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HOW NOT TO PLAN FOR RETAIL

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Gary Green, Partner
Pikes Lawyers

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When *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675 at 687 was handed down in the 70's those in the more rarefied sections of our society, the lawyers and judges and planners and economists, thought they understood economics. They must have or they wouldn't have attempted to create a criteria of planning that made economics a component part of the planning test of "community detriment".

They were wrong!

The reality is that the more this group have intervened, the more confused, legalistic, monopolistic, anti-competitive, and cumbersome the assessment of retail within our planning system has become. In the 30 years of planning for retail that have elapsed, no clear cohesive planning has emerged other than "to the winner go the spoils"! In almost the whole of metropolitan and regional NSW demand for retail services far outstrips supply, to the financial and communal loss of all of NSW population and most of its businesses.

It has been a disgrace.

Retail Planning and the Law

But first, lets deal with the planning. To do so we must start with His Honour Justice Stephen's most quoted comment from *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675 at page 687:

"If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the ***resultant community detriment*** *will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However, the mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."*

If the "resultant community detriment" of increased competition (with all its obvious benefits, which for 30 years no one seems to have mentioned) is what is to be assessed, surely our planners in 30 years, would have been able to tell us what it was or at least how to measure it.

In the 80's and 90's the much maligned Department of Urban Affairs and Planning (under its many and varied titles over that period) had a whole branch devoted to the issue, The Metropolitan and Regional Management Branch. That branch elucidated on and attained studies of business centres that had occurred since the 50's and came up with a number of "official documents." These included:

1 Sydney into its 3rd Century – Metropolitan Strategy for the Sydney Region (1988);

2 Cities for the 21st Century 1995;

3 Circular C11 "Industrial Lands Policy 1991".

Additionally in 1996 the Draft Retail Policy for the Greater Metropolitan Region went on exhibition and the report prepared went to the Minister of the Ministerial Retail Advisory Group.

Despite what would appear to be a matter of extreme planning importance to our city, none of these documents ever reach the elevated status of a planning instrument for the purpose of Section 90 or 79C of the Environmental Planning and Assessment Act. Nevertheless they were regularly wheeled out on a case by case basis (effectively retrospectively for any Applicant) to lambast particular developments deemed to be discouraged by the department.

Probably one of the hardest hit were the Reading Group in the decision of *Jokona v Liverpool City Council* (unreported, 4 June 1997 per Bignold J, LEC proceedings 10323/96). There the Department intervened in proceedings to impart a death sentence on a proposal by the Reading Cinema Complex to provide competition to Westfield at Hoxteth Park, outside the Liverpool CBD.

Of interest in the findings of the Court in that case is finding (x) (on page 18 of the judgment) where his honour said:

> "the proposed development involves a risk to the viability to the existing Westfield cinema complex and involves a small loss of revenue from retail activity in the Liverpool CBD especially that conducted in the Westfield Shopping Complex."

This extraordinary proposition was based on evidence from Westfield and probably of itself shows the lack of understanding amongst any of us of the complexity of decision making within businesses generally and the majors in particular.

It would seem that the *Jokona* decision emboldened the NSW Government and numerous statutory combatants in their firm view that nothing actually needed to be done to make Government Policy clearer.

All over the State, retail in the form of bulky goods or other various uses were made permissible in statutory instruments in industrial zones or other commercial areas. There was always a rider though, in the guise of limits placed within the objectives of the zone that the use was not to "detrimentally effect the viability of any business centre" –clauses close to my heart.

Indeed, by the time *Terrace Towers Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 came along, the only addition to this "mosh pit" of feel good statements about encouraging single visitation shopping at infrastructure hubs was the infamous Draft State Environmental Planning Policy 66. That document, like the Draft Retail Strategy before it, remained in

its draft form for at least some 10 years until its innocuous demise into obscurity by Ministerial direction that it would no longer be given any force in 2009 (a process this Government was getting very good at).

But not before it had done a lot of damage.

None more than in the *Terrace Towers v Sutherland* decision itself.

In that case, the Draft SEPP, which had in it an express provision that it was not to be taken into account in transitional applications (as this was), was held to be of determining weight as a matter of public interest under section 79C.

It was hard (though I found a way) not to have sympathy for an Applicant who was being defeated by a planning document between 5 – 15 years old which it can only be inferred from the time lag, Government had refused to give any statutory status. Again, Westfield was the intervener and was successful. In this particular case Miranda was given preferred status as an infrastructure hub, despite never previously having been referred to as having any subregional status, despite having grown haphazardly (albeit successfully) over 20 years with incremental approvals, and despite that growth being to the detriment of Caringbah and Sutherland, the nominated growth areas.

There were many examples of such haphazard development in Sydney. Leichhardt Marketown was another example where the Court granted extensions and increased hours despite the lack of subregional status.

The other creation given life in this litigation was the growth of "clusters," a form of adhoc development seemingly developed despite zoning and planning over Sydney over the previous 25 years. These now had legitimacy with extension of rights to develop bulky goods regardless of impact. The 80's and 90's equivalent to the 50's strip shop development.

Mind you, the decision in Terrace Towers was in the end right! It enabled an abundance of availability of industrial land to become available for the Government to impose Seniors Living Developments in the decades to come.

But let's not dwell in the past.

The Government decided to move on, and with the best of intentions brought forward the Metropolitan Strategy and Draft Regional Strategies which again sit in limbo (I do note, for what little it may be worth, that on 1 October the Minister issued a directive that all 'planning proposals,' known to you and I as draft LEPs, be consistent with the metropolitan strategy. Except of course in those circumstances when it can be inconsistent). The Strategies purport to macro and micro engineer retail hierarchy of regionally based centres from small village, village, neighbourhood, to local and regional status. The briefest of readings of these documents, which have found their way into Draft Local Environmental Plans currently under consideration within the template process, show that they are inherently flawed. The analysis is

desktop and in many cases is either wrong, overly simplified or at the very least has no overlay analysis of the supply and demand for the services which the commercial areas would otherwise be able to provide – a waste of time and very dangerous .

Mind you, you won't see any of these documents in your 149 Certificate, but they will invariably be used by Councils and interveners alike to downzone permissible development of small and middle size retail nature all over metropolitan Sydney, mostly with success.

An example of their infiltration into the planning system and into spot rezoning was shown in the recent decision of *Restifa v Sutherland Shire Council and Ors* [2009] NSWLEC 1267 regarding what is known as the Kirrawee Brick Pit site.

By the way, Westfield intervened in this case too and convinced the Court, on what I've read almost single handedly, (and probably quite rightly given the wording of the zone objective) that a full line supermarket in Kirrawee would not be consistent with the relevant hierarchy as a local shopping centre. No doubt Westfield genuinely cared, and deeply, about the rest of the shops in Kirrawee remaining as a local shopping centre. Unless you missed my point about Westfield, there is a certain trend developing here.

Anyway, at the end of the 30 year trek, finally a new Draft Centres Policy: "Planning for Retail and Commercial Development" emerged in April this year and has been exhibited. It walks away from stereotyping locality shopping districts, and hierarchies and focuses on providing services and real planning. The document separates the zoned sites from out of centre

development and (with respect to the former) provides 5 very important principles:

- Commercial and retail floorspace should generally be located in existing centres/high streets;
- The need for flexible planning systems to allow centres to grow and new centres to be created;
- The "market" is best placed to determine the need for retail space – the planning system should only deal with broad spatial patterns for growth;
- The planning system needs to ensure retail GFA supply is greater than demand;
- The planning system shouldn't favour one form of retail over another to ensure a level playing field for all ie where retail land use is permitted, there shouldn't be any planning control over type or GFA. To be left to merit assessment.

The document has a familiar cover though, marked "Consultation draft: not Government policy".

Historically that means it will only be draft for 20 years! Perhaps Westfield will intervene on its implementation – they usually do.

Economic Planning an Inexact Science

To be fair, the Court's have acknowledged that economic forecasting is an inexact science. It might have been helpful if there were some criteria but for the last 30 years none existed and experts' assessments of what was reasonable reign supreme. Senior Commissioner Roseth, as he then was, tried but in my view was fumbling in the dark (see *Direct Factory Outlets Homebush Pty Ltd v Strathfield Municipal Council* [2006] NSWLEC 318). He wasn't on his own. My client in the Commission of Inquiry into the Westfield development at Bondi Junction thought a15% drop in turnover of the shops in Bondi Junction would result and would kill the centre but Westfield successfully agitated to build the Bondi Junction development and historically we were proved wrong. The real losers weren't in Bondi, they were in Double Bay (which is why the Government was under so much pressure to approve the Ashington development. Double Bay will be one to watch, because shops need people).

Some of the intrinsic difficulties in analysing retail planning are as follows:

1 Disputes over the growth of population and timing of that growth;

2 Disputes over the trade area, primary and secondary;

3 Disputes over the expenditure and escape expenditure;

4 Disputes over use and intensity of floor space;

5 Disputes over definition of bulky goods.

In any case, how does the Court ever know how competitors will ever respond?

- Will they do it on price,?
- Will the changes be made over the mid term or the long term?
- Will there be site amalgamations?
- Will they change their product lines?

One thing we know about business, it's inventive.

Each of the variables can have an exponential impact on the numbers and the outcome and ignores any doubts on the potential or otherwise of future development and/or future rezoning of other sites.

The list is endless.

In the recent decision of Emily *II Pty Ltd v Rockdale City Council* & anor [2009] NSWLEC 1229 (another case close to my heart), Council and IGA argued, again contrary to the zoning but pursuant to the Draft Regional Strategy, that the proposal would be the death of the Bexley Shopping Centre (arguably an event that took place on the advent of the car some time ago). The proposal in my view, will actually revitalise the whole of the centre and provide a real contribution to the "community" that Justice Stephen was talking about in Gantidis.

But, to tell the truth, even the economists are confused, so how can the lawyers and planners interpolate such an inexact science. Recent articles written on causes of the current economic crisis surmise that the real cause for our current economic failures is not in the failure to balance the ongoing relationship of the Keynesian supply and demand economic that Justice Stephen was contemplating as I was taught in Legal and Business Association at University. That superficial view of economics went out in the 70's (with my flares).

Supply of goods and services has become a distant second in terms of its impact in comparison to the financialisation of capital and its impact on our market which distorts all decision making. If we have accumulated large amounts of venture capital, instead of investing it in product (and building things), we are focused on speculation in the financial services sector: "increased financial investment and increased financial profit opportunities crowd out real investment by changing incentives of the firm managers and directing funds away from real investment". If this be right and it is a respected view of the current economic theory of the economic crisis facing the world, the mere discouragement by the planning system against any real retail competition or diversity of itself is anti competitive, monopolistic and to the "community detriment" – perhaps that's what Justice Stephen was really talking about – he just didn't know it.

So my advice

1 Get planning out of the market, you don't know what you're talking about;

2 Make it permissible or prohibited (preferably permissible) – skip the "do good" objectives of the zone that try and tell us where and when we want to shop because apparently we're stupid;

3 The lawyers and the planners can focus on whether it looks good and whether it has enough parking. Its what we're good at.

If you don't believe me, ask Westfield, they haven't been wrong yet, at least the Court thinks so.

4 By the way – don't get me onto Green Square!!

References

- *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675 at 687;
- *Jokona v Liverpool City Council* (unreported, 4 June 1997 per Bignold J, LEC proceedings 10323/96);
- *Terrace Towers Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195;
- Emily *II Pty Ltd v Rockdale City Council* & anor [2009] NSWLEC 1229;
- *Restifa Pty Ltd v Sutherland Shire Council* & ors [2009] NSWLEC 1267;
- *Fabcot Pty Ltd v Hawkesbury City Council* No. 10592 of 1996 [1997] NSWLEC 27 (14 March 1997);
- Draft Centres Policy: Planning for Retail and Commercial Development;
- Draft Retail Metropolitan Strategy;
- The Financialization of Capital and the Crises by Bellamy Foster
    - □ Fred Magdoff, "The Explosion of Debt and Speculation,"9;
    - □ See Kindelberger and Aliber, Manias, Panics, and Crashes, 126-35.