ENVIRONMENTAL LAW REPORTER

ABN 54 158 326 831

Issue (2023) 42 ELR (23-043) – (23-055) 31 July 2023

INSIDE THIS ISSUE:

REPORTERS IN THIS ISSUE:

Serafina Carrington is an Associate at Hones Lawyers

Lauren Lancaster is a Law Student at University of Sydney

Nicholas Andrews is a Senior Associate at King Wood Mallesons

Luke Salamone is an Associate at Norton Rose Fulbright

Rainer Gaunt is a Solicitor at Herbert Smith Freehills

Lee Cone is a Senior Associate at Addisons

Sorcha Kyriacou is an Associate at Johnson Winter Slattery

Bamidele Emmanuel Akinyemi is a Solicitor at Hones Lawyers

Registered by Australia Post Publication: NBG 6415 ISSN: 1035-6150

Managing Editor: Janet McKelvey – **Editors**: Tom White, David Gunter

NEW SOUTH WALES

SUPREME COURT

(23-043) El Khouri & Anor v Gemaveld Pty Ltd & Ors [2023] NSWSC 25

White J - 2 February 2023

Keywords: First instance in Supreme Court on referral from Court of Appeal - judicial review of decision by Land and Environment Court to grant development consent to respondent for erection of new dwelling-house and associated structures - factual questions arising on summons for judicial review remitted to Equity Division for determination - dispute regarding method of calculating the height of a dwelling-house in accordance with relevant local planning instrument – allegation of unauthorised excavation of site

Peter and Goumana El Khouri and Effi Theodorakopoulos (**the Applicants**) filed a summons for judicial review of a Land and Environment Court decision in the Court of Appeal. The decision concerned the granting of development consent for the erection of a new dwelling-house and associated structures on residentially zoned land in Blakehurst. The respondents were Gemaveld Pty Ltd (**Gemaveld**), the LEC, and the Georges River Council. The LEC filed a submitting appearance.

In the LEC decision, Gemaveld and the Council reached an agreement pursuant to s 34(3) of the ***Land and Environment Court Act 1979*** concerning Gemaveld's appeal against the Council's refusal of its development application. A Commissioner of the LEC granted development consent in accordance with the terms of the agreement (***Gemaveld Pty Ltd v Georges River Council*** **[2022] NSWLEC 1182**). The applicants were not parties to the proceedings in the LEC.

The primary ground for which the applicants sought review was that the LEC had no power to grant consent because the height of the proposed development exceeded the relevant height control in *the Kogarah Local Environmental Plan 2012* and there was no request to vary that standard as required by cl 4.6 of the KLEP.

The parties disputed the method of calculating the height of a dwelling-house in accordance with cl 4.3 of the KLEP. Gemaveld argued that on the plans submitted with the DA (and approved by the LEC), the proposed building did not contravene the maximum building height. Gemaveld also argued that the first and second applicants had unlawfully excavated part of the subject land in the location at which the building was purportedly in breach of cl 4.3 of the KLEP.

As the dispute raised questions of fact, the Court of Appeal referred the factual questions for determination by a single judge in the Supreme Court's Equity Division pursuant to s 51(4) of the ***Supreme Court Act 1970.***

HELD:

1. Height of buildings within the meaning of cl 4.3(2) of the KLEP is to be measured from any point of the existing ground level over which the proposed building is to be erected to the highest vertical point. The proposed dwelling house therefore exceeded the 9m height limit, but this was not present or apparent on the plans submitted with the DA.

2. The first and second applicants did not excavate the land as alleged by the respondent.

Questions of fact answered as above.

Costs of the determination of the above questions to be determined by the Court of Appeal.

Reporter: Lauren Lancaster

COURT OF APPEAL

(23-044) El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78

Leeming J – 26 April 2023

Keywords: Judicial review of development consent – consent granted following s 34 conciliation conference – height restriction imposed by relevant planning instruments - applicants adduced fresh survey evidence establishing height control exceeded – whether compliance with height control was a jurisdictional fact

The applicants were neighbours to the north and south of land owned by the respondent, Gemaveld Pty Ltd (**Gemaveld**), in Blakehurst, southern Sydney. All three

lots owned by Gemaveld descended steeply from street level to the Georges River and were zoned residential under the ***Kogarah Local Environment Plan 2012***. The KLEP imposed a height of buildings development standard of 9m.

The Land and Environment Court granted development consent to Gemaveld's development application for a new dwelling house pursuant to s 34(3) of the ***Land and Environment Court Act 1979*** following an agreement reached with Georges River Council: ***Gemaveld Pty Ltd v Georges River Council*** **[2022] NSWLEC 1182** (**LEC Decision**).

The Applicants sought judicial review of the LEC Decision on the basis that the LEC had no power to grant consent because the height of the proposed development exceeded the relevant height control in the KLEP and there was no request to vary that standard as required by cl 4.6 of the KLEP. The Court therefore lacked the power to grant consent to the DA because it was not a decision made within the proper exercise of the Court's functions for the purpose of s 34 of the LEC Act.

White J sitting in the Equity Division had made a separate determination on findings of fact that the building approved by the DA did not comply with the height of buildings development standard under cl 4.3 of the KLEP but this was not evident from the plans submitted with the DA and before the LEC when the LEC Decision was made: ***El Khouri & Anor v Gemaveld Pty Ltd & Ors*** **[2023] NSWSC 25.** As such, the central issue was whether adherence to the height standard was a jurisdictional fact that the Court of Appeal could review based on evidence that was not before the LEC.

HELD:

1. The content of the KLEP, or another environmental planning instrument, cannot determine whether a power conferred by statute is subject to a precondition which is a jurisdictional fact.

2. Compliance with the height control is not a jurisdictional fact.

3. There was no material difference between a development consent granted by a consent authority or the LEC after hearing an appeal and a development consent granted under s 34(3) of the LEC Act following a successful conciliation conference. In no case is compliance with an environmental planning instrument a jurisdictional prerequisite to the power to grant consent.

4. The granting of development consent by the Commissioner was not vitiated merely because the applicants could establish, on evidence not made available to the Commissioner at the time of their decision, that there was no compliance with the height restriction clause in the KLEP.

Development consent upheld.

Amended summons dismissed with costs.

Reporter: Lauren Lancaster

LAND AND ENVIRONMENT COURT

(23-045) G&J Drivas Pty Ltd v Sydney Metro [2023] NSWLEC 20

Duggan J- 13 March 2023

Key Words: Construction of s 56(1)(a) of the Just Terms Act – decrease in land value caused by public purpose – construction work not undertaken to be disregarded when determining market value – actual use of land – whether stamp duty is compensable under s 59(1)(f).

In March 2021 (**Acquisition Date**), Sydney Metro compulsorily acquired from the applicants land in the Parramatta CBD for the Sydney Metro West Project (**Public Purpose**). The land was improved by a mixed-use office and retail arcade leased out to a number of tenants. The land benefited from a development consent for the erection of a large mixed use residential and commercial tower. The applicants had taken steps to seek, but had not yet been granted, an additional consent to expand the proposed tower.

About 18 months prior to the Acquisition Date, the applicants were informed of Sydney Metro's intention to acquire their land to carry out the Public Purpose and,

as a result, decided to stop all work on the proposed development. No physical works had been undertaken, however, non-physical works had commenced, including the provision of architectural services, the preparation of detailed drawings and entering into contracts for the marketing and future leasing of the proposed expanded building.

The applicants contended that but for being notified of the intention to carry out the Public Purpose, the proposed development would have progressed, translating to an increase in the market value of the land as at the Acquisition Date. Accordingly, the applicants contended that the decrease in the value of the land caused by the decision to stop work on the proposed development ought to be disregarded when determining market value under s 56(1)(a) of the Just Terms Act. The applicants also contended that they were entitled compensation under s 59(1)(f) for stamp duty costs that would be incurred when purchasing replacement land.

Sydney Metro contended that s 56(1)(a) only permits consideration of the impact of physical work actually undertaken as at the Acquisition Date and does not include non-physical works. Sydney Metro's position was that market value should not be determined as though the Applicant continued to the progress the proposed development and that the applicants did not meet the "actual use" requirement to be entitled to compensation for stamp duty under s 59(1)(f).

HELD:

1. Section 56 of the Just Terms Act does not prohibit the consideration of non-physical works in the determination of market value.

2. The applicants' decision to stop work on the proposed development was a direct consequence of being notified of the intention to carry out the Public Purpose.

3. The decision to stop work caused a decrease in the value of the land which ought to be disregarded in the determination of market value for the purposes of section 56(1)(a) of the Just Terms Act, i.e. market value should be determined assuming the decision to stop work had not been made.

4. The land was held as part of the applicants' stock in trade for the purpose of their property development business and that applying the principles in *Blacktown City Council v Fitzpatrick Investments Pty Ltd* [2001] NSWCA 259, that was an "actual use" of the land for the purposes of s 59(1)(f). Accordingly, the applicants were entitled to compensation for stamp duty incurred on purchasing replacement land, legal fees on the purchase of replacement land and loan establishment fees.

The parties were directed to complete final calculations for the determination of input figures for the Estate Master software used to calculate market value so that final orders could be made. Those orders have not been published.

Reporter: Luke Salamone

(23-046) Denny v Optus Mobile Pty Ltd [2023] NSWLEC 27

Pain J – 16 March 2023

Keywords: Judicial review of development consent for telecommunications tower – whether tower was a building to which height controls were intended to apply under Gosford Local Environmental Plan 2014 – legal error in variation of height standard tainted – failure of consent authority to satisfy itself of EP&A Act s 4.14 bushfire requirements

The first respondent submitted a development application to Central Coast Council for a telecommunications tower on bushfire prone land in Killcare Heights, NSW.

The tower would have exceeded the height limit under cl 4.3 of the ***Gosford Local Environmental Plan 2010***. Accordingly, the first respondent submitted a written request to vary the height limit under cl 4.6 of the GLEP. In its cl 4.6 request, the first respondent relied on the first ground in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and argued that compliance with the height limit was unreasonable or unnecessary because the height limit was intended to apply to 'standard buildings' but not utility infrastructure such as the tower.

The Central Coast Local Planning Panel was the consent authority for the application. The Panel granted development consent following Council's recommendation for approval. However, in its reasons the Panel did not rely upon or refer to the relevant tests in *Wehbe* or provide an opinion about development on

bushfire prone land as required by s 4.14 of the EPA Act. Consequently, the applicant argued that the Panel could not have reached the requisite state of satisfaction under cl 4.6 of the GLEP and s 4.14 of the EPA Act.

HELD

1. The definition of building in the EPA Act includes structures, and therefore, contrary to the first respondent's cl 4.6 request, no distinction can legally be drawn between 'standard buildings' and infrastructure for the purposes of cl 4.3 of the GLEP. Therefore, the Panel could not have been satisfied that the first respondent's request demonstrated the matters required under cl 4.6(3).

2. The Panel was required to apply the law as set out in *Wehbe* and ***Initial Action Pty Ltd v Woollahra Municipal Council*** [2018] NSWLEC 118 but failed to do so and instead erroneously formulated and applied its own legal test.

3. The Panel did not reach an opinion as to the development's conformity to the requisite bushfire prone land standards, as required by s 4.14 of the EPA Act.

The Court declared the development consent invalid and made orders restraining the first respondent from taking any steps in reliance upon it.

Costs were reserved.

Reporter: Rainer Gaunt

(23-047) Denny v Optus Mobile Pty Ltd (No 2) [2023] NSWLEC 57

Pain J – 1 June 2023

Keywords: Costs of judicial review – whether party had contributed to consent authority error by mis-stating the law in its development application – consent authority expected to form its own opinion

The first respondent submitted a development application and a request for an exception to height limits under cl 4.6 of the ***Gosford Local Environmental Plan 2014*** for a telecommunications tower. The development consent was declared invalid in *Denny v Optus Mobile Pty Ltd* [2023] NSWLEC 27, set out earlier in this volume. Amongst other things, it was found that the first respondent's application of cl 4.6 contained legal error. There was no question that the respondents (being the consent holder, Optus Mobile, Central Coast Local Planning Panel and Central Coast Council) were liable for costs, however, there was a dispute over which of the respondents should be liable. The applicants argued the first respondent should be liable for costs in addition to the Panel and Council since it contributed to the invalid decision through its erroneous cl 4.6 request relied upon by the second and third respondents.

The first respondent argued that it should not be liable for costs since it did not defend the proceedings and was merely the beneficiary of a consent. Despite the errors in its cl 4.6 application, it argued the legal error in the decision arose from the failure of the consent authority to form the requisite opinions under cl 4.6 of the GLEP.

HELD

1. While the first respondent could be said to have contributed to the error made by the second and third respondents, that was a matter about which the consent authority had to form its own opinion.

2. The first respondent was therefore not liable for costs.

The Court ordered the second and third respondents pay the applicants' costs as agreed or assessed.

Reporter: Rainer Gaunt

(23-048) Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47

Pritchard J – 03 May 2023

Keywords: Administrative Law – judicial review – amendment to Bega Valley Local Environmental Plan – application of time-bar – procedural fairness

Boydtown Pty Ltd and Boydtown Pastoral Pty Ltd (applicants) owned a parcel of land at Boydtown, south of Eden. The applicants intended that the future development of Boydtown would comprise a village centre, residential zones and highway service centres. In August 2017, the Minister for Planning and Public Spaces decided an amendment to the ***Bega Valley Local Environmental Plan 2013*** should proceed subject to

conditions (Gateway Determination). In May 2021, Ms Lees on behalf of the Secretary, Department of Planning and Environment endorsed an amended planning proposal (May 2021 Planning Proposal) pursuant to a condition of the Gateway Determination (Endorsement Decision). In August 2021, Bega Valley Shire Council endorsed the May 2021 Planning Proposal (Council's approval decision).

In August 2021, the applicants commenced judicial review proceedings challenging the Gateway Determination, the Endorsement Decision and Council's approval decision. An additional issue at trial was who the proper parties to the proceedings were.

HELD:

1. The proper respondent in respect of the Endorsement Decision was the Secretary.

2. The applicants' claims in respect of the Gateway Determination were time-barred. The applicants' delay in bringing the proceedings was very significant, there was no explanation for their delay which caused prejudice to the Minister and third parties. ***Uniform Civil Procedure Rules 2005 r 59.10 and Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd*** **[2017] NSWLEC 97** applied.

3. Ms Lees did not fail to take into account the matters stipulated in a condition of the Gateway Decision when making the Endorsement Decision. All that was required to be taken into account was the "amended Planning Proposal and any supporting maps and studies" referred to the Secretary.

4. Council was not obliged to consider the applicants' masterplan and planning proposal, which in any event it did consider for its approval decision.

5. The timing of Council's approval decision was not *ultra vires*, invalid and of no effect. Section 56(8) of the EPA Act applied such that a failure to comply with a requirement of a gateway determination did not prevent the instrument from being made or invalidate it.

6. Council did not deny the applicants procedural fairness and it complied with its notification and consultation obligations under the EPA Act.

Summons dismissed. Applicants ordered to pay costs.

Reporter: Nicholas Andrews

(23-049) Georges River Council v SAF Developments Pty Ltd [2023] NSWLEC 50

Pepper J – 10 May 2023

Keywords – Sentencing – development contrary to waste disposal conditions in consent – unauthorized use of land as waste facility – consent of receiving landowner

The defendant was charged with, and entered a delayed guilty plea for, its failure to comply with conditions of consent, and the unlawful use of land as a waste facility. A relevant condition of the consent required building and demolition waste to be disposed of properly and in a certain manner.

During construction, an employee of the defendant was approached by an elderly landowner of other land, who requested that building materials be deposited into a disused swimming pool so it could later be levelled and turned into lawn.

An employee of the defendant agreed with the elderly landowner to deposit clean building materials and waste into the disused pool. Minor works were undertaken to the land to provide access to the pool, and 27 tonnes of waste was deposited into the pool over a number of visits. The elderly landowner's daughter made complaints to the Environment Protection Authority and to Georges River Council. Investigations confirmed that the building and demolition waste did not contain asbestos.

The prosecutor issued a number of notices and development control orders to remove the waste. The defendant did not initially comply with the orders. However, at the time of the hearing, the defendant had removed the waste.

The prosecutor contended that the state of mind of the employee responsible for the transportation and deposition of waste was attributable to the defendant. However, no evidence was provided to support that he was the controlling mind of the company or that the company knew of the circumstances. Rather, the actions were undertaken by an employee. Further, the prosecutor did not establish that the defendant was on notice or suspected that there was unlawful works being undertaken.

The defendant, however, did not take steps to inform itself of the conditions of consent and had control over the transportation and deposition of the waste.

Whilst the defendant entered a delayed guilty plea, complied with clean-up orders issued by the prosecutor, and arranged for a director to attend the hearing, these actions did not show contrition or remorse.

The defendant had four other recent convictions for failure to comply with conditions of consent. The defendant continued to operate in the construction industry.

HELD:

1. Notwithstanding the agreement with the land-owner, the defendant handled the building and demolition waste improperly, and failed to take responsibility for it.

2. Amenity impacts to surrounding neighbours due to the unauthorised development were short-lived. The waste was 'clean' from asbestos. The environmental harm caused was minor and temporary.

3. The prosecutor did not establish that the landowner was vulnerable or a victim, merely due to being elderly.

4. The offences were at the middle of the low end of objective seriousness.

5. The sentence was to be reduced when applying the totality principle, as the convictions relate to a single course of conduct.

6. The defendant is to publish a notice in the Daily Telegraph and on its website for 60 days.

Defendant convicted and fined $26,000. Defendant to pay the prosecutor's costs as agreed in the sum of $70,000.

Reporter: Serafina Carrington

(23-050) Rouse Hill Custodian Corporation Pty Ltd v Prisma Rouse Hill Development Pty Ltd [2023] NSWLEC 48

Pain J – 02 May 2023

Keywords: Easement – LEC Act s 40 – need to vary development consent – discretion not to join parties – *Conveyancing Act 1919 s 88K factors*

Rouse Hill Custodian Corporation Pty Ltd (RHCC) was the registered proprietor of land located at 49 Terry Road, Rouse Hill. Prisma Rouse Hill Development Pty Ltd (Prisma) was the registered proprietor of the land opposite viz. 54 Terry Road.

In ***Terry Rd Development Pty Ltd v Blacktown City Council* [2018] NSWLEC 1226**, the Court granted development consent to RHCC for a medium density residential development comprising three four-storey residential buildings, a café, basement car parking, new public roads, landscaping works and with 2,113 l/s of stormwater to drain by pipe under Terry Road over Prisma's land towards Second Ponds Creek.

RHCC applied for orders under s 40 of the LEC Act imposing an easement under s 88K of the ***Conveyancing Act 1919*** for the construction of an open swale drain. Prisma opposed the application.

HELD:

1. Section 40(1)(a) of the LEC Act applied because the development consent granted by the Court contemplated drainage of RHCC's land to Second Ponds Creek.

2. RHCC would need to modify the development consent because the easement only contemplated 421 l/s of water being discharged through it.

3. Section 40(3) of the LEC Act did not require that the proceedings be dismissed because not all possibly relevant parties had been joined. ***A.T.B. Morton Pty Ltd v Community Association DP270447 (No 2)* [2018] NSWLEC 87** applied.

4. RHCC had made reasonable attempts to secure the easement or an easement having the same effect but had been unsuccessful: s 88K(2)(c).

5. The easement was reasonably necessary for the effective use and development of RHCC's land: s 88K(1). ***Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* (2010) 171 LGERA 286** applied.

6. The use of RHCC's land was not inconsistent with the public interest: s 88K(2)(a).

7. $882,000 was adequate compensation for Prisma for the imposition of the easement comprising loss of value of the easement land; loss of value of R3-zoned land outside the easement and setback areas; and removal of easement infrastructure costs: s 88K(4).

Parties to prepare a timetable regarding the modification of easement terms in accordance with the judgment and for addressing costs.

Reporter: Nicholas Andrews

(23-051) Perry Properties Pty Limited v Georges River Council [2023] NSWLEC 51

Pritchard J – 11 May 2023

Keywords: Civil enforcement - compulsory acquisition - proposed acquisition notice - *Local Government Act 1993* – acquisition for authorised purpose - interest in land - period of negotiation under s 10A of the *Land Acquisition (Just Terms Compensation) Act 1991*

The applicants brought Class 4 proceedings seeking civil enforcement of the ***Local Government Act 1993*** by way of, among other remedies, a declaration that the proposed acquisition notices (**PANs**) issued by the respondent in relation to property it owned in Carlton were unlawful.

The first applicant was the registered proprietor of the former Kogarah Hotel site (**Site**). The Site is within the Jubilee Oval Precinct and is the only privately owned parcel of land within the block which contains the Jubilee Oval Stadium and Kogarah Park.

The proceedings challenged the decision of the respondent to issue the PANs and the decision of the Minister for Local Government to approve the PANs on the bases that the issuing of the PANs involved the breach of:

1. ss 186 and/or 188 of the LGA as the Council was not acquiring the Site for an authorised purpose and/or was acquiring it for re-sale;

2. s 187 of the LGA on the basis that the respondent had not obtained valid approval of the Minister as the Minister had been misled as to the purpose of the acquisition; and

3. s 187 of the LGA as there had been no negotiation with the second to sixth applicants in accordance with s 10A of the Just Terms Act.

In relation to Ground 1, the applicants took the Court to masterplans prepared by external consultants which it alleged indicated that the respondent intended to develop the Site for residential/commercial uses and either lease it as a licensed venue or run the licensed venue itself. The applicants also alleged that the acquisition of the Site was premature given Council was still considering masterplan options for the Site and its surrounds, and submitted that the public purpose stated in the PANs were a "bare statement" of purpose, relying on the Court of Appeal's decision in *Roads and Maritime Services v Desane Properties Pty Ltd*.

In relation to Ground 2, the applicants alleged that valid approval of the Minister was not obtained as the Minister was told the acquisition was to provide "public recreation space", which the applicants' alleged was untrue. Further, the Council meeting resolving to acquire the Site, which had been held in closed session, ignored the objection of the first applicant and this should have been disclosed to the Minister.

In relation to Ground 3, the applicants alleged that as caveators, the second to sixth applicants should have, but had not, been afforded the sixth month negotiation period required under s 10A if the Just Terms Act.

HELD:

1. Ground 1 – dismissed, as the applicants failed to establish any basis for concluding that the acquisition of the Site was not for the purpose of the respondent's functions under the LGA, for the following reasons:

    a) If the purpose of the acquisition of the Site were for it to be sold to a third party, this might contravene s 188 of the LGA. However,

given the scant evidence relied upon by the applicants, the respondent did not at any relevant time have as its purpose the acquisition of the property for its re-sale.

b) There was insufficient evidence to find that the purpose of the acquisition was for the respondent to ultimately lease the Site to a private operator as a pub/bar or licensed restaurant or to itself to operate any such pub/bar or licensed restaurant.

c) There is no sound basis in evidence on which an inference would be drawn that the respondent's acquisition of the Site was premature.

d) The description of the public purpose went beyond a "bare statement".

2. Ground 2 – dismissed, for the following reasons:

a) As the applicants failed on Ground 1, the aspect of Ground 2 relating to misleading the Minister was not considered.

b) The respondent was not obliged to notify the Minister of an objection to the closing of a council meeting, nor was the closing of the meeting unlawful.

3. Ground 3 – dismissed. Section 10A requires negotiation with the owner of the land, but not every owner of an 'interest in land' within the meaning of the Just Terms Act and, even if it did, non-compliance with s10A would not be a matter affecting the lawfulness of issuing a PAN.

Reporter: Lee Cone

(23-052) Mildred v Steinhauer [2022] NSWLEC 88

Pain J – 19 July 2022

Keywords – s 56a appeal – tree dispute – procedural fairness and bias against expert – appeal upheld

The appellant landowner appealed orders of an Acting Commissioner of the Land and Environment Court requiring the pruning of a 60-year-old Tallowood tree located on the respondent's adjoining property and requiring the appellant to pay for 70% of the cost involved.

The appellant had claimed that the tree caused damage to the nearby sewer pipes, possibly causing future damage and representing a genuine risk of injury to the appellant's future tenants and neighbours. The appellant therefore requested the Court make an order under the ***Trees (Disputes Between Neighbours) Act 2006***.

The appellant essentially raised 4 grounds of appeal. The first ground was that the Acting Commissioner had failed to accord procedural fairness in his treatment of the appellant's arborist's evidence**.** It was put that the Acting Commissioner had advised the parties during the hearing that the Court's jurisdiction under s 10(2)(a) of the Trees Act had been enlivened, but the Acting Commissioner reversed this finding in his judgment which denied the Appellant procedural fairness as he would have placed more emphasis on the risk of injury claim under s 10(2)(a) if he thought that jurisdiction was in issue. Secondly, it was put that the Acting Commissioner unfairly attacked the arborist's qualifications and methodology in the judgment, but failed to raise these concerns during the hearing. Further, the arborist was unnecessarily excluded from the site visit and the Acting Commissioner acted as an advocate for the respondent, rather than as an impartial adjudicator.

The appellant's second ground was that the Acting Commissioner incorrectly considered that past damage caused by the tree was irrelevant as it had occurred when the appellant did not own the property, submitting that there is no requirement that damage occur during ownership for the Court to have jurisdiction under section 10(2)(a) of the Trees Act.

The appellant's third ground was that the Acting Commissioner had made an error of law by ordering an inappropriate remedy. It was put that he failed to consider damage caused to the sewer pipe at another property, as that neighbour was not a party to the proceedings.

The appellant's final ground was that the Acting Commissioner had made an error of law by ordering he pay 70% of the costs of pruning the tree by relying on incorrect details of the tree, by failing to consider the respondent's failure to address issues caused by the tree and by failing to consider the future risk of injury. The appellant submitted that per Galwey AC in ***Page v Lang*** **[2012] NSWLEC 1205**, the general cost of removing a tree lies with the owner unless exceptional circumstances exist and that the Acting Commissioner had incorrectly ordered the appellant to pay 70% of the costs of pruning a tree it did not own.

HELD:

1. The appellant had the opportunity to raise evidence under s 10(2)(b) of the Trees Act, and the Acting Commissioner's final orders nonetheless addressed the issue.

2. Applying the test in ***Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337**, the Acting Commissioner did not demonstrate a lack of impartiality.

3. The Acting Commissioner's failure to identify his concerns with the expert evidence of the appellant's arborist denied the appellant the opportunity to address those concerns causing sufficiently serious procedural unfairness to vitiate the decision.

4. Although the Acting Commissioner incorrectly applied the decision of Preston CJ in ***Robson v Leischke* [2008] NSWLEC 152**, evidence of past damage was not material and was still considered in his reasoning and, therefore, no error of law was demonstrated.

5. The jurisdiction of the Court was to consider the land owned by the applicants to proceedings. Accordingly, the Acting Commissioner did not have to consider the alleged damage to the neighbour's property. Alleged errors of fact could not be raised on appeal.

6. The original decision, when read as a whole, did not fail to consider future injury.

7. The Acting Commissioner had broad discretion to determine remedies, including to order the appellant to pay 70% of the costs of pruning the tree.

Appeal upheld and remitted to be reheard by a different Commissioner.

Reporter: Sorcha Kyriacou

(23-053) Stannards Marine Pty Ltd v North Sydney Council [2022] NSWLEC 99

Preston CJ – 8 August 2022

Keywords: Merit appeal – development application for the use of a relocatable shed and development application for the mooring and use of a floating dry dock at a boatyard on Sydney Harbour – visual, heritage, acoustic, air quality, contamination impacts – national and heritage significant harbour – intergenerational preservation

The applicant landowner leased both land and waters used as a boatyard at Berrys Bay to Noakes Group Pty Ltd (Noakes). Noakes as lessee wished to change its activities at the boatyard and lodged two development applications with the respondent. In DA 57/2019 Noakes sought to moor and use an existing floating dry dock it had purchased from the Australian Navy in 2014 in the water lease area to carry out repair and maintenance of larger boats. In DA 456/21 Noakes sought consent to use an existing relocatable shed in a new location at the boatyard to repair smaller vessels, and to connect it to an air quality pollution control system in existing sheds.

Regarding the DA for the mooring of the dock, the respondent raised contentions regarding visual and acoustic impact, heritage impact, operational matters, and impacts on water ecology, air quality and stormwater. Regarding the DA for the relocatable shed, the respondent raised contentions about the structural integrity of the building, acoustic and air quality impacts and the potential for the mobilisation of contamination on the land beneath.

HELD:

1. The appeal of the application relating to the relocatable shed was upheld, and development consent granted for its use and the installation of the air quality pollution control system, subject to the parties settling conditions. These included noise limits, requirements to treat the walls and ceilings, and requirements to protect the shed with PVC curtains. The issue of contamination caused by installation could be mitigated by conditions requiring remediation.

2. The relocatable shed DA was granted conditional approval as it was comparable to other sheds on the property and the air pollution system would not be visible to those enjoying Berrys Bay or, if it was visible, it was proportionate to other existing industrial items. The approval also satisfied the objects of the ***North Sydney Local Environment Plan 2013*** encouraging waterfront maritime and industrial activities.

3. Following consideration of the ***State Environmental Planning Policy (Biodiversity and Conservation) 2021*** and the zone objects, the appeal regarding the floating dry dock was dismissed, and development consent refused. The dock was

deemed highly obtrusive and likely to cause significant visual impacts. Although it would be built in an industrial landscaped area, the view of it would be situated within the sensitive natural coastline. Further, the dock itself would displace other boats, and installing it risked disturbing the sea floor. Overall, the floating dock was too out of character for Berrys Bay.

4. The Biodiversity SEPP and the ***Sydney Harbour Foreshores and Waterways Development Control Plan 2005*** recognise the principles of intergenerational equity, where the seas and harbours are on public trust, imposing duties on decision-makers to avoid adverse impacts and minimise damage. As Sydney Harbour is a public asset of national and heritage significance, consent for the mooring of the dock was refused.

Parties to settle conditions of consent relating to the relocatable shed and air quality system. Appeal dismissed regarding the mooring and use of the floating dock.

Reporter: Sorcha Kyriacou

(23-054) Gemaveld Pty Limited v Georges River Council [2022] NSWLEC 1182

Horton C - 7 April 2022

Keywords: Class 1 appeal - refusal of development application - conciliation conference - in-principle agreement reached between parties - orders to be made

These proceedings concerned an appeal under s 8.7 of the ***Environmental Planning and Assessment Act 1979*** against the refusal by the Georges River Local Planning Panel on behalf of the respondent of Gemaveld's development application which sought consent for demolition works, tree removal, and construction of a multi-level dwelling house, swimming pool, front fence, landscaping and site works at 117 Stuart Street, Blakehurst.

During the Court arranged conciliation conference in accordance with s 34(1) of the ***Land and Environment Court Act 1979*** the parties reached in-principle agreement on the matters in contention and subsequently filed the terms of their agreement which requested the Court uphold the appeal and granting conditional development consent to the development application.

Under s 34(3) of the LEC Act, the Court must dispose of the proceedings if the parties' decision during conciliation was a decision that the Court could have made in the proper exercise of its functions.

HELD:

1. The proposed building complied with the height of buildings standard (imposing a 9m limit) under cl 4.3 of the ***Kogarah Local Environmental Plan 2012***.

2. The Court was satisfied that the parties agreement is a decision that the Court could have made in the proper exercise of its functions.

Appeal upheld.
Amended development application approved.

Reporter: Lauren Lancaster

(23-055) IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v North Sydney Council [2023] NSWLEC 1207

Dixon SC – 03 May 2023

Keywords – Demolition of a heritage item – MLC Building – heritage significance

The applicant sought development consent to demolish a heritage item known as the MLC Building in North Sydney (**MLC Building**) and construct a significantly taller building.

On 4 June 2021, the MLC Building was listed on the State Heritage Register, however the applicant challenged this decision successfully, and the listing was determined to be invalid and of no effect. The State listing was therefore removed. Despite this, the State Heritage listing decision held significant weight in the merit appeal despite procedural issues.

The applicant contended that the MLC Building had reached the end of its design life and it was not reasonable to conserve due to the financial burden of refurbishment. There was limited evidence that any important refurbishment or changes took place since 2001.

The issue with regards to cost of refurbishment versus redevelopment critically turned upon risk. The applicant

and Council agreed that, without a tenant, it would not be feasible to pursue a refurbishment option. If a tenant was guaranteed, it would be feasible.

The applicant submitted that without a committed tenant, the only option apart from land banking, would be redevelopment.

Council contended that the loss of the MLC Building would cause significant harm to the environment, and that it would not be in the public interest. Council further contended that the applicant did not address the demolition issue adequately. Council submitted that the financial cost that would be incurred by the applicant was irrelevant. Profitability was not a planning consideration. Rather, the maintenance costs ought to have been considered when purchasing the land.

HELD:

1. The earlier heritage provision in the North Sydney LEP, now replaced by clause 5.10, is not relevant to the assessment of the development application.

2. There is no reason to rely on the Court's planning principles outside of a conservation area when the respondent's controls in the ***North Sydney Development Control Plan 2013*** contained specific provisions about demolition of heritage items and prescribed the relevant matters for consideration which centred around the retention of the MLC Building.

3. Demolition of the MLC Building would have significant, irreversible impacts on heritage and the applicant did not satisfactorily demonstrate that conserving the MLC building would be unreasonable. No evidence was submitted as to pests or to establish the MLC Building was a danger to the public.

4. Adaptive reuse of the MLC Building would preserve its essential and most significant heritage features, which outweighed the benefit from redevelopment of the site. The applicant did not demonstrate that there is no acceptable alternative to demolition.

5. It was in the public interest, and in the interests of ecologically sustainable development and intergenerational equity, to retain the MLC Building.

Appeal dismissed.

Reporters: Serafina Carrington and Bamidele Emmanuel Akinyemi

FOR SUBSCRIPTION ENQUIRIES OR BACK ISSUES:

Contact Michele Kearns,

Martin Place Chambers, 32nd Floor,
52 Martin Place, Sydney NSW 2000.

Tel. (02) 8227 9600.
E-mail: kearns@mpchambers.net.au

SUBSCRIPTION RENEWAL 2023/2024

Supply of Environmental Law Reporter for year ending 30 June 2024

SUBSCRIPTION COST:

Print Copy only	$550 inc GST
Webpage access only	$440 inc GST
Multiple Users	$770 inc GST
Library and Distribution Agencies	$440 inc GST

BACK ISSUES AND ADVERTISING:

$440 inc GST

ADVERTISING:

ELR will only insert handbills, brochures etc, supplied. The fee is $363 per insert.

MANAGING EDITOR:

Janet McKelvey is a barrister at Martin Place Chambers in Sydney.

(02) 8227 9600

EDITORS:

Tom White is a Special Counsel at Norton Rose Fulbright Australia.

David Gunter is an Associate at Sparke Helmore.

COMMENTS/SUGGESTIONS:

mckelvey@mpchambers.net.au

Printed by Environmental and Planning Law Association, NSW Inc.