PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
July 2012

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GREEN PAPER ON PLANNING REFORM

The New South Wales State Government has issued a Green Paper on a new planning system which will be on public exhibition until 14 September 2012.

It is a long road to hoe from the Green Paper to the White Paper and we plan to provide regular updates on the process.

Some recommendations which are of interest are:

1 A greater emphasis on community involvement at the strategic planning phase and less community involvement at the development assessment phase.

2 The proposal to introduce three new zones:

- An "enterprise zone" to capture investment opportunities.
- A "future urban release zone" to indicate future use prior to infrastructure investment.
- A "suburban character zone" to give greater certainty in areas where the local community want to preserve local character.

3 Retention of the Planning Assessment Commission (PAC) and Joint Regional Planning Panels (JRPP).

4 The JRPP to determine section 82A reviews of Council determinations of development applications.

5 Reviews to the JRPP in respect of re-zonings.

6 All Council decisions on development applications to be determined under delegated authority by either Council staff or an expert panel.

IF IN DOUBT, STAY OUT

***Rumble v Liverpool Plains Shire Council* [2012] NSWDC 95**

5 July 2012 – District Court of NSW – Mahony SC DCJ

The Plaintiffs, Mr and Mrs Rumble, were the occupiers of residential premises at Quirindi together with their five children. Over the course of two days in August 2009, Liverpool Plains Shire Council ("the Council") by its employees and agents, entered the premises of Mr and Mrs Rumble, and removed a number of damaged and derelict cars and various car parts.

The Plaintiffs claimed damages for trespass to their property against the Council, officers of the Council, its sub-contractors and the State of New South Wales (together "the Defendants"). The Plaintiffs claimed aggravated and exemplary damages in respect of the trespass. In addition, the Plaintiffs sought damages for the seizure and removal of their property.

The Defendants conceded a trespass to the Plaintiffs' land. However, they submitted that only nominal damages should be awarded as there was no damage sustained by the Plaintiffs. The Defendants also resisted any order for aggravated or exemplary damages.

The individual defendants relied on the indemnity provided under the Local Government Act 1993 ("the LG Act") as they were carrying out duties on behalf of the Council and those duties were carried out in good faith.

The unauthorised entry to the premises was purported to be in reliance of an order under section 121B of the Environmental Planning and Assessment Act 1979 ("the EP&A Act").

The Purported Order

During the course of 2009, Council's officers had been attending the Plaintiffs' premises and investigating the unauthorised use of residential premises as a caryard or junkyard. This included the storage and keeping of numerous vehicles and parts in varying states of repair. In July and August 2009, Council's officers issued various Notices of Intention to Issue an Order under section 121B of the EP&A Act.

On 12 August 2009, Council's officers issued an order that required the removal of all unregistered vehicles within 12 hours of the order. The order stated that the period for any appeal of the order must be made within 48 hours of the order.

The Plaintiffs submitted that the order was invalid as the statement of reasons was deficient and the period for compliance was inadequate. Further, it was submitted that the person who signed the order on behalf of the Council did not have delegated authority.

The Defendants did not challenge the asserted invalidity of the order.

The Trespass

On the morning of 13 August 2009, two Council officers attended the Plaintiffs' premises together with two police officers. When the Council officers were refused entry to the premises, one of the Council officers used a bolt cutter to cut the chain locking the front driveway gate.

Attached to the front driveway gate and other gates to the property, was a sign that stated "… ADMITTANCE BY INVITATION ONLY OR TRESSPASS APPLIES".

It was not in issue that the Council officers were asked to leave the property on no less than three occasions.

Over the course of two days, Council's officers, aided by sub-contractors with tow trucks and trailers removed a total of 56 vehicles as well as various car parts.

Damages

The Court found that the trespass was not of a trifling nature such as to warrant nominal damages as it involved entry to land against the express wishes of an occupier who had a right to exclusive possession and quiet enjoyment. The Court held that the trespass was extensive and involved numerous Council officers, sub-contractors and police officers entering the property to remove the vehicles.

The Court ordered damages to each of the Plaintiffs in the amount of $10,000.00.

In relation to the claim for aggravated damages, the Court noted that the Council's officers acted in a high-handed manner towards the Plaintiffs. The Court found that the Council was reckless as senior staff were prepared to issue orders that led to the unauthorised entry without legal advice of their position or entitlements.

However, the Court noted that the Plaintiffs were continuing a non-compliance with planning laws and that the Plaintiffs did not suffer indignity, embarrassment or outrage to an extent that would warrant an award of aggravated damages.

In relation to exemplary damages, the Court noted that the Council acted in direct contravention of the EP&A Act in trespassing on residential property, which would normally require a Court order or a search warrant. Again, the Court noted the recklessness of Council's senior staff and that the conduct in carrying out the trespass was egregious.

The Court held that it was necessary to mark its disapproval of the conduct and deter the Council (and others) from repeating such conduct by awarding exemplary damages. Exemplary damages in the amount of $10,000.00 were awarded to each of the Plaintiffs.

Finally, the Court awarded damages of $12,500.00 to each of the Plaintiffs for removal and disposal of the vehicles and parts.

Immunity for Council's Officers

The individual Defendants, being the Council's officers as well as its sub-contractors, relied on the immunity from personal liability pursuant to section 731 of the LG Act.

The Court noted that the test of whether a person acted in good faith was a subjective one. The Court held that the individual Defendants' acts of trespass were done in good faith and under the direction of senior staff. This immunity extended to senior staff notwithstanding the Court's comments regarding the high-handed and reckless nature of the trespass.

For enquiries about this case please contact Peter Jackson or Andrew Simpson.

LAST GASP FOR SMOKERS?

***Parramatta Business Freedom Association Inc v Parramatta City Council* [2012] NSWLEC 139**

20 June 2012 – Land and Environment Court of NSW – Biscoe J

The Parramatta Business Freedom Association Inc ("the Association"), whose members included the owners of five restaurants in the Parramatta Council area, brought proceedings against Parramatta Council challenging the validity of no smoking conditions in approvals granted by the Council for footpath restaurants.

The approvals were issued under section 68 (Part E) of the Local Government Act 1993 ("LG Act") and sections 125 and 126 of the Roads Act 1993 ("Roads Act").

There is no legislation in New South Wales that directly prohibits smoking in footpath restaurants. However, in December 2011 the Council became the 32nd Council in New South Wales to adopt a policy banning smoking in outdoor dining areas under its ownership or control.

Council initially resolved to adopt a policy by resolution on 12 December 2011.

There subsequently came into existence a revised policy prepared by Council staff which differed materially from the policy adopted by resolution on 12 December 2011. There had been no resolution by the Council adopting that amended policy and there was no suggestion that Council staff had authority to change the policy already adopted.

The Association challenged the smoking ban on a number of grounds including:

1 Council had no power to ban smoking in footpath restaurants by way of notice under section 632 of the LG Act.

2 Council had no power to ban smoking in footpath restaurants under section 68 of the LG Act or sections 125 and 126 of the Roads Act.

3 Conditions banning smoking under LG Act approvals or Roads Act approvals were beyond power because they relied on a policy which was not formally adopted by Council.

The Court determined in relation to each of the grounds as follows:

Ground 1 – Section 632, LG Act Notices

The Council had not in fact erected no smoking signs pursuant to section 632 of the LG Act therefore this ground did not arise.

Ground 2 – No power to ban smoking under LG Act approvals and Roads Act approvals

The Applicant submitted that a condition in approvals under the LG Act imposing an obligation on the holder to ensure that no smoking occurs in the area the subject of the approval was not reasonably capable of being regarded as related to the Council's power to grant such approvals under section 68 of the LG Act.

The Court noted that section 89 of the LG Act set out matters for consideration in determining applications under section 68.

Section 89(3)(b) provided that in considering the public interest the matters the Council is to consider include: "protection of public health, safety and convenience".

The Court concluded that consideration of the public interest, including the protection of "public health" and "convenience", is a factor that is to be taken into account in the determination of an application for approval under section 68 of the LG Act and, therefore, the decision to ban smoking on a footpath the subject of a footpath restaurant was within power.

The Court then considered the argument that the Council had no power to impose a non-smoking condition when granting approval under section 125 or 126 of the Roads Act.

The Association submitted that the condition was not reasonably capable of being related to the purpose for which the function of the Council was being exercised. It submitted that the objects of the Roads Act do not include any suggestion that an approval can regulate personal behaviour.

The Court held that the grant of such an approval involved a broad grant of power to regulate footpath restaurants consistent with the fact that the Council is the owner of public roads including footpaths.

The Court accordingly held that the condition was within power agreeing with the decision of Preston CJ in *Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No. 5)* [2012] NSWLEC 53.

Ground 3 – Policy not formally adopted by Council

This ground was a technical ground based on Council's failure to formally adopt the amended non-smoking policy. The Court held in favour of the Association on this ground.

In conclusion, the Court held that the relevant conditions of the approvals were invalid because they were based on a policy that had not been formally adopted by Council but this did not prevent the Council from rectifying the invalidity by formally adopting the amended no smoking policy.

For enquiries about this case please contact Julie Walsh or Michael Hewett.

COURT ORDERS EASEMENT OVER COUNCIL PARKLAND

***Samy Saad v City of Canterbury* [2012] NSWSC 389**

27 April 2012 – Supreme Court of NSW – Nicholas J

This was an application by the owner of a landlocked property ("Lot 1") for an easement under section 88K of the Conveyancing Act 1919 over a Council park (Heynes Reserve) zoned "open space" which was classified as community land under the Local Government Act 1993.

The proposed easement was 2.83 metres wide, 32 metres in length, with an area of approximately 90 square metres.

Lot 1 was zoned residential but had previously been subject to a County Road Reservation.

The RTA had previously owned Lot 1 and when the County Road Reservation was abandoned, the RTA requested the Council to grant an easement over the park so that Lot 1 could be disposed of on the open market or alternatively, whether the Council would be interested in purchasing Lot 1 at a market price.

The Council declined the offer to purchase Lot 1 and indicated it was unable to grant an easement as Lot 1 comprised community land under the Local Government Act.

The land had been rezoned "residential" with the inclusion of a specific clause in the Planning Scheme Ordinance providing that the Council must not grant consent to development of Lot 1 for the purpose of a dwelling house unless the Council was satisfied that the development provided for adequate vehicular access to the land.

The RTA subsequently sold Lot 1 to the Plaintiff for $140,000.00.

The Plaintiff then negotiated with two of his adjoining neighbours for vehicular access to Lot 1. These negotiations were unsuccessful.

The Council resisted the claim for an easement on the following grounds:

1 The easement was not necessary for the effective use or development of Lot 1.

2 The use of Lot 1 with the benefit of the easement would be inconsistent with the public interest.

3 The Council could not be adequately compensated for loss or disadvantage arising from the imposition of the easement.

4 The Plaintiff failed to make reasonable attempts to obtain an easement of similar effect over another property.

5 The Court should not in the exercise of its discretion impose the easement.

The Court held against the Council on all grounds.

The Court noted that the easement was reasonably necessary for the effective use and development of Lot 1, i.e. a dwelling house, given that it was landlocked and the Planning Scheme Ordinance required vehicular access to be obtained.

The Court found based on the evidence that the proposed easement over the park was the only realistic solution available to the need for the effective development for the purposes of a dwelling on Lot 1.

Accordingly, the Court held that if the easement was not granted the land could not be developed for the benefit of the community because it was private land and there would be no effective use or development of it in accordance with the zoning.

The Court held that the loss of this area from the park would have no discernible adverse effect on the public use of the surrounding area and that a common-sense and objective evaluation of the likely impact of the driveway over the park supported the finding that any impediment to the public's use and enjoyment of the community land would be minimal.

The Council argued that the grant of the easement would not be in the public interest.

The Court noted however that section 88K(2)(a) of the Conveyancing Act requires the Court to be satisfied that "use of the land having the benefit of the easement will not be inconsistent with the public interest". It is the use of the dominant tenement that is not to be inconsistent with the public interest.

The Court held that the Council was incorrect in focusing on whether it was in the public interest for the servient tenement to be the subject of an easement.

The Plaintiff's valuer valued the 90 square metres at residential values of $1,200.00 per square metre and discounted this by 50% on the basis that it was an easement rather than the fee simple of the land, resulting in a figure of $54,000.00.

The Council's primary submission was that payment of a sum of money would not be adequate compensation. This was rejected by the Court.

The Council accepted the value of $1,200.00 per square metre but argued that the land would be effectively sterilised if the easement was granted and that an amount of $108,000.00 should be awarded.

The Court, however, accepted the Plaintiff's argument and awarded compensation in the sum of $54,000.00.

For enquiries about this case please contact David Baxter or Kim Probert.

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