ENVIRONMENTAL LAW REPORTER

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NEW SOUTH WALES

LAND AND ENVIRONMENT COURT

(23-056) Keller v Blacktown City Council [2023] NSWLEC 74

Duggan J- 10 July 2023

Key Words: Notice of motion to set aside part of notice to produce – applicant sought documents from Class 1 proceedings concerning nearby land – whether flooding has the capacity to affect acquired land – legitimate forensic purpose – apparent relevance – Notice of Motion dismissed – access granted – costs

In Class 3 proceedings regarding the compulsory acquisition of land in the Blacktown LGA (**Acquired Land**), the Applicants sought by way of Notice to Produce (**NTP**) that the Council produce:

1. A development assessment report, development plans, development consent and correspondence regarding Council's assessment of a development application relating to land in the vicinity of the Acquired Land (paragraph 1 of the NTP); and

2. Copies of the Class 1 Application and the parties' pleadings with respect to the consent granted by the Land and Environment Court to the development application in paragraph 1 (paragraph 2 of the NTP).

Council agreed to produce documents responsive to paragraph 1 of the NTP but filed a Notice of Motion seeking to set aside paragraph 2 of the NTP.

Council contended that:

1. there was no legitimate forensic purpose to the documents sought under paragraph 2 of the NTP as those documents concerned a property of an entirely different nature to the Acquired Land;

2. the documents sought under paragraph 2 of the NTP would not have logical probative value as the documents sought under paragraph 1 of the NTP would be sufficient for the Applicants to understand the management of drainage in the vicinity of the Acquired Land; and

3. the documents sought in paragraph 2 of the NTP had no apparent relevance and there was only mere speculation that the documents could assist the Applicants' understanding of the matter.

The Applicants contended that the documents sought were relevant as they related to the impact of flooding risks arising from the same watercourse and riparian zone regulated under the same planning controls as the Acquired Land and that the development consent the subject of the NTP is the same as the Acquired Land. The Applicants further contended that the material sought would assist to understand the development potential and constraints of the Acquired Land, especially with respect to flooding risk, and/or would assist in understanding Council's reasoning in determining the development potential of the land and management of drainage in the vicinity of the Acquired Land.

HELD:

1. There is an apparent relevance in the request for documents in paragraph 2 of the NTP and, therefore, a legitimate forensic purpose, as the process of Council's consideration of flooding and drainage issues on the nearby site is material to the consideration of the development potential of the Acquired Land given it was subject to the same planning controls.

2. Notice of Motion dismissed with costs.

Reporter: Luke Salamone

(23-057) Environment Protection Authority v Sydney Water Corporation [2023] NSWLEC 68

Pritchard J – 5 July 2023

Keywords: Class 5 proceedings – pollution of water – uncontrolled sewage leak – plea of guilty – sentencing criteria

The EPA (**Prosecutor**) prosecuted Sydney Water Corporation (**Defendant**) for a breach of s 120(1) of the *Protection of the Environment Operations Act 1997* arising from a sewage discharge from three separate parts of the Northern Suburbs Sewage Treatment System (**Plant**) into Flat Rock Creek and subsequently into Middle Harbour during a period of moderately heavy rain over six to seven days in October 2020 (**Offences**).

The sewage caused the temporary relocation of 39 residents due to the severe odours emitted. The Defendant agreed with the Prosecutor's allegation that approximately 16 million litres of untreated sewage had been released from the Plant due to ageing and poorly maintained pipes and maintenance portals, and entered a plea of guilty in February 2023.

The parties agreed that each discharge caused potential harm to the environment and human health and had an actual impact on amenity, but there was no evidence of long-term environmental harm.

HELD:

1. The Offences were committed inadvertently and not deliberately, and were not intentional, negligent or reckless.

2. Although the Defendant did not have unlimited capacity to maintain the Plant, this was not an excuse for maintenance work to not have been carried out. The Defendant had direct control over the causes that led to the Offences.

3. The Offences were from a low- to mid-range of objective seriousness.

4. The many prior offences to which the Defendant has either been found or has pleaded guilty, the good character of the Defendant and the remorse and relatively early entering of a plea of guilty in this case resulted in discounts to the penalties for the Offences of between 10% and 25%. The application of the totality principle resulted in a further discount of 35%.

Defendant was fined a collective total of $365,625 for the Offences, with 50% of that amount ordered to be paid to the NSW Environment Trust and the remainder to the Prosecutor under a moiety order. Defendant ordered to pay the Prosecutor's costs.

Publication orders made in respect of the Offences requiring the Defendant to issue social media posts in addition to the issue of a letter to various affected property owners and the standard newspaper publication order.

Reporter: Peter Clarke

(23-058) Eastern High Pty Ltd v Ku-ring-gai Council [2023] NSWLEC 1383

Dickson C – 20 July 2023

Keywords: Class 1 Appeal - Proposed multi-dwelling housing development – whether proposed use is characterised as a residential flat building – whether the request to vary the lot size and frontage should be upheld (4.6).

Eastern High Pty Ltd (**Eastern High**) sought development consent for 'multi dwelling housing' involving a four-storey building with a dwelling on each floor. Access to each dwelling was via a door and stairs at ground level. The site was zoned R3 Medium Density Residential under the *Ku-ring-gai Local Environmental Plan 2015* (**KLEP**). 'Multi dwelling housing' was permitted with development consent within the R3 zone, however, 'residential flat buildings' were prohibited.

Ku-ring-gai Council (**Council**) opposed the proposed development on the basis it was properly characterised as a 'residential flat building' and, therefore, prohibited. The basis of Council's contention was that the stairs provided access to the upper levels of the buildings rather than to each dwelling. The dwellings were therefore accessible via the first and second floors, not the stairs. The Council also argued that because the stairs provided access to each floor of the building, they could not be considered part of each dwelling.

Eastern High argued that the proposed development was properly characterised as 'multi dwelling housing' relying on the decision in *Mount Annan 88 Pty Ltd v Camden Council* [2016] NSWLEC 1072 at [21]-[22], which found that the provision of direct access at ground level or indirect access by stairs satisfied the access requirement in the definition of 'multi dwelling housing'. Eastern High also submitted that the length of stairs or number of flights did not affect whether there is access at ground floor.

HELD:

The development was properly characterised as 'multi dwelling housing' as each dwelling was accessible by a door and stairs located at the ground level and the proposed development was not excluded from satisfying the requirement of access at ground level merely because

the stairs provided access to other parts of the buildings. The stairs were, by their nature, a building element designed to allow access at ground level to higher levels of the building applying *Mount Annan 88 Pty Ltd v Camden Council* [2016] NSWLEC 1072 at [21]-[22].

Ultimately, the appeal was dismissed, and the development application was refused due to contravention of development standards.

Reporters: Alan McKelvey and Emily Seaman

COURT OF APPEAL

(23-059) Verde Terra Pty Ltd & Ors v Central Coast Council & Anor [2023] NSWCA 121

Ward P, White JA and Kirk JA – 2 June 2023

Keywords: Development application - Whether consent orders merge in prior development consent so as to render development "approved"

In October 1998, Gosford City Council (the predecessor of Central Coast Council) granted development consent (**1998 Consent**) to the predecessor of Verde Terra to expand and remodel a nine-hole golf course at Mangrove Mountain via excavation and backfilling, including with waste.

In 2012, the Council initiated proceedings in the Land and Environment Court against the predecessor of Verde Terra to remedy alleged violations of the 1998 Consent. The parties agreed to consent orders in August 2014 (**2014 Orders**). However, the works the subject of the 2014 Orders differed from the works authorised by the 1998 Consent.

In December 2018, Verde Terra lodged a new development application to alter aspects of its 1998 Consent, as modified by the 2014 Orders. This resulted in a deemed refusal. In July 2019, Verde Terra initiated both Class 1 and Class 4 proceedings in the LEC. The Class 4 proceedings sought two declarations. The first, a declaration that Verde Terra did not need a new development consent to carry out the excavation and backfilling, and, the second, a declaration that the excavation and backfilling constituted development (whether "existing or approved") for the purposes of cl 35 of Pt 2 of Sch 3 of the *Environmental Planning and Assessment Regulation 2000*. At first instance, the first declaration was made, but the second was not.

The questions on appeal were:

(i) whether the primary judge erred in finding that the development approved via the 2014 Orders did not amount to "approved" development for the purposes of cl 35 of Pt 2 of Sch 3 to the EPA Regulation; and

(ii) whether the primary judge erred in not finding that the 2014 Orders merged with the 1998 Consent, so as to amount to "approved development".

HELD:

1. Where judgments and orders by consent can establish a *res judicata* estoppel that is enforceable among the litigating parties, such rulings do not possess the capacity to create a judgment *in rem* that binds third parties.

2. For the purposes of cl 35 of Pt 2 of Sch 3 to the EPA Regulation, "approved development" *can* include development authorised by an order of the Court. However, as cl 35 affects the rights of third parties, when the total environmental impact of a development is being assessed, it must be assessed against an approval that is binding on third parties. As the 2014 Orders in this case were not binding on third parties, the development the subject of the Verde Terra's application did not fall into the category of "approved development".

Appeal dismissed with costs.

Reporter: Claire McHattie

(23-060) McMillan v Taylor [2023] NSWCA 157

Payne JA – 6 July 2023

Keywords: Practice and procedure – confidential documents from conciliation conference under LEC Act s 34 requested from Land and Environment Court file

The Applicants and the Respondents were neighbours. In ***Taylor v Council of the Municipality of Woollahra* [2022] NSWLEC 1658,** a Commissioner of the Land and Environment Court disposed of an appeal against a refusal of a development application in accordance with an agreement under s 34 of the LEC Act. The applicants were not parties in the Land and Environment Court proceedings.

The Applicants commenced judicial review proceedings challenging the Commissioner's decision. As the Applicants were not parties to the Land and Environment Court proceedings, they served a notice to produce seeking access to documents contained in the Land and Environment Court file including expert reports and documents prepared for the conciliation conference. The applicants ultimately did not rely upon the notice to produce and instead relied upon r 33.13 of the ***Uniform Civil Procedure Rules 2005*** (UCPR) for the production of the documents.

HELD:

1. The documents sought were "confidential" within the meaning of s 34(11) of the LEC Act and were prepared for the dominant purpose of the compulsory conciliation conference within the meaning of s 34(11)(b) of the LEC Act . Allowing access to the Land and Environment Court file would have been inconsistent with guiding principles of Part 6 of the ***Civil Procedure Act 2005***.

2. As the documents were confidential, they are also inadmissible in the judicial review proceedings. LEC Act s 34(12) applied.

3. The Respondents were also entitled to object to production on the grounds of privilege under r 1.9(3) of the UCPR, although the Court did not rule on this objection as it was unnecessary given the Court's determination that the documents were confidential and, therefore, inadmissible.

Notice to produce set aside. Application for access to file refused. Costs in the cause.

Reporter: Nicholas Andrews

(23-061) The Next Generation (NSW) Pty Ltd v State of New South Wales [2023] NSWCA 159

Meagher JA, Gleeson JA and Beech-Jones JA – 12 July 2023

Keywords – Validity of Regulation – inconsistency with parent legislation – inconsistency with EPA Act

The Appellant commenced a Class 1 appeal against the Independent Planning Commission's refusal to grant development consent to a State Significant Development application to construct and operate an energy from waste facility.

Concurrent with those Class 1 appeal proceedings, the Appellant commenced Class 4 proceedings to challenge the validity of the *Protection of the Environment Operations (General) Regulation 2022* (**Thermal Energy from Waste Regulation**). These proceedings concern an appeal against Preston CJ's dismissal of those Class 4 proceedings.

The Appellant contended that the Thermal Energy from Waste Regulation was made beyond the regulation making power conferred in s 323 of the Protection of the Environment Operations Act 1997 (**POEO Act**). That section provided a power to enact regulations 'not inconsistent' with the POEO Act for or with respect to any matter the POEO Act is required or permitted to be prescribed.

The sections of the Thermal Energy from Waste Regulation that the Appellant contended rendered the regulation invalid included s 143 of the Thermal Energy from Waste Regulation, which prohibited the thermal treatment of waste in certain circumstances. Additionally, s 145 required a licence application to be refused if the granting of the licence would purport to authorise an activity prohibited by the relevant part of the regulation.

The first issue on appeal was whether the Thermal Energy from Waste Regulation, in particular s 143, was a regulation 'with respect to' a matter permitted to be prescribed by the POEO Act, or whether it was inconsistent with the POEO Act.

The Court recognised that a waste facility included any premises used for the 'processing' of waste, which would include the thermal treatment of waste.
The Appellant contended that s 143 of the Thermal Energy from Waste Regulation sought to proscribe what was authorised by the POEO Act, and therefore it sought to widen the purpose of the POEO Act. The Respondent contended that the regulations and POEO Act were intended to operate concurrently, and the regulation could impose additional restrictions, or prohibit an activity or work altogether.

The purpose of s 143 of the Thermal Energy from Waste Regulation was to prohibit or regulate certain types of processing of waste. Accordingly, it was created 'with respect to' the prohibition of 'processing' of thermal waste, and was made within power. Further, the Thermal

Energy from Waste Regulation was not inconsistent with the POEO Act, as the POEO Act recognises that the regulations may prohibit what a licence would otherwise authorise.

The second issue on appeal was whether the Thermal Energy from Waste Regulation, in particular s 145, was invalid as it was inconsistent with the EPA Act. Relevantly, s4.42(1)(e) of the EPA Act stated that an application for a licence under the POEO Act cannot be refused if it is necessary for carrying out State Significant Development authorised by a development consent. The Appellant contended that this was inconsistent with s145 of the regulation which stated that a licence application must be refused if the granting of such licence would purport to authorise a prohibited activity or work.

The Respondent accepted that it was implicit in s4.42(1)(e) of the EPA Act that the provisions of that Act prevail over a regulation made under the POEO Act, to the extent of any inconsistency. The parties accepted that s 145 of the Thermal Energy from Waste Regulation was inconsistent with s 4.42(1)(e) of the EPA Act, and, therefore, on the Respondent's case the EPA Act prevailed.

In the circumstances, s 145 could be read down so as to not be inconsistent with the EPA Act. Whilst it was contended that s 145 did not operate to preclude the granting of an environment protection licence subject to s4.42(1)(e) of the EPA Act, no declaration was made to this effect as this was not the subject of the appeal.

The third issue on appeal was whether the Court should make a declaration about the scope of the operation of s 145 of the Thermal Energy from Waste Regulation and s4.42(1) of the EPA Act. Whilst the Respondent contended that a new instrument had been introduced to remove the potential for inconsistency between those sections, a declaration should not be made as that new instrument was not before the primary judge. Rather, that issue could be ventilated in the Class 1 proceedings which remained before the Land and Environment Court.

HELD:

1. The purpose of s 143 of the Thermal Energy from Waste Regulation was to prohibit or regulate certain types of processing of waste. It was created 'with respect to' the prohibition of 'processing' of thermal waste and was within power.

2. Section 145 of the Thermal Energy from Waste Regulation was not inconsistent with s 4.42(1)(e) of the EPA Act. It could be read down so as to not be inconsistent with the EPA Act.

3. The Court declined to make a declaration in relation to a new instrument enacted after the hearing of the Class 4 proceedings the subject of the appeal.

Appeal dismissed with costs.

Reporter: Serafina Carrington

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