

# **ATTACHMENT 6 TO REPORT**

**(Circulated Under Separate Cover)**

## **EXTRA ORDINARY LOCAL PLANNING PANEL MEETING**

### **5.1 S8.2 Review of DA21/0257.01 for a Two (2) Lot Subdivision of Land at Part Lot 313 DP 1245164, No. 27 Kimberley Driver, Bowral**

**Wednesday 22 September 2021**

**ATTACHMENTS:**

- ATTACHMENT 6 - Applicant's Review of Determination Cover Letter & Application**
- ATTACHMENT 7 - Applicant's Review of Determination Supporting Information**
- ATTACHMENT 8 - Further Information from Applicant on Clause 4.2D of WLEP 2010**
- ATTACHMENT 9 - Further Aerial Photo prepared by Applicant detailing**



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Interim General Manager  
Wingecarribee Shire Council  
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Dear Mr McMahon,

**RE: Section 8.2 Review for Development Application 21/0257, 2 lot subdivision, Milton Park, Bowral**

I refer to the above Development Application that was considered by the Interim Independent Advisory Planning Assessment Panel meeting of 7 April 2021.

A Notice of Determination Refusal was subsequently issued by Wingecarribee Shire Council dated 12 April 2021.

On behalf of the applicants and owners of the subject land, Tujilo Pty Ltd, I writing to support the lodgement of a formal application pursuant to the provisions of Sections 8.2 and 8.3 of the *Environmental Planning and Assessment Act 1979*, to have that decision reviewed.

The Interim Independent Advisory Planning Assessment Panel determined the original application and therefore it is assumed that in accordance with Section 8.3(4) of the Act, the Panel will be required to make the determination of the Review. I would appreciate confirmation of the process as soon as possible so I may advise my client and if necessary, engage with the allocated assessment officer during the re-assessment process. This opportunity is the foundation of ensuring procedural fairness in the conduct of a review application.

Also critical is the 6 month time limitation placed upon the consent authority to make a determination of an application for review. Given that the Planning Panel meetings are scheduled on a monthly basis, we believe Council needs to immediately work towards presenting this matter to the Panel meeting of September at the latest.

The review application relies upon the information initially submitted with the Development Application with no amendments.

A Statement has been prepared by Lee Environmental Planning that sets out the basis for the review. This Statement is supported by an information bundle that will assist in clarifying and confirming specific aspects of the proposed

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• Planning Proposals • Statement of Environmental Effects • Strategic Planning and Development advice • Advocacy and problem solving  
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development in its entirety. This bundle of documents directly addresses the reasons for Refusal, in particular 2 and 5, both of which are based upon a believe that there was a lack of information and clarity about the history of the development approvals already issued and activated at Milton Park.

Also submitted is a supporting statement from Dr Caroline Cosgrove Heritage Consultant to specifically address Reason for Refusal No.4 that focused on potential heritage impacts.

I would be pleased to discuss any aspect of this application with you and look forward to confirmation that it will be presented to the September meeting of the Independent Advisory Planning Assessment Panel.

Yours faithfully,  
Scott Lee  
Lee Environmental Planning  
30 May 2021

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# **Section 8.2 Review of Determination Application**

relating to

**Development Application 21/0257**

**Two lot subdivision**

at

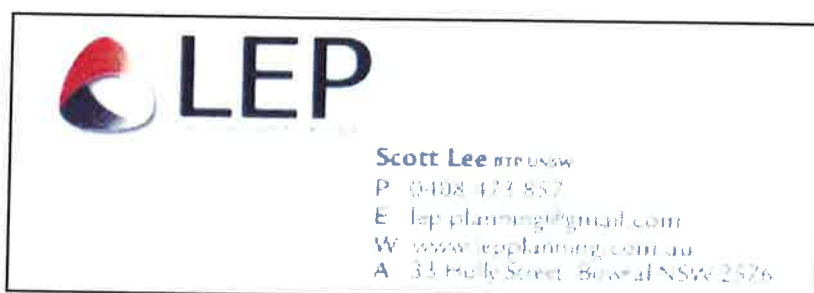
**Milton Park**

**Horderns Road**

**Bowral**

**30 May 2021**

**prepared by**



## **Clarification of the development being proposed**

Pursuant to Section 8.2 of the *Environmental Planning and Assessment Act 1979*, the applicant is seeking a review of the determination of Development Application 21/0257, issued by Wingecarribee Shire Council by a Notice of Determination dated 12 April 2021.

Pursuant to Section 8.3 of the *Environmental Planning and Assessment Act 1979*, the proposed development remains for the original purpose of a two lot subdivision

The provisions of Section 8.3(3) allow an applicant to make amendments to the original submission. However, in this case, the applicant seeks to rely upon the development application as originally submitted.

The original Development Application was supported by a comprehensive Statement of Environmental Effects (SEE) prepared by Lee Environmental Planning. This SEE properly considered all relevant planning and environmental matters to enable Council to make an informed assessment decision.

This application for Review continues to rely upon this SEE together with the information and comments in this Section 8.2 Review Statement.

Critically, in undertaking the Review, the consent authority is requested to review and consider the attached portfolio of supporting information-provided by the Applicant, which document provides incontestable details related to the original 1984 Consent for the redevelopment of Milton Park as a Tourist Resort, the various Modifications to that Consent, and the approval by the Minister for Planning to the amending Local Environmental Plan No. 55 to facilitate the subdivisions of the land to support the said Consents.

This information, when read in conjunction with the original Statement of Environmental Effects together with the Development Application Assessment Report prepared and presented to the Independent Advisory Planning Assessment Panel meeting of 7 April 2021, provides ample information upon which a review of the determination can be made.

With no changes to the proposed development, Council can be satisfied that the development remains substantially the same as originally proposed, which is a requirement of Section 8.3(3) of the Act.

The subdivision process has no bearing on the land uses or the built form that it takes, but necessarily does allow the long term management of the approved development upon the land.

## **Basis of the Review application**

The applicant has made the decision to lodge the review application on the basis of concerns related to the reasons for Refusal within the Notice of Determination issued by Wingecarribee Shire Council.

The reasons arose from the determination of the Interim Independent Advisory Planning Assessment Panel meeting of 7 April 2021.

The reasons provided are set out here below:

- 1. One of the proposed lots does not comply with the minimum lot size of 40 hectares, contrary to clause 4.1 of Wingecarribee LEP 2010 (WLEP 2010).*
- 2. Pursuant to the provisions of clause 4.2D(4) the proposal is not permitted because the panel is not satisfied that: (a) the subdivision is necessary for the ongoing operation of the permissible use(s); (b) the uses relied on are currently permissible uses; (c) the subdivision is appropriate having regard to the natural and physical constraints of the land.*
- 3. The proposal does not represent orderly and economic development in circumstances where the proposed dwelling house Lot (Lot 1) will contain the existing on-site waste water treatment pumping station and treatment / maturation pond for proposed Lot 2.*
- 4. The proposal fails to satisfy clause 5.10(4) of WLEP 2010 that requires consideration of the impact of the development on the heritage significance of the heritage item, as listed in Schedule 5 of WLEP 2010. A heritage management document (Heritage Impact Statement) was not submitted with the development application; (b) On the information provided the Panel is not satisfied that the proposal meets the objective 5.10(1) of WLEP 2010, in particular with regards to an assessment of the curtilage, setting and views of the heritage item. It is noted that the heritage listing covers part of proposed Lot 2; (c) The panel concurs with the views of the Heritage Council of NSW that "the reasons for the proposed subdivision provided in the Statement of Environmental Effects are ambiguous and insufficient".*
- 5. Insufficient information has been provided in the application to identify the site of the original approval of the villas and any implications of the development on existing consents.*

The objection to the Reasons for Refusal particularly notes that the comprehensive Assessment Report prepared by Council staff recommended approval for the development application as it was submitted. That report did not raise any of the issues associated with the reasons for refusal.

In our view, the reasons for refusal do not have the proper justification necessary to substantiate the refusal of the Development Application.

## **Rebuttal of Reasons for Refusal**

1. *One of the proposed lots does not comply with the minimum lot size of 40 hectares, contrary to clause 4.1 of Wingecarribee LEP 2010 (WLEP 2010).*

This is simply a statement of fact that has never been in dispute and is not a reason to sustain a refusal in this case.

It is apparent that the Panel was unaware that the local planning provisions were put aside in relation to this Strata Titled Development at Milton Park as from 17<sup>th</sup> May, 1985 through the gazettal of Wingecarribee Local Environmental Plan No. 84, which amended the aforementioned Wingecarribee Local Environmental Plan No. 55. In effect, compliance with the 40 hectare minimum lot size has not been a relevant requirement for Milton Park and this development in particular, since the 1985 gazettal of those planning amendments.

**A copy of the said gazettal is Attachment 'A' within the portfolio of supporting information. (the PSI).**

The land the subject of the gazettal was Lots 12 & 13 DP 264572, which comprised approximately 108 hectares. On 17 March, 1987 Lots 12 & 13 were consolidated, as required by the 1984 Consent, and was then subdivided into three (3) lots, being Lot 1 - Village 1: 2.796 hectares; Lot 2 - Village 2: 4.709 hectares; and Lot 3 - The Hotel Development & Farm: 105 hectares. Since the 17 March, 1987, Wingecarribee Shire Council (WSC) have approved a further six (6) applications to subdivide what was originally Lots 12 & 13. These applications have created new lots or adjusted the boundaries of existing lots. In all, twelve (12) lots have been approved by WSC, of which nine (9) such approved lots were for lots of less than 40 hectares and, in fact, were all less than 14 hectares.

**Details of all subdivision approvals and their registration by the LPI / LRS since gazettal of Amendment No. 84 of WLEP No. 55, are provided in Attachment 'B' within the PSI.**

Development Application 21/0257 simply sought to create a single 40 hectare lot to accommodate an existing approved dwelling and farm, with the residual of Lot 313, Proposed Lot 2 of 13.47 hectares, being the development area of "The Milton Park (Tourist) Village" which accommodates not only the remaining Strata Titled Villa Units approved under DA 32/27/3182/84, but also the Arts & Crafts / Village Centre; Indoor Pool, Gymnasium, Sauna, Steam Room & Spa, Tennis Courts & Pavilion; three (3) Residences; the Equestrian / Administration Centre; Conference Centre; the Hordern Commemorative Garden; and various associated works, all of which were approved by DA 32/27/3182/84, and modified by LUA 11/0869.

2. *Pursuant to the provisions of clause 4.2D(4) the proposal is not permitted because the panel is not satisfied that: (a) the subdivision is necessary for the ongoing operation of the permissible use(s); (b) the uses relied on are currently permissible uses; (c) the subdivision is appropriate having regard to the natural and physical constraints of the land.*

In relation to point (a), the DA21/0257 made a cogent case for the reasons for the subdivision based upon the development already approved at Milton Park. The Council Assessment Report concurred. The desired outcome is to achieve exactly the same outcome as that provided already for Village 1 and for the Milton Park Hotel and gardens. That is, separate parcels of land that recognise ownership patterns and enables ongoing management of different elements of the original approved Master Plan, as amended.

Pursuant to the 1985 Gazettal, subject to the current application (DA 21/0257) being approved, the property will have been subdivided into five lots, including:

1. Village 1 (SP 32202 – 20 villas) on **3.336 Ha**,
2. The Milton Park Hotel & gardens (Lot 310 DP 1191798) on **11.25 Ha**,
3. The approved Tourist Development (Proposed Lot 2 – DA 21/0257) on **13.47 Ha**,
4. The existing Dwelling & Farm (Proposed Lot 1 – DA 21/0257) on **40 Ha**, and
5. The existing Farm (Lot 314 DP 1245164) on **40.04 Ha**., also known as the 'South Paddock'.

**Total: 108 Hectares**

All of the current uses of the total 108 hectares comprised in Milton Park are permissible under WLEP, as amended, and have been approved by the current Consents.

In relation to point (b), it is simply incorrect to imply that the current uses on the site may in some way be unauthorised or illegal and this implication needs to be fully rejected. In September 2020, Council instigated a complete review of the Milton Park development. My clients participated in that, as did Council's legal representatives, Shaw Reynolds and members of the local community. There has never been any insinuation from Council or its legal representatives, including B. Bilinsky & Co Solicitors, SWAAB Attorneys, and Mr Ian Lacy - WSC General Counsel, at any time that the development at Milton Park lacks legality or legitimacy. The development that will sit upon Proposed Lot 2 is approved by both the original development consent (DA32/27/3182/84) and the amendment issued by Council under 11/0689 and is in fact under construction through a Construction Certificate CC395/18 issued by Building Certification Associates Pty Ltd.

**Copies of legal advice attesting to the legitimacy of the current Consents, including LUA 11/0869, are Attachment 'C' within the PSI.**

Point (c) is challenged on the basis that in this case, the subdivision is following on from development already approved. It is common for subdivision of land to facilitate the future development of that land. In this case, the reverse is true. The subdivision is following on from the already approved and under construction development and is being put forward so that development can be viable and properly funded with good



title being provided to the stakeholders and the Strata Plan being economically and effectively better managed in the long term. The impacts of the development have already been assessed and agreed to be acceptable. The natural and physical constraints of the land have been considered previously in the various approvals over the past 37 years that have led to this point. When the subdivision is approved and the new Lots registered, there would be no work associated with that process and no change to the already approved built form. There will be no impact or effects upon the natural or physical constraints of the land.

The consent authority can be satisfied, as necessary, that all requirements of Clause 4.2D(4) have been addressed in a positive fashion.

My client also makes the following important observation:

**The boundaries of proposed Lot 2 (13 hectares), the subject of the application (DA 21/0257), are entirely compatible with the boundaries shown on the stamped approved Site Plans for the existing consent (LUA 11/0869). This development is under construction with project costs to date exceeding \$20Million.**

3. *The proposal does not represent orderly and economic development in circumstances where the proposed dwelling house Lot (Lot 1) will contain the existing on-site waste water treatment pumping station and treatment / maturation pond for proposed Lot 2.*

This assertion cannot be substantiated for the following reasons:

- i. The original Consent for the Sewerage Treatment System and Maturation Pond (DA 32/27/3182/84) was issued on 6 November, 1984 and included approval by the State Pollution Control Commission (SPCC).
- ii. The existing Treatment System (AWTS) Maturation Pond and related infrastructure were upgraded in 2003 by the Applicant / current owner with the Integrated Approval of WSC & the Sydney Catchment Authority (SCA).
- iii. Both systems referred to (i. & ii. above) were designed to service the entire Milton Park property, including all of the approved developments, a number of which are yet to be completed and are the subject of Modifications to DA 32/27/3182/84 IE - LUA 11/0869.
- iv. The system effectively services the Milton Park Hotel, Village 1 (SP 32202 – 20 Villas), and will shortly service Proposed Lot 2 (DA 21/0257) and has the capacity to accommodate these and other future loads.
- v. The most current approval for the AWTS, Maturation Pond and related infrastructure, issued on 28 October, 2011 (LUA 11/0869) included the Integrated Approval of WSC & the SCA.
- vi. The system is owned by the Applicant, and is on its land, and it was the Applicant that rebuilt it in 2003, the costs being shared 2/3 to 1/3 with the Applicant and Village 1 (SP 32202), at which time the Applicant owned the Milton Park Hotel and the proposed Village 2 Tourist Development.
- vii. Despite the system being owned by the Applicant, it will not be utilised by the Applicant until its development on Village 2 comes online, and it is therefore appropriate that the system be operated, under license from WSC, by the major user, IE Milton Park Hotel (Lot 310 DP 1191798) for its own benefit and the benefit of Village 1 (SP 32202).
- viii. All current and future lot owners at Milton Park have, or will have, incontestable legal easement rights pursuant to DP 639837 to utilise the system, subject to meeting their obligations set out in paragraphs 3 & 4 of the relevant 88B Instrument. The easement was executed under seal and registered on 11 May, 1987 and no issue has been taken by WSC, SPCC or SCA since the system was upgraded by the Applicant in 2003.

**Details related to the Integrated Approvals for the System issued by WSC & SCA, the easement rights and obligations of all lot owners / users at Milton Park, the design / capacity and operation & maintenance of the System, are in Attachment 'D' of the PSI.**

The subdivision does not affect the operation of the existing AWTS and maturation pond. This facility has been operating for over thirty years to service all of the Milton Park development, the vast majority of which is not on the same allotment of land as the plant and it is estimated that the waste water generated by the Village 2 Tourist Development will be no more than 25% of the total load on the system.

It is completely unclear as to why the proposed subdivision would be to the detriment of the operation of the treatment plant.

This reason for refusal cannot be substantiated nor sustained

4. *(a) The proposal fails to satisfy clause 5.10(4) of WLEP 2010 that requires consideration of the impact of the development on the heritage significance of the heritage item, as listed in Schedule 5 of WLEP 2010. A heritage management document (Heritage Impact Statement) was not submitted with the development application; (b) On the information provided the Panel is not satisfied that the proposal meets the objective 5.10(1) of WLEP 2010, in particular with regards to an assessment of the curtilage, setting and views of the heritage item. It is noted that the heritage listing covers part of proposed Lot 2; (c) The panel concurs with the views of the Heritage Council of NSW that "the reasons for the proposed subdivision provided in the Statement of Environmental Effects are ambiguous and insufficient".*

In relation to point (a), a heritage impact statement has never been considered to be necessary by Council for the consideration of this particular DA. It is not obligatory that every DA that involves heritage items or conservation areas be supported by a formal heritage impact statement.

In this case, the subdivision will not physically impact the site, it does not introduce any new development to the site, nor does it alter any relationships between any built form and the critical heritage curtilage of the original Milton Park home and gardens.

In relation to point (b) and concerns about settings and views of the heritage item, the proposal involves no physical work. It is not possible to have impact upon heritage settings or views as a result of the DA. The actual physical buildings that will sit upon Proposed Lot 2 are already approved and in fact are already under construction. This point was made in the Council Assessment Report but has been ignored.

The Milton Park curtilage area as defined by the NSW Heritage Council in its consideration of the site for State Heritage listing, is not conflicted or impacted by the subdivision. The subdivision does nothing more than create a parcel of land for the future management of the approved and under construction Village 2. This is exactly the same management approach that was taken for Village 1 that has been in place for 34 years. The inconsistency is obvious and of concern to my clients.

In relation to point (c), the comments made by the Heritage Council's Assessment Officer are not relevant to the application for the following reasons:

1. No future development (other than the approved Hordern Commemorative Garden and Decorative Pond) is proposed outside of the perimeter of the approved construction / buildings under LUA 11/0869.
2. No future development, that is not currently approved, is proposed within the curtilage of the SHR No. 02026.
3. The additional area of land mentioned by the Heritage Office is discussed herein below.
4. The Conditions of the IDA (No. 2020/110) Approval dated 16<sup>th</sup> November, 2020, have or will be, strictly observed.
5. The listing of the 'Milton Park Cultural Landscape' on the State Heritage Register (SHR No. 02026 - NSW Government Gazette No. 238) provides an exemption under Section

57.1 of the Heritage Act. The said exemption, as set-out in Schedule "C" of the gazettal, exempts the following:

*"All works and activities in accordance with a current and valid development consent in force as at the date of gazettal (25.09.2020) for listing on the NSW SHR, excluding any modifications."*

Note: Current and valid development consents include:

- i) DA 32/27/3182/84 Stage 1 – Outstanding works,
- ii) DA 32/27/3182/84 Stage 2 – Outstanding works,
- iii) Section 96(2) Modification to ii) above -  
LUA 11/0869 – Outstanding works,
- iv) DA 5039 D1 & D2 – 575/89 – Outstanding works,  
(within Lots 12 & 13).

With reference to the concerns expressed by the Panel in relation to the comments made by the Heritage Council's Assessment Officers, the Applicant met with the said Officers on 21 May, 2021 to better clarify the reasons for those comments. Subject to the Heritage Office giving further consideration to the matter when the consent authority provides them with details of its s.8.2 Application, via the Planning Portal, the following points, as discussed with the Heritage Officers, are of relevance:

- The Heritage Office of NSW provided their General Terms of Approval for the two (2) Lot Subdivision (DA 21/0257).

There was no suggestion on the part of the Heritage Office that the Application should be refused.

- The comments made by the Heritage Office to the effect that the SEE was ambiguous and insufficient in fact relate to their further comment that the proposed Lot 2 is significantly larger than the area of land originally proposed for Village 2 (Lot 2 DP 740232), shown on the Application as a dotted line. It is important to note that Lot 2 DP 740232 was originally intended as the site of the 24 Strata Titled Villa Units the subject of DA 32/27/3182/84, which bears no resemblance to the development now approved and under construction.

Details in relation to the increase in site area are evidenced by:

- Attachment 'B' to the PSI,
- LUA 11/0869 - Drawing Sheet 1,
- Reference to the penultimate paragraph of the rebuttal to Reason 1 of the Refusal (above) which consolidates all of the development Approved by DA 32/27/3182/84, the vast majority of which is contained in existing Heritage Buildings, in order to ensure their sustainability.

- The comments made by the Heritage Office were apparently related to their concerns in relation to how the additional area of land was to be utilised.

The Applicant advised the Heritage Office that it had no intention of further developing any part of Proposed Lot 2 (DA 21/0257) beyond that which is currently approved, and all of which is exempted by Heritage & Planning Gazettal No. 238.

- As aforementioned, the Heritage Office will review the s. 8.2 Review Application and respond to WSC in the ordinary course.

Notwithstanding the above contentions alleviating the need for a Statement of Heritage Impact in relation to the Development Application, which is nothing more than a two (2) lot subdivision of the land involving no proposed or intended building works whatsoever, the Applicant commissioned an appropriately qualified Heritage Expert to prepare a supporting document.

The services of Dr Caroline Cosgrove PhD, Grad.Dip., BA, MPHA.

The statement provided, in its final paragraph, simply concludes:

*"The proposed subdivision represents a more relevant property boundary for continuing management of the land associated with the approved Village 2 development at Milton Park by creating a separate lot for Village 2 and a single 40 hectare lot that accommodates an existing residential dwelling. This boundary will assist in retaining the rural landscape of the proposed Lot 1 and the use of the land in this area for its intended purpose. It is therefore considered that this proposal has no impact on the heritage character of the Milton Park Cultural Landscape".*

**The said heritage statement and attached photographs from Dr Cosgrove is Attachment 'E' to the PSI.**

5. *Insufficient information has been provided in the application to identify the site of the original approval of the villas and any implications of the development on existing consents.*

This reason is refuted and not consistent with the development assessment report prepared by Council.

It does reflect the Panel's lack of knowledge and understanding of the history of the development. If a lack of information was in fact a potential issue, the Council Assessment Report would have raised that. If the Panel were of the view that the information available to them was not sufficient to enable them to make an informed decision, it would have been prudent to defer a decision. Given the refusal, the Applicant now finds itself in a position where it will suffer inordinate delay, not being able to fund the project or pre-sell the approved villas. The Panel should have identified the information they believed was necessary and then made a decision once that information was made available. It is apparent that the Panel has chosen to consider matters that have no relationship to the Application before Council, and which were considered in detail by Council's Senior Assessing Officer.

The location of the built form and the area involved has been the subject of previous and extensive consideration by Council. The built form has been approved by Council in the exact location it is now being constructed. As already noted in this letter, in September 2020 Council instigated a complete review of the Milton Park development. My clients participated in that, as did Council's legal representatives, Shaw Reynolds. This question was again the subject of discussion and review at that session.

Mr Chris Shaw confirmed the following in his correspondence to WSC dated 8 September, 2020:

7. *"Based on the material available, there was no legal error in approving the Modification" IE LUA 11/0869.*
10. *"It was open for Council to arrive at the conclusion it did based on the Courts interpretation of Council's obligations"*

Although there are at least two (2) objectors that are dissatisfied with the Village 2 Tourist Development and are of the said opinion that it was wrongfully approved, even they are accepting of the fact that the Consent is valid.

This reason for refusal cannot be substantiated nor sustained.

**Copies of legal advice attesting to the legitimacy of the current Consents, including LUA 11/0869, are Attachment 'C' within the PSI.**

I also bring to your attention "*Wingecarribee Shire Council Weekly Circular, 20<sup>th</sup> November, 2020*", prepared by the Group Manager Planning Development and Regulatory Services, and in particular to File No. 11/0969.03. This document provides a good, albeit abridged, summary of the history of the relevant development consents and modifications from 1984 (DA 32/27/3182/84) thru 2011 (LUA 11/0869), as well as the 1985 gazettal by the Minister for Planning.

**A copy of the said Circular is Attachment 'F' within the PSI.**