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LAND AND ENVIRONMENT COURT

(22-027) Scentre Group Limited v The Council of the City of Sydney [2022] NSWLEC 1101

O'Neill C – 28 February 2022

Keywords: development application altering awning on local heritage item – impact of the development on the heritage significance of the heritage item

The Applicant brought an appeal pursuant to s. 8.7(1) of the ***EPA Act*** against the deemed refusal by the Council of the City of Sydney (the **Council**) of a development application for alterations and additions to the existing awning at the former David Jones Market Street store in the Sydney CBD (**DA**).

The development proposed in the DA comprised: a) inversion of the existing awning 'step' on the Castlereagh Street frontage and relocation of the awning 'step' on Market Street frontage eastwards towards the corner intersection; b) interpretation of the existing awning location through a recessed band of re-used and matching new travertine within the previous awning location; and c) repair and reinstatement and matching new awning soffits and fascia.

The Council contended that the proposal would have unacceptable heritage impact on a locally listed heritage item, did not exhibit design excellence as required by cl. 6.21(3) of the ***Sydney Local Environmental Plan 2012***, and was inconsistent with the footpath awning objectives and provisions contained in s. 3.2.4 of the ***Sydney Development Control Plan 2012***.

HELD:

1. In relation to the impact of the proposal on the amenity of the building, the predicted change in the penetration of wind driven rain under the awning as a result of the raising of the awning was negligible and not determinative. Whether the awning was reinstated to match the original position, or it was raised as proposed, the awning would satisfy the objective for footpath awnings to enhance pedestrian amenity and provide weather protection.

2. In relation to the heritage and urban design features of the proposal, while the proposal eroded the very horizontal, functionalist style of the awning, it was consistent with the changed brief and suite of major changes to the original building. It retained the style and materiality of the original awning and it left the relationship between the awning and the original entries on Castlereagh Street and Market Street unchanged. Therefore, the proposal would have an acceptable impact on the identified heritage significance of the building and was restrained and responsive to the changes to the principal elevations of the existing building.

Appeal upheld. The DA was approved subject to conditions of consent.

Reporter: Amelia Cook

(22-028) 2 Phillip Rise Pty Ltd v Kempsey Shire Council [2022] NSWLEC 1107

Bradbury AC – 01 March 2022

Keywords: Appeal – construction certificate – jurisdictional prerequisites – whether development consent has lapsed

On 1 November 2021, 2 Phillip Rise Pty Ltd (Applicant) made an application to Kempsey Shire Council (Council) for a construction certificate to undertake site clearing works on the land described as Lot 2 DP 1091323 known as 1 Phillip Drive, South West Rocks (Land) pursuant to development consent granted by Council on 24 February 1993 (Consent) (Application). The Applicant appealed Council's deemed refusal of its Application.

The principal contested issue in the proceedings was whether the engineering works previously carried out on the Land were sufficient to physically commence the Consent to prevent its lapsing. The Court also considered as a jurisdictional pre-condition whether the proposed site clearing works were capable of constituting building works.

HELD:

1. The Court can determine whether the Consent is in force and has not lapsed as a jurisdictional pre-requisite to the determination of the Application.

2. Statutory conditions must be satisfied before an application for a construction certificate can be determined by approval.

3. The proposed clearing works were preparatory to the construction of a building and therefore were physical activities involved in the erection of a building required to be authorised by a construction certificate.

4. The Court was required to dismiss the appeal because the engineering works relied on by the Applicant to prevent the Consent from lapsing did not have the requisite nexus with the development authorised by the Consent and therefore the Consent had lapsed.

Appeal dismissed. The construction certificate refused.

Reporter: Charlene Cai (Chujing Cai)

(22-029) The Next Generation Pty Ltd v Independent Planning Commission and Ors [2022] NSWLEC 16

Robson J – 2 March 2022

Keywords: Development application refused – application to amend development application – whether consent authority's function to agree to an amendment exhausted – leave to amend allowed

The Independent Planning Commission refused The Next Generation Pty Ltd's (**Applicant**) development application for a proposed energy-from-waste facility. The Applicant commenced a Class 1 appeal and subsequently filed a notice of motion seeking leave to amend its development application. The IPC consented to the amendment being made, however, as the IPC had determined the development application by way of refusal, it submitted that whether leave for the amendment should be given was a matter for the Court as it no longer had power to agree to the amendment under cl 55 of the ***Environment Planning and Assessment Regulation 2000*** **(EPA 2000 Regulation)**. The other parties (Blacktown City Council and Jacfin Pty Ltd) both opposed the motion to amend but agreed that the IPC as to its lack of power to agree to the proposed amendment. This gave rise to a question of statutory interpretation. In particular, the Applicant argued that because the appeal was still pending, the IPC retained its power to agree to the amendments in its role as 'consent authority' for the purposes of cl 55 of the EPA 2000 Regulation. Ultimately, this turned on whether the functions of the IPC were instead vested in the Court given that the development application had actually been determined by way of refusal, and appeal proceedings had been commenced.

HELD:

1. The IPC's actual refusal of the development application did not exhaust its power to agree to amendments under cl 55 of the EPA 2000 Regulation during appeal.

2. For the purpose of cl 55 of the EPA 2000 Regulation, the development application was not to be considered 'determined' until the appeal had been decided by the Court. As such, the IPC maintained its functions as 'consent authority' whilst the appeal was pending.

3. The functions of a consent authority will only vest in the Court, for the purpose of cl 55 of the EPA 2000 Regulation, if it does not agree to a proposed amendment.

Leave granted to the Applicant.

Reporter: James Donaldson

(22-030) AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2022] NSWLEC 1089

Dixon SC – 11 March 2022

Keywords: Modification application – whether the Court has power to dispose of proceedings – where proposed conditions in s 34 agreement not specifically within the scope of modification application

The Applicant is the proponent of the Dartbrook coal mine in the Upper Hunter Valley. In August 2001, the Applicant was granted approval under Part 3A of the ***EPA Act*** for the purpose of an underground coal mine. The approval authorised longwall mining until 5 December 2022.
In February 2018, the Applicant lodged a request to modify the approval with the Respondent pursuant to the now repealed section 75W of the EPA Act to extend the operation of the approval for an additional 5 years until 5 December 2027. The Respondent delegated its power to the Independent Planning Commission (**IPC**), which partially approved the modification but refused the 5-year extension.

The Applicant commenced class 1 proceedings appealing the IPC's decision. The parties attended a s 34 conciliation conference, where an in-principle agreement was reached, and the parties subsequently filed an executed s 34 agreement.

Before final orders were made, the Hunter Thoroughbred Breeders Association Inc (**HTBA**) was permitted by the Court to make submissions on the Court's power to give effect to the agreement reached between the parties.

HTBA submitted that certain proposed conditions in an annexure to the s 34 agreement were beyond power because they were not subject to the "request" for the modification. HTBA also argued that the relevant conditions significantly altered the modification application and did not fairly or reasonably relate to the development for which approval was being given.

The Applicant and Respondent submitted that HTBA's interpretation was "practically unworkable", as it would mean the power to condition a modification request would be limited to the scope of the request made by the Applicant which was a restrictively narrow interpretation.

HELD:

1. The definition of "modification of approval" in s 75W(1) is "wide and inclusive", and enables a consent authority to change both the conditions of an approval, as well as the terms of an approval.
2. The Court agreed with the Applicant's and Respondent's submissions, namely that conditions imposed on a modification application are not limited to the terms of the application. To do so would limit the consent authority's power in a way that was inconsistent with the statutory scheme in former Part 3A of the EPA Act and the need to manage environmental impacts of a development.
3. Accordingly, the Court had power to impose the disputed conditions and was obliged to dispose of the matter pursuant to s 34(3)(a) of the LEC Act.

Appeal upheld.

Reporter: Brigitte Rheinberger

(22-031) Transport for New South Wales v Estuary Constructions Pty Ltd; Transport for New South Wales v Sampson [2022] NSWLEC 23 (and (No 2) [2022] NSWLEC 52)

Duggan J – 23 March 2022

Keywords – Environmental pollution offence – failure to prevent incident – control, extent and cause of harm – sentencing

The Defendant company and sole director operate in the marine sector in a number of waterways. The Defendants pleaded guilty, and were sentenced, for four offences which related to the sinking of a barge at a commercial mooring facility at Pittwater.

Three years prior to the offences, the Defendants were issued with a prohibition notice. This notified the Defendants that the barge presented a risk to persons and the environment and required repairs to be undertaken. The Defendants did not comply with the prohibition notice.

Eighteen months later the Defendants were issued with a prevention notice, which required the barge to be removed from the water. This notice identified that no preventative action or repairs had been undertaken since the prohibition notice was issued. The Defendants did not comply with the prevention notice.

In early 2019, the barge sank 15m below the surface, and debris, leaking oils and fuel dispersed into the surrounding waters. The solid debris was measurable, but the liquid substances that entered the water were unable to be measured.

The Defendants were issued with a clean-up notice immediately following the incident. The Defendants denied responsibility for the incident and did not take any steps to comply with the clean-up notice, other than to remove some floating debris from the surface water. The Prosecutor subsequently arranged, and paid for, the salvage of the barge and the clean-up of remaining debris.

During the Prosecutor's investigation, the Defendant company refused to comply with a notice to provide information and records. The Defendants did not assist the prosecution in the investigation at any point and did not show any contrition or remorse.

The Defendants' evidence primarily comprised financial information in an attempt to demonstrate financial incapacity for compliance with the notices, and to pay fines. The Defendants presented incomplete financial records, which rendered it impossible for the Court to assess the Defendants' financial capacity. The Defendants could not make good their submission that the notices were not complied with due to financial limitations.

The Court considered the mitigating factors, which were limited to an early guilty plea and a lack of criminal history.

HELD:

1. The submersion of the barge caused environmental harm by directly and indirectly altering and degrading the environment although this was not widespread or permanent.

2. There was a direct and causal link between the Defendants' failure to comply with the prohibition notice, prevention notice, and clean-up notice and the environmental harm caused.

3. The Defendants did not undertake the works necessary to comply with the prevention and clean-up notices so as to avoid the incurring of costs which enabled the Defendants to retain a financial advantage of retaining assets without incurring debt or liability for the payment of the removal of the barge or its repair.

4. The extent of the environmental harm was mitigated by the actions of the Prosecutor. The Defendants took no steps to limit the potential environmental harm. The Defendants are to pay the abatement and investigation costs of the Prosecutor.

5. The incident and harm were foreseeable, and the risk brought to the attention of the Defendants some 3 years prior to the incident.

6. The Defendants had control over the incident.

7. The pollution, clean-up notice and prevention notice offences were in the mid-range of seriousness.

8. The failure to comply with the notice to produce information or records was in the low range of objective seriousness.

9. Specific deterrence was warranted.

10. A monetary fine was imposed on both Defendants in relation to each offence.

11. A publication order was made (and subsequently modified pursuant to a slip rule application, as the specific manner (including sizing details) of the publication could not be achieved as ordered).

The Defendant company and individual were fined a combined $559,000, and ordered to pay the Prosecutor's legal, investigation, and abatement costs.

Reporter: Serafina Carrington

(22-032) Tamvakeras v Inner West Council [2022] NSWLEC 1140

Peatman AC – 24 March 2022

Keywords – Savings provisions – application of affordable housing SEPPs – appropriate weight – determination of development application

The Applicant sought development consent for the demolition of existing structures and construction of a boarding house with basement parking.

At the conciliation conference in the proceedings, the parties agreed on the resolution of the application with the exception of one condition of consent proposed by the Respondent. The conciliation conference was terminated and the parties requested that the proceedings be disposed of by way of a hearing pursuant to s34(4)(b) of the ***Land and Environment Court Act 1979*** **(LEC Act)**.

At the commencement of the hearing, the Applicant made an application that the hearing be terminated and that the matter be dealt with by way of conciliation conference pursuant to section 34(3) of the LEC Act. The Court determined that as the hearing had commenced the Court was required to dispose of the proceedings by way of a hearing under section 34(4)(b).

Given the timing of the development application, the primary issue in the proceedings was whether the ***State Environmental Planning Policy (Housing) 2021*** **(Housing SEPP)** or the ***State Environmental Planning Policy – Affordable Rental Housing 2009*** **(SEPP ARH)** applied, or whether both policies applied concurrently.

The parties jointly submitted that the Housing SEPP and SEPP ARH operate concurrently, as the wording of the savings provision does not explicitly stay the provisions of the Housing SEPP as applied by Commissioner Horton in ***Emag Apartments Pty Limited v Inner West Council*** **[2022] NSWLEC 1042**.

In considering whether the SEPP ARH and the Housing SEPP applied concurrently the Court considered the different provisions that applied to boarding houses under the SEPP ARH and co-living under the Housing SEPP.

HELD:

1. Where an order has been made at the request of the parties that the Commissioner dispose of the proceedings by way of hearing pursuant to s34(4)(b) of the LEC Act, the Court must proceed in this manner and cannot dispose of the proceedings by way of an agreement under s 34(3) of the LEC Act

2. It is not clear that both the SEPP ARH and Housing SEPP apply concurrently, particularly due to competing provisions, as one must prevail.

3. Given the timing of the application, the SEPP ARH applied, and is to be provided more weight in the event of inconsistency with the Housing SEPP. The Housing SEPP was only required to be considered as if it were a draft instrument that was certain and imminent.

4. The proposed development was capable of approval, compatible with the character of the local area, and the removal of trees was satisfactory.

5. The Council's contentions were satisfactorily addressed subject to conditions of consent.

Appeal upheld and development consent granted.

Reporter: Serafina Carrington

(22-033) Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Environment Protection Authority (No 9) [2022] NSWLEC 29

Pepper J – 25 March 2022

Keywords: Civil enforcement proceedings – cross-claim in respect of earlier consent orders of Court – jurisdiction of Court to make consent orders – construction of prior development consent – validity of Court-ordered works as prior approved works - declaratory relief granted

These civil enforcement proceedings were brought by Verde Terra Pty Ltd (**Verde Terra**) against Central Coast Council seeking a declaration that an existing golf course and waste facility on land at Mangrove Mountain (**Development**) constituted "development" (whether existing or approved) within the meaning of Sch 3, cl 35 of the ***Environmental Planning and Assessment Regulation 2000*** **(EPA 2000 Regulation)**.

The Development was carried out on the land purportedly in accordance with development consent granted in 1998 (**1998 Consent**). An environment protection licence granted in respect of the land permitted the ongoing operation of the Development (**EPL**).

Council brought a cross-claim against Verde Terra seeking to set aside consent orders made by the Land and Environment Court in earlier Class 4 civil enforcement proceedings heard in 2014 (**Consent Orders**) which had the purported effect of approving the Development and permitting further works to be carried out on the land without further development consent first being obtained from Council.

Council also brought civil enforcement proceedings against the NSW Environment Protection Authority that prior variations to the EPL made between 2009 and 2011 were invalid insofar as they related to the works approved pursuant to the Consent Orders and purportedly permitted 'controlled development' pursuant to s 50(2) of the ***Protection of the Environment Operations Act 1997*** **(POEO Act)** absent any development consent.

HELD:

1. In respect of Verde Terra's proceedings against Council, the use of the land for the purposes of a

waste facility (at the scale being operated on the land) fell outside of the scope of the 1998 Consent, and accordingly the Consent Orders authorised works which went beyond what the 1998 Consent approved. However, the Consent Orders were validly made to correct a breach of the ***Environmental Planning and Assessment Act 1979***.

2. The Consent Orders were within the power of the Court to have made.

3. Council was estopped from seeking to set aside the Consent Orders as doing so would have caused significant prejudice to Verde Terra.

4. Clause 35 of Schedule 3 of the EPA 2000 Regulation applied to the Development as approved by the 1998 Consent, and not to the subsequent works carried out in accordance with the later Consent Orders. No further development consent was required for Verde Terra to carry out the works set out in the Consent Orders, given that those orders were validly made.

5. In respect of Council's proceedings against the EPA, the proceedings were brought within time due to Rule 59.10 of the ***Uniform Civil Procedure Rules 2005*** not having retrospective effect.

6. The variations to the EPL were held to be invalid because Verde Terra had applied to vary the EPL rather than the EPA electing to vary the EPL on its own initiative. The power in s 50(2) of the POEO Act was thus not enlivened, and the invalid conditions imposed by the impugned variations were severed from the remainder of the EPL.

Verde Terra was granted the declaratory relief it sought. Council's proceedings against the EPA were dismissed with costs reserved.

Reporter: Peter Clarke

(22-034) Brasson Investments Pty Ltd v Lane Cove Municipal Council [2022] NSWLEC 51

Robson J – 11 April 2022

Keywords: Separate determination of question – where appropriate

In Class 1 proceedings seeking approval for the construction of a dual occupancy (attached) residential development and strata subdivision, the applicant filed a notice of motion for the separate determination of the following questions:

1. Whether the proposed development is prohibited pursuant to clause 4.1A of the Lane Cove LEP 2009; and

2. Whether clause 4.1(4A) of the Lane Cove LEP 2009 applies to the proposed development.

The respondent opposed the application.

HELD:

1. It is ordinarily appropriate that all issues in proceedings be disposed of at one time and, in particular, there is an expectation that all issues in proceedings governed by s 34AA of the LEC Act will be dealt with at the same time.

2. The exercise of discretion to make an order for the determination of a separate question should be approached with an appropriate degree of care and caution so as not to cause delay, extra expense, appeals and uncertainty they were intended to avoid.

3. An order for separate question is likely to be appropriate where it can be clearly seen that it will facilitate the just, quick and cheap resolution of the real issues in the proceedings to give effect to s 56 of the *Civil Procedure Act* 2005.

4. The affidavit material relied upon was not sufficient to convince the Court that there was a sufficient or material saving in terms of time and cost if the matter proceeded to a separate question.

Notice of motion dismissed.

Reporter: Ashleigh Egan

(22-035) Friends of Gardiner Park Inc v Bayside Council (No 2) [2022] NSWLEC 61

Preston CJ – 18 May 2022

Keywords: costs in public interest litigation – whether unreasonable conduct of litigation – interlocutory application extended unreasonably – no order as to costs except for part of the interlocutory hearing

Friends of Gardiner Park Inc (FOGP) was unsuccessful in proceedings to judicially review the decision of Bayside Council (the Council) to upgrade the sports fields in Gardiner Park (see *Friends of Gardiner Park Inc v Bayside Council* [2022] NSWLEC 22). The Council sought an order that FOGP pay its costs of the proceedings or, in the alternative, that FOGP pay the Council's costs of the unsuccessful application for an interlocutory injunction to restrain the carrying out of the upgrade works (see *Friends of Gardiner Park Inc v Bayside Council* [2020] NSWLEC 176) (the interlocutory application). FOGP submitted that the Court should exercise its discretion under Rule 4.2(1) of the *Land and Environment Court Rules 2007* not to make an order for the payment of costs in relation to the proceedings or the interlocutory application because the proceedings were brought in the public interest.

HELD:

1. The proceedings were brought in the public interest and rule 4.2(1) of the *LEC Rules* was engaged. The Court was guided in this decision by the considerations identified in *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365 and the factors identified in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280.

2. There was disentitling conduct of FOGP in the unreasonable manner in which the interlocutory application was conducted, which caused the interlocutory hearing to be extended from one day to three days. The Council should be compensated for this increased length (and hence cost) of the interlocutory hearing by FOGP paying its costs of the second and third days of that hearing. FOGP did not otherwise act unreasonably in bringing the interlocutory application.

FOGP to pay the Council's costs of the interlocutory hearing on 9 and 10 December 2020 as agreed or assessed.

Reporter: Amelia Cook

(22-036) Hodgson v The Hills Shire Council [2022] NSWLEC 73

Duggan J – 17 June 2022

Keywords: s 56A appeal – amendment to summons – no error of law by Commissioner - leave not granted

This interlocutory decision concerned a Notice of Motion filed by the Appellant in an appeal pursuant to s 56A of the ***Land and Environment Court Act 1979*** **(Appeal)** against the decision of Clay AC in ***Hodgson v The Hills Shire Council*** **[2021] NSWLEC 1444 (Primary Proceedings)** to refuse a development application for the change of use and upgrade of a shed in a rural area due to unacceptable bushfire risks (**DA**).

The Appellant raised 15 grounds in the Summons commencing the Appeal prior to obtaining legal representation. Upon taking legal advice in respect of the Appeal, the Appellant filed the Notice of Motion seeking substantial amendments to the Summons.

The proposed amendments to the Summons concerned alleged errors in law that were made by Clay AC by not referring the DA to the NSW Rural Fire Service (**RFS**) to determine an alternative solution to ameliorate the bushfire risks, and in construing the subject development as not meeting the definition of 'infill development' pursuant to that defined term in the current version of the RFS "Planning for Bushfire Protection" guidelines (**PBP**). Neither of these matters were put before Clay AC during the Primary Proceedings.

HELD:

1. There was no utility in granting leave to amend a Summons to raise new grounds that do not disclose an error of law other than imposing an inappropriate costs burden on the Respondent.

2. When considering to grant leave to amend a Summons it is appropriate for the Court to consider the utility of each proposed amendment in the

same context as if each ground of appeal were the subject of a strike-out application, and to therefore consider whether each new ground of appeal would have reasonable prospects of success by application of the test in ***General Steel Industries Inc v Commissioner for Railways (NSW)*** **(1964) 112 CLR 125**.

3. There was no mandatory obligation on Clay AC (or, on referral, the RFS) to develop an alternative solution for a development application that lacked merit. The Commissioner also did not err in finding that the shed was not 'infill development' pursuant to the PBP when he concluded that the DA lacked merit regardless of whether the shed was 'infill development' or not. The Commissioner did not lack jurisdiction to determine the DA by way of refusal in those circumstances.

4. Each of proposed new grounds appeal therefore had no prospects of success.

Notice of Motion dismissed. Appellant ordered to pay the Respondent's costs of the Notice of Motion.

Reporter: Peter Clarke

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