LOCAL GOVERNMENT NSW

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IN THIS ISSUE

Summary of cases

1. A case where a developer and its project manager and director were found guilty of carrying out development without consent. The Court also rejected their defence of necessity.
2. An appeal by a council against an approval of the Court for demolition of an existing structure and the construction of a residential flat building.
3. An appeal against a council's deemed refusal for an application for the demolition of an existing improvement on a site and the construction of an in-fill affordable housing development.
4. An appeal by Telstra against a council decision to refuse a development application for the construction of a telecommunications facility.

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Maddocks

1. Leichhardt Council v Geitonia Pty Ltd (No 6) [2015] NSWLEC 51

In this case, the Court found Geitonia Pty Ltd (the owner and developer of land) and its director and project manager guilty of carrying out development without development consent. The Court also rejected the defence of 'necessity' raised by both the developer company and its director.

Background

On 2 April 2015, Justice Biscoe found that each of Geitonia Pty Ltd (the owner and developer of the land), GRC Project Pty Ltd (Geitonia's project manager) and Bill Gertos (the sole shareholder and director and alter ego of Geitonia) guilty of demolishing the façade of a building in a heritage conservation area in breach of section 76A of Environmental Planning & Assessment Act 1979. Both Geitonia and GRC were fined $50,000 for the offence. Mr Gertos was personally fined $150,000.

The development consent granted by Leichhardt Council required retention of part of the existing building, including the majority of the front (southern) façade, and permitted construction of a multi-story mixed commercial and residential development over a basement carpark. Remarkably, prior to the façade being demolished, Geitonia had on two occasions sought to obtain Council modification approval for the demolition of the façade, both of which were unsuccessful.

Direct and Vicarious Liability

After considering the evidence presented by the Council, Justice Biscoe concluded that:

- Geitonia, through Mr Gertos, had directly authorised Global Demolitions Group Pty Ltd to demolish the façade of the building.
- The overwhelming inference was that Geitonia, through Mr Gertos, authorised GRC Project Pty Ltd to contract with Global Demolitions Group Pty Ltd to demolish the façade of the building.
- Consequently, GRC Project Pty Limited was authorised by Geitonia, through Mr Gertos, to give detailed instructions to Global as to what to do to the façade, and how to carry out the demolition of the façade.

The Court found Geitonia directly liability for carrying out the demolition without development consent in breach of section 76A of the Environmental Planning & Assessment Act 1979 because it directed that the demolition take place, and commercially benefited from the demolition. The Court found that GRC Project Pty Limited was vicariously responsible for the demolition carried out by Global Demolitions Group Pty Limited because Global Demolitions Group Pty Limited carried out the demolition under a contract with GRC Project Pty Limited and the evidence established that Global Demolitions Group Pty Limited carried out the development on instructions from GRC Project Pty Limited.

The Court found Mr Gertos separately liable for his own conduct in carrying out development on the land contrary to the development consent. His liability was vicarious for the conduct of Global Demolitions Group Pty Ltd because at a coffee shop meeting, he negotiated and orally agreed to the demolition by Global Demolitions Pty Limited. The Court found that Mr Gertos had directly instructed both GRC Project Pty Limited and GRC Project Pty Limited to demolish the façade of the building, and he couldn't hide behind the developer company of which he was the sole director and shareholder.

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The Defence of 'necessity'

Perhaps what is more interesting about this case is the defence of necessity raised by Getonia and Mr Gertos. Getonia and Mr Gertos submitted that the southern façade was so unsafe that it had to be pulled down immediately.

Justice Biscoe gave a brief history of the defence of necessity in his decision, which has not been successfully raised as a defence to criminal proceedings in the Land & Environment Court. It is instructive to consider the following paragraph in Justice Biscoe's decision:

> A high bar was set for the defence of necessity in a case of cannibalism on the high seas, The *Queen v Dudley and Stephens* (1884) 14 QBD 273. Four shipwrecked sailors were adrift in an open boat on the high seas more than one thousand miles from land. One of their number, the cabin boy, was the youngest and eventually became the weakest. After 20 days adrift they had been without food for seven days and without water for five. Dudley and Stephens killed the cabin boy and (with the fourth sailor) ate his flesh and drank his blood. Four days later, a passing ship rescued them in the lowest state of prostration. The two killers were tried for murder. Their defence of necessity was that if they did not kill and feed on one of their number, they would all die of starvation. Delivering the judgment of a court consisting of five judges, Lord Coleridge CJ rejected the defence of necessity, convicted them of murder and sentenced them to death. Acknowledging that the prisoners were subject to "sufferings which might break down the bodily powers of the strongest man, and try the conscience of the best" (at 278), Lord Coleridge intimated that the Crown might exercise the prerogative power of mercy (at 288). This the Crown later did, by commuting the death sentence to six months in prison.

Justice Biscoe articulated the three elements that must be established to successfully rely upon the defence of necessity:

- The criminal act must be done in order to avoid the infliction of irreparable evil on the accused, or others that he or she was bound to protect.
- The accused honestly believed on reasonable grounds that he or she was placed in a situation of imminent peril.
- a reasonable person in the position of the accused would have considered that he or she had no alternative but to take the action that he took, which involved breaking the law, in order to avoid the peril.

In this case, the Court did not find that any of the elements of the defence of necessity had been established by Geitonia or Mr Gertos. This was largely because the Council had adduced engineering evidence, which the defendant's own expert agreed with, that the front façade was stable and not in imminent danger and that there were ways to temporarily brace the front façade which would prevent the façade from being impacted by, for example, a high wind event.

2. Botany Bay City Council v Botany Development Pty Ltd (No 2) [2015] NSWLEC 55

This case concerned an appeal by Botany Bay City Council (Council) against a Commissioner's approval of a development proposal in Botany for the demolition of the existing structures on the site and construction of a 3 – 6 storey residential flat building.

Background

The Applicant sought development consent to build a residential flat building with associated car parking, landscaping and ancillary works on the site. The proposed residential flat building was to comprise 158 units

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with one bedroom units between 50.7 and 67.5 square metres, two bedroom units between 78.1 and 93.8 square metres, and three bedroom units between 98.1 and 98.9 square metres. These unit sizes were considered too small by the Council. The Council refused to grant the development consent.

The Commissioner approved the development.

Issues

The Council appealed the Commissioner's decision, arguing in essence that:

1. The unit sizes did not meet the minimum sizes specified in its Development Control Plan 2013 (DCP) and the Commissioner had erred in failing to apply the minimum sizes in DCP; and
2. The Commissioner had both misapplied clause 30A(1)(b) of SEPP 65, and the Residential Flat Design Code (RFD Code).

Interpretation of the RFD Code

This case turned on the Court's application and interpretation of RFD Code. Relevantly, clause 30A(1)(b) of the SEPP provides:

(1) A consent authority must not refuse consent to a development application for the carrying out of residential flat development on any of the following grounds:

(b) apartment area: if the proposed area for each apartment is equal to, or greater than, the recommended internal area and external area for the relevant apartment type set out in Part 3 of the Residential Flat Design Code.

Notably, the RFD Code refers to two different sets of minimum unit sizes: firstly in a table which specified minimum internal and external areas for nine different apartment types (the Table); and secondly under "Rules of Thumb" which provides suggestions made by the Affordable Housing Service for the minimum areas of 1,2 and 3 bedroom apartments. The minimum areas specified in the Table were significantly higher than those contained in the Rules of Thumb.

All the apartments proposed by Botany Development exceeded the areas identified in the Rules of Thumb, but only 63% meet those in the Table. Botany Development argued that the Rules of Thumb contained the recommended minimum areas referred to by clause 30A(1)(b).

The Council disagreed, contending that the applicable minimum areas were those in the Table.

At first instance the Commissioner agreed with Botany Development, and found that under clause 30A(1)(b) of the SEPP the development could not be refused on the basis of unit size.

Decision

On appeal however, the Court overturned the Commissioner's interpretation. Clause 30A(1)(b) of the SEPP contemplated both recommended internal areas and external areas for the prescribed unit types. As the Rules of Thumb did not distinguish between internal and external areas, the Court found that on its proper construction and context clause 30A(1)(b) could only have been referring to the Table. Furthermore, the Court considered Botany Development's interpretation would be contrary to the aims of the SEPP, namely, "to provide quality design outcomes for residential flat buildings across the board". In doing so, the Court was concerned to ensure that affordable housing standards would not be broadly applicable to all new units.

As proposed units did not satisfy the minimum area requirements of the RFD Code, clause 30A(1)(b) of the SEPP was therefore not applicable. The Court found that the DCP was a relevant consideration, and should

have been taken into account by the Commissioner by virtue of s79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979.

The decision was remitted to the Commissioner for further hearing.

3. Zhang v City of Ryde Council [2015] NSWLEC 1091

This was an appeal by Mr Zhang against a deemed refusal by the City of Ryde for an application for the demolition of the existing improvements on the site and the construction of an in-fill affordable housing development at Denistone.

Background

The site is located in Denistone and is currently zoned R2 Low Density Residential under the Ryde Local Environmental Plan 2014 (LEP 2014). However, as the development application had been lodged prior to the commencement of the new LEP, it was caught by the savings provisions in clause 1.8A in the LEP 2014. The parties agreed that the relevant LEP was therefore the Ryde Local Environmental Plan 2010 (LEP 2010). Under LEP 2010, the site was within Zone R2 Low Density Residential. Multi-dwelling housing is a permissible use in this zone.

The parties also agreed that the appropriate development control plan was the Ryde Development Control Plan 2014 (DCP 2014), as there was no savings clause contained in the Ryde Development Control Plan 2010.

Relevantly, the site is rectangular in shape with a total area of 1,011.7 square metres. The surrounding area is characterised by single storey dwelling houses and single storey multi-dwelling housing development.

The proposed development provides for a part single storey, part room in the roof and part two storey building containing four dwellings.

Issues

The Council contended that the proposed development should be refused because it was:

- inconsistent with provisions in LEP 2010 and State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP) such that the density control in cl 4.5A of LEP 2010 was not satisfied,
- incompatible with the local area,
- inadequate in terms of amenity for Dwelling 4 because of insufficient floor area, and
- inconsistent with the zone objectives.

Inconsistency between the LEP 2010 and the SEPP

The Council argued that even though the proposed development satisfied the floor space requirements of the SEPP, it did not satisfy the density controls contained in the LEP 2010.

Under clause 4.5A of the LEP 2010, the site area for multi dwelling housing located in the R2 zone, was required to be 300 square metres for each 1, 2 and 3 bedroom dwelling. The Council contended that as the proposed development was for four dwellings, it required there to be a total site area of 1,200 square metres. However, as the site was only 1,101.7 square metres, it had the potential for only 3.67 dwellings.

The SEPP in clause 14 specified minimum floor areas for each affordable housing dwelling. In so far as these areas were inconsistent with another planning instrument, clause 8 of the SEPP provided that the SEPP would prevail to the extent of the inconsistency.

Mr Zhang argued that the LEP 2010 and SEPP were inconsistent as they both related to the general matter of the amount of development even though they are expressed in different ways. Mr Zhang contended that clause 8 of the SEPP was activated and the Court should only apply the SEPP's controls for density, not those of the LEP 2010.

The Court agreed with the Council finding that the SEPP's controls addressed bulk and scale, whereas the LEP 2010 addressed the number of dwellings on a particular sized lot. The site area was therefore deficient under the LEP 2010's requirements for the proposed development.

Character

On the issue of whether the proposed development was within the character of the exiting local area, the Court held that the correct approach was to principally look at the visual catchment in which the development would be viewed, however agreed that the wider catchment was also relevant. The parties' experts agreed that the local area was predominantly single storey residential development, however there was also other multi storey development with a maximum of three dwellings per allotment.

The Council's expert considered that the development was inconsistent with the appearance of other existing buildings in the locality and the character of the street, on the basis that most of the other buildings in the street were single storey.

Mr Zhang's expert approached the issue differently, arguing that compatibility is not about sameness but rather about a proposal's ability to exist in harmony with its surroundings. Compatibility also relates to the acceptability of a proposal's physical impacts on surrounding development. On this approach, Mr Zhang's expert concluded that the proposed development was within the character of the local area.

The main difference between the Council and Mr Zhang's reasoning was the form of development which should be considered in determining the character of the area. The Applicant adopted the form of development anticipated by the Council's controls whereas the Council adopted the existing form of development. The Court agreed with Mr Zhang.

Zone objectives

The Council's contention relating to incompatibility of the development with the zone objectives largely related to the proposed development's exceedence of the LEP 2010's prescribed density, as discussed above. In disagreeing with the Council's expert, the Court found that this did not automatically make the proposed development contrary to the zone objectives.

Conclusion

Due to the proposed development's non-compliance with the site area controls contained in the LEP 2010, the Court dismissed the appeal and refused to grant development consent.

4. Telstra Corporation Limited v Port Stephens Council [2015] NSWLEC 1053

Background

This case involved an appeal by Telstra against the Council's refusal of a development application (DA) for the construction of a telecommunications facility, equipment shelter and ancillary works on a site in Corlette. The site was owned by the Hunter Water Corporation (HWC) and was situated within a Council reserve. The facility was to include a 30 metre monopole in neutral grey colour with a non-reflective surface able to accommodate three panel antennas.

The location of the facility was predominantly clear of trees. However, the proposed development required the removal of trees from the surrounding Council reserve to facilitate the construction of the compound and associated access track, and to comply with the recommended 10 metre Asset Protection Zone (APZ) around the proposed monopole and equipment shelter required under the applicable Rural Fire Service Practice Note. The APZ was to extend outside of the subject site's boundaries and onto the Council reserve. Owners consent from the Council and HWC was provided for the lodgement of the development application.

Planning controls

The following planning instruments applied to the site:

- State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP), and
- Port Stephens Local Environmental Plan 2000 (LEP 2000) (which was in force at the time the development application was lodged).

The relevant guidelines and principles required to be considered under the Infrastructure SEPP, are contained in the NSW Telecommunications Facilities Guideline including Broadband (Guideline), and include:

- Principle 1: A telecommunications facility is to be designed and sited to minimise visual impact.
- Principle 2: Telecommunications facilities should be co-located wherever practical.
- Principle 4: Minimise disturbance and risk, and maximise compliance.

The proposed development was permissible with consent under these instruments. As the Council reserve was classified as community land, additional restrictions applied to the site under the Local Government Act 1993 (LG Act) as to the use and management of community land. Under this regime, compliance with the relevant Plan of Management was also required.

Issues

Council raised a number of issues with the development including:

- that the development was inconsistent with the zone objectives of the LEP 2000,
- the development was an unauthorised use of community land, and
- the development was not suitable for the site having regard to issues such as the visual impact of the development.

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Bushfire protection requirements

The first issue considered by the Court was the fact that the site was located in a natural bushland context. In this context, Telstra needed to comply with the bushfire protection requirements under the relevant RFS Practice Note requiring a 10 metre APZ for such infrastructure, yet on the other hand, it needed to meet the requirements of Principle 1 of the Guideline that the facility was to be "designed and sited to minimise visual impact."

The Court held that the proposed development would have a visual impact for the users of the adjoining public reserve due to the clearing required for construction of the facility and the maintenance of the APZ. The Court was also concerned that there would be a significant visual impact from the broader locality of the structure as it would "interrupt the natural ridge line" and would be "visually prominent from a number of viewing points," including both private and public land.

The context of Community Land

The second item for consideration was that the adjoining public reserve was classified community land and the required APZ was to extend over onto the reserve.

Community land is subject to restrictions on leasing and licencing under the LG Act and the Plan of Management. Council argued that it did not have the power under the terms of the LG Act or the Plan of Management to grant a tenure or permission over the land to enable the construction of the proposed development as well as the APZ, as the land was natural bushland. Further, in relation to the APZ, Council argued that it would be "fundamentally inappropriate for an application to rely on the use of land which it does not own and over which it has no tenure in order to provide an APZ to protect its development." Council argued that the combined effect of the natural bushland context and the community land context worked against Telstra obtaining approval of the site.

Telstra argued that the requirement for it to obtain authorisation or approval required for the use of the community land, was not a relevant consideration under s 79C of the Environmental Planning and Assessment Act 1979. Telstra relied on Botany Bay City Council v Minister for Planning & Infrastructure [2015] NSWLEC 12 as authority for this position. Telstra also argued that as there was power for Telstra to obtain the necessary authority under the LG Act, and other means of obtaining access over community land to undertake the works, the Council was unable to demonstrate that the proposed development was incapable of being lawfully carried out.

While the Court accepted this part of Telstra's argument, it agreed with Council that it would be fundamentally inappropriate for an applicant for development consent to rely upon the use of land which it does not own and over which it has no tenure, in order to provide an APZ to protect its development from fire.

The objectives of LEP 2000

The relevant zone objectives of the LEP 2000 provided:

- that the land be available for open space recreation; and
- the aesthetics of the land, which is prominent and visible to the public along foreshore areas, be preserved.

As the development was visible from the foreshore and the maintenance and establishment of the APZ would alter the vegetated area which was used for open space recreation, the Court was not satisfied that the development as proposed by Telstra would be compatible with the objectives of the LEP 2000.

The Court also considered the development in light of the Infrastructure SEPP, having regard to Telstra's argument that the Infrastructure SEPP was to prevail to the extent of any inconsistency with the LEP 2000. While the development was permissible under Infrastructure SEPP, the Court still had to consider the principles in the Guideline, in particular, principles 1, 2 and 4. (The relevant guidelines and principles required to be considered under the Infrastructure SEPP are contained in the NSW Telecommunications Facilities Guideline including Broadband). The Court essentially agreed with Council's contentions regarding the inconsistency of the development with principles 1 and 4, finding as follows:

- Principle 1: The location of the monopole above the vegetated ridgeline, and its visual prominence from the various viewing locations reflected in the photomontages was not a location where the visual impact of the facility was minimised or one that would minimise or avoid the obstruction of a vista or panorama; and
- Principle 4: In the absence of some authorisation from the Council for the work required to be undertaken on the APZ for the facility to be constructed on the reserve community land, the development was not consistent with Principle 4, which required, among other things, that the facility is to be erected wholly within the boundaries of a property where the landowner has agreed to the facility being located on the land.

Council also raised concerns about the suitability of the location of the development given that the slope of the area surrounding the facility would result in an access way with slopes in excess of 30%. To address this issue, there would need to be significant upgrade works, including the removal and lopping of trees and the construction of timber retaining walls up to 700mm high. The Court found that these works would represent a departure from the "the existing access track and natural bushland setting presently available to bushwalkers."

Conclusion

The combination of the visual impacts of the development as contrasted against its natural bushland setting, led the Court to conclude that it was not satisfied that the proposed development was consistent with the objectives of the LEP 2000, the SEPP Infrastructure and Guidelines or the considerations under s 79C of the Environmental Planning and Assessment Act 1979. Accordingly, the appeal was dismissed and development consent was not granted.

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Definitions

Appeal – an application or proceeding for review by a higher tribunal or decision maker.

Consent authority – the body having the function of determining the application, usually a council.

Deemed refusal – where a consent authority has failed to make a decision in relation to a development applications within the statutory time limit for determining development applications.

Development means:
(a) the use of land, and
(b) the subdivision of land, and
(c) the erection of a building, and
(d) the carrying out of a work, and
(e) the demolition of a building or work, and
(f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

Development Application – an application for consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) to carry out development but does not include an application for a complying development certificate.

Environment – includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

Existing use rights – rights under Planning Legislation to continue previously lawful activities on land which would no longer be permitted following the introduction of changes to environmental planning instruments.

LEP – Local Environmental Plan, planning tool created by councils to control the form and location of new development.

Local heritage significance – in relation to a place, building, work, relic, moveable object or precinct means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

Objector – a person who makes a submission to a consent authority objecting to a development application for consent to carry out designated development.

Occupier – includes a tenant or other lawful occupant of premises, not being the owner.

Planning principle – 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.

Premises means any of the following:
(a) a building of any description or any part of it and the appurtenances to it
(b) a manufactured home, moveable dwelling and associated structure
(c) land, whether built on or not
(d) a tent
(e) a swimming pool
(f) a ship or vessel of any description (including a houseboat).

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Procedural fairness – this term is interchangeable with "natural justice" and is a common law principle implied in relation to statutory and prerogative powers to ensure the fairness of the decision making procedure of courts and administrators.

Prohibited development means
(a) development the carrying out of which is prohibited on land by the provisions of an environmental planning instrument that apply to the land, or
(b) development that cannot be carried out on land with or without development consent.

Public authority includes:
(a) a public or local authority constituted by or under an Act
(b) a government Department
(c) a statutory body representing the Crown.

State heritage significance – in relation to a place building, work, relic, moveable object or precinct means significance to the State in relation to the historical, scientific, cultural, social, archeological, architectural, natural or aesthetic value of the item.

Subpoena – a document by which a court compels a person to attend a court to give evidence or to produce documents within that person's possession.

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Useful links

Land and Environment Court website: www.lawlink.nsw.gov.au/lec

Australasian Legal Information Institute: www.austlii.edu.au

NSW Attorney General's Department – Land and Environment Court: www.agd.nsw.gov.au/lec

Case Law NSW: www.caselaw.nsw.gov.au

Environment Protection Biodiversity Conservation Act - subscription to EPBCA group: http://groups.yahoo.com/group/epbc-info/

Environment and Planning Law Association NSW: www.epla.org.au

Development and Environmental Professionals Association: www.depa.net.au

Urban Development Institute of Australia: www.udia.com.au

Property Council: www.propertyoz.com.au

Housing Industry Association: www.hia.com.au

Planning NSW: www.planning.nsw.gov.au

Environment Australia: www.erin.gov.au

Environmental Protection Authority (NSW): www.epa.nsw.gov.au

EDONet: www.edo.org.au

NSW Agriculture: www.agric.nsw.gov.au

NSW National Park and Wildlife Service: www.nationalparks.nsw.gov.au

Planning Institute of Australia: www.planning.org.au

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