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NEW SOUTH WALES

LAND AND ENVIRONMENT COURT

(25-133) The Owners-Strata Plan 934 v T&P Chimes Development Pty Ltd [2025] NSWLEC 9

Pritchard J – 25 February 2024

Keywords – Strata renewal plan – Class 3 proceedings – preliminary issues - whether strata renewal plan needed to be varied – whether amendments of a minor nature that does not affect the plan in any substantial way

The Applicant, being The Owners – Strata Plan 934 (in respect of 45-43 Macleay St, Potts Point), and the First Respondent, being the owner of a majority of lots in SP 934, sought orders pursuant to s 182(1) of the *Strata Schemes Development Act 2015* (NSW) (**SSD Act**) in Class 3 proceedings to give effect to a strata renewal plan to redevelop SP 934 and other consequential orders. The subject property comprised 80 residential lots and 27 car space lots.

There was not unanimous agreement of the strata owners to proceed with the strata renewal plan. As at the time of preparing the strata renewal plan, there were a number of dissenting lot owners. As at the time of the hearing, this number had reduced to a single dissenting owner, being the owner of Lot 19.

This judgment concerned preliminary issues which arose in relation to the variation of the strata renewal plan prior to the Court's determination of the Applicant's Class 3 application. They were:

i) Whether cl 3.3(g) of the strata renewal plan "needed" to be varied to reflect the higher sale prices in the contract of sale, and whether the Court should vary Annexure B to the plan varying the proposed sale price of Lot 19; and

ii) Whether the proposed variations were of a minor nature that did not affect the strata renewal plan in any substantial way, within the meaning of s 182(3)(a) of the SSD Act.

Those preliminary issues arose due to a number of lot owners changing their position to support the strata renewal plan, and due to inconsistencies in the terms of the strata renewal plan including purchase prices and settlement dates.

HELD:

1. As to (i), the Court found that included in the strata renewal plan was a definition of "Option Agreement", which included a contract for sale. Option Agreement was defined to mean "the document for a Lot entitled 'Option Deed' or to a similar effect between an Owner (as grantor) and TPTC (or a Related Entity of TPTC) (as grantee), under which the grantee has the right to require the Owner to sell that Owner's Lot". Annexed to the strata renewal plan was a contract for sale and purchase of land between the First Respondent and a dissenting owner that provided that completion was 2 months from the contract date.

2. As to (ii) and whether or not the strata renewal plan 'needed' to be varied, the word 'need' did not appear in the **SSD Act**. The Court's power to vary a strata renewal plan could only be exercised if the variation was of a minor nature that did not affect the plan in a substantial way, and written agreement to the variation had been given by the owner of each lot in relation to which a support notice for the plan had been given.

3. Whilst the strata renewal plan referred to an 'option agreement', such a process could include the formation of a contract for sale and ultimate purchase of land. The definition of 'option agreement' including 'or to a similar effect' in the strata renewal plan included a contract for sale.

4. In terms of lot 19, the valuation evidence proffered in the proceedings demonstrated that the amount provided in the strata renewal plan exceeded the market and disturbance value. The Court relied upon the sale price of a neighbouring, similar lot.

5. Such variations to correct the matters set out above were of minor nature, particularly as they were limited to a small number of lots.

Applicant to seek written agreement from owners to amend the strata renewal plan. Final determination of the Class 3 Proceedings to follow.

Reporter: Serafina Carrington

(25-134) *Reisinger v Placek* [2025] NSWLEC 11

Pain J – 25 February 2025

Keywords: Judicial review – Hardiman principle – apprehension of bias

The Applicant commenced judicial review proceedings in the Land and Environment Court (**Court**) against two of his adjoining neighbours, the first and second respondents (**Neighbours**), and also against Woollahra Municipal Council (**Council**) as consent authority in relation to a development application for an inclinator on the Neighbours' property (**DA**).

The DA had been approved in 2024 granting consent to an almost identical form of development on the Neighbours' land that had been the subject of a development application in 2023, which itself had been the subject of prior judicial review proceedings brought by the same applicant (**Prior DA**). The Applicant in the present proceedings made the novel claim that the DA should be held to be invalid on the grounds of apprehension of bias, and sought relief in the form of the DA being re-determined by either a delegate of Council or Council's local planning panel (**LPP**). This form of relief had never been granted by the Court in judicial review proceedings before.

The basis of the apprehended bias claim was that in accordance with the principle in *R v Australian Broadcasting Tribunal; Ex Parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13 (***Hardiman***), Council's active involvement in the proceedings concerning the Prior DA meant that Council could not reasonably be seen to "have brought an impartial and unprejudiced mind to the determination of the… DA".

Although Council took an active role in respect of the Prior DA proceedings, it filed a submitting appearance in these proceedings. Importantly, the Prior DA proceedings had been discontinued by the Applicant, and as such, there had been no findings made about Council's determination of the Prior DA.

HELD:

1. The application of the statutory scheme in the context of the determination of the DA meant that the *Hardiman* principle had no role to play in the proceedings. There was insufficient evidence of any apprehension of bias adduced by the Applicant to overcome the onus of proving bias.

2. Because the function of approving a development application is a decision of the Council as a whole, being a body politic (LG Act, s 220(1)), it did not follow that Council's active participation in the Prior DA proceedings had to be attributed to all of Council's employees, regardless of what delegated functions they were performing.

3. The *Hardiman* principle could "potentially" apply as a result of Council's actions in the Prior DA proceedings, although that point was not decided, but any such breach of the principle was effectively cured by the determination of the DA by a different delegate of Council.

4. The Applicant did not identify any authority on which to claim the relief sought, and as a result of the foregoing conclusions the Court did not determine whether the Court has power to direct a council to require a development application to be determined by an LPP or a delegate not employed by Council.

The summons was dismissed with costs reserved.

Reporter: Peter Clarke

(25-135) Dubow v Warrumbungle Shire Council [2025] NSWLEC 15

Pritchard J – 5 March 2025

Keywords: Notice of motion – stay of order pursuant s 124 *Local Government Act 1993* pending outcome of appeal – request for referral to Pro Bono Panel granted

In the substantive proceedings the Applicant, Yolande Dubow, appealed in Class 2 of the Court's jurisdiction against Warrumbungle Shire Council's issuing of an order on 6 December 2024 under s 124 ***Local Government Act 1993*** (LG Act) ('Order 18') relating to the keeping of poultry on her premises in Dunedoo.

In a notice of motion filed 4 February 2025, the Applicant sought (in effect):

1. referral to a barrister or solicitor on the Pro Bono Panel for legal assistance under rule 7.36 of the UCPR; and

2. stay of Council's Order 18 pending the outcome of the Class 2 appeal.

The applicant relied upon two affidavits in which she deposed to her previous bankruptcy, the poultry kept on her property and her turbulent relationship with surrounding neighbours. Ms Dubow deposed that she was admitted as a solicitor in 1984 and practiced as recently as 2023, however, was now reliant on JobSeeker and poultry auction sales for income. Her submissions included that she had severe depression and was taking medication which impaired her concentration. Council adopted a neutral position regarding the Applicant's Pro Bono referral application.

Regarding the application for a stay of Council's order, the Applicant submitted that the poultry were owned by the bankruptcy trustee and was not hers to remove from the property. Council submitted there was no evidence to support an unconditional stay of Order 18, and that the poultry continued to generate high levels of noise (which was noted by the Court as evident on the AVL connection, in addition to a crowing rooster appearing to perch on a sideboard behind the Applicant on screen).

HELD:

1. It was in the interests of the administration of justice for the Court to refer the Applicant to the Pro Bono Panel for legal assistance, taking into account her means, capacity to obtain legal assistance, and the nature and complexity of the proceedings. The Applicant's evidence as to her personal circumstances and mental health issues, which was unchallenged, was accepted by the Court.

2. The Applicant bore the onus of persuading the Court that a stay of Council's order should be granted. The highly audible level of noise generating from the property was accepted as being of concern to Council.

3. Given the Court's findings in relation to the mental health of the Applicant, a stay of Order 18 was appropriate pending the provision of legal assistance. There was no evidence establishing unfairness to any party. There was a risk that the appeal would prove abortive if the Applicant were to be successful and is a stay was not granted.

Order made pursuant r 7.36(1) UCPR referring the applicant to the registrar for referral to a barrister or solicitor on the Pro Bono Panel for legal assistance.

Order made staying Council's Order 18 until 5pm on 7 April 2025.

Matter listed for directions.

Reporter: Georgie Cooper

(25-136) Stroud and Anor v CMZZJ Investments Pty Ltd [2025] NSWLEC 16

Robson J - 5 March 2025

Keywords: statutory interpretation -*Trees (Disputes Between Neighbours) Act 2006,* s 4(4) - whether application can be brought after tree has been removed

CMZZJ Investments Pty ltd (**CMZZJ**) sought summary dismissal of Class 2 tree dispute proceedings on the basis that the tree in question had been removed from their land two years before the proceedings were commenced. The tree was removed after John Stroud and Karine Akbar (**Applicants**), the owners of a property adjacent to the property owned by CMZZJ, provided CMZZJ with a civil and structural engineering report detailing damage allegedly being caused by the tree.

The applicants commenced proceedings seeking the removal of the tree and payment of damages. CMZZJ contended that the proceedings were incompetent on the basis that the ***Trees (Disputes Between Neighbours) Act 2006*** (**Trees Act**) did not apply to any tree that was removed before an application under Pt 2 was made.

Section 4(4) of the Trees Act, inserted in 2010, provided that "a tree that is removed following damage or injury that gave rise to an application under Part 2 is still taken to be situated on land for the purposes of the application if the tree was situated wholly or principally on the land immediately before the damage or injury occurred".

CMZZJ pointed to various textual and contextual features which it submitted indicated that the Trees Act required

that the tree must have been situated on CMZZJ's land as at the time the application was made under Part 2 of the Trees Act for the provisions of the Trees Act to apply. CMZZJ submitted that s 4(4) and in particular the words "that gave rise to an application" required the tree to be situated on the Respondent's land at the time when the application was made. It also submitted that proceedings under the Trees Act involve the administration of public law, whereas if the tree is removed before the application is made, the only legal questions remaining would be issues of damage, causation and remedy, which, it submitted, were more appropriately considered as a matter of private or common law.

HELD:

1. CMZZJ's interpretation was not accepted. Both the text and context of s 4(4) of the Trees Act clearly provided that an application brought pursuant to s 7 of the Trees Act may be commenced if the tree in question had been removed.

2. The purpose of the Trees Act was to provide for proceedings for the resolution of disputes between neighbours concerning trees. To exclude the application of the Act from the current circumstances would thwart the intention and purpose of the Trees Act. The amendment inserting s 4(4) was intended to give the Court jurisdiction in such cases, following the Court's decision in *Robson v Leischke* [2008] NSWLEC 152.

CMZZJ's application was dismissed with costs reserved.

Reporter: Ellen Woffenden

(25-137) Hanave Pty Ltd v Waverley Council [2025] NSWLEC 19

Pritchard J - 13 March 2025

Keywords: Class 4 - judicial review - power to impose condition requiring an affordable housing contribution - construction of transitional provision - whether a condition can be severed from the development consent

The Applicants commenced judicial review proceedings seeking, inter alia, a declaration that the condition requiring contributions for affordable housing (**Condition**) imposed on a development consent granted by the First Respondent, Waverley Council, is invalid.

The subject development consent was granted on 27 September 2023 and relates to alterations and additions to the existing residential flat building at 241 Bondi Road, Bondi (**Consent**). The Condition was imposed following a decision of the Second Respondent, Waverley Local Planning Panel, pursuant to cl 48 of *State Environmental Planning Policy (Housing) 2021*.

The Applicants submitted that the Condition was not authorised to be imposed under the *Waverley Local Environmental Plan 2012* (**Waverley LEP**) as authorised by ss 4.17(1)(h) and 7.32 of the EPA Act. At all relevant times, the Waverley LEP contained no provision authorising the imposition of any such condition.

The Respondents contended that:

1. The Condition was valid as a result of the operation of cl 15A of Pt 1B of Sch 4 to the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**2017 Regulation**) which empowered the Waverley Local Planning Panel to impose such condition. Clause 15A of the 2017 Regulation provided that a State environmental planning policy could authorise the imposition of affordable housing conditions.

2. In the alternative, in the event the Condition was invalidly imposed, it was not severable from the Consent as it was a fundamental element of the Consent in terms of how the impact of the proposed development on affordable rental housing "would be ameliorated". As a result, the Consent should also be declared invalid.

In response to Respondents' first submission, the Applicants argued that cl 15A of the 2017 Regulation can only apply to development consents granted prior to 1 March 2018 as it was a transitional provision only intended to operate in conjunction with Part 5B of the EPA Act, which had not commenced at the time. Once Part 5B of the EPA Act commenced, which was prior to the granting of the Consent, cl 15A of the 2017 Regulation had no further work to do.

In response to the Respondents' second submission, the Applicants contended that the question is not whether the condition is fundamental to the granting of the Consent, but rather whether severance of the Condition

would result in the remainder of the Consent operating differently. The Applicants submitted that the Condition is independent of any of the other conditions in the Consent, and the invalidity of the Condition could not affect the validity of the Consent as a whole.

HELD:

1. That the Second Respondent was not authorised to impose the Condition on the Consent. The Waverley LEP did not contain any provision authorising the imposition of such a condition. On its proper construction, cl 15A of the 2017 Regulation can only apply to development consents granted prior to 1 March 2018.

2. That the Condition can be severed from the Consent. Severability of a condition requires consideration of whether the balance of the development consent will operate differently and not whether the unlawful condition was fundamental to the granting of the development consent. In circumstances where the Condition only required the payment of a monetary contribution, the balance of Consent would remain for the same development. That the consent authority may have come to a different decision if it had known that the Condition was not enforceable does not mean that the Consent will operate differently on the Applicants or produce a different result.

The Court declared that the Condition on the Consent is invalid and of no force or effect.

Reporter: Christina Zhang

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