

Local Government & Planning Newsletter



**Adam Seton Partner –
Local Government &
Planning**



**David Baird Partner –
Local Government &
Planning**

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.

MARSDENS LOCAL GOVERNMENT PLANNING & ENVIRONMENTAL LAW SEMINAR FOR NORTHERN NEW SOUTH WALES

This year on 10 March 2006 we will be holding a Local Government Planning and Environmental Law Seminar at Byron Bay Community Centre at Byron Bay. We are travelling to northern New South Wales to provide this free seminar to Local Councils in the area who might not ordinarily have the opportunity of travelling to Sydney for our annual seminar.

On the last page of this Newsletter we have provided you with the program for the day. We are confident that we have provided speakers of the highest calibre presenting on a wide range of topics of interest. This is sure to be a most interesting and informative seminar and is one that should not be missed.

If you have not already booked to attend this seminar then we recommend that you contact our Campbelltown Office urgently.

COUNCIL'S LIABILITY TO PURCHASERS OF LAND

The New South Wales Court of Appeal had reason to consider a Council's liability to purchasers of land in circumstances where the Council was made aware during the development consent process that the land would be significantly affected by aircraft noise in the future. In the case of *Port Stephens Shire Council –v- Booth & Ors; Port Stephens Shire Council –v- Gibson & Anor (2005) NSWCA 323* the Council appealed from a District Court decision which found that purchasers of land were entitled to damages for diminution in the values of their lots with damages ranging from between \$98,000.00 to \$110,000.00.

In 1993 a development application was lodged by Lloyd Moffat Investments Pty Limited with Port Stephens Shire Council seeking consent for the development of a holiday cabin resort to be known as Fisherman's Village. The Council ultimately granted development consent and in 1993 construction of forty one new cabins and infrastructure work commenced.

The land became subject to a community title subdivision in accordance with the Community Land Development Act 1989 so that the lots were ultimately sold (most as investments) with the owners of each lot purchasing a shared interest in community property. The RAAF Base was situated approximately nine (9) kilometres from the land. The Salt Ash Weapons Range which was used by the aircraft was situated approximately two and a half (2 & 1/2) kilometres from the land. After the land had been purchased by each of the claimants aircraft noise increased to the extent that in late 1998 a decision was made that the resort would only operate commercially on weekends when there was rarely aircraft noise.

The claim in the District Court was made on the basis that the council was negligent in the grant of the development consent and the building approval and the council was also negligent in

NEW PLANNING PRINCIPLE CONCERNING CONDITIONS FOR PRESERVATION OF LANDSCAPING

the issue of certificates under Section 149 of the Environmental Planning and Assessment Act 1979 owing to the fact that at the time of the grant of development consent the Council had in its possession an Aircraft Noise Exposure Forecast. This Forecast confirmed that the land would be subject to aircraft noise as it was between the 25 to 30 ANEF contours which meant that aircraft noise would seriously affect the land. The owners of the land to whom development consent was granted were not advised by the Council of this information.

In considering the appeal, the Court of Appeal held as follows:-

1. The council was exercising a statutory power in determining the development application and the test that should be applied is whether reasonable care had been taken in the approval of the development and building applications.
2. In the exercise of that reasonable care in the course of considering the development application, proper attention was required to be given to the Aircraft Noise Exposure Forecast in order to discharge the duty of care owed by the council to the owners of the land. This was a duty separate to that owed to prospective and ultimate purchasers of the land from the owners. The owners could not have been warned by a Section 149 Certificate which failed to give proper attention to the Forecast.
3. Proper attention had to be given to the manner in which information from the Aircraft Noise Exposure Forecast was to be included in any certificates to ensure that it was not materially and prejudicially misleading. In balancing the harm against the ease of correct disclosure or in providing a misleading certificate, it was unreasonable for the council to have issued the 149 certificate in the form that it took.
4. On the facts of this case the ultimate losses to the purchaser of the land were caused by the council's breach of duty. The loss to each purchaser flowed from the purchase of the land.
5. There was diminution in value of the land because at the time the land was purchased there could have been no doubt that the changes in aircraft type and usage at the Range would cause an increased noise affectation of the land.

It was also held that the District Court was not in error in allowing interest on the damages in circumstances where the purchasers are entitled to damages representing money lost to them by overpayment for their land in the first instance. This is notwithstanding that the land at current value may be of an increased value. It was held that at law the purchasers had been deprived of the money lost to them and were therefore entitled to damages since the date they purchased their land.

In the recent case of *Falcomata –v- Ku-ring-gai Council (No.2)(2005) NSW LEC 459*, Commissioner Moore outlined a new planning principle on the imposition of conditions relating to the preservation of landscaping or the protection of existing vegetation.

The matter was an appeal pursuant to Section 97 of the Environmental Planning and Assessment Act 1979 against the deemed refusal by the council of a development application for the demolition of a tennis court and the construction of two detached dual occupancy dwellings. The Commissioner identified as the principal issues the question of the impact on a number of ancient Turpentine trees located on neighbouring properties, the impact on two (2) Blackbutt trees on the land, the question of amenity and adequacy of private open space for the residents of one of the dwellings proposed on a portion of the land and solar access for that dwelling.

In draft conditions of consent submitted to the Commissioner by the council, the council proposed two (2) conditions relating to the imposition of cash performance bonds for the purposes of landscaping establishment and maintenance as well as protection of trees on the site. The Commissioner expressed his view that there is no statutory power under the EPA Act to impose such a bond and went on to formulate the following planning principles to be applied to the establishment and maintenance of the proposed landscaping for the site or for the protection of existing vegetation on a site during and after construction:-

- (1) *A development consent may include conditions requiring the establishment and maintenance of proposed landscaping or the protection and retention of existing vegetation;*
- (2) *Such conditions should specify the following:-*
 - (a) *new landscaping plans to be implement and maintained;*
 - (b) *the species and location of tree(s) or other vegetation which is to be protected and retained during and after construction on a plan which shows this information with precision and clarity; and*
 - (c) *any requirements necessary to ensure the protection of such tree(s) or vegetation during construction;*
 - (d) *whether an experts report on compliance is required prior to the issue of an occupation or building certificate;*
 - (e) *if an experts report is available prior to approval, the conditions of consent should incorporate its recommendations as conditions;*

(f) Whether landscaping, maintenance or vegetations retention, which is to extend beyond the construction phase is to be for a nominated period of time after the issue of an Occupation or a Building Certificate or if it is to be an ongoing obligation for the life of the development.

(3) Conditions relating to landscaping or vegetation on private property should not include any financial surety or bond unless such bond or surety is specifically permitted by a relevant statute. Example: Section 22(C) of the Rivers and Foreshores Improvement Act 1948. Enforcement of conditions arising from (1), (2), (4) or (5) should be through the normal processes for ensuring compliance with the conditions of consent.

(4) Conditions can include the requirement that if a tree or vegetation to be protected dies or is significantly damaged it is to be replaced.

(5) Where extensive landscaping is proposed on the common property of a strata title or community title development, in appropriate cases a condition may be imposed requiring the body corporate or community association to enter into a maintenance contract for the landscaping for the period of maintenance specified in the conditions of consent. The conditions may require that a copy of such contracts be provided to the council prior to the issue of an occupation or building certificate. The period of time specified for such a contract should be sufficient for only the establishment of the landscaping rather than long-term or open-ended.

COMPANION ANIMALS ACT – MEANING OF “ATTACK”

The New South Wales Supreme Court recently considered an appeal by a council against the dismissal of an offence under Section 16(1) of the Companion Animals Act 1998 by a Local Court Magistrate.

In the case of *Council of the City of Lake Macquarie –v- Wayne Jeffrey Morris* (2005) NSWSC 387, His Honour Justice Johnson was called upon to review a case involving an alleged attack by an American Pit Bull Terrier and a Rottweiler upon a Staffordshire Terrier. The original Local Court prosecution proceedings were heard out of Toronto Local Court when the Magistrate dismissed the prosecution.

The prosecution proceedings were brought against the owner of the Pit Bull Terrier pursuant to Section 16 of the Companion Animals Act 1998 (“CAA”) which provides:-

“(1) If a dog rushes at, attacks, bites, harasses or chases any person or animal whether or not any injury is caused to the person or animal:-

(a) the owner of the dog; or

(b) is guilty of an offence.”

Section 16 (2) of the CAA provides a defence when it provides:-

“(2) It is not an offence under this section if the incident occurred:-

(a) as a result of the dog being teased, mistreated, attacked or otherwise provoked, or

(b)

(c) as a result of the dog acting in reasonable defence of a person or property; or

The undisputed evidence at the local court hearing disclosed that Ranger Barry saw the American Pitt Bull Terrier and the Rottweiler covered in mud and standing over something in a drain. As he moved closer to these dogs he could see another dog lying motionless in about fifteen (15) centimetres of water in the drain. He stated:-

“I continued to approach the dogs in an effort to impound them, the American Pitt Bull Terrier tried to bite the motionless animal as I approached it...”

There was no evidence given to the court by any witnesses concerning how the dog came to be lying in the drain or how the injuries had been caused to it.

In dismissing the local court prosecution the Magistrate stated that:-

“The issue which is squarely raised by the defence at the start of proceedings was that the prosecution was put on notice, it had to negate the defence which is provided for under Section 16(2).....Now look the onus is on the prosecution to negate in a case like this where the section provides a clear defence to negate the available defence to Mr Morris the defendant.....there’s absolutely no evidence that there was no provocation, indeed there’s no evidence of which dog attacked which dog initially, that is the start of the incident at all.....there is no evidence which negates the available defence to Mr Morris, the owner of the subject dogs.....”

The appeal was lodged on the basis that the Magistrate fell into error of law by holding that it was the prosecutor who had to negative the Section 16(2) defences without first considering whether the defendant had discharged an evidentiary burden so as to raise the statutory defence provided for consideration.

On the facts, His Honour held that:-

“It is possible to approach the charge involving the American Pit Bull Terrier upon the basis that the actions of the dog as observed by the Council Rangers were capable in law of constituting an “attack”..... there is no reason to approach the proper construction and application of the word in Section 16(1) by confining it to the very beginning of the series of events which apparently led to injuries being caused to the Staffordshire Terrier.”

His Honour went on to say:-

“In my view, the learned Magistrate erred in law in approaching the matter upon the basis that it was for the Plaintiff to prove beyond reasonable doubt the absence of Section 16 (2) matters, even where the Defendant had not discharged the evidentiary burden of raising a Section 16(2) matter or matters. Section 16(2) matters are not elements of the offence which a prosecutor must negative beyond reasonable doubt in every Section 16(2) prosecution whether or not they have been raised. It would be entirely contrary to the purposes of section 16 CA Act to place such a burden on a prosecutor in every case.”

His Honour noted:-

“The aggressive action of this dog, as observed by the Council Rangers, taken alone, was capable of constituting a prima facie case of an “attack” under Section 16(1) CA Act. Further, this evidence of aggressive conduct may be viewed with the other circumstances, including that dog standing over the badly injured Staffordshire Terrier, so as to give rise to a prima facie case of an offence under Section 16(1) CA Act involving the American Pit Bull Terrier with respect to the injuries sustained by the Staffordshire Terrier.”

His Honour concluded that:-

“there was a clear prima facie case of a Section 16(1) CA Act offence with respect to the American Pit Bull Terrier. It was erroneous for the learned Magistrate to approach the matter upon the basis that it was for the Plaintiff necessarily to establish beyond reasonable doubt that Section 16(2) circumstances did not exist whether or not an evidentiary burden with respect to these circumstances has been discharged by the Defendant.”

AMENDMENT TO STATE ENVIRONMENT PLANNING POLICY NO. 4

Amendment no. 17 to SEPP4 was gazetted on 3 February 2006.

SEPP 4 relates to “Development without Consent and Miscellaneous Exempt and Complying Development.” The aim of the amendment was to identify the erection of satellite TV dishes, the erection of temporary wind monitoring towers and the installation of rain water collection tanks in educational establishments with a capacity of up to 25,000 litres as exempt development, subject to the development meeting certain requirements.

New clauses 17 and 18 have now been inserted into SEPP 4. Clause 17 makes provision for when a satellite TV dish is exempt development and provides that:-

- (a) *the satellite TV dish must be erected wholly within the boundaries of a property;*
- (b) *the satellite TV dish must be installed in accordance with the instructions of the manufacturer and any relevant standard imposed by Standards Australia,*
- (c) *the satellite TV dish must not affect the structural integrity of any building on which it is erected,*
- (d) *if the satellite TV dish is erected on or adjacent to a dwelling, it must comply with the additional requirements set out in sub clause (2),*
- (e) *if the satellite TV dish is erected on land that is zoned commercial or industrial under an environmental planning instrument, it must comply with the additional requirements set out in subclause (3).*

Clauses 17(2) and (3) provide particular diameter and height requirements concerning the erection of a satellite TV dish.

Clause 18 provides that for a wind monitoring tower to be exempt it must comply with the following:-

- (a) *the wind monitoring tower must be a temporary structure that is removed within 30 months of its being erected,*
- (b) *the wind monitoring tower must be erected in accordance with the instructions of the manufacturer,*
- (c) *the site on which the wind monitoring tower is erected must be enclosed by a fence that prevents unauthorised persons from entering the site,*
- (d) *the wind monitoring tower must have a height not exceeding 110 metres,*
- (e) *the wind monitoring tower must not be erected within 100 metres of any public road,*
- (f) *the wind monitoring tower must not be erected within 1 kilometre of any other wind monitoring tower,*
- (g) *the wind monitoring tower must not be erected within 1 kilometre of any dwelling (except with the prior consent in writing of the owner of the dwelling),*
- (h) *the wind monitoring tower must not be erected within 1 kilometre of any school,*
- (i) *the wind monitoring tower must not be erected within 500 metres of any item of environmental*

heritage that is listed on the State Heritage Register under the Heritage Act 1977,

(j) prior to the erection of the wind monitoring tower the Civil Aviation Safety Authority must be notified of the following:-

(i) the as constructed co-ordinates of the wind monitoring tower in longitude and latitude,

(ii) the ground level of the wind monitoring tower expressed in Australian Height Datum,

(iii) the height of the wind monitoring tower expressed in Australian Height Datum,

(iv) the proposed date for removal of the wind monitoring tower

OUR SENIOR PARTNER

As many of our readers are aware our Senior Partner, John Marsden has once more undergone a bone marrow stem cell transplant in his continuing fight against cancer. Many of the people who receive this newsletter often enquire as to John's progress. We are pleased to report John is in remission from the cancer however John is feeling the debilitating affects of the treatment and in particular is suffering from the graft\host disease arising out of the transplant. Notwithstanding, John will shortly be embarking on one of his country road trips to visit a number of our country council clients and will be present at our Byron Bay conference. He looks forward to speaking to many of you there.

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.



Annual Local Government, Land & Environment Conference

Friday 14th July 2006

Bankstown Town Hall Theatre
Cnr Rickard and Chapel Roads, Bankstown

9.30am to 10.00am	Registration. Tea and coffee served.
10.00am to 10.05am	Welcome by Mr John Marsden LLM, AM. Senior Partner of Marsdens Law Group.
10.05am to 10.30am	Peta Seaton, MP.
10.30am to 11.15am	ICAC's Relationship with Local Government. The Hon. Jerrold Cripps QC. ICAC Commissioner.
11.15am to 11.30am	Morning Tea at Conference.
11.30am to 12.30pm	Department of Local Government Investigating Councils. Mr Angus Broad. Investigator with Department of Local Government.
12.30pm to 1.30pm	Infrastructure in Ageing Communities. The Hon. Craig Knowles. Former Minister for Infrastructure & Planning. Former Minister for Natural Resources. Former MLA for Macquarie Fields.
1.30pm to 2.15pm	Lunch at Conference.
2.15pm to 2.45pm	Recent Developments and Cases of Interest in Planning, Local Government and Environmental Law. Mr Adam Seton B.Ec, Dip.Law Partner of Marsdens Law Group Land & Environment Department. NSW Accredited Specialist Local Government & Planning Law.
2.45pm to 3.15pm	A Review of Remedies for Breaches of the EP & A Act. Mr David Baird Dip.Law. Partner of Marsdens Law Group Land & Environment Department.
3.15pm to 3.45pm	360° of Litigation Success. Mr Grant Butterfield LLM. Partner of Marsdens Law Group Commercial Litigation Department. NSW Accredited Specialist Advocacy.
3.45pm to 4.15pm	The Hon. Justice B Preston. Chief Judge Land & Environment Court.
4.15pm to 4.30pm	Closing Address by The Hon. Kerry Hickey MP. Minister for Local Government.
4.30pm	Drinks & Savouries at Conference.