PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
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ADMISSIBILITY OF RECORD OF INTERVIEWS IN CRIMINAL PROCEEDINGS

***Port Macquarie-Hastings Council v Waite* [2019] NSWLEC 146**

This case concerned the admissibility of a record of interview conducted between a defendant in Class 5 proceedings (Mr Waite) and an investigations officer of the prosecutor, Port Macquarie-Hastings Council (Mr Henderson).

Mr Waite was charged with three offences under the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) relating to certain forms of prohibited development and development without consent allegedly carried out at Wauchope. Mr Waite pleaded not guilty to these charges.

The Council commenced its investigation in September 2017. A Notice to Provide Information and Records under the EPA Act was issued to Mr Waite and his wife on 7 September 2017. Following correspondence between Mr Waite and Mr Henderson, Mr Waite sought an extension of time to comply with the Notice.

On 14 September 2017, Mr Henderson emailed Mr Waite requesting that he cease operation of the caravan park immediately. Mr Waite responded suggesting a meeting be held to discuss. Whilst Mr Henderson agreed to a meeting, he indicated he wished for it to be in the form of a recorded interview. The recorded interview took place on 19 September 2017 at Council chambers. The interview went for approximately 1.15 hours and 327 questions were asked.

Mr Waite was cautioned prior to commencement of the interview that: "*you do not have to say or do anything here today but anything you do say or do can be recorded and may be used in evidence against you.*" This type of caution is required by s 139 of the *Evidence Act* 1995.

The central issue in this case was whether Mr Henderson was required to warn Mr Waite that he could object to answering questions on the grounds of self-incrimination as required under s 9.31 of the EPA Act (formally s 119S(3)).

The Council sought to argue that Mr Waite attended the interview voluntarily, as it was his suggestion that a "meeting" take place, and no notice in writing had been given to Mr Waite under the EPA Act requiring him to attend the interview. Justice Pepper held that s 9.23 of the EPA Act (formally s 119K) gave rise to two types of interviews – an interview where no written notice had been issued and an interview where one had been.

It is only the second type of interview which required the person to be provided with the opportunity to nominate a reasonable place and time for undertaking the interview (see s 9.23(4)). The first type of interview could occur at any time and at any location.

Her Honour found that both interviews required the warning regarding self-incrimination under s 9.31 of the EPA Act to be given. Further, even if written notice was required, her Honour was satisfied that the email correspondence between Mr Waite and Mr Henderson constituted such notice. Her Honour noted that the EPA Act and Regulation did not specify the form of such a written notice.

Her Honour was also satisfied that whilst it may have been Mr Waite's initial idea to meet, what transpired resulted in there being a formal interview where Mr Waite's attendance was required. This was supported by the fact that Council had previously issued a Notice to provide information and records, that this Notice was discussed during the interview and that it was highly unlikely in these circumstances that when Mr Henderson requested a formal interview, he was not exercising his powers under s 9.23.

Consequently Mr Henderson's failure to provide Mr Waite with the warning regarding self-incrimination rendered the interview inadmissible. Given this finding, it was not strictly necessary for her Honour to consider whether the interview should be excluded under the *Evidence Act*. However, her Honour proceeded to consider this issue in case she was in error.

Her Honour concluded that the desirability of admitting the interview outweighed any undesirability arising from the way the interview was conducted. Therefore s 138 of the *Evidence Act* did not operate to exclude admission of the interview.

This case demonstrates the importance of ensuring strict compliance with the requirements of the EPA Act when Council investigation officers are exercising their powers. Any formal interview where a person is required to attend and is compelled to answer questions must include the warnings contained in s 9.31 of the EPA Act. Merely because a formal notice under the EPA Act to attend an interview has not been issued, does not mean these requirements will not apply.

However, we do not interpret this decision as requiring any and all discussions that occur between a person and a Council investigation officer as needing to include the warnings

contained in s 9.31 of the EPA Act. It will ultimately depend upon the stage of the investigation (including whether other powers have been exercised), and the circumstances surrounding the questioning, as to whether the warnings are required to be given.

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

TERRESTRIAL BIODIVERSITY CLAUSE (6.4) DOES NOT DEROGATE FROM INCORPORATED PROVISIONS

***Saffioti v Kiama Municipal Council* [2019] NSWLEC 57**

This decision of Preston CJ was an appeal from the refusal of development consent by a Commissioner for a dwelling house on land zoned E2 Environmental Conservation.

A dwelling house was permissible with consent under cl 42 of the *Environmental Planning and Assessment Regulation* 2000 (**EPA Regulation**) as an existing use.

At first instance the Commissioner was not satisfied that the proposed development:

(a) was designed, sited and managed to avoid, minimise or mitigate any significant adverse environmental impacts on terrestrial biodiversity as required under cl 6.4 (4) of *Kiama Local Environmental Plan* 2011 (**KLEP**);

(b) complied with controls C7, C10, C25, C46, C48 of *Kiama Development Control Plan* 2012 (**KDCP**), and that reasonable alternative solutions were not available that would achieve the objects of those controls.

The grounds of appeal fell into three categories:

(a) denial of procedural fairness by not applying the "amber light approach";

(b) cl 6.4 (4) of KLEP did not derogate from the incorporated provisions of Part 5 of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**); and

(c) conflation of the controls in KLEP and KDCP.

The allegation of a denial of procedural fairness was rejected on appeal. The Court held that there was no obligation to offer an "amber light" and that the "amber light" approach was without a statutory basis. The Court also said that the Commissioner was not obliged to inform the applicant that evidence adduced on her behalf was uncertain or insufficient, nor was the Commissioner obliged to allow an opportunity to overcome deficiencies in the evidence or to provide reasonable alternatives.

The second ground of appeal related to the alleged misdirection by the Commissioner concerning derogation.

Section 4.67 (3) EPA Act provides:

> *(1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to—*

(a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and
(b) the change of an existing use to another use, and
(c) the enlargement or expansion or intensification of an existing use.
(d) (Repealed)

*(2) The provisions (in this section referred to as **the incorporated provisions**) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.*

(3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.

(4) Any right or authority granted by the incorporated provisions or any provisions of an environmental planning instrument extending, expanding or supplementing the incorporated provisions do not apply to or in respect of an existing use which commenced pursuant to a consent of the Minister under section 4.33 to a development application for consent to carry out prohibited development.

The reference to the "incorporated provisions" is a reference to the provisions of Part 5 EPA Regulation.

Clause 6.4 (4) KLEP required:

(4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—

(a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
(b) if that impact cannot be reasonably avoided the development is designed, sited and will be managed to minimise that impact, or
(c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

The question in the case was whether cl 6.4(4) KLEP "would derogate or have the effect of derogating from the incorporated provisions". If that was the case cl 6.4(4) would have "no force or effect".

Preston CJ supported as correct the finding of the Commissioner that cl 6.4 (4) KLEP did not derogate from the incorporated provisions. The crux of the decision is in paragraphs [67]–[70], where the following points were made:

- existing use rights do not of themselves authorise any change in an existing use
- any entitlement to change an existing use comes from Part 5 EPA Regulation and may only be done in one or more of the ways specified in and subject to the provisions of that Part

- each of the provisions requires development consent for a change to an existing use
- there is no entitlement to change an existing use, only to make a development application to seek consent to change an existing use
- the test is therefore whether cl6.4(4) of KLEP derogates from the entitlement to make, and have the consent authority consider and determine, a development application seeking consent to change the existing use
- cl6.4(4) KLEP did not derogate from that entitlement.

The third ground of appeal relating to the conflation of the controls in KLEP and KDCP was also rejected, with Preston CJ finding that the Commissioner did not err in his consideration of the controls of KDCP in the ways claimed by the appellant.

The appeal was dismissed with costs.

For further information regarding this update, please contact Roslyn McCulloch.

CARE NEEDED MAINTAINING INDEPENDENCE OF EXPERTS

***DeBattista v Minister for Planning and Environment* [2019] NSWCA 237**

Mr DeBattista owned land in St Georges Basin (**the Land**). Part of the Land had a height limit of 13 metres pursuant to *Shoalhaven Local Environmental Plan 2014*. Most surrounding land had a height limit of 8-8.5 metres.

Mr DeBattista sought to develop his land and lodged development applications to do so. The development of the Land to a greater height than surrounding sites generated significant community opposition. At the time of the council elections in 2016 some now successfully elected councillors campaigned in opposition of the permitted building height on the Land.

Later in 2016, the newly elected Council resolved to prepare a planning proposal to reduce the 13m height limit to 8.5m on the Land (**the Planning Proposal**). Upon lodgement of the Planning Proposal, the Department of Planning and Environment expressed concerns that the Planning Proposal was inconsistent with directions made by the Department (namely direction 3.1) as it sought to reduce residential density. On that basis the Department requested further information to justify the Planning Proposal. Council commissioned an urban design review from an external firm.

In late 2017, a delegate of the Minister made a gateway determination that the Planning Proposal proceed subject to certain conditions. Council was given delegated power to amend the LEP following community consultation. The Minister's delegate expressly stated that the Planning Proposal was inconsistent with direction 3.1 but that did not warrant rejection of the Planning Proposal. The community consultation process subsequently took place. The Planning Proposal which was put on display asserted that it was consistent with direction 3.1.

Mr DeBattista commenced proceedings in the Land and Environment Court seeking an order that the Council withdraw the Planning Proposal on the bases that there was a reasonable apprehension of bias concerning Council's approach and that Mr DeBattista had been denied natural justice.

Justice Moore held that the community consultation process undertaken by Council was void and of no effect, because the assertion that the Planning Proposal complied with direction 3.1 was materially misleading. His Honour otherwise declined to order Council to withdraw the Planning Proposal. His Honour concluded that the processes in which the Council is engaged, in determining whether or not to amend the LEP, are of a political and policy nature and are not sufficiently equivalent to curial or *quasi-judicial* processes as to permit intervention on the basis of apprehension of bias.

Mr DeBattista appealed the decision to the Court of Appeal on the grounds that, inter alia, Justice Moore erred in concluding that the Council processes, in determining whether or not to amend the LEP, were of a political and policy nature only and were unfettered so as to preclude the LEC from intervening.

The Court of Appeal considered that the Council's discretionary legislative power in amending the LEP is extraordinarily wide. Council must consider any submissions made during public consultation and if Council were shown not to have genuinely considered in good faith any submissions made, there may be a remedy available. However, given that the Planning Proposal was yet to be adopted and further community consultation was required it would be premature to make any further finding. On that basis the appeal was dismissed.

Emmett AJA commented generally that "*If the Council succeeds in its object, Mr DeBattista will receive no compensation for the expenditure incurred by him on the strength of the height restrictions as they stood when the expenditure was incurred. It is a source of considerable disquiet that such a burden should be placed upon a citizen in relation to his private property, a burden thought to be for the benefit of the community, but for which no compensation is available to Mr DeBattista. That is a sad indictment of the rule of law.*"

For our colleagues and clients that give or commission expert evidence regularly, there was significant criticism of the way in which Council commissioned the urban design report. White JA expressed concern about the pressure applied by Council to the consultant to amend its report (note: a similar criticism was made recently in the decision of *Huajun Investments Pty Ltd v City of Canada Bay Council (No 3)* [2019] NSWLEC 42).

White JA stated at [9]-[12]:

> [the circumstances] *illustrate a pressing ethical issue relating to the use of consultants, usually professionals, whose apparent independence is to be relied upon by their client, whilst their client seeks to control the opinion expressed. The ethical issue is critical to lawyers, to many other professionals and other bodies whose independence is to be relied upon, either by legislative or regulatory authorities (such as the Department in the present case) or the market. Lawyers, town planners, valuers, accountants, rating agencies, and a myriad of other professional or quasi-professional disciplines whose opinions or reports will be relied*

upon by persons other than their own clients all have an obligation to preserve not only the appearance but the reality of their independence.

It is generally bad practice for a person in such a position to agree to provide his or her opinion or report to the client in draft. If the opinion provided mistakes the facts, or does not address, or sufficiently address, the questions raised, or if, as in the present case, the professional is asked to address a re-formulated question, then that can and should be addressed by a supplementary opinion and report that transparently discloses the reasons for amendment.

In the present case, in considering the Council's proposed amendment to SLEP 2014, the Department should have had available to it, and should now have available to it, the different iterations of Atlas Urban's opinion as its instructions changed.

The present appeal is but a single example of a client's (the Council's) placing pressure on a professional retained by the client to produce an opinion conformable to the client's wishes. In this case, the pressure was all the greater because apparently the terms of the professional's retainer were that it would not be paid if the Council were dissatisfied with the opinion provided. No professional should assent to such a term. No ethical client should demand it.

We unreservedly agree with the comments made by White JA. Bearing this in mind, when briefing experts we always recommend that you take care in formulating the questions raised in the brief and meet with the expert face-to-face for a preliminary opinion.

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

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