ENVIRONMENTAL LAW REPORTER

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NEW SOUTH WALES

COURT OF CRIMINAL APPEAL

(25-118) Environment Protection Authority v McMurray [2024] NSWCCA 160

White and Mitchelmore JAA; Preston CJ of LEC – 22 August 2024

Keywords: Environmental Offences – Liability of Councils and directors – special executive liability – s 169(1) of *Protection of the Environment Operations Act 1997* (NSW) – statutory construction – construction of "to and in respect of" – whether such an expression is to be read disjunctively or conjunctively – ordinary and grammatical meaning of "and" is conjunctive – s 220(4) of *Local Government Act 1993* (NSW)

In *Environment Protection Authority v McMurray* [2024] NSWCCA 160, the New South Wales Court of Criminal Appeal addressed the applicability of special executive liability provisions under the *Protection of the Environment Operations Act 1997* (POEO Act) to local councils and their officers. This was an appeal against the Land and Environment Court's decision in *Environment Protection Authority v McMurray* [2024] NSWLEC 6.

The EPA prosecuted both the Cootamundra-Gundagai Regional Council and its General Manager, Mr McMurray (the Defendant), with the offence of "*causing a place to be used as a waste facility without lawful authority*", in contravention of s 144(1) of the POEO Act. The charge stemmed from the Council's operation of the Cootamundra Sewage Treatment Plant, which received leachate from a landfill and deposited it in a pond at the treatment plant, allegedly without the necessary authority.

The Defendant was charged by the EPA with committing the offence by relying on s 169(1) of the POEO Act, which imposes a "*special executive liability*" on each person "*who is a director of a corporation or concerned in the management of a corporation*." The section does not apply if that person was not in a position to influence the conduct of the corporation in committing the offence, or if all due diligence was used by that person to prevent the contravention by the corporation.

The central issue was whether s 169(1) of the POEO Act extended to local councils and their officers.

The proceedings were first commenced in the Local Court. The Local Court stayed the prosecution on the basis s 220(4) of the ***Local Government Act 1993*** (LG Act), which provides that "*a law of the State applies to and in respect of a council in the same way as it applies to and in respect of a body corporate*", did not operate to apply s 169 of the POEO Act to a general manager of a council. The EPA appealed to the Land and Environment Court. The Land and Environment Court dismissed the EPA's appeal on the basis that s 169 of the POEO Act only applied to a person, and therefore did not apply "*to and in respect of a corporation*". Section 220(4) of the LG Act could not be relied upon to engage s 169 of the POEO Act against the Defendant.

The Land and Environment Court, pursuant to s 5BA(1) of the *Criminal Appeal Act 1912,* stated two questions to the Court of Criminal Appeal, with only one question being pressed: Does s 169(1) of the [POEO Act) apply to [the Defendant] by operation of s 220(4) of the [LG Act]?

HELD:

1. Section 169(1) of the POEO Act is a law which applies to and in respect of a corporation.

2. Section 220(4) of the LG Act applies section 169(1) of the POEO Act to councils in the same way it applies to corporations.

3. The Defendant was a person who was involved in the management of the Council and was liable under s 169(1) for causing a place to be used as a waste facility without lawful authority.

Special leave was refused by the High Court on 5 December 2024.

Reporter: Zoe Plant

LAND AND ENVIRONMENT COURT

(25-119) Georges River Council v Eskander [2024] NSWLEC 98

Robson J – 26 September 2024

Keywords: APPEAL – Appeal on a question of law — Appeal pursuant to s 56A of the Land and Environment Court Act 1979 (NSW) — Appeal against a Commissioner's decision — Whether Commissioner was satisfied that adequate arrangements had been made for suitable vehicular access when required — The fact that there was an existing application to obtain an easement cannot amount to an arrangement — Proceedings remitted back to Commissioner for consideration

The appellant Council appealed Commissioner Gray's decision to uphold an appeal and grant development consent for the demolition of an existing dwelling and the construction of a detached dual occupancy at 12 Ogilvy St, Peakhurst. The consent was granted subject to a deferred commencement condition which provided that the consent would not operate until the proponent satisfied Council (within 24 months) that there were "adequate written documents and plans" to address "an easement for a right of carriageway over Lot 8 ... for the benefit of the site, to provide vehicular access to the secondary dwelling". Lot 8 was owned by Council and access from the secondary dwelling would require that vehicles traverse part of Lot 8.

The primary issue on appeal was whether cl.6.9 of the *Georges River Local Environmental Plan 2021* (the LEP) prevented consent from being granted subject to the deferred commencement condition in relation to suitable vehicular access. cl.6.9 of the LEP relevantly provides:

> **6.9 Essential services**
>
> Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required—
>
> ...
>
> (f) suitable vehicular access.

HELD:

1. Where the consent authority forms the state of satisfaction that suitable vehicular access *is* available, the prohibition on the grant of consent otherwise in cl.6.9 is lifted and consent can be granted.

2. If the consent authority cannot form *that* state of satisfaction, the prohibition remains and cl.6.9 enables the grant of consent if the consent authority is satisfied that "adequate arrangements have been made" and that the essential service will be available "when required". Accordingly, the state of satisfaction requires the adequate arrangements to have "been made".

3. While it is clear that something less than a formal or binding promise is required, there must be some form of objective and tangible proof to constitute an arrangement as something "made". The fact that the proponent had initiated Class 3 proceedings under s 40 of the Court Act for an easement over Lot 8 to facilitate vehicular access was insufficient. As Council maintained its opposition to the grant of the easement, there remained a prospect that the Court would not grant the easement.

4. The Commissioner misdirected herself in forming her opinion of satisfaction that adequate arrangements had been made to make suitable vehicular access available when required.

Appeal upheld. Proceedings remitted for determination.

Reporter: Joanna Ling

(25-120) Hawkesbury City Council v Laird [2024] NSWLEC 116

Pain J – 1 November 2024

Keywords: Contempt for failure to comply with consent orders – plea of guilty to charge of contempt – orders regarding production of waste classification report not complied with – wilful contempt not purged – indemnity costs

In early 2022, Michael Laird (First Respondent) and Ashlee Harte (Second Respondent) entered into consent

orders requiring, amongst other things, the First Respondent and Second Respondent (as respondents to Class 4 civil enforcement proceedings brought by Hawkesbury City Council to refrain from using land in Putty as a waste disposal facility (**Land**), to install and maintain erosion and sediment control measures, and (relevantly to the contempt proceedings) provide a waste classification report to Council (Final Consent Orders). The First Respondent had previously sold the land to the Second Respondent in 2019, who continued to use the Land as a waste disposal facility.

By October 2022 the First Respondent had still not complied with the Final Consent Orders. Council commenced contempt proceedings against the First Respondent and Second Respondent (as owner of the Land). The First Respondent relied on evidence supporting his attempts to prepare the required report and to clean up the Land, and the Second Respondent relied on evidence that she had assumed that the First Respondent and their environmental consultant, Dr Aiken, had been corresponding with Council to comply with the Final Consent Orders.

Both Respondents pleaded guilty to the charge of contempt in December 2022.

After commencement of the hearing in March 2023, the proceedings were adjourned to August 2023, September 2023, February 2024 and finally April 2024 in order to give the Respondents the opportunity to purge their contempt. Despite these numerous and lengthy adjournments, and various attempts to purge their contempt, the Respondents had not complied with the Final Consent Orders by late April 2024.

Council submitted that the Respondents contempt was wilful and serious given the numerous inadequate attempts by the Respondents to produce the required report to Council and to clean up the Land since 2022. The Respondents made competing submissions as to the seriousness of their contempt, the reasonableness of their attempts to comply with the Final Contempt Orders and to purge their contempt, their current financial hardship and the uncertain nature and wording of the Final Contempt Orders.

HELD:

1. The Respondents were clearly aware of the consequences of failing to comply with the Final Consent Orders, as those orders contained a penal notice regarding the liability of a fine, imprisonment or sequestration of property for non-compliance.

2. The allegation that the Final Consent Orders were uncertain was unfounded in circumstances where the Respondents pleaded guilty to the contempt charges.

3. The First Respondent's contempt for failing to comply with the Final Consent Orders was wilful given the lengthy period of time during which the non-compliance was ongoing, notwithstanding his supposed financial difficulties. However, numerous prior fines relating to pollution of land elsewhere in NSW were held to be neither relevant nor an aggravating factor.

4. The Second Respondent's contempt was technical only, as a result of her reliance on the First Respondent to comply with the Final Consent Orders. Her good character and absence of prior convictions or fines resulted in a lesser need to reflect the objectives of deterrence and denunciation in contempt proceedings. Accordingly, no penalty was imposed on the Second Respondent.

The First Respondent was ordered to pay $15,000 for his failure to comply with the Final Consent Orders, with a mechanism ordered for a further penalty of $15,000 if the First Respondent failed to comply with the Final Consent Orders at six month intervals. The First Respondent was ordered to pay costs of Council's contempt proceedings on an indemnity basis. Finalisation of orders relating to the Second Respondent's costs liability were reserved.

Reporter: Peter Clarke

(25-121) XYZ Services Pty Limited v Inner West Council [2024] NSWLEC 1765

Walsh C – 28 November 2024

Keywords: APPEAL – development application – demolition of building within a heritage conservation area – effect of demolition on heritage significance – contravention of limited development on foreshore area controls – whether foreshore area controls a development standard – land subdivision – two detached dwellings – uncertainty regarding "slither of land" immediate to site and subject to possessory title claim – whether owners consent needed – contravention of development control plan provisions – implications of proposed works contrary to building line covenant

The Applicant appealed against the Council's deemed refusal of a development application seeking consent for demolition of existing buildings, Torrens title subdivision, construction of two new detached dwellings (one on each lot), each with a swimming pool, deck, foreshore access and associated landscaping, on land in Balmain.

Relevantly, cl.6.5(3) of the *Inner West Local Environmental Plan 2022* provided:

> **6.5 Limited development on foreshore area**
>
> ...
>
> (3) Development consent must not be granted for development on land to which this clause applies except for the following purposes—
> (a) the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area,
> (b) boat sheds, cycleways, fences, jetties, retaining walls, slipways, swimming pools, walking trails, waterway access stairs, wharves, picnic facilities or other recreation facilities (outdoors).

The Applicant proposed certain works within the foreshore building line which did not fall within any of the exceptions to cl 6.5(3).

The Council raised a threshold legal question as to whether cl. 6.5 of the LEP was a prohibition or a development standard (capable of variation under cl. 4.6). 'Development standard' was defined in s.1.4 of the *Environmental Planning and Assessment Act 1979* (the Act) as follows:

> ***development standards*** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:
>
> (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
>
> ...
>
> (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

The Council also raised merit considerations including in relation to the effect of the proposed development on the heritage significance of a heritage conservation area, desired future character and solar access.

HELD:

1. The obligation of the Court is to interpret the clause in the instrument before it (*Bell v Shellharbour Municipal Council* (1993) 78 LGERA 429 at [423]). Therefore whilst numerous cases were cited in the parties' submissions on the proper characterisation of cl 6.5 of the LEP, there were limits on the extent to which the Court could rely on authorities dealing with differently worded foreshore building line provisions.

2. In considering the question of whether a provision is a 'development standard', the definition of 'development standard' under s.1.4 of the Act is the primary consideration (*Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319; [2001] NSWCA 270 at [95]).

3. Cl. 6.5 of the LEP meets the definition of 'development standard' because it fixes a standard in respect of the distance of "a building... from (a) specified point" (being the foreshore building line) and sets a standard in respect of the 'location' and 'siting... of a building or work'.

4. The proposed development was otherwise acceptable on its merits.

Appeal upheld. Development consent granted.

Reporter: Joanna Ling

(25-122) Bowie Ferris Investments Pty Ltd v Woollahra Municipal Council [2024] NSWLEC 1774

Dixon SC – 29 November 2024

Keywords – Heritage item – existing and operating hotel – heritage significance for use – change of use - whether there is an obligation to continue existing use

The Applicant commenced Class 1 proceedings to challenge the Respondent's refusal to grant development consent to change the use of an existing hotel to a commercial (retail) premises.

The existing hotel was an item of local heritage, with its significance being tied to its use as one of the earliest established hotels in Paddington. The heritage experts agreed that the continuous use of the pub, and fabric, were significant components of the item.

A primary issue in the proceedings was whether the "change of use" from the pub to a high-end retail premises would have adverse impacts upon the heritage significance of the item. The Applicant contended that the Class 1 application did not propose a "change of use" as the cessation of the operation of the pub was merely a by-product of the grant of consent for the development.

The Applicant also contended that it was under no obligation, at law, to obtain development consent to cease operation of the pub. It could do so at any time. The Applicant therefore contended that the loss of the use of the item as a hotel was not relevant to the assessment of the heritage impact of the development.

The primary heritage reason put forward by the Applicant in support of the development was that the current hotel use was not viable. In support, the Applicant provided evidence from a real estate agent as to the inability to sell the property for a certain price.

The Respondent contended that the social significance of the heritage item (which included people gathering) would be predominantly lost if the development were approved. The Respondent also noted that the Applicant ought to have been aware of the item's circumstances and use at the time of purchase, as it had been operating as such for over a century.

The Respondent's position was that the proposed use would only be permissible if the Applicant established that the existing use was not viable. This was not established with any proper evidence.

HELD:

1. The Court acknowledged it could not force the continued operation of the pub.

2. The loss of the use of the item as a pub was relevant because of the requirement to consider the effect of the proposed development on the heritage significance of the item under cl 5.10(4) of the ***Woollahra Local Environmental Plan 2014***.

3. The Applicant did not satisfactorily demonstrate that the operation of the pub was not viable by relying on advice from the former owner's sales agent. The Court was not informed by any valuation evidence, nor any financial evidence, profit or loss evidence or financial records to support the assertion about the unviability of the existing use.

4. The removal of the pub directly and adversely impacted the heritage significance of the property.

Application dismissed and the application was refused consent.

Reporter: Serafina Carrington

(25-123) Dahua Group Sydney Project 6 Pty Ltd v Shellharbour City Council [2024] NSWLEC 1814

Dickson J - 18 December 2024

Keywords: Class 1 appeal - development application - staged subdivision of land - integrated development - bushfire safety - Aboriginal heritage - absence of integrated authority approvals - adequacy of information about potential impacts on Aboriginal heritage

The Applicant commenced proceedings against the Respondent's deemed refusal of a development application which sought consent for Torrens title subdivision to create 192 residential allotments, one local park lot and two residue parcels. The subdivision was proposed to be phased over 5 stages.

The development application was integrated development pursuant to s 4.46 of the EPA Act as it required approval (an **AHIP**) under s 90 of the *National Parks and Wildlife Act 1974* to destroy Aboriginal artefacts within the footprint of the development, and it also required a bush fire safety authority under s 100B of the *Rural Fires Act 1997*.

The Respondent submitted that the development application should be refused for four reasons:

1. It did not include the construction of an additional bridge and the failure to do so provided unsatisfactory traffic management.

2. It failed to provide appropriate bushfire safety measures, in particular in relation to fire fighter safety. The consent authority could not be satisfied that the development met the requirements of s 4.14 of the EPA Act.

3. There was uncertainty about the relevant works and their impacts. The application had not demonstrated that the development would not have an adverse impact on Aboriginal cultural heritage and Aboriginal places of significance.

4. On similar grounds to Reason 3, there was insufficient information for a consent authority to perform the requirement at cl 6.2(3)(f) of the *Shellharbour Local Environmental Plan 2013*, namely to consider the likelihood of disturbing relics.

In relation to Reason 1, the Applicant argued that there were no unacceptable traffic impacts arising from the development for which consent was sought. The expert evidence established that the existing road network had capacity to service the residential subdivision and did not give rise to the need for this bridge.

In relation to Reason 2, the Applicant had proposed two performance-based solution to provide access for firefighters and emergency vehicles, in lieu of perimeter roads in accordance with *Planning for Bushfire Protection* (**PBP**). The first performance solution was a fire trail by easement over 13 individually owned residential allotments. The access would have a dual use for emergency services and residents. The Respondent submitted that the reduced width impacted the feasibility of the fire trail and the conflict of use by residents seeking to egress and the firefighting function was a detrimental likely impact. The second performance solution was a series of extended shared driveways. The Respondent argued that the shared driveways between the proposed lots did not allow a coordinated and efficient response by fire fighters undertaking fire suppression and property protection activities.

In relation to Reasons 3 and 4, the development application indicated that there was one known Aboriginal site on the subject site but there was no detail about how the identified artefacts were sought to be retained. The application included an Aboriginal Cultural Heritage Assessment (**ACHA**), however, Heritage NSW declined to provide concurrence and requested additional information (archaeological test excavations, additional assessment, additional mapping, and compliance with guidelines and legislative requirements). The Applicant did not agree with the need for a test excavation and argued that the additional information requested could be completed a part of an updated AHIP application. The Respondent argued that the beneficial and facultative character of the integrated development provisions meant that the Applicant could not deal with, or defer, the relevant issues with the development application process.

HELD:

1. The fact that the development application did not include the construction of a bridge from the end

of Bemboka Street to Terragong Street did not warrant its refusal.

2. The development application did not provide adequate protection for life, assets and firefighters as the proposed performance-based solutions did not meet the bushfire planning measure of Access at Section 5.3.2 of PBP.

3. The extent to which the proposed development deviated from the PBP, the risk of detrimental impacts arising from the performance-based solutions, and the concerns raised by the New South Wales Rural Fire Service in relation to the lack of justification for the lack of perimeter roads would warrant refusal of the development application.

4. The development application did not provide sufficient information to determine the likelihood of the presence Aboriginal artefacts in locations where development (or works) was proposed, and it had not demonstrated that the proposal would not have an adverse impact on Aboriginal cultural heritage.

5. A proposed condition requiring the undertaking of test excavations post consent did not relieve a consent authority from the obligation to take into consideration all matters of relevance under s 4.15(1) of the EPA Act.

Appeal dismissed.

Reporter: Christina Zhang

(25-124) Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust v The Council of the City of Sydney [2024] NSWLEC 1825

Walsh C – 19 December 2024

Keywords: Development Application – consent orders between parties – lay objections - proposed demolition of existing residential flat buildings – construction of new residential flat buildings – development standards - proposed contravention of maximum building height controls – interpretation of objectives of residential zone – whether consistent with those objectives - whether in public interest – whether provided for housing needs of the community – jurisdiction unavailable – amenity impacts – Court not satisfied on merits – appeal dismissed

The Applicant lodged an appeal against the Council's deemed refusal of its development application (Proposal) for demolition of existing buildings and construction of two new residential flat buildings comprising 20 apartments (with associated basement car parking) across two parcels of land in Elizabeth Bay.

The Proposal had been amended prior to the hearing to reflect agreements in the design that had been reached between the parties. As such, the Council's contentions were all satisfied, and the parties had prepared consent orders that the appeal be upheld subject to agreed conditions.

Notwithstanding that agreement between the parties, the Court needed to be satisfied of all jurisdictional requirements, and the outstanding concerns of lay objectors. Those outstanding matters were:

6. Whether the Court had jurisdiction to grant development consent for a proposed contravention of the maximum building height controls in the Sydney *Local Environmental Plan 2012*, to which the Applicant had prepared a request pursuant to clause 4.6 of the LEP seeking to justify that exceedance.

7. In considering that contravention of the building height controls whether the Proposal was in the public interest insofar as it was consistent with objectives of the General Residential "R1 Zone" in the LEP, of which the first objective was providing for the housing needs of the community.

8. Potential risks of a net reduction in housing numbers, and potential loss of affordable housing in the locality.

9. Amenity impacts, including:

   a) potential loss of harbour views;

   b) visual bulk;

   c) inadequate building separation distances;

d) unsustainable design; and

e) effects of excavation required for the proposed basement carparking, and impacts during the construction stage.

HELD:

1. The permissive powers conferred by clause 4.6(2) of the LEP were not enlivened, as the Court was not satisfied that the Applicant's clause 4.6 request justified a contravention of the height limit. The Court was not satisfied that the Proposal was in the public interest, because it was inconsistent with the objectives of the R1 Zone.

2. The Proposal was inconsistent with the first objective of the R1 zone insofar as it would result in a net reduction of dwellings and decrease the availability of more affordable housing, thereby contradicting community housing needs and creating an unacceptable risk of reducing housing supply in the area.

3. Even if those jurisdictional prerequisites were satisfied, the Proposal would fail on its merits (including in respect of heritage, bulk, and demolition and construction impacts). Although the Court generally considers whether potential impacts can be tolerated when evaluating proposals that provide for more housing (and are thereby consistent with the core objective of residential zones), those impacts can only be tolerated when a Proposal in a residential zone increases housing supply for a demographic in need of that supply.

4. The Proposal would create unacceptable view loss impacts on neighbouring properties and communal open spaces. Having regard to the principles in *Tenacity*, the Court could not consider those impacts to be acceptable when weighed against more negative effects associated with the Proposal.

Appeal dismissed.

Reporter: Lily Whiting

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