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LEGAL UPDATE
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COURT CLARIFIES DOCUMENTS TO BE CONSIDERED WHEN INTERPRETING A DEVELOPMENT CONSENT

The issue of what documents can be considered when construing a development consent was considered by the NSW Court of Appeal (**NSWCA**) in *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147.

The Court dismissed the appeal, subject to certain amendments to the declarations and orders made by the Primary Judge (Molesworth AJ of the Land and Environment Court).

Facts

Hunter Industrial Rental Equipment Pty Ltd (**first appellant**) owned a quarry in the Hunter Valley known as the Martins Creek Quarry. Buttai Gravel Pty Ltd (**second appellant**) was responsible for the day to day operations of the quarry.

More than a century ago a large deposit of andesite rock was discovered which was suitable for railway ballast. The State appropriated the land to be used as a quarry, and constructed a branch rail line which allowed the rock to be transported from the quarry.

In 1979 a geological investigation was undertaken of an area adjoining the existing quarry which located a further large deposit of andesite. The State Rail Authority obtained leases of this land (known as the Western land) and lodged an application with Council in 1990 to develop this land. As

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the application was designated development, an environmental impact statement (**EIS**) was submitted with the application. Consent was granted by the Council in 1991.

An environmental protection licence (**EPL**) issued under the *Protection of the Environment Operations Act* 1997 applied to the land. In December 2006, RailCorp sought a variation of the licence to increase the production of hard rock gravel quarrying. In April 2007, an amended licence was issued by the EPA which permitted extraction of between 500,000 tpa and 2 million tpa from the land.

In 2009, RailCorp announced that the quarry was no longer needed for railway operations and sold its interests in 2012 to the first appellant.

On 31 March 2015, the Council commenced proceedings against the first and second appellants and the Environmental Protection Authority (EPA) seeking:

1. declarations and orders to restrain the first and second appellants from carrying out alleged breaches of the *Environmental Planning and Assessment Act* 1979 (**EP&A Act**); and

2. a declaration that the decision of the EPA to vary the EPL was invalid and of no effect.

Eleven key issues were identified by the Primary Judge in the proceedings which included – the documentation to be considered when construing a consent, existing use rights, whether the grant of consent was valid and conditional, whether certain consent conditions had been breached, the validity of the variation to the EPL and discretion.

The Primary Judge found in the Council's favour and make a number of declarations and orders. Orders restraining the unlawful conduct were stayed for a period of three months. The first and second appellants commenced proceedings in the NSWCA. The EPA filed a submitting appearance at first instance and on appeal.

Findings

The analysis below is limited to the parties' dispute as to the interpretation of the 1991 consent, which included whether the approval was for the particular product of railway ballast and whether the quarry area was restricted to an area as shown on a plan contained in the EIS and submitted with the development application.

In summary, the NSWCA held that:

- the primary source of information for both applicants and the public in relation to a development consent will be the material contained on the register of consents which is required to be publicly available under the EP&A Act. Such material (which includes the development application and consent) is required to be included on the register for the purposes of understanding the scope and operation of the consent;

- it is not necessary to find ambiguity or uncertainty in the terms of a development consent before having reference to the development application;

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- it should generally be permissible to have regard to the development application for the purpose of determining the scope and nature of proposed development;

- it was permissible in this case to look at the summary of the proposed development in the EIS (irrespective of whether the EIS was found on the public register), to the extent that it provides a full description of the proposed development;

- the development application in this case sought consent to quarry in a specifically designated area within the larger development site. Therefore consent could not be granted to quarry the entirety of the site as this would not be a grant of consent to the application;

- the nature of development was a quarry for the purpose of winning material primarily for railway ballast; and

- the first and second appellants had breached the 1991 consent, as excavation was not being undertaken for the primary purpose of railway ballast and was also being undertaken outside of the approved area; and

- that as a result of these breaches being established, orders should be made to enforce compliance with the 1991 consent.

The NSWCA granted a stay for a period of 3 months (subject to a number of conditions), or until:

- the determination of the State significant development application lodged by the first and second appellants, which seeks to regularise the extraction and processing activities being undertaken on the land; and

- the grant of any further licence,

whichever is the earlier.

Implications

In making the findings summarised above, the NSWCA has distinguished older case law that purported to only allow use of documents that were incorporated either expressly or by necessary implication into a development consent when interpreting the meaning of the consent (including any conditions approved). The NSWCA has clarified that because development consent can only result from a development application, material comprising the application can also be used when interpreting what development has been approved.

For further information regarding this update, please contact Tom Ward or Mark Cottom.

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CASE NOTE ON RECENT PVL MATTER

***Noubia Pty Ltd v Coffs Harbour City Council* [2019] NSWLEC 113**

Introduction

In 2007, 2008 and 2012 property developers Noubia Pty Ltd (**Noubia**) transferred three lots of land to Coffs Harbour City Council (**Council**) pursuant to a modified condition of their development consent for a subdivision. Following a denial by the Council to pay any compensation under that condition, Noubia commenced proceedings against the Council in Class 4 of the Land and Environment Court and also in the Equity Division of the Supreme Court.

Background

On 20 September 2002, Noubia lodged development application DA 575/03 with Council. The DA sought development consent for the staged subdivision of land to create 160 residential lots, community centre lot, land for public reserves and one future development lot. The DA was approved by the Council on 11 April 2003, subject to conditions, most significantly that the developer would enter into a deed of agreement with the Council prior to the release of the linen plan of subdivision.

Noubia and the Council were unable to agree on terms of a deed and therefore on 6 July 2006 Noubia lodged with the Council a modification application seeking to modify the terms of the original Condition 1. The approved modification instead required a deed of agreement, and the Council to compensate the applicant for the lands, the value to be determined at the date of transfer in accordance with s54(1) of the *Land Acquisition (Just Terms Compensation) Act* 1991.

Dispute and the proceedings

The three lots were transferred from Noubia to the Council on the following dates:

i. Lot 94 transferred 18 May 2007;
ii. Lot 96 transferred 31 July 2008; and
iii. Lot 163 transferred 1 February 2012.

Noubia had been in dispute with the Council since the completion of the dedication of Lot 163 in respect of the amount of the compensation payable by the Council to Noubia in respect of each lot.

Despite the Council's denial to pay any compensation in respect of the three lots, on the morning of the first day of hearing a joint note on amended declaratory relief was tendered and the Court was asked to determine the value of two of the lots of the land (94 and 163) and further determine whether the Council had liability to pay compensation for the third lot (96).

At hearing the applicant Noubia's case was based on the argument that, absent the public purpose, Lots 94 and 163 could have been developed for residential purposes. The applicant maintained that the "five lakes system" Noubia built as part of the subdivision existed to fulfil the public purpose, namely, water quality management and stormwater and flooding control. Absent the public purpose the highest and best use of the land was

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land capable of residential development and therefore the value of the land was that of a residential value. The applicant's consultant engineer, Mr Peter Jamieson created a hypothetical alternate trunk channel development to show what Noubia could have done, absent the public purpose.

The respondent Council maintained throughout the proceedings that the subject land (94 and 163) was constrained, and therefore, not developable. The respondent contended that even in the applicant's hypothetical the land is not developable because the lakes would still be so located because of the natural characteristic of the land, the developer would still make choices related to cost and convenience and policies of the Council at the time favoured lakes not channelisation. The respondent therefore submitted that the monetary value of the land was much lower than claimed by the applicant.

In regards to Lot 96 the applicant maintained it was transferred to the Council for the purposes of a public reserve and was made into a neighbourhood park. The Council denied that it had required this land to be dedicated to it, and sought to argue that the land was additional land to be dedicated at no cost to Council pursuant to item 3 of the modified consent.

The difference of the applicant and respondent's valuers are as follows:

Lot	Applicant	Respondent
Lot 94	$3,256,000	$110,000
Lot 96	$265,000	Nil
Lot 163	$560,000	$110,600
TOTAL	**$4,081,000**	**$220,600**

The Court declared that on the proper construction of Condition 1 of the development consent, the land referred to in the original and modified consent included all three lots, and the value of those lands as at the date of transfer or dedication in accordance with section 54(1) of the *Land Acquisition (Just Terms Compensation) Act* 1991 were the values claimed by the applicant in the table above.

The respondent was ordered to pay interest and costs of both proceedings. In essentially upholding the applicant's case, Justice Sheahan (since retired) of the Land and Environment Court accepted that the applicant's hypothetical subdivision development scenario which formed the basis of its "highest and best" valuation case was "both feasible and achievable". Accordingly, the significantly higher market value claimed by the applicant was adopted by the Court.

For further information regarding this update, please contact Mikaela Mahony or David Baxter.

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COURT CLARIFIES MEANING OF "WASTE" AND "WASTE FACILITY" UNDER POEO ACT

Recently the NSW Court of Criminal Appeal (**NSWCCA**) has unanimously provided further clarification on the meaning of "waste facility" for the purposes of the *Protection of the Environment Operations Act 1997* (**POEO Act**). In doing so, the Court has remitted numerous issues to the Land and Environment Court (**NSWLEC**) for redetermination of a complex prosecution for using land as a waste facility without lawful authority.

Background

Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie [2019] NSWCCA 174 involved the NSWCCA determining 15 questions that had been put to it for determination by Justice Pain (Pain J) of the NSWLEC. The stated case had been submitted to the NSWCCA by Pain J at the request of the prosecutor (EPA), following her findings that the defendants in a prosecution for using land as a waste facility without lawful authority (being an offence against section 144(1) of the POEO Act) were not guilty.

Rather than making final orders acquitting the defendants, the stated case allowed the NSWCCA to determine the contested questions before the criminal proceedings were finalised in the NSWLEC. One category of questions determined by the NSWCCA involved whether the request by the EPA for the stating of the case to the NSWCCA was lawful in the circumstances, however that matter is not the subject of this article (except to say that the NSWCCA upheld the EPA's case on those questions).

The categories of questions that are of interest for the purposes of this article concerned whether (put broadly for our purposes):

- stockpiles of material (**the Material**) received at a sand quarry (**the Premises**) from recycling facilities, which included some elements of asbestos, were "waste" within the meaning of the POEO Act (despite only being stockpiled temporarily, pending use of the Material as roadbase); and

- the Premises fell within the definition of "waste facility" in the POEO Act as a result (in this case, "*any premises used for the storage … or disposal of waste (except as provided by the regulations)*").

While other categories of questions were also determined by the NSWCCA in its lengthy judgment, the answers largely flowed from the Court's determination of the above two issues. In relation to all categories of questions, the NSWCCA found in favour of the EPA and remitted the matter to the NSWLEC for further determination.

Recycled "waste"

The EPA had charged the defendants on the basis that they had allegedly stored and/or disposed on the Premises "*material comprising, amongst other things, mixed construction and demolition waste and asbestos*" in the form of three stockpiles. The Material was said to be "waste" as defined in the Dictionary to the POEO Act, which provides as follows:

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waste *includes:*

(a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or

(b) any discarded, rejected, unwanted, surplus or abandoned substance, or

(c) any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or

(d) any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations, or

(e) any substance prescribed by the regulations to be waste.

A substance is not precluded from being waste for the purposes of this Act merely because it is or may be processed, recycled, re-used or recovered.

The defendants however contended that because the Material was recycled waste and it:

- was not "applied to land" (so the defendants claimed) due to it being in stockpiles for the purposes of the offence as charged; and

- did not fall within the circumstances prescribed by clause 3B of the *Protection of the Environment Operations (Waste) Regulation 2005* (**Waste Regulation**),

the Material was not "waste" for the purposes of the POEO Act. At first instance, the NSWLEC had accepted these arguments and found them to be two of the bases on which the defendants were not guilty of the offence charged under section 144(1) of the POEO Act.

The NSWCCA overturned the first instance decision in this respect. In summary, the Court found that "[t]*he paragraphs of the definition of waste are not mutually exclusive and in particular a substance that is processed, recycled, re-used or recovered can be waste not only by meeting the criteria in paragraph (d) but also because it meets the criteria in any one or more of the other paragraphs of the definition of waste*". Whilst not strictly necessary in light of that finding (because the EPA did not need to limit itself to the circumstances prescribed by the Waste Regulation as a result), the Court also found that the depositing of the Material into the stockpiles was sufficient to constitute the Material being "applied to" the Premises in any event.

Stockpiling of waste as "storage … or disposal of waste" for purposes of "waste facility" definition

Given that the Material was "waste" for the purposes of the POEO Act, the next category of questions concerned whether the stockpiling of the Material gave rise to the Premises being "*used for the storage … or disposal of waste (except as provided by the regulations)*". If the answer was yes, then the Premises were used as a "waste facility" and the onus would then fall onto the defendants to prove under section 144(2) of the POEO Act that they had lawful authority to so use the Premises.

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In summary, the NSWCCA held that the temporary storage of waste in stockpiles pending the transfer of the waste for another purpose was sufficient to amount to "storage … of waste" for the purposes of the statutory definition of "waste facility". Further, the extent to which asbestos was contained within the Material as a whole was found to be of no consequence to the matter.

Conclusion

The decision of the NSWCCA demonstrates that the circumstances in which "waste offences" can arise under Division 3 of Part 5.6 of the POEO Act are quite broad. In particular, offences of unlawful waste transportation under section 143 of the POEO Act and unlawful use of a place as a waste facility under section 144 of the POEO Act can arise in a broad range of circumstances. Transportation and use of substances that were considered surplus at the originating facility, even on a temporary basis at the receiving premises, might be considered an offence under the POEO Act.

For further information regarding this update, please contact Mark Cottom.

"SUBSTANTIALLY THE SAME" REQUIREMENT EXPLAINED BY LAND AND ENVIRONMENT COURT

***Arrage v Inner West Council* [2019] NSWLEC 85**

Decision of Justice Preston dated 7 June 2019

In 2016 the Land and Environment Court granted development consent for a shop top housing development pursuant to Section 34 (3)(a) of the Land and Environment Court Act, following a Section 34 Conciliation Conference and agreement reached between the parties.

The applicant in the present matter sought a modification to that development consent, which modification application was refused at first instance by the Court on the basis that the modified development would not be substantially the same development as that which was originally approved.

These proceedings were an appeal pursuant to Section 56A of the Land and Environment Court Act against the Commissioner's decision.

The principal argument of the applicant was that the Commissioner at first instance had erred in law in that the Commissioner had failed to identify, and indeed could not identify, an essential element of the development as originally approved and in the absence of such an essential element the Commissioner could not have found that the development resulting from the modification application would not be substantially the same as that which was originally approved.

The applicant relied on a frequently cited passage from *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298, calling for a qualitative and quantitative assessment of the developments being compared in their proper context, including the circumstances in which the consent was granted and having regard to the material and essential features of the approved development.

The applicant argued that in the absence of a detailed decision of the Court, a Council Officer's report or any record of evidence as to the reasons why an agreement was

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reached or any conditions of consent requiring amendment to the built form, no essential element could be identified.

In the absence of an essential element, the Court could not find that the proposed development would not be substantially the same as that which was originally approved (so the applicant argued).

His Honour Justice Preston rejected the applicant's arguments in their entirety.

Firstly, his Honour held that the test to be applied was not that applied in *Moto Projects*, but rather the statutory provision of Section 4.55(2)(a) of the Act: is the modified development "substantially the same development" as that originally approved?

The decision in *Moto Projects* could not substitute a different or additional test for the test imposed by the statutory provision. As such the Commissioner was not bound to apply the *Moto* test.

His Honour went on to reject the argument that no essential element of the development consent was readily identifiable from the circumstances of the grant of the consent as "unappealing sophistry".

His Honour found the circumstances around the making of the Section 34 Agreement in the original proceedings entirely uninformative as to the essential elements question. His Honour held:

> *… the essential elements to be identified are not of the development consent itself, but of the development that is the subject of that development consent …* [and] *… the essential elements are not to be identified "from the circumstances of the grant of the development consent"; they are to be derived from the originally approved and the modified developments. It is the features or components of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development.*

His Honour also held that the approach advocated by the applicant would have had the effect of reversing the onus of proof with respect to whether Section 4.55(2) of the Act was satisfied. Section 4.55(2) requires the consent authority to form a positive opinion of satisfaction that the modified development is substantially the same and it is for the applicant to persuade the Commissioner to form that opinion of satisfaction.

Arguing that there were insufficient indicators (as a result of the section 34 process) to prevent the Commissioner from forming the necessary state of satisfaction assumes that the development is substantially the same unless the contrary is proved by the respondent Council. That is not the test in Section 4.55.

Finally, the Court held that the Commissioner in any event had undertaken a detailed assessment of the qualitative and quantitative changes between the originally approved development and the modified development and had made a determination as to what were the material or essential features and in so doing had made a determination as to the material or essential features of the two developments.
Accordingly, the Court refused the appeal against the Commissioner's decision.

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The decision of the Court acts as a caution against slavishly applying judicial constructions of legislative provisions and draws attention back to the words of the provision itself. The question of whether proposed modifications to a development consent will result in development that is substantially the same as the originally approved development is one which may be answered in a variety of ways and although past decisions of the Court may give some guidance as to appropriate approaches, those approaches are not strictly binding on current decision makers.

For further information regarding this update, please contact Joshua Palmer.

A BIT MORE ON CL. 4.6

In our July 2019 and September 2018 legal updates we provided some case notes in relation to decisions which have added to the ever growing body jurisprudence on cl. 4.6. Recently, Pikes & Verekers Lawyers were successfully involved in a case where the Court upheld a cl. 4.6 variation for a relatively substantial exceedance of the height of buildings development standard.

***Hansimikali v Bayside Council* [2019] NSWLEC 1353**

The matter related to a development application for a five-storey mixed use development on Botany Road, Mascot. The site had a 14m height limit and a floor space ratio standard of 2:1. The proposal had a floor space ratio of 1.91:1 but the majority of the fifth storey was over the 14m height standard.

The cl. 4.6 request sought to justify the exceedance of the height standard on the basis that the proposal complied with the FSR development standard and the building envelope effectively redistributed a small portion of GFA to the fifth level in order to increase the rear setback of the proposal due to the site having an interface with the R2 Low Density Zone at the rear.

That redistribution was carefully positioned so that the resulting building envelope minimised the overshadowing of two residential properties at the rear. The Court accepted the justification set out in the cl. 4.6 request and upheld the development appeal.

Council submitted that the interface between the subject B2 Zone and the R2 Low Density Residential Zone at the rear was not unique to the site and therefore could not be relied upon as an environmental planning ground.

The Commissioner held that there is nothing in cl. 4.6 (3)(b) of the LEP that requires the environmental planning grounds relied upon by an applicant to be unique to the site.

For further information regarding this update, please contact Alistair Knox.

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