PIKES LAWYERS

Practical Aspects of Local Government and Planning Practice

Planning Decisions in the Land and Environment Court and their Impact on the Broader Community

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A OVERVIEW

The title of this paper is ' Planning Decisions in the Land and Environment Court and their impact on the broader community'. The idea behind the paper when the collage contacted me was to provide a summary of half a dozen cases which had been determined in the last 12 months within the Court's jurisdiction and which would be relevant to the attendees which from past experience, varies enormously.

The areas considered by the cases can be summarised as:

1. Appeal Rights in Class 1 of the Court's Jurisdiction;
2. Court granted easements;
3. Planning Principles;
4. Interpretation of Development Standards;
5. Existing Use Rights;
6. Costs in Class 1 Proceedings.

The cases selected cover a broad range of matters before the Court and will appeal to the cross section of participants practicing within Local Government and Planning Law.

In general terms it can be said that the Court is now grappling with a number of legislative changes brought into being by the former Minister for Planning Frank Sartor and the likelihood is that those amendments will have to be reconciled in the not too distant future – Watch this space!

B Case Studies

Longhill Projects Pty Ltd v Parramatta City Council [2009] NSWLEC 1414

11 December 2009 – NSW Land and Environment Court – Acting Registrar Gray

S82A Review Of Determination- Right of Appeal

In this matter the Applicant had sought development consent for multi-unit housing, initially refused by Council in November 2008. The Applicant lodged a request for review pursuant to section 82A of the Environmental Planning and Assessment Act 1979 ("the Act") in September 2009. The Applicant then appealed to the Land and Environment Court against the deemed refusal of the section 82A review in October 2009. In November 2009 the section 82A review was refused.

The Applicant sought leave to amend the class 1 application in light of the refusal of the section 82A review request. Both parties agreed that the application should be amended, but differed as to how.

The Applicant thought that the appeal should be amended to an appeal against Council's refusal of the development application in November 2008. The Council argued that the amendment should be to an appeal against the actual refusal of the section 82A review request.

The question turned on the interpretation of section 97(1) of the Act which section gives rise to the right of appeal to the Land and Environment Court with respect to the determination of a "development application (including a determination on a review under section 82A)". The Applicant took the view that section 97 restricted any appeal to the determination of the development application but that the determination and development application included any review and determination under section 82A. The Council's view was that an Applicant could choose between an appeal against either the determination of the development application or the determination of the section 82A review application.

The Registrar took a different view to either of the parties after a detailed analysis of sections 82A, 82 (which section deals with the deemed refusal of a development application) and section 97. Her analysis referred closely to the decision of His Honour Justice Lloyd in *Hainbury Pty Limited v Campbelltown City* Council [2007] NSWLEC 713.

The Registrar found that the word "determination" as used in those sections referred only to the determination of the development application in the first instance. A review request under section 82A if approved, has the effect of altering the original determination but that approval does not constitute a "determination" of itself. Conversely if a review request under section 82A is refused then the original determination stands. It is only this original determination, whether altered by

Section 82A or not, that can be appealed against. Similarly there can be no appeal against a deemed refusal of a section 82A review request.

The significance of this finding is that a section 82A review request does not vary the date from which time begins to run for the purposes of the appeal period under section 97. Regardless of whether a section 82A review request is made and regardless of whether Council approves or refuses that section 82A review request the time for lodging an appeal, 12 months, commences from the date of the original determination and no other.

Whilst going further than the decision in *Hainbury Pty Limited v Campbelltown City Council* [2007] NSWLEC 713 the Registrar's decision in this matter is in keeping with that of Justice Lloyd, who found that by simply making a section 82A review request, where that request was undetermined, an Applicant did not put themselves in a position to lodge an appeal at a date later than 12 months after the original determination was made.

A further consequence is that an appeal to the Court, being limited to the original determination, must be made on the plans the subject of that determination. Where a section 82A review request is refused (or not determined) those plans will be the plans originally before Council. Should the Applicant seek to rely on the plans forming part of the section 82A review request on appeal, formal leave to substitute those plans would be required, with potential cost consequences under section 97B of the Act.

***Rainbowforce Pty Limited v Skyton Holdings Pty Limited* [2010] NSWLEC 2**

13 January 2010 – NSW Land and Environment Court – Preston CJ

Court Granted Easements

This case concerned an application to the Land and Environment Court under section 40 of the Land and Environment Court Act 1979 ("the Act") for an order imposing a right of way over the adjoining land owned by Skyton Holdings Pty Limited ("Skyton").

The Court made an order imposing the right of way and ordered the Applicant to pay Skyton compensation and its costs of the proceedings.

The Judgment comprehensively analyses the factors relevant to the imposition of an easement by the Court. Those factors are set out below.

Reasonable necessity (s88K Conveyancing Act 1919)

Before the Court will grant an easement, it must be satisfied that the easement is reasonably necessary for the "effective use or development" of the land that will have the benefit of the easement. The requirement of reasonable necessity does not mean that there must be an absolute necessity for the easement.

The Court found that the creation of the easement was reasonably necessary and that the availability of alternate routes for an easement did not cause the proposed easement to NOT be reasonably necessary.

Whether the use of the land with the benefit of the easement is consistent with the public interest(s88K(2)(a) Conveyancing Act 1919)

The Court held that there was nothing in the proposed development or use of the Applicant's land that would be inconsistent with the public interest. In coming to this conclusion, the Court noted that the development and subsequent use of the Applicant's land was for a permitted purpose under the relevant environmental planning instrument and was consistent with site-specific planning for the area. It was further noted that the land was identified as a target site for medium to high density residential development which was in accordance with orderly and economic planning.

Whether the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disturbance (s88K(2)(b) Conveyancing Act 1919)

The Court must be satisfied that the owner of the land to be burdened can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the easement. In determining compensation, the Court will normally consider:

1 The diminished market value of the affected land.

2 Associated costs that would be caused to the owner of the affected land.

3 An assessment of compensation for loss of amenity, such as loss of peace and quiet.

The Court found that Skyton could be reasonably compensated.

Whether all reasonable attempts have been made to obtain the easement (s88K(2)(c) Conveyancing Act 1919)

To satisfy this test, the Applicant must:

1 Make an initial attempt to negotiate with the person affected and make some monetary offer which is not token.

2 Sufficiently inform the person affected of what is being sought and provide for the person affected an opportunity to consider its position and requirements.

Thereafter, the Applicant is not required to continue to negotiate with the person affected by making more and more concessions until consensus is reached.

Once it appears from an objective point of view that it is extremely unlikely that further negotiations will produce a consensus within the reasonably foreseeable future, it may be concluded that all reasonable attempts have been made to obtain the easement.

Discretion to impose the easement (s88K (1) Conveyancing Act 1919)

The Court's discretion to impose the easement is to be exercised with the goal of facilitating the reasonable development of land whilst ensuring that just compensation be paid for an erosion of private property rights. In exercising the discretion, the Court cannot take into account the affected person's simple reluctance to make the grant of the easement for whatever reason.

Costs of the proceedings (s88K(5) Conveyancing Act 1919)

There is a general entitlement for the person affected by the imposition of the easement to have their costs of having the matter determined by the Court. This entitlement will only be lost if the person affected has engaged in unreasonable conduct. The basis on which costs should be paid is the ordinary basis and not an indemnity basis, unless the conduct of the Applicant for the order has been such as to justify an order for indemnity costs.

The Benevolent Society v Waverley Council [2010] NSWLEC 1082

14 April 2010 – NSW Land and Environment Court – Senior Commissioner Moore

New Planning Principle- Solar Access

Senior Commissioner Moore has issued a revised planning principle dealing with solar access which replaces the previous planning principle of former Senior Commissioner Roseth set out in *Parsonage v Ku-ring-gai Municipal Council* [2004] NSWLEC 347.

The new planning principle is as follows:

> *"Where guidelines dealing with the hours of sunlight on a window or open space leave open the question what proportion of the window or open space should be in sunlight, and whether the sunlight should be measured at floor, table or a standing person's eye level, assessment of the adequacy of solar access should be undertaken with the following principles in mind, where relevant:*
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> - *The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed). At higher densities sunlight is harder to protect and the claim to retain it is not as strong.*
>
> - *The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.*
>
> - *Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.*
>
> - *For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formula are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area.*

- *For private open space to be assessed as receiving adequate sunlight, regard should be had to the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of it requiring sunlight for it to have adequate solar amenity. A useable strip adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on private open space should ordinarily be measured at ground level but regard should be had to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate.*

- *Overshadowing by fences, roof overhands and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.*

- *In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development".*

The above authority has amended the principle in Parsonage when assessing a window as relevantly 'being in sunlight', Parsonage required the sun to strike the window at a horizontal angle of 22.5 degrees and for half of the surface area of the window to be in sun.

The Senior Commissioner criticized this approach saying the likely architectural response was to make any window being assessed smaller by shrinking it in the direction of the proportion of the window surface in sunlight.

The Commissioner considered this to be contrary to the outcomes sought to be achieved by Parsonage.

For this reason, the Commissioner reformulated the principle removing the mathematical formula and substituting a process orientated test involving a consideration of the glazed area of the window and where the sunlight actually penetrates internally and externally.

Agostino v Penrith City Council [2010] NSWCA 20

3 March 2010 – NSW Court of Appeal – Giles JA, Tobias JA and McClellan CJ at CL

Development Standard or Prohibition

This appeal related to a development application for alterations and additions to an existing fruit and vegetable store, prohibited in the zone (as a shop). The specific site however, was the subject of a special provision within the LEP, clause 41(3), which provided:

> *"Notwithstanding any other provision of this plan, a person may, with the consent of the Council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sqm."*

The proposal fell within the definition of fruit and vegetable store for the purposes of the clause, however the proposal sought to substantially increase the floor area. The question for the Court was whether the maximum floor area of 150 m^2 specified in clause 41(3) was a development standard amenable to variation under State Environmental Planning Policy No. 1 ("SEPP 1").

Justice Tobias undertook analysis of the historical case law on the question and found that the approach to be taken is to:

> *"Identify the proposed development and then to determine whether it falls within description of that which clause 41(3) makes permissible with consent. In performing this exercise, it is necessary to identify which criteria are essential conditions in determining whether particular development proposed is permissible…it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing, care is also to be taken to ensure that form does not govern substance…"*

His Honour found that the 150 m^2 limit was an essential criterion and found that clause 41(3) "is definitional in substance if not in form", despite the words "with a maximum floor area of 150 m^2" not being inserted into the express definition of fruit and vegetable store.

Justice Giles, without elucidating further, agreed with Justice Tobias and the Court held that the provision was not a development standard but rather a prohibition.

Justice McClellan (former Chief Judge of the Land and Environment Court) disagreed, holding that the provision was a development standard amenable to variation under SEPP 1.

In his Judgment, Justice McClellan noted:

> *"The wastage of public and private money debating these issues is a blight upon our planning system which should be resolved, preferably by legislative intervention or amendment to individual planning instruments."*

It is arguable that this has been at least in part been achieved by clause 4.6 in the standard LEP which clause replaces the operation of SEPP 1. Clause 4.6(8) provides that the clause does not allow consent to be granted for development that would contravene, amongst other things, clause 5.4 of the standard LEP which contains specific floor space or other controls for various uses.

The operation of clause 4.6(8) appears to accept that the controls contained within clause 5.4 may well be development standards however the final determination of that question is not ultimately necessary given that even if they are development standards they are not open to be varied pursuant to clause 4.6.

All Councils have been directed by the Minister for Planning to prepare new LEPs based on the standard LEP but to date only a few have been gazetted.

Iris Diversified Property Pty Ltd v Randwick City Council [2010] NSWLEC 58 (7 May 2010)

7 May 2010 – NSW Land and Environment Court – Pain J

Existing Use Rights

Fact

The Applicant, the operator of the Clovelly Hotel, lodged a development application which sought to change the use of part of the existing hotel (with existing use rights) within the residential zone to a residential use.

The Respondent identified exceedances of development standards and refused the application for want of SEPP 1s in respect of those standards.

The Appellants lodged a Class 1 appeal in the Land and Environment Court. A preliminary point of law was heard before Pain J. The issues for determination as part of that point of law was as follows:

a If it be determined that the land known as 379 – 401 Clovelly Road, Clovelly, being the whole of lot 1 in DP 105854, has the benefit of existing use rights, in the context of the present development application for the change of such use to another use permissible in the zone, do the otherwise relevant provisions of the Randwick Local Environmental Plan including, but not limited to:

Clause 31 – landscape area; Clause 32 – maximum floor space ratios; Clause 33 – building heights.

derogate from the incorporated provisions and thus have no force or effect while incorporated per force of 108 (3) of the Environmental Planning and Assessment Act 1979?

and/or

b Can the present development application be determined by the grant of development consent in the absence of an objection made under SEPP1?

Competing arguments were advanced by Counsel for the parties, relevantly John Robson SC for the Respondent and John Ayling SC for the Applicant. These augments can be summarised as follows:

The Respondent

1 The provisions of Randwick Local Environmental Plan relevant to the proposal do not derogate, within the meaning of section 108(3) of the Environmental Planning and Assessment Act 1979 from the

incorporated provisions in the Environmental Planning and Assessment Regulation 2000 ;

2 Clause 41(1)(d) does not provide an exemption from complying with any relevant requirements of an applicable Environmental Planning Instrument for development that is otherwise already permissible merely because the site benefits from existing use rights;

3 Clause 41(1)(d) was intended to reduce the concessions attached to development on land subject to existing use rights and a change of use is sought;

4 Subsequent to the amendments to Clause 41 (the 2006 amendments) the subsections to clause 41 were repealed namely subsections (2), (e) and (f) and new subsection (2) (not relevant here) was introduced;

5 Clause 41(1)(d) now provides for another use "but only if that other use may be carried out with or without development consent" by contrast with the former clause these words are restrictive, narrow, and exclude prohibited development. So rather than derogate from Clause 41(1)(d) now;

a The requirements in an Environmental Planning Instrument which are intended to constrain a consent authority's power to grant consent should not be considered to "detract" from the operation or effect of clause 41(1)(d);

b If a development does not comply with development standard (in the absence of a SEPP1) it is difficult to see how it could be "carried out with or without development consent" within the meaning of clause 41(1)(d)

6 Where a development fails to comply with an Environmental Planning Instrument the relevant provisions do not derogate from clause 41(1)(d) but are a requirement of it;

7 Clause 41(1)(d) permits only a change to a permissible use. LEP requirements that have the effect of restricting a consent authority's power to grant consent to permissible uses are relevant to an application to change to a permissible use;

8 The purpose of Clause 41(1)(d) is to constrain changes and uses relying on existing use rights to otherwise already permissible uses;

9 The purpose of the legislative changes was to rein in conversions to prohibited uses;

10 If land owners could continue to rely on section 108(3) to say that development standards which they are in breach of derogates from the right to change an existing use to one which is permissible with or without consent. The purpose behind the amendments would be defeated;

The Respondent submitted on the basis of the above submissions that the questions proposed should be answered No and that SEPP 1's were required to vary the applicable development standards in the LEP

The Applicant

1 Before the 2006 amendments, the regulations specifically permitted a change of an existing use to a use otherwise prohibited;

2 Any doubt as to the capacity of an Applicant to make an application to carry out a permissible use in reliance upon existing use rights was dispelled by the decision in Star Property Investments Pty Limited v Leichhardt Municipal Council [2000] NSWLEC 235.

In this authority, Talbot J concluded:

"*in my view, it is just as consistent with the purpose of the existing use provisions to allow a change of use to another non-confirming use as it is to allow a change to a conforming use. Furthermore, a change to a conforming use that satisfies the requirements of the incorporated provisions, but does not comply with stricter development standards contained in modern planning instruments that in effect derogate from the incorporated provisions, could positively facilitate a move towards bringing the use of property into closer conformity with current planning aims and objectives*".

3 The above proposition is consistent with the NSW Court of Appeal decision in Carden v Willoughby Municipal Council [1985] 56 LGRA 367;

4 In Masterbuild Pty Ltd v Hornsby Shire Council [2005] NSWLEC 212, Pain J cited Berowra RSL and Star Property and accepted that specific planning controls must yield their relevance to general planning principle in cases where the proposal involves a change of use to a permissible purpose;

5 There is no authority upon the effect of the incorporated provisions subsequent to the 2006 amendments which removes the ability of a consent authority to grant consent to the change of an existing use to another non conforming use;

6 The correct legal position is that controls within Environmental Planning Instruments which have the effect of restraining or limiting the consent authority's capacity to approve a change of existing use to a conforming use, or which purport to prevent that capacity being exercised, are properly to be seen as derogating from the operation of the incorporated provisions and in particular Clause 41(1)(d) and in accordance with section 108(3) have no force or effect;

7 The Applicant submitted on the basis of the above submissions that both questions should be answered yes;

The Decision

On 7 May 2010 Pain J delivered judgment (accepting the Respondent's arguments) and held:

1 The application of development standards in an Environmental Planning Instrument to the assessment of a conforming use as defined under the land use table of that instrument is **not a derogation** which the Environmental Planning and Assessment Act 1979, NSW, 108(3), forbids. Applying the development standards will not detract from, destroy or impair the operation of the Environmental Planning and Assessment Regulation 2000 NSW, Clause 41(1)(d);

2 Prior authority that may appear to be to the contrary derives from the predecessor to Clause 41(1)(d) which permitted a change of existing use to another prohibited use.

ROI Properties Pty Ltd v Council of City of Sydney [2010] NSWLEC 22

22 February 2010 – NSW Land and Environment Court – Pain J

Costs

Facts

The parties participated in a conciliation conference under section 34 of the Land and Environment Court Act 1979. The Applicant's Solicitor had appeared at the section 34 conference with 4 expert witnesses and 2 representatives of the Applicant Company.

The Council was represented at the section 34 conference by its Solicitor only.

The Applicant filed a Notice of Motion seeking its costs for the preparation of and attendance at the section 34 conference.

There was evidence of the steps taken by both parties in preparation for the section 34 conference in the form of affidavits of the parties Solicitors.

The Applicant objected to the reading of the paragraph of the affidavit of the Council's Solicitor in which he attested to what had occurred at the section 34 conference, and it did not put on any evidence from the Solicitor who attended the conference on its behalf.

The question for determination was whether costs thrown away in preparation for attendance at a section 34 conference ought to be awarded. The Court relevantly held, standing the application over, as follows:

Under section 34(11) of the Court Act, no evidence of anything said at the section 34 conference can be referred to in the hearing unless there was agreement to do so by both parties under section 34(12) of the Court Act.

There was no such agreement.

The result was that, neither party could make submissions supported by evidence of what occurred at the section 34 to advance their respective cases, and without that evidence, the determination of costs could not occur.

By virtue of the Council's preparation and instructions to its Solicitors, the matters it considered could be addressed at the Conference were narrower than the Applicant intended but that did not mean that there had been a lack of good faith in the conciliation process on the Council's part as required by section 34(1)(a) of the Court Act.

Final determination of any Notice of Motion seeking costs was stood over until the substantive Class 1 matter had been decided.

Conclusion

The above cases are just a smattering of what's gone on in the justification over the last 12 months and the Court continues to revisit and update its jurisprudence particularly in response to legislative change.

At the outset I said that there are a number of matters which the Court has not yet had to grapple with but which will be contentious for the Court and the profession practicing in the jurisdiction within the next 12 months:

i) There is yet to be an appeal against the determination of a JRPP's decision. it will be interesting to see how the Court approaches such an appeal in terms of the weight one gives to the findings of the JRPP and in circumstances where the Council disagrees with the JRPP's findings (in instances such as consent orders) weather the JRPP will seek to be heard and or joined in such proceedings;

ii) The decision in Iris is currently on appeal. How the Court reconciles those principles and what that means for the continuation and value of existing use rights will have potentially wide ranging effects;

iii) The pitfalls of the newly commenced complying development SEPPs will start to be revealed;

iv) The certifier accreditation process particularly in relation to Council accreditation and the potential civil liability cases stemming from that process;

All I can say is "watch this space"!