LOCAL GOVERNMENT NSW

Land and Environment

COURT REPORTER

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IN THIS ISSUE

Summary of cases

Welcome to the first edition of the Court Reporter for 2019. In this edition we consider 4 cases.

1. The first case, Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel [2018] NSWLEC 207, is an interesting example of the Court upholding the public's right to access beaches and the coastal foreshore when determining a development application.
2. The second case, Dennes v Port Macquarie-Hastings Council [2018] NSWLEC 95, considers an applicant's ability to extend the deferred period of a development consent subject to a deferred commencement condition.
3. The third case, Arkibis Pty Ltd t/a Arkhaus v Randwick City Council [2019] NSWLEC 1020, provides an interesting example of the Court's considerations in respect of onsite parking, and the weight given to share cars and nearby public transport routes.
4. The final case, Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7, is a "landmark" decision, with the Court rejecting an application for an open cut mine due largely to the impacts the mine would have on climate change and the community.

We hope you enjoy reading this edition of the Court Reporter.

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Maddocks

1. Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel [2018] NSWLEC 207

These proceedings were commenced by three land owners, who each lodged development applications to carry out works to repair sea walls on Belongil Beach in order to protect their properties from coastal hazards.

The case is interesting example of the Court upholding the public's right to access the beach and coastal foreshore, and consideration of future development with regard to past unlawful works.

Background

On 19 January 2017, three land owners lodged development applications with the consent authority, the New South Wales Coastal Panel (Panel), seeking consent to carry out works to repair sea walls on Belongil Beach. The three land owners were Ralph Lauren Pty Ltd (**Ralph Lauren**), Stewartville Pty Ltd (**Stewartville**) and Mr Watson (**Watson**).

The existing sea walls consisted of rock rubble, concrete cubes and demolition concrete slabs, and were amongst a series of largely unapproved, ad hoc rock/rubble walls along Belongil Beach.

After the Panel had not determined the development applications within the prescribed time, the land owners commenced an appeal on 29 September 2017 under s 97 of the *Environmental Planning and Assessment Act 1979 (NSW) (EPA Act)* against the Panel's deemed refusal of their development applications.

During the course of the proceedings, the Panel accepted that a number of its contentions could be addressed by the granting of consent subject to conditions that require the preparation and approval of a plan of management and a regime such that the life of the sea wall would be less than the 30 year life proposed by the land owners.

The land owners also provided more information and amended plans for the proposed works and for the arrangements for access to carry out the work, which addressed a contention that the proposal was insufficiently described and not accompanied by sufficient supporting information to enable it to be properly assessed.

Issues

Before consent could be granted, the Court had to first be satisfied that two legislative preconditions were met, being:

- section 55M(1) of the *Coastal Protection Act 1979* (**CP Act**). Although the CP Act was repealed by the *Coastal Management Act 2016* on 3 April 2018, the land owners' development applications were lodged before the repeal date and therefore still subject to the provisions of the CP Act; and
- clause 88(3) of Byron Local Environmental Plan 1988 (**Byron LEP 1988**), which continues to apply to the properties rather than the current Byron Local Environmental Plan 2014.

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Conclusion

Chief Justice Preston held that consent could not be granted to the land owners' development applications to carry out the proposed works to repair the existing sea walls. In refusing to grant consent, his Honour stated that he was not satisfied that the preconditions in s55M(1)(a)(i) of the CP Act, and in cl 88(3)(a) of the Byron LEP 1988 had been met.

In particular, his Honour concluded:

- as the proposed works were to be built wholly or largely on the public land at Belongil Beach, they would limit or be likely to limit public access to or the use of the beach or impede or diminish the physical, land-based right of access of the public to or along the coastal foreshore;
- the parts of the beach that the public would not be able to access or use because of the works were significant;
- the proposed works were in sections of Belongil Beach that currently and are likely in the future to be accessed and used by the public;
- the resultant repaired sea walls would limit access to and use of the beach for a long time;
- there would be a shorter time limit, impeding or diminishing public access to and use of other parts of the beach whilst the repair works were being carried out;
- the repaired sea walls would limit public access to and use of the beach outside of the parts of the beach on which the sea walls were physically located;
- the limitation on public access to and use of the beach, does not cease to be a limitation merely because the existing sea walls currently limit, impede or diminish public access to and use of the beach. The assessment of the degree and significance is to be undertaken without regard to the existing sea walls, as the sea walls should not exist on the beach because they were not lawful (given that no development consent was sought or obtained for the existing sea walls). Whilst development consent can be granted to the future carrying out of a work and the future use of works on land, the consideration of such future development is to be done without regard to the past unlawful works and unlawful use;
- the extent and the ways in which the proposed works would limit or were likely to limit public access to or the use of the beach, make the limitation unreasonable for the purposes of s55M(1)(a)(i) of the CP Act; and
- there were no practical reasons that would preclude the land owners from designing, locating and constructing coastal protection works so as not to impede or diminish the physical, land-based right of access of the public to or along the coastal foreshore, as required by cl 88(3)(a) of Byron LEP 1988.

As a result, his Honour dismissed the appeals. Although it was unnecessary to determine the other contentions of the Panel, his Honour also concluded (amongst other findings) that granting consent to the proposed works would set a precedent for granting consent to carrying out similar coastal protection works in front of other properties along Belongil Beach.

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2. Dennes v Port Macquarie-Hastings Council [2018] NSWLEC 95

The applicant, Mr Dennes, commenced an appeal against a decision of Port Macquarie-Hastings Council (the Council) that the deferred commencement condition on a development consent approved by the Court, was satisfied. The issue was primarily whether the appeal could be heard, as the appeal had been commenced after the 12 month deferred commencement consent had expired.

Chief Justice Preston dismissed the appeal on the basis that Mr Dennes had failed to lodge the appeal within the 12 month deferred commencement period, meaning that the deferred commencement consent had lapsed.

Background

Mr Dennes applied for development consent in relation to a replacement dwelling house on his property at 330 Koree Island Road, Beechwood. The Council rejected his application because the site was a flood hazard and that it would pose a risk to life and property in breach of the Council's Flood Policy.

Mr Dennes appealed this decision and Commissioner Fakes granted development consent, subject to a deferred commencement condition. The deferred commencement condition required Mr Dennes to submit to Council a Flood Emergency Response Plan (**FERP**). Both Mr Dennes and his architect submitted a FERP on or before 26 April 2017. On 20 June 2017 the Council notified Mr Dennes that the FERP was not satisfactory.

Between 20 June 2017 and 17 August 2017 (the expiry date for the deferred commencement period) Mr Dennes took no action to appeal the Council's decision or apply for an extension under Division 4.9 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**).

The Appeal

Mr Dennes lodged an appeal against the Council's decision that his FERP was unsatisfactory under s 97(3) of the EPA Act on 22 December 2017.

The Council submitted that the Court should dismiss the appeal because the Court had no jurisdiction to hear the appeal owing to the lapsing of the 12 month deferred commencement consent. The Council also submitted that the FERP would still be considered unsatisfactory. The Council emphasised the failure of the FERP to comply with relevant policies, that it failed to disclose the author or their qualifications and finally that there was a contradiction within the plan itself.

Mr Dennes argued that the 20 June 2017 letter did not constitute a decision or notification of a decision in accordance with the deferred commencement condition and therefore he could still commence his appeal.

The Decision

Preston CJ found that the Council's letter did constitute notice of its decision that the FERP was unsatisfactory. His Honour also found that, because of Mr Dennes' inaction, the deferred commencement consent had lapsed on 17 August 2017.

The Council's decision that the FERP was not satisfactory resulted in the deferred commencement condition not being satisfied. As Mr Dennes had failed to lodge his appeal before the lapsing of the deferred commencement condition period, there was no effective development consent. This meant that Mr Dennes could not make an appeal under s 97(3) of the EPA Act.

This finding was consistent with previous decisions in which deferred commencement consent had lapsed, meaning the requirements had not been met and the appeal could not be heard.

3. Arkibis Pty Ltd t/a Arkhaus v Randwick City Council [2019] NSWLEC 1020

The Land and Environment Court has upheld an appeal and approved a development application for the construction of a two storey residential flat building with no onsite parking. This case is an interesting example of the Court's considerations in respect of onsite parking, and the weight given to share cars and nearby public transport routes.

Background

Arkibis Pty Ltd t/a Arkhaus (**Applicant**) sought consent for alterations and additions to a building at 4 Prince Street, Randwick as well as the development of four new residential units at the rear of the site.

Randwick City Council (**Council**) argued that the DA should be refused by the Court on the basis that it provides no onsite parking, nor adequate justification for a variation to Council's residential parking rates and an approval would set an "undesirable precedent".

The site was zoned R3 Medium Density Development pursuant to Randwick LEP 2010 and the proposed use as a residential flat building was permissible with consent. The Randwick Development Control Plan 2013 (**DCP 2013**) also applied to the site. The DCP 2013 sets out the relevant parking rates and exceptions to parking rates, including where it is not "physically possible or aesthetically desirable to provide parking" (section 3.3). The DCP also sets out controls and the issues to be addressed in order for the parking rates to be varied, including the availability of on street parking in the area and proximity and access to public transport.

Issues

The Applicant submitted, amongst other things, that a variation to Council's parking provisions is justified, as it is not physically possible or aesthetically desirable to have onsite parking and that the DCP allows for the provision of no off street parking if the site is well serviced by public transport.

The Council contended that the DA should not be approved due to the "saturation" of on street parking in the area, the lack of certainty that a car share scheme will exist for the life of the development, and the potential changes to parking availability that could be brought about by the light rail construction. Council was also not satisfied that it was appropriate to vary the parking provisions in accordance with section 3.3 and argued that it was likely to create a precedent for other developments.

The parties' traffic experts provided a joint report and agreed that the site is located within walking distance of bus and light rail transport routes, though Council's expert argued that the provision of onsite parking should be maximised due to the existing street parking being highly utilised at the site.

Existing driveway

The experts agreed that the current driveway at the site was not able to be used in a manner compliant with the Australian standard for parking facilities.

Parking rates

Under parking rates in DCP 2013, the proposed development was required to provide nine parking spaces. The Applicant's expert submitted that given the existing garage was non-compliant, the shortfall was reduced

to two spaces, and that the "unmet parking demand generated by the development of two spaces [would] not have an adverse impact on the surrounding streets". Alternatively, the Council's expert contended that the shortfall was four spaces and that the proposed development could not rely on the on street parking having sufficient capacity.

Share cars

The DA proposed the addition of a "GOGET" car share pod in front of the site. Council's expert did not consider this a viable, long-term alternative and considered the use and viability of the "GOGET" locations in closest proximity to the site, which averaged less than 3 hours of use per day.

Conclusion

Commissioner Dickson upheld the Applicant's appeal and approved the DA, stating that a "variation to the car parking rates" was "appropriate in the circumstances of the subject site" and that the objectives of the parking provisions in DCP 2013 and s 4.15 of the Act were satisfied. Commissioner Dickson stated that she was satisfied that the site would be "appropriately serviced" by the provision of an additional car share pod and the on-street parking space achieved through the removal of the existing driveway, as well as by "proximate and high quality public transport".

A deferred commencement condition was imposed on the development consent such that the development consent for the car share pod was to be obtained within 24 months.

4. Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7

In a landmark decision, Chief Justice Preston of the Land and Environment Court has rejected an application for an open cut mine in the Gloucester Valley due to the impacts the mine would have on climate change and the community.

Background

Gloucester Resources Limited (**the Applicant**) proposed to mine seams of coal in an "idyllic" valley located beneath Rocky Hill, close to the Mid North Coast town of Gloucester. The town has a core of dense urban development and a number of rural residential estates and smaller agricultural and agri-tourism properties on its outskirts. Some of the outlying properties were to be within one to two kilometres of the mining pit.

The proposed mine has heavily divided the community of Gloucester, with the local action group Groundswell Gloucester being joined as a party to the proceedings and represented by the Environmental Defenders Office, to argue that the mine's detrimental impact on climate change and on the social fabric of the town were relevant matters to be taken into consideration by the Court.

The Applicant had unsuccessfully applied to the Minister for Planning for development consent to develop, operate and rehabilitate the 832ha site over a period of up to 21 years. The maximum run-of-mine coal production would be 2 million tonnes per annum, with 500 hectares of the site to be disturbed throughout the life of the project.

Court proceedings were commenced in December 2017, after the Planning Assessment Commission, as the delegate of the Minister, refused consent on the grounds of incompatibility with other land uses in the vicinity, visual amenity and public interest.

Issues

Numerous contentions were raised on appeal, particularly by Groundswell Gloucester, as to why the development consent should be refused, including:

- the incompatibility of the proposed mine with the existing, approved and likely preferred uses of land in the vicinity of the proposed mine, under cl 12 of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2009*;
- the adverse visual impacts of the mine;
- the adverse social impacts of the mine, including social impacts caused by the noise, dust and visual impacts of the mine;
- the economic and public benefits of the mine are uncertain and overstated and not shown to be greater than the public cost of the mine; and
- the project is not in the public interest, for the above reasons, and because it is contrary to the principles of ecologically sustainable development due to the direct and indirect greenhouse gas emissions of the mine will contribute to climate change.

Conclusion

Chief Justice Preston upheld each of these contentions, and highlighted the climate impacts of coal mining as a reason to refuse the proposal. Importantly his Honour held that the "downstream" emissions from the burning of the coal (scope 3 emissions) must be considered as an impact. Further this impact would be calculated by reference to the burning of the amount of coal forecast to be extracted, not just the emissions from the additional coal over and above the amount that would be burnt in the absence of the mine.

His Honour clearly states that the assessment requirements both relating to the public interest and the "downstream" impacts of a development extend to "all of the direct and indirect greenhouse gas emissions of the Rocky Hill Coal Project" and concluded that:

> *An open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided.*

Relevantly, the Court accepted that the contribution that the direct and indirect greenhouse gas emissions from the proposed mine would have on climate change was a relevant public interest consideration under s4.15(1)(e) of the *Environmental Planning and Assessment Act 1979* (NSW). This decision highlights that indirect, downstream greenhouse gas emissions are a relevant consideration to take into account in determining applications for activities involving fossil fuel extraction, combustion or electricity generated by fossil fuel combustion and other industries, such as agriculture.

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Definitions

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

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

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

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

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

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

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

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

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

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

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

Planning principle – statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.

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

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

Prohibited development means

(a) development the carrying out of which is prohibited on land by the provisions of an environmental planning instrument that apply to the land, or

(b) development that cannot be carried out on land with or without development consent.

Public authority includes:

(a) a public or local authority constituted by or under an Act

(b) a government Department

(c) a statutory body representing the Crown.

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

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

Useful links

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

Legislation NSW: www.legislation.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.propertycouncil.com.au

Housing Industry Association: www.hia.com.au

NSW Planning and Environment: 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

Department of Primary Industries: www.dpi.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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