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LAWYERS

RECENT CASES IN LAND AND ENVIRONMENT COURT FOR AUSTRALIAN INSTITUTE OF BUILDING SURVEYORS CONFERENCE JULY 2005

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Physical Commencement

Hunter Development Brokerage Pty Ltd v *Cessnock City Council; Tovedale Pty Ltd* v *Shoalhaven City Council* [2005] NSWCA 169
23 May 2005 – NSW Court of Appeal – Santow JA, Tobias JA, Stein A-JA

These cases (heard together on appeal because the same issue was in question) were appeals against a decision in the Land and Environment Court that no work had commenced on the sites and as a result development consent had lapsed. The issue was whether 'building, engineering or construction' work had 'physically commenced' on the sites for the purposes of section 95 of the Environmental Planning and Assessment Act 1979.

In the case of *Hunter* the Applicant had undertaken geotechnical investigation work (including the digging of testpits), surveys of the site and landscape works. In *Tovedale*, survey work had been undertaken. In both cases the survey work involved the placement of permanent survey marks on or under the surface, placement of pegs and clearing of vegetation.

In deciding whether work had commenced, the court stated that there were three relevant questions:

1 was the work relied on building, engineering or construction work; if so,
2 did it relate to the approved development; if so
3 was it physically commenced on the land to which the consent applied prior to the relevant lapsing date?

In relation to the first question, the court found that survey work was engineering work and that engineering work should be interpreted broadly.

In relation to the second question, the court stated that the work must have a real relationship to the development consent. This includes preparatory work which must be done before the erection of the development can commence (including survey work).

The difference between physical commencement and non-physical commencement is that work is commenced on the land in the physical sense, as opposed to planning and design work off-site. Physical commencement can include preparatory work and does not require a change in the physical nature of the land.

As a result of the above findings, the court declared that neither of the consents had lapsed.

Care must be exercised in applying this decision to other cases. The court noted that this decision is not authority for the proposition that any survey work would be sufficient to constitute "engineering work" within the terms of the section to prevent lapsing. The court further noted that there is an element of fact and degree in each case.

Substantially the Same Development

Brendan Howell v *City of Canada Bay Council* [2005] NSWLEC 335
24 June 2005 – Land and Environment Court – Watts C

The Applicant submitted a development application for erection of a two-storey, attached dual occupancy dwelling house and subdivision. The Council approved the construction of the dwelling house with a condition that the lot not be subdivided.

The Applicant lodged a section 96 application to modify the consent to include subdivision of the lot, which was refused by Council. At the appeal Council argued that there was no power to grant consent to the section 96 application on the basis that it was not 'substantially the same development'.

The Commissioner found that a dwelling house, compared to a dwelling house and subdivision, could not be said to be substantially the same. The Commissioner discussed the potential differing planning consequences that would arise from the different applications. If the subdivision was allowed, the owners of the different lots might seek to 'individualise' their dwellings so that the dual occupancy would no longer appear like a single dwelling and would be out of character with the area.

Accordingly, the appeal was dismissed.

Costs on a Successfully Defended Class 1 Appeal

Aldi Foods v *Holroyd City Council* [2005] NSWLEC 338
27 June 2005 – Land and Environment Court – Talbot J

This case illustrates the difficulties in seeking costs in a Class 1 Appeal.

The Council successfully defended a Class 1 Appeal during which the parties had attended three case management conferences. At two of these conferences offers of compromise were put to the Applicant by Council and were rejected. Further, the Applicant amended its plans

several times during the course of proceedings. Council made a claim for costs.

Justice Talbot restated the principle in relation to costs applications as being that costs are only awarded in Class 1 Applications in cases where it is fair and reasonable to do so. Generally, this means there will be no costs orders made. The reason for this was to avoid discouraging parties from commencing or defending Class 1 Applications.

The judge stated that amended plans arising out of case management and appointment of Court Appointed Experts do not necessarily give rise to costs orders. Furthermore, he added that Applicants are not obliged to respond to demands of Council in relation to offers of compromise. Rather, in some instances it is appropriate that differences of opinion on the impact of a development be tested in the legal system.

The judge found that the Applicant had raised legitimate arguments in support of its case in the merits appeal. Based on this finding, he concluded that it would not be fair and reasonable to make an order for costs against the Applicant.

Finally, the judge found that Council should pay the costs of the motion seeking costs. This was on the basis that the relevant Practice Direction in regards to costs is intended to encourage Applicants to apply for merit reviews without the risk of costs if unsuccessful. The Council's application caused additional costs to the Applicant so to make the Applicant pay its own costs for the costs of the motion would be contrary to the intention of the Practice Direction.

Effect of a Mandatory Precondition in Local Environmental Plan

Skouteris v *Auburn City Council and Anor* [2005] NSWLEC 207
29 April 2005 – Land and Environment Court – Cowdroy J

Clause 14 of the Auburn LEP states 'Consent may be granted to development within Zone no 2(a), 2(b) or 2(c) only if, in the opinion of the consent authority, it is compatible with the existing and likely future character and amenity of nearby properties…'

The validity of a development consent for a child care centre was challenged on the grounds that Council in determining the application did not form the requisite opinion under the above clause and therefore did not have the power to grant consent. The Council officer's report to Council did not refer to clause 14 although each of the matters particularised in clause 14 were dealt with as part of the officer's general merit assessment. The court was not prepared to accept that clause 14 of the LEP was within the knowledge of each of the elected members.

The court found that the forming of the opinion required by clause 14 was a 'mandatory precondition' to Council having the power to grant consent and in the absence of the reference to clause 14 in the officer's report declared the development consent to be invalid.

Similar clauses relating to a Consent Authority being required to be "satisfied" as to various matters are contained in many other Local Environmental Plans (eg. relating to zone objectives and heritage conservation provisions). Care needs to be taken that the officer's report specifically refers to the relevant clauses, where appropriate.

Reasonable Access to Services: SEPP (Seniors Living) 2004

Information Gateways Pty Limited v *Hornsby Shire Council* [2005] NSWLEC 242
13 May 2005 – Land and Environment Court – Cowdroy J

SEPP (Seniors Living) 2004 requires that self-care housing on land that adjoins land zoned primarily for urban purposes provides reasonable access to on-site services namely, home delivered meals, personal care and home nursing and assistance with housework (clause 74) as well as access to off-site services such as banks and general practitioners (clause 75).

In the development application the Applicant provided as evidence of the provision of the on-site services pro forma statements by 4 service providers stating that in principle, they would be able to provide services to the proposed development. In relation to the provision of access to off-site services, the Applicant proposed a condition of consent to require the Community Management Statement for the proposal to include the provision of a bus.

The court found that these arrangements did not satisfy the requirements of the SEPP. In relation to on-site services, the court stated that the consent authority requires assurances that the service providers will provide on-site services for the life of the development. The Applicant can satisfy the consent authority that the services will be provided by lodging a draft contract as well as evidence that the Applicant and the service providers agree to the terms of that contract. A service management plan that provides for the services to be provided for the life of the development should also be included in the development application.

Provision of the bus service that would provide access to off-site services was not a matter that could be conditioned. Rather, the court required that the Applicant submit a Community Management statement covering such matters with the development application so that the arrangements could be properly assessed by the consent authority before the application is determined.

As these matters had not been satisfied, the court was not prepared to grant consent.

Invalid Exercise of Delegated Authority

Wyong Shire Council v *MCC Energy Pty Ltd & Ors* [2005] NSWCA 86
29 March 2005 – NSW Court of Appeal– Sheller JA, Hodgson JA , Tobias JA

Under the Local Government Act, Wyong Council had delegated several functions to the General Manager. The General Manager also had the power to delegate and sub-delegate in accordance with the terms of the Delegation of Authority Manual which had been adopted by resolution at Council.

Council approved a development application for alterations and additions to a dwelling, under delegated authority. This decision was challenged on the basis that the consent was void because the delegated authority had not been properly exercised.

The court found that the consent was void because the officer who determined the application did not have valid delegated authority. This was because the General Manager had not reviewed and renewed his delegated authority which was required to be done every 2 years by the Delegation of Authority Manual. This meant the General Manager had no power to delegate at all at that point in time.

Secondly, the terms of the Delegation of Authority Manual had not been complied with in delegating the decision to the Council Officer who determined the matter. The Council Officer could only exercise delegated authority if there was no 'significant public objection'. The court found that objections from almost all adjoining neighbours constituted significant public objection and that it was not necessary that large numbers of the general public object. As such, the Council Officer was not authorised to determine the application under delegated authority.

PLANNING PRINCIPLES

The Chief Judge of the Land and Environment Court has advised that the Court will be developing "planning principles" which may be referred to and relied on in other cases.

These planning principles are not intended to replace provisions contained in Local Environmental Plans or Development Control Plans, but to provide general guidance where there is no applicable provision.

Some recent decisions setting down "planning principles" are summarised below.

A list of planning principle judgments is on the Land and Environment Court website.

Planning Principle –Licensed Premises

Vinson v Randwick Council [2005] NSWLEC 142
6 April 2005 – Land and Environment Court – Moore C

This was an appeal against the refusal by Council to issue a Place of Public Entertainment Authority (POPE) for licensed premises which would result in an increase in patron numbers.

Commissioner Moore put forward 5 questions consent authorities should consider when deciding whether to permit extensions of trading hours, increases in permitted patron numbers or additional attractions for licensed premises:

1. *What are the adverse impacts of the present trading hours, permitted number of patrons and permitted activities?*

   Adverse impacts include noise, anti-social behaviour linked to the premises and demand for on-street parking. Specific and documentary evidence of these impacts (diary entries, police records etc) are preferable to anecdotal evidence.

2. *What measures are in place to address those impacts?*

   Includes security guards, noise control measures, litter collection.

3. *How are those measures documented?*

   It is preferable that measures are documented in a comprehensive and well-prepared management plan which is available to local

residents. Staff should be aware of the contents of the management plan. Additionally, documentation detailing responses to complaints from nearby residents should be kept by the licensee.

4. *Have those measures been successful?*

   If measures have only been in place for a short time, are not fully implemented or are of limited effectiveness, less weight should be given to these measures.

   Past performance in the control of adverse impacts resulting from use of the licensed premises is relevant to deciding whether future measures to deal with an intensification of the use will be successful.

5. *What additional measures are proposed by the applicant or might otherwise be required?*

   When considering this question consent authorities might also consider whether trial periods assessing the impacts of extended hours and effectiveness of control measures would be useful and/or appropriate.

   In this case the court refused to issue the POPE on the basis that there was no recorded history to demonstrate that the noise control and security measures proposed by the applicant would be effective in controlling the adverse impacts.

Existing Use Rights

Masterbuilt Pty Ltd v *Hornsby Shire Council* [2005] NSWLEC 212
18 May 2005 – Land and Environment Court – Pain J

The site was a former caravan park which had existing use rights. There were 11 appeals against Council's refusal of 11 development applications on the subject site, ranging from residential flat buildings to 2 storey dwelling houses.

In deciding whether to allow the proposed developments, Justice Pain considered the planning principle contained in the judgment of *Fodor Investments Pty Ltd v Hornsby Shire Council* [2005] NSWLEC 71 [referred to in our April Judgments Bulletin] and section 79C of the Environmental Planning and Assessment Act 1979. *Fodor* stated that when determining whether to allow a development on a site with existing use rights the following factors should be considered:

- How do the bulk and scale of the proposal relate to what is permissible on surrounding sites?
- What are the impacts on the adjoining land?
- What is the internal amenity?

In *Fodor* Senior Commissioner Roseth also stated the general principle that the existence of existing use rights on a site does not mean that principles of good design and town planning do not apply to assessment of the development application.

Applying the above principles, Justice Pain refused three of the development applications. She found all three applications which were refused to be of a scale and density out of character with surrounding development. Further, two of the applications would have an unacceptable visual impact when viewed from locations external to the site. Finally, one of the proposed developments provided inadequate internal amenity in that the solar access to the private open space was poor.

Planning Principle – The Use of Landscaping to Conceal a Building (or "No-one would ever suggest screening out the Opera House")

Lim v *Pittwater Council* [2005] NSWLEC 239
13 May 2005 – Land and Environment Court – Roseth SC

This was an appeal against, amongst other things, a condition of development consent that required landscaping to screen 60% of a dwelling house within 5 years time.

In relation to this condition, Senior Commissioner Roseth stated that the purpose of landscaping is to soften the appearance of a building, not to conceal it. If a building is unacceptable in terms of bulk and scale, it is not appropriate that this be dealt with by requiring landscaping. Instead, the problem should be addressed by controls relating to the building itself.

The Commissioner also thought the condition unsatisfactory as an assessment of whether it was fulfilled would be subjective. For example, the condition did not make clear from what point the extent of the screening should be judged.

As such, the condition was found to be inappropriate.

Construction Certificate Issued after Works Carried Out

Marvan Properties v Randwick CC [2005] NSWLEC 9
11 January 2005 – Land and Environment Court – Talbot J

The Land and Environment Court has held that a Construction Certificate can be issued retrospectively.

In this case, the Applicant had obtained development consent for alterations and additions to an existing apartment building. Some of the works had been carried out prior to obtaining a full Construction Certificate. The Council granted a Building Certificate, but refused to grant a Construction Certificate on the grounds that Construction Certificate could not be issued retrospectively. Without a Construction Certificate, the Applicant could not obtain an Occupation Certificate.

The Court held that a construction Certificate could be validly granted after the works had been carried out. This was because a Construction Certificatehad the effect of certifying that works carried out in accordance with the CC plans would comply with the Act and Regulations, and this could equally be done before or after the works were carried out. Of course, the scheme of the EP&A Act dictated that a Construction Certificate should be obtained prior to carrying out work, and a person who commenced a development without a Construction Certificate committed an offence. However, there was utility in granting a Construction Certificate retrospectively, because this was the only way that a valid Occupation Certificate could be issued.

CONSTRUCTION CERTIFICATE PLANS TO BE "NOT INCONSISTENT" WITH DEVELOPMENT CONSENT: SECTION 101 EP&A ACT

Lesnewski v Mosman MC & Anor [2005] NSWCA 99

This was an appeal to the Court of Appeal against the decision of Justice Pain in the Land and Environment Court.

Case involving a disgruntled neighbour who had alleged that a development consent granted by the Council was invalid either because the Council had denied procedural fairness or because the Council officer who issued the consent did not have power to do so on a delegated authority. The neighbour also challenged the issuing of the Construction Certificate issued by the Council on the basis that there were inconsistencies with the development consent plans.

Dealing first with the challenge to the Construction Certificate, cl.145(1)(a) of the EP&A Regulations 2000 provide that a Construction Certificate may only be issued if the certifying authority is satisfied that the Construction Certificate plans are "not inconsistent" with the development consent. At issue, really was not so much what the words "not inconsistent" under the clause meant, but what the Applicant wanted and expected from the Land and Environment Court when the matter was considered before Justice Pain. The Applicant expected the Court to review for itself whether the Construction Certificate plans and development consent plans were consistent.

The Court of appeal rejected this submission and in so doing probably closed the flood gates on what could have been multiple challenges to Construction Certificate drawings. The Court of Appeal held that cl.145(1)(a) requires a certifying authority itself to be satisfied of the required matters and that was really the end of the matter subject to a limited review on conventional Administrative Law grounds (such as manifest unreasonableness).

The Lesnewski decision is also important concerning the application of s.101 of the EP&A Act. Section 101 effectively creates a legal bar for actions challenging the validity of a development consent following the expiration of three months from the date of which public notice is given of a consent.

The Court of Appeal, overturned the finding of Justice Pain in the Land and Environment Court, that s.101 did not prevent a

development consent being challenged on the ground of procedural fairness and that an appeal could be brought later than the three month expiration. The Court of Appeal found that where a section of an Act, such as s.101, prevents a person from challenging a decision, the Court will give a narrow interpretation to the section because there is an assumption that the legislature does not intend to take away a challenger's access to the Courts.

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July 2005