



# PRINCIPLES LED PLANNING IN THE LAND AND ENVIRONMENT COURT OF NSW

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# The Power to Make Planning Decisions

“Of particular significance in the present case is that the relevant statutory power is vested in a [body] exercising a discretionary power expressed in broad terms to which multiple considerations apply and with respect to which the range of permissible opinion is extraordinarily wide - including issues of policy, taste and philosophy - not least by the adoption of an express formulation as to what constitutes “the public interest” ...”

*McGovern v Ku-Ring-Gai Council & anor (2008) 161 LGERA 170*

# A Policy Response

“Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.”

*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*  
(1979) 2 ALD 634

# A Policy Response

- Environmental Planning and Assessment Act 1979
- State Environmental Planning Policies
- Local Environmental Plans
- Development Control Plans
- Other local policies

# What's the Aim Here?

“[D]evelopment standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

*Wehbe v Pittwater Council* (2007) 156 LGERA 446

# What's the Aim Here?

- **Clause 4.6**

(1) The objectives of this clause are as follows—

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

- **Section 4.15(3A)(b)**

(3A) Development control plans

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

...

- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development...

# Flexibility, certainly

“[I]nconsistency and unpredictability have social and economic costs, as community, business and government should be able to make decisions and order their affairs on the basis that the outcome of a review proceedings is reasonably ascertainable.”

Pearson L, *Planning Principles and Precedents in Merits Review*, Australasian Conference of Planning and Environment Courts and Tribunals, 2010

# Flexibility, certainly

“There is no doubt that in the area of administrative law and, in particular, the jurisprudence relating to the duty of an administrative decision-maker to give reasons for his or her decision, the beneficial effects of that duty include... consistency in decision-making.”

“I am in no way convinced that in the context of adversarial proceedings in the Land and Environment Court, there is any place for the so-called principle of consistency in administrative decision-making. As I have observed (at 191 [51] supra), that concept is more appropriately applied to true administrative decision-making at the level of executive or local government. It has no application to adversarial proceedings where the merits of any particular application depend upon the facts and circumstances of the case and the substantive issues joined between the parties.”

*Segal v Waverley Council* (2005) 64 NSWLR 177



# Flexibility, certainly

“My only qualification to the foregoing, at least in the context of environmental planning, is that consistency in the application of planning principles is, clearly, a desirable objective. This has been recognised by the Commissioners of the Land and Environment Court... But it does not follow that a consistent application of those principles results in the same outcome. That would depend upon the particular facts of each case as well as upon the evidence called by the parties to support the outcome, based on those principles, for which each contends...”

*Segal v Waverley Council* (2005) 64 NSWLR 177

# What is a Planning Principle?

“A planning principle is:

- statement of a desirable outcome from;
- a chain of reasoning aimed at reaching; or
- a list of appropriate matters to be considered in making

a planning decision.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.”

# What is a Planning Principle?

“Planning principles assist when making a planning decision – including:

- where there is a void in policy; or
- where policies expressed in qualitative terms allow for more than one interpretation; or
- where policies lack clarity.”

# Bring the policy into the light

- Principle: a general assumption or belief forming the basis of a chain of reasoning
- Planning Principle applies to a situation that arises frequently and can be applied to assist in reaching a decision in a particular case
- “While legal principles have always been the basis of decisions by judges, they are a new phenomenon in merit decisions by commissioners... They hovered in the background of most assessments, but they were usually not explicitly stated.”

Roseth SC, *Planning Principles and Consistency of Decisions*, Law Society  
Local Government and Planning Law Seminar 2005

# A little bit of history

- Dawn of the internet age
- GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268
- Rapid expansion of principles between 2003 and 2006, some revision in 2010, 2013.
- Currently 37 planning principles identified on the Court's website, and a further 3 Tree Dispute Principles.
- Most recent is Yao v Liverpool City Council [2017] NSWLEC 1167

# How the sausage is made

- Published in court decisions, but not made there
- Collegiate process – all commissioners have input, and interested judges, including Chief Judge
- First draft, multiple iterations
- Final version is the one all commissioners can at least live with.
- Input invited from parties to matter in which issue arises
- Premade and ready to go?

# From Prescription to Process

- Two types of planning principle
  - Prescriptive
    - What the right outcome is
  - Process oriented
    - How the right outcome be determined
- Parsonage v Ku-Ring-Gai [2004] vs The Benevolent Society v Waverly Council [2010] NSWLEC 1082
- Edgar Allen Planning Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 790 vs Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187

# The Principles behind the Principles

- Theme 1:
  - “There is more to the assessment of impacts than applying quantitative criteria and then ticking off every issue on the basis of whether or not it meets them”
  - Parsonage/Benevolent Society:
    - “Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines.”



# The Principles behind the Principles

- Theme 2:
  - “Change in impact is often as important as the magnitude of impact”
  - Parsonage/Benevolent Society:
    - “The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.”

# The Principles behind the Principles

- Theme 3:
  - “In assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it”
  - Super Studio v Waverley Council [2004] NSWLEC 91:
    - “For example, the privacy impact of a second-storey side window in an area of two-storey buildings should be accorded a higher threshold of acceptability than the impact of a second-storey balcony in a house that already has three other balconies..”

# The Principles behind the Principles

- Theme 4:
  - “The level of design skill applied to a proposal is also relevant to the assessments of its impacts... not even a small impact is acceptable if it arises out of poor design”
  - *Meriton v Sydney City Council* [2004] NSWLEC 313:
    - “Overlooking of neighbours that rises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional costs, has a reduced impact on privacy.”

# The Principles behind the Principles

- Theme 5:
  - “Impact that arises from a proposal that does not comply with planning controls is much harder to justify than one that arises from a complying proposal”
  - *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140:
    - “A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on view arises as a result of non-compliance with a control, even a moderate impact may be considered unreasonable.”

# What Planning Principles Aren't

*Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126

“First planning principles are not immutable. Planning principles are evolutionary and can change or grow as circumstances in particular cases give rise to matters where members of the Court collectively consider a further statement of generality (either by revision to or expansion of an existing planning principle) is desirable”

# What Planning Principles Aren't

*Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126

“Second, planning principles are not intended to be exhaustive. This is, perhaps, a corollary of the first proposition. Just as members of the Court will consider whether particular cases give rise to general matters which might expand or otherwise build upon an earlier planning principles, so the Court may invite the advocates for the parties, in appropriate cases, to suggest modification or evolution of an already published planning principle.”

# What Planning Principles Aren't

*Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126

“Third, planning principles are not binding... Planning principles published and adopted by the Court are intended to provide guidance to those who bring similar cases to the Court for determination and are also intended to provide assistance and guidance for local consent authorities. They do not and cannot have the same force as some form of statutory prescription.”

# What Planning Principles Aren't

*Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126

“Fourth, planning principles are not statutory instruments and are not intended or expected to be the subject of the same statutory interpretation and construction of the words and phrases contained within them as if they had the force of law and were subject to the requirements for statutory interpretation of their intention.”



# Flexible in One's Views

## Tenacity v Warringah

- Assess the views – of what?
- Viewed from where? Side boundaries, seated, standing?
- Assess the extent of impact: Whole of property, type of room, qualitative vs quantitative
- Assess reasonableness of the proposal – compliance? Good design?

# Flexible in One's Views

Rose Bay Marina Pty Ltd v Woollahra Municipal Council [2013]  
NSWLEC 1046

- Assess the views – of what? Includes whether static or dynamic
- Viewed from where in the public domain?
- Assess the extent of impact – for everyone, so no eye height distinction
- Identify the intensity of public use
- Documentary record of the importance of the view

# Just how flexible

- Not binding
- But cannot be ignored
- Can be distinguished
- May be a better approach in a given matter, or generally
- Must justify position
- Jumping off point for joint conferencing, or any other forum to express views