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Local Government & Planning Newsletter

Adam Seton Partner – Local Government & Planning

David Baird Partner – Local Government & Planning

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.

FIRST NEWSLETTER OF THE YEAR

This is our first Newsletter for 2009. Since our last Newsletter we are pleased to have been appointed to the panel of legal service providers for City of Sydney and Hawkesbury City Council. We look forward to working with these Councils in the future.

In this Issue we have included articles and case summaries on a range of issues including the personal criminal liability of a Council employee, challenges to a Council's application to the Minister to increase its rates, as well as a challenge to findings by a Code of Conduct Committee and relevant recent legislative charges.

It continues to be our aim in producing this Newsletter to keep you abreast of topical legal issues that might be of relevance to you and we welcome any feedback that you may have

CRIMINAL SENTENCING OF A COUNCIL OFFICER

Justice Lloyd of the Land and Environment Court recently handed down his decision on sentence in the case of *Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council [2009] NSWLEC1.* It had been earlier found by Justice Lloyd that between 15 September 2003 and 19 December 2003, Port Macquarie Hastings Council through its employee, Mr Freeman, acting in his capacity as the Council's Director of Infrastructure, caused the construction of road works on land owned by the Council west of the Port Macquarie Airport and south of the Hastings River. It was common ground that the area was the habitat of a number of threatened species and in particular the Eastern Chestnut Mouse, Grass Owl and the Wallum Froglet.

The prosecution had been commenced by the Department of Environment and Conversation and the offences for which Mr Freeman was found guilty were two (2) offences under the *National Parks and Wildlife Act 1974* that he, in his capacity as a person concerned in the management of the Council, caused damage to the habitat, not being critical habitat, of a threatened species by undertaking the construction of road works knowing that the land was habitat of that kind. His Honour, after hearing all the evidence, was satisfied that the critical elements of the offence had been

committed and that Mr Freeman had knowledge that the offence was being committed. His Honour was only required to make this finding on the balance of probabilities. The judge noted *"If necessary, I would have so found beyond a reasonable doubt. In his capacity as the Acting General Manager of the Council, when a report on the ASSR Project and Plan of Management were included on the Agenda of a Council's meeting on 10 February 2003, Mr Freeman knew, before any of the road works started, that the land was habitat of the two (2) threatened species"*.

The maximum penalty for the offences was $110,000.00 or imprisonment for one (1) year.

His Honour found that the construction of the roads caused damage to the habitat of a threatened species to a significant extent. He found that the damage clearly had the potential to impact upon the species themselves. He also found that the roads had the potential to interfere with the hydrological conductivity of the area. His Honour noted though that the construction of the roads was of no material benefit to Mr Freeman, the impact of the works had since been minimised by remediation works, that Mr Freeman was now contrite with respect to his actions and that he was of previous good character.

His Honour ordered that Mr Freeman pay total fines of $57,000.00 for the two (2) offences plus the prosecutor's costs in the sum of $167,500.00.

CHALLENGES TO RATE INCREASE

In the case of *Sharples v Minister for Local Government and Tweed Shire Council [2008] NSWLEC 328*, Justice Biscoe of the Land and Environment Court was called upon to consider the potential for misleading representations to invalidate an administrative decision made by the Minister for Local Government in 2006 and 2007 to allow an increase to Tweed Shire Council's general income under section 508A of the *Local Government Act* ("LGA"). The Applicant, Mr Terry Sharples, was a ratepayer in the Tweed Shire.

Mr Sharples claimed that the Council had misled the public and that the information gained from the public was then used to mislead the Minister.

Under section 508A of the LGA, a Council can apply to the Minister for Local Government for a determination allowing it to increase its general income. Section 508A(3) provides *"the determination may be made only on the application of the Council made in accordance with any applicable guidelines issued by the Director-General under this Act".*

The applicable guidelines provide for 20 minimum requirements in relation to applications to the Minister. One of those requirements, which the Applicant relied upon, required the Council to provide evidence of community support for the proposal and how the community was consulted (e.g. use of meetings, surveys, etc). It was stated that a Council should consider conducting a public meeting to discuss the proposal and any submissions concerning the draft Management Plan.

In this case, the Council had held public meetings and it had also undertaken a survey through the local paper, the Tweed Link.

There were two (2) discrete arguments in the Applicant's case:

1. Misleading the public – both determinations of the Minister were ultra vires because under the guidelines the Council is required to demonstrate to the Minister that there was evidence of community support but in seeking to obtain such evidence, misleadingly understated to the community the effect of the proposed rate increase in the Council newspaper, Tweed Link.

2. Misleading the Minister – both determinations were invalid because in the applications to the Minister the Council misleadingly overstated the extent of community support or understated the extent of community opposition in paper and telephone surveys.

The Applicant's submission was that the representation in the special edition of Tweed Link conveyed the meaning that rates would increase at around $1.00 per week each year compared with the immediately preceding year. This failed to disclose that the amount would compound so that, although only $1.00 extra per week would be the reality in the first year, this amount was likely to reach $7.00 in a few years. This, the Applicant submitted, was misleading. Therefore it was alleged that the applications made to the Minister were invalid as the applications contained misleading survey representations, they breached the guidelines, the Minister failed to give proper consideration to whether there was community support for the proposal and therefore the Minister's determinations were manifestly unreasonable.

The Court found that the determinations by the Minister in 2006 and 2007 were not invalid, however, that the representation contained in the Tweed Link was materially misleading.

Whilst there were qualifying articles after the initial survey in the Tweed Link, the Court found that a person who did not read those qualifying articles would be likely to understand the representation as meaning that 83% of ratepayers would only pay around an extra $1.00 per week for each of the seven (7) years and that the questions were also framed in a manner that made the answers difficult to quantify.

As the 2006 and 2007 applications relied on evidence of community support that flowed from that representation, they were not in accordance with the guidelines because they did not satisfy the minimum requirement of *"evidence of community support for the proposal".*

Whilst in some circumstances misleading statements have the capacity to vitiate a decision, it was held here that it was not a legislative purpose that a guidelines discordant application should result in invalidity of the resultant determination.

The Council was only required to provide *"evidence"* of the community support, which it had done. The Minister was not required to consider whether there was community support for the proposal. The guidelines only required evidence and not the Minister's acceptance of, or finding as to, the evidence. The Applicant's assertion that the determinations were manifestly unreasonable was therefore held by the Court to be unsustainable.

GUIDANCE BUT NOT A PLANNING PRINCIPLE

In the case of *Double Bay Marina v Woollahra Council [2009] NSW LEC 1001*, Senior Commissioner Roseth of the Land and Environment Court set out what he described as a planning principle in relation to deciding the public interest in development applications. The case concerned the deemed refusal by the Council of a development application to redevelop the existing mariner at Castra Place, Double Bay. The development was both designated and integrated development under the *Fisheries Management Act* and the *Water Management Act*.

The most pertinent and contentious issue of the case was whether the renewed marina proposed by the Applicant constituted a public benefit. In paragraph 9, clause 2(2)(b) of the Sydney Harbour REP it was stated that in the assessment of any proposed change for Sydney Harbour and its foreshores, the public good has precedence over the private good. Pursuant to Section 79C(1)(a) of the *Environmental Planning and Assessment Act,* the public interest is a matter for consideration in the evaluation of all development applications.

The Senior Commissioner provided the following guidance in discerning the public interest in development applications:

"47. Consideration of the public interest may usefully be broken into 3 steps:

- *defining the public whose interest is being invoked;*
- *defining the benefit towards which a proposal claims to make a contribution (or from which it is claimed to detract); and*
- *making explicit the weight given to the public interest relative to other considerations.*

48. "The public" is an amorphous term. Like "locality", it requires redefinition in every case. At its broadest (for example when impacts that have no borders, such as pollution are considered), the public may be all people in the world. At its narrowest, the public may be the people who live or work in a locality or a business centre or use a public facility, such as a park or a beach. At mid-level, the public may be the residents of a suburb, a local government area or a city.

49. Councils often confuse the public interest with the complaints of individual objectors. In most cases, the interest of objectors is a private interest. The fact the number of objectors is large does not, by itself, render their interest public. For the interest of objectors to be equated with the public interest, the objectors must be identifiable as a section of the public as described above. The fact that their number may be small (for example the users of a park) does not deny the public nature of their interest.

50. The next step is to make explicit the benefit to which a proposal contributes or from which it detracts. Where the benefit or detriment can be quantified, this should be done; however, not all benefits lend themselves to accurate measurement. Moreover, not all benefits are universally recognised as benefits. In the case of some benefits, there is likely to be general agreement that they are *benefits. For example, everyone would agree that reducing the risk of traffic accidents is a benefit. Hospitals, nursing homes and schools, whether public or private, are usually considered a public benefit. When it comes to changing a view composed of natural elements of the landscape into one dominated*

by man-made elements, the benefit – detriment debate becomes less clear cut, though most people would prefer natural landscapes. However, when it is a question of a new building replacing an old one, opinions may split evenly on whether this is desirable or undesirable. Where there are competing and feasible claims whether a proposal contributes to or detracts from the public interest, there is no option for the decision maker but to make a subjective choice between them.

51. The final and most difficult step is the ranking of the various interests. This may require weighing one public interest against another or balancing the public interest against private interest. Although only few planning instruments contain a statement that the public interest is paramount, in planning decisions, other things being equal, the public interest overrides the private interest. However, other things are rarely equal, and where a public detriment is minor, a major private benefit may take precedence over it.

52. The hardest conundrum occurs when the decision maker must choose between competing public interests. For example, does the public benefit of a wind farm producing renewable energy justify the public detriment of covering a scenically beautiful area with turbines? In these cases, decision makers cannot avoid making value judgments, but they owe it to the readers of their judgment to make the value judgments explicit."

Recently, on the Land and Environment Court Website it was confirmed that whilst Commissioner Roseth proposed the above statement as a planning principle, it has not been adopted by the Court and will not be published as a planning principle.

NEW REQUIREMENTS OF REGISTRATION FOR COUNCILS

A new regulation has been inserted into the Companion Animals Regulation 2008, which operates from 20 February 2009 to require Councils to enter information relating to a dog attack on the Register of Companion Animals within 72 hours of receiving information about the attack.

The Companion Animals Amendment (Reporting Dog Attacks) Regulation 2009 inserts a new clause 33A, which relevantly provides:

"33A. Dog attack information on the Register

(1) Information about dog attacks may be entered on the Register, whether or not the attacking dog is a registered companion animal at the time of the attack.

(2) A Council with which an arrangement is in place under Section 74(4) of the Act must enter on the Register the following information in respect of a dog attack:

(a) the identification information of the dog if it is a registered companion animal,

(b) a description of the dog and the owner (if known) if it is not a registered companion animal,

(c) details of the person or animal attacked and the nature of any injury,

(d) details of any securing or seizing of the dog under Section 18 of the Act or any action taken to protect persons or property under Section 22 of the Act,

(e) such other information as the Director-General may direct from time to time by notice to the Council.

(3) A Council must enter the information on the Register within 72 hours after any relevant information is received by the Council.

*(4) In this clause, **dog attack** means an incident that involves or is alleged to involve a dog rushing at, attacking, biting, harassing or chasing a person or animal (other than vermin) whether or not any injury is caused to the person or animal, but not including an incident that occurs in the course of:*

(a) lawful hunting, or

(b) the working of stock by the dog or the training of the dog in the working of stock, or

(c) the working or training of a Police dog."

CODE OF CONDUCT COMMITTEES

A determination by a Code of Conduct Committee to refer a report to the Council was challenged by a Councillor in the case of *Valantine v Muswellbrook Shire Council & Ors [2008] NSW SC 1300.*

The Plaintiff initiated the Supreme Court proceedings to challenge the administrative process that brought about the Conduct Committee's findings which were unfavourable to the Plaintiff. The Plaintiff sought to challenge the alleged failure of the Conduct Committee to provide an independent investigator with all the information that would be required to produce a fair and just outcome for the Plaintiff. The Plaintiff alleged that the Committee failed to provide to the independent investigator contradictory statements made by another witness to the alleged misconduct. The Plaintiff also then challenged the independent investigator's failure to make proper enquiries.

Based upon the facts of this matter, Justice Adams of the Supreme Court made a number of key findings as to the function of Conduct Committees and independent investigators who investigate breaches of Council's Code of Conduct:

1. There is nothing within the Code of Conduct that suggests that a Council is bound by the factual determinations made by either a Committee or an independent investigator.

2. Providing the Council gives the particular Councillor a fair hearing as to whether it should rely on the outcome of the Conduct Committee procedure and what action, if any, it should take, it is not required to undertake an independent hearing of its own.

3. On the face of it, the Code of Conduct envisages that a Council will adopt the determinations made with respect to the underlying facts, but then consider for itself whether a prima facie breach of the Code found by the Code of Conduct Committee indeed constitutes a breach and, if so, what should occur.

4. The Code of Conduct Committee in this instance is not a decision maker. The Code of Conduct distinguishes fact finding from the finding of a prima facie breach of the Code.

5. The Code of Conduct is silent on the question of onus of proof, but it is obvious that no adverse decision can be made unless the fact finder is satisfied on the balance of probabilities that the complaint is true. It cannot be that the person against whom the complaint is made must establish his or her innocence.

6. The failure of a Code of Conduct Committee to pass on a full report of the investigator to the person against whom the complaint is made will not amount to a breach of the rules of natural justice, although it is good practice to do so.

7. Where a member of the Code of Conduct Committee is a witness to certain events surrounding an investigation, it is the circumstances of those events which will determine if the member will be allowed to remain on the Code of Conduct Committee.

In this case, the Court did not find that the Code of Conduct Committee had acted inappropriately, however, did make a finding that the independent investigator had not properly undertaken the investigation task and, therefore, made an order that the Committee was not to provide the investigator's report to the Council

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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.