



Local Government, Planning And Environmental Law Conference

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THE TOPICS

- **BIAS AND PREJUDGMENT IN THE DETERMINATION OF DEVELOPMENT APPLICATIONS**

- **PLANNING PRINCIPLES**

BIAS AND PREJUDGMENT IN THE DETERMINATION OF DEVELOPMENT APPLICATIONS

A member of the governing body of the council - Councillors, as members of the governing body, should work as part of a team to make decisions and policies that guide the activities of the council; and

An elected person. The role as an elected person requires councillors to represent the interests of the community and provide leadership.

In relation to making decisions the Model code says
“you must take all relevant facts known to you or that you should be reasonably aware of, into consideration and have regard to the particular merits of each case. You must not take irrelevant matters or circumstances into consideration when making decisions.”

In respect of making decisions on developments the Model Code says:

“You must ensure that development decisions are properly made and that parties involved in the development process are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the development assessment process.

In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors conveys any suggestion of willingness to provide improper concessions or preferential treatment.”

- ***Mid Western Community Action Group Incorporated v Mid-Western Regional Council & Anor (No 2) [2008] NSWLEC 143***

- ***McGovern v Ku-ring-gai Council (2008) 161 LGERA 170.***

*“We know you CAN do it.
The question is, WILL you do it?
Will you save Mudgee and our region from the
Stockland Monster?
Send it back, get it improved and you will be my hero.”*

Mayor: *Why did you send me the bill for it? (laughter) I might also add, while I asked while I asked you why you sent the bill to me, you know, I might also add that you upset me wife and my family very bad by doing it. You also up [sic] me, upset me, I've got pretty broad shoulders but I'm pretty upset about you upsetting my wife and me family and me mother and father who are 90 year old. I'd also like to ask this question, another question now, why did you get these printed in Sydney in Stanley printing company when we got a printing place in Mudgee and you claim, claim to be protecting all the businesses in Mudgee...*

....And my poor old mother 90 years old seen it and then she's had a stroke since and she's in a home, in a home, and my family all say that's what caused it. You're a disgrace.

The Mayor later said:

Mayor: I'm sorry Russell we need to move on but I'm absolutely disgusted particularly when you've got members of that committee that I've side side side on things like the drug action team [inaudible] and other people that I've got faith in and a lot of respect for but to do that to me family not to me I got broad shoulders but to do that to me family is an absolute disgrace and I'd like to move on now.

In considering whether there was apprehended bias Justice Jagot said:

“The test for apprehended bias is clear (whether a fair minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to resolution of the matter) (Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337 at [6] – [7]). But it is equally clear that the application and precise content of the test varies depending on the context. A fair minded lay observer does not necessarily have the same expectations of an administrative decision-making body such as a council as of a judicial or quasi-judicial decision-maker. Moreover, if a lay observer did have those expectations, they may not be reasonable.”

*“..members of councils are no different from any other person. They might on occasion feel affronted by another person’s conduct. They might feel and express annoyance, distress or anguish about that conduct. Their expression might be forceful but nevertheless reasonable in all of the circumstances. Even in cases where regrettable language is used, it has been said “occasional departures from the appropriate standard are nothing more than indications of ordinary human frailty” (IOOF Australia at [194]). **Moreover, the “appropriate standard” in this case is not the standard applicable in a court. While courtesy is usually desirable in any forum, a local council meeting is a political forum. Conflicts are frequently raised and resolved in such a forum in more robust language than would be seen as appropriate in a court.**”*

McGovern v Ku-ring-gai Council (2008) 161 LGERA 170

Mr Allan described Mrs McGovern to Councillor Ebbeck as "**a vexatious complainant**", who had "lied to the Council guy about me doing illegal plumbing for the spa"; who had "lied in objections to the DA", had "personally solicited other complaints", "**has no credibility but is a bully that seems to get the Council into kowtow mode at call**".

*“Mark,
My position has not changed and I am embarrassed
that you have to come back before us again ... this
should have already been resolved.
Regards,
Nick Ebbeck “*

*Hi Mark,
You know you have my vote – I
just hope we can get enough
others across the line for you.
Adrienne.*

Mr Allan emailed Councillor Ryan, in the following terms:

“Thank you again for your very hard work in the cause of common sense. I do not really understand where this now leaves us, but if you have any ideas for any action I could be taking to assist our case before the next meeting it would be much appreciated.”

“Your idea of going to the media is probably a good one. ... I can't advise you about your next course of action but I will support you in what you chose to do. Heritage matters of this nature are not high on my agenda. In fact, I have made a statement to the media today in relation to the right of Council to arbitrarily impose decisions on home-owners without due consideration to the negative impact those decision may have. If anything good is going to come out of my "demotion" it will be that I now have the ability to speak frankly and openly about what really pisses me off!”

The relevant findings of the Court were:

1. In respect of councillors, the fair-minded observer would expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.

2. In the context of a multi-member elected decision-making body, there is no requirement that each of the decision-makers keep an "open mind" until every decision-maker is prepared to make a decision.

3. The fact that two councillors came to a conclusion that the application should be approved, prior to the final decision, and expressed themselves in strong terms does not of itself establish that they were not open to persuasion. Both formed their views after consideration of the information available to them, particularly the report by council officers, and on direct observations. Neither councillor took a step or made a statement that constituted a proper basis for a finding that they were not open to persuasion.

The holding of provisional or preformed views on a matter will not of itself constitute bias however a Councillor's mind should not be so foreclosed that he or she gives no genuine consideration to the matter in question.

PLANNING PRINCIPLES

Principle	Specific aspect	Case
Adaptive re-use	Adaptive re-use and public interest	Michael Hesse v Parramatta City Council [2003] NSWLEC 313 revised - 24/11/2003
Aesthetics	Weight to be given to expert opinion on architectural design	Architects Marshall v Lake Macquarie City Council [2005] NSWLEC 78
Aesthetics	Acceptance or not of proposals of court appointed expert witness	PDP (Darlinghurst Apartments) Pty Limited v City of Sydney Council [2005] NSWLEC 41
Brothels	Location of brothels	Martyn v Hornsby Shire Council [2004] NSWLEC 614
Building envelope	Tensions between a prescribed floor space ratio and a prescribed building envelope	PDE Investments No 8 Pty Ltd v Manly Council [2004] NSWLEC 355
Compliance	Responsibility for monitoring compliance with a condition	Dayho v Rockdale City Council [2004] NSWLEC 184
DCPs and Council policies	Weight to be given to Development Control Plans and to policies which had been adopted by councils although not embodied in DCPs	Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472 revised - 01/10/2004

Demolition	The extent of demolition - alterations and additions or a new building	Edgar Allan Planning Pty Limited v Wollahra Municipal Council [2006] NSWLEC 790
ESD and the precautionary principle	Explication of the precautionary principle and framework for its implementation	Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133
ESD principles	What regard should a consent authority give to the principles of ecologically sustainable development	BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 revised - 05/05/2005
FSR	FSR - Compatibility in a suburban context	Salanitro-Chafei v Ashfield Council [2005] NSWLEC 366
General impact	Impact on neighbouring properties	Pafburn v North Sydney Council [2005] NSWLEC 444
General impact	Reasonableness of and necessity for proposal	Super Studio v Waverley Council [2004] NSWLEC 91
Height, bulk and scale 	Assessment of height, bulk and scale	Veloshin v Randwick Council [2007] NSWLEC 428

Heritage	Demolition of contributory item in conservation area	Helou v Strathfield Municipal Council [2006] NSWLEC 66
Heritage	Impact of adjacent development	Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353
Landscaping	Imposition of conditions relating to the preservation of landscaping or protection of existing vegetation.	Falcomata v Ku-ring-gai Council (No 2) [2005] NSWLEC 459
Licensed premises	Extension of trading hours increase in permitted patron numbers or additional attractions	Vinson v Randwick Council [2005] NSWLEC 142
Master plans	Proposal permissible but inconsistent with Master Plan	Aldi Foods Pty Limited v Holroyd City Council [2004] NSWLEC 253
Noise	Attenuation measures	Stockland Developments v Wollongong Council and others [2004] NSWLEC 470
non-statutory regional planning policies	Assessing the role of non-statutory regional planning policies vis-à-vis statutory local plans	Direct Factory Outlets Homebush v Strathfield Municipal Council [2006] NSWLEC 318

Open Space	Location of communal open space	Seaside Property v Wyong Shire Council [2004] NSWLEC 600
Plan of management	Adequacy or appropriateness of a plan of management to the particular use and situation	Renaldo Plus 3 Pty Limited v Hurstville City Council [2005] NSWLEC 315
Privacy	General principles	Meriton v Sydney City Council [2004] NSWLEC 313
Privacy	Use of landscaping to protect privacy	Super Studio v Waverley Council [2004] NSWLEC 91
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - general	Melissa Grech v Auburn Council [2004] NSWLEC 40
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - where intensification of development is anticipated	Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - role of Court in assessing consolidation negotiations	Karavellas v Sutherland Shire Council [2004] NSWLEC 251

<p>Redevelopment</p>	<p>Existing use rights and merit assessment</p> <p>The principles to be considered when undertaking a merits assessment of a proposed redevelopment of a site with existing use rights were dealt with by Roseth SC in Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71.</p> <p>In Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587 the planning principles in Fodor were considered and confirmed by Pain J at pars 83-89.</p> <p>Principle 2 was specifically supported in paragraph 87 and principles 1,3 and 4 were specifically supported in paragraph 89.</p> <p>Her Honour states, in para 89, that care must be exercised in the application of the principles to ensure that there is not a de facto application of standards in environmental planning instruments as that is prohibited by s 108(3) of the Environmental Planning and Assessment Act.</p>	<p>Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587</p> <p>Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71</p>
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Seniors living	Seniors living in low density zone	GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268
Setbacks	Building to the side boundary in residential areas	Galea v Marrickville Council [2005] NSWLEC 113
Site dimensions	Small or narrow sites	CSA Architects v Randwick City Council [2004] NSWLEC 179
Staged development	How much information should be provided at Stage 1	Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353
Subdivision	When a residential subdivision application should impose constraints on future development	Parrott v Kiama Council [2004] NSWLEC 77 revised - 16/03/2004
Subdivision	Solar access for allotments in residential subdivisions	Wallis & Moore Pty Limited v Sutherland Shire Council [2006] NSWLEC 713

Sunlight	Access to sunlight	Parsonage v Ku-ring-gai Council [2004] NSWLEC 347
Surrounding development	Compatibility of proposal with surrounding development	Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191
Unusual contemporary design	Basis for assessment	Totem Queens Park Pty Ltd v Waverley Council [2004] NSWLEC 712
Use	Impact of intensification	Randall Pty Ltd v Leichhardt Council [2004] NSWLEC 277
Views	Views – general principles	Tenacity Consulting v Warringah Council [2004] NSWLEC 140
Zones	Weight to be given to the zoning	BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 revised - 05/05/2005
Zones	Development at zone interface	Seaside Property Developments Pty Ltd v Wyong Shire Council [2004] NSWLEC 117

The Court defines them as follows:

A planning principle is:

- 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.

The four of the most frequently considered and applied principles are those in the cases of:

- Martyn v Hornsby Shire Council (location of brothels);
- Parsonage;
- Tenacity; and
- Vinson v Randwick Council (impacts of extended trading hours of licensed premises)

To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5° or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.

26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

27 The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.”

Alphatex Australia v The Hills Shire Council

- 1. Planning principles are not immutable.*
- 2. Planning principles are not intended to be exhaustive.*
- 3. Planning principles are not binding. **They are not the stone-inscribed commandments that Moses is described, in Exodus Chapter 20, as bringing down from Mount Sinai.***
- 4. Planning principles are not statutory instruments and are not intended or expected to be the subject of the same statutory interpretation and construction of the words and phrases contained within them as if they had the force of law and were subject to the requirements for statutory interpretation of their intention.*

*“Finally, they speak for themselves. **Croesus asked Pythia, the sibyl or oracle at Delphi, if he should make war on the Persians and if he should take to himself any allied force. The oracle gave the response, that if he made war on the Persians, he would destroy a mighty empire. Croesus declared war and, indeed, succeeded in destroying a mighty empire – his own. Planning principles are not statements replete with hidden meaning or calculated ambiguity – unlike Delphic prophecies habitually were.**”*

