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Local Government & Planning Newsletter

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RECENT CASES

Marsdens are committed to the provision of specialist legal services in the area of Local Government, Planning and Environmental Law. Our Local Government and Planning Law Partners, Adam Seton and David Baird, know only too well that this area of law is continually evolving and provide the following summaries of some recent cases and legislation.

PLANNING REFORM DRAFT EXPOSURE BILLS RELEASED

On 3 April 2008 the Minister for Planning released Exposure Bills outlining the wide-ranging reform proposals to our planning system.

The draft Environmental Planning and Assessment Amendment Bill 2008 and draft Building Professionals Amendment Bill 2008 include a number of significant reforms which relate to the plan-making process, the assessment regime for large projects, rights of appeal and review of development proposals and rules and penalties for accredited certifiers.

The Department of Planning is accepting public comment on these Bills until 24 April 2008.

NOTIFICATION OF DEVELOPMENT APPLICATION BY POST

Sisic v Rockdale City Council & Anor [2007] NSWLEC 687

In this case, Justice Pain of the Land and Environment Court was called upon to consider whether or not there had been a failure to properly notify an interested party of a development application in circumstances where the notification was sent by prepaid post, however, not physically received. The Applicant was seeking the suspension under s 25B of the Land and Environment Court Act 1979 of a development consent on the basis that there had been a breach of procedural fairness due to the failure to properly notify the Applicant.

The evidence provided to the Court confirmed that notification letters were sent to the Applicant at properties that he owned which were properties that were affected by the development application. There was also evidence accepted by the Court that mail sent to these addresses was ordinarily diverted to an alternate address where the Applicant would receive his mail. Notwithstanding, the Applicant maintained that he had not received Council's notification.

The Applicant argued that there was a breach of the Environmental Planning & Assessment Act 1979 ("EP&A Act") as the notification requirement of the relevant DCP had not been complied with. The Applicant also argued that there had been a breach of the common law duty of procedural fairness.

The DCP relevantly required that:

> *"(a) Under clause 3.1 all local residents who may reasonably be affected by a development proposal are to be notified of the proposal*
> *(b) Notification under clause 3.1 is to be effected by sending letters to the owners and occupiers of surrounding properties listed in the relevant table, Table 1."*

The Council's undisputed evidence was that a total of 7 letters were posted by pre-paid post to the Applicant in the usual way by the Council's administrative officer. The Council therefore submitted that the EP&A Act and the DCP had been complied with.

The Applicant raised as an issue that Section 153 of the EP&A Act had not been complied with. Section 153 of the EP&A Act allows for the service of documents by pre-paid post and sub-section 2 thereafter relevantly provides:

> *"(2) A notice or other document shall, in respect of a notice or other document sent by pre-paid post in accordance with sub-section (1)(a)(ii) or (b)(ii), be deemed to have been given or served at the time at which the notice or other document would be delivered in the ordinary course of post."*

Therefore Justice Pain had to consider whether *"deemed to have been given or served"* gave rise to an irrebuttable presumption of service or giving of a document.

Justice Pain referred to the case of *Kyogle Shire Council v Muli Muli Local Aboriginal Land Council [2005] 62 NSWLR 361* which considered s 710 of the Local Government Act 1993. That section concerned service of notices under that Act and relevantly provided:

> *"(1) A notice required by or under this Act to be served on a person may be served as provided by this section.*
> *(2) The service may be:*
> *(c) by posting the notice by prepaid letter addressed to the last known place of residence or business or post office box of the person to be served, or….*
> *(8) Proof by affidavit or orally that a notice has been posted, or its transmission by electronic mail has been initiated in accordance with this section, is conclusive evidence of service."*

In that case, Tobias JA held at [35] that the act of posting a prepaid notice, addressed as the subsection required, completed the act of service, and further observed at [44] that "*it is clear from the various modes of service referred to in s 710 (other than personal service) that service may be effected without there being any proof or requirement that the notice has actually been received by the person to be served.*"

In the present case, Pain J observed that the effect of s 153(2) and s 710(8) was similarly conclusive of service, and concluded that it was reasonable and appropriate to apply the findings by Tobias JA given the similar wording in s 153 of the EP&A Act. In doing so, her Honour considered the legal effect of s 153 was to provide an irrebuttable presumption that delivery has occurred if effected in accordance with s 153(1)(a)(ii) of the EP&A Act.

In addition, Justice Pain considered whether compliance with the EP&A Act by Council satisfied its obligations to accord procedural fairness.

The Respondents relied on *Hillpalm Pty Ltd v Tweed Shire Council [2002] 119 LGERA 86* in which Lloyd J concluded that the EP&A Act provided a comprehensive scheme for public notification and there was no basis on which the Court should require more notification than that required by the EP&A Act finding at [123] that the legislation has *"precluded the implication of any further requirements to fulfil the duty of procedural fairness"*.

Justice Pain identified that this issue as raised also arose in the case of *Vanmeld Pty Ltd v Fairfield City Council [1999] 46 NSWLR 78.* In that case Meagher JA (Spigelman CJ dissenting) considered that the provisions of the EP&A Act specified exactly the extent to which procedural fairness was accorded and held that the Council had complied with the requirements of the EP&A Act in that case.

Her Honour dismissed the proceedings of the Applicant and held that Council had complied with its obligations to notify the development application under the EP&A Act. Her Honour held that there was no room for finding that the Applicant had been denied procedural fairness in the circumstances of this case and concluded:

"*Consideration of the comprehensive scheme provided for by s 79A(2) of the Act through the DCP and the above cases Muli Muli, Hillpalm and the majority judgment in Vanmeld suggests that Parliament does intend that the provisions made under the Act specify the procedural obligations of the Council in relation to the notification of development applications.*"

CHARACTERISATION OF EXISTING USE RIGHTS

Grace & Anor v Thomas Street Café Pty Ltd & Ors [2007] NSWCA 359

In this case, the New South Wales Court of Appeal considered the approach to be taken in the characterisation of an existing use.

The First Respondent operated a café in North Sydney on land which, prior to 19 April 1963, was zoned light industrial. It was then re-zoned to residential at which time shops and refreshment rooms became a prohibited use. The *"existing use"* provisions found in Part 4 Division 10 of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") provided that the use of the premises at the time of rezoning was not affected.

The Appellants brought proceedings at first instance alleging that the use of the premises as a café was unlawful. The Land and Enironment Court had determined that the existing use of the premises as at 19 April 1963 should be characterised as a 'refreshment room' which included use for the purpose of a restaurant or cafe. The Land and Environment Court also found that if the existing use was not a refreshment room, but rather a 'take-away food shop', then the development consent granted by Council subsequently for an awning over the courtyard for the use by the café amounted to a consent to a change of use in the form of a café or refreshment room.

The Appellants appealed to the Court of Appeal and contended that the premises were a corner shop and as a concomitant part of its business it sold sandwiches and milkshakes. Whilst the Appellants did not dispute that the premises were used as a café as and from 1985, their argument was that in 1963 it was not used for the purpose of a café and that its subsequent conversion to use as a café was a conversion to an unlawful use.

Beazley JA held that in characterising an existing use, the proper test was stated by McHugh JA in *Royal Agricultural Society of New South Wales v Sydney City Council [1987] 61 LGRA 305*, when he stated:

"*a liberal approach should be adopted with the purpose of the land described only at that level of generality which is necessary and sufficient to cover the individual activities and transactions at the relevant date. However, it is not to be so general that the characterisation can embrace activities or transactions which differ in kind from the use which the activities as a class have made of the land*'.

It was further held in this case that an existing use can naturally evolve over a period of time and changes in the method of operation of a particular category of use will not deny existing use rights. The task is always to categorise the purpose for which the premises have been put.

In the Land and Environment Court the Trial Judge had found that "*change in emphasis from a milk bar to a café seems to be a natural change in the method of carrying on the business consistently with the principles explained by McHugh JA in the Royal Agricultural Society case*", concluding that the purpose for which the premises were used had not changed since 1963 and their present use as a refreshment room was lawful.

In the Court of Appeal however, McClellan CJ found the essential principle to be that when a use of land or a building undergoes *"natural change"* so that, although carried out by contemporary methods the purpose of the use remains the same, the existing use will be maintained. The Trial Judge found that the business had changed. A *"milk bar"* had become a *"take away food business and café"* or *"refreshment room."* McClellan CJ stated that the question that must be answered is whether the contemporary use, described as a *"take away food business and café*" involved a *"natural change"* in *"the method of use"* in 1963 of a *"milk bar."* His Honour was of the view that it did not.

Beazley JA further held that the town planning purposes behind the legislative provisions are to be emphasised when characterising an existing use. Her Honour referred to *North Sydney Municipal Council v Boyts Radio & Electrical Pty Limited & Ors [1989] 16 NSWLR 50 where* Kirby P stated the use had to be considered:

"….. from the perspective of the impact of the use on the neighbourhood. This is because the regulation of the use within the neighbourhood is the general purpose for which planning law is provided."

Whilst there was no doubt that use as a milk bar and use as a café involved the purchase of food for immediate consumption and invites and facilitates social interaction amongst patrons, Beazley JA and McClellan CJ found that the town planning considerations in respect of the two uses are markedly different. Differences between the two uses included the time a customer would spend on the premises, the size of their purchases, noise considerations, the pattern of movement of people such as whether the premises would be attended in a group, traffic and parking, and the quantity of rubbish removal.

The town planning perspective proved to be the decisive factor in that they found that a milk bar with takeaway food is a different use from a café. Consequently, the Court held that there was a change in use and the primary Judge had erred in classifying the use as a refreshment room as at 19 April 1963. The premises did not have existing use rights as a café/restaurant/refreshment room.

The second matter challenged by the Appellant was the primary Judge's finding that a development consent issued by the Council in 1999 to erect an awning over the courtyard for the café use amounted to a consent to a change of use to a café or restaurant.

The Court accepted the Appellants submission that a development consent granted pursuant to s 81A of the EP&A Act does not make permissible a use of land which is otherwise prohibited under a relevant planning instrument. The Court approved the case of *Gameplan Sports and Leisure Pty Ltd v South Sydney City Council* (NSWLEC, Pearlman J, 4 October 1996, unreported) where her Honour held that the effect of s 91(4), being the predecessor to s 81A of the EP&A Act, was to streamline the development application process, so that in circumstances where a person was applying for consent to construct a building and use a building, only one application was necessary. Her Honour specifically rejected the proposition that the section made permissible the use of land which was otherwise prohibited under the relevant planning instrument.

In agreeing with this construction of s 81A, Beazley JA was of the view that had s 81A been construed "*so as to validate a prohibited use merely by the grant of a consent*, *the purpose of the structured planning system instituted by the Act would be fundamentally undermined*'.

FLEXIBLE AND PRACTICAL APPROACH TO CONSTRUCTION OF AN LEP

Currey v Hargraves and Others [2007] 155 LGERA 91

In October 2003, Wyong Shire Council, ("the Council") granted development consent for tourist accommodation and additions and alterations to Noraville House, an item of State significance under the Wyong Local Environmental Plan 1991 (NSW) ("the LEP"). This first consent was granted under delegated authority by its Director of Health and Development. The Council conceded that the Director did not have delegated authority to do so.

Upon Council becoming aware that the delegation was not valid, it invited the Respondents to make a second development application to which consent was granted in 2006.

Noraville House was within zone 2(a) (Residential Zone) under the LEP. The use or development of land for the purpose of tourist accommodation was prohibited in that zone. Clause 36 of the LEP, however, provided an exception wherein it allowed such development if the conditions of that clause were satisfied. Clause 36 provided:

> ***"36 Conservation incentives***
>
> *(1) The Council may grant consent to the use, for any purpose, of a building that is a heritage item or of the land on which the building is erected, even though the use would otherwise be prohibited by this plan, if it is satisfied that:*
>
> *(a) the proposed use would not adversely affect the heritage significance of the item and would have little or no adverse effect on the amenity of the area, and*
> *(b) the conservation of the building depends on the granting of the consent.*

The validity of both consents was challenged on the basis that there was no power to grant consent because the preconditions of the power to do so contained within clause 36 of the LEP were not met. Ultimately, the allegation of invalidity with respect to

the first consent could not be entertained however due to the operation of s 101 of the *Environmental Planning and Assessment Act* 1979 ("EP&A Act").

The Respondents relied on a letter to Council, submitted by a firm of architects, which referred to clause 36 of the LEP, the fact that extensive repairs were required to the building and that its conversion to a bed and breakfast facility would enable the funding of its ongoing maintenance. Annexed to that letter was a report to the New South Wales Heritage Approvals Committee prepared by the New South Wales Heritage Office which noted that the proposed change of use would provide sufficient income to carry out the initial conservation work and to maintain the property in an adequate manner thereafter.

The Applicant submitted that there was nothing before Council which showed that the conservation of the heritage building "*depends on*" the granting of the consent, as required by clause 36(1)(b). Whilst it is self-evident that the granting of the consent together with the consequent income from the tourist accommodation would *"assist in*" or "*contribute to*" the conservation of the building, it was submitted that the phrase "*depends on*" in clause 36 implied something stronger, for which there was no evidence, such as the cost of conservation work and estimate of the likely income to be derived for that purpose.

The Applicant's submission focused on the words "*depends on*" in clause 36(1) of the LEP. Justice Lloyd observed that the LEP is subordinate legislation and not drafted with the particularity or specificity of a statute and that it should not be construed in a strict or over-technical way, but rather in a practical, reasonable and commonsense way.

His Honour held that the requirement that "*the conservation of the building depends on the granting of the consent*" is met if the consent "*assists in*" or "*contributes to*" the conservation of the building, since that would achieve the objectives of the LEP.

His Honour further held that Clause 36 required the Council to be satisfied that the conservation of Noraville House depended, in the relevant sense, on the granting of the consent. It was open to the Council to be satisfied that the conservation of Noraville House depended on the funding to be received through the operation of the proposed tourist accommodation.

A second ground of alleged invalidity with respect to the second consent was that Council failed to take into consideration the impact upon views from the Applicant's property as required by s 79C(1)(b) of the EP&A Act. Trees and shrubs had grown to a height which obstructed the Applicant's view, and it was alleged that Council's failure to impose a condition to preserve those views, by requiring that the plants be kept at a reasonable height, was manifestly unreasonable.

Justice Lloyd found that the report to Council did in fact consider the question of view loss and upon referring to the test of manifest unreasonableness in *Bromley London Borough Council v Greater London Council* [*1983] 1 AC 768* and *Minister for Immigration and Ethnic Affairs v Teoh [1995] 183 CLR 24* held that the failure of Council to impose a condition of the kind suggested is not so devoid of plausible justification that no reasonable person or body would have done so, given that the shrubs and trees were already there, and had there been no development application, absolutely nothing could be done about them.

COUNCIL'S RESOLUTION DELEGATING AUTHORITY INVALID

Belmorgan Property Development Pty Ltd v GPT Re Ltd and Anor [2007] 153 LGERA 450

This appeal concerned the validity of a development consent granted by Council to the Appellant pursuant to a purported delegation of authority to the General Manager of Wollongong City Council.

On 27 August 2004 the Appellant lodged a development application for a retail shopping centre and commercial office complex comprising a supermarket, department store and cinema.

A report prepared by the Council's Manager Development Assessment and Compliance recommended against the approval of the application unless the ground floor supermarket and associated retail floor space were deleted from it.

In assessing the application, the Council did not adopt the report's recommendations, rather it resolved that:

> "The General Manager be delegated authority to approve Development Application 1565/2004 …….."

The development application was subsequently approved in August 2005 subject to conditions.

On 28 October 2005, the First Respondent instituted proceedings challenging the validity of the consent on the ground that Council's resolution delegating authority to the General Manager to approve the application was itself invalid.

In the Land and Environment Court Biscoe J upheld the challenge, formally declaring that the consent was void and of no effect and ordered that the Appellant be restrained from carrying out any works pursuant thereto. The Appellant subsequently appealed to the Court of Appeal.

In the appeal to the Court of Appeal, it was common ground between the parties that the Council resolution authorised the General Manager to grant consent to the application but did not authorise him to refuse consent. The primary Judge disagreed with the proposition that the General Manager was authorised not to exercise his power of approval at all, as his Honour considered that if the General Manager did nothing, there would be a deemed refusal under s 82(1) of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") which would be the same as if he had expressly refused consent.

The First Respondent submitted that the 2005 resolution was an invalid exercise by, or fetter, on the power of the General Manager because it authorised him only to approve the application but not to refuse it. It was contended by the First Respondent that Council had a single indivisible function under s 80(1) of the EP&A Act to determine an application either by granting consent unconditionally or conditionally or by refusing consent.

Tobias JA on the appeal stated that in making a determination under s 80(1) of the EP&A Act it was mandatory for the consent authority to take into consideration the matters prescribed by s 79C(1) insofar as they were relevant. His Honour noted that the section 80(1) function of determining a development application was indivisible and was supported by the provisions of s 79C(1) as it was the whole of the s 80(1) determination function that had to be exercised in accordance with that provision. The primary Judge had observed that it would be:

> *"..…difficult to see how s 79C matters can be properly, genuinely and realistically considered in making a determination if the determination can only go one way. To delegate to the general manager a power to approve only is a limitation on the nature of the opinion that can be formed and, I think, inconsistent with the statutory scheme that the delegate standing in the shoes of the council must make a s 80 determination on relevant matters referred to in s 79C."*

The primary Judge had subsequently held, first, that there was no power in the Council to delegate its function to the General Manager under s 80(1) of the EP&A Act to determine the application by only granting consent thereto; and, second, that in any event to delegate authority to the General Manager to only grant consent to the application would constitute an impermissible fetter upon the General Manager's authority to determine the application in a manner which complied with the mandatory requirements of s 79C(1).

Tobias JA accepted the primary Judge's finding, and that the 2005 resolution was not a valid delegation by the Council, stating that it was "*correct to categorise the relevant function of the Council under s 80(1) of the EP&A Act delegable pursuant to s 377 of the LG Act, as being a function 'to determine a development application' rather than the function to determine that application in a particular manner.*"

PETA HUDSON RETURNS

Many of you who receive this newsletter will have dealt in the past with Peta Hudson of our office. Peta is a Senior Associate and an integral part of our Local Government and Planning practice.

Peta took maternity leave after the birth on 28 September 2007 of her son, Jack.

Peta has now returned from maternity leave and we are pleased to welcome her back.

This newsletter represents a brief summary only of the cases and legislation discussed and is not intended to be a definitive analysis and therefore should not be relied upon as a definitive or complete statement of the relevant law. For more information or detailed legal advice, please contact Adam Seton (02) 4626 5077.