the existing hotel and the 2.5:1 FSR limit under the Woollahra LEP 1995.

As well as the height and FSR non-compliances, the Director Generals Environmental Assessment Report highlighted a number of other non-compliances with the Woollahra LEP 1995. These clauses are discussed below and relate to visual impact and heritage impact.

Clause 19 of the Woollahra LEP 1995 relates to development within the harbour foreshore scenic protection area. Clause 19(2)(b) requires council to make an assessment of the visual impact of a proposed development, on the natural landform and topography, when viewed from Sydney Harbour. According to the Director Generals report, the preferred project option would have a detrimental impact on “the character of the Double Bay valley floor which is considered to be a significant landform feature in this locality” (NSW Government Department of Planning 2009a, P.49).

Clause 27 of the Woollahra LEP 1995 requires council to assess the impacts of a proposed development on heritage significance of nearby heritage items or heritage conservation areas, as the site adjoins the Transvaal Avenue Heritage Conservation Area which is made up of single storey federation semi-detached cottages. The Director Generals report stated that the preferred project option would not comply with Clause 27 due to the fact that the towers would be overpowering and impact on the character and rhythm of the conservation area (NSW Government Department of Planning 2009a).

The Director Generals Environmental Assessment Report also outlined a non-compliance with character controls and sketches for Cross Street as outlined in Part 4.7 of the Double Bay Centre DCP 2002.

iv) The Government Architects Review:

An unusual feature about the assessment of the Ashington development was the use of Government Architect to write a report reviewing the impacts of proposal. The architect was required to review the preferred project option in relation to:

- The suitability of the proposal in the immediate, local and wider contexts;
- The amenity impacts of the proposal;
• The efficiency of the redistribution of gross floor area; and
• The overall design quality of the development.

Further to this, the architect was also asked to provide advice on any changes which should be made to the preferred project option to manage its impacts. This report was then passed on to the Director General who considered the findings when writing his Environmental Assessment Report.

The Department of Planning often asks the Government Architect to provide informal advice on specific developments but it is considered highly unusual to ask the architect to do a formal report. A spokesperson at the Department of Planning advised that, to the best of her knowledge, the government architect had never been requested to write a report in this manner. When probed about its use, the Departments Deputy Director General, Richard Pearson, indicated that the purpose of the architects review was to add a further layer of scrutiny to the assessment of the proposal (Bennett 2009a).

The Key Issues:

In his report, the architect, Peter Mould, found a number of positive aspects of the proposal. In particular he praised the open space design, the creation of an active street frontage and the scale of the podium when viewed from the street. He also found the materials and finishes to be of a high standard and suitable for the site.

However, despite its positive contributions, the architect was concerned about a number of key aspects of the preferred project option including context, amenity impacts, redistribution of floor space and design quality.

In relation to context, the architect held the view that the towers had an overpower effect on Double Bay due to their height and bulk. He advised that the towers were unacceptable in the context of Double Bay Town Centre which is predominantly 3 to 5 storeys in height with a village atmosphere.

With regards to privacy, the architect commented that the preferred project option resulted in unacceptable acoustic and visual privacy impacts both within the proposed development and on the surrounding neighbours. He further commented that whilst privacy screens are shown on the application, they could be removed in the future, given their detrimental effect on the internal amenity of the apartments. He also advised that noise management policies could address acoustic issues.
The other amenity issue addressed by the report was solar access. The architect found that the towers would substantially increase overshadowing to the pavement, on the southern side of Cross Street, in the winter months. The pavement on this side of the street is wide and used by several cafes with outdoor seating arrangements. Solar access to these cafes is desirable at mid morning and lunch time in the cooler months of the year. The architects report found that the towers would block sun to thee cafes in the winter months and he determined that this impact was unacceptable.

The redistribution of floor space was another concern raised by the architect. He formed the opinion that the inclusion of the two towers was not optimal in terms of floor space distribution. The amenity impacts lead the architect to form this conclusion.

In relation to design quality, the architect found that the preferred project option provided a good architectural expression. However, he held that the design quality was let down by the amenity impacts of the proposal.

When commenting on the required changes to the preferred project option, the architect commented that the towers should be removed with the floor space redistributed to the podium. However, the architect did indicate that it might be possible to have smaller towers if they were well designed.

From these findings the architect concluded that the proposal was unacceptable in its current form.

v) The Director General’s Environmental Assessment Report (Key Issues Outlined):

The Director Generals Environmental Assessment Report was prepared in September 2009 by the Department of Planning. In conducting the assessment, the Director General critically analysed both the preferred project option and the previous assessment report prepared by the government architect. The Director Generals report considered all of the planning criteria outlined in the architect’s review and a number of additional criteria were also assessed. The additional criteria included view loss, public domain impacts, heritage impacts, construction impacts, traffic impacts, parking impacts, vehicular access, the potential for flooding, objector concerns and external referral responses.
The assessment report was prepared, discussed and reviewed by a hierarchy of employees, including the Director General of the Department of Planning prior to completion. Once finalised, the Director Generals Environmental Assessment Report was referred to the Minister for Planning, Kristina Keneally, for final assessment and determination.

**Key issues:**

The assessment report highlighted a number of key concerns in relation to the preferred project option. These issues included context, amenity impacts, redistribution of floor space design quality and heritage impacts.

In the immediate context, the report found that the towers were unacceptable as they are over-scaled and intrusive on the Cross Street and Transvaal Avenue visual catchments. In forming this view, the report argued that the towers were out of character with the existing village atmosphere of Double Bay.

In the local context, the report made the point that the towers would be substantially taller than the existing mature tree canopy. The report went on to argue that the towers would be intrusive in the local context as they would inappropriately dominate important vistas at Bellevue Road, Greenoaks Avenue and Steyne Park (as demonstrated by image 3.7).

These findings on context are generally consistent with the findings in the Government Architect Review.

**Image 3.7** Montage from Steyne Park

Source: Department of Planning.
Amenity impacts were broken down and assessed in two (2) sections. These consisted internal amenity impacts (impacts within the site) and external amenity impacts (impacts on the neighbours). With regard to internal amenity impacts, the Director Generals report identified two (2) key issues. The first issue related to the clustering of sensitive land uses. The problem related to the proximity of the proposed residential dwellings to other proposed land uses such as bars, restaurants and hotel suites. The impacts of concern included noise pollution and light spill. The second issue related to overshadowing of the piazza. The report commented that, during winter, the piazza would be in overshadowed for most of the day by the development. External amenity impacts were further broken down into three (3) sections being privacy, overshadowing and view loss.

In relation to acoustic and visual privacy, the report identified a number of issues. In particular it found that the preferred project option failed to adequately protect the privacy of the northern adjoining neighbours. Of concern were the bar, restaurant and pool areas on the ground floor and level 4. Also of concern were a number of residential apartments within the podium and the towers.

Overshadowing to the cafes on Cross Street was another concern identified in the report. In particular it commented that this overshadowing would have a detrimental impact on the vibrancy of Cross Street.

These findings on the amenity impacts are generally consistent with those outlined in the Government Architect Review.

One amenity issue discussed in the Director Generals report but not the Government Architect Review was view loss from private properties to the harbour. Due to the fact that Double Bay is situated in a natural valley, the Director Generals report found that views over the existing building to the harbour were only experienced by properties between 250m and 400m from the site. These properties had distant but expansive views, some of which are partially obscured by existing trees and buildings. The report concluded that given the distance, the view loss impact was not unreasonable.

In relation to amenity impacts generally, an important point was made in the report about each issue in isolation. The report found that whilst acoustic privacy, visual privacy and overshadowing were detrimental within the site and on the neighbours, each issue, in isolation, was not detrimental enough to warrant the projects refusal. It was the combination of issues which made the project unacceptable.
Similarly to the architect review, the Director Generals report found that the floor space redistribution was unacceptable when compared with the existing building. The issues with the floor space related to the intrusive nature of the towers which were out of character with the Double Bay Town Centre.

In relation to design quality, the Director Generals report found that the preferred project option provided a good architectural expression. However, the report also held that the design quality was let down by the amenity impacts of the proposal. This finding was very similar to those of the Government Architect Review.

The Transvaal Heritage Conservation Area is made up of Federation/Queen Anne semi-detached single storey houses. These buildings have had alterations to the rear but the street front elevations retain intact. The buildings have also been adapted to be used as shops and business premises.

When assessing the impact of the preferred project option on these buildings, Clause 27 of the Woollahra LEP 1995 was considered. This clause requires council to assess the impacts of a proposed development on heritage significance of nearby heritage items or heritage conservation areas. The Director Generals report considered the heritage impact to be unacceptable due to the fact that the towers would be overpowering and impact on the character and rhythm of the conservation area (NSW Government Department of Planning 2009).

The Director Generals report held the view that the traffic impacts of the preferred project option would be minimal and existing access to the site would be sufficient. In addition, the report considered the provision of on-site parking to be adequate.

The Director General recommended that the preferred project option should be refused due to its substantial impacts which could not be mitigated by conditions of consent.

vi) The Planning Assessment Commission Review of Director Generals Report

After viewing the Director Generals Environmental Assessment Report, the Minister for Planning requested that the Planning Assessment Commission conduct review the reasonableness of its findings. This review occurred in late September. The PAC found that the Departments recommendation of refusal was reasonable. In reaching to this conclusion the PAC commented that the refusal is supportable by a thorough evaluation from the Government Architect and by a detailed list of reasons.
The PAC further recommended that Woollahra Council should investigate the development potential of the site and appropriate planning controls for both the site and the surrounding area.

vii) In Summary

After the preferred project option was lodged, the proposal went through a number of assessment processes. In order, these included:

- An external review by the Government Architect (upon request by the Minister for Planning);
- An assessment by the Director General taking into consideration the findings of the architects review, public submissions, external referral response and a number of other criteria; and
- Finally, a review of the Director Generals recommendations by the Planning Assessment Commission (upon request by the Minister for Planning).

Following this process, the Minister for Planning refused the project on 28 September 2009 pursuant to Section 75J (1) of the Environmental Planning & Assessment Act 1979 after considering all relevant matters outlined in Section 75J(2) of ‘the Act’.

The Ministers reasons for refusal were:

1. Incompatibility of the towers elements with the character of the Double Bay Town Centre due to their height bulk and scale. In particular the towers elements would contribute negatively to both the immediate and local context;

2. Unacceptable visual impact from the tower elements;

3. Unacceptable impacts on the northern neighbouring properties in relation to noise and privacy;

4. Unsatisfactory justification for the breach of the FSR control in the Woollahra LEP 1995 and the height control in the Double Bay Centre DCP 2002; and

5. The preferred project option was not in the public interest. The negative impacts of the tower elements on the character of Double Bay outweighed any potential public benefits that would have come about from the construction of the proposal.
**d) The Future of the Site:**

The Ministers refusal of the ‘preferred project option’ leaves the developer with three potential avenues to move forward. Firstly, the developer could appeal the refusal to the Land & Environment Court as no public hearing was held by the PAC (refer to Section 23F of ‘the Act’). Secondly, the developer could lodge a new ‘major project application’ with the Department of Planning addressing key issues raised in the Director Generals Environmental Assessment report. Finally, the developer could alter the proposal such that it would be assessed under Part 4 of ‘the act’ by Woollahra Council or a JRPP.

When asked for comment shortly after the development was refused, an Ashington spokesman indicated that company is reviewing the Ministers Decision but have not ruled out an appeal to the court (Bennett 2009b). In the author’s opinion, a court appeal is unlikely given the reasons for refusal, the strength of the refusal and the assessment processes of the court.

The most likely avenue taken by the developer will be to redesign the proposal such that it comes close to complying with the requirements outlined in the Director Generals report whilst still meeting the requirements to be assessed as a Part 3A application. In effect this could result in a mixed use development of 7 or 8 storeys in height, probably with a redesigned podium (NSW Government Department of Planning 2009a).

### 3.3 Case study 3 – The Brick Pits (Kirrawee)

**a) Details of the Site & the Proposal:**

**i) Original Proposal:**

On 9 April 2008 development application (DA347/2008/1) was lodged with Sutherland Shire Council for a mixed use residential, commercial and retail development, at 566 - 594 Princes Highway Kirrawee. The DA related to stage one of the development which consisted of:

- Four residential flat buildings containing 63 apartments;
- A retail shopping centre consisting of two (2) supermarkets and a range of cafes and speciality stores with a total floor space of 11 000sqm;
- A childcare centre for 40 children;
- A Basement car park;
• Building envelopes for the remainder of the buildings to be built in later stages. The envelopes included building heights, building footprints, proposed uses and an estimated number of dwellings;

• Various open space areas with a 0.9ha public park; and

• New roads to provide vehicular, pedestrian and bicycle access throughout the site.

The total staged development was envisaged to have an additional 187 dwellings and 2235sqm of floor area dedicated to commercial uses.

ii) Amended Court Proposal:

The development application was appealed to the Land & Environment Court as a deemed refusal (for reasons discussed in subsection (d) of this chapter). During the court proceedings the DA plans were amended in accordance with an ‘in principle’ agreement, by the stakeholders, on the changes required. The amended proposal consisted of the following changes:

• Deletion of one supermarket and a reduction in total retail floor area to 8000m² (down from approximately 11 000m²);

• A new entry to the basement shopping Centre off Flora Street;

• Reduction to the size of the childcare centre and a reduction in its capacity to a maximum of 20 children;

• Relocation of the basement car parking ramp so as to retain a brick Kiln on the site;

• Increase to the width of the park with a longer recreation area;

• The provision of new cycling paths through the site; and

• An increase to the on-site storm water detention capacity.

iii) Existing Buildings, Physical Features & Site Topography:

There is currently one small structure on the site being an electrical substation located on the northern boundary (refer to image 3.10). There are also some remnants of previous structures on the site. These include old footings, concrete slabs and the partial remains of 5 brick kilns.

With regards to physical features, approximately 50% of the 4.2 hectare site consists of a deep pit associated with its former use as brickworks. The pit has walls ranging in height between 3m and 15m and it is currently half filled with water. The rest of the site predominantly consists of natural vegetation (refer to image 3.8 & image 3.9).
Image 3.8  The subject site viewed from the front at the Princes Highway.  Source: Pikkat A.

Image 3.9  The subject site viewed from the rear at Flora Street.  Source: Pikkat A.
iv) The Surrounding Environment:

Development opposite the site, to the north, consists predominantly of industrial uses, fast food franchises and some commercial uses (refer to image 3.12). The land directly west of the site, on the opposite side of Oak Road, is zoned residential and currently contains a number of 3 storey town houses (refer to image 3.13). Development running along Flora street directly south of the sites is predominantly industrial and consist of a lot of car repair shops (refer to image 3.14).

The Kirrawee Town Centre is immediately south of the site running along Oak Road. The town centre is street based and contains approximately 30 shop to the street front (refer to image 3.15). The Kirrawee train line runs east-west just adjacent to the town centre and the station is less than 500m from the site. Approximately 1.2km west of the site is the Sutherland Town Centre which is street based and contains approximately 110 shops. To the east, there is a large Westfield shopping centre approximately 1.6 km from the site in Miranda.
Image 3.11  Aerial image of the subject site.  Source: Google Earth.

Image 3.12  The Princes Highway from the subject site (looking East).  Source: Pikkat A.
Image 3.13  Town houses on Oak Road opposite the site.  
Source: Pikkat A.

Image 3.14  Flora Street (looking west).  
Source: Pikkat A.
v) Site History

The site was used as a brick pit between 1912 and the early 1970’s when the ‘Metropolitan Water Sewerage & Drainage Board’ purchased the site. The site then sat unused for approximately 25 years until 2001 when the Kirrawee Living Centre project was launched. This project lasted 20 months and involved extensive consultation with the community to determine the future use of both the site and the existing Kirrawee Town Centre (Parliament of New South Wales 2005); (Parliament of New South Wales 2008).

The result of this project was the production of the Kirrawee Local Area Management Plan which provided for the site being used as a mix of residential and employment land with a large area set aside for a public park. The management plan was provided statutory force by the Sutherland Shire Local Environmental Plan 2006 and the Sutherland Shire Development Control Plan 2006 (Parliament of New South Wales 2005); (Parliament of New South Wales 2008).

After its rezoning under the LEP, the site was purchased in 2007 by its current owners who submitted a development application in 2008.
b) The Key Points of Contention:

i) The Councils Perspective:

The assessment and determination process for the development occurred between April 2008 and July 2009. This coincided with the Local Government Elections which were held during September 2008. As a result of this timing, the proposed development featured heavily in the election campaign. Councillors, both pre and post elections shared a wide range of views about the development. The majority of them, however, were disapproving of a least a portion of the proposal.

A review of the DA files revealed that the councillors had many concerns about the proposed development. Under the new Sutherland Shire LEP 2006 and Sutherland Shire DCP 2006 the council had rezoned the land and created controls which reflected Council’s vision for the site. Many of the councillors held the view that the proposed development did not match the vision. This related primarily to the scale and nature of the retail portion of the development, particularly the two supermarkets (Sutherland Shire Council 2008). It was anticipated that the retail portion of the development would impact negatively on character and economic viability of the Kirrawee Town Centre. In particular, the pre-election Mayor was quoted stating: “Council has openly and repeatedly sought to ensure that any retail development on this site supports the existing Kirrawee town centre rather than overwhelming or undermining it” (O’Brien 2008, p.1).

Other issues raised by both the Council staff and councillors included social impacts on the community, traffic and parking impacts, a lack of pedestrian connectivity to the Kirrawee town centre, inappropriate urban design and excessive height, bulk and scale (Sutherland Shire Council 2008).

ii) The Perspective of Residents & Business Owners:

During the early stages of the DA process, the State Minister for Parliament for Miranda (Barry Collier) wrote to all Kirrawee households asking their opinion on the proposed development. During this time he also spoke with a large number of shopkeepers on Oak Road to get their opinions.

According to Mr Collier, residents were about evenly divided in their view of the project with 52% in favour and 48% against it. He further stated that the view of shopkeepers was again mixed, but largely depended on what type of business they had. He went on to state that the majority were in favour of the development (Trembath 2008).
An analysis of the submissions on the DA file, conducted on 28 September 2009, revealed very different results. More than 70 individual submission letters were received and the resident action group submitted a letter containing the names addresses and opinions of several hundred people. An overview of the submission letters revealed that More than 80 percent of residents and 90 percent of business owners who had written submissions to council were against the proposed development. The resident action group also submitted a petition signed by 2444 people opposing the development (Sutherland Shire Council 2008).

Resident shared similar concerns as the Councillors and Council staff. The three biggest issues raised by the residents were:

- Economic impacts of the retail portion of the development;
- Change to the character of Kirrawee Town Centre; and
- Traffic and parking impacts.

Business owners were very concerned about the potential financial impacts with a large number implying that if the development was approved it would mean the end for their business (Sutherland Shire Council 2008).

With regards to the supporters, the DA files revealed that the most common supporting group tended to be elderly retirees. The main points of support for the proposal included:

- Economic benefits including the creation of many new jobs and the associated flow on effect for the community;
- The convenience of having a new supermarket in the area. Many supporters commented that there was a lack of parking at the other supermarkets and some stated that they didn’t own a car or drive;
- Another commonly raised point of support was the fact that the current site is an eyesore and the proposed development would improve the attractiveness of the area; and
- Finally, a number of people agreed with the design ‘in principle’ but objected to the two supermarkets.
c) The Assessment Process:

i) Site Zoning & Permissibility:

The site was rezoned by Sutherland Shire LEP 2006 to be a combination of ‘Zone 7 – Mixed Use’ and ‘Zone 13 – Public Open Space’. The original proposal and the court proposal were both permissible under the zoning.

ii) Compliance with Relevant EPIs & DCPs:

Compliance with all relevant EPI’s was difficult to ascertain as Council did not have a proper assessment report on the DA files. However, the original proposal did not comply with building height (cl 33) and building density (cl 35) of the Sutherland Shire LEP 2006. The developer addressed both of these non-compliances by way of SEPP1 objections. The level of these numerical non-compliances is outlined in Table 3.2. The figures used in the table were taken from the applicant’s SEPP1 objection so their accuracy is uncertain.

<table>
<thead>
<tr>
<th>Table 3.2 Non-compliances with Southern Shire Council planning controls</th>
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<td>Sutherland Council LEP Controls</td>
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As well as the numerical non-compliances, Council was of the opinion that the original proposal did not comply with a number of Objectives within the Sutherland LEP 2006 for Zone 7. The most contested objectives, by council, included:

(c) to encourage high employment-generating development that encompasses high technology industries, commercial display centres and light industries compatible with the existing locality and adjoining residential buildings,

(j) to facilitate the re-vitalisation of the Kirrawee Town Centre and the Kirrawee railway station precinct,

(k) to ensure any expansion of retail activity within the zone maintains the role and function of Kirrawee Town Centre and does not adversely impact on the sustainability of other centres in the Sutherland Shire,

(l) to ensure any new shops integrate with and support the existing Kirrawee Town Centre (Sutherland Shire Council 2006).
Objectives (k) and (l) were part of Amendment 4 to the LEP which was gazetted on 9 January 2009. The date of gazettal was after the DA was lodged but prior to the Court determination.

The non-compliance with these zone objectives predominantly related to the commercial and retail portions of the development, in particular the supermarkets. Councils key arguments related to the fact that:

- Substantial retail floor space was never envisaged for the site (refer to Objective c);
- The development lacked pedestrian connectivity with the Kirrawee Town Centre [refer to Objective (j), (k) & (l)]; and
- The retail floor space would have an adverse impact on Kirrawee, Sutherland & Gymea Town Centre’s [refer to Objectives (j), (k) & (l)].

Further to the LEP non-compliances, Council was of the opinion that the original proposal did not comply with a number of clauses within the Sutherland Shire DCP 2006. These are discussed in more detail later in subsection (d) of this chapter and also in chapter 4.


An assessment of the DA was nearly finalised and it was proposed that it be heard by Councils Independent Hearing & Assessment Panel before being determined by the Councillors. However, the developer used the deemed refusal appeal rights to take the matter to the Land & Environment Court. As a result of the deemed refusal, there was no development assessment report on the DA file. The court case and the reasons for the developer using the deemed refusal appeal rights are discussed in subsection (d) below.

d) The Court Case:

i) Reasons for the deemed refusal:

The circumstances leading to the Land & Environment Court Appeal primarily related to the refusal of the council, to negotiate with the developer. During the assessment process the developer indicated that they wanted to submit amended plans in an attempt to satisfy the concerns of council and the objectors. In particular, they wanted to amend the retail portion of the development as well as other aspects. Sutherland Council advised the developer that this avenue was unacceptable with the Director of Environmental Services, stating the following in an email to the developer (dated 4 June 2008):
“Over the past decade council has responded to demands from applicants and the NSW Government and has streamlined its assessment procedures.”

“Traditionally, some applicants have seen the submission of a development application as the initiation of process for negotiation. Not only is this contrary to the provisions of the Act because the Act makes no allowance for negotiation, it unnecessarily delays determination of the application.”

“The current amendments to the Act will encourage councils not to accept amended plans during assessment but promote the submission of amended plans as part of a s.82A review. Sutherland Shire Council already operates in this manner. Any negotiations/discussions occur prior o a DA being submitted or, if the application is refused, before the s.82A review application is submitted. To minimise application determination times this assessment period is devoted to assessment, not negotiation” (Brunton J 2008, email. 4 June).

Further to this, council put forward the argument that the developer’s proposed amendments might not meet the ‘substantially the same development’ requirements for such a review and a new DA would therefore be required.

The developer also wanted to meet with the Councillors, in private, to discuss the proposed amendments to the DA and draft amendments to the Sutherland Shire DCP. The Council refused to take this approach with the Director of Environmental Services responding to this request with an email to the developer (dated 11 June 2008) stating:

“From your perspective the unwillingness of councillors to meet with the applicant suggests the councillors are prejudiced. To the community, if councillors privately meet with an applicant this is clear evidence that the councillors are prejudiced in favour of the applicant. Several years ago Council considered this dilemma. In seeking to find a solution to this dilemma Council has considered the expert opinions of the ICAC and Council’s Internal Ombudsman.”

“Ultimately, Council has two options: it holds discussions with all stakeholders in a public forum or it meets with no-one. Rather than prejudging this development application councillors are seeking to ensure that there can be no hit of prejudice by refraining to meet with any stakeholders. This approach was reflected in the decision of the Council to be briefed about the DA only by staff and in a public forum” (Brunton J 2008, email. 4 June).

In effect, the council prevented the developer from submitting amended plans by refusing to allow the developer to meet with the councillors and refusing to discuss the required amendments to the application.
Whilst this was occurring, the Council was also busy preparing draft amendment No.3 to the Sutherland Shire DCP 2006 to better control the scale and intensity of development on the brick pits site, so as to better reflect council’s intent. These amendments mostly related to the size and nature of the retail development.

Given the above, there were two primary reasons for the deemed refusal. These included the councils’ refusal to negotiate with the developer and also the councils’ decision to publicly exhibit draft changes to the Sutherland Shire DCP 2006. This position is backed up with further email correspondence between council and the developer on the DA file.

ii) Key Issues Outlined by the Court and the Determination:

During the early stages of the court case, Sutherland Shire Council outlined a number of key issues with the proposed development. According to Council’s legal team, the most significant issues related to the impacts associated with the proposed supermarkets. In particular the Council was concerned about the negative impacts the supermarkets would have on the retail hierarchy of nearby town centres such as Sutherland and Kirrawee.

The traffic impact was another significant issue according to the council. A traffic assessment report, commissioned by the council, determined that the proposed supermarkets would increase traffic flows along Oak Road by 300%. Other issues raised by council related to stormwater, urban design, the public open space area and a reduced potential to develop adjacent industrial land (O Brian 2009b).

The court battle resulted in the lodgement of several sets of amended plans by the developer. These amendments removed one of the supermarkets and fixed some of the smaller issues. However, the council and the developer still couldn’t come to an agreement with council flat out rejecting even a single supermarket.

The commissioners presiding over the case made a final determination on 7 August 2009 by dismissing the appeal. The dismissal was based primarily on unacceptable impacts from the proposed supermarket. The court case is discussed in more detail in section 4.3 of Chapter 4.

e) The future of the site:

As stated above, the appeal was dismissed by the Land & Environment Court. As a result of this, the developer is left with two potential avenues to proceed forward. Firstly, the developer can appeal the Land & Environment Courts decision to the Court of Appeal. Secondly, the developer can start the process all over again by lodging a new development application with Council.
A local news article was written in mid August discussing the outcomes of the Case. In an article, the author indicated that the developer is considering alternate proposals for the site (O’Brien 2009a). When asked about what these alternatives could include, the Mayor of Sutherland Shire (Councillor Lorraine Kelly) suggested that a site could be developed with any number of options including aged care, office space and/or residential buildings. The mayor also indicated that a proposed retail use is not out of the question (O’Brien 2009a). As of October 2009, the council had not received a new development application for the site.

In terms of assessment, if a new DA is lodged with Council, it would more than likely be assessed and determined by a Joint Regional Planning Panel. This is due to the size and monetary value of the project. Given their relatively new status, it is too early to make a judgment call on how this will impact on the assessment of any future developments for the site.

### 3.4 Conclusion

This chapter examined two highly contentious mixed use developments situated within existing urban areas. As outlined in the introduction, the general aim of this chapter was to provide an overview of the objectors concerns, the assessment process and the development issues according to the assessment and determination bodies. This aim has been achieved with a thorough examination of both developments.

The next chapter will lead on from this broad overview by providing a more detailed analysis of the conflict prevention, conflict resolution and public participation mechanisms used in both developments. Similarities and differences between the case studies will then be outlined and a general comparison of conflict management under Part 3A and Part 4 will be provided.
CHAPTER 4 – ANALYSIS OF CONFLICT MANAGEMENT (PART 4 VS – PART 3A)

4.1 Introduction

This chapter contains a thorough analysis of conflict management strategies, used in both the Ashington development and ‘Brick Pits’ development. Comparisons are then drawn between the two with regards to their conflict management abilities and best practices are identified. A further analysis is then provided comparing the conflict management abilities of Part 3A and Part 4 in general terms with suggestions made of improvement.

4.2 Analysis of the Assessment Process for the Ashington

a) The Preferred Project Option (Addressing Key Conflicts):

Ashington made a very modest attempt at addressing the key stakeholder concerns in their preferred project option. Before deciding on the final design, three floor space distributions were tested to determine which would have the least impact in terms of height, bulk, scale, view loss, overshadowing, acoustic privacy and visual privacy. However, all of these options still involved a tower configuration of some sort. When compared against the original proposal, the preferred project option removed three storeys off one of the towers and left the other tower at almost the same height (refer to Image 4.1 on page 82). It should be noted however, that the lost floor space was predominantly moved to the other tower by increasing its width and depth.

When questioned about the changes, the Head of Sales and Marketing at Ashington commented: “We have listened to local residents and business owners and have amended our proposal to accommodate many of their concerns” (Murray 2009, p.2). Not surprisingly, the resident action group disagreed with this opinion, with the head of the action group, Keri Huxley, commenting: “it really is laughable that any process can facilitate such an outrageous disregard of our community” (Bennett 2009c, p.5). Woollahra Council, in their response to the preferred project option, commented that the changes appeared to be ‘tokenistic’ and did not address the Council’s primary concerns. The Council was very critical of the preferred project option report stating that it: “does not fulfill its proper role to assist the consent authority in making an informed decision on the merits of the project” (Woollahra Council 2009 p.1-2). The council did, however, acknowledge that the parking issues had been addressed with substantial increases to the number of spaces.
Considering these facts, it can be reasonably concluded that the preferred project option did not work as it was intended to (as a conflict resolution mechanism). Furthermore, it could be argued that the Director General should not have accepted the preferred project option. The Department should have required Ashington to revise the plans and assessment reports. However the final outcome, being the project refusal, still addressed the objectors concerns.

Image 4.1  Ashington’s Preferred Project Option (shown in red)  Source: The Department of Planning.

b) The Public Consultation Process (was it adequate?)

i) Overview of the Consultation:

Throughout the development design and assessment process, Ashington engaged in a number of forms of community consultation. These included community meetings, regular news updates on Ashington’s website, news articles and advertisements run in the Wentworth Courier, a community newsletter and an on-site drop in centre during the exhibition period.

The most prominent form of public consultation was the community meetings which were held at two stages. The first meeting was held in April 2008 and run as a Community Information Day. The purpose of this meeting was to better understand the community’s concerns and general thoughts about the redevelopment of the site. No specific proposal was put to the community during this meeting.
Following the meeting, a letter was sent out in May 2008 thanking participants and including a transcript of participant questions and Ashington’s response to each question. According to the proponent, the thoughts and concerns of the community were then considered in the initial design process and implemented where possible (Urban Concepts 2008).

The second set of consultation meetings were a series of ‘Stakeholder briefings’ held in December 2008 and January 2009 as part of the DGR. Community members were required to book in advance to attend these meetings, as they were focus groups with a maximum of 25 community stakeholders per group. The briefings went for 2 hours and they were run in the following format:

- Ashington presented their proposal, explained the Part 3A process, explained their design parameters and detailed the advantages of their ‘proposed’ preferred project option;
- This was followed by an analysis of stakeholder concerns in relation to height, overshadowing, parking, solar access, acoustic privacy and visual privacy;
- The meetings concluded with the conveners giving participants an opportunity to ask questions and make comments about the proposal (Urban Concepts 2008).

Another major form of community consultation was a series of community newsletters. These were distributed to the community at important stages of the development process. The basic intent of the newsletters was to keep the relevant stakeholders updated on the progress of the development through the assessment process and to inform them of any significant changes to the development. The newsletters also provided community members with an email address to contact Ashington representatives if they had any questions.

ii) Analysis:

Ashington engaged in stakeholder consultations early in the process, however, this was not a mandatory requirement. This was probably done as a preemptive strategy, as the proponent would be aware that the DGR would necessitate community consultation. Furthermore, the early consultation may have been used as a tactic in an attempt to both prevent and reduce community opposition.

Given the arguments in ‘section (a)’ of this chapter, it could be strongly argued that both stakeholder consultation meetings were tokenistic. The community did not want the towers but Ashington went ahead with them anyway (both in the initial design and with the preferred project option). This view point is further backed up by one of the interviewees, John Mant, who attended the one of the second set of consultation meetings. When asked about his opinion of how the meeting could have been improved, Mant, a professional planning lawyer, commented:
“Oh look I don’t think any of these consultation processes aren’t worth the paper they are written on quite frankly. They just become totally cynical, they are run by professionals and they are a box to tick in the application to say that you’ve gone through a process… You don’t need a consultation process with a development like Ashington’s to know what the community thinks of it. And of course they effectively completely ignored the results of the consultation because the consultation said we didn’t want a high rise in Double Bay breaching the existing planning controls. So I mean what’s there to consult about?” (Mant 2009, Interview., 2 October).

Several community members also wrote into the Wentworth Courier stating that opposition at the second round of consultation meetings was almost unanimous, with regards to high rise towers. In terms of the opportunity for stakeholder involvement in the process, one community member commented in the Wentworth Courier that he was unable to attend any meetings, despite phoning ahead, as they were booked out (Nolan 2009). Further, the Mayor of Woollahra Council commented that the second round of consultation was held during the Christmas holiday period, when a lot of local residents were away on holiday. With regards to the random street survey, another community commented that there was no mention of high rise buildings in the survey (Tregoning 2009).

With all things taken into account, it can be strongly asserted that the stakeholder consultation process was inadequate, and the developer was just going through the motions as required by the DGR. The process failed both in its ability to prevent conflict and in its conflict resolution capacities.

**c) The DOP Assessment (Addressing Key Conflicts & the Public Interest):**

**i) The Public Interest (a summary):**

According to the Director Generals environmental assessment report, the proponent’s EA was exhibited for 52 days and attracted over 950 submissions and 2 petitions containing a total of 3013 signatures. In addition to this, a further 100 submissions were lodged after the preferred project option was submitted. From all of these submissions only 12 supported the project. This equates to an approval rating of around 1% (or 0.3% when factoring in the petitions). From these statistics it becomes very clear that the community did not want the towers and the project was therefore not in the public interest.
ii) Analysis of the DOP assessment:

Before discussing the assessment further, it is acknowledged that the Department of Planning, and the Minister for Planning, ultimately addressed the key conflicts, and hence the public interest, by refusing the project.

With regards to rigor, the Department of Planning provided a reasonably thorough assessment of the preferred project option. The final design was assessed by two separate reports written by five assessment officers. Further to this, the findings of the reports were also reviewed by both the PAC and the Minister for Planning. The assessment reports considered an extensive range of issues including, but not limited to: urban design, amenity impacts, visual impacts, heritage impacts, traffic impacts and impacts to the character of Double Bay. However, there were a few planning issues not adequately assessed by the Department. Furthermore, from reading the assessment reports, it became apparent that the Department of Planning and the Minister were a lot less concerned with certain aspects of the project when compared with Woollahra Council and the wider community.

In particular, issues such as acoustic privacy, view loss, overlooking and overshadowing were given a significantly different weighting by the Department, when compared to the Council and the community. When discussing amenity impacts in his assessment report, Director General commented that:

“The Department’s view is that the edge conditions of commercial centres need special attention; however development should not be unduly restricted by unreasonable expectations of residential amenity in these locations. In this regard, amenity tensions at the boundary of commercial and residential zones need to be carefully resolved by balancing the growth of the commercial centre against the amenity of the adjoining residential properties” (NSW Government Department of Planning 2009a, p.27).

When assessed singularly, the Department of Planning did not consider the amenity impacts sufficient to refuse the proposal. The Department instead placed heavy weighting on the fact the towers were out of character with the Double Bay Town Centre. In this respect, the Department of Planning’s view contrasted starkly with the views of the wider community and the Council.

Further to this, when discussing appropriate development for the site, the Director Generals environmental assessment report provided that, with the right configuration, development of 8 storeys would be considered acceptable. This would result in a development, substantially in breach of Woollahra Council’s 16.5m height control, as outlined in the Woollahra LEP. Assessed under Part 4, this scale of development would more than likely be refused by Woollahra Council.
Another key difference between the Council’s assessment and the Director Generals assessment related to precedent. The Council pointed out that if approved, the development would erode the local planning controls, and set a precedent where by high rise development would be acceptable in Double Bay (refer to Image 4.2 on page 87). The Director Generals Environmental Assessment Report responded to this issue stating “No other site exists with such a large existing FSR within the centre, so the issue of the current proposal becoming a precedent for other sites to be developed to a similar scale is unjustified” (NSW Government Department of Planning 2009a, p.40). Whilst possibly correct, this justification is flawed. A precedent could still for smaller scaled high rise buildings, on smaller sites.

In relation to economic impacts, the Department of Planning relied on economic impact assessment reports, submitted by the proponent, in the EA and preferred project option report. No independent economic impact was conducted, and this proved to be a substantial deficiency, in the Department’s evaluation of the project, when considering arguments raised by Woollahra Council. The Council expressed the view that EA incorrectly calculated the economic benefits of the project. In forming this view, the Council argued that the economic assessment, provided in the EA, did not take into account the impacts of the closure of the Stamford Plaza Hotel. It can therefore be claimed that the Department of Planning relied on flawed economic data when assessing the project. In contrast to this, it is likely that the development would have been subject to an independent economic impact assessment, if it had been assessed by Woollahra Council.

Given the points of view expressed above, two conclusions can be drawn in relation to the public interest. Firstly, it can be irrefutably argued that the determination of the project addressed the public interest (99% of the submissions were against the project and it was refused). Secondly, and in contrast, it can also be concluded that the Department of Planning’s assessment did not address all of the key issues raised by the Council and the community. With the second conclusion, emphasis is placed on the amenity considerations and the precedent considerations.


d) Other Considerations

A Developer Tactic (Abuse of Part 3A?):

According to the proponent’s projects preliminary environmental assessment, the development had an estimated capital value of $114 million and would directly generate 103 tourist based jobs. Under Clause 17 of State Environmental Planning Policy (Major Projects), tourist based developments valued at over $100 million, or directly generating more than 100 jobs, are required
to be assessed under Part 3A. This had the effect of prohibiting a Part 4 assessment as the minimum Part 3A threshold requirements were met.

The trigger for an automatic Part 3A assessment was disputed by both the resident action group and Woollahra Council. Both of these stakeholders put forward a strong case, backed up with evidence, that the job figures were inaccurate. In particular, the resident action group, in their submission to the DOP, pointed out that the hotel portion of the development only had 66 rooms and a large number of jobs were lost with the closure of the Stamford Plaza hotel. Given those two facts, the resident action group estimated that the job creation would be less than 50 tourism based employees. Further to this, the resident action group argued that the estimated capital value of the project, in relation to the tourism portion (the hotel), was well under the $100m threshold requirement.

Given the substantial difference in figures, it appears that Ashington may have deliberately designed the project, to make sure it was assessed under Part 3A. If so, this was probably used as a tactic, as the proponent would have expected a more favourable assessment under Part 3A. This assumption is provided with a lot of weight when examining the Part 3A online determinations. Between 1 January 2009 and 6 October 2009 a total of 319 applications had been determined by the Department under Part 3A. Of these, only 4 (including Ashington) have been refused. That equates to a 98.7% approval rating. When considering all determinations from 2006 till present, the approval rating increases to 99.3%. This approval rate is substantially greater than that of Woollahra Council from the author’s experience.

4.3 Analysis of the Assessment Process for the ‘Brick Pits’

a) The Council Public Consultation Process (was it adequate?)

i) Overview of the Consultation:

Throughout the development assessment process, Sutherland Shire Council engaged in a number of forms of community consultation. These included neighbourhood notification letters, advertisements in the local newspaper, regular news updates on Council’s website, a community information session and a council briefing session. It was also proposed to put the DA before Council’s IHAP, however, the deemed refusal prevented this. These public consultation mechanisms are further discussed below.
The most prominent form of public consultation was the **advertising and notification process**. The development was initially advertised and notified on 15 April 2008 with surrounding residents and businesses receiving letters. These letters contained a description of the proposal, an A4 copy of the plans, a contact phone number for council information officer and a website link where more information could be obtained about the proposal. Objectors were originally given 15 days to make a submission.

Council requested Electronic copies of SEE to put on website. These were made viewable to the public. Anyone who made a submission was also given the chance to make further submission to the Land & Environment Court after the DA was refused (Sutherland Shire Council 2008).

A **council information session** was also held as a result of the substantial number of objections received and the issues raised. The session was held on 1 July 2008 and was restricted to community members who had made a submission with (the developer not in attendance). The information session was basically a **facilitation mechanism** undertaken prior to the assessment of the development. The session was chaired by an external facilitator and attended by the assessment officer, a manager and Councils IHAP/Mediation Officer. It had a basic aim of enhancing public participation.

Another public involvement mechanism was the **council briefing session** which was held on 7 July 2008. This briefing was used to inform councillors about the development and its progress. During the meeting, Councillors were provided information including:

- A thorough description of the proposed development;
- The history of the LEP & DCP controls and relevant amendments;
- The impact of these controls on the proposed development;
- A summary of the DA’s progression; and
- Key issues from the relevant internal and external referral authorities.

Community members were permitted to attend this meeting but not allowed to ask any questions.

ii) Analysis:

As a form of public involvement, the **advertising and notification process** was very thorough. The initial notification period was extended by 21 days at the request of the Kirrawee, Sutherland & Miranda Chambers of Commerce. This was done to afford these groups with an ample
opportunity to formulate responses to the proposal. Further to this, the surrounding neighbours and businesses were notified on five separate occasions throughout the assessment process and subsequent court appeal. These notification letters provided the concerned stakeholders with additional opportunities to comment on amended proposals and to participate in the LEC court case.

The advertising and neighbourhood notification process resulted in a total of 70 individual submission letters to the Council. In addition to this, the resident action group submitted a letter containing the names addresses and brief comments from several hundred concerned community members. These comments were openly provided on the resident action group’s website. The resident action group also submitted a petition signed by 2444 people opposing the development (Sutherland Shire Council 2008). Given the substantial number of objections and their bearing on the final determination, it can be strongly argued that the neighbourhood notification process was a successful mechanism for public involvement.

Another public participation mechanism used in the “Brick Pits” DA was the community information session. As a mechanism for public consultation, this session can be argued to be successful for a number of reasons including:

- First and foremost, the session was chaired by an external facilitator. The use of an external chair person has a number of benefits as discussed in chapter 2;
- Secondly, the meeting gave the council staff an opportunity to hear about issues, from the perspective of the objectors, in a face to face format. This allowed the Council staff to fully explore the objector concerns;
- Thirdly, the session provided the objectors with a better understanding of Councils planning controls, the DA assessment processes and any relevant procedures; and
- Finally, it focused in on the specific issues whilst disregarding misinformation about the proposal.

In summary, the session helped to inform the concerned stakeholders and clarify their points of concern. This was beneficial as it allowed the Council to more thoroughly assess the DA and better defend the public concerns in the LEC court case.

The final form of public involvement during the Council assessment was the council briefing session. As discussed above, this session provided the councillors with a more thorough understanding of the site, the DA and the relevant planning issues. In relation to public
participation and conflict resolution, it was beneficial as it provided members of the community with another opportunity to find out more about the proposed development and any relevant updates. Further to this, it provided the Councillors with a thorough understanding of the development and all the key issues. This meant that the Councillors were better prepared to both answer any questions from community members during their day to day business and assess and determine the development more effectively on its merits.

There were, however, two public consultation mechanisms, which are generally used by Sutherland Shire Council, but neglected for the “Brick Pits” DA. The first mechanism was mediation which is frequently used by council to resolve DA objections. The failure to use mediation was probably the result of three factors as follows:

- Firstly, it would probably have been very ineffective given the sheer number of objectors, each holding very divergent views about the proposal;
- Secondly, as discussed in section (d) of Chapter 3, the council did not want to negotiate amended plans with the objector; and
- Finally, any amendments might not meet the ‘substantially the same development’ test and a new DA would be required.

In summary, there would probably be very little gained by conducting a mediation session. Furthermore, the facilitated information session, used during the assessment, was more appropriate.

The other public consultation mechanism which council failed to use was their IHAP. Disregard of this mechanism was, however, the result of the developer’s court appeal rather than a refusal on Council’s part. The Council did intended to put the application to the IHAP to make a recommendation before being determined at a full Council meeting.

In the overall context, the Council’s use of public participation mechanisms was very thorough and it strong encouraged community involvement. All relevant mechanisms were used in the assessment process with great success. It can therefore be held that the Councils public participation process was more than sufficient.

b) The LEC Assessment (Addressing Key Conflicts & the Public Interest):

i) The key issues:

As outlined in section (d) of Chapter 3, the council had a large number of concerns during the early stages of the court case. These concerns related to two primary aspects including:
• First and foremost, the negative impacts the supermarkets would have on the retail hierarchy of nearby town centres such as Sutherland and Kirrawee;
• Secondly, the traffic impacts associated with the development and particularly the supermarkets – A council traffic assessment report, determined that the proposed supermarkets would increase traffic flows along Oak Road by 300%.

Other issues raised by council related to stormwater, urban design, the public open space area and a reduced potential to develop adjacent industrial land (O Brian 2009b). Residents shared similar concerns as the Council. The three biggest issues raised by the residents were:

• Economic impacts of the retail portion of the development;
• Change to the character of Kirrawee Town Centre; and
• Traffic and parking impacts.

Business owners were very concerned about the potential financial impacts with a large number implying that; if the development was approved, it would mean the end for their business (Sutherland Shire Council 2008).

ii) The Court Response:

During the LEC court case, the Commissioners relied on an adversarial and very systematic approach to conflict resolution. The case began with an on-site hearing on 16 February 2009. The on-site hearing was used to hear evidence from a number of stakeholders and provide context to the primary issues raised. Objecting residents were also given an opportunity to outline their concerns in front of the Commissioners during the on-site hearing.

Following this, the court heard evidence from a number of experts representing the Council and the developer. These experts provided evidence in relation to urban design, traffic and economic impacts. Evidence from these experts was considered systematically against all relevant strategic planning documents and site specific planning controls. An in-principle agreement was then reached on 20 February 2009 about the required changes. Primarily these included the deletion of one supermarket, substantially enhanced pedestrian access to the Kirrawee town centre, a substantial reduction in parking spaces and improvements to both urban design and the public park.
To be ‘in-principle’, the council experts needed to agree to the changes. It can therefore be surmised that the in-principle agreement adequately considered the key issues from the perspective of the Council experts. With regards to the residents and business owners, the key issues were only partially addressed. This was particularly the case for business owners, as the substantial retail portion would impact on the viability of their respective businesses. The in-principle agreement can at best be seen as compromise for these stakeholders, with only some of their concerns being met.

Council considered the amended plans on 23 March 2009 but found that they did not address all of Council’s concerns. The court case resumed on 3 April 2009, with further evidence heard from both experts and objectors relating to the amended application. Additional economic and parking reports were provided about the impacts of a single proposed supermarket. Leave was again granted, for further amendments to the plans, with a single supermarket still considered satisfactory.

The hearing recommenced on 30 June 2009, to consider the April round of amendments. Further evidence was heard from experts and objectors. In additional, Westfield was granted permission to be joined as a Party to the proceedings. Experts on behalf of Westfield provided further evidence in relation to the negative economic impacts of the development. The hearing then ended in late July with the commissioners retiring to consider the evidence.

The commissioners then presented their findings on 7 August 2009. In their findings, they considered the residential and commercial portions of the final amended plans to be satisfactory. Further, the commissions considered that the traffic and urban design issues had been resolved. However, the commissioners dismissed the appeal on 7 August 2009. According to the commissioners, the primary unresolved issue related to the supermarket which was deemed too large. In the judgment, the commissioners concluded:

“237 In our opinion the size of the supermarket and retail component has the potential to impact on the sustainability of Kirrawee and Sutherland Centres. If not economically but in the strategic role that they play in the region, which needs to be thoroughly assessed” (Tuor & Taylor 2009, p.47).

In coming to this conclusion, the commissioners considered that the proposal did not comply with the vision for the site as defined in the Sutherland Shire LEP 2006 and the Sutherland Shire DCP 2006. Further, the amended supermarket design lacked an economic impact assessment and the commissioners raised doubts about the methodology used in the original economic impact assessment (Tuor & Taylor 2009).
iii) Further Analysis:

As demonstrated above, the assessment process undertaken by the court was very rigorous. All of the relevant planning instruments were considered, and several attempts were made, through amended plans, to reach an acceptable outcome. Although the approach was adversarial, the court case, through the amended plans, succeeded in resolving a lot of the issues accord to the council. From the perspectives of residents and business owners however, the amended plans were only partially effective at addressing their concerns. This was particularly the case for a lot of business owners as the retail portion of the development would impact on the viability of their respective businesses.

The commissioners, in their final determination, relied on two primary factors. Firstly, they relied on the vision for the site, contained with the Objectives and Controls of Sutherland Shire LEP 2006 and the Sutherland Shire DCP 2006. Secondly, they relied on evidence that the amended proposal would have a negative impact strategically and economically on the surrounding centres. Given the second reason for refusal, it can be argued that the Commissioners addressed the wider public interest. This argument is given further weight when considering that most community members were opposed to the retail portion of the development.

c) Other Considerations:

i) The Pre-DA Process:

The development went through Sutherland Council’s Pre-DA process. However, the Pre-DA was unsuccessful in preventing conflict for two primary reasons. Firstly, the developer lodged the DA shortly after the meeting, prior to receiving feedback from all the relevant council referral authorities. Whilst the initial concept had some merits, one of the referral authorities (the architectural review advisory panel) was unsatisfied with a number of aspects of the Pre-DA. For example, sense of place and lack of connection to the Kirrawee town centre. These issues were not conveyed to the developer prior to the lodgement of the DA. Furthermore, these became significant issues in the court case.

The second reason for the failure of the Pre-DA process, related to the fact that the developer substantially changed the design, after the meeting. A large amount of retail floor space was added to the design; including the two supermarkets.

After the initial Pre-DA meeting council had offered to meet again for further discussion. They also offered to organise representatives from the Economic Development Committee to be at the meeting. When considering this, it appears that council made a genuine attempt to get the project
submitted in an acceptable form. If the developer had submitted the DA as per council’s recommendations it still would have been contentious, however, a number crucial issues would have been addressed up front.

ii) An Important Lesson:

From extensive analysis of the ‘Brick Pits’ DA, one very important lesson can be learnt; that Councils’ need to pay very careful attention when designing planning controls on major development sites. Sutherland Shire Council did not foresee the ‘Brick Pits’ site being used as a major retail centre, although it was permissible under the zoning. In an attempt to prevent the retail portion of the development from going ahead, the Council was forced to amend both the LEP, and the DCP, to tighten up the controls for the site, and to better express the intent for the site. If the council had the managed to design the planning controls right initially, the supermarkets would not have been proposed. This would have eliminated a substantial point of contention with any proposed development for the site.

4.4 Notable Similarities & Discrepancies between the Case Studies

a) Public Involvement:

With the Ashington development, the public were permitted to write submissions, in relation to the preferred project option. However, there were no public participation mechanisms, following the exhibition period. Furthermore, the public did not get the chance to view or comment on; ‘the Government Architect’s review’ or the ‘Director Generals environmental assessment report’, until after the Minister had made her final determination. This was due to the fact that neither report was placed on the Department’s website, until post determination. In addition to this, the Minister is not required (by the Act or the Regulation), to involve the public after the submission period.

In contrast, Sutherland Shire Council and the LEC used a significant number of public participation mechanisms after the notification period expired. These included:

- The Council Information Session: - Objectors were invited to further outline their concerns and be briefed about Councils planning controls and the assessment process;
- The Council Briefing Session: - This session briefed councillors about the development with the public allowed to attend and listen;
- The Independent Hearing & Assessment Panel: - The application was going to the IHAP but the developer used the deemed refusal rights shortly before this took place. Objectors were invited again and would have had the chance to address the panel

- The Court Case: - The objectors were invited to provide additional objection comments about 3 sets of amendments to the plans during the court case. Furthermore, objectors were given permission to give evidence at an on-site hearing. A number of objectors were also granted permission to be joined as a party in the court case.

Authors comment:

To improve public involvement in highly contentious Part 3A projects, a mechanism could be inserted, requiring the preferred project option to be re exhibited, to allow objectors an improved opportunity to provide additional comments. Currently, the Minister has the ultimate discretion to do this.

Public involvement could further be improved by providing objectors access to a draft copy of the Director Generals environmental assessment report (and any report by the PAC), prior to determination. The objectors could then have a chance to submit additional comments about the report(s) and possibly outline potential deficiencies in the assessment. In effect, this would work in much the same way as an IHAP, Council Development Control Committee or Council Planning Panel.

Public involvement and conflict management could improved by requiring the Minister for Planning (or the PAC), to make the final determination of a major and contentious development in a public forum. The final discussions and determination of the DA would be heard in the presence of the Council and nominated objector representatives. Basically, this would again work in a similar manner as IHAP, Council Development Control Committee or Council Planning Panel.

A trigger for all of these processes could relate to the development getting a certain number of objections.

b) The Assessment Process:

Sutherland Shire Council did not have a development assessment report on file. This makes it difficult to compare the assessment process of both developments. However, one notable difference related to the use of external consultants. With the ‘Brick Pits’ DA, the Council engaged an external consultant, to conduct an independent economic impact assessment of the DA. This was done to verify the accuracy of the economic impact assessment submitted by the applicant.
In contrast, the Department of Planning did not conduct an independent economic impact assessment with the Ashington development. The Department instead relied on the economic impact assessments provided by the proponent. As the consultant was paid by the development, the accuracy of the economic data was argued to be flawed [as detailed above in section (c)].

In terms of conflict management, one similarity between both developments related to the impact of EPIs and DCPs on the determination. As discussed throughout Chapter 3 and Chapter 4, non-compliances with LEPs and DCPs were significant reasons for the refusal of both developments.

Authors comment:

In terms of assessment, the Part 3A process could be improved by mandating the use of external consultations to conduct the EA and Preferred Project Option reports. In the case of the EA, this could occur if the Director General forms the opinion that the Development will be highly contentious. In the case of the Preferred Project Option, this could be triggered by a certain number of objections. In situations where this mechanism was used, the proponent could be provided the monetary capital and the Department would randomly select from a range of qualified professionals who have volunteered their services.

4.5 Conclusion

This chapter presented a thorough analysis of conflict management strategies, used in both the Ashington development and ‘Brick Pits’ development. Comparisons were drawn between the two, with regards to their conflict management abilities and best practices were identified. A further analysis is then provided comparing the conflict management abilities of Part 3A and Part 4 in general terms with suggestions made of improvement.

The next chapter will present provide a summary of the thesis, its implications and the overall findings of the research. Following this, a list of recommendations will be made in relation to potential ways to improve the development control system in NSW. Finally, the thesis will be concluded by outlining potential avenues for further research.
CHAPTER 5 – POTENTIAL IMPROVEMENTS TO THE NSW PLANNING SYSTEM

5.1 Summary

Chapters 1 – 4 of this thesis have explored conflict management and public participation in two tiers of the NSW Planning System, being Part 3A and Part 4 of the Act. In doing this, particular emphasis has been placed on major (urban based), residential, commercial and retail developments.

Chapter 1 provided a broad overview of the underlying factors which result in community involvement in the development process. Chapter 2 then outlined the assessment processes and provided an examination of the conflict management mechanisms under Part 3A and Part 4 of the Act. Chapter 3 afforded context to the mechanisms discussed in Chapter 2 by reviewing two highly contentious mixed use developments, assessed under Part 3A and Part 4 of the Act. Common points of conflict were outlined in the chapter and the assessment processes was then discussed for both developments. Chapter 4 built on the previous chapter by presenting a thorough analysis of the conflict management strategies used in both case studies. The chapter also provided comparisons of the conflict management abilities of Part 3A and Part 4 in general terms. The chapter concluded by offering some suggestions for improving conflict management in the NSW planning system.

5.2 So What? (Implications of the Research)

This research has demonstrated that Part 3A and Part 4 of the NSW development control system are both deficient in their abilities to manage conflict associated with major and controversial forms of development. Both systems have significant flaws in relation to public involvement, with a technocratic approach often used for both assessment and determination of DAs. Furthermore, both systems predominantly rely on an adversarial approach to conflict management, with ADR less commonly used (and often reserved for the LEC).

When comparisons drawn between the two systems, it does however become apparent the Part 4 is superior for conflict management. It provides a better system in relation to the number of public involvement mechanisms used and their abilities to both prevent and resolve conflict.
5.3 Recommendations:

i) Part 4 Development Assessed By Local Councils:

In light of this research, the following recommendations are made for improving the Part 4 development control system, in relation to conflict prevention and conflict resolution, associated with major and contentious residential, commercial and retail forms of development.

- Pre-DA process should be a compulsory requirement for certain types of major residential, commercial and retail development. This would be beneficial as it would necessitate awareness, on the part of the developer, of the likely contentious issues upfront. In other words, the developer would be aware of the planning controls, the council’s perspective and the community’s perspective about appropriate development for the site.

- Councils’ should consider improving community access to DA information for major developments. This can be achieved by providing electronic copies of architectural plans, statement of environmental effects and other support reports on the Council’s website.

- Councils’ should also consider implementing best practice mediation and/or facilitation conflict management mechanisms, similar to those used by Sutherland and Gosford Councils;

- Councillors should be prohibited from sitting on Development Control Committees if they currently, or have previously, been employed as a real estate agent, a property valuer, a builder, an architect or a property developer. This prohibition would also apply if an immediate family member works in one of the above listed professions. This change would likely reduce corruption and both real and perceived conflicts of interest. Furthermore, decisions by the councillors would be more likely to be based on the merits of the application. The system would still remain fair as people working in these professions could still work as councillors, only outside of development control.

- Further to this, Councillors should be designated mutually exclusive roles. This would work by limiting councillors to work in either plan making or development assessment (but not both). Furthermore, they would be prohibited from switching roles, for their entire duration working as a councillor. This would provide a separation of powers and which would be beneficial in reducing a number of issues associated with conflict of interest.

- Councils’ should be encouraged, and in some cases pressured to establish IHAPs by the Department of Planning, using the new powers under the 2008 amendment Act. Further to this, the powers of Council IHAPs should be strengthened in two ways:
Firstly, the courts should strongly consider awarding costs in class 1 appeals where the Council recommended against the IHAP but the Court reached the same conclusions as the IHAP. This would only be applied cautiously but it would put pressure on the councillors to make a determination on planning grounds.

Secondly, objectors should have third party appeal rights in cases where the Councillors approved a DA against the advice of the IHAP. To prevent objector abuse, heavy cost penalties could be used to prevent vexatious appeals.

- Given the arguments outlined in Chapter 2, JRPPs should be abolished and their determination powers divided between Councils and the Department of Planning. Review powers should be returned to the Land & Environment Court.
- The Department of Planning should strongly consider abolishing objector merit review mechanism of the PAC. However, if they are to continue, Section 52 of the Act should be amended to allow full access to legal representation.

ii) Part 3A Development Assessed by the Department of Planning:

In light of this research, the following recommendations are made for improving the Part 3A development control system, in relation to conflict prevention and conflict resolution, associated with major and contentious residential, commercial and retail forms of development.

- With Part 3A projects which are likely to be controversial, the Director General (or someone acting on his behalf), should consider the idea of holding at least one community meeting prior to the finalization of the DGR. The representative would present the preliminary project design to the community and get an understanding of the issues from their perspective. These issues would then form part of the DGR which would have a number of benefits as outlined in Chapter 2.
- The Department of Planning should consider amending the ‘Major Project Community Consultation Guidelines October 2007’. In particular, the guideline should more accurately specify the level and type of community consultation required, in relation to major residential, commercial and retail forms of development. Alternatively, the DGR should more accurately specify the level and type of community consultation required.
- The Department should also consider a greater use of external consultants to conduct the EA and/or the Preferred Project option reports for highly contentious projects. The process and benefits of such a system are outlined in Section 4.4 of Chapter 4.
- With highly controversial developments, the Department of Planning should also consider incorporating a mechanism which requires the preferred project option to be re exhibited.
This practice is currently at the discretion of the Director Generals and the Ministers for Planning. A mechanism triggering this process could be a certain number of objections.

- Further to this, the Department should consider providing objectors access to a draft copy of the Director Generals environmental assessment report (and any report by the PAC), prior to determination. This would have a number of benefits as outlined in Section 4.4 of Chapter 4.
- Finally, the use of a public forum should be considered for the final assessment and determination of highly contentious developments. The process and benefits of such a system are again outlined in Section 4.4 of Chapter 4.

5.4 Where to from here?

Following the completion of this thesis, the author does not intend to do any further research on the topic as it has nearly driven him to insanity. However, for other Bachelor of Planning students, bold enough to take the challenge, there are a number of potential avenues for further research including:

- Investigating the potential for a completely new consolidated and simplified Act for development assessment, replacing all of the following:
  - The Environmental Planning & Assessment Act 1979
  - The Environmental Planning Regulation 2000; and
  - The Environmental Planning & Assessment Amendment Act 2008
- Further investigation could also be carried out into an improved system of third party merit appeals. Other states such as South Australia have done this; and
- Finally, further research could be conducted looking at improving the LEC court. In particular, the ability to make it an inquisitorial based system (rather than an adversarial based system).
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APPENDIX B – SCHEDULE OF QUESTIONS

Organisation – No High Rise in Double Bay Resident Action Group
Interviewee – John Mant
Position – Planning Lawyer & Spokesperson for the Resident Action Group

1. Ok to start off, can you briefly tell me about your various jobs in the development assessment system and your specializations?

2. Ok next, can you tell me a bit about your role in the No High Rise Double Bay Resident Action Group?

3. Alright moving on, what is your opinion on the role of the new PAC and JRPP in determining merit appeals?

4. Do you believe that these panels provide adequate means for public involvement in appeals?

5. What is your opinion on merit appeal rights for objectors with respect to major residential, commercial and retail developments?

6. In what circumstances should be objector merit appeal rights be allowed?

7. Ok moving on, S75J of the EP&A Act requires the minister, when making a decision, to take into account the Director Generals Report and any findings of a review by the PAC. From your understanding, can the Minister completely ignore the recommendations of these bodies and still fulfill the consideration requirement outlined in this section of the Act?

8. Ok Moving on to Ashington, did you attend one of the initial developer public consultation meetings and if so what was your opinion of it?

9. (YES ASHINGTON MEETING) In your opinion, what could have been done to improve the developer consultation at the Ashington meetings?

10. Ok next, what do you think of the Preferred Project Option submitted by Ashington?

11. Do you think anything positive came out of the preferred project option?

12. From your experience, is there anything you would like to see changed with the development assessment system under Part 4 in relation to conflict resolution?

13. There has been a bit of criticism about the IHAPs not actually working. What is your opinion on that?

14. From your experience is there anything you would like to see changed with the development assessment system under Part 3A in relation to conflict resolution?

15. Anything else on conflict resolution and Part 3A?

16. Do you have anything else to add on the topic of development assessment or public participation?

17. Ok we have come to the end of the interview. Do you have any questions you would like to ask me?
1. Ok to start off, how long have you worked in Local government and could you tell me a little about your various roles in development assessment?

2. One of the primary forms of development control in NSW is land use zoning. In your opinion is zoning an effective tool for preventing land use conflicts associated with major residential and commercial developments?

3. One point of conflict prevention in the development process is neighbour notification. Can you briefly outline Campbelltown Council's neighbour notification policy?

4. State Environmental Planning Policy 65 – Design Quality of Residential Flat Buildings is one type of environmental planning instrument for reducing potential amenity impacts of Residential Flat Buildings. In your opinion is it effective at preventing unacceptable amenity impacts on adjoining neighbours?

5. Another potential method of minimizing the impacts of major residential and commercial development is social impact assessment. Do you believe that social impact assessment should be a mandatory requirement for major residential and commercial developments if they meet a certain criteria?

6. (IF YES) In your opinion what potential criteria could trigger the requirement for a social impact assessment, like say monetary value or something else?

7. From my research I found that a decrease in property values is a major trigger for conflict. What is your opinion on the potential for the requirement of some level of financial compensation by the developer for developments which substantially reduce neighbouring property values?

8. Sometimes it can be very difficult to determine the nature and severity of the impacts of a proposed development. One potential option to reduce this could be a system monitoring the actual impacts of approved DA’s of a major or contentious nature. What is your opinion on such a system?

9. Do you believe it could be implemented in NSW?

10. Ok onto a different topic entirely, what is your opinion on the new Exempt and Comply development codes made Under the Environmental Planning & Assessment Amendment Act 2008?

11. In relation to the construction of new dwellings, do you believe that the new complying development codes adequately address the potential impacts on neighbours such as overshadowing and visual privacy?

12. From your experience, is there anything you would like to see changed with the development assessment system under Part 4 in relation to conflict resolution?

13. What about Part 3A?

14. Do you have anything else to add on the topic of development assessment or public participation?

15. Ok we have come to the end of the interview. Do you have any questions you would like to ask me?
Organisation – Ku-ring-gai Municipal Council  
Interview Participant 1 – Anonymous participation (refer to FBE HREAP Form 4)  
Interview Participant 2 – Anonymous participation (refer to FBE HREAP Form 4)

1. Ok to start off, how long have you worked in Local government and could you tell me a little about your various roles in development assessment?

2. The first point of conflict prevention and conflict resolution occurs at the Pre-DA stage. In your opinion, should a Pre-DA meeting be a compulsory requirement for certain major and controversial types of residential and commercial development assessed under Part 4 of the Act?

3. (IF YES) Elaborating on the previous question, do you believe that if Pre-DA’s were required for these types of development, potentially affected neighbours should be invited to participate in the meeting?

4. Another point of conflict prevention is neighbour notification. Can you briefly outline Ku-ring-gai Councils neighbour notification policy?

5. From my research I have found that a lack of public involvement to be a major trigger for conflict with development applications. What is your opinion on the idea of putting the applicants’ statement of environmental effects on Councils website with a website link in neighbor notification letters?

6. Another potential means to increase public involvement would be to require the developer to consult with potentially affected neighbours prior to writing the statement of environmental effects. The basic being that the community could outline issues they wish to have addressed in the statement of environmental effects. Do you believe this could work if implemented for major and controversial Part 4 developments?

7. Some council’s have attempted to deal with land use conflicts through the use of mediation. In your opinion should Council Assessment Officers be trained in negotiation and mediation as a means of conflict resolution?

8. From my understanding Ku-ring-gai Council is under a lot of pressure from the State Government to increase residential densities within the LGA. There are two State Environmental Planning Polices promoting urban consolidation. These being SEPP 32 (Urban Consolidation – Redevelopment of Urban Land) and also SEPP 53 (Metropolitan Residential Development). Have you dealt with either of these SEPPs and if so what impacts have they had on development assessment in Ku-ring-gai?

9. (IF YES) what impact have these SEPPs had on public participation?

10. From my research, I have found that the NSW Department of Planning has intervened with the development assessment and determination process at Ku-ring-gai Council by inserting a state government planning panel to determine certain developments. With respect to decisions on major development applications, were the state government panel decisions more developer friendly compared with the council panel?

11. Do you think the Part 3A assessment and determination adequately considers the opinions of the Council and the Local community?

12. Moving on, the Environmental Planning & Assessment Act was substantially amended last year. What is your opinion on the new Joint Regional Planning Panels with respect to development assessment?

13. JRPP’s are composed of both State and Local government representatives however the balance is in favour of the State Government. What are your thoughts on this?

14. From your experience, is there anything you would like to see changed with the development assessment system under Part 4 in relation to conflict resolution?

15. What about Part 3A anything you would like to see changed with development assessment?
16. Do you have anything else to add on the topic of development assessment, public participation or conflict resolution?

17. Ok we have come to the end of the interview. Do you have any questions you would like to ask me?