LOCAL GOVERNMENT NSW

Land and Environment

COURT REPORTER

Summary of cases

Welcome to the second edition of the Court Reporter for 2019. This edition contains a number of interesting decisions.

1. The first decision considers issues relating to the requirement of land owner's consent for the making of development applications and the granting of development consent.
2. The second reported decision is a useful reminder of the factors that the Court will take into consideration when making an order to demolish a building that has been erected and used without development consent.
3. We then explore the "amber light approach" that has been used by Commissioners and some judges of the Land and Environment Court (LEC), as well as the nature of the function being performed by the LEC in determining development application appeal proceedings in its Class 1 jurisdiction.
4. The final judgment offers an interesting consideration of the works required to activate a development consent and whether unlawful works can activate a consent. The case also considers the breadth of the Court's discretion to issue make orders regarding the requirements of Construction and Occupation Certificates.

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

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Maddocks

1. Stokes v Waverley Council [2019] NSWLEC 1137

This case is an interesting example of the level of completeness required for conditions of consent and the importance of obtaining owners consent when carrying out development activity on adjoining land.

Background

This case was an appeal against the refusal of a Development Application (**2017 DA**) by Waverley Council (the **Council**). The 2017 DA sought to amend the internal layout for a previously approved dual occupancy use as well as additional excavation works.

The site subject of the 2017 DA (the **Site**) had been excavated in accordance with a previously approved development application (**2014 DA**).

The 2017 DA was submitted to the Waverley Development Assessment Panel (**WDAP**). The WDAP refused the development. Ms Stokes (the Applicant) appealed the WDAP's decision.

During the hearing in the Land and Environment Court, amended plans were tendered by Ms Stokes. These amended plans did not resolve any of the issues in contention, however the amended survey plans confirmed that excavation was in excess of what was approved the 2014 DA.

The amended survey plan also identified that 2 piles used for structural stability on the western boundary of the site were located on an adjoining property. Leave was granted by the Court to provide the adjoining resident with the amended plans and to seek out their owner's consent. No response or owner's consent was received on this issue.

The parties submitted a draft condition of consent to remedy the over excavation at the Site.

The condition failed to adequately address the void caused by over-excavation and failed to clarify the reliance on piles located on the adjoining property. Commissioner Bish was not satisfied, based on the amended plans and draft conditions, that the piles had been isolated so as to remove the reliance of the development upon them. Therefore, owner's consent was required from the adjoining property owners before the development could proceed.

Issues

Incomplete conditions of consent:

One of the issues for the Court to determine was whether the conditions of consent proposed by the parties were able to be imposed. The Court found that in order to approve a development application based on conditions of consent, the conditions 'cannot leave open the possibility that a development may be carried out not in accordance with the consent granted'. The conditions must provide adequate detail as to the scope of works required, to the extent that any further decisions to be made regarding scope will not fundamentally alter the development for which the application was made.

Commissioner Bish was not satisfied that the conditions adequately addressed the reliance on the piles on the adjoining land and in this regard the conditions of consent were incomplete. The Court found that, on their face, the plans relied on access to the piles on the adjoining land and therefore owner's consent was required before the 2017 DA could be approved.

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Owner's consent:

Under the EPA Act and its Regulations if a proposed development encroaches on land not owned by the applicant, the development application must include evidence that the owner of that land consents to the development being carried out. Commissioner Bish followed the recent authority in *Al Maha*[1] which held that obtaining owner's consent is 'an essential prerequisite to, and part of the process of, a consent authority's determination of the application.' A consent authority may only grant a consent where this precondition is satisfied. As such, Commissioner Bish held because owner's consent had not been provided, the Court was not able to grant development consent.

Conclusion

Commissioner Bish held that without the owner's consent she did not have the power to approve the 2017 DA. Further, in the absence of adequate conditions to consent, the Commissioner was not satisfied that the 2017 DA complied with the EPA Act.

2. Tweed Shire Council v Taylor [2019] NSWLEC 45

This appeal relates to a development control order that was issued by Tweed Shire Council (**Council**) to Murray Taylor and his daughter Jerri Taylor (**the Taylors**) to stop using, demolish and remove a treehouse which they had constructed for the purpose of a serviced apartment.

The case is a useful reminder of the factors that the Court will take into consideration when making an order to demolish a building that has been erected and used without development consent.

Background

On or about September 2016, the Taylors erected a treehouse in the forest near Upper Crystal Creek in northern New South Wales. The treehouse was constructed and adapted to provide self-contained accommodation to tourists or visitors and was partly on land owned by the Taylors and partly on a Crown road reserve. The Taylors did not seek or obtain development consent, and from October 2016 until 4 December 2018, used the building for the purpose a serviced apartment and advertised it on Airbnb.

On 22 March 2018, Council gave Mr Taylor notice of intention to give a development control order. On 20 April 2018, Council issued a development control order under Part 9 Division 9.3 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), which required the Taylors to:

- stop using the treehouse for the purposes of a serviced apartment within 14 days; and
- demolish or remove the treehouse within 90 days.

Mr Taylor delayed complying with the order, as he had advance bookings and did not wish to disappoint those tourists or visitors. As a result, Council commenced proceedings against the Taylors on 23 August 2018 to restrain the use of the building as a serviced apartment and for the demolition and removal of the building.

Ultimately, Mr Taylor ceased using the building as a serviced apartment and Council officers who inspected the building on 4 December 2018 observed that certain services and facilities had been dismantled.

[1] *Al Maha Pty Ltd v Huajun Investments Pty Ltd* **[2018] NSWCA 245**

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Issues

The Taylors did not dispute that the erection and subsequent use of the building for the purpose of a serviced apartment were in breach the EPA Act. However, they did contest that they should be ordered to demolish and remove the building.

The central issue was therefore whether an order should be made to remedy the breaches of the EPA Act.

Conclusion

Chief Justice Preston determined that it was appropriate to order that the building be demolished and removed to remedy the breaches of the EPA Act.

In doing so, his Honour accepted and adopted the Council's submissions and found the following factors to be most persuasive:

- the building had been erected partly on a Crown road reserve without consent, and the Crown had not indicated that it would consent to any future building or use of the building for a lawful purpose;
- the building had not been shown to comply with relevant building regulations, including the National Construction Code which incorporates the Building Code of Australia, and no assessment and report by a registered structural engineer had been provided;
- the building could not be used lawfully for the purpose of a serviced apartment, because that use is prohibited in the applicable RU2 Zone;
- there was no evidence that the building could be used for a permissible purpose with development consent in the applicable RU2 Zone;
- there was no evidence establishing that the building, or any use of the building was or would be exempt or complying development; and
- the inconvenience and cost associated with demolishing and removing the building was not shown to be any greater than the inconvenience and cost associated with erecting the building in the first place.

Chief Justice Preston also made orders restraining the use of the building for the purposes of a serviced apartment and ordered the Taylors to pay Council's costs of the proceedings.

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3. Ku-ring-gai Council v Bunnings Properties Pty Ltd [2019] NSWCA 28

This appeal relates to a development application lodged by Bunnings Properties Pty Ltd (**Bunnings**) seeking the demolition of the former 3M commercial building in Pymble, and erection of a new building for the purpose of hardware and building supplies.

This case explores the "amber light approach" that has been used by Commissioners and some judges of the Land and Environment Court (**LEC**), as well as the nature of the function being performed by the LEC in determining development application appeal proceedings in its Class 1 jurisdiction.

Background

On 8 April 2015, Bunnings lodged a development application with Ku-ring-gai Council (**Council**) that sought the demolition of all existing structures and construction of a four-storey building for the sale of hardware and building supplies at 950-950A Pacific Highway and 2 Bridge Street, Pymble (**Site**).

On 26 June 2015, Bunnings commenced an appeal against the deemed refusal of the application. The appeal was heard by Commissioner Brown, and during closing submissions, Counsel for the Applicant sought to be given the opportunity to address the concerns raised by the Council with further plans.

In his first judgment in the proceedings on 20 July 2016, Commissioner Brown found that he was not satisfied that the proposed development was acceptable in the form submitted, but allowed Bunnings to provide a new design to address the deficiencies identified by the Commissioner. He noted that "it does not follow that approval will be granted if amended plans are provided". This course was not labelled by the Commissioner as adopting the "amber light approach".

On 6 December 2016, Commissioner Brown granted leave to Bunnings to rely on amended plans. A second hearing was subsequently held and in a further judgment of 16 May 2017, the Commissioner found that the amended development was acceptable and granted development consent subject to conditions.

The Council appealed against the decision and orders of Commissioner Brown to a judge of the LEC under s56A of the *Land and Environment Court Act 1979 (NSW)* (**LEC Act**). On 28 February 2018, Justice Sheahan dismissed the appeal.

The Council subsequently sought leave to appeal from the LEC against the decision and orders of Justice Sheahan made on the s56A appeal.

Issues

The issues raised on appeal were substantially the same as those in the s56A appeal. The question for the Court of Appeal was whether the primary judge had erred in law by not finding that the Commissioner had acted outside of power in one of the two ways raised, being:

- whether the Commissioner acted outside of power by not finally disposing of the appeal in the first judgment and instead allowing Bunnings to amend the development application and then granting consent to the amended development application; and
- whether the Commissioner's decision was legally reasonable by allowing the removal of a tree of high significance.

Conclusion

In a majority decision, the Court of Appeal dismissed the appeal. Chief Justice Preston of the LEC found (with Justice Beazley agreeing) that the Commissioner did not, in his first judgment, exercise the power under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to determine the development application, and that that power was not exercised until the Commissioner granted the consent to the amended application. His Honour also held that the Commissioner was not required to conclude the appeal following his first judgment, which instead was a judgment that made interim findings of fact based on the evidence then before the LEC.

In forming this conclusion, Chief Justice Preston of the LEC noted that even though the determination of the LEC on the Class 1 appeal is substituted for the decision of the consent authority, and is deemed to be the final decision of the consent authority, there remains a distinction between the LEC and the consent authority. For example, the LEC's decision is not a determination of the development application by a consent authority under Part 4 of the EPA Act, and the LEC on appeal is free from some of the constraints imposed on a consent authority's exercise of the function of determining a development application, including consultation and concurrence requirements.

Further, when undertaking merits review, the Court is making a discretionary administrative decision, rather than a judicial decision. The fact that the exercise of the function of determining a development application involves application of legal criteria to the facts and circumstances of the particular development application does not mean that what is involved is an exercise of judicial power.

Chief Justice Preston of the LEC also made a number of observations in relation to the "amber light approach", noting that it is problematic in the following ways:

- it has no statutory basis in the EPA Act, the LEC Act, any court rule in the Land and Environment Court Rules 2007 or Uniform Civil Procedure Rules, or any Practice Note or Policy of the LEC;
- the approach diverts attention from the functions being exercised by the LEC in hearing and disposing of an appeal under s97 now s8.7 of the EPA Act; and
- the constraints on the amber light approach suggested by Commissioners and judges of the LEC who have considered the approach risk imposing terms on the LEC's exercise of the functions of determining the development application and hearing and disposing of the appeal that have no basis in or are inconsistent with the statute conferring those functions.

In dissent, Justice Basten found that Commissioner Brown had exceeded the scope of his statutory authority, and that the LEC's power to permit amendments to development applications was constrained by the nature of the jurisdiction as defined by the EPA Act. His Honour also determined that the LEC could not grant an adjournment to amend a development application after the hearing had been completed and a finding made that the application should be refused.

With respect to the second issue regarding the removal of the tree of high significance, Chief Justice Preston of the LEC and Justice Beazley agreed that the Commissioner's decision to grant consent, thereby approving the removal of the significant tree, was not illogical or legally unreasonable. Justice Basten did not consider it necessary to consider the second ground, as he held that the appeal should have been allowed.

4. Cando Management and Maintenance Pty Ltd v Cumberland Council [2019] NSWCA 26

This case offers an interesting consideration of the works required to activate a development consent and whether unlawful works can activate a consent. The case also considers the breadth of the Court's discretion to issue make orders regarding the requirements of Construction and Occupation Certificates.

Background

On 23 July 2004, Paramatta Council gave consent for the development of 9 townhouses on a site in Guilford (the **Site**) subject to conditions (the **Development Consent**). In accordance with the EPA Act the Development Consent would lapse on 23 July 2009 (**Lapse Date**), unless building, engineering or construction work relating to the building physically commenced on the Site before the Lapse Date.

In 2011, the Site was re-zoned, making the development prohibited. However, the development would not be prohibited if the development was carried out in accordance with the Development Consent.

In 2012, the Applicant, Cando Management and Maintenance Pty Ltd (**Cando**) purchased the Site.

The Respondent, Cumberland Council (the **Council**) submitted that the Development Consent lapsed before 23 July 2009 because, even though demolition and site clearing work had commenced on the Site, the work did not comply with the conditions of the Development Consent. In turn, the work was unlawful and could not amount to construction work relating to the building. The primary judge agreed with the Council.

Cando appealed this decision.

Issues

Had the Development Consent lapsed?

White JA reversed the decision of the Land and Environment Court and held that the Development Consent had not lapsed.

Did the building, engineering or construction work "relate to" the development?

Under the EPA Act, a development consent will lapse 5 years from the date from which it operates unless building, engineering or construction work (**Works**) *relating to* the building, subdivision or work is physically commenced on the land to which the consent applies prior to the development consent lapsing.

The Council submitted that the demolition, site clearing, tree clearing, fencing and water disconnection work that took place on the Site was not in accordance with the Development Consent conditions and not lawful [50-51]. Therefore, no physical Works relating to the building to which the consent applied had taken place prior to the Lapse Date.

His honour held that 'compliance with the conditions of consent is a necessary element of a party's establishing that the work *relates to* the development for which the consent was given.' This is because the power to give a consent subject to conditions is permitted by the EPA Act. In turn, any work done outside these conditions is a violation of the EPA Act, and cannot *relate to* the development because the work is unlawful.

It was accepted that the water disconnection and fencing was not carried out in accordance with the conditions of the consent. However, Cando submitted further evidence regarding the clearance of the trees on Site.

Did removal of shrubs on Site breach the conditions of consent?

Condition 44 of the Development Consent stated that 'all pruning works or tree removals' were to be carried out by a qualified tree surgeon or arborist in accordance with the relevant standard (the **AS Standard**).

Cando submitted that the AS Standard only prescribed the method of pruning trees and did not apply to the removal of trees or the removal of shrubs. Both parties agreed on this construction of the AS Standard. His Honour agreed with the Council that notwithstanding this, Condition 44 imposed a requirement that removal of tress be carried out by a qualified arborist. The tree clearing performed by Cando did not comply with Condition 44 and as such, this was not work *relating to* the development for which consent was given.

However, Cando submitted that the removal of shrubs on the Site were sufficient Works to prevent the consent from lapsing. Condition 44 did not require the removal of shrubs to be undertaken in accordance with the AS Standard or by a qualified arborist. His honour agreed with this submission and held that the clearance of shrubs prior to 23 July 2009 was not in breach of the conditions and therefore qualified as works relating to the development for the purposes of the EPA Act [115]. As such, the development consent had not lapsed.

Can the Land and Environment Court make and order that sanctions and authorises an act that is in breach of the EPA Act?

Under the EPA Act, in the absence of a construction certificate, no occupation certificate can be issued and therefore occupation of the building is prohibited.

Cando failed to obtain these certificates, and sought orders from the Court that rectification works could be carried out without a construction certificate and that the Site could be occupied without an occupation certificate. Cando submitted that the Court could make these orders pursuant to the 'wide discretion' afforded to the Land and Environment Court under s9.46 of the EPA Act to restrain or remedy a breach of the EPA Act.

His honour held that the overarching objective of the Court's powers under s9.46 of the EPA Act is to ensure compliance with statutory provisions. The Court may restrain parties from contravening the EPA Act or remedy a breach of the EPA Act. The Court does not have discretion to sanction further breaches of the EPA Act. If the Court were to give the orders requested by Cando, it would in effect be giving orders that Cando commit further actions in violation of the EPA Act. Such a direction would be 'antithetical to the powers conferred' by s9.46.

Conclusion

The Court ordered that the Development Consent had not lapsed.

Cando were not permitted to carry out further works until a construction certificate was issued and a principal certifying authority appointed. Cando were also prohibited from occupying the premises, or permitting the premises to be occupied, until an occupation certificate was obtained in accordance with the EPA Act.

The Court has wide discretion to remedy or restrain breaches of the EPA Act however this discretion does not allow the Court to sanction further breaches of the EPA Act.

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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 that may be controlled by an environmental planning instrument.

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.

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Legislation NSW: www.legislation.nsw.gov.au

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

Case Law NSW: www.caselaw.nsw.gov.au

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

NSW Planning and Environment: www.planning.nsw.gov.au

Department of Environment and Energy: www.erin.gov.au

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