


LOCAL GOVERNMENT, PLANNING AND ENVIRONMENTAL LAW UPDATE

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"any attempt to always find planning logic in planning instruments is generally a barren exercise". Tobias JA 2005

The Topics

- Modifying Development Consents – The recent cases
- The requirement to consider "the likely impacts" of a proposed development (Ballina Shire Council v Palm Lake Works Pty Ltd [2020] NSWLEC 41)
- Is a construction certificate required for the removal of vegetation? (2 Phillip Rise Pty Ltd v Kempsey Shire Council [2022] NSWLEC 1107)
- The hiatus in the LEP Flooding provisions
- The power (or lack thereof) to approve a development application requiring the dedication of land free of cost (L & G Management Pty Ltd v Council of the City of Sydney [2021] NSWLEC 149)

Modifying Development Consents – The recent cases

Section 4.55(2) of the EP&A Act:

(2) ….. A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

> (a) it is satisfied that the development to which the consent as modified relates **is substantially the same development** as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and

Arrage v Inner West Council [2019] NSWLEC 85

The "substantially the same development" test was considered by Justice Preston who confirmed:

- the consent authority must form the **positive opinion of satisfaction** that the modified development is substantially the same development as the originally approved development
- one of the ways that may be utilised to identify whether the modified development is substantially the same development as the originally approved development is to **identify the material and essential features of the originally approved and modified developments** and to compare those features.

- the essential elements are not to be identified “from the circumstances of the grant of the development consent”; they are to be derived from the originally approved and the modified developments. **It is the features or components of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development.**
- another way that may be utilised to identify whether the modified development is substantially the same development as the originally approved development is to **compare the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development**.

Section 4.55(3) of the EP&A Act provides :

> "(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. **The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified**."

The second sentence was inserted on 1 March 2018 at the same time as the insertion of new Pt 1 of Sch 1 into the EPA Act, which included cl 20:

20 Public notification of certain decisions and reasons for the decisions

(1) This clause applies to the following decisions:

...

(c) the determination by a consent authority of an application for development consent,

...

(2) The mandatory notification requirement in relation to a decision to which this clause applies is public notification of:

(a) the decision, and

(b) the date of the decision, and

(c) the reasons for the decision (having regard to any statutory requirements applying to the decision), and

(d) how community views were taken into account in making the decision.

Feldkirchen Pty Ltd v Development Implementation Pty Ltd and Anor [2021] NSWLEC 116

Justice Robson confirmed:

- that the use of the definitive "the" as well as the past participle "given" in the second sentence of s 4.55(3) of the EPA Act restricts the consent authority's obligation to consider reasons **to those objectively identifiable reasons that are specifically produced by the consent authority when granting the original consent**.
- s 4.55(3) requires consideration of the reasons given for the grant of development consent by the consent authority, rather than the background circumstances in which the development consent was granted.
- the requirement for the reasons for a decision to be publicly notified is applicable, notwithstanding the existence and content of a community participation plan.

- the requirement to consider objectively identifiable reasons that are specifically produced by the consent authority when granting the development consent could be fulfilled through consideration of multiple documents that contain the objectively identifiable reasons.

- reasons for the imposition of conditions in a notice of determination can be distinguished from the reasons given for the grant of the Consent and are directed at elucidating the motive for imposing discrete conditions rather than with the Consent as a whole.

Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177

Condition 30 of the development consent required the payment of a monetary contribution. Buyozo paid the full amount of the contribution to the Council (the Council). After Buyozo had completed construction of the building and commenced use of the building, Buyozo applied to the Council to modify the development consent by amending condition 30 to reduce the amount of contribution. Justice Preston found:

- There was no power to modify the development consent to amend condition 30 in circumstances where the contribution had already been paid. A condition of consent imposed either on the grant of development consent or the modification of the development consent has the essential characteristic of requiring the doing or refraining from doing something in the future. A condition of consent can never be imposed so as to require the doing of something retrospectively but rather only to do something prospectively: at [43]-[45]; and

- A modification under s 4.55(2) or s 4.56(1) of the EPA Act must effect some change to the development. Substituting a lesser amount for a greater amount of the monetary contribution could not effect any change to the development. In this circumstance, the preconditions to the exercise of the power could have no application and neither s 4.55(2) or s 4.56(1) were available sources of power to modify the development consent.
- The Court has no power to order a refund of contributions paid:

  "…this Court held in Frevcourt Pty Ltd v Wingecarribee Shire Council (2005) 139 LGERA 140; [2005] NSWCA 107 at [103]- [106] that there is no power to refund contributions paid. Since that decision, the provisions of the EPA Act dealing with the payment of monetary contributions have been amended but in a way that reinforces the conclusion that there is no right to a refund of contributions paid under a condition of consent, see, for example, s 7.3(1) and (2) of the EPA Act. The Contributions Plan in this case also stated that "no refunds will be provided". (see also Pepper J in **Anglican Church Property Trust Diocese of Sydney v Camden Council** [2021] NSWLEC 118)

Intrapac Skennars Head Pty Ltd v Ballina Shire Council [2021] NSWLEC 83

Appeal concerned a deemed refusal of a modification application in seeking that the contributions payable pursuant to a condition imposed under section 7.11(1) of the EP&A Act be reduced. Preston CJ confirmed:

- The modification of a development consent is taken not to be the granting of a development consent: s 4.55(4) and s 4.56(1C) of the EPA Act.
- Statutory provisions regulating the exercise of the power to grant development consent or the carrying out of development in accordance with a development consent have no operation or effect on the exercise of the power to modify a development consent: (see North Sydney Council v Michael Standley & Associates Pty Ltd at 481; Willoughby City Council v Dasco Design and Construction Pty Ltd at [96]-[99].)

- s 7.13(3) of the EP&A Act, which allows the Court on appeal to disallow or amend a condition under s 7.11 because it is unreasonable in the particular circumstances of the case, does not operate as a constraint on the power to modify a development consent.

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2021] NSWCA 112 and Duke Developments Australia 4 Pty Limited v Sutherland Shire Council [2021] NSWLEC 69

- held that there was no express or implied power in the EP&A Act or the EPA Regulation for a consent authority (or the Court on appeal) to amend a an application to modify a development consent.
- To address this anomaly, the Environmental Planning and Assessment Amendment (Modifications) Regulation 2021 inserted a specific provision (cl 121B) into the EP&A Regulation on 14 July 2021 to allow an applicant to apply to the consent authority to amend a modification application.

Scarf v Shoalhaven City Council [2021] NSWLEC 128

- Justice Pain held that in the absence of power in the enabling Act [regulations] cannot be made with retrospective effect.
- The new power to amend a modification application did not have retrospective effect and could not be used by the Court to amend a modification application that had been determined by the Council prior to 14 July 2021.

“the likely impacts” of a proposed development

Ballina Shire Council v Palm Lake Works Pty Ltd [2020] NSWLEC 41

- Section 4.15(1)(b) of the EP&A Act requires the consideration of "the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality".
- In the Ballina case Preston CJ considered that "the likely impacts of a proposed development, the subject of a development application, can include likely impacts of activities other than the proposed development". He said:

  "... the fact that works, which are likely to impact on the environment, are not the subject of the development application is not dispositive of the question of whether the likely impacts of the works need to be considered in the determination of the development application. The likely impacts of the works can be considered to be likely impacts of the development the subject of the development application where there is ***a real and sufficient connection between the works and their impacts and the proposed development.***"

- The phrase “the likely impacts of that development” embraces not only site specific impacts, being impacts of the proposed development on the development site, but also off-site impacts. Off-site impacts can be caused not only by the proposed development impacting adjoining or other land in an area of influence but also by some other development provided that the impacts of that other development have “a real and sufficient link” with the proposed development, such as where the impacts are caused by “some further undertaking that is ‘inextricably involved’ with the proposed development”
- **‘Likely’** in this context has the meaning of **a ‘real chance or possibility’ rather than more probable than not…”**
- Increasing remoteness in the chain of likely consequences will decrease the significance of an impact.
- As remoteness from the development increases, impact is likely to decrease, until it no longer has practical significance in terms of approving or refusing to approve the application.

- The power in s 4.16(3) of the EPA Act to grant consent to a development application subject to a deferred commencement condition does not relieve a consent authority from the obligation to take into consideration all matters of relevance to the development the subject of the development application under s 4.15(1) of the EP&A Act: (see Cameron v Nambucca Shire Council (1997) 95 LGERA 268 at 275-276; Weal v Bathurst City Council [2000] NSWCA 88; (2000) 111 LGERA 181 at 201 [93]- [94].)

Clause 28(1) of the Seniors SEPP:

> *"(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that the housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage."*

- The Commissioner imposed a deferred commencement condition requiring an application for and grant of approval of the water and sewer services prior to the consent operating and the seniors housing development being carried out.

Justice Preston said the Commissioner had erred because:

- the Commissioner could not be satisfied that, by imposing the deferred commencement condition, the seniors housing development "will" be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage. Those outcomes might occur, if approval is granted for the works, but it cannot be concluded that those outcomes "will" occur.
- the Commissioner's satisfaction needed to be based on "written evidence" available to the Commissioner before she exercised the power to grant consent to the development application. The deferred commencement condition that she imposed on the consent came into existence upon, and not before, the grant of consent to the development application. Clause 28(1) required the Commissioner to be satisfied, by written evidence, **before** granting consent to the development application for that development.

Is a construction certificate required for the removal of vegetation?

2 Phillip Rise Pty Ltd v Kempsey Shire Council [2022] NSWLEC 1107

- Application for a construction certificate to undertake site clearing works on land at South West Rocks involving clearing of existing trees and vegetation; stripping of topsoil; erection of temporary tree protection barriers and erosion control works.
- The works related to a development consent for a resort complex.
- A construction certificate is required for the **erection of a building** in accordance with a development consent: EP&A Act, s 6.7(1) and person **must not carry out building work** without a construction certificate: EPA Act, s 6.3(1).
- A construction certificate is a certificate to the effect that "building work" completed in accordance with specified plans and specifications or standards will comply with the requirements of the regulations: EPA Act, s 6.4(a).

- "Building work" means any physical activity involved in the erection of a building: EP&A Act, s 6.1.
- In **Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd** (2018) 98 NSWLR 439; [2018] NSWCA 240 ('Hakea') the construction of a road was held not to be the erection of a building and not to require a construction certificate. Basten JA said:

  *"one does not ordinarily speak of **erecting a road** or occupying a road except, in the latter case, perhaps, by protestors. On the other hand, one can envisage many structures which are erected which may not be described as a building in ordinary usage. Television towers and radio masts may be examples. A structure which is never described as having been "erected" does not fall within the concept of a building, even on an expansive view of that term. Importantly, …the Act demonstrates no intention to give "building" so expansive a denotation as to encompass all kinds of structures. The fact that something may stand above the natural level of the land … suggests that such a characteristic is not sufficient to make the thing a structure."*

- Removal of vegetation, stormwater drainage works and soil erosion control works are, like the road in Hakea, not things that in ordinary language would be described either as "buildings" or as being "erected" and therefore they do not involve the erection of a building and do not require a construction certificate under s 6.7(1) of the EPA Act.
- However, the definition of "building work" in s 6.1 of the EPA Act extends beyond the erection of a building and includes *"any physical activity involved in the erection of a building".*
- The removal of vegetation, the stormwater drainage works and soil erosion control works were physical activities involved in the erection of the buildings that were the subject of the Development Consent because the buildings could not be erected unless the site was cleared of vegetation, and the necessary drainage and soil erosion controls were put in place.
- Accordingly, they constitute building work for the purposes of s 6.3(1) of the EPA Act and could not be carried out without a construction certificate.

The hiatus in the LEP Flooding provisions

- State Environmental Planning Policy Amendment (Flood Planning) 2021 (Flood Planning SEPP) commenced on 14 July 2021 and had the effect of repealing the then existing flood planning provisions in Council LEP's which generally provided as follows:

6.3 Flood planning

(1) The objectives of this clause are as follows—

(a) to minimise the flood risk to life and property associated with the use of land,

(b) to allow development on land that is compatible with the land's flood hazard, taking into account projected changes as a result of climate change,

(c) to avoid significant adverse impacts on flood behaviour and the environment.

(2) This clause applies to land at or below the flood planning level.

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development—

(a) is compatible with the flood hazard of the land, and

(b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and

(c) incorporates appropriate measures to manage risk to life from flood, and

(d) will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and

(e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.

(4) A word or expression used in this clause has the same meaning as it has in the *Floodplain Development Manual (*ISBN 0 7347 5476 0*)* published by the NSW Government in April 2005, unless it is otherwise defined in this clause.

(5) In this clause, ***flood planning level*** means the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metre freeboard.

- Whilst the heading to Flood Planning SEPP schedule that repealed the various provisions was "***Amendments consequent on the Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021"*** the SEPP did not contain any specific savings provision that required to the repealed provisions to continue to apply to DA's that had been made prior to the commencement of the repeal. But had not been finally determined.
- On the same day that the Flood Planning SEPP came into force the Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021 (Standard Instrument Order 2021) amended the standard instrument and inserted a new cl 5.21 Flood Planning as a compulsory item for every standard instrument LEP as follows:

5.21 Flood planning [compulsory]

(1) The objectives of this clause are as follows—

(a) to minimise the flood risk to life and property associated with the use of land,

(b) to allow development on land that is compatible with the flood function and behaviour on the land, taking into account projected changes as a result of climate change,

(c) to avoid adverse or cumulative impacts on flood behaviour and the environment,

(d) to enable the safe occupation and efficient evacuation of people in the event of a flood.

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

(a) is compatible with the flood function and behaviour on the land, and

(b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and

(c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and

(d) incorporates appropriate measures to manage risk to life in the event of a flood, and

(e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

(a) the impact of the development on projected changes to flood behaviour as a result of climate change,

(b) the intended design and scale of buildings resulting from the development,

(c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,

(d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

(4) A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.

(5) In this clause—

Considering Flooding in Land Use Planning Guideline means the *Considering Flooding in Land Use Planning Guideline* published on the Department's website on 14 July 2021.

flood planning area has the same meaning as it has in the Floodplain Development Manual.

Floodplain Development Manual means the *Floodplain Development Manual* (ISBN 0 7347 5476 0) published by the NSW Government in April 2005.

- The Standard Instrument (Local Environmental Plans) Order 2006 contains an internal savings provision in clause 8(1) that says:

  "(1) The amendments made by an amending order do not apply to or in respect of any development application that was made, but not determined, before the commencement of the amending order."

- The issue that arises is that repealed flood provisions in LEP's do not continue to apply to DA's lodged before 14 July 2021 and the new clause 5.21 provision does not apply to those applications because of the operation of the savings provision in clause 8(1).

- However, the hiatus does not mean that flood risk and impacts are irrelevant in determining those applications because:

  (a) flood provisons in applicable DCP's are not set aside by the repeal of the LEP flood provisions; and

- (b) section 4.15(1) of the EP&A Act requires consideration to be given to specified matters where they are of relevance to a development application which include in sub-clause 4.15(1)(b) and (c)

  (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

  (c) the suitability of the site for the development,

- As stated by Justice Mason (President of the NSW Court of Appeal) in Terrace Tower Holdings Pty Limited v Sutherland Shire Council [2003] NSWCA 289 in respect of the former section 79C(1) (now section 4.15(1)) of the EP&A Act (at paragraph 56):

  "Section 79C(1) does not stipulate or imply a hierarchy among its various paragraphs or among the subparagraphs of (a)."

- In other words, there is nothing in section 4.15(1) of the EP&A Act that requires the provisions of an applicable environmental planning instrument (such as a local environmental plan) or a development control plan as referred to in subclause 4.15(1)(a) to be given more or less consideration or weight in the determination of a development application than the likely impacts of the development on the built environment as referred to in subclause 4.15(1)(b) or the suitability of the site on s4.15(1)(c).

In **Carstens v Pittwater Council [1999] NSWLEC 249** Justice Lloyd held (at [25]):

> *"[25] …the matters for consideration listed in s 79C(1) are not the only matters to which a consent authority may have regard. The listed matters are those which a consent authority* ***must*** *consider.* ***The consent authority may also take into consideration other matters not included in those which are listed. Those other matters include, in the public interest, any matter which relates to the objects of the Act set out in s 5. This does not mean that the decision-maker may take anything into consideration. The relevant considerations are confined so far as the subject matter, scope and purpose of the Act and any environmental planning instruments allow."***

The power (or lack thereof) to approve a development application requiring the dedication of land free of cost

L & G Management Pty Ltd v Council of the City of Sydney [2021] NSWLEC 149

- DA for construction of a five-storey building for commercial and retail uses, subdivision and dedication of a 2.4m strip of land at Botany Road, Waterloo
- The issue in the case was whether there was power to approve the development application with the proposed dedication of the strip of land in the absence of Contributions Plan authorising the dedication free of cost or an offer to enter into a VPA.

Justice Duggan confirmed:

- The only power to impose a condition requiring dedication of land free of cost is that available under ss 7.11 or by a VPA offer under s7.4;
- Merely because an applicant formulates a development application that exceeds the power of approval if a condition was imposed is not overcome by an approval to the development application absent a condition. The grant of the approval can only be made if the development it contains is development capable of being approved;
- In the EP&A Act development that included the dedication of land free of cost can only be approved if the dedication is authorised by a provision of the EP&A Act (either by VPA offer under section 7.4 or being authorised under section 7.11 and a contributions plan where the consent authority is the Council).