LOCAL GOVERNMENT NSW

Land and Environment

COURT REPORTER

ISSUE 2, 2014

IN THIS ISSUE

SUMMARY OF CASES **PAGE 1**

1. FORGALL PTY LTD (ACN 074 213 933) V GREATER TAREE CITY COUNCIL **PAGE 1**

2. COUNCIL OF THE CITY OF SYDNEY V KARIMBLA PROPERTIES (NO. 24) PTY LTD [2014] NSWLEC 77 **PAGE 2**

3. CATALINA ISLAND PTY LIMITED V PITTWATER COUNCIL [2014] NSWLEC 1125 **PAGE 4**

4. ARMIDALE DUMARESQ COUNCIL V VORHAUER (NO 3) [2014] NSWLEC 50 **PAGE 5**

5. HAMOD V WOLLONGONG CITY COUNCIL [2014] NSWLEC 1121 - COURT REPORTER JULY 2014 **PAGE 6**

6. GOARIN V MANLY COUNCIL [2014] NSWLEC 1108 **PAGE 7**

DEFINITIONS **PAGE 9**

USEFUL LINKS **PAGE 10**

Summary of cases

- An appeal against a refusal by council for a “bio-clinic facility” for the treatment of patients suffering from chronic illnesses.
- An application for an interlocutory injunction to restrain building work on a large construction site where no construction certificate had been issued.
- An appeal against a decision of council to refuse a development application for the construction of eight apartments pursuant to SEPP (Housing for Seniors and Persons with a Disability) 2004.
- A case in which a council sought performance orders from the Court for the removal of unlawful items on a property.
- An appeal against a council’s refusal for the modification of a development consent which sought to include a rooftop terrace.
- A determination by the Court that although a greenfields site was zoned for residential purposes it did not mean that the owner had an entitlement to develop the site for residential purposes.

The material contained in the Land and Environment Court Reporter is of the nature of general comment only. No reader should rely on it without seeking legal advice.

1. Forgall Pty Ltd (ACN 074 213 933) v Greater Taree City Council [2014] NSWLEC 1132

Forgall Pty Limited (**Forgall**) applied to the Greater Taree Council for approval to develop Australia’s first ‘bio-clinic facility’. The development application was for the construction of a ‘holistic health care facility’, providing a range of therapies not currently offered in Australia for the treatment of patients suffering from cancer, and other chronic illnesses such as AIDS and hepatitis. The proposed ‘bio-clinic facility’ used pro-active immune system therapies such as:

- Whole body heat therapy
- Local heat therapy using heat pads and electrolysis
- Ozone/oxygen injection into the bloodstream
- Mistletoe/thymus injection into the bloodstream
- Detoxification.

The Greater Taree Council refused the development application, and Forgall appealed the Council’s refusal to the Land and Environment Court.

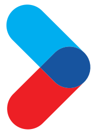
The development application

The location of the facility was chosen for its ‘eco-medicine’ potential, being a tranquil, stress free environment which provided the best opportunity for the self-healing of chronically ill patients. The site is adjacent to Saltwater National Park, Khappinghat Reserve and opposite Wallabi beach, dedicated as sensitive coast beach and wetland.

The elements of the bio-clinic facility included:

- A main function building with reception area, heat therapy room, gymnasium, staff rooms, kitchen, offices and storage rooms
- Consultation rooms
- Ten single bedroom cabin patient accommodation
- Water feature
- Recreation area
- 54 car spaces.

The facility would have capacity for up to 28 staff and a maximum of 31 inpatients. The details of the design and landscape of the development were not finalised at the time of the application.



The issues

The site is located within zone 1(a) Rural General of the *Greater Taree Local Environmental Plan 1995* (**LEP**). In order to be permissible in the 1(a) Rural General zone, the Court had to be satisfied that the use was consistent with *"…such objectives of this zone as are relevant in the particular case"*.

Council contended that the development did not meet the objectives of the zone including, among other things,

- *"the protection or conservation of…environmental values of the land and visual amenity including landscape and scenic quality, rural character and tourism values"* and
- *"the enabling of development for the purposes that are…appropriate to the location and sympathetic with the environmental characteristics of the land"*

Council also contended that the development failed to meet the aims of the *State Environmental Planning Policy No 71 – Coastal Protection* (**SEPP 71**), which included the protection and preservation of coast native vegetation, ensuring the development is appropriate to the location as well as protecting and improving the scenic quality of the surrounding area.

A random development

Many local objectors reiterated the same concern to Council that the development was not sympathetic to the environmental characteristics of the land. Further, the Commissioner was not satisfied that Forgall had adequately addressed the following areas of concern in the design and landscaping of the proposed development:

1.1 Compatibility with the surrounding environment

The development was found by the Commissioner to be incompatible with the zoning objectives of the land. As the site was located in a rural area of national park, bushland, coastline and farmhouses, a development of this size and scale would be a "random development" that was out of character with the locality. Without appropriate landscaping, the development had the potential to be highly visible (especially at night), becoming a "beacon" in the night sky.

Further, the size and scale of the development was such that it could be seen from a declared Aboriginal Place of cultural significance, which was 500m from the site. The two page Aboriginal Cultural Heritage Due Diligence Report provided on behalf of Forgall did not include an archaeological survey over the proposed development site as recommended by the Office of Environment and Heritage. The Commissioner stated that the Due Diligence Report was insufficient, despite the acceptance of the Report by Council's planner.

1.2 Health and safety concerns

There was only one sealed road to access the property, and in the event of a fire, this road would be used by other surrounding property owners. The application did not detail fire evacuation methods or emergency exit pathways from the property. The remote location of the site was also too distant from the main hospital in the event of an emergency, and the layout of the cabins raised occupational health and safety issues for the clients and staff.

Further, the development application did not detail the extent of the land to be cleared to comply with Rural Fire Service safety requirements, seen by the Commissioner as a fundamental flaw in the application. Given the height and bulk scale of the development, it was likely that a significant portion of the land would have to be cleared for the development, causing the development to stand out from the viewpoint of the village at Wallabi Point and the headland. The Commissioner concluded it was impossible to assess the application as being consistent with the zone objectives without a final landscape drawing which identified the extent of the proposed vegetation clearance.

Conclusion

The appeal was dismissed and the development application refused.

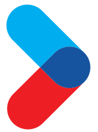
2. Council of the City of Sydney v Karimbla Properties (No. 24) Pty Ltd [2014] NSWLEC 77

In this case, the Council of the City of Sydney sought an interlocutory injunction restraining Karimbla Properties (No 24) Pty Ltd (**Karimbla**) from carrying out building work on a large construction site in Waterloo. Karimbla had been carrying out the building work without a construction certificate in breach of s 81A(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). This case highlights how the Court balances competing interest in granting or refusing injunctions.

Background

Karimbla had been granted deferred commencement development consent by Council for the development of approximately 360 residential apartments, as well as public domain works, a childcare centre, carparking for 255 vehicles and associated infrastructure works. Before a construction certificate could be issued to commence the building work, there were a number of conditions of the development consent that had to be satisfied by Karimbla.

The Project Manager contracted by Karimbla was aware that a construction certificate had not yet been obtained, but authorised building work to commence. The Project Manager gave evidence that



he considered that the conditions of the development consent which had not yet been satisfied could be negotiated with Council so that they no longer formed a barrier to the issuing of a construction certificate. It was not until Council staff discovered that building work had commenced on the site that the issue was flagged to the management of Karimbla, by which time 4 of the 5 buildings had been partially constructed.

Negotiations between Council and Karimbla commenced and Karimbla lodged a number of modification applications in an attempt to address the outstanding conditions of consent and obtain a construction certificate for the works. However, modification applications in relation to 3 conditions remained outstanding, and Council requested Karimbla to cease work on the site until the matter was resolved. Karimbla's refusal to do so resulted in Council seeking an order, as well as an interlocutory injunction, restraining the carrying out of building work until the conditions of development consent were satisfied and a construction certificate had been issued.

Considerations for the grant of an Interlocutory Injunction

In order for a Court to grant an interlocutory injunction, it must be shown that there is a serious question to be tried before the Court in the final hearing, and that the balance of convenience favours the granting of the injunction. Karimbla did not dispute that there was a serious question brought by Council in that it had breached the requirements of the EPA Act. Karimbla did argue, however, that the inconvenience it would suffer if an injunction was granted was far greater than the inconvenience suffered by Council if the injunction was not granted. It did so by reference to the 3 outstanding conditions which Council contended should be complied with before a construction certificate could be issued and building work could continue.

Outstanding conditions

1.3 The need for a Contamination Site Audit Statement

Council was concerned that Karimbla had not provided a contamination site audit statement as required under Condition 10. Karimbla contended that no building work had been or was being undertaken on the areas of the site which required remediation and an Audit Statement taken. Therefore, Karimbla argued that this condition could be modified to defer the time by which this statement was to be given to Council so that building work could continue in the meantime. Karimbla also confirmed that no building work would be commenced on the parts of the site relevant to the contamination condition, and that the Audit Statement would be provided to Council before all buildings were completed and before any occupation certificate was issued for any building.

1.4 Determining Footpath levels

Karimbla had also failed to provide the footpath levels adjacent to the site to Council as required under Condition 93. Karimbla argued that as the development was not at the point where footpaths needed to be constructed, the time by which Karimbla needed to provide the footpath levels could be deferred without preventing the continuance of building works. It was indicated on the evidence before the Court that Council in principle agreed to this modification.

1.5 Access to Stormwater Disposal and Drainage Works

Finally, Karimbla had not complied with the requirement under Condition 108 to provide access to stormwater disposal and drainage works before the site works would be connected to Council's external drainage system. Karimbla argued that this condition could also be modified to extend time for compliance without impacting the continuance of building works. The evidence before the Court indicated that Council had deferred to Sydney Water on this matter who was amenable to the modification application.

Against the balance of convenience

The Court noted that the outstanding conditions did not impact on the current building works, and that the conditions would be complied with before the relevant building works commenced. Karimbla also confirmed that all future work would be closely supervised, having contracted an accredited certifier to certify the remaining building work pursuant to the development consent. Further, there was no evidence that the buildings as constructed would not eventually comply with the remaining conditions under the development consent, nor did Council seek the demolition of the building work already undertaken.

On the other hand, Kamimbla submitted that if work ceased onsite, almost all of the 311 workers would have to be stood down, adversely impacting a number of future commitments of contractors employed onsite and causing serious financial hardship. While it was clear that Karimbla had not complied with its obligations under the EPA Act in commencing the building work so far, the Court considered that the hardship suffered by workers onsite if the injunction was granted and work ceased, was greater than the harm flowing from allowing the work to continue.

Conclusion

The Court therefore refused to grant the injunction and stood the matter over until final hearing.

3. Catalina Island Pty Limited v Pittwater Council [2014] NSWLEC 1125

This case was an appeal against the refusal by Pittwater Council of a development application by Catalina Island for the construction of eight apartments pursuant to the *State Environmental Planning Policy (Housing for Seniors and Persons with a Disability) 2004* (**SEPP**) on a sloped site overlooking the Careel Headland Reserve in North Avalon. The primary issue in the proceedings was the risk of flooding on the site from the nearby Careel Creek, including the failure to comply with Council's flood controls contained in its Development Control Plans (**DCP**).

Zoning and Flood Study

The site was zoned 2(a) Residential under the *Pittwater Local Environmental Plan* 1993, which usually prohibited the development of apartment complexes. However, because the complex was to be built for the use of persons over the age of 55 or with a disability, the development was permissible under the SEPP.

The Court noted that Council had carried out a flood study of the catchment of Careel Creek, which included the proposed development site. This study showed that, under current climatic conditions, the site would be affected during a 1:100 year flood (that is, there is a 1% probability, in any year, that such a flood will occur). Council's modelling showed that the site would also be significantly inundated during a probable maximum flood (**PMF**) – which is the highest flood level predicted to occur under the most extreme predicted rainfall conditions in the Careel Creek catchments. Senior Commissioner Moore noted that when anticipated climate change impact are factored in, these risks are exacerbated.

Council's Development Control Plan

Council's primary contention was that the development did not comply with Part B 3.21 of Council's DCP. The DCP required that developments of this kind have a pedestrian access through a "low flood hazard area to a 'safe haven' that was a minimum of above 300mm below the level of the PMF." Further, as the proposal was for persons over 55 of with a disability, the development was categorised as a "Special Flood Protection" development and therefore all floor levels had to be at or above or raised to the PMF.

Council's expert raised concerns that in the event that there was exceptional and continuing intensity of rain reaching the PMF, it was likely that Careel Creek would flood. If flooding occurred, the design and location of the development was such that it would be under 30 minutes until there would be significant volumes of water in the garages and ground floor levels of the complex.

While Catalina Island amended the plans to raise the floor level by 175mm, there still remained only a few minutes for occupants to evacuate to the residential first level of the complex before it was unsafe to do so. Given the predicted climate changes increased the likelihood of such severe rainfall, and the fact that the occupants would be elderly and disabled, Council was concerned that this alternative still did not meet the requirements of the DCP.

Alternative Means of Compliance

In light of s 79C(3A)(b) of the *Environmental Planning and Assessment Act 1979* (NSW), the Court had to consider whether, despite the proposal's failure to comply with the DCP standard, there was a reasonable alternative solution for the development such that it still achieved the overall objects of the standards imposed by the DCP.

The Court considered the following alternative solutions proposed by Catalina Islands:

1.6 Flood Impact Mitigation Works on the Lift

Council was concerned that the hydraulic lifts between the ground and first floor of the development had the potential to be "rendered inoperable" in the event of a flood if the electrical circuitry running the lifts were to become water affected. Catalina Islands argued that the control mechanisms of the electrical circuitry could be waterproofed or their location changed in order to prevent this occurring. However, expert evidence indicated that it would be difficult to adequately waterproof all the control mechanisms or to move them to a position that was still accessible to persons in wheelchairs. Further, there had been no known examples of such measures, and the lack of evidence as to the practical workings of this alternative did not satisfy the Court that this was a reasonable alternative solution.

The resting point of the lifts was also a concern in the event of flooding. Catalina Islands suggested that if the lift were to fail in the event of flooding, it could default to the upper level rather than resting at the inundated ground floor level. However, once the lift defaulted to the upper level, it would not be able to move again until the flooding was under control and a technician could fix the lift, leaving anyone on the ground floor stranded. The lifts only had capacity for one wheelchair or two standing people, which would not accommodate all evacuating residents, and it was likely that residents being elderly or disabled might struggle to use the stairs safely. Therefore, this too failed to be a reasonable alternative solution.

1.7 Reinforcing Entrance Doors

Catalina Islands also suggested that the entrance doors to the development could be reinforced to mitigate the impacts of a flood. However, evidence suggested that in the event of a flood, the water was

likely to flow directly down the driveway and into the garages, not through the entrance doors. Most of the evidence tendered did not address the need to redesign the garage doors to address flood impacts, but focussed on the entrance doors and therefore did not provide a reasonable alternative solution.

1.8 Detention Sump Capacity

Catalina Islands also proposed to add 100m3 of storage creating a detention sump to hold extra water in the event of a flood. However, the Court found that according to unchallenged Council expert evidence, for a sump to be effective, there would need to be storage capacity of 2000m3, not merely 100m3. The sump proposed by Catalina Islands would therefore only buy a few extra seconds in time in the event of evacuation, and was not a reasonable alternative solution.

1.9 A Rainfall Duration/Intensity Alarm System

Catalina Islands also suggested installing an alarm which might alert the residents of potential flooding from a broad networking base. Expert evidence indicated that there would still be a considerable time delay in transmitting the data from the networked monitoring system that was likely to be longer than the time the effects of flooding would be felt on the development.

Catalina Islands proposed in the alternative that an alarm based on the site rather than from a broad network might address this issue. However, the experts did not know of any alarms of the kind operating on an individual location basis, and even if there were, the short amount of time within which evacuation could occur safely was such that residents would be subjected to a number of false alarms in anticipation of flooding that might never eventuate. Given that these alarms would be a nuisance, the Court was concerned that residents were likely to disable the alarm and therefore it was not a reasonable alternative solution.

Conclusion

The Court concluded that it was not possible for the objectives of the DCP to be met by the plans brought forward by Catalina Island, nor on any possible alternatives brought before the Court during submissions. Therefore, the appeal was dismissed and the development application refused.

4.Armidale Dumaresq Council v Vorhauer (No 3) [2014] NSWLEC 50

In this case, Armidale Dumaresq Council sought substituted performance orders from the Court for the removal of unlawful items on Mrs Vorhauer's property in Armidale, NSW.

The Background

Council sought the removal of two transportable construction site offices as well as a storage shipping container stored on Mrs Vorhauer's property without the development consent of Council. Mrs Vorhauer was living on the property in the construction site offices with her disabled daughter, as well as using the shipping container to store material intended to be used in the construction of a kit home. The presence of the items were discovered during an inspection of the property from the road by a Council officer.

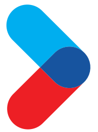
Previous Proceedings

After a number of unsuccessful attempts to negotiate the removal of the items with Mrs Vorhauer, Council commenced civil enforcement proceedings in the Land and Environment Court. The Court in those proceedings ordered that the shipping container and construction site offices be removed from the property. Despite these orders and the repeated reminders of Council, Mrs Vorhauer and her daughter remained living on the property with no intention of leaving.

Council then sought by Notice of Motion that it be permitted to remove the unlawful items from the property, giving 48 hours' notice of the time and date of the Council's entry to the property and directions of where the container and site offices would be removed and stored. The Council also sought costs from Mrs Vorhauer for the filing of the motion and the costs of the removal of the items. Mrs Vorhauer challenged firstly whether the Court had the power to make the orders sought by Council, and secondly whether it should use its discretion to do so.

Council's Submissions

Council initially argued that the Court's initial removal orders under s 123 could form the basis of the Court's power to make orders for the substituted removal of the unlawful items because they included a liberty to apply for an extension of time order. The Court rejected this basis, as a liberty to apply order is usually given by the Court to take into account changing practicalities in the implementation of Court orders, and are not to be used to apply to the Court to change the substance of an order. The liberty to apply order only related to an application to extend the time within which the items were to be removed, not as a means to change who was to remove the items.



The Council instead relied upon the Court's power to make a substituted performance order under rule 40.8 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), which provides that where a court order has not been complied with, the Court may direct another person to do the acts required to comply with the orders.

Mrs Vorhauer's submissions

Mrs Vorhauer appeared to apply a scatter gun approach, raising a variety of submissions as to why the Court did not have the power to make the substituted performance order, including the following:

- Mrs Vorhauer raised a series of concerns around whether Council was considered a business or a politically elected body enabled to commence the Court proceedings which were dismissed by the Court. It was confirmed that while Council did have an ABN for taxation purposes, it was a body politic of the State and had the same legal capacity as other individuals.
- Mrs Vorhauer also put forward a number of submissions concerning the constitutional jurisdiction of the Court to give the substituted performance orders as well as the potential bias of the Court, however, these had already been dealt with in the previous proceedings and the Court refused to reopen those issues.
- Mrs Vorhauer also argued that such orders would amount to the Court sanctioning theft. However, the Court noted that while the orders would remove and store the items elsewhere, they were not to be kept for Council's possession and could be reclaimed by Mrs Vorhauer and placed elsewhere.
- Mrs Vorhauer also raised concerns about Council's filed Court forms and Council's omissions to consistently provide its ABN every time its name was mentioned, as well as the fact that the forms had been signed by their lawyer and not Council itself. The Court found that it was not misleading or criminal as an ABN does not form part of the name of the applicant on these forms and Council was still correctly identified on the forms. Further, it was not improper about Council's lawyer to sign the form on the Council's behalf, as it was permitted to do so under rule 7.1 of the UCPR.
- Mrs Vorhauer also alleged that the Council had not demonstrated any direct environmental harm caused by the items to the property. However, while the Court agreed with this, she had caused indirect environmental harm by undermining the planning regime in NSW. In any event, environmental harm is not a pre-requisite to seeking the orders sought by Council, as Council merely had to establish that the land was being used without consent and that there had not been compliance with the removal order.

The ownership issue

While Mrs Vorhauer failed on all the above counts, she was successful in challenging the Motion largely due to a procedural oversight by Council. Mrs Vorhauer had maintained her argument from previous proceedings that the unlawful items were in fact owned by her daughter. While there were evidentiary concerns relating to such ownership, it appeared that the previous judge had accepted that the ownership of the site offices and shipping containers was in the daughters name and it was not open to this Court to question that finding of fact. Council failed to join Mrs Vorhauer's daughter to these proceedings and serve the Notice of Motion separately on her.

While the daughter was a party to previous proceedings, she was not a party to the current Notice of Motion and therefore she had not been given any opportunity to "comment on whether the orders sought by Council, which could potentially have the effect of rendering her homeless, should it be made." As the daughter was capable of representing herself, and had done so in previous proceedings, Mrs Vorhauer could not be said to be representing her daughter. The Court also refused to adjourn the proceedings in order for a copy of the Motion to be served on the daughter, as there had been a number of delays at the fault of Council and it was therefore against Mrs Vorhauer's interests to do so.

Conclusion

The Court dismissed the motion, and costs were ordered against the Council.

5. Hamod v Wollongong City Council [2014] NSWLEC 1121 - Court Reporter July 2014

This case was an appeal against the decision of Wollongong City Council to refuse an application by Mr Hamod for the modification of a development consent. Mr Hamod sought to amend the approved plans for the construction of a dwelling to include a roof top terrace.

The main concerns raised by Council were the visual privacy, acoustic and visual impacts of the roof terrace on surrounding development and neighbours. By the time of the hearing, these issues had been resolved by amended plans and the parties sought consent orders from the Court.

The modification application

At the time of the appeal, the dwelling house approved under the initial development consent had been constructed, as well as the roof top terrace. Modification of the consent to include the roof top terrace was only sought after Council inspections

had found that the roof top terrace had already been constructed and an order under s 121B of the Environmental Planning and Assessment Act 1979 (**EPA Act**) had been issued by Council for the demolition of the roof top terrace. The modification application sought approval to use the rooftop terrace as well as approval to construct a spiral staircase at the southern end of the first floor balcony to access the rooftop terrace.

Council subsequently refused the modification application due to concerns that the roof terrace would have an adverse impact on the enjoyment of the occupants of the adjoining premises and on the built environment of the locality. Council was also concerned that approving the modification application would set an "undesirable precedent for similar inappropriate development" which would not be in the public interest.

Amended plans

Mr Hamod and Council underwent an unsuccessful s 34 conciliation conference, however, the conference did result in Mr Hamod filing amended plans with the Court which amended the design of the terrace and spiral stairs. The amended plans reduced the size of the terrace, provided a solid wall and parapets to decrease privacy concerns, and changed the proposed spiral staircase to a retractable access ladder.

On the basis of these amendments to the plans, Council was willing to enter into consent orders before the Court. However, concerns raised by an objector (similar to Council's initial concerns) were maintained, as outlined below.

Visual privacy

The objector raised concerns of the potential for the rooftop terrace to overlook adjoining private properties, especially over the pool and yard areas, a problem already experienced due to the existing balcony.

The experts agreed that the amended plans had addressed this concern through the parapet and rendered wall preventing the view line of those on the rooftop terrace into surrounding properties. It was recommended, however, that the parapet and the new rendered wall were raised to 1350mm to prevent any deliberate or casual overlooking into limited areas of other properties possible at the height of 1200mm.

Acoustic impacts

The objector raised concerns that as the development will be used as an entertainment area, the noise would impact upon the surrounding houses, especially as the existing balcony already posed noise problems.

The experts were satisfied that the rendered wall on the first floor balcony would address noise concerns for the existing balcony. Further, the parapet and new rendered wall on the terrace, as well as the reduction in the size of the terrace limiting the number of people able to use the terrace would reduce noise impacts as well.

Visual impact

Finally, the objector contended that the rooftop terrace was "unsightly and out of character with the design of the house and neighbourhood."

The experts were satisfied that the amendments improved the overall visual impact of the development, by replacing the spiral staircase and glass balustrade construction with solid rendered walls. The experts did note a disparate glazed element of the design at the street elevation that should be finished in render to be compatible with the rest of the development.

Conclusion

The concerns raised by Council and the objector were found by the Court to be adequately addressed by the amended plans. Accordingly, the Court upheld the appeal and modifying the consent according to the amended plans. Mr Hamod was required to pay the Council's costs in amending the application in the amount of $500 under s 97B of the EPA Act.

6. Goarin v Manly Council [2014] NSWLEC 1108

In a recent Land and Environment Court case, the Court determined that even though a particular greenfields site was zoned for residential purposes did not mean that the owner of the land had an entitlement to develop the site for residential purposes.

This case is known as *Goarin v Manly Council* [2014] NSWLEC 1108 and was an appeal to the Court against the refusal by Manly Council for the construction of a one-bedroom dwelling in Manly.

The site

The site had a frontage to the northern side of a public walkway located within the unmade section of the street. The site was subdivided in 1908 and had remained undeveloped. It consisted of a grassed area, rocky outcrops, native trees and was located on top of a cliff, some 10m above a row of houses on the street below. The site had pedestrian access along a public walkway located within the unmade section of the street, but had no vehicular access.

The surrounding area included dwelling houses and some residential flat buildings in landscaped settings and the unmade road, which formed a landscaped and sealed pedestrian link within the area.

Zoning

The site was located within Zone R1 General Residential under Manly Local Environmental Plan 2013 (LEP 2013). The development application was lodged, but not determined, prior to the LEP 2013 coming into effect. Therefore, the primary planning controls were contained in the previous LEP, Manly Local Environmental Plan 1988 (LEP 1988). In LEP 1988 the site was within the No.2 Residential Zone. The construction of a dwelling house was therefore permissible under both LEP 1988 and LEP 2013.

Development suitability

Commissioner Brown found that in accepting that the site was appropriately zoned for the construction of a dwelling, the application was also to be considered against the matters in s 79C(1) of the Environmental Planning and Assessment Act 1979 (EP&A Act) and any relevant LEP or development control plan (DCP).

The Applicant relied on the findings in BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 (BGP Properties) at paragraphs 117 and 118 which state:

"In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site."

Commissioner Brown found that in most cases it can be expected that the Court will approve an application to use a site for a purpose for which it is zoned, provided the design of the project would result in acceptable environmental impacts. The Commissioner also referred to paragraph 119 of BGP Properties which states:

"However, there will be cases where, because of the history of the zoning of a site, which may have been imposed many years ago, and the need to evaluate its prospective development having regard to contemporary standards, it may be difficult to develop the site in an environmentally acceptable manner and also provide a commercially viable project."

Commissioner Brown stated that "[i]f it was suggested that there is somehow an entitlement for a dwelling on the site because of the zoning, then this must be rejected."

The Commissioner determined that insufficient evidence was provided to satisfy the Court that the proposed development was suitable for the site for the following reasons:

- The site has no vehicular access. There was no suggestion that the unmade road would ever be constructed in the future, particularly as the road reserve has been included in Zone RE1 Public Recreation under LEP 2013. Access to the site required either descending or ascending stairs and walking a distance of between 45-60m. Commissioner Brown found that this it was unacceptable that a new dwelling should be so difficult to access for its future occupants. The difficulty in performing simple day-to-day functions, such as unloading shopping or receiving deliveries was not found to be consistent with what would be reasonably expected of a new dwelling. No evidence was provided to suggest how this concern could be addressed or any potential difficulty minimised.
- The site had unacceptable access for waste collection. Although Commissioner Brown stated that in normal circumstance this would not make a development application unsuitable, in this case it was. No evidence was provided to suggest how this concern could be addressed or any potential difficulty minimised.
- The applicant had not demonstrated that the site could be connected to water supply or sewerage disposal. The application had also not demonstrated that stormwater could be appropriately directed away from the site.
- The potential difficulty in locating the site and the only means of access being along the pedestrian pathways raised issues over the ability of emergency services, such as ambulance and fire fighting services to access the property in a reasonable time.

This case demonstrates that whilst zoning is important, it does not create an entitlement to develop the site for the purposes identified in the zone.

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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