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Summary of cases

- An appeal against the refusal of a Development Consent for the re-use of a commercial building as a boarding house including the associated alterations and additions required for that use.
- An appeal against the refusal by a council of a development application for the construction of a bus depot at Ingleside.
- An appeal against a refusal of a development application for the fit-out and use of premises as a vehicle body repair workshop.
- An appeal against a decision of the Court where the Court had dismissed an earlier appeal for development consent for a medium density project.

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. Rianon Mateer v Lane Cove Council [2014] NSWLEC 1152

This case was an appeal by Rianon Mateer against the refusal of a Development Application by Lane Cove Council for the re-use of a commercial building as a boarding house including the associated alterations and additions necessary for that use. The case considers the provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP (ARH)**) and the suitability of the site due to its close proximity to a packaged liquor outlet.

Background

The site was located in Lane Cove West, and contained an existing three storey commercial building overlooking residential backyards as well as an undercroft level of parking. The proposal included partially infilling the northern end of the undercroft level to provide two accessible rooms with courtyards, a managers unit with courtyard, a common room, an outdoor space, a laundry and car parking on the southern side of the undercroft. The existing building was to be retained, with changes to the dimensions of window openings, the inclusion of screens and glass bricks to prevent overlooking of the neighbouring backyards. A service station was located on the eastern side of the site and to the north there was a packaged liquor outlet.

Planning framework

A boarding house was permissible in the relevant B1 Neighbourhood Centre zone under the *Lane Cove Local Environmental Plan 2009* (LEP 2009). The site was also compliant with the provisions of SEP (ARH) in relation to the provision of parking, communal living room, minimum room size, maximum occupancy rates, bathroom and kitchen facilities and a managers room.

However, the floor space ratio (**FSR**) of the site was 1.47:1, which exceeded the maximum FSR development standard under the SEPP (ARH), set to ensure that the bulk and scale of development is compatible with the locality. Mateer submitted a written





request to exceed the FSR development standard under clause 4.6 of the LEP 2009, which permitted Council to approve non-compliance if:

- Compliance with the standard is unreasonable or unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify the development standard; and
- The proposed development is in the public interest because it is consistent with the objectives of the particular standard and the zone objectives in which the development is to be carried out.

Issues

At the hearing, Council raised the following issues;

- 1.1 As the development did not comply with the FSR development standard for the site, the proposal was an over-development of the site. Council was not satisfied that the request to exceed the FSR development standard by Mateer was well founded; and
- 1.2 As the site was located adjacent to a packaged liquor outlet and a service station, the site was unsuitable for the development.

Two resident objectors also raised concerns about the location of a boarding house in a family oriented area, as the boarding house would not attract university students being too far from universities and instead would attract transient single males, possibly unemployed and potentially with drug and alcohol issues. The objectors were also concerned that the development was next door to a liquor store and a women's refuge, and there were no opportunities for employment in the area. Finally, there were concerns surrounding the overlooking of the development into the backyards of nearby residences, smokers congregating in the nearby lane and an increase of residents exacerbating an already existing rubbish problem.

Contravention of the FSR Development Standard

Mateer argued in its written request that the FSR standard was unreasonable and unnecessary as the existing building already exceeded the standard, the bulk and scale of the existing building was compatible with the area, and the partial infill of the undercroft did not add to the bulk of the building. There was also no overall change to the height of the building or any adverse amenity impacts of the contravention. The Court accepted this argument, even though it was the only building of three storeys in the locality and the development would increase the gross floor area of the building (albeit in the undercroft level), as it was compliant with the objectives of the zone.

The Suitability of the Site

Council submitted that the development of the site as a residential boarding house was not compatible with surrounding land uses, in particular, the liquor outlet and service station.

In terms of the service station, Council was concerned that the noise levels of the station may disturb future occupants. However, the Court noted that a boarding house was permissible in the zone and therefore it would have been envisaged that the house may be adjacent to businesses (not only residential development) and would be impacted by the associated noises from these kinds of development.

In terms of the liquor store, Council was concerned that the people attracted to live in the development would be low-moderate income workers and the proximity of the liquor outlet would increase the likelihood of alcohol related harm. The Court accepted evidence from the parties' social planning experts that the future occupants would be in the low to moderate income range and the rent level would be likely to exclude those in the very low income range. Accordingly, the Court accepted Mateer's expert's evidence that there was no substantial evidence that the type of person attracted to living in the development would be more likely to engage in risky drinking than any other residents in the area who were also within walking distance of the outlet. Finally, the Plan of Management and house rules, as well as the availability of the manager were sufficient mechanisms for monitoring any anti-social behaviour.

Conclusion

The need to provide for affordable housing in the Lane Cove area and the consistency of the development with the aim of the LEP 2009 to promote affordable housing choices, outweighed the concern over the potential risk of alcohol related harm to the future occupants. The proposal was not contrary to the family orientation of the neighbourhood and the exceedance of the FSR standard was justified. Accordingly, the appeal was upheld.

2. Lucas v Pittwater Council [2014] NSWLEC 1137

[This case was an appeal by Kevin and Ann Lucas against the refusal by Pittwater Council of their development application for the construction of a bus depot at Ingleside.](#)

Background

The site was located in a non-urban zone between Mona Vale Road, the Garigal National Park, Kuring-Gai Chase National Park, and Wirreanda Creek. The site was approximately 3.44 hectares and





contained a single storey fibro cottage, a large shed, a small amenities block, a two storey rendered brick house with a free standing double garage, a stable building, and a dirt dressage ring. The surrounding uses included rural industries, a nursery, a quarry, residences and market gardens.

The site was accessed via the narrow sealed Wirreanda Road, running parallel to Mona Vale Road which was which accessed by Tumburra Street. Wirreanda Road had no kerbs gutters, footpaths or street lights and the shoulders of the road were overgrown making sight around bends of the road limited.

RMS reports indicated that there were upgrades to Mona Vale Road proposed to commence in 2018. The upgrades aimed to improve traffic travel times through the construction of a four lane dual carriage road between Terrey Hills and Ingleside, as well as two roundabouts on Wirreanda Road, creating direct access to Mona Vale Road.

The issues

Council raised the following contentions against the development:

- 2.1 The proposed use would generate unacceptable traffic impacts; and
- 2.2 The proposed use was inconsistent with the desired future character of the locality under the *Pittwater Development Control Plan No 21 (DCP 21)* and the future zoning of the site under the imminent *Draft Pittwater Local Environmental Plan 2013 (Draft LEP 2013)*, being excessive in site coverage and incompatible with the rural and bushland character of the locality.

Traffic Impacts

Council and objectors were particularly concerned about the pedestrian and vehicle safety impacts of the development along the local road networks as well as the potential additional traffic delay once Wirreanda Road was joined to Mona Vale Road. However, RMS did not raise similar concerns, and supported consent being granted to the application alongside conditions taking into account the future upgrade of Mona Vale Road. Further, both traffic experts agreed that, so long as amendments providing for road widening to certain parts of Wirreanda Road were implemented, the application did not cause any safety concerns.

In terms of the traffic delay along Mona Vale Road, both experts accepted that after the planned upgrades to the road were undertaken there would be no unacceptable traffic delay arising from the application. In considering whether the existing road network was capable of sustaining the development in the meantime, evidence indicated that the intersection of Mona Vale Road and Tumburra Street was safe

for use by the buses and geometrically capable of accommodating the buses. Further, while the intersection of Tumburra Street and Wirreanda Road required buses to cross the centre of the road when turning, it was safe and not uncommon for large vehicles accessing the nearby nursery to also do so.

Inconsistency with the desired future character of the locality

The parties accepted that the Draft LEP 2013 was both certain and imminent and therefore it had to be given consideration by the Court under s 79C of the *Environmental Planning and Assessment Act 1979 (EPA Act)*. Relevantly, the Draft LEP 2013 zoned the site RU2 Landscape and the proposed use would be prohibited. Also of relevance was DCP 21, which set out a “desired character” for the Ingleside locality and provided that the locality would “remain a low-density area characterised by rural residential and other compatible land uses on large allotments in a natural landscaped setting.”

Council contended that the site was incompatible with both the future zoning and the desired character as it did not enhance the rural and bushland character of the locality, and the site coverage was excessive being over the acceptable coverage area outlined in DCP 21. The Court accepted the Lucas’ expert evidence that the proposed development did not change the character of the neighborhood, as the development had no built structures or large porous areas of pavement or substantial landscaping which would change the visual impact of the land and therefore it was integrated with the natural landscaped setting. Further, the excess site coverage was minor and did not prevent the development from conforming to planning objectives and outcomes. The Court considered that the site was compatible with the rural character of the zone, having:

- 2.3 minimal structures visible on the land;
- 2.4 minimal impact on existing vegetation;
- 2.5 acceptable traffic impacts; and
- 2.6 its overall impact was less than a single storey development (with appropriate amendments).

While the proposed development would be prohibited under the Draft LEP 2013, it could be protected under the savings provision even if the Draft LEP 2013 had been gazetted by the time of the hearing, given that the site was compatible with the zone and desired character of the locality.

Bushfire conditions

The Lucas’ opposed a condition which the Council sought to impose on measures to be taken to prevent danger that might arise from a bushfire on the basis





of recommendations made by the Rural Fire Service and in accordance with s 79BA of the EPA Act. The Court accepted that the fuel and vehicle storage that would occur on site because of the development had the potential to increase the risk of a bushfire and it accordingly was a likely impact on the built and natural environment under s 79C(1)(b) of the EPA Act.

Conclusion

The appeal was upheld and development consent was granted according to the proposed amendments and the imposition of the bushfire condition.

3. Gemini Accident Repair Centres Pty Ltd v Council of the City of Sydney [2014] NSWLEC 1148

This case was an appeal by Gemini Accident Repair Centres Pty Ltd (**Gemini**) against the refusal of a Development Application by the Council of the City of Sydney for the fit out and use of a premises in Rosebery as a vehicle body repair workshop. The case considered the noise, traffic and emissions impact of the proposal in order to determine whether the proposed use could be characterised as “light industry” which was permitted in the zone.

Background

The site is located within an industrial complex known as the “Rosebery Industrial estate”. The estate contains a number of separate tenancies, including premises used for warehousing and distribution facilities. Adjoining the site is a school and low density residential housing. The proposed development included fit out works which had already been undertaken at the site, including the installation of two spray booths and exhaust systems, five working bays, a mixing room, and office and reception areas.

The proposed development differed from a standard vehicle smash repair business. The business catered only for jobs booked through an insurance company which would entail fast turnaround work for minor damage on vehicles that would be driven and not towed to the premises. No mechanical work would be undertaken.

Planning Framework

The site is zoned IN2 Light Industrial under the *Sydney Local Environment Plan 2012 (LEP 2012)* with “light industries” being a use permissible with consent. The use of the site as a “heavy industry” was prohibited by the LEP 2012. Within the LEP 2012, “light industry” is defined as “a building or place used to carry out an industrial activity that does not interfere with the amenity of the neighbourhood by reason of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust,

waste water, waste products, grit or oil, or otherwise, and includes any of the following: (a) high technology industry, (b) home industry.”

Issues

A conciliation conference was held between Gemini and Council with Gemini providing Council with further information on the proposal. As a result, Council’s concerns with the proposed development were largely resolved. Gemini and Council were in agreement that it was appropriate that development consent be granted subject to conditions, and sought orders from the Court. However, Council maintained its contention relating to the significant community objection to the proposal.

Resident objectors raised concerns with respect to parking, traffic, vehicle movements, waste and pollution, emissions of hazardous materials and noise, and the impact of having smashed cars parked on the street. An objection regarding the emanation of noise was raised to the proposed condition that the central roller door from the shared driveway remain open during operations. Objectors were also concerned about ensuring compliance by Gemini with the conditions of consent, vehicle access on a narrow driveway, and health and safety from emissions given the proximity of the proposed development to the school. A petition with 294 signatures was provided to the Court.

Effects on Health and Amenity

The primary issue of concern for the Council in its assessment of the application was the toxicological impacts of emissions from the operation of the business, and the impact on amenity of odour emissions. The expert engaged by Gemini concluded in his assessment that the proposal would comfortably comply with all applicable standards for health and odour. Council’s expert agreed that the toxicological impacts would not exceed the relevant assessment criteria, but recommended Gemini install and operate an appropriate emission control device (such as activated carbon filtration) to resolve any residual uncertainties regarding the health and amenity impacts of emissions. Gemini’s expert disputed the necessity of this requirement, however, the Court was ultimately satisfied with the recommendation made by Council’s expert.

Traffic Concerns

The assessment of traffic impacts by Gemini’s traffic expert concluded that the proposed development was compliant with the parking provisions contained in Council’s applicable planning controls. Furthermore, the expert concluded that there would be no material or measurable increase in traffic that could be attributed to creating a hazard to nearby school



children. The Court accepted this evidence and was satisfied that the conditions of consent and provisions in the proposed Plan of Management relating to vehicle numbers, deliveries, parking, and staggering of vehicle drop off and pick up times meant that the additional traffic and vehicle movements generated by the proposed development did not warrant refusal.

Acoustic Impacts

Operational noise was assessed by Gemini's acoustic expert on the assumption that roller doors on the southern side of the building would be open during operations. In response to concerns raised by Council as to the monitoring locations, Gemini's expert assessed four further locations. The conclusion was that predicted noise levels would be lower than existing daytime background noise level and that the proposed development would comply with Council's standard conditions relating to noise criteria, although the expert recommended that acoustic assessment of mechanical services equipment would need to be undertaken during the detailed design phase of the development. The Court accepted this evidence and was satisfied with the proposed conditions.

Conclusion

The Court was satisfied that the health, amenity and acoustic issues would be adequately addressed by the conditions of consent and the proposed Plan of Management. Accordingly, the Court was satisfied that the development could be characterised as "light industry" and was permissible in the zone. The Court noted that alternatively the proposed development could be characterised as "vehicle body repair shop" which was an innominate form of development not prohibited in the zone.

The appeal was upheld and development consent granted according to the proposed conditions of consent and the Plan of Management.

4. Universal Property Group Pty Ltd v Blacktown City Council (No 2) [2014] NSWLEC 115

This case was an appeal against the decision of Commissioner Hussey in *Universal Property Group Pty Ltd v Blacktown City Council* [2013] NSWLEC 1231.

Commissioner Hussey had dismissed an appeal for development consent for a medium density project. The Universal Property Group Pty Ltd (UPG) appealed on the basis that Commissioner Hussey had made the following errors of law: 1) denial of procedural fairness; 2) failure to give adequate reasons; and 3) failure to deal with a mandatory relevant consideration.

Background

In the first instance, UPG had appealed against the deemed refusal of a Development Application by Blacktown City Council for the approval of a medium density project located at a site in Woodcroft. The proposal involved a medium density development comprising 102 dwellings (88 two-storey houses, and 14 villas, each with three to four bedrooms), and included associated uses, open space, parking and private internal roads.

Commissioner Hussey dismissed the appeal on the basis that he was not satisfied with the proposed 'shared zone' (pedestrian and vehicles) for internal roads throughout the site.

UPG appealed, seeking the matter be remitted to a commissioner other than Commissioner Hussey to be heard again and determined afresh. UPG claimed that Commissioner Hussey had made the following errors of law:

- 4.1 Denial of procedural fairness.
- 4.2 Failure to give adequate reasons.
- 4.3 Failure to deal with a mandatory relevant consideration.

Class 1 Proceedings before the Commissioner

Council raised five contentions about the proposed development during the Class 1 proceedings, regarding proximity of car parking spaces, distribution of visitor parking, whether there should be a separate pedestrian path, the set back of the driveways from the intersection, and the location of some common open space. Most of these issues were able to be resolved either by minor amendment of the proposal, or by agreed conditions of consent.

The original internal road design was to operate as a "shared zone" for pedestrians and vehicles. During the hearing the Commissioner expressed concern that the design and intended mode of operation of the project's internal roads was inadequate when assessed against the RMS "Shared-Zones" Policy guidelines. In response, the traffic experts of both UPG and Council endorsed an amended plan, which included a raised pedestrian pathway adjacent to the perimeter road, as being acceptable on traffic safety grounds.

The Commissioner noted that for developments of this proposed scale there existed a lack of development control standards for designing internal roads, against which the "shared accessway" could be assessed. In ultimately making his assessment, the Commissioner adopted nine evaluative criteria which he primarily based on the RMS "Shared-Zones" Policy. The Commissioner considered the following objectives of





the RMS “shared zone” policy were not satisfied by the proposal:

- Provide priority for pedestrians;
- Reduce the dominance of vehicles along the street;
- Improve the amenity for pedestrians; and
- Enhance the quality of the street environment

Both counsel for UPG and Council submitted that the residual concerns held by Council were not determinative and therefore there was no reason for the Court to refuse the application. However, the Commissioner remained dissatisfied with the proposal, particularly the internal road design, and dismissed the appeal.

The Appeal

Sheahan J confirmed the Commissioner’s power to determine the Class 1 proceedings independent of any agreement reached between the parties on any issues which they had not earlier resolved.

Denial of procedural fairness

UPG argued that in instances where a Commissioner raises an issue not in contention between the parties, the Commissioner needs to clearly identify and put the parties on notice of that contention. Failure to do so, UPG alleged, was tantamount to a denial of procedural unfairness. UPG pointed to a number of uncontentious matters between the parties referred to by the Commissioner, in particular the internal road design. The issue for the Court was therefore whether UPG was given proper notice of, and an opportunity to meet, the concerns of the Commissioner which led to his refusal to grant consent.

The Court considered the transcript of the Class 1 hearing and held that the Commissioner had made it clear to the parties’ experts on multiple occasions the issues which he was seeking assistance with and had afforded UPG ample opportunity to do so. The Court found that procedural fairness had been afforded to UPG and therefore there was no error of law.

Failure to give adequate reasons

The second ground alleged by UPG was that the Commissioner failed to give adequate reasons for rejecting the experts’ evidence on the issue of the safety and amenity of the internal access roads.

The Court rejected this argument and held that although the Commissioner did not always make clear his distinctions between the written and oral evidence given by the experts, this did not amount to an error of law. Furthermore, failure to specifically mention some detail of the evidence does not automatically mean that the Commissioner had failed to discharge his duty to consider it. The Court found that the Commissioner

not only considered the expert evidence, he provided adequate reasons for his rejection of it. Given that the experts could not point to any consistent evaluative criteria that could provide a basis for the favourable assessment of the safety and amenity of the proposed accessway, the Commissioner was therefore entitled to formulate his own assessment criteria.

Ground 3 - Failure to deal with a mandatory relevant consideration

UPG argued on appeal that the Commissioner failed to give proper consideration to clause 6.13 of the Blacktown Development Control Plan 2006 as required by s 79C(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as he had instead substituted his own test as to what should be the appropriate width of the accessway.

The Court found the Commissioner had sought evidence from the experts as to what was an appropriate standard for the accessway given the type and volume of traffic it was assessed it would carry. The Commissioner had therefore applied the DCP, and the Court concluded that that his analysis and reasoning of other documents which called the DCP up for consideration did not amount to a failure by the Commissioner to consider the DCP.

Conclusion

His Honour dismissed UPG’s appeal and ordered UPG to pay Council’s costs.





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:
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