LOCAL GOVERNMENT NSW

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Summary of cases

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2. This case considered whether the standard savings and transitional clause in an LEP (clause 1.8) applies to subsequent amendments of the LEP and development applications lodged prior to the introduction of those amendments.
3. This appeal related to the Minister for Local Government's proposal to amalgamate Randwick, Waverly and Woollahra Councils.
4. This appeal relates to a request for tender by Woollahra Municipal Council and the response by Secure Parking Pty Ltd. At issue between the parties was whether the issue of a letter of acceptance by Council had, despite the absence of an executed agreement, formed a valid contract for the operation and management of four carparks owned by Council.

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. 73 Union Street Retail Pty Ltd v Council of the City of Sydney [2016] NSWLEC 145

In this case, 73 Union Street Retail Pty Ltd (**the Company**) appealed against convictions in the Local Court on two charges that were laid on behalf of the Council of the City of Sydney (**the Council**).

The Land & Environment Court upheld the appeals and reduced the penalties imposed on both charges.

Background – the two charges

The Company was represented in the Local Court, and the Land & Environment Court, by Mr Soltan – the Company's Director. It operated a retail business at 296 George Street, Sydney (**the Premises**), and was charged by the Council with two separate offences.

Charge one – July 2015

The operation of the retail business at 296 George Street was the subject of a development consent, which set out the permitted hours of operation.

A compliance officer of the Council attended the Premises on 11 and 19 July 2015, and observed that the Company was trading outside the permitted hours. Subsequently, the Council sent the Company a letter dated 21 July 2015 that recited both the observations of 11 and 19 July 2015 and the conditions of the relevant development consent which the Company was in breach (the letter).

On 25 July 2015, the compliance officer attended the Premises for a third time and discovered that the Company was still trading outside of permitted hours. It is this conduct, on 25 July 2015, that gave rise to the first charge.

Charge two – November 2015

As a result of the first charge, Mr Soltan lodged a modification application with the Council, seeking to change the trading hours of the business. Council approved the application on 13 November 2015 but imposed the following conditions:

- The Company must comply with the Plan of Management that had been prepared by Mr Soltan;
- Copies of the development consent and the Plan of Management must be made available upon request; and finally,
- CCTV surveillance cameras were to be installed on the Premises.

On 29 November 2015, a council compliance officer undertook an inspection of the Premises and observed that the Company was not complying with the Plan of Management and had not installed CCTV surveillance cameras. This resulted in the second charge.

Sentencing in the Local Court

In the Local Court, Mr Soltan entered guilty pleas for both charges.

The Local Court fined the Company $5,000, together with $977.50 for professional costs for the July 2015 offence. For the November offence, the Local Court fined the Company $10,000, with an additional $682 for professional costs.

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

Sentencing in the Land & Environment Court

On appeal, the Land & Environment Court considered the severity of the sentences in each instance.

The Court held that the penalty to be imposed on an offence is determined by undertaking an 'instinctive synthesis' of the aggravating and mitigating factors listed in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). After undertaking this instinctive approach the Court then considered the principles of totality and accumulation.

Applicable aggravating factors

The Court held that only one aggravating factor was potentially relevant – whether an offence was committed for financial gain. The Court held that this factor was only applicable to the July 2015 offence, as the November 2015 offence related to the physical aspects of the operation of the Premises, and did not affect the financial efficacy of the business.

Applicable mitigating factors

The Court held that a number of mitigating factors were applicable. First, it observed that the Company did not have any prior records of convictions. Second, it considered the Company to be of good character. Third, in light of the Company's downturn in business and the Premises' discontinued operation, the Court was satisfied that there was no realistic likelihood of the Company reoffending. Fourth, the Court took into account the remorse shown by Mr Soltan on behalf of the Company. Finally, the Court considered it appropriate to apply a discount of 25 percent to any penalty that may be imposed due to Mr Soltan's entries of plea of guilty.

Total of penalties

Pursuant to an 'instinctive synthesis' of all relevant factors, and the principles of totality and accumulation, the Court decided that the appropriate combined penalty for both offences was $8,000. The Court then applied a discount of 25 percent, giving rise to a total penalty of $6,000.

In giving effect to the broad ratio adopted by the Local Court, the penalties were apportioned $2,000 for the July 2015 offence and $4,000 for the November 2015 offence.

Further, the Land & Environment Court held that the professional cost orders in the Local Court stands undisturbed, but decided that no order for professional costs should made in the current proceedings.

2. Wingecarribee Shire Council v De Angelis [2016] NSWCA 189

This case considered whether the standard savings and transitional clause in an LEP (clause 1.8) applies to subsequent amendments of the LEP and development applications lodged prior to the introduction of those amendments.

Background

Mr De Angelis sought development consent for a mixed use development on a piece of land in Bowral. After the development application had been lodged Wingecarribee Shire Council (**Council**) then introduced an amendment to its LEP to apply exclusively to Mr De Angelis' property, preventing him from developing in the way he wanted to.

The principal planning instrument (which was amended by the amending LEP) provided that a development application made before 'this Plan' commenced was to be determined as if 'this Plan' had not commenced.

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

Mr De Angelis contended that this provision should be read to encompass amending instruments, such that a development application made before commencement of an amendment should be determined as if that amendment had not commenced.

At first instance in the NSW Land and Environment Court (LEC) and on appeal to the NSW Court of Appeal (**NSWCA**), the case turned on an interpretation of that provision.

Legislation

The principal planning instrument was the *Wingecarribee Local Environmental Plan 2010* (**WLEP 2010**). *Wingecarribee Local Environmental Plan 2010 (Amendment No 38)* (**LEP 38**) amended WLEP 2010 in October 2015. LEP 38 applied exclusively to Mr De Angelis' property, changing its zoning requirements such that retail businesses were prohibited.

Mr De Angelis brought an application in the LEC seeking development consent for a mixed use development (De Angelis v Wingecarribee Shire Council [2016] NSWLEC 1). He relied on the savings provision in WLEP 2010:

> 1.8A Savings provision relating to development applications
>
> If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.
>
> Note. However, under Division 4B of Part 3 of the Act, a development application may be made for consent to carry out development that may only be carried out if the environmental planning instrument applying to the relevant development is appropriately amended or if a new instrument, including an appropriate principal environmental planning instrument, is made, and the consent authority may consider the application. The Division requires public notice of the development application and the draft environmental planning instrument allowing the development at the same time, or as closely together as is practicable."[1]

The LEC at first instance found in favour of Mr De Angelis. The Council appealed to the NSWCA.

The note in clause 1.8A

The note to cl 1.8A makes reference to Part 3, Division 4B of the Environmental Planning and Assessment Act 1979 (NSW), which provided that a development application may be made in anticipation of an amending LEP. At first instance, it was said that the inclusion of this note demonstrated that the drafter had intended to draw attention to the instance in which the cl 1.8A would not apply.

On appeal, Basten JA held that to read the note this way would frustrate the purpose of the clause. If it were the case that cl 1.8A provided that a DA lodged before an LEP had commenced was to be determined as though that LEP had not commenced, then the note and cl 1.8A would contradict that purpose.

The Savings Provision

The words 'this Plan' in cl 1.8A were of critical importance at first instance.

[1] Emphasis added.

The Land and Environment Court considered that '[w]hat constitutes "this Plan" is a time dependant concept… Clearly, reference to "this Plan" at the present day necessitates reference to that planning instrument incorporating all of its amendments to date.'

'The inclusion of a clause such as cl 1.8A in a local environmental plan is clearly intended to address the position that would otherwise obtain, requiring each development application to be determined upon the law that applies at the date of determination.'

The Court of Appeal disagreed, finding that savings provisions "deal with a precise point in time". In this instance, that point in time was the date at which the WLEP 2010 had commenced.

Appellate Justice Basten considered that a construction of LEP 38 should be conducted according to its purposes. As LEP 38 applied only to Mr De Angelis' property, the intention of the legislature was to be interpreted as intending to apply new zoning requirements to Mr De Angelis' property. Further, LEP 38 contained no savings provision. It would inconsistent to interpret the legislation, therefore, as to not apply to Mr De Angelis' property.

The 'practical purposes'

The LEC cited NSWCA authority that regulations should be viewed in light of 'practical considerations', rather than by undertaking 'meticulous' comparative exercises that might be appropriate for acts of parliament. WLEP 2010 was one such regulation.

The LEC then concluded that construing the development application in the way he did, so as not to take into account the amending LEP 38, was 'not inconsistent with the application of practical considerations'.

Appellate Justice Basten in the NSWCA concluded that the '[s]o called "practical considerations"… [did] not empower the Court to embark on a wholesale rewriting of the instrument', and noted that no such 'practical considerations' had been identified in the lower court's judgment.

Conclusion

The appeal was allowed and the proceedings were remitted to the Land and Environment Court.

3. Woollahra Municipal Council v Minister for Local Government [2016] NSWLEC 86

This appeal related to the Minister for Local Government's proposal to amalgamate Randwick, Waverly and Woollahra Councils.

Background

On 6 January 2016, the Minister for Local Government (**Minister**) initiated a proposal to amalgamate Randwick, Waverley and Woollahra Councils.

There has been considerable public scrutiny of the refusal by the Minister, and Delegates, to provide access to all the documents and internal working papers which formed part of KPMG's independent modelling and analysis of the recent proposals to amalgamate and change the boundaries of local councils in NSW. In particular, questions have been raised by a number of NSW local councils about the legitimacy of an amalgamations process that prevented councils and the public from having access to the KPMG analysis

and reports, when these documents were relied upon by the Minister to justify the financial benefits arising from the implementation of the amalgamation proposals.

The role of the KPMG report was the focal point of this case commenced by Woollahra Municipal Council against the Minister.

In short, the Court concluded that reports and information that Minister relied upon to 'initiate' a proposal, are not necessarily relevant to the process to amalgamate and change the boundaries of local councils in the Local Government Act 1993 (**LGA**). Therefore, the failure to provide access to these documents did not invalidate the statutory amalgamation process initiated by the Minister and undertaken by the Delegates.

The Council has commenced an appeal of the Court of Appeal. At the time of writing judgment in the Appeal remained reserved.

Submission 1: Reasonable public notice of the inquiry not given

Section 263(3) of the LGA imposes a duty to give reasonable public notice of the holding of an inquiry.

The Council submitted that the obligation to give notice of the holding of the inquiry required the Delegate to also give notice of the basis upon which the proposal was made, including "the complete material relied upon in respect of the KPMG analysis" and to make such information publicly available. This is necessary to enable the public to properly address the proposal and provide meaningful submissions.

The NSW Land and Environment Court (Court) held that the requirement to give notice does not require the public to be given notice of the basis on which the proposal was made. The requirement to give notice also does not require that any documentation on which the proposal was based, in this case the various analysis undertaken by KPMG, be placed on public exhibition so as to enable submissions to be made on it.

Submission 2: there was no valid inquiry

Section 263(2) and (2A) of the LGA requires that either the Boundaries Commission or Departmental Chief Executive hold an 'inquiry' for the purpose exercising its functions to examine and report on the matter.

The Council submitted:

- The entire process of 'examining and reporting' should have been carried out in public at the inquiry.
- An inquiry is required to be active and transparent. The Delegate could not satisfy this duty by simply accepting the broad propositions contained in the Minister's proposal document (and other documents provided to the Delegate).
- There was insufficient information made available to the public to enable any inquiry to be conducted into the financial results that KPMG report said would flow from the amalgamation, or the assumptions upon which those results were based.
- To be transparent, the Delegate was required to closely scrutinise the assumptions in the KPMG report, ask questions with respect to it, and elicit information. Instead, the Delegate was passive, and one point saying he was "here only to listen".

  The Council also alleged that private meetings took place after the inquiry at which information about the proposal and the KPMG analysis was received but from which the public were precluded from attending.

The Court found:

- An 'inquiry' under section 263 does not require 'a structure and forensic process similar to that of an administrative tribunal'. An 'inquiry' also does not entail 'the entire process at which materials are advanced and arguments are made in relation to an amalgamation proposal'.
- Because section 263 is silent as to the procedure to be followed at the inquiry, the person holding the inquiry has discretion as to how it should be conducted.
- Therefore, section 263 does not require that information obtained by the Boundaries Commission or Departmental Chief Executive be publicly disclosed and publicly adduced at an inquiry.
- Accordingly, it was not incumbent on the Delegate to make the KPMG report publicly available for it to be the subject of public scrutiny at the 'inquiry'.

Submission 3: the challenge to the examination and report

Section 263(1) of the LGA requires the Boundaries Commission or Department Chief Executive to examine and report on the Minister's proposal. Section 263(3) of the LGA sets out the factors which must be considered, which includes the financial advantages and disadvantages of the proposal.

The Council submitted:

- In order for the Delegate to examine the proposal, the Delegate was required to 'scrutinise, test and interrogate' the claims made by the Minister, particularly the claimed financial benefits set out in the KPMG analysis. The Council claimed that the Delegate simply assumed the correctness that the amalgamation would lead to more than $124M in net financial savings over 20 years. The process of "examination" is impossible where the Delegate is denied access to the material and modelling information that is relied upon to support the claims made about the financial sensibility of the amalgamation. The Council claimed that it could be inferred that there was only a superficial review of the KPMG figures.
- The Delegate failed to have regard to the mandatory reconsideration in section 263(3)(a) which required an examination of the financial advantages and disadvantages of the proposal. The Delegate did not consider the financial advantages and disadvantages of the "areas concerned" and in particular did not consider the advantages and disadvantages to the residents and ratepayers of the Woollahra local government area.

The Court considered:

- the Delegate was not legally obliged to scrutinise, test and interrogate the claims made by the Minister and KPMG in the proposal document accompanying the referral of the proposal or other KPMG documents or to scrutinise, or otherwise address the appropriateness of, KPMG's assumptions, methodologies or conclusions. The KPMG Reports stood in no privileged position compared to other material that was received by the Delegate, such as submissions from the Woollahra Council.
- If the Delegate was not required to individually scrutinise all submissions that were received otherwise (such as from residents and the Council) then it follows that it was not required to so scrutinise the KPMG report. The Delegate was entitled to find facts and draw inferences in his sole discretion. The Delegate may draw conclusions and place weight on the submissions that he chooses.

- Section 263(3)(a) is drafted at a high level of generality, and did not require the Delegate to break up the financial advantages and disadvantages to the residents and ratepayers of each of the individual areas of Randwick, Waverly and Woollahra.

Submission 4: the Boundaries Commission failed to validly review and comment on the Delegate's report

If the Minister refers an amalgamation proposal to the Departmental Chief Executive, pursuant to section 218F(6)(a) of the LGA the Departmental Chief Executive must furnish the Departmental Chief Executive's report to the Boundaries commission for review and comment. The Boundaries Commission must review the report and send its comments to the Minister pursuant to section 218(6)(b) of the LGA.

The Council claimed:

- That the Boundaries Commission should have expressed its own view as to the merits of the proposal and re-examined the advantages and disadvantages identified in the report would merit the implementation of the proposal with or without modification.
- That the Boundaries Commission imposed upon itself a self-limiting ordinance of merely considering whether or not the Delegate had complied with its statutory obligations.

The Court considered:

- The Department Chief Executive is required to 'examine and report' on the Minister's Proposal; the Boundaries Commission is required to 'review the report and send its comments' to the Minister.
- In doing so, the Commission looked at whether the Delegate had "adequately considered" all of the factors required of it.
- This was all that the Commission was required to do. There was no minimum content requirement in respect of the comments that the Commission made.

Submission 5: the Delegate denied Woollahra Council procedural fairness

The Council claimed that the duty to accord procedural fairness required the Delegate to give Woollahra Council a reasonably opportunity to address the factors in section 263(3). To do this, the Delegate was required to give Woollahra Council an opportunity to deal with information that was credible, relevant and significant to the decision made. This included providing:

- the KPMG analysis as well as all documents underpinning the KPMG analysis;
- the submissions of Waverly and Randwick Councils, and
- the SGS Economics and Planning report relied upon by Waverly and Randwick Councils.

The Court considered:

- There was no denial of procedural fairness.
- Whilst there was a duty to accord procedural fairness, that duty did not extend to require the Boundaries Commission or Departmental Chief Executive to disclose all adverse information that is credible, relevant and significant to the examination and report on the proposal.

- Some of the KPMG documents which the Council claimed it should have had also not been provided to the Delegate. The Delegate was not under an obligation to disclose documents it did not have.

- Further the KPMG information that was disclosed was 'adverse' to Woollahra Council. What was not disclosed were KPMG's internal workings and calculations. The Court concluded that the duty to afford procedural fairness did not extend to the disclosure of KPMG's internal workings and calculations.

Submission 6: the Boundaries Commission denied Woollahra Council procedural fairness

The Council submitted it was denied procedural fairness by the Boundaries Commission as a result of the Boundaries Commission's failure to afford it, as an entity directly affected by the amalgamation proposal, a reasonable opportunity to respond to the Delegate's report and have this response considered as part of the Boundaries Commission's review and comment.

The Court rejected the submission. The LGA does not require the Boundaries Commission to receive public or Council comments on the Department Chief Executive's report.

Submission 7: the Boundaries Commission made misleading statements, invalidating the amalgamation process

The Minister had publicly stated that the proposals were supported by 'independent' analysis and modelling by KPMG. KPMG's analysis and modelling was not independent and this invalidated the statutory amalgamation process. Had the Delegate and the public known that the KPMG reports were not independent, the public and the Delegate would have given the KPMG material a greater level of scrutiny.

The Court found that the Minister's statements were not false and misleading – KPMG exercised its professional judgement in undertaking its analysis and drafting its report.

Even if the statements were false and misleading, that would not have the legal consequence of invalidating any step in the amalgamation process. The allegedly misleading statements were not in any notice required to be given under the LGA or in any document required to be produced or publicly exhibited by the LGA.

Conclusion

None of the Applicant's submissions were made out, and the proceedings were dismissed with costs. An appeal was heard in the NSW Court of Appeal in August 2016. Judgment on the appeal was reserved at the time of writing.

4. Secure Parking Pty Ltd v Woollahra Municipal Council [2016] NSWCA 154

This appeal relates to a request for tender by Woollahra Municipal Council (**Council**) and the response by Secure Parking Pty Ltd (**Secure**). At issue between the parties was whether the issue of a letter of acceptance by Council had, despite the absence of an executed agreement, formed a valid contract for the operation and management of four carparks owned by Council.

Background

Woollahra Municipal Council (Council) issued an invitation for Tender in respect of the operation and management of any or all of four carparks owned by it in November 2010. Three of the car parks are located in Double Bay and one is located in Bondi Junction. In response to a request for tender process conducted under s55 of the LG Act, Secure submitted a tender to the Council on 16 December 2010 for the management of all four car parks.

The invitation for Tender document was divided into three sections. Section 1 set out the 'Conditions of Tender'. Section 2 consisted of 'Tender Schedules' identified by the letters A to G. Section 3 consisted of three attachments. The first contained provisions dealing with the completion of the draft management agreement. The second was the draft management agreement, having 'DRAFT' water-marked on each page. The third contained historical statistics concerning the use of the car parks.

The draft management agreement required that bank guarantees be provided by the operator of the car parks. This was later discussed between representatives of the Council and Secure at a meeting in February 2011 following the submission of tenders. Secure's representatives asserted that the company could not provide a bank guarantee and offered to provide a performance bond as an alternative.

Council sought to vary the guarantee amount in the tender on 28 February 2011, requesting the equivalent to 3 months of the total guaranteed income in Secure's tender. Secure responded that it was 'happy however to agree a Performance Guarantee Bond for the amount of 2 months'. Council's representative replied stating 'I will put a requirement of 2 months Bank Guarantee ($385,000) in my report to Council'. Secure did not respond to that email from Council.

The signed tender response form put forward by Secure, acknowledged Secure's acceptance of the following requirement:

> **3.1 Completion of Management Agreement**
>
> 3.1. The successful Tenderer/s must within fourteen (14) days after the date of the Council's written notification of acceptance of a Tender, agree on a commencement date for the Management Agreement, sign the Management Agreement and deliver to the Council the signed Management Agreement together with evidence of the insurances and the initial Bank Guarantee required under the Management Agreement.

On 14 March 2011, the Council resolved to accept Secure's tender offer, notifying Secure of that acceptance the following day. Although the parties did not thereafter sign or otherwise enter into any formal agreement, the Council's position was that on 15 March 2011 it had made a binding contract with Secure for management of all the car parks. A dispute then arose between Secure and the Council as to whether a binding contract of the management of the car parks had been made.

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

By letter dated 8 June 2012, the Council purported to terminate the contract and commenced proceedings seeking a declaration as to the existence of the contract and its being validly terminated, as well as a claim for damages.

Lower court decision

The Council's claim, that a contract had been made upon its acceptance of Secure's tender offer on 15 March 2011, was upheld by Ball J in the Supreme Court. His Honour determined that the terms of the offer and acceptance included an agreed variation by which Secure would provide a bank guarantee for an increased amount of guaranteed income. Ball J held that the Council was entitled to terminate the contract for repudiation when Secure refused to acknowledge the existence of, or perform its obligations under, that agreement, and assessed damages for loss of the benefit of that contract at $5,339,592, and for the cost of undertaking a second tender process at $122,829.

Secure appealed the decision of Ball J to the New South Wales Court of Appeal.

Issues on Appeal

There were six issues before the Court of Appeal:

1. whether the primary judge erred in holding that Secure had varied its tender offer so as to increase the Initial Bank Guarantee Amounts to two months guaranteed income;
2. whether the primary judge erred in holding that the Council's communicated acceptance of Secure's tender corresponded with that offer;
3. whether the primary judge erred in not holding that no contract was made because of the absence of agreement as to the Commencing Date of the management period for each car park;
4. whether the primary judge erred in not holding that the Council was not entitled to terminate the management contract because it was not ready and willing to perform it and was insisting that Secure execute a written form of agreement that did not accurately record the terms of the contract;
5. whether the primary judge erred in not holding that the Council had engaged in misleading or deceptive conduct by not disclosing to Secure that the Woolworths redevelopment proposal included a car park of 500 parking bays; and
6. whether the primary judge erred in not holding that Secure had engaged in misleading and deceptive conduct by representing, contrary to its actual intention, that it intended to enter into and perform an agreement in accordance with the terms of the tender conditions.

In effect, the Court of Appeal had to determine whether a binding contract had been made, whether the Council was entitled to terminate that contract and whether both parties had engaged in misleading or deceptive conduct. The unanimous judgment of the Court was delivered by Meagher JA.

Was a contract formed?

To determine whether a contract existed between the parties, the Court had to consider whether Secure varied its tender to provide a bank guarantee and if the failure to agree a commencement date for the car park management was fatal to the existence of a binding contract.

The Court determined that a reasonable bystander in the position of the parties would have understood that there was a difference in substance between what was sought by the Council, in asking for a variation of the proposed agreement so as to increase the amount of guaranteed income given by bank guarantee, and what

was offered by Secure, in agreeing to increase the amount of guaranteed income on the basis of a performance bond. Secure had done nothing by its silence to vary its offer and there was no agreement made by the mere exchange of those email communications.

In relation to whether the Council's acceptance of Secure's tender corresponded with the offer, the Court concluded that the tender purportedly accepted by the Council included the provision of Initial Bank Guarantees for 2 months' guaranteed income, which did not correspond with the terms offered by Secure. It followed that the parties did not reach any consensus that was capable of supporting the contract alleged by the Council to have been made on 15 March 2011.

Further, the Court held that as at 15 March 2011, there was no consensus between the parties as to the commencement date. It had been accepted by both parties that agreement as to commencement date was essential to the formation of a binding contract. No term, express or implied, of any proposed management agreement provided for how that date should be determined in the absence of any such consensus. The absence of agreement as to the commencement date provided an additional reason for concluding that no contract for the management of the car parks was made on the Council's notification of its acceptance of Secure's tender.

Could Council terminate the contract?

Meagher JA determined that even if the Court had concluded that there was a contract on the terms of the draft management agreement, or that agreement as varied to provide for a bank guarantee of 2 months' guaranteed income, the Council would still not have been entitled to terminate the contract. This was because Council was not ready and willing to perform the contract due to its continued insistence that Secure execute the amended management agreement.

Did the parties engage in misleading or deceptive conduct?

Meagher JA concluded that Secure's acknowledgement in its tender offer, that it understood and accepted the terms and conditions of the tender, said nothing about its understanding of the scope and content of the obligations which in law it was undertaking. No representation was made by Secure in the terms contended for, and as such there was no misleading or deceptive conduct on their part.

In relation to the Council, the Court concluded that in the face of the information that was publicly available regarding the Woolworths redevelopment, there was no basis for a reasonable expectation on the part of Secure that any information relevant to the viability and profitability of the car parks for which tenders were invited (that information being the number of parking bays that would exist in a nearby, redeveloped car park), would be disclosed directly to tenderers by the Council's representatives. There was also no reasonable expectation that the information would be disclosed upon the Council's receipt of Secure's tender offer. Accordingly, the Court held that Council did not engage in misleading and deceptive conduct.

Conclusion of the Court

The Court upheld Secure's appeal, overturning the decision of Ball J in the Supreme Court. The decision by the Court of Appeal emphasises the need for a council to carefully consider the potential consequences of resolving to accept a tender where the final terms of the contract are not entirely agreed.

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

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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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.

Useful links

Land and Environment Court website: 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

Planning Institute of Australia: www.planning.org.au

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