LOCAL GOVERNMENT NSW

Land and Environment

COURT REPORTER

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IN THIS ISSUE

Summary of cases

Welcome to the November edition of the Court Reporter. It has been some time since a Court Reporter was published and distributed. We're sorry about that. We hope to start publishing the Court Reporter every second month to keep you up-to-date with significant decisions in the Court that directly impact local councils.

With respect to significant decisions, we are starting with a bang!

1. Our first reported decision is Bayside Council v Karimbla Properties (No 3) Pty Ltd [2018] NSWCA 257. This is a significant decision for local councils because it discusses when, for rating purposes, the categorisation of land changes from being in the "business" rating category, to being in the "residential" rating category.
2. Our second reported decision is Wingecarribee Shire Council v Uri Turgeman trading as Uri T Design [2018] NSWLEC 173. This decision reminds us that a development consent will be declared invalid if it is purported to be determined by someone who did not have the proper delegation.
3. Our third decision, Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245, covers a number of topics, including the requirement for councils to have land owner's consent where the proposed development includes access over neighbouring land, the appropriate application of the slip rule, and the requirement for a Commissioner to give reasons when approving development that is the subject of a section 34 agreement.
4. Our fourth decision is Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118. This case is significant because it explains how a consent authority must consider a clause 4.6 request to exceed a development standard. The principles in this case were also endorsed by the Court of Appeal in Al Maha.

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

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Maddocks

1. Bayside Council v Karimbla Properties (No 3) Pty Ltd [2018] NSWCA 257

On 14 November 2018, judgment was handed down by the New South Wales Supreme Court, Court of Appeal in respect of whether a commercial land owner was entitled to recover rates, levied and paid during the construction phase of a residential development.

The Appeal Court considered whether, for the purposes of section 516(1)(a) of the *Local Government Act 1993*, the dominant use of the land could be categorised as being "for residential accommodation" during the construction of the residential apartments.

Background

Various Karimbla Properties Companies (**Meriton**) lodged applications with Bayside Council, Council of the City of Sydney and North Sydney Council (**the Councils**) to change the rating categorisation of the lands from "business" to "residential" (**the Applications**).

The Applications, in most cases, were not determined and, as a consequence, Meriton filed multiple Class 3 Applications in the Land & Environment Court seeking orders that the various lands be declared within the "residential" rating category under the Act, and an adjustment of rates previously paid and payable under the "business" rating category be refunded as monies overpaid.

The primary judge in the Land & Environment Court handed down judgment declaring the lands at the time of demolition and construction of residential apartments were within the residential rating category and ordered the Councils to pay various sums of monies, being an adjustment of rates consequential upon that declaration. The Land & Environment Court essentially followed a previous decision of Pain J in *Meriton Apartments Pty Limited v Parramatta City Council* [2003] NSWLEC 309 (*Meriton Apartments*).

The Appeal

The Councils appealed against declarations and orders made in the Land & Environment Court.

The critical issue for the Appeal Court to determine was the meaning of "its dominant use is for residential accommodation" in section 516(1)(a) of the Act, and in particular the importance of "***for***" in the phrase.

Meriton submitted that the dominant use of the land was ***for*** residential accommodation from the time that physical activities of demolition commenced. The Council of the City of Sydney and Bayside Council submitted that the lands were not used ***for*** residential accommodation until an Occupation Certificate had been issued so that it would be lawful for the buildings to be used as residential accommodation. North Sydney Council contended that the lands were not used ***for*** residential accommodation until they were actually occupied as such.

The majority in the Appeal Court accepted the Council of the City of Sydney and Bayside Councils' construction of the phrase, where Emmett AJA and McColl JA took the view that the issue of an Occupation Certificate was the appropriate indication that a future intended use for residential accommodation had come sufficiently into fruition to become a present use for residential accommodation. White JA accepted North Sydney Council's proposition that an issue of an Occupation Certificate was not sufficient indication that a use for residential accommodation has come sufficiently into fruition to become a present use, but rather the commencement of physical occupation for residential purpose.

In addition, Emmett AJA expressed the opinion that section 527 of the Act created no right or cause of action providing an entitlement to a refund, repay or recovery of rates paid voluntarily without protest under a lawful

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rate notice and that an adjustment of rates in the statutory context and scheme meant an adjustment in the record required to be kept by a council under section 602 of the Act.

Why is this decision important to Local Government?

The Appeal Court judgment overturns the authority in *Meriton Apartments* and represents an important determination as to when the status of land changes to being categorised as ***for*** residential accommodation.

In addition, Local Government now has a clear understanding that the adjustment of a rating category does not necessarily mean a monetary refund. It may simply mean an adjustment in the record required to be kept by a council under section 602 of the Act.

2. Wingecarribee Shire Council v Uri Turgeman trading as Uri T Design [2018] NSWLEC 173

These proceedings were commenced by Wingecarribee Shire Council (Council) seeking judicial review of a determination purportedly made under delegation on 14 September 2017 to grant development consent for the erection of a residential flat building.

The case is an interesting example of a consent authority seeking review of a decision purportedly made on its behalf, as a result of administrative error.

Background

On 20 July 2016, Uri T Design (**the Proponent**) lodged a development application with Council, seeking development consent for the erection of a residential flat building at 1 Kangaloon Road, Bowral (**the Site**). On 4 April 2017, the application was determined by refusal by the Group Manager, Planning Development and Regulatory Services (**Group Manager**), as delegate of the Council.

On 11 May 2017, the Proponent lodged an application pursuant to the former section 82A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), for review of the decision to refuse consent to the original development application. On the same day, the review application was allocated to a contract town planner for assessment. The Council subsequently received and noted a report on 14 June 2017 that the review application would be brought for determination by the full Council.

However, on 15 September 2017, the contract planner purported to determine the review application himself by granting the consent subject to conditions, and a Notice of Determination was issued to the Proponent the following day.

When Council became aware of that determination, it took a series of steps seeking to have the development consent either surrendered or set aside, ultimately commencing Class 4 judicial proceedings on 6 April 2018. In earlier proceedings before Pepper J, the Council was granted an extension of time to commence the proceedings, and the Proponent subsequently filed a submitting appearance for the substantive proceedings.

Issue

Section 8.3(4)(b) of the EPA states that the review of a determination or decision made by a delegate of a council is to be conducted "by another delegate of the council who is not subordinate to the delegate who made the determination or decision".

At all relevant times, the contract planner was subordinate to the Group Manager who had determined the original development application.

Conclusion

Justice Moore held that the terms of section 8.3(4)(b) did not act to prevent the contract planner from undertaking an *assessment* of the determination that was to be reviewed, but it did prohibit him from making any *determination*, as he was clearly subordinate to the Group Manager.

The Court declared the development consent purportedly granted by the contract planner invalid and of no effect, and made orders restraining the Proponent from carrying out development in accordance with that consent.

In exercising his discretion to make those substantive orders, Moore J observed that although the errors that gave rise to the proceedings were clearly ones which arose within the Council's administration, that did not amount to disentitling conduct that would result in the Court not exercising its discretion to remedy a breach of the EPA Act. His Honour also noted that the purported grant of consent should not be allowed to stand as it would undermine the integrity of the administration of the relevant LEP by the Council.

3. Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245

This appeal related to a development application to build a residential apartment building that was granted consent by Commissioner Smithson in the Land & Environment Court. The proceedings were commenced in the Appeal Court by the owner of the adjoining land, who sought to have the development consent declared invalid.

This case is important because it highlights the matters a Commissioner must be satisfied with prior to approving, and the significance of giving reasons before approving, an agreement under section 34 of the *Land and Environment Court Act 1979* (**the Act**).

Background

Huajun Investments Pty Ltd (**Huajun**) lodged a development application with the City of Canada Bay Council (**Council**) in relation to its land at 38-42 Leicester Avenue, Strathfield (**the Site**) to build an eight-storey residential apartment building. The application was deemed to have been refused and Huajun lodged a class 1 appeal in the Land & Environment Court.

On 26 February 2018, the parties attended a second conciliation conference under section 34 of the Act which resulted in an agreement between the parties. Commissioner Smithson granted consent to the development application in accordance with the terms of a section 34 agreement signed by the parties.

Al Maha Pty Ltd (**Al Maha**), the owner of an adjoining parcel of land at 36 Leicester Avenue, Strathfield, lodged an objection to the development application on the basis that it would encroach on its land and Al Maha had not given its consent as owner of the land which is required by clause 49 of the *Environmental Planning and Assessment Regulations 2000* (EPA Regulation).

On 25 May 2018, Al Maha commenced proceedings in the Supreme Court claiming that the development consent was invalid and sought to have the Commissioner's decision quashed.

On 4 June 2018, Huajun filed a Notice of Motion in the Land & Environment Court seeking to amend the terms of the development consent pursuant to the "slip rule" to remove from the description of the

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development any work that was to be carried out on Al Maha's land. On 7 June 2018, Commissioner Smithson purported to amend the conditions of the consent.

Al Maha commenced judicial review proceedings in the Appeal Court arguing that the development consent granted by the Land & Environment Court was invalid.

The absence of owner's consent

The land that was the subject of the development consent included Al Maha's land. The proposed driveway that connected the residential building to the road crossed the land owned by Al Maha.

As such, evidence of Al Maha's consent, as the owner of the land, was required to be provided under the EPA Act and the EPA Regulation. Chief Justice Preston stated, at paragraph 174, that this land owner's consent was a "jurisdictional prerequisite" to the Commissioner having the power to grant development consent.

The Court found that the Commissioner's decision to grant development consent without the consent of the owner of the land constituted jurisdictional error and was therefore beyond power.

Irrationality

Chief Justice Preston agreed with Al Maha's argument that the Commissioner had granted development consent without plans that demonstrated how driveway access to the road would operate and that the development plans were inconsistent and unclear.

However, this did not mean that the Commissioner's decision was outside of her functions. The Court held that the inconsistencies in the plans did not impact upon the power of the Commissioner to grant consent to the application. The plans did not cause the development application to fail to meet the essential requirements of a development application under the EPA Act and EPA Regulation.

Failure of the Commissioner to form opinions of satisfaction

The proposed development contravened the height standard in the Canada Bay LEP. Clause 4.6(4) of the LEP allows a consent authority to grant development consent for a building that contravenes the height standard if the conditions under the clause are satisfied.

The consent authority must be satisfied that the applicant's written request adequately demonstrates that (at paragraph 177-178):

- compliance with the development standard is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify contravening the standard; and
- the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development for the zone in which the development is proposed to be carried out.

Huajun did make a written request under clause 4.6 of the LEP seeking to justify the contravention of the height development standard.

Section 34(3) of the Act requires the Commissioner to set out in writing the terms of the decision reached in the conciliation conference. Preston CJ stated, at paragraph 194, that from the Commissioner's "formulaic recitation of the test in s34(3)" it could not be inferred that the decision was one the Court "could have made in the proper exercise of its functions". The terms of the decision must identify the jurisdictional prerequisite for the exercise of the function and why it is satisfied (paragraph 202).

The Commissioner failed to include in her judgment or orders any record that she had considered the request submitted under the above requirements or formed the necessary opinions of satisfaction under clause 4.6(4) of the LEP. The Court inferred that the Commissioner failed to form the necessary opinions of satisfaction and as such, lacked the power to grant consent to the development application.

Was the conciliation conference invalid?

Al Maha argued that the second conciliation conference attended by the parties was invalid because the proceedings were to be dealt with at a hearing following the first conciliation conference. This argument was rejected by Preston CJ. His Honour observed at paragraph 241 that the function to arrange a conciliation conference is "facultative" and the Court has the ability to arrange a conciliation conference once a hearing has commenced.

The slip rule decision

Chief Justice Preston noted, at paragraph 272, that Huajun and the Council applying to amend the development application pursuant to the slip rule was "an attempt to cloak the Court with jurisdiction". His Honour stated that this was not within the power of the slip rule as it was not used to correct a mistake or error in the Commissioner's decision. As such, the slip rule decision was set aside.

Conclusion

The Court ordered that the Land & Environment Court's decision to grant consent to the development application should be quashed and declared invalid. The Commissioner did not have the power to grant the development consent without Al Maha's consent as the owner of the land on which the development was to be carried out and without forming the necessary opinions of satisfaction under clause 4.6(4) of the LEP. The Commissioner's development consent decision, slip rule decision and the development consent were set aside.

4. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

Chief Justice Preston has handed down an important decision on the interpretation and application of clause 4.6 of a standard instrument LEP. In addition, he repeated his conclusions in the Appeal Court decision of Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 which is discussed above.

Exceptions to development standards – clause 4.6

The objectives of clause 4.6 in most LEPs are to provide flexibility in the application of development standards and to achieve better development outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6(4)(a) permits a consent authority to grant development consent for development that would otherwise contravene a development standard where the consent authority is satisfied that:

- the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3) (i.e. the applicant's written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case: clause 4.6(3)(a), and that there are sufficient environmental planning grounds to justify contravening the development standard: cl 4.6(3)(b)): clause 4.6(4)(a)(i); and

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the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out: clause 4.6(4)(a)(ii).

Initial Action

Initial Action sought development consent for a residential flat building in Double Bay. The proposed development did not comply with the applicable development standard for height under clause 4.3 of the *Woollahra Local Environmental Plan 2014* (**WLEP**). The applicant made a written request under clause 4.6(3) of the WLEP seeking to justify the contravention. Woollahra Council refused to grant consent and the applicant appealed Council's decision.

Commissioner Smithson heard the appeal in the first instance and found that the contravention was not justified and dismissed the appeal.

Appealing the Commissioner's decision, the applicant submitted that the Commissioner had misinterpreted and misapplied clause 4.6 of the WLEP. Preston CJ agreed for the following reasons.

Applicant's written request

Preston CJ held that the Commissioner misdirected herself in considering, under clause 4.6(4)(a)(i), whether she was satisfied that the applicant's written request had adequately addressed the two matters required to be demonstrated by clause 4.6(3).

In relation to clause 4.6(3)(a), Preston CJ found that the Commissioner applied the wrong test as the Commissioner directly determined under clause 4.6(3)(a) whether she considered that compliance with the height development standard was unreasonable or unnecessary, rather than determining whether the applicant's written request had adequately addressed this matter.

In relation to clause 4.6(3)(b), Preston CJ found that the Commissioner applied the wrong test by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard. Clause 4.6 does not directly or indirectly establish this test. The requirement in clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard.

Preston CJ also held that the Commissioner misdirected herself in considering under clause 4.6(4)(a)(ii) whether she was satisfied that the proposed development would be in the public interest because she did not properly consider objectives of the particular standard or the objectives of the zone in which the development was proposed to be carried out.

Conclusion

This case sets out the appropriate application of clause 4.6. Notably, Preston CJ concluded:

- Clause 4.6(4) of the SLEP establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.
- The first opinion of satisfaction in clause 4.6(4)(a)(i) is whether the clause 4.6 request has adequately addressed the matters required to be demonstrated in clause 4.6(3). Those matters are:

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- that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
- that there are sufficient environmental planning grounds to justify contravening the development standard.

- The consent authority does not have to directly form the opinion of satisfaction regarding these matters, but only indirectly form the opinion of satisfaction that the written request has adequately addressed these matters.
- The second opinion of satisfaction in clause 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.
- The consent authority must be directly satisfied that the clause 4.6 request adequately addresses the matter in clause 4.6(4)(a)(ii), which is not merely that the proposed development will be in the public interest, but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development in the zone.

The final precondition in clause 4.6(4) that must be satisfied is that the concurrence of the Secretary of the Department of Planning and Environment has been obtained. The Court has the power under clause 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in clause 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under clause 4.6(4)(b) by reason of section 39(6) of the *Land and Environment Court Act 1979*.

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Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prohibited development means

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

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

Public authority includes:

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

(b) a government Department

(c) a statutory body representing the Crown.

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

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

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

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

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

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

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

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

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

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

Property Council: www.propertycouncil.com.au

Housing Industry Association: www.hia.com.au

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

Environment Australia: www.erin.gov.au

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

EDONet: www.edo.org.au

Department of Primary Industries: www.dpi.nsw.gov.au

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

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

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