LOCAL GOVERNMENT NSW

Land and Environment

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Summary of cases

1. This case involved an appeal under s 97 of the Environmental Planning and Assessment Act 1979 (NSW) (**EPA Act**) against a refusal of a development application for the construction of a tennis court and removal of 9 trees. The Court dismissed the appeal, finding that the development did not adequately address the desirability of retaining and minimising disturbance to native vegetation and that alternative locations for the tennis court had not been adequately considered.

2. This case concerned sentencing for the illegal demolition of parts of the interior of a state heritage listed terrace in Millers Point. The Court held that the offence was at the lower end of medium seriousness and considered a number of mitigating factors, including an early guilty plea entered by the offender. The offender was fined $60,000 and ordered to pay the prosecutor's costs of $35,000.

3. This case involved an appeal under s 97 of the EPA Act against a refusal of a development application for the construction of a dual occupancy and Torrens Title subdivision. The Court dismissed the appeal, finding that the development did not constitute a dual occupancy and did not comply with solar access or private open space requirements.

4. This case involved an appeal under s 97AA of the EPA Act against a refusal of an application to modify a development consent granted for the construction of a two storey dwelling. This sought retrospective approval for the relocation of 2 bedrooms, which resulted in non-compliance with maximum floor space ratio and setback controls. The Court upheld the Applicants' appeal finding that despite the numerical non-compliance the modification did not result in unacceptable impacts.

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

Maddocks

1. *Knox v Ku-ring-gai Council [2016] NSWLEC 1039*

This case involved an appeal by Ms Knox pursuant to s 97 of the EPA Act against a refusal by Ku-ring-gai Municipal Council (Council) of a development application for the construction of a tennis court and other works.

Background

The site is located in Wahroonga with a total area of 2,920sqm. Already located on the site is an existing dwelling and a swimming pool. An open un-piped stormwater channel is located along the rear boundary of the site. The site is heavily vegetated with canopy trees, which are made up of Turpentines, Brushbox, Camphor Laurel and Coral Trees.

Ms Knox lodged a development application for the construction of a tennis court, including the construction of a concrete slab, fencing and controlled discharge drainage pit, and the removal of 9 trees. The tennis court was proposed to be set back 3m from the northern and rear boundaries and 2m from the southern boundary. The site is zoned 2(c) under the Ku-ring-gai Planning Scheme Ordinance (**KPSO**) and the proposal was permissible with consent.

The site contains Sydney Turpentine-Ironbark Forest (**STIF**), which is identified as part of an endangered ecological community protected under the Threatened Species Conservation Act 1995 (NSW) (TSC Act). Two of the trees (Trees 40 and 42) proposed to be removed as a part of the development application are remnant/natural specimens of the STIF.

Issues

Council raised 2 main contentions against the proposed development:

- that the proposal would have an adverse ecological impact from the loss of endangered biodiversity through the removal of trees; and
- that the proposed stormwater management would give rise to an unacceptable impact on the neighbouring property.

Development controls

The TSC Act, KPSO *and Ku-ring-gai Residential Design Manual Development Control Plan* contain objectives for site planning, conservation of biological diversity, and protection and conservation of habitat which are relevant to the site.

The relevant objectives of the KPSO are:

- to maintain and where appropriate improve the existing amenity and environmental character of residential zones; and
- that any building or development work shall maintain or encourage replacement of tree-cover whenever possible to ensure the predominant landscape quality of the municipality is maintained and enhanced.

Council's *Water Management Development Control Plan* also applies to the proposal and requires that tennis courts be constructed as on-site detention systems unless other approved.

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

Proposed removal of trees

The experts gave evidence that Trees 40 and 42 were in good health. Ms Knox's expert gave evidence that the removal of both trees was justified because the removal of the trees surrounding and supporting Trees 40 and 42 would be significant enough to warrant the removal of Trees 40 and 42. Council's arboriculturalist disagreed with this opinion.

Council's ecologist also gave evidence that the removal of Trees 40 and 42 would further fragment the STIF community and that fragmentation is recognised as a key threatening process to STIF. Although the Vegetation Management Plan proposed by Ms Knox provided for the planting of advanced Turpentines and other endemic lower canopy species, the Council's expert considered that it would be many years before they would achieve the current maturity of the existing trees.

The Court accepted the evidence of the Council's arboriculturalist and ecologist both with regards to the retention of Trees 40 and 42 and the fragmentation of the STIF community. The Court found that the proposed development did not adequately address the desirability of retaining and minimising disturbance to remnant native vegetation on the site in order to maintain Ku-ring-gai's biodiversity. The Court was not persuaded that the removal of Tree 40 was warranted in the circumstances.

Proposed location of the tennis court

Ms Knox's expert contended that the proposed location of the tennis court was the only option on the site. This was due to site constraints such as the existing pool and the sewer manhole, which precluded locating the tennis court further to the east to avoid the need for the removal of Trees 40 and 42.

However, the Court did not accept the evidence provided by Ms Knox's expert. The Court was not satisfied that the option of moving the sewer line and/or manhole had been fully explored and therefore did not accept that there was no alternative position for a north-south orientated tennis court on the site, but rather that this had resulted from Ms Knox's preference to retain the swimming pool.

Conclusion

The Court dismissed the appeal and refused Ms Knox's development application for a tennis court.

2. Council of the City of Sydney v Adams [2015] NSWLEC 206

This case concerned the appropriate sentencing of Mr Adams for the illegal demolition of parts of the interior of a state heritage listed terrace in Millers Point (the earliest residential precinct in Australia still in residential use today).

Background

In 2014, Mr Adams purchased a colonial Georgian house located in Millers Point from the NSW Government. At the time of sale a Conservation Management Plan (**CMP**) was applicable to the house. The CMP detailed the heritage significance of the house, and was attached to the contract for sale and had been signed by Mr Adams.

The CMP specifically identified elements of the interior of the house that were of 'exceptional significance' including the original plaster on the internal ground and first floor walls and the original timber joinery. This 'exceptional' grading constitutes a 'rare or outstanding element directly contributing to an item's Local and State significance'. Constraints on the way the house could be used and the elements that needed to be retained were also identified in the CMP.

Within a week of completing the purchase of the house, Mr Adams began demolishing the interiors of the house, including removing the internal plaster on the walls, skirting boards and other joinery. A heritage officer from the Council of the City of Sydney (Council) inspected the house on 1 December 2014 and orally directed Mr Adams to stop work.

Mr Adams did not comply with the oral stop work direction.

The Council posted a stop work order to Mr Adams on 3 December 2014, which he received and complied with on 8 December 2014.

Illegal works and the offence

As the house is listed on the State Heritage Register under the Heritage Act 1977 (NSW) (**Heritage Act**), approval is required for all works to it. Development consent is also required to carry out development, demolition or alteration of a heritage item under the Sydney Local Environmental Plan 2012 (**LEP**).

Mr Adams did not apply for or obtain development consent for the works that he undertook to the house. Preston CJ held that Mr Adams' works satisfied the LEP's definition of demolition of a heritage item (to 'wholly or partly destroy, dismantle or deface the heritage item'), and constituted a criminal offence against s 125(1) of the EPA Act.

Mr Adams pleaded guilty to the charge.

The sentence

To determine and impose an appropriate sentence for the offence committed by Mr Adams the Court considered the objective and subjective circumstances as well as the aggravating, mitigating and other factors contained within the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Having considered the evidence presented by the parties, Preston CJ made the following findings.

Objective circumstances

- The maximum penalty at the time of the offence was $1.1 million. However, a new 3 tier offence regime had subsequently commenced on 31 July 2015 which would have had the effect of reducing the maximum penalty in this instance. His Honour held that the new maximum penalties did not apply because at the time of Mr Adams' works the regime had not commenced.
- Preston CJ held that the irretrievable loss of significant fabrics through Mr Adams' works and the absence of numbering and cataloguing to identify the origin of removed materials contributed to the adverse impact on the heritage significance of the house. This was not remedied or mitigated by Mr Adams. It was therefore held that the offence caused actual harm of medium seriousness and found that even if restoration proceeded it would not fully restore or wholly compensate for the diminution in heritage significance.
- Mr Adams' development without consent undermined the objectives of the EPA Act in requiring prior application, assessment and approval for the carrying out of development. His Honour held that use of the criminal law in this instance would ensure the credibility of the regulatory system.
- As Mr Adams' offence was one of strict liability, consideration of his state of mind was relevant in determining the objective seriousness of the offence. Mr Adams was made aware of the law and facts concerning the heritage significance of the house through the CMP. However, he mistakenly believed that the work he was doing fell within an exemption that would permit him to repair or

replace the fabric of the house without an approval from the Heritage Council under the Heritage Act. Preston CJ found that while Mr Adams' actions were reckless, with disregard to whether or not the works could lawfully be carried out without development consent, he did not find that the offence was intentionally committed.

Preston CJ also held:

- the offence was not aggravated by the intention of financial gain;
- Mr Adams could reasonably have foreseen that his actions would be likely to cause harm to the house and its heritage significance;
- there were practical measures that Mr Adams could have taken to avoid harm such as reading the CMP and the standard exemptions, and checking with Council; and
- Mr Adams had complete control over the causes of the offence by performing all of the work himself.

His Honour concluded that the objective seriousness of the offence was therefore of medium seriousness, but at the lower end of that range.

Subjective circumstances

Preston CJ considered the mitigating factors of Mr Adams' lack of prior convictions, his early plea of guilty (which afforded Mr Adams the maximum penalty discount of 25%), his good character, his remorse for the offence, the unlikelihood of his re-offending and his assistance to authorities.

Purposes of sentencing

Preston CJ held that the sentence is a public denunciation of Mr Adams' conduct and should act as a general deterrent to others who might be tempted to commit like crimes.

Conclusion

Having considered these matters, His Honour fined Mr Adams $60,000 and ordered him to pay the prosecutor's costs of $35,000.

3. *Condor Design Pty Limited v Bankstown City Council [2016] NSWLEC 1009*

Bankstown City Council (**Council**) refused a development application lodged by Condor Design Pty Limited (**Condor**) for the construction of a dual occupancy and Torrens title subdivision. Condor subsequently appealed to the Land and Environment Court under s 97 of the EPA Act against the Council's refusal.

Background

The site is located in Bass Hill and zoned 2(a) Residential under *Bankstown Local Environmental Plan 2001* (**LEP**). It is rectangular in shape with an area of 613 sqm and contains a single storey fibro dwelling with an attached metal carport. A drainage easement runs along the southern boundary of the site. Low density residential development surrounds the site.

Condor sought development consent to demolish the existing structures on the site and construct a two storey dual occupancy with a Torrens title subdivision to form 2 lots. Lot 1 was proposed to be developed with a two storey four bedroom dwelling that would face the street (**Unit 1**). Lot 2, at the rear of the site, was

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

proposed to be developed with a two storey dwelling with four bedrooms and a study (**Unit 2**). Units 1 and 2 would be connected at the common boundary where part of the wall of the laundry and BBQ of Unit 1 would adjoin part of the wall of the garage of Unit 2.

Issues

The key issues in dispute between the parties were whether:

- the development was permissible;
- the private open space was adequate; and
- the private open space would receive sufficient solar access.

Is the development permissible?

Under the LEP dual occupancies were permissible within the 2(a) Residential zone. Dual occupancy was defined to mean 'two attached dwellings (with a single common wall) or two detached dwellings on a single allotment where both dwellings face the street'.

As the *Bankstown Local Environmental Plan 2015* (**Draft LEP**) had commenced on 5 March 2015, after the development application was made, the parties agreed that the Draft LEP was 'imminent and certain' and therefore must also be given weight. The parties agreed that the proposed development satisfied the definition of 'dual occupancy' under the Draft LEP, however they disagreed as to whether the dual occupancy was 'attached' or 'detached' and whether it satisfied the requirement that both dwellings face the street.

The expert for Condor argued that the Units were attached as they shared a common wall. However, the expert conceded that both Units could be built independently since each of the Units would have an external wall adjoining the common boundary but entirely within their own lot. Condor further argued that requiring both Units to face the street was an unreasonable constraint on the development and, alternatively, that Unit 2 would not need to be visible from the street to face it.

Council's expert did not consider the development satisfied the definition of 'dual occupancy' under the LEP as the Units would not share a single common wall and would therefore not be 'attached', and did not consider that Unit 2 would face the street as required by the definition of 'dual occupancy' as it would be located behind Unit 1.

The Court agreed with the Council's submissions, finding that the proposal was not a 'dual occupancy' development as defined under the LEP or for any other nominated use in the 2(a) Residential zone. Consequently, the Court found that the proposed development was not permissible in the 2(a) zone and consent could not be granted.

Merits issues associated with private open space

The parties' experts agreed that the location of Unit 2 would result in a reduction in the level of solar access to the private open space of Unit 1, with at least half of the private open space of Unit 1 receiving less than 3 hours of sunlight between 9am and 5pm. This was contrary to the solar access requirements of s 5.18 of Part D2 of the *Bankstown Development Control Plan 2005 (***DCP**). The experts agreed that if both Units had been designed to face the street then compliance with the solar access requirement could be achieved.

The experts also agreed that the proposal would not achieve a minimum of 80sqm of private open space for each dwelling, which was required in s 5.15 of Part D2 of the DCP, although the expert for Condor

considered that the private open space would still be attractive to and usable by future occupants of the Units. However, the Court agreed with the Council's expert, finding that if the Units had been designed in accordance with the LEP and faced the street then this design would result in greater open space to the rear of the site and would provide a more usable area with greater amenity.

Conclusion

The Court refused the development on the grounds that the proposal was not permissible within the zone and dismissed Condor's appeal.

4. Kakoz & Anor v Fairfield City Council [2016] NSWLEC 1056

This case involved an appeal by the Applicants under s 97AA of the EPA Act against a refusal by Fairfield City Council (**Council**) of an application made by the Applicants pursuant to s 96(1A) of the EPA Act to modify a development consent granted for the construction of a two storey dwelling.

Background

The site is located in Fairfield West and is zoned R2 Low Density Residential under the *Fairfield Local Environmental Plan 2013* (**LEP**). The site has a downwards sloped gradient towards the front boundary. The adjacent development to the site consists of a single storey dwelling house to the east and a vacant block to the west.

Development consent for the site had previously been granted by Council in March 2013 for the construction of a two storey dwelling, attached garage (basement), in-ground swimming pool and masonry front fence. The Applicants' constructed development was partially non-compliant with the development consent. Therefore, the Applicants sought to modify the development consent, seeking Council's retrospective approval for the relocation of the third and fourth bedrooms on the first floor of the dwelling house to the western side of the building. The Council refused the modification application in September 2015.

Issues

The Council argued that the modification application should be refused because it would result in excessive bulk and unacceptable amenity impacts on neighbouring development due to it failing to comply with:

- the maximum floor space ratio (FSR) specified in the Fairfield City Wide Development Control Plan 2006 (DCP); and
- the minimum required side-setbacks in the DCP controls.

Further, Council argued that the development was not in the public interest and the approval of unauthorised works would set an undesirable precedent.

Relevant development controls

The relevant development controls that the Court was required to consider related to FSR and side setbacks. Under the LEP, the maximum FSR permitted on the site is 0.45:1, although cl 4.6 enables that development standard to be varied. The DCP's side and rear setback controls for dwelling houses in s 5A.2.3.2 requires that 'for a proposal with a combined void space greater than 20sqm, the upper floor side setback must be a minimum of 4m from the south and west boundaries of the property'.

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

Did the non-compliances warrant refusal of the application?

The Council argued that the upper floor proposed by the Applicants in the modification application would contravene this control as the proposed relocation of the third and fourth bedrooms would move the first floor western wall approximately 3.5m closer to the boundary and cause it to protrude from the upper story towards the west. This would result in setbacks of approximately 915mm and 1815mm from the western boundary, presenting as a vertical wall approximately 7m high for a length of 4.5m, with the combined length of the wall to the western boundary being 14.8m. Furthermore, the modification application would result in a development with a FSR of 0.5:1 which exceeded the FSR control in the LEP.

Council's expert gave evidence that the increase in FSR and relocation of the bedrooms to the western side of the house would increase the bulk and scale of the building as viewed from the street and adjacent property, and would lessen the amenity enjoyed by future occupants of the adjoining vacant property by restricting their outlook to the east to a significant degree especially for windows on the ground floor on the eastern wall. The proximity of the wall would, in Council's opinion, decrease the design options for a future dwelling on the adjoining vacant property. The Applicants' expert disagreed and considered that the modified development would not significantly alter the existing approved streetscape appearance, but would rather result in a building of similar bulk to that previously approved.

Although the Applicants' expert accepted that the modified development would result in non-compliance with the DCP setback control, he also gave evidence that there would be no unreasonable privacy impacts or shadow impacts on the adjoining property resulting from the modification. The Court agreed, finding that the high level windows in the third and fourth bedrooms would prevent overlooking of the adjacent property and therefore privacy was not an issue.

Despite the Court finding that there would be a loss of sky view from the eastern side of any future dwelling on the adjacent vacant property and an increase in bulk, the Court considered that the real issue was whether the increase in bulk would be acceptable, in the context of the bulk of the building as approved which already exceeded the FSR, maximum height limit, and setback controls in respect of the adjacent property to the east. To determine whether the increase in bulk was acceptable, the Court contemplated the objectives of the planning controls, finding that while there was a non-compliance with the numerical controls in the DCP, when regard was had to the objectives of those controls the departure could not be considered to result in unacceptable impacts. The Court also noted that the fact that the development had already been carried out was not a barrier to approval being granted.

Interestingly, although the Court deemed relevant the Council's submission that it was in the public interest that the statutory controls should be complied with to ensure the regulatory provisions are upheld, the Court noted that the Council had other avenues available to address this.

Conclusion

For these reasons, the Court was satisfied that the modification application should be approved and upheld the Applicants' appeal.

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).

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

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

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

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

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

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

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GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

Useful links

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

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

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

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