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Summary of cases

- A case brought under the *Swimming Pools Act 1992* concerning the failure to adequately fence an existing swimming pool on a rural residential property.
- An appeal in respect to an order issued by council under section 121B of the *Environmental Planning and Assessment Act 1979* to cease the use of premises as an unauthorised boarding house.
- An appeal against a decision of a council for the use of a site as an indoor recreational facility as well as an appeal against emergency orders issued by council to cease using a site without consent.
- An appeal against a council's refusal of a development application for the demolition of two buildings and the construction of 20 short term holiday units.

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1. Lismore City Council v Hamshaw [2013] NSWLEC 204

This case was brought under the *Swimming Pools Act 1992 (SP Act)* and concerned the failure to adequately fence an existing swimming pool on rural residential premises. Council successfully obtained orders against Mrs Hamshaw (the owner) and Mr Hamshaw (the occupier) requiring a fence to be installed in compliance with the SP Act.

The pool

In 1985, Council had granted building approval for the construction of a swimming pool on the property. A condition of approval required that the swimming pool be completely enclosed with an approved child proof fence meeting certain standards under the Building Code of Australia (BCA).

An officer of Council inspected the property in November 2012 and identified that the pool was not completely enclosed by a child proof fence. In particular, an additional room with windows and doors facing the swimming pool had been constructed and, as a result, no fence separated the dwelling from the swimming pool. In addition, the fence which surrounded part of the pool did not comply with certain BCA standards.

Swimming Pools Act 1992

Section 7 of the SP Act provides that an owner must ensure that a swimming pool is surrounded by a child-resistant barrier that separates the swimming pool from any residential building and is constructed and maintained in accordance with the prescribed standards (2012 Standards). Section 8 relevantly provides certain exemptions for swimming pools constructed before August 1990 and prescribed a different set of standards for pool fencing (2007 Standards).

Council's evidence

Council provided evidence of observations from an inspection of the property by a Council officer. The





Council officer noted that the existing pool enclosure failed to comply with both the 2012 and 2007 Standards in a number of respects. Following the inspection a draft direction was given to Mrs Hamshaw requiring remedial action. No response was received and so Council proceeded to issue a direction under the SP Act.

Council undertook a number of further inspections of the property which demonstrated that the remedial action required by the direction had not been undertaken. A further direction was given. Subsequent inspections showed that the matters had not been addressed.

Orders

Justice Craig was satisfied that a number of breaches of the SP Act had occurred, including failure to observe the requirements of sections 7 and 8, and non-compliance with the directions issued by Council. His Honour was satisfied that it was appropriate to make orders requiring remedy or restraint of the breaches.

Justice Craig noted that the Court has a broad discretion as to the terms of orders and that the power may extend beyond the scope of an order available to Council giving directions under the SP Act.

Given Mrs Hamshaw's previous non-compliance, Justice Craig held that order should identify with specificity the work to be carried out to provide a fence or child-resistant barrier which complied with the SP Act and relevant standards. His Honour noted that by framing an order that reflects the precise requirements imposed on the owner, no doubt could arise as to what is required.

Self-help Order

Justice Craig identified that Council had also sought an order that, if the works were not carried out in accordance with the directions of the Court, that Council be permitted to enter the property and carry out the works at the cost of Mrs Hamshaw. However, Council was not able to identify the source of any such power and his Honour declined to make the order.

Costs

Mr and Mrs Hamshaw were ordered to pay Council's costs.

2. Khoury v Holroyd City Council [2013] NSWLEC 1236

This case concerns an appeal in respect of an order issued by Council under section 121B of the *Environmental Planning and Assessment Act 1979* on Mr Khoury. The order required Mr Khoury to cease the use of premises as an unauthorised boarding house.

Background

In 2003, Council had granted deferred commencement consent for the 'erection of a part single and part two-storey attached dual occupancy' on Mr Khoury's site.

A complaint was subsequently made that the premises were being used as a boarding house. Council officers undertook an inspection and, on the basis of the inspection, Council formed the view that Mr Khoury was using the premises as a boarding house. No development consent for such use had been granted. Council issued a notice of intent to give an order to cease the use of the premises as a boarding house. Following non-compliance with the notice of intent, the order was served.

A search showed that the premises were registered with the Department of Fair Trading as a boarding house in accordance with the *Boarding Houses Act 2012*.

Evidence

Mr Khoury was self-represented. Mr Khoury provided no evidence and did not contest the evidence tendered by Council. After unsuccessfully seeking an adjournment at the commencement of the hearing, Mr Khoury chose to 'withdraw' from the proceedings, meaning that he left the Court room and the matter was heard in his absence.

Council's evidence included a diagram showing 10 units across 3 levels. Council's evidence also included a 'BCA Defects Table' for the premises, which included risks involving fire safety.

Findings

Based on the evidence, Commissioner Fakes was satisfied that the premises were being used as a boarding house within the relevant definitions of the planning controls. The Commissioner noted that a boarding house registration does not equate to a development consent. Commissioner Fakes was also satisfied that elements of the construction posed a life-threatening hazard to occupants due to BCA non-compliances. The Commissioner was therefore satisfied that the order was well founded.





Conclusion

Commissioner Fakes noted that although Mr Khoury withdrew from the proceedings, he had been given adequate opportunity to participate and that any reservations concerning his withdrawal were 'overwhelmingly' outweighed by council's evidence regarding fire risks to residents.

Given the Court's findings, Commissioner Fakes ordered that Mr Khoury cease using the premises as an unauthorised boarding house within 60 days of service of a sealed copy of the Court's orders.

3. Flip Out – Trampoline Arena Trading Pty Limited v Penrith City Council [2013] NSWLEC 1229

This case was an appeal against a refusal by Penrith City Council (**Council**) for the use of a site as an indoor recreation facility as well as an appeal against emergency orders issued by Council to cease using the site without consent, due to fire safety risks. The primary issue in the case was whether the facility should cease trading while fire safety measures were put in place.

Background

Flip Out Trampoline Arena Trading Pty Ltd (**Flip Out**) occupied a former car sales yard as recreation area without development consent. The site was surrounded by commercial and industrial development with residential development located nearby. The recreation area included an outdoor trampoline structure, foam pit and bike ramp as well as a building which contained a number of structures including a further two trampoline areas, a foam pit, two cafes and a mezzanine area with a children's cinema. Council issued several notices to Flip Out in relation to the unauthorised use and fire safety concerns. Flip Out lodged a development application seeking consent for the use of the indoor and outdoor structures.

No construction activities were proposed as part of the development application.

Council refused consent and issued an emergency order requiring the cessation of use of the site because consent had not been obtained and it had public safety concerns. Flip Out appealed against the refusal of consent and the issue of the orders. The parties agreed that these two matters would be heard concurrently.

Issues

An initial contention was whether the outdoor use of the site was a separate prohibited use. However,

following amendments to the plans, the parties agreed that the use of the site was for a recreation facility (indoor) and was therefore permissible within the zone.

Council's primary contention was that the premises did not meet fire standards. By the time of the hearing, Flip Out had undertaken work at the site in order to improve the fire safety standards. Despite this it was still Council's position that the building remained unsafe.

Council's experts submitted that a number of fire prevention measures were required to be put in place including treating the foam in the pits with fire retardant. Flip Out's expert argued that the treatment of the foam would not have long term effect, and instead considered that it was more important that the building have a smoke detector system which would provide an early warning system to customers in the event of a fire. All of the experts agreed that an emergency evacuation plan was to be developed and that it was appropriate to impose a condition requiring external lighting for the safety of customers and staff during the evening period, ensuring that the lighting did not affect the neighbouring properties.

The main issue between the parties was whether the use of the premises should cease until such time as the remaining fire safety works were completed. Council's position was that the facility should close until the remaining works were complete and an occupation certificate issued. Flip Out submitted that the works would only take a short time to complete and it would be allowed to continue to trade during this period.

Findings

Commissioner Morris was satisfied that the amendments made to the development application during the hearing was sufficient for the use to be permitted by and consistent with the objectives of the zone.

The Commissioner held that the most important issue was the safety of persons on the premises and while the applicant had undertaken a number of works in this regard, there was still a list to be completed. Commissioner Morris was not persuaded that in the event of a fire at the premises adequate safeguards were in place to protect occupants. For this reason, the use of the building was required to cease until such time as fire and smoke alarms and hydrants were installed and an emergency evacuation plan was developed.

Held

- The appeal was allowed in part.
- The order issued by Council relating to fire safety was modified so that the premises could not be used until specified fire safety works were carried out.





4. Blackmore Design Group Pty v Manly Council [2013] NSWLEC 1220

This case was an appeal against Manly Council's (Council) refusal of a development application for the demolition of two buildings and the construction of 20 short term holiday units (Proposal).

Issues

The Council refused the Proposal on two grounds:

1. The Proposal did not preserve the heritage values of the heritage conservation area; and
2. The Proposal caused adverse amenity impacts on the surrounding area.

The proposal

The Proposal was to demolish two buildings on the site, one of which was a building divided into three residential apartments, the other was used for backpacker accommodation. Blackmores Design Group (BDG) proposed to construct a three storey building containing 20 short term holiday accommodation units, a manager's office and a basement carpark.

The site is within a Tourist Area under the Local Environment Plan, close to the beach, and therefore the Proposal was classified as 'tourist and visitor accommodation' which was permissible with consent in the zone.

Public submissions

Neighbours of surrounding properties expressed concern of anti-social behaviour, privacy, overshadowing of the courtyard and noise, however none objected to the development overall.

Heritage

Council raised the following heritage issues in relation to the Proposal:

1. What was the contribution, if any of the existing buildings to the local conservation area; and
2. If the existing buildings would be demolished, was the Proposal a sympathetic addition to the local conservation area.

In relation to the first question, the heritage expert for Council was of the view that the two buildings to be demolished made an important contribution to the local conservation area and the Proposal should retain the existing buildings by incorporating part of each building into a new development. BDG's heritage expert was of the opinion that neither building expressed its original character in an unaltered manner and both

were substantially compromised to the point of having little or no ability to contribute to the value of the surrounding conservation area.

Both heritage experts considered the Helou planning principle (set out in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66 at par 46). Council's heritage expert considered that the buildings formed part of a streetscape which was in unison in age, style scale and period with the other buildings in the vicinity. BDG's heritage expert found that retaining the building would not contribute any substantial heritage benefit.

Findings

In considering the heritage benefits of the existing buildings, Commissioner O'Neill found that the two buildings made little or no contribution to the local conservation area because:

- Both buildings were unremarkable and neither demonstrated unusual, rare or outstanding design, materials or workmanship;
- Both buildings had lost their integrity and were highly compromised in relation to their original form, due to removal of original fabric and finishes and significant alterations and additions;
- The interiors of both buildings had been altered and much of the original detail and finishes have been removed;
- The streetscape was generally eclectic and the two buildings did not form part of a coherent group or style, nor did they relate in any way to each other or their neighbours.

On this basis the Commissioner determined that the buildings could be demolished. The Commissioner was satisfied that the replacement building was a suitable addition to the local conservation area because the design was of a sympathetic character and scale that drew from and related to surrounding buildings.

Planning contentions

The following concerns were expressed by Council's planning expert:

1. The scale of the of the Proposal was too great and therefore two units should be deleted;
2. 17 carpark spaces was excessive; and
3. a manager should be on-site 24 hours/7 days a week to deal with potential late night disturbances. BDG proposed a 12 month trial period of having a contact person available during nights and weekends for complaints.

The planning experts from both sides agreed to raising the sill heights of the windows in the northern and southern elevation to 1.7m for the privacy of adjoining neighbours.





Findings

Commissioner O'Neill found that the Proposal was permissible with consent and consistent with the relevant objectives of the zone.

The Commissioner accepted BDG's proposal of a 12 month trial period of an overnight and weekend contact person rather than a 24/7 manager.

The Commissioner was of the view that the scale of the proposal was appropriate and that deleting 2 units would not reduce the scale of the building.

The Commissioner did not accept that raising the sill heights of all windows in the northern and southern elevation to 1.7m was necessary and held that such a solution would significantly compromise the internal amenity of rooms. There was insufficient justification for raising the sill height in all but one apartment.

The number of car spaces proposed was acceptable.

Conclusion

The appeal was upheld and the development application was approved for the demolition of the two buildings and the construction of a short term holiday accommodation of 20 units subject to certain conditions.





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).

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.





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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