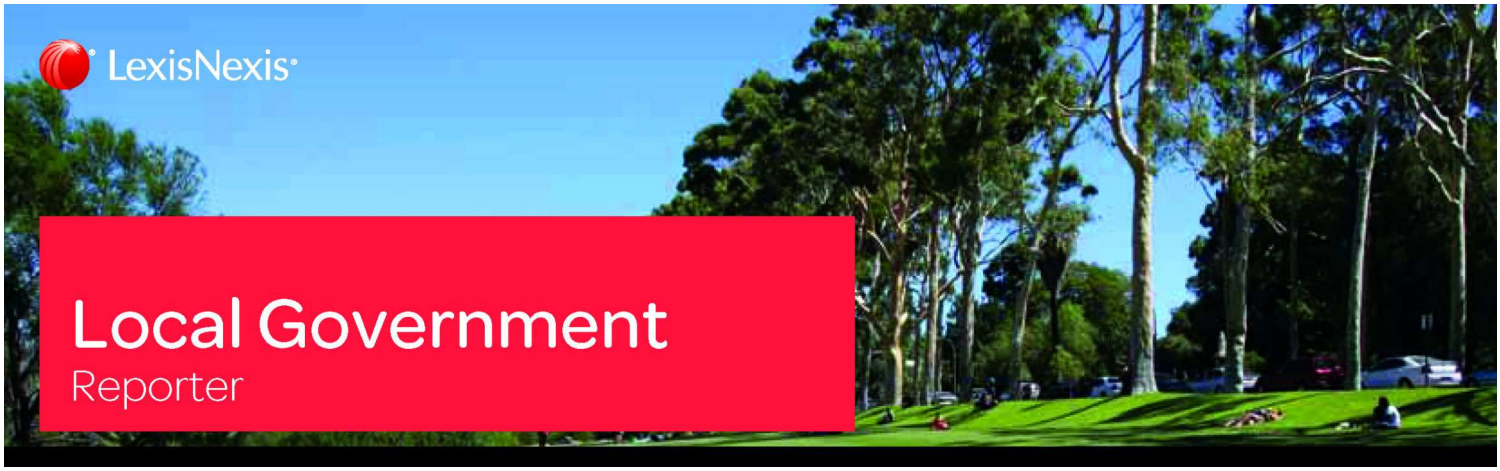

Local Government Reporter

2013 . Vol 11 No 3

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Section 39(2) of the Land and Environment Court Act not broad enough for 20 km of wiring: The Northern Eruv Incorporated v Ku-ring-gai Council

James Fan *PIKES & VEREKERS LAWYERS*

A recent decision by a Land and Environment Court judge has analysed the scope of the court's functions and discretion in disposing of a merits appeal pursuant to s 39(2) of the Land and Environment Court Act 1979 (the Court Act).

The power under s 39(2) of the Court Act is frequently used in circumstances where the concurrence of another authority or exercise of statutory power is required, most contentiously in areas such as integrated development but also frequently in areas to which no issues are raised (such as approvals to create access under the Roads Act 1993).

The court's power under s 39(2) has been the subject of various proceedings, including decisions of the Court of Appeal, with none strictly confirming a limit. Thus it had been assumed that this power was sufficiently broad to deal with most if not all matters under for the court's consideration.

In the decision of Craig J in *Northern Eruv Inc v Ku-ring-gai Council*,[1] his Honour confirmed during the review of a commissioner's decision,[2] that the power under s 39(2) was not so broad so as to cover aspects where there was a tenuous connection or insufficient nexus between the development and the power sought to be exercised.

This article will discuss the court's reasoning, but also the implication of the court's reasoning on merits appeals seeking to rely upon the court's power under s 39(2).

Background

The applicant sought to construct an Eruv around a substantial area of St Ives, in the northern suburbs of Sydney. This Eruv would provide a symbolic area in which observers of the Orthodox Jewish faith are permitted to carry out activities during the Sabbath and other religious observances.

To give effect to this, the applicant sought consent from Ku-ring-gai Council (the Council) under the Environmental Planning and Assessment Act 1979 (the EPA Act) to erect poles on 11 separate residential premises in disparate locations around the proposed Eruv.

Approval was also sought from the Council under the Roads Act (as the Council was the relevant road authority under that Act) for the connection of the poles proposed under the 11 development applications with non-live wiring to street poles within public road reserves to which the subject properties fronted. Further approval was sought under the Roads Act for the connection of wiring on various poles located along a 20 km route around the suburb of St Ives.

The Roads Act applications were made pursuant to s 138 of that Act, which provides:

(1) A person must not:
  (a) erect a structure or carry out a work in, on or over a public road, or
  (b) dig up or disturb the surface of a public road, or
  (c) remove or interfere with a structure, work or tree on a public road, or
  (d) pump water into a public road from any land adjoining the road, or
  (e) connect a road (whether public or private) to a classified road,

  otherwise than with the consent of the appropriate roads authority.

The effect of the applications was to construct an Eruv, the perimeter of which would consist of 20 km of wiring forming an unbroken line.

The Council refused all of the applications and appeals were lodged with the Land and Environment Court pursuant to s 97 of the EPA Act in respect of the determinations seeking development consent. No right of appeal existed in respect of the applications pursuant to the Roads Act.

The commissioner's decision

Commissioner Morris found at first instance that the appeals relating to the development applications should be upheld as the poles and wiring on the individual lots was permissible (as it was found that the poles and wiring were ancillary to the use of the dwellings),[3] and that the development was acceptable on its merits — as it would not have any adverse amenity impacts such as those relating to streetscape.[4]

In turning to the component of the applications under the Roads Act, the commissioner noted that any power to exercise in respect of those matters rested on the court's jurisdiction under s 39(2) of the Court Act.[5] Section 39(2) states:

> (2) In addition to any other functions and discretions that the court has apart from this subsection, the court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

In noting that the various appeals were comprised of individual applications for consent to construct poles on residential premises on disparate locations, the commissioner found that the subject of the appeals consisted only of the erection of poles and wires on those individual properties.[6]

The commissioner then turned attention to whether the various Roads Act components had a sufficient nexus to the subject of the appeals. It was found that the connection of the poles and wiring from the individual lots to the adjacent street poles were "integrally connected" and "inextricably intertwined" to the individual development applications.[7] Accordingly, the commissioner exercised her powers under s 39(2) of the Court Act to grant approval to connect the individual lots to the adjacent street poles with wiring.[8]

In dealing with the remainder of the Roads Act approvals sought for wiring purely along public roads, the commissioner found that the court's power to determine the subject matter of the appeal was not so broad to extend to the carrying out of works along a 20 km route around a suburb — that work having no nexus to the construction of poles and wiring on individual lots.[9] In finding that no nexus existed to that aspect, the commissioner found there was no power under the Court Act to grant approval to the vast bulk of the wiring.[10]

In granting consent to the various development applications under the EPA Act but not granting approval to the vast bulk of the wiring under the Roads Act, the commissioner effectively refused consent to construct the 20 km Eruv.

Section 39(2) considered on review

In reviewing the commissioner's decision pursuant to s 56A of the Court Act, Craig J noted that the judicial treatment of the court's power under s 39(2) was varied. This treatment was considered in detail by Biscoe J in the decision of *Goldberg v Waverley Council*[11] and Craig J adopted the same summary.

In analysing the authorities, his Honour found that, in order to engage the power under s 39(2) of the Court Act, "the 'nexus' must involve an exercise of power that is legally indispensible to the exercise of power to determine the subject matter of an appeal".[12] The phrase "indispensible" was noted by the court as being synonymous for phrases taken from the authorities such as "an incident of power to grant consent", "a necessary precondition to the grant of consent", or "inextricably bound up" with the function to grant consent.[13]

The court then found that the commissioner was not in error in determining the power under s 39(2), either in respect of the connection of wires from the individual properties to the adjacent street poles, or in respect of the refusal to approve the connection of various street poles along the 20 km route.

His Honour found that the commissioner had correctly identified the subject matter of the development application appealed as being only to erect poles and wiring. Therefore, the lack of contiguity to the various properties subject of the appeals, and the lineal extent of works, were matters to be considered in finding the nexus did not exist.[14]

It was found that the Roads Act approval sought to connect the vast 20 km route was not integral or inextricably linked to the individual consents sought under the EPA Act. Rather, his Honour found that it was apparent from the applicant's development documentation that the works within the road reserves along the 20 km route was the primary power sought to be exercised. [15]

It appears from the court's reasoning that, while the individual appeals sought consent for the erection of poles and wiring (which was ancillary to each dwelling), the overall creation of an Eruv was not incidental to the use of the use of the dwelling house. Therefore, the function of the court on appeal to consent to the general Eruv works was not authorised by s 39(2).[16]

Conclusion

The effect of the court's finding was that, the Council's decision to refuse consent under the EPA Act and the Roads Act meant that the proposal to construct the Eruv ended there, as there was no right of appeal under the Roads Act.

In circumstances where an applicant for development consent is making application to a consent authority

together with an application for another exercise of statutory power, they must carefully consider their application and what means are available to challenge any adverse determination.

The court has stated that s 39(2) limits, and cannot extend to covering all aspects of an overall activity, if those aspects are not integral or sufficiently connected to the matter that is the subject of the appeal.

It may have been previously assumed that court would exercise this power under s 39(2) if that matter was appropriate on its merits. The decision of Craig J should alert applicants to the need to seriously consider the ambit of an appeal and what powers of the court are sought to be exercised, not merely the merits of the overall development.

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Footnotes

1. *Northern Eruv Inc v Ku-ring-gai Council* [2012] NSWLEC 249; BC201209451.
2. *Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058; BC201202188.
3. Above, n 2 at [28] and [53].
4. Above, n 2 at [54].
5. Above, n 2 at [61]–[64].
6. Above, n 2 at [65].
7. Above, n 2 at [66] and [68].
8. Above, n 2 at [67] and [68].
9. Above, n 2 at [71].
10. Above, n 2 at [73].
11. *Goldberg v Waverley Council* (2007) 156 LGERA 27; [2007] NSWLEC 259; BC200704246.
12. Above, n 1 at [53].
13. Above, n 1 at [53].
14. Above, n 1 at [59].
15. Above, n 1 at [61].
16. Above, n 1 at [62].

Validity of "stakeholder engagement" conditions of planning approval

Craig Slarke *MCLEODS*

It is well established that a condition of planning approval will not be valid unless it is, among other things, imposed for a legitimate planning purpose and not for any ulterior purpose.[1] What constitutes a legitimate planning purpose is to be ascertained from a consideration of the applicable legislation and town planning instruments to which the responsible authority is subject, and not to some preconceived general notion of what constitutes planning.[2]

The Supreme Court of Western Australia has observed that "the scope for town planning schemes is as wide and diverse as the ingenuity of planners is able to contemplate",[3] and that the parliament intended to afford "the widest possible scope in formulating the ways and means whereby the policy of the [Town Planning and Development Act 1928 (WA)] is to be put into execution".[4]

Although the Supreme Court's observations were made in the context of the former Town Planning and Development Act 1928 (WA), the "wide grant of authority"[5] in s 6 of the former Act to make a planning scheme is very similar to the broad prescription contained in s 69 of the Planning and Development Act 2005 (WA) for the making of a local planning scheme. Among other things, the Planning and Development Act 2005 (WA) contemplates that a concept as amorphous as "the public interest" is a relevant planning consideration.[6]

These comments are by way of introduction to a recent decision of the State Administrative Tribunal (WA), which serves to reinforce the potentially broad sweep of planning and conditions of planning approval.

Validity of "stakeholder engagement" conditions

In *Hanson Construction Materials Pty Ltd v Shire of Serpentine-Jarrahdale*,[7] the Tribunal was called upon to consider as a preliminary issue whether certain conditions applied by the Shire to the grant of planning approval for an extractive industry could be lawfully imposed. The conditions challenged were with respect to "stakeholder engagement", mine closure planning and a contribution to public art. The Tribunal (comprised by His Honour Judge Parry, Deputy President) concluded that the proposed conditions could be lawfully imposed. For the purpose of this article, I will focus on the conditions concerning "stakeholder engagement".

The "stakeholder engagement" conditions in dispute were:

12. The landowner is to submit to the Shire within 12 months of this approval a plan for a Community Consultation Framework. The plan shall feature, but not be limited to, the relevant land owner, community and government agency representatives, terms of reference for the committee and the frequency of the meetings.
    Once approved the plan is to be implemented in its entirety.
13. A Compliance Assessment Report for the approved Community Consultation Framework must be lodged with the local government by 31 March each year following the approval of the Community Consultation Framework. The Compliance Assessment Report shall report in summary on:
    (i) The community engagement activities carried out during the preceding year;
    (ii) The stakeholder interaction carried out during the year, including the number and nature of any complaints made and the response to those complaints; and
    (iii) The meetings of the Community Consultation Group.

    Any records kept by the operator pursuant to the Community Consultation Framework including the minutes of the Community Consultation Group meetings, must be provided to the local government if requested in writing. The annual Compliance Assessment Report and records kept pursuant to the Community Consultation Framework are to be made publicly available.

The Shire submitted that the Community Consultation Group contemplated by the conditions would have a role in, among other things:

- providing feedback (to and from the developer) about any planning issues (in the broad sense to include environmental and social issues) the development gives rise to over time;

- promoting strategies or changes to management plans or operational practices in order to ensure the amenity of the locality is not adversely affected as the development is carried out;
- providing a forum for compliance assessment reporting by the developer; and
- planning for the next stage of the extractive industry, including mine closure planning.

The Shire further submitted that the stakeholder engagement conditions challenged had a direct link to the "bedrock" planning notions of the preservation of amenity and orderly and proper planning. The applicant for its part contended that the conditions could not be lawfully imposed because they did not serve a proper planning purpose and/or were manifestly unreasonable.

Validity of conditions upheld by Tribunal

His Honour did not agree with the applicant's contention. In giving his reasons, he referred to the respondent's submission that extractive industries generate, or have the potential to generate a range of emissions or external effects which are often controversial or unpopular with nearby residents and ratepayers, and concluded that the purpose of the Community Consultation Framework and Community Consultation Group (CCG) contemplated by the conditions was to preserve the amenity of the locality and promote orderly and proper planning by providing a forum for discussion between the applicant, relevant authorities and the surrounding community, about the operation of the approved development and mitigation of its environmental and amenity impacts. The CCG's role in ongoing stakeholder engagement was considered to be consistent with the purposes of the Planning and Development Act 2005 (WA) to "provide for an efficient and effective land use planning system in the state" and "to promote the sustainable use and development of land in the state",[8] as well as the objective of the local planning scheme of securing the amenity, health, safety and convenience of the inhabitants of the district.

The applicant also attacked the proposed role of the CCG in other ways. It was argued that the promotion of strategies or changes to management plans or practices was an ulterior purpose amounting to an unauthorised interference with the management plans that the applicant is required to prepare and submit to the state environment minister in compliance with its obligations in a separate approval granted pursuant to the Environmental Protection Act 1986 (WA). That argument was negated by a determination that the CCG was not authorised to interfere with the developer's compliance under other legislation, and that management plans and operational practices are likely to be material in ensuring that the approved development is carried out in an acceptable manner in terms of environmental and amenity impacts, which is a core planning purpose.

The Tribunal accepted it to be a legitimate role of the CCG to provide a forum for compliance assessment reporting by the developer and to discuss planning for the next stage of the extractive industry, including mine closure planning.

Conclusion

In Western Australia, "stakeholder engagement" conditions are new and still somewhat novel, but the Tribunal was able to accommodate them by the application of orthodox planning law principles.[9] The Tribunal's decision allows for the possibility that, in appropriate cases (most likely where a development is a long-term one, with the potential to produce effects or emissions beyond the site boundaries) a local government may impose innovative conditions which formalise an ongoing role for the community in aspects of the development in which the community has a legitimate interest.

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Footnotes

1. *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731; [1980] 2 WLR 379; (1980) 40 P & Cr 148.
2. *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 at 500; 20 LGRA 208; [1971] ALR 201; BC7000570 per Walsh J; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; 137 LGERA 232; [2004] HCA 63; BC200408399 at [56] per McHugh J and [93] per Gummow, Hayne JJ.
3. *Costa v Shire of Swan* [1983] WAR 22 at 24; (1982) 52 LGRA 145 per Olney J.
4. *Costa v Shire of Swan*, above n 3.
5. See, *Pearse v City of South Perth* [1968] WAR 130 at 134; (1967) 16 LGRA 71 per D'Arcy J.
6. Planning and Development Act 2005 (WA), Sch 7 cl 9.
7. *Hanson Construction Materials Pty Ltd v Shire of Serpentine-Jarrahdale* [2012] WASAT 140.
8. Planning and Development Act 2005 (WA), s 3(1)(b) and (c).
9. The SAT's decision revolved around the well known "Newbury" tests for the validity of planning conditions: see n 1.

The final piece of the puzzle?

Richard Brockett *and* ***David Morgans*** *ASHURST*

The onshore coal seam gas and liquefied natural gas (CSG-LNG) industry in Queensland has expanded exponentially in the last 5–10 years. Exploration and production tenements for three of the proposed coal seam gas (CSG) projects cover almost 1.5% of the area of Queensland. Currently, there are approximately 3200 CSG wells in Queensland with the total number of wells required to support all of the CSG projects being estimated to be 40,000. Many of these wells are, or will be, located within or in close proximity to Queensland's prime agricultural land and major regional communities. Importantly, the current Liberal National Party (LNP) government's economic development policy highlights the importance of the resources industry and agriculture as two of its four pillars.

As a consequence, the ability, or willingness, of the CSG and agricultural industries to coexist has become one of the key political and economic issues facing Queensland. The government has, up until now, primarily attempted to address these coexistence issues through developing and amending the applicable regulatory frameworks.

However, as recognised in *The Draft National Harmonised Regulatory Framework for Coal Seam Gas* (prepared by the Standing Council on Energy and Resources), the sustainable development of the CSG industry is dependent on governments, industry and communities working together to deliver the best possible balance of social, environmental and economic outcomes.[1]

Arguably, while industry has taken extensive steps to attempt to address this in developing its individual relationships with affected landholders and communities, there has been no overarching, impartial entity responsible or able to facilitate greater alignment and sustainability. Furthermore, this key element has not yet been adequately dealt with in the extensive legislative amendments that have been made in response to the rise of the CSG industry.

Commencement

The LNP government, following extensive community agitation and consultation with affected stakeholders, announced the establishment of the Queensland GasFields Commission (the Commission) in July 2012.

The primary objective of the Commission is to manage and improve the co-existence and sustainability between regional communities, rural landowners and the onshore gas industry.[2]

There are currently seven commissioners with Mr John Cotter, former AgForce president, acting as the chairperson. The remaining commissioners have been selected from various backgrounds including community leaders from the affected regions, and landholder and resource industry representatives. This broad array of backgrounds will facilitate the Commission in achieving its objectives by being able to draw upon and utilise the views of all affected stakeholder groups.

Formalisation

The Commission is to be formalised as a statutory body pursuant to the Gasfields Commission Bill 2012 (the Bill) which was introduced into the Queensland Parliament on 27 November 2012. The Bill has been referred to the State Development, Infrastructure and Industry Committee (the Committee) for consideration.[3] The Committee's report on the Bill is to be provided by 27 March 2013.

What the Commission "can do"

The Bill ascribes twelve functions to the Commission. Relevantly these include:

- facilitating better relationships between landholders, regional communities and the CSG industry;
- making recommendations to the Minister that regulatory frameworks and legislation relating to the CSG industry be reviewed or amended;
- obtaining information from government entities, landholders and CSG operators; and
- making recommendations to the Minister and the CSG industry about leading practice or management relating to the CSG industry.

The Bill also furnishes the Commission with the powers necessary to perform its functions. These powers include:

- the requirement for compulsory consultation between the Commission and government entities that are developing policy or legislation intended to affect the CSG industry; and

- the power to require landholders and CSG operators (and the companies they engage) to provide information in their possession that the Commission reasonably requires for the effective and efficient carrying out of its functions.

At face value, these powers seem to give the Commission "the teeth it needs to get the job done".[4] However, further consideration of the terms of the Bill highlight that these "powers" are significantly watered down by exceptions and exclusions. For example, the "compulsory consultation" requirement is only "directory" and "does not create rights or impose legally enforceable obligations on the state, government entities or anyone else". Furthermore, the failure to comply with the consultation requirement does not affect the validity of any decision made by a government entity.[5]

Similarly, while on the face of it, the Commission's power to requisition information from stakeholders appears far reaching, there are numerous exceptions pursuant to which both industry and government entities may be excused from complying with a request from the Commission, including:

- that disclosure of the information requested would breach confidentiality restrictions;
- that compliance with the information request would be detrimental to the commercial position of the entity; or
- that such a disclosure would result in a breach of any law.[6]

Finally, despite one of the Commission's functions being to convene meetings between landholders, regional communities and the industry for the purpose of resolving issues it has no power to intervene or arbitrate in disputes between CSG proponents and landholders. Similarly, it has no specific enforcement or regulatory function as such.

The scope of these restrictions and exceptions may be amended following public consultation and review by the Committee. However, the authors consider that it is unlikely that they will be substantially amended.

What does it mean for local governments?

While local governments are not primarily responsible for the overall regulation of the CSG industry, they are impacted in many ways by the expansion of the CSG industry within their shires, for example, in working together to develop and sustain the necessary infrastructure to support the industry and the growing regional communities. However, despite this central role, the Bill is not directly applicable to local governments in their role as governing authorities (they may be subject to the Commission's powers to the extent that they are landholders).[7]

As a consequence, even though the Commission is not empowered or required to consult with them, local governments will undoubtedly still consider it imperative to be involved in any policy discussion and regulatory development in respect of the CSG industry. The extent to which local governments will be able to be actively heard by the Commission will, by and large, be subject to the approach of the Commission itself. It is worth noting, however, that one of the current Commissioners is Councillor Ray Brown, Mayor of Western Downs Regional Council, so local governments should have a sympathetic ear within the Commission.

What then will be the role for the Commission?

The Draft National Harmonised Regulatory Framework for Coal Seam Gas considers that the success of any regulatory framework for the CSG industry is dependent on all stakeholders genuinely and willingly listening to and appreciating the views and concerns of all affected parties.

The authors contend that the Commission will be the central body responsible for facilitating such transparent and extensive community discussion. In addition, it will be able to contribute to that discussion through the collection and dissemination of accurate, independent information and scientific data regarding the impact of CSG on issues such as water. Finally, if only for political or social licence to operate reasons, its recommendations will be listened to by the state government and the CSG industry.

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Footnotes

1. SCER, The *Draft National Harmonised Regulatory Framework for Coal Seam Gas*, Standing Council on Energy and Resources, Canberra, 2012, available at www.scer.govspace.gov.au.

2. See the "Our Role" section of the GasFields Commission Queensland website, available at http://www.gasfieldscommissionqld.org.au/about-gasfields-commission/our-role.html.
3. See "Work of Committees" available at http://www.parliament.qld.gov.au/work-of-committees/committees/SDIIC/inquiries/current-inquiries/08-GasfieldsCommission.
4. Hon J W Seeney, Deputy Premier and Minister for State Development, Infrastructure and Planning, First Reading Speech Gasfields Commission Bill. Queensland Parliamentary Hansard, 27 November 2012, pp 2754–5.
5. Gasfields Commission Bill 2012 (Qld), cl 23(2).
6. Gasfields Commission Bill 2012 (Qld), cl 24(3).
7. Refer to the definition of "government entity" in Sch 1 of the Gasfields Commission Bill 2012, which refers to the relevant definition in s 24 of the Public Service Act 2008 (Qld). Local governments are excluded from this definition.

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Costs in Class 1 Land and Environment Court proceedings in New South Wales

Mark Hamilton

In a recent issue of the *Local Government Reporter*, the residential development process in New South Wales was canvassed.[1] This article will consider the costs implications of Class 1 proceedings before the Land and Environment Court of New South Wales.

Civil Procedure Act 2005

The starting position relating to costs in Class 1 proceedings is s 98 of the Civil Procedure Act 2005 (NSW) (CPA), which provides:

> (1) Subject to rules of court and to this or any other Act:
>
> (a) costs are in the discretion of the court, and
>
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
>
> (c) the court may order that the costs are to be awarded on the ordinary basis or an indemnity basis.[2]

Land and Environment Court Rules 2007

The discretion afforded by s 98 of the CPA is subject to r 3.7 of the Land and Environment Court Rules 2007 (NSW) (LEC Rules), which provides in r 3.7(2) that:

> The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.[3]

Rule 3.7(3) describes the "[c]ircumstances in which the Court might consider the making of a costs order to be fair and reasonable", which include (without limitation):

> (a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question:
>
> (i) in one way was, or was potentially, determinative of the proceedings, and
>
> (ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,
>
> (b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents:
>
> (i) that are required by law to be provided in relation to any application the subject of the proceedings, or
>
> (ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,
>
> (c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings,
>
> (d) that a party has acted unreasonably in the conduct of the proceedings,
>
> (e) that a party has commenced or defended the proceedings for an improper purpose,
>
> (f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where:
>
> (i) the claim or defence (as appropriate) did not have reasonable prospects of success, or
>
> (ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable.

This catalogue of circumstances where it would be fair and reasonable to make a costs order overlaps with some of the examples given in the case law: see, for example, Preston CJ in *Grant v Kiama Municipal Council* [2006] NSWLEC 70; BC200600828 at [15]. Of course, those circumstances in r 3.7(3) and the case law are mere examples and not a complete catalogue.

Rule 3.7 has been described as a "presumptive rule that there will be no costs order"[4] — that is, that costs will lay where they fall or, in other words, each party pays their own costs. The presumption that there will be no order for costs "is only displaced if, in all the circumstances, it can be concluded that it is fair and reasonable to make an order in favour of any one party".[5]

Costs in Class 1 proceedings contrast sharply with those in other civil proceedings brought before the Land and Environment Court, such as declaratory and injunctive proceedings brought in Class 4 of the court's jurisdiction. Even though the discretion as to costs in s 98 of the CPA applies to Class 4 proceedings,[6] r 3.7 of the LEC Rules does not apply.[7] The court's discretion in relation to costs in Class 4 proceedings is subject to r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR),[8] which provides that "if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some

other order should be made as to the whole or any part of the costs". Rule 42.1 of the UCPR does not apply to Class 1 proceedings.[9] Justice Biscoe sets out the rationale behind the differing costs regime as follows:

> One of the purposes of the costs follow the event rule in ordinary civil litigation is to encourage the parties to settle their disputes … In contrast, a no discouragement principle underlies the no costs rule in planning appeals, that is, that persons generally should not be discouraged from exercising their rights of appeal via the prospect of an adverse costs order … This may be rationalised on the bases that a significant purpose of planning appeals is to improve the decision-making process and that those involved are not adversaries in the same sense as adversaries in conventional civil litigation. [Citations omitted.][10]

Environmental Planning and Assessment Act 1979

One provision that fetters a judge's discretion to award costs in Class 1 proceedings is s 97B of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act), which is in the following terms:

> (1) This section applies to proceedings if the Court, on an appeal by an applicant under section 97 allows the applicant to file an amended development application (other than to make a minor amendment).
> (2) In any proceedings to which this section applies, the Court must make an order for the payment by the applicant of those costs of the consent authority that are thrown away as a result of amending the development application.
> (3) The regulations may provide for circumstances in which subs (2) does not apply.
> (4) This section has effect despite the provisions of any other Act or law.

The ordering of costs is mandatory ("the Court must make an order …") upon the triggering of the provision (the filing of "an amended application (other than to make a minor amendment)"). The following are considerations relating to the concept of "minor amendment":

> (a) first, the question of what is "minor" is one of fact and degree;
> (b) second, regard must be had not to the number of amendments, but to their cumulative or overall effect in the context and location of the proposed development;
> (c) third, where a significant re-assessment of the development application is required by the proposed amendments the amendments are unlikely to be classified as minor;
> (d) fourth, merely because the amendments do not involve a change in concept does not mean that they are not minor;
> (e) fifth, merely because the amendments do not raise an entirely new issue does not mean that they are not minor;
> (f) sixth, merely because the amendments are responsive to issues raised by the council or narrow the issues in contention between the parties is not relevant to the determination of whether they are minor;
> (g) seventh, the fact that the amendments do not require re-notification is an irrelevant consideration in determining whether or not the amendments should be classified as minor; and
> (h) eighth, an absence of evidence by the consent authority that costs will be incurred or work will be undertaken by it in relation to the proposed amendments may be taken into account but is not determinative. [Citations omitted.][11]

In the recent decision of Sheahan J in *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866, his Honour clarified three aspects of the provision. The provision before his Honour was s 97B of the EP&A Act as originally enacted (the provision having been subsequently amended), which has a different focus for formulating the scope of costs payable. Under the original enactment, the costs payable by an applicant by dint of filing an amended application were "those costs of the consent authority that were incurred in respect of the assessment of, and proceedings relating to, the original development application the subject of the appeal". The costs payable under the amended provision are "those costs of the consent authority that are thrown away as a result of amending the development application".

The first aspect his Honour dealt with was the implication of the word "original" in s 97B as enacted. The phraseology in the amended provision does not use the word "original", but his Honour's discussion is of more than just academic interest as there may be some cases still to be decided under the original provision.[12]

The applicant for development consent, which had amended its application, submitted to his Honour that s 97B of the EP&A Act was not enlivened, as the development had been amended twice: the first amendment resulting in consent orders in which an amount for costs was included pursuant to s 97B, and the second amendment, which was the subject of the costs proceedings before his Honour. The submission was put that once leave was granted to amend the application the first time, it "ceased to be the **original application**, and the operation of s 97B was, therefore, exhausted".[13] Hence, s 97B could only be relied upon once per proceedings. An earlier decision of the acting senior commissioner of the court would support such an argument,[14] but an earlier decision of the chief judge would weigh against that view.[15]

The consent authority council submitted, and in obiter remarks his Honour agreed, that "the original development application" should be interpreted to mean

the DA that existed immediately prior to its amendment,[16] hence not restricting the use of s 97B of the EP&A Act to one amendment only.

Another aspect of s 97B that his Honour dealt with was the meaning of "**file** an amended development application" in s 97B(1) of the EP&A Act (as enacted and amended). Before the commissioner hearing the substantive proceedings, the plans constituting the amended application were never formally filed and instead they became an exhibit. His Honour rejected the applicant's argument that s 97B was therefore not engaged, holding that "[a]n unduly restrictive interpretation of the section cannot be justified, and I do not think that anything turns upon whether the amendment(s) relied upon is formally filed with the Court, or comes before it as an exhibit".[17]

One further aspect of his Honour's decision worth considering involves the discussion surrounding the decision to amend the application. Consistent with the "amber light" approach of the court, applicants often amend their applications to constitute a development that the court has indicated it will uphold, or at least view more favourably than the current proposal. This amendment may occur during the hearing or after an interim view is given by the court. Often, applicants, upon appraisal of council's concerns (contentions), neighbourhood objections and expert opinion, will amend their plans constituting an amended development.

Following the substantive hearing before the commissioner, a judgment was handed down stating that "[t]he judgment identifies a number of matters that require consideration by the applicant".[18] Those matters were then set out and the following was noted:

> Other matters were agreed by the parties, prior to the hearing and these matters should also be included on the amended plans or revised conditions. Further directions will be made after discussions with the parties on an appropriate timetable for the amended plans and amended conditions.[19]

The application was subsequently amended and upheld, consistent with the amber light approach.

Some moment is placed by the parties to the costs hearing and his Honour on whether the commissioner's comments set out above constituted "a **direction** to amend, or merely, an indication that an amendment might be desirable, and/or would be favourably considered".[20] Counsel for the applicant argued that s 97B:

> … does not contemplate an order being made under the section, unless an amended DA is filed as a result of leave sought and granted … In this case, the applicant did not apply for leave to file the amendments, and the Court did not "allow" the filing of them, but instead directed that the application be amended … The section, therefore, "is not enlivened".[21]

Counsel for the consent authority argued "that there was no direction requiring the applicant to make the amendments, but that the applicant was instead, 'allowed' to amend its application".[22]

His Honour agreed with the applicant's submission, holding that "[w]hether amendments are responsive to something said by the Court, or initiated purely from the applicant's own accord, is not relevant, unless it can be shown that the applicant was truly **directed** by the Court to amend its DA".[23]

His Honour concluded the issue by holding:

> The applicant was clearly directed by the Court to reconsider its proposal, and amend its plans, so that they would be more in line with the designs provided in material in evidence before the Commissioner … I find, therefore, that s 97B does **not** apply.[24]

In the end, his Honour's finding on to the issue of "direction" was not determinative to the costs application on its own, as his Honour held that the amendments were "minor" and hence s 97B was not engaged.[25] Notwithstanding, I do not think that this will be the last time that the "direction" issue will be considered by the court. Costs are an important issue for local government practitioners, both those acting for applicants and those acting for consent authorities. As outlined, costs will usually fall where they lay, unless it is fair and reasonable to disturb them or a mandatory provision mandates that they be disturbed.

Mark Hamilton
Lawyer
Commissioning Editor
Local Government Reporter

Footnotes

1. J Wauchope and D Slimnicanovski, "Residential development in New South Wales" (2012) 11(2) *LGR* 23.
2. Section 98 of the CPA applies to Class 1 proceedings by dint of Sch 1 of that Act.
3. Rule 3.7 of the LEC Rules applies to Class 1 proceedings by dint of r 3.7(1) of those Rules.
4. *Stanton Dahl Architects v Penrith City Council* [2010] NSWLEC 156; BC201005930 at [11].
5. *Owners — Strata Plan No 20226 v North Sydney Council* [2012] NSWLEC 148; BC201204980 at [36].
6. By dint of Sch 1 of the CPA.
7. By dint of r 3.7(1) of the LEC Rules.
8. By dint of Sch 1 of the UCPR.
9. Above n 8.

10. *Arden Anglican School v Hornsby Shire Council* (2008) 158 LGERA 224; [2008] NSWLEC 103; BC200801439 at [10].
11. *Futurespace Pty Ltd v Ku-ring-gai Council* (2009) 169 LGERA 45; [2009] NSWLEC 153; BC200908353 at [42].
12. By dint of the EP&A Act, Sch 6, Pt 24, the amended provision, which commenced on 18 February 2011 (Planning Appeals Legislation Amendment Act 2010 (NSW), Sch 1 at [22]), only applies to development applications lodged with the consent authority after that date.
13. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [86].
14. *Hillsong Church Ltd v Council of the City of Sydney* [2012] NSWLEC 1059; BC201204205.
15. *Groeneveld v Wollongong City Council* (2009) 168 LGERA 260; [2009] NSWLEC 149; BC200908224.
16. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [123].
17. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [121].
18. *McDonalds Australia Ltd v Ashfield Council* [2011] NSWLEC 1140; BC201103807 at [60].
19. *McDonalds Australia Ltd v Ashfield Council* [2011] NSWLEC 1140; BC201103807 at [62].
20. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [38].
21. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [83].
22. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [100].
23. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [122].
24. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [124].
25. *McDonald's Australia Ltd v Ashfield Council (No 2)* [2012] NSWLEC 268; BC201209866 at [127].

Backyard blitz

New South Wales

Council requirements under the Boarding Houses Act 2012

The NSW Department of Premier and Cabinet, Division of Local Government has issued a circular to councils outlining new council responsibilities under the Boarding Houses Act 2012 (NSW). The Act seeks to ensure the health, safety and welfare of boarding house residents through mandatory registration and inspection of boarding houses.

Under the Act, councils will be required to:

- conduct initial inspections of all registered boarding houses within 12 months of registration or re-registration (unless they have been inspected within the previous 12 months), or on a change of proprietor; and
- develop a boarding house inspection program, including an appropriate inspection fee amount, in consultation with their local communities.

A copy of the circular is available at www.dlg.nsw.gov.au/dlg/dlghome/documents/Circulars/13-02.pdf.

A copy of the Boarding Houses Act is available at www.legislation.nsw.gov.au/maintop/view/inforce/act+74+2012+cd+0+N.

Model Code of Conduct for Local Councils

The NSW Department of Premier and Cabinet, Division of Local Government has drafted a Model Code of Conduct for Local Councils in NSW, which is to commence on 1 March 2013.

Councillors, administrators, members of staff of the council, independent reviewers, members of council committees including the conduct review committee, and delegates of the council must comply with the applicable provisions of the council's code of conduct in carrying out their functions as council officials.

A copy of the Model Code and the department's circular to councils regarding the Model Code is available at www.dlg.nsw.gov.au.

Model Asbestos Policy

The Local Government and Shires Associations of NSW (LGSA), on behalf of the Heads of Asbestos Coordination Authorities (HACA), has produced a publication titled *A Guide to the Model Asbestos Policy for NSW Councils* to assist councils to develop an asbestos policy based on the Model Asbestos Policy for NSW Councils. The guide assists councils in tailoring relevant sections of the Model Asbestos Policy to create an asbestos policy for their local area. The Model Asbestos Policy was developed by the NSW Department of Premier and Cabinet, Division of Local Government.

A copy of the guide and the Model Asbestos Policy are available at www.dlg.nsw.gov.au.

Local Government Shires Association of NSW on Twitter

The LGSA has launched its Twitter account, @lgsa, which is an additional communication tool to engage with journalists, councillors, council staff, members of parliament and other stakeholders.

For more information, see www.lgsa.org.au/news/media-release/lgsa-now-communicating-twitter.

South Australia

Independent Commissioner Against Corruption Act 2012 becomes law

The Independent Commissioner Against Corruption Act 2012 (SA) establishes in South Australia an independent body focused entirely on preserving and safeguarding confidence and the integrity of the functions performed by public officers, agencies and authorities in South Australia.

The primary objectives of the Act are to establish the Independent Commissioner Against Corruption (ICAC) and the Office for Public Integrity (OPI). The public officers, the public authorities responsible for the officers, and the ministers responsible for the public authorities to which the functions of the ICAC and the OPI will apply are set out in Sch 1 of the Act. Further, a private individual may also be subject to an ICAC investigation into corruption where their alleged corrupt conduct is in connection with a public officer, inquiry agency or public authority exercising a function of public administration.

The Act is available at www.austlii.edu.au.

An article discussing the Act will appear in an upcoming issue of the *Local Government Reporter*.

Tasmania

Social media policy template for councils

The Local Government Association of Tasmania (LGAT) and Local Government Managers Australia (LGMA) have worked in partnership to produce a social media policy template and related guidelines.

- The policy template is broad, covering aspects of social media use for staff and elected members.
- While it considers both the positive and the negative uses of social media, the policy focuses on correct use in personal settings or once council has agreed to use social media. Consideration of whether social media is an appropriate tool for council, the way it will be used, and the specific social media tools (eg, information sharing versus consultation, Facebook versus Twitter) should be incorporated in other policies, such as community engagement, marketing and so on.
- The policy template provides some indicative principles related to the use of social media.
- It provides guidance in relation to personal and corporate use of media.
- It outlines some key requirements and risks.
- It is based on the premise that under the law, online content is essentially permanent and should never be considered private.

More information is available at www.lgat.tas.gov.au/page.aspx?u=195&c=2508.

PUBLISHING EDITOR: Banita Jadroska, banita.jadroska@lexisnexis.com.au PUBLISHER: Joanne Beckett SUBSCRIPTION INCLUDES: 10 issues plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia CUSTOMER RELATIONS: 1800 772 772 GENERAL ENQUIRIES: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au
ISSN 1447-2163 Print Post Approved PP 255003/06255 This publication may be cited as (2013) 11(3) *LGovR*