LOCAL GOVERNMENT NSW

Land and Environment

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Maddocks

1. Nelda Bay Pty Limited v Sutherland Shire Council [2015] NSWLEC 95

This case concerned an appeal under section 97(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the decision of Sutherland Shire Council to refuse Nelda Bay's development application to alter and use an existing building as retail premises for a Jaycar Electronics store at Caringbah (the land). The development application relied on existing use rights.

Background

The land was originally used as a Mobil Oil service station in 1961. On 12 May 1976, Council granted development consent to the Bob Jane Corporation to use the premises for motor tyre sales and to erect a storage area along the southern boundary (the 1976 consent). Bob Jane T-Mart occupied the land until July 2013 when it was sold to Nelda Bay. After three unsuccessful development applications seeking to alter and use the existing building for use as a Jaycar Electronics store relying on the existing use rights provided for in the EPA Act and altered under clause 14(1)(e) of the *Environmental Planning and Assessment Regulations 2000* (EPA Regulations), Nelda Bay appealed Council's refusal in the Land and Environment Court.

Planning controls

At the time that the land was used as a Mobil Oil service station and at the time development consent was granted to Bob Jane T-Mart, the land was zoned Industrial Class A under the County of *Cumberland Planning Scheme Ordinance* (CPSO) which permitted all uses other than offensive/hazardous industries, dwellings and mines. In 1980, the land was zoned 4(a2) General Industrial (Restricted) under the *Sutherland Planning Scheme Ordinance* (SPSO), which prohibited commercial premises other than banks, timber yards, motor parts and accessory sales ancillary to an industrial use, service stations and car repair stations.

The zoning changed to General Industrial 4(a) under the *Sutherland Shire Local Environmental Plan 1993* in 1993 and remained General Industrial 4(a) under the *Sutherland Shire Local Environmental Plan 2000* in 2000. From 2006 onwards the land was zoned Zone 11 – Employment pursuant to the *Sutherland Shire Local Environmental Plan 2006* (LEP 2006), which prohibits business premises and shops, as well as motor tyre sales.

Issues

The issue before the Court was whether Nelda Bay could rely on the existing use of the land permitted by the 1976 consent to lodge a development application for a use which is now prohibited under the LEP 2006.

Council argued that the use of the land for a Bob Jane T-Mart was more properly characterised as being for the purpose of a 'vehicle and mechanical repair premises' because the sale of tyres included the fitting and repair of tyres, a use which was permissible under the LEP 2006. Existing use rights are defined under section 106 of the EPA Act as 'use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for [the existing use rights provisions in the EPA Act], have the effect of prohibiting that use.' Therefore, existing use rights cannot be relied upon where the existing use is still permissible under a subsequent instrument i.e. the LEP 2006.

Nelda Bay argued that the use of the land was properly characterised as for the purpose of 'motor tyre sales' being a retail shop or other commercial use because the fitting and repair of tyres was ancillary to the use being the sale of tyres. Retail uses are prohibited under the LEP 2006. Accordingly, the existing use of the land falls within the definition of section 106 of the EPA Act and consequently enjoys existing use rights.

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Existing use rights for a motor tyre sales shop

The Court did not accept Council's argument that the first step was to determine whether the use could be characterised as a permissible use under the LEP 2006, as existing use rights will only exist if a use is prohibited under the environmental planning instrument currently applicable to the land. Instead, the Court first looked to the purpose of the use of the land pursuant to the 1976 consent in order to characterise the use of the land, as the 1976 consent was the relevant legal basis for the use of the land before the LEP 2006 came into operation.

The Court ultimately agreed with Nelda Bay that the land enjoyed existing use rights for the purpose of a motor tyre sales shop, for the following reasons:

- the 1976 consent expressly provided consent to the use of the land for the sale of motor tyres;
- the conditions of the 1976 consent were consistent with the use of the land for motor tyre sales and identified the provision of services of tyre fitting and maintenance as being related to the main purpose of motor tyre sales;
- while the plans attached to the 1976 consent identified signage on the existing building which referred to a 'car care centre,' these plans cannot be used to extend the expressly approved use in the consent which was for motor tyre sales (applying *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103);
- the fact that machinery located on the land could be described as being able to be used for vehicle repair and maintenance did not convert the purpose of the land to that of a vehicle and maintenance repair premises;
- the list of goods and services sold by Bob Jane T Mart demonstrated that the majority of income was derived from the sale of tyres and wheels and not the ancillary services of fitting and wheel balancing;
- the lease of the land by Bob Jane Corporation Pty Ltd listed the use of the premises as being for the 'retail sale of tyres, wheels and batteries including the fitting and repair of same' indicating that the fitting of the tyres was ancillary to the dominant purpose of the sale of tyres;
- the Franchise Agreement expressly stated that while fitting of wheels, wheel balancing and minor repairs were undertaken on land, this was not the primary business and general vehicle maintenance was forbidden; and
- the repair of a vehicle in a planning law context was different to the fitting and repair of tyres undertaken on the land, having regard to the definition of 'vehicle repair station' in the Standard Instrument which differentiates between the activities.

Conclusion

The Court concluded that Council's case 'sought to specify a use at too great a level of particularity' and the Nelda Bay's construction of the 1976 consent was correct.

Accordingly, the use of the land was not for the purpose of 'vehicle and mechanical repair premises' but for a motor tyre sales shop where the selling and fitting of accessories to the vehicle was ancillary to that use. The use of the premises for a motor tyre sales shop is prohibited under the LEP 2006 and accordingly, existing use rights had been established by Nelda Bay, which could be altered by Nelda Bay as sought under section 108 of the EPA Act and clause 14(1)(e) of the EPA Regulations.

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2. Maschewski v Murray Shire Council [2015] NSWLEC 1251

The proceedings concerned a refusal by Murray Shire Council of a development application lodged by Mr Maschewski seeking consent to use an existing building as a rural workers' dwelling.

Background

The site is a large 10 hectare lot located in Moama and adjacent to the Murray River and is zoned RU1 Primary production under the Murray Local Environmental Plan 2011 (LEP). An existing dwelling house has been constructed on the site in proximity to the river without development consent. The surrounding development comprised agricultural land.

Mr Maschewski sought consent to use the existing dwelling as a 'rural worker's dwelling' to be used monthly by himself and the owner of the site. Livestock were kept in paddocks on the property and Mr Maschewski also indicated there were future plans to grow lucerne. An Agistment Agreement had also been provided with the development application with an expectation that full time care would be provided for the livestock.

The Council had refused to grant development consent and the parties were unable to reach an agreement at a section 34AA conference.

Issues

The contentions raised by Council concerned whether the proposed development would satisfy the aims of the LEP and the three requirements of clause 4.2B(3)(b) of the LEP in relation to rural worker's dwellings.

Council was also concerned that there was insufficient information provided to support the application, due to the lack of detail provided in the plans. Mr Maschewski also needed to demonstrate that appropriate arrangements had been made onsite for the provision of essential services, as required by clause 7.1 of the LEP.

Existing agricultural industry and commercial purpose

Under Clause 4.2B of the LEP, before development consent could be granted for rural workers' dwellings, Mr Maschewski was required to demonstrate that the use being carried out on the site was an existing agricultural or rural industry. As the LEP did not contain a definition of 'agricultural industry', the Council relied upon the definition of 'agricultural produce industry' which in part required that the use be for commercial purposes'.

Mr Maschewski's experts contended the purpose was a commercial purpose. Ms Erdelyi, Mr Maschewski's town planner, argued that the proposed future use of the site for the cropping of lucerne would constitute a commercial purpose because the business plan identified that there would be a profit. Ms Erdelyi had created a Business Plan for the lucerne crops which estimate a sale price of $80,000.

There was no other evidence of income produced from the site.

The Commissioner found that under the LEP the only relevant use of the site was the existing agricultural or rural industry occurring on site. Proposed *future* uses such as lucerne cropping was not relevant to the determination of this issue and there was no evidence to suggest that the land was currently being used to graze livestock for a commercial basis.

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Impairment of the land

To satisfy the first requirement of clause 4.2B(3)(b) of the LEP, the Commissioner was required to be satisfied that the development did not impair the use of the land for agricultural or rural industries. Both experts agreed that the location of the dwelling meant that 1ha of the site could not be used for agriculture. It was also agreed that because of the need for part of the paddock to be used for septic disposal it would not be appropriate for crops to be grown in that area, although Mr Leake agreed that the grazing of stock may be possible. The Commissioner considered this may negatively impact the profitability of the site and was therefore not satisfied in relation to the first requirements of clause 4.2B(3)(b) of the LEP.

Capacity to support the ongoing employment of rural workers

The second limb of clause 4.2B(3)(b) of the LEP required the Commissioner to find that the agricultural industry being carried out on the land has a demonstrated capacity to support the ongoing employment of rural workers.

Evidence from the experts was that the activities planned for the site (agistment and growing lucerne) would provide only part time employment opportunities and would not require a full time worker. The Council's expert considered the site was too small to generate the need for a rural worker and that, for extensive livestock grazing, such threshold would not be reached unless the area of production exceeded 350ha.

The Commissioner, however, was satisfied that the site required some form of employment for the existing agricultural use, as conducted by Mr Maschewski.

The development is necessary

The third requirement of clause 4.2B(3)(b) of the LEP required the Commissioner to find that the development is necessary considering the nature of the agricultural or rural industry land use lawfully occurring on the land or as a result of the remote or isolated location of the land.

Mr Maschewski argued that the rural worker's dwelling is necessary because the owner of the land does not reside at the property. In rejecting this argument, the Commissioner held that the land use was the relevant consideration, and not the personal circumstances of the owner, that necessitated the need for a rural worker. The existing use of the land was being carried out in the absence of anyone living at the property. The Commissioner was therefore not satisfied in respect of the third limb of clause 4.2B(3)(b).

Conclusion

In addition to the above, the Commissioner determined that the proposed development failed to meet the zone objectives.

The Court therefore refused the development application and dismissed the appeal.

3. Council of the City of Shoalhaven v Wilson [2015] NSWLEC 93

These were criminal proceedings brought by Council of the City of Shoalhaven (Prosecutor) for the lopping of two banksia trees. The Court considered the extent to which the difficult personal circumstances of Mr Wilson ought to be taken into account.

The Offence

Mr Wilson pleaded guilty to the charge that he lopped or injured two banksia trees in a waterfront Crown Reserve adjoining his land without consent as required by the Shoalhaven Tree Preservation Order (TPO) and breached section 76A of the EPA Act contrary to section 125(1) of the EPA Act.

By pleading guilty Mr Wilson had admitted to the essential elements of the offence.

The Evidence

The Prosecutor tendered and played in Court a very short video showing Mr Wilson using a chainsaw to lop tree branches.

The affidavit of Mr Wilson detailed his difficulties with alcohol addiction since an accident in 2010 and stated that he had been diagnosed with post-traumatic stress disorder, anxiety and depression. Mr Wilson stated that he was consuming alcohol heavily on a daily basis and his memory of the day of the offence was adversely affected by his state of intoxication at the time. He said that he regretted his actions in lopping the banksia trees. Mr Wilson said that he had since made efforts to take care of his mental health and had been abstinent from alcohol use since January 2015. In 2014 Mr Wilson separated from his long-term partner with whom he had a child. He had a large mortgage on his property and owned a business franchise. He offered to pay the cost of new vegetation for the area.

Mr Wilson tendered a psychiatric report by Dr Furst. In his report, Dr Furst expressed his opinion that Mr Wilson's high level of anxiety, his depression and intoxication were all factors that impacted on his judgment and contributed to him offending. Dr Furst stated that there was impairment in Mr Wilson's level of psychosocial function and that he regretted his actions.

Considerations in Sentencing

Justice Pain considered section 3A of the *Criminal (Sentencing Procedure) Act 1999* (CSP Act), the objective circumstances of the offense and subjective circumstances of Mr Wilson including:

- **maximum penalty:** The offence of carrying out development without consent is serious. The maximum sentence the Court may impose under section 126(1) of the EPA Act, being $1,100,000;
- **Integrity of statutory scheme for development control important:** Justice Pain agreed with the Prosecutor that:
    - the actions of Mr Wilson were harmful, and hence serious, because removal of vegetation without prior environmental assessment injures the system of development control imposed by the EPA Act. Such conduct was antipathetic to both the planning system ordained by the EPA Act and the preservation of local amenity manifest in the TPO;
    - certain objects of the LEP provide for the protection of natural environments and scenic and landscape qualities.

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- **Environmental harm**: Justice Pain agreed with Defendant that there was environmental harm which was exacerbated by the offence occurring on public land but the harm was not proven to be substantial.

- **Defendant's state of mind:** Justice Pain held that Mr Wilson knowingly and deliberately caused damage to trees that were alive. Mr Wilson's actions involved three separate incidents using several implements. This suggested knowing, deliberate, and intentional action rather than anything negligent or reckless on the part of Mr Wilson. The CSP Act states that when sentencing, the self-induced intoxication of the offender at the time the offence was committed was not to be taken into account as a mitigating factor.

  As to the additional mental health issues identified by Dr Furst, the primary issue was held to be the extent to which these issues should be given weight in reducing the need to denounce the offence and whether Mr Wilson was an appropriate vehicle for general deterrence. Her Honour dealt with this in relation to general deterrence, as set out below.

- **Reasons for the commission of the offence**: the Court found that the Prosecutor failed to show beyond a reasonable doubt that the reason Mr Wilson committed the offence was to obtain a benefit to his land.

- **Subjective consideration:** Justice Pain found that:

  - Mr Wilson's plea of guilty was entered at the earliest opportunity and therefore the appropriate discount was in the order of 10% to 25% and was to be applied to the full extent identified.

  - Mr Wilson had no prior convictions for environmental offences.

  - Mr Wilson had shown remorse.

  - Mr Wilson was unlikely to reoffend and had good prospects of rehabilitation.

- **General deterrence:** Her Honour held that a mental health problem may make an offender an inappropriate vehicle for general deterrence. However, Her Honour found that only limited weight was to be given to Dr Furst's opinion in the face of the deliberate behaviour of Mr Wilson on the day of the offence.

- **Evenhandness:** Her Honour identified other cases similar to the one before her and compared the penalties imposed.

- Justice Pain also considered whether the Prosecution should have brought the matter in the Local Court and took this into account in sentencing.

Finally, the "instinctive synthesis of objective and subjective factors" was considered by Pain J. Taking these into account, a penalty of $12,000 was held to be appropriate, which was reduced by 30% to $8,400 in light of the mitigating factors set out above.

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4. SH Camden Valley Pty Ltd v Camden Council [2015] NSWLEC 104

A recent decision handed down by his Honour Justice Sheahan and Commissioner Brown provides guidance on the categorisation of land for rating purposes under the *Local Government Act 1993* (LG Act).

The applicant, SH Camden Valley Pty Ltd (SH) appealed decisions of Camden Council (Council), seeking declarations that the five parcels of land are to be categorised 'Residential'. Council contended that the parcels should be categorised 'Business'. One of the parcels (referred to as the ECB land) was dealt with separately to the other four parcels (referred to as the non-ECB land).

Statutory framework

Relevantly, the LG Act requires that land be categorised, prior to the levying of local government rates, as:

- farmland;
- residential;
- mining; or
- business.

A person can appeal against a declaration of a category (section 526).

Justice Sheahan reviewed the case law on categorisation of land. His Honour referred to authority[1] which requires that, where land has more than one use, the comparison of the uses identify the 'main' or 'principal' use 'in terms of the space occupied, time spent in occupation and layout'. His Honour also referred to authority that intention to use the land is not sufficient and that the use of the land is manifested by physical activities on the land.[2]

The ECB land

The ECB land had been unoccupied since at least May 2014. It had been used as an 'equestrian themed entertainment facility' and buildings remained on the site from that use. The parties agreed that the ECB land was 'vacant land' for the purposes of section 516(1)(b) of the LG Act. Under section 516(1)(b), if land is vacant, it is to be categorised as residential if it is:

- a parcel of rateable land valued as one assessment; and
- zoned or otherwise designated for use under an environmental planning instrument for residential purposes (with or without development consent).

Under the relevant local environmental plan, the ECB land was partly zoned R1 General Residential (35%) and RE2 Private Recreation (65%).

After considering the parties' submissions, the Court found that the ECB land is appropriately characterised as 'business' for rating purposes. The Court was not satisfied that the parcel was zoned for residential purposes. This was because:

- a parcel of rateable land valued as one assessment; and

[1] *McKenzie v Randwick City Council* [1996] NSWLEC 41 (***McKenzie***); *Meriton Apartments Pty Ltd v Parramatta City Council* [2003] NSWLEC 309 (***Meriton***).
[2] *Meriton* [2003] NSWLEC 309; *Council of the City of Newcastle v Royal Newcastle Hospital* [1957] 96 CLR 493; *Peabody Pastoral Holdings Pty Ltd v Mid-Western Regional Council* [2013] NSWLEC 86.

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- the R1 zone extended over only 35% of the land, which the Court considered insufficient to support a residential zoning of the parcel;
- the RE2 area was not zoned for residential purposes; and
- while SH had purchased the ECB land partly for residential development, no building work had commenced.

The Non-ECB land

The parties disagreed regarding the relevant time at which to identify the parcel of rateable land 'valued as one assessment'. This was relevant to the inquiry into dominant use. SH sought re-categorisation as at 1 July 2010. In 2010 there were two parcels of land, each valued as one assessment, each of which included but extended beyond the Non-ECB Land. The Court accepted Council's submission that the relevant non-ECB parcels are 'those that were "actually" valued as once assessment by the Valuer-General at the date to which the category is sought to be backdated' (i.e. 1 July 2010). That meant that for the purposes of determining 'dominant use', the relevant parcels were those that were rated as one assessment at the time to which SH sought to backdate the assessment.

Having identified the relevant parcels, the Court considered their dominant use, noting that the assessment was of the 'collective use' of the areas, rather than the use of each individual area. The Court considered in particular the extent of the golf course, which occupied the largest area of land and was largely operational at 1 July 2010. The Court held that as at 1 July 2010, the land did not have a dominant use as Residential, even though that is likely to be its ultimate use.

Accordingly, the appeals were dismissed.

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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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

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