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Summary of cases

- A case concerning the refusal by council of an application to demolish an existing dwelling and the construction of a boarding house where a planning principle was affirmed
- A case where a school made an application for approval to carry out building works to allow for increasing student and staff numbers
- A refusal by council of a development application to construct an eight storey mixed use development on the eastern side of Lindfield Station
- A challenge to a Wingecarribee Shire Council LEP and DCP, on matters including procedural fairness, adequate community consultation and the delegation of powers to sign planning instruments.

1. Revelop Projects Pty Limited v Parramatta City Council [2014] NSWLEC 1167

This case concerned the refusal by Council of an application by Redevelop Projects for approval to demolish the existing dwelling and construct a boarding house on the corner of Shortland St and Evans Rd in Telopea. It also affirmed the planning principle set out in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 as relevant and to be retained.

Background

The site was zoned for high density residential development under the *Parramatta Local Environmental Plan 2011* (LEP), but was also marked for renewal which would increase the density allowed even further.

To the northeast of the site Council had approved a new residential flat building limited to a height boundary of 11 metres, opposite the site diagonally was an area with a 15 metre height control and to the south-west diagonally was an area with a height control of 20 metres and subject to specific provisions in the Telopea precinct elements of the *Parramatta Development Control Plan 2011* (DCP).

A number of design concerns and fears expressed by objectors about anti-social behaviour resulting from the boarding house were addressed or not pressed before the hearing. The Court identified two broad categories remaining of concern to Council, which were that:

- A boarding house on this site is inappropriate in the planning and social context of Telopea and should not be permitted
- The proposal had deficiencies in the design for the boarding house.

Character

The Court noted that, after a review of planning principles undertaken by the Commissioners of the Court, the planning principle set out in *Project*

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Venture Developments v Pittwater Council [2005] NSWLEC 191 was expressly held to be relevant and was to be retained. Accordingly, where planning controls anticipate a change of character for an area, compatibility with the desired future character of the area should be regarded as more appropriate than compatibility with the existing character.

The Court found that the design of the proposed development was in keeping with the surrounding buildings and the desired future character of the area. The current DCP identified the site as being marked for future increases in density compared to the current single storey single residence existing on the site. Further, it was indicated that change was anticipated not only for the site but for the surrounding area, with the development of a new residential flat building to the north east of the site.

While the area currently consisted of the lowest quartile of the socioeconomic spectrum, it was planned that the public housing located to the northwest of the Telopea Shopping Centre was to be redeveloped with an increase of over 1,000 new dwellings for both private rentals and affordable housing. Therefore, it was expected the social disadvantage of the precinct was to change over time in a positive manner to include residents with an income of up to 110% of the median income.

Accordingly, as there would be no adverse social impact on either the present or desired future character of the area by the development and it was appropriate to erect a boarding house on the site.

Design

The first design contention raised by Council was that the development did not comply with the setbacks from its street frontages as outlined in the DCP. The Court found that while the development did not "precisely comply" with the 5 metre set back requirement being 30 centimetres over the boundary, the more pressing concern was the requirement that corner developments were to address each street frontage and were to define prominent corners. The examples provided in the DCP indicated that having prominent corners did not mean having a "bold and assertive presentation to the corner" as was evident in the proposed development but provided for soft, non-aggressive and non-angular definitions of the corner.

Accordingly, the corner of the development was held to be "so out of character with that which was envisaged by the Development Control Plan as to warrant refusal of the development on that basis." Further, to take an amber light approach which would order the removal of the units at the corner of each of the building was considered by the Court to be either a constructive refusal of the development or such a major intervention that it was inappropriate to exercise the discretion in this situation.

Council's second design contention concerned the communal living spaces provided for in the proposed development. The DCP required that there be one communal living space per floor of the boarding house which was not presently provided for in the development plans. It was submitted and accepted by Council that as the development was a "new generation boarding house" including generous private living spaces with expansive views over Telopea Valley, this requirement for communal living spaces might be dispensed with.

However, the Court found that having only a ground floor communal living space and one small and cramped communal area on level 1 in a four storey boarding house was not appropriate, without expressing any view on the general principle of whether a living area on each floor is appropriate. The Court also wasn't satisfied that under an amber light approach, it could unilaterally designate areas within the development on the upper levels as communal areas as this too would be a major interference with the proposed design.

Conclusion

The Court concluded that while it was not inappropriate to permit a boarding house on the site in the present social and planning cycle for the area, it was inappropriate to approve the proposed development in light of the design concerns of the proposed development.

2. Western Grammar School v Blacktown City Council [2014] NSWLEC 1191

This case concerned the application by Western Grammar School to Blacktown City Council for approval to carry out building works on the existing school in Plumpton in order to allow for increasing student and staff numbers.

Background

The School was initially an independent school operating under development consent granted in *Best Western Services Pty Ltd v Blacktown City Council* [2011] NSWLEC 1380 and was zoned Residential 2(b) under the Blacktown Local Environmental Plan 1988 (LEP). The site included two lots which contained former dwelling houses and a shed converted into the School, and having two street frontages onto Cannery Road and Bottles Road.

The School eventually grew from a "single stream school" catering for primary school years Kindergarten to year 4, to a school which catered for all years up to year 8. On 5 November 2013, the School lodged a development application with Council to undertake development to increase the student capacity from 125

students to 320 students and staff numbers from 12 to 15 full time staff. To accommodate this increase, the School proposed to:

- Demolish the metal clad building containing the library, computer room and one classroom;
- Construct a two storey building including six classrooms, a library and a computer room, toilets and staff facilities; and
- Construct five additional car parking spaces.

The proposed development was located on the part of the site fronting Bottles Road, and the eastern part of the site included singe dwellings mainly of brick and tile. To the west of the site, eight two storey townhouses adjoined the site, further west of which was a place of worship and Plumpton Park. To the north of the site was Plumpton Public School and Plumpton High School and to the east of the site was Plumpton House School for behaviorally challenged students.

The School commenced proceedings under s 97(1) of the *Environmental Planning and Assessment Act 1979* before Council had formally refused the application.

Issues

Council's concerns with the proposal were that:

2.1 The design of the proposed development was inconsistent with the existing and desired future character of the area; and

2.2 Increased student numbers would generate unacceptable noise and traffic impacts.

Objectors also raised concerns along similar lines, emphasising the noise and traffic impacts of the development. The School amended the development plans to address these issues including, among other things, an updated traffic management plan, a redesign of the car park and street signage and additional acoustic measures.

Locality and character of the area

The existing character of the area was a mix of building forms and land uses, with the east and west of the site being residential uses and the rest of the locality having uses such as churches and schools. Given the school uses opposite the proposed development, the Court did not agree that the development would be inconsistent with the existing character of the area. While those school uses were in a special use zone and the proposed development was in a residential area, the Court found that it would be artificial to draw this distinction as educational establishments were allowed for in the Residential 2(b) zone of the LEP.

In relation to the desired future character of the area, while the draft *Blacktown Local Environmental Plan 2014* proposed to zone the site Low Density Residential and prohibit educational establishments, Division 3 of Part 3 of the *State Environmental Planning Policy (Infrastructure) 2007* still allowed educational establishments as permissible. The Court was therefore satisfied that in the context of the SEPP and the three other schools being in close proximity, the proposed development was consistent with the desired future character of the area.

In terms of the design of the development, the Court looked to the whole of the surrounding area and found that it was consistent with the existing and desired future character of the area being a two storey development similar to those in the locality, under the height set by the SEPP and adjoining similar developments on all sides bar one (being low density residential).

Traffic and noise impacts

With respect to traffic, by the conclusion of the hearing, the School's draft operational plan of traffic management had been significantly updated to include provision of staff supervision, staggering of pick up times, at least three minivan/bus services, and outlining procedures for drop off and pick up by parents and carers which addressed Council's concerns surrounding the cumulative impacts of the development on the intersection of Bottles Road with Rooty Hill Road North.

In terms of noise impacts, the Court assessed that implementing the acoustic measures recommended by the School's acoustic expert into the conditions of consent would mitigate noise impacts, including:

- Placing noise barriers to two metres in the air between the new building and the existing building before the development is occupied
- Restricting access to the area adjacent to the boundary of Cannery road (next to the low density residential properties) by students
- Installing acoustically absorbent material on the underside of the ceiling/roof of the food servicing area near the boundary of Cannery road.

Conclusion

The Court granted conditional consent to the amended application, pending the finalising of all the conditions.

3. Arkibuilt Pty Ltd v Ku-ring-gai Council [2014] NSWLEC 1161

This case concerned the refusal by Ku-Ring-Gai Council of a development application to construct an eight storey mixed use development on the eastern side of Lindfield Station. The primary issue in the proceedings was the proposed removal of endangered remnant native trees from the site.

Background

The site of the proposed development was in a highly urbanised area zoned R4 High Density Residential and B2 Local Centre. The development proposed to consolidate five properties to create 62 apartments with parking for 147 cars over three levels of basement car parking, as well as a 100m2 neighbourhood shop and a 1105m2 gourmet grocer.

To accommodate the new development, the existing vegetation on the site was proposed to be cleared. The proposed clearing included three trees identified as remnant native trees of the Turpentine species and forming part of the endangered Sydney Turpentine Ironbark Forest (STIF). STIF is listed as an endangered ecological community under the *Threatened Species Conversation Act* 1995.

The trees were identified as "Areas of Biodiversity Significance" on the Natural Resource Biodiversity in the *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (LEP). The LEP prescribed that development consent could not be granted unless the consent authority was satisfied that the development was consistent with the objectives of the biodiversity clause in the LEP, and that the development satisfactorily addressed specific matters regarding biodiversity protection. The *Ku-ring-gai Local Centres Development Control Plan* (DCP) also identified the site as being of biodiversity significance and provided guidance in relation to the level of analysis required for the site by the biodiversity protection clause in the LEP.

Issues

There was significant community objection to the removal of the trees, as well as concerns expressed about the bulk and scale of the project, traffic impacts, the loss of the existing community shopping strip, services and affordable housing close to the railway and other services. The owners of the adjoining properties were also concerned that their properties would become "isolated and highly constrained." However, amendments to plans and the proposed imposition of certain conditions by Council resolved all of these contentions, except the proposed removal of the trees.

In relation to the removal of the trees, Council argued that the development needed to comply with the objectives of the biodiversity clause of the LEP and the development, as currently proposed, did not comply. Council submitted that the development could be redesigned to preserve the trees on the site.

The Applicant argued:

- It could not redesign the proposal because the trees blocked the access path to the basement car park entry
- The trees were in the line of stormwater drainage on the site and as result the trees were poor condition having been adversely affected by contaminants and pathogens in the stormwater; and
- The proposed vegetation offset would compensate for the loss of the trees.

Biodiversity significance

Both party's ecological experts agreed that the trees were identified as of biodiversity significance, but disagreed as to the categorisation of the trees in the DCP, which in turn impacted on the assessment of the trees under the LEP. Council's expert considered that the trees were Category 3 – Landscape Remnant, whereas the Applicant's expert considered the trees to be Category 5 – Canopy Remnant. If the trees were only identified as Category 5, the DCP specified that the biodiversity clause in the LEP did not apply. However, the Court held that regardless of how the trees were categorised under the DCP, the land was clearly identified as an "Area of Biodiversity Significance" in the LEP and the biodiversity clause was therefore relevant. Further, the DCP itself stated that site-specific investigations were needed to identify any ground changes or inaccuracies which might be reflected in the maps identifying the categories.

Accordingly, the Applicant had engaged ecological consultants to assess the significance of the trees against a seven-part test outlined in the DCP and the objectives of the LEP. The Court noted that the Applicant's consultants had concluded in their report that the development was "not likely to result in significant impact upon species, populations and communities under the Threatened Species Conservation Act 1995" as they were a negligible proportion of the total gene pool for STIF and their removal was unlikely to create a significant impact on the total gene pool for STIF. Further, the report alleged that the trees were of poor health due to being infected with root rot fungi and their loss could be compensated by the planting of a number of these trees in the new landscape works. This result was confirmed in a Species Impact Statement by the same consultants prepared at the further request of Council as well as by the expert employed by the Applicant in the court proceedings.

Council's expert disagreed with the conclusions reached by the Applicant's consultants and ecology

expert. Council's expert noted that there was evidence that the trees were remnant of a number of the same species which used to exist on the site and the three trees remaining still represented a remnant area greater than 0.1ha, which was a greater proportion of trees than usually found in that species. Further, Council's expert submitted that as the three trees were canopy trees existing on a viable soil seed bank, they were also of high conservation significance as most other examples of the species were single trees without the same viable soil seed bank. Council's expert concluded that this demonstrated the limited extent remaining of the STIF community and the impact on the long term survival of the species should these trees be removed. The Council's expert also stated that the vegetation offset proposed in the development was at best supportive of one or two replacement trees of the species, due to the proximity to the buildings and therefore did not meet the requirement that there be no net loss of significant vegetation or habitat. Finally, the expert contested the assumption of the ecological consultants that the trees were diseased, as root rot fungi is part of a normal ecosystem and was unknown to kill the species of the trees.

Conclusion

The Court accepted the Council's expert evidence that the area was accurately mapped in the LEP as being of biodiversity significance and should be classed as Category 3 - Landscape remnant in the DCP. The Court held that the trees were of high conservation significance due to being grouped together and being located within a viable soil seed bank. As a result the Court was not satisfied that the proposed removal of the trees would be consistent with the objectives of the biodiversity clause, to protect or maintain or improve the biodiversity and condition of native vegetation and habitat. The Court was also not satisfied that the Applicant had exhausted all other design alternatives so as to avoid the adverse environmental impact of the removal of the endangered trees.

Accordingly, the Court dismissed the appeal.

4. DeAngelis v Pepping [2014] NSWLEC 108

This case concerned the challenge by Mr DeAngelis of a Local Environmental Plan (LEP) and Development Control Plan (DCP) made by Wingecarribee Shire Council, and signed on behalf of Council and the Minister for Infrastructure by Council Officer Mark Pepping on 28 March 2014. The case considers issues of procedural fairness and adequate community consultation in creating planning instruments and the manner by which the Minister and Council can delegate power to sign planning instruments.

Issues

Mr DeAngelis alleged that the LEP and DCP were invalid on the following grounds:

1. Council failed to notify Mr DeAngelis of the proposed amendments to the LEP and DCP;
2. Council had not exhibited the Planning Proposal in accordance with the requirements in the Gateway Determination;
3. Council had denied Mr DeAngelis procedural fairness at common law, by failing to exhibit the draft DCP at the same time as the Planning Proposal or to notify Mr DeAngelis that there would be no savings or transitional provision within the new LEP;
4. The Council officer who signed the LEP amendment did not have the correct authority; and
5. Council failed to comply with the requirements under the *Environmental Planning and Assessment Regulation* (EPA Regulation) to publicly exhibit the draft DCP.

The Background

Council Mr DeAngelis owned land on the south-eastern corner of the intersection of Bowral St and Moss Vale, which was zoned partly Residential and partly Mixed Uses under the *Wingecarribee Local Environmental Plan 2010* (LEP 2010).

In March 2012, Mr DeAngelis lodged a development application (DA) to use the part of the site zoned Mixed Uses for a large retail and residential development. The Council received a number of community objections to the DA. In December 2012, Mr DeAngelis commenced Class 1 proceedings against Council's deemed refusal of the DA.

In June 2013, Council resolved to submit a Planning Proposal for the site to the Minister which changed the zoning of Mr DeAngelis' site from B4 Mixed Use to R3 Medium Density Residential. The Planning Proposal covered the whole of the site owned by Mr DeAngelis, and if approved, would prohibit the development proposed under the first DA. Council proposed that community consultation on the Planning Proposal would occur following Gateway Determination, by advertising the Proposal in the local newspaper, providing the details on the website, providing details at Council's customer service centre and Bowral library, and notifying the same property owners who were contacted during the exhibition of the first DA.

The Minister indicated that the Planning Proposal should be resubmitted once the first DA was determined by the Court. The first DA was subsequently refused by the Court and accordingly, Council resubmitted the Planning Proposal to the Minister who by delegation issued a Gateway

Determination in September 2013. The conditions of the Gateway Determination required the Planning Proposal be amended to include existing and proposed land zoning, lot size and other applicable maps clearly identifying the subject lands. Council was also required to undertake community consultation under sections 56(2)(c) and 57 of the *Environmental Planning and Assessment Act 1979* (the EPA Act) as well as in accordance with the Department's guidelines for preparing planning proposals and local environmental plans (the Guide).

The Exhibition Period

Council exhibited the Proposal according to the methods set out in the Proposal from 9 October 2013 to 23 October 2013, including sending out letters to 435 people who had made submissions on the proposed development by Mr DeAngelis on the site under the first DA (except two owners located on the other side of Moss Vale Road and diagonally opposite the site). No complaint was lodged by Mr DeAngelis in this time regarding the documents or the recording of the lots that comprised the site which was the subject on the website, and he only objected to Council's omission to exhibit the draft DCP on the website.

On 11 November 2013, Mr DeAngelis submitted a second DA for the same development of the site, but with modifications based on the findings in the first Class 1 proceedings. The second DA identified both the LEP 2010 and the Proposal as relating to the site. On 27 November 2013, Council resolved to proceed with the making of the amendment to the 2010 LEP as proposed under the Planning Proposal, naming it Amendment 13. On 23 January 2014, after Council was deemed to have refused the second DA, Mr DeAngelis commenced further Class 1 proceedings. On 27 March 2014, a council officer, Mr Pepping, signed Amendment 13 (and the relevant LEP and maps), under delegation. Amendment 13 was published by the Department on 28 March 2014 alongside an amended DCP which reflected the changes in zoning.

Mr DeAngelis subsequently commenced proceedings challenging the validity of the LEP and DCP.

Failure to Notify Mr DeAngelis of the Proposal's Exhibition

Mr DeAngelis argued that neither himself or any of his employees received a letter from Council notifying him of the exhibition of Amendment 13 and associated documents. Accordingly, Mr DeAngelis submitted that Council had failed to comply with its obligations under s 57(1) of the EPA Act in relation to public notification of the Planning Proposal.

The Court did not accept Mr DeAngelis' evidence that he did not receive a notification letter from Council. The Court considered evidence from Council's file which indicated that a specific letter had in fact been sent to Mr DeAngelis (instead of the pro-forma letter sent to other residents). The Court stated that the fact that Mr DeAngelis did not make submissions was not evidence that he did not receive the notification letter. The Court considered that Mr DeAngelis may have chosen not to make submissions given he would not have anything new to add from past submissions made to Council and there was significant opposition to the proposed development already expressed by objectors in the past. Further, the affidavit evidence of Mr DeAngelis' employees relied upon was not supported by appearances of those people in Court, who had been given ample notice of the hearing date.

The Court noted that Council's report recommending the making of Amendment 13 before Council in November 2013 had made note of the fact that no submissions had been received from Mr DeAngelis, despite 78 other submissions being received by Council. The Court also noted that Mr DeAngelis did not complain of not being informed prior to the commencement of the second Class 1 Proceedings, and the Statement of Facts and Contentions filed by Mr DeAngelis made reference to the progress of Amendment 13. Accordingly, the Court was not satisfied that Mr DeAngelis had sufficiently proved that he had not received Council's notification letter regarding the Planning Proposal.

Statutory non-compliance with community consultation requirements

Mr DeAngelis submitted that even if he had received the notification letter, Council had not complied with all of the notification requirements of the Guide, which had been identified by the Minister in his Gateway Determination. Mr DeAngelis alleged that Council had failed to comply with these notification requirements in the following three ways:

(a) Council had not provided written notice to himself and to some of the adjoining landowners;

(b) The notice in the newspaper was given on the first day of exhibition and the notifying letter was sent the day before the exhibition, giving rise to the possibility that these notifications may have been received by some of the community after the exhibition period had commenced; and

(c) The notification letter itself did not provide an address for the receipt of submissions or an explanation of the Minister's delegation of power to sign the LEP to Council.

The Court rejected Mr DeAngelis' argument that all of the community consultation requirements in the Guide were mandatory. The Court looked at the language of the relevant section and noted that the Guide included both mandatory and discretionary notification elements, with mandatory requirements being signified

by the word "must" and discretionary elements being signified as "generally undertaken." The three methods of community consultation said to be not complied with by Mr DeAngelis were signified as "generally undertaken" and accordingly were not mandatory. Further, the Minister in the Gateway Determination appeared to give the Council some measure of latitude in the manner in which public exhibition was undertaken by not making the discretionary elements of the public notification requirement in the Guide mandatory.

The Court therefore held that Council was not obliged to comply with these three consultation methods. Rather, these methods were discretionary examples of how consultation was generally undertaken. The Court indicated that so long as Council's actual notification methods could be described as public exhibition, then Council had not failed to comply with the Guide and therefore the requirements specified in the Gateway Determination. Publication of two notices in the local newspaper together with publication on Council website was considered by the Court to be sufficient public exhibition of the Planning Proposal.

In relation to the specific failures identified by Mr DeAngelis, the Court considered the alleged non receipt of the notification letter by Mr DeAngelis and some adjoining landowners and found that this did not amount to statutory non-compliance with the Guide or with the Gateway Determination. The Court also did not consider the fact that the letter and the newspaper might be received after the exhibition period as resulting in non-compliance by Council, as the Gateway Determination allowed for notification on the first day of exhibition and Council's website was updated prior to the prior to the notification period. Finally, as the letter was not mandatory, the Court found there was no statutory non-compliance in relation to the failure to provide the address or inform of the Minister's delegation, and the letterhead contained Council's address which was sufficient to comply with the need to provide an address for submissions.

Denial of procedural fairness at common law

Mr DeAngelis also contended that even if certain community consultation requirements were not mandated in the Gateway Determination or in the Guide, Council was required under common law procedural fairness to adequately notify the community of the Proposal. The Court rejected this argument as case authorities indicated that the EPA Act by necessary implication excluded rules of procedural fairness in favour of the procedures set out in the EPA Act as to the right to be notified and heard. However, the Court still considered the two bases of contravention of procedural fairness alleged by Mr DeAngelis as follows:

(d) *Council's failure exhibit the DCP with the Proposal*

The Court rejected Mr DeAngelis' allegation that the notification of the Proposal was misleading because the draft DCP was not exhibited with the Planning Proposal. The Court found that there were sufficient materials to describe the changes proposed in the Proposal including the rezoning of the land, and a reasonable viewer of the Proposal would have understood that there would be resultant changes to other planning documents due to the Proposal. The Gateway Determination also did not require that the DCP be publicly exhibited, nor did the maps attached to the Amendment need to indicate the substantive effect on all planning instruments in order to comply with s 55(2)(d) of the EPA Act. Further, while the Proposal did not address the resultant changes to the DCP, any inconsistency with the DCP would resolve in favour of the LEP. Finally, even if the DCP had not been amended, the change in zoning in the new LEP would still have effect and there would be no inconsistency between the instruments.

(e) *Council's failure to notify Mr DeAngelis that there would be no savings or transitional provisions within the new LEP*

Whilst the Proposal was specific to Mr DeAngelis' site only, the Court did not accept that Council was required to specifically notify Mr DeAngelis that there would be no savings or transitional provisions in the new LEP. The Court noted that it was likely that Mr DeAngelis, having been informed of the Planning Proposal, would have been aware that the making of the LEP was imminent and certain even though he did not know the precise date it would be published by. The Court considered that when Mr DeAngelis commenced the second Class 1 proceedings he was aware that this was his only chance of success in undertaking the proposed development.

Absence of authority to make Amendment 13

Mr DeAngelis also challenged Mr Pepping's power and authority to sign the LEP on behalf of Council or the Minister, on the basis that Council had not validly sub-delegated its power to Mr Pepping. The Court accepted that Council's resolution of December 2013 delegating powers to Mr Pepping in his role as the Group Manager Strategic & Assets in relation to "Department of Planning Concurrence" was not a delegation of power to sign the Proposal. This was because the use of the word "concurrence" indicated an intention to cover those matters under the EPA Act which used the same "concurrence" term, rather than an intention to cover any power delegated by the Minister to Council for the signing of LEP amendments.

However, the Court did accept that Mr Pepping was able to sign the instrument as an "agent" of Council.

Council was said to have appointed Mr Pepping as its agent through its resolution of November 2013 which specified that Mr Pepping was to sign the instrument. As there was no dispute that Council was authorised to sign the document as the Minister's delegate, Council had power to authorise its agent to sign on its behalf as the agent role in signing the instrument was merely functionary as a signatory and subordinate to Council's intent as specified in its resolution. In any event, even if Mr Pepping was not authorised to sign the document, the Court indicated that it would have exercised its discretion to refuse the relief Mr DeAngelis sought as there was evidence that the General Manager would have taken the necessary steps to ensure that the delegation or instrument was affected herself should the delegation or agency be found invalid.

Failure to comply with clause 18 of the Environmental Planning and Assessment Regulations in exhibiting the draft DCP

The Council acknowledged that it had failed to comply with the EPA Regulations as it had failed to exhibit the draft DCP. However, the Court held that this failure did not result in invalidity of the document in the circumstances. The Court considered that the nature of status of a DCP was a relevant consideration. In this regard, the Court noted that the DCP is not an environmental planning instrument and the amendments to the DCP did no more than regularise a change effected by an LEP which could have been effected without any amendment to the DCP. As a result, the non-compliance with the EPA Regulations by Council did not lead to invalidity.

In coming to this conclusion, the Court said it was significant that there was no obligation on Council to amend a DCP to bring it into conformity with applicable planning instruments, and it was only desirable that it do so where the changes would create an inconsistency between the two. In any event, an inconsistency in a DCP yields to an LEP and accordingly Amendment 13 would achieve the same outcome even if there had been an inconsistency. The Court also noted that even if the DCP was found to be invalid, it would have exercised its discretion to decline relief as the amendment to the DCP was merely to regularise it with the LEP which had undergone the due process of exhibition and notification.

Conclusion

The Amended Summons were dismissed, the validity of the LEP and DCP was upheld and Mr DeAngelis was ordered to pay Council's costs.

Definitions

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

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

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

Development means:

(a) the use of land, and

(b) the subdivision of land, and

(c) the erection of a building, and

(d) the carrying out of a work, and

(e) the demolition of a building or work, and

(f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

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

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

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

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

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

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

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

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

Premises means any of the following:

(a) a building of any description or any part of it and the appurtenances to it

(b) a manufactured home, moveable dwelling and associated structure

(c) land, whether built on or not

(d) a tent

(e) a swimming pool

(f) a ship or vessel of any description (including a houseboat).

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

Prohibited development means

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

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

Public authority includes:

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

(b) a government Department

(c) a statutory body representing the Crown.

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

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

Useful links

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

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

NSW Attorney General's Department - Land and Environment Court: www.agd.nsw.gov.au/lec

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

Environment Protection Biodiversity Conservation Act - subscription to EPBCA group: http://groups.yahoo.com/group/epbc-info/

Environment and Planning Law Association NSW: www.epla.org.au

Development and Environmental Professionals Association: www.depa.net.au

Urban Development Institute of Australia: www.udia.com.au

Property Council: www.propertyoz.com.au

Housing Industry Association: www.hia.com.au

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

Environment Australia: www.erin.gov.au

Environmental Protection Authority (NSW): www.epa.nsw.gov.au

EDONet: www.edo.org.au

NSW Agriculture: www.agric.nsw.gov.au

NSW National Park and Wildlife Service: www.nationalparks.nsw.gov.au

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

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