

Planning and Local Government Matters, Winter 2011

CREATIVE LEGAL SOLUTIONS FOR LOCAL GOVERNMENT IN REGIONAL NSW

Case Alert: Developer involvement in LEP process: need to tread carefully

Background

The rezoning of land is often triggered by a site specific proposal put forward by a developer. There is nothing unusual about this but, as a recent case shows, care must be taken to avoid giving the impression that that irrelevant or inappropriate factors were considered in the rezoning decision making process. In legal terms this can, if established, constitute “apprehended bias” and may undermine the validity of the resultant local environmental plan.

Recently, Williams Love and Nicol successfully represented Queanbeyan Council in proceedings brought by Capital Airport Group seeking to challenge the validity of steps taken by the Council in the preparation of a draft local environmental plan for land known as South Tralee (*Capital Airport Group Pty Ltd v Director General of the NSW Department of Planning (No. 2)* [2011] NSWLEC 83). Capital Airport Group claimed that Council’s decision to prepare the draft plan was infected by apprehended bias because:

- (1) Council had considered environmental studies funded and supplied by the developer;
- (2) Council had a “financial interest” in the outcome of the process because it was negotiating a Voluntary Planning Agreement (VPA) with the developer for financial contributions to the acquisition and development of land; and
- (3) Council had “prejudged” the issue of rezoning, having made conclusions central to the preparation of the draft local



environmental plan (LEP) and the environmental study of the land.

The Court found that:

- (1) Consideration of environmental studies funded and supplied by the developer did not give rise to an apprehension of bias because the studies were prepared for the Council (not the developer) and had been peer reviewed and considered by Council before adoption;
- (2) The VPA between the developer and Council did not give rise to an apprehension of bias because (i) it was in draft form such that no financial commitments were made; and (ii) a financial contribution by a developer under a VPA is permitted by legislation and is required to be directed to a public purpose; and
- (3) The resolution adopted by Council to submit the Draft LEP to the Department of Planning did not evidence that Council had a contractual obligation or had publically committed to rezone in a particular manner because Council had a statutory obligation to submit the draft LEP.

Apprehended bias arising from developer involvement in the preparation of a LEP is less likely to arise under the current version of the EP&A Act because, under s54(3) of the EP&A Act, Councils are authorised to require the owner to carry out studies or provide other information concerning the planning proposal or to pay the Council’s costs in the preparation of the proposal.

However, to reduce the risk of possible challenge, a Council should ensure that:

- (1) Council (and not the developer) determines the scope and content of studies, reports or proposals commissioned;
- (2) It is clear that the purpose of any planning proposal or study undertaken by the land owner is to inform the Council in the exercise of its powers under the EP&A Act; and
- (3) All discretion and decision making power remains with the RPA, DG or Minister in accordance with the EP&A Act.

Case Alert: Council defends defamation claim following publication of Former Councillor’s conduct review

In *Chetwynd v Armidale Dumaresq Council* [2010] NSWSC 690, the NSW Supreme Court considered whether the Council’s publication of an investigation report into a potential breach of its Code of Conduct constituted defamation and, if so, whether the Council could establish a valid defence to the defamation.

Background

Mayor Chetwynd, on behalf of the Council, sought and received legal advice on the termination of the employment of the Director of NERAM (a corporate beneficiary of the Council). Shortly afterwards a Council meeting was convened and Council resolved to proceed with the termination in line with Mayor Chetwynd’s expressed opinion, which was not consistent with the legal advice received. Council later investigated whether Mr Chetwynd had appropriately represented the legal advice received to his fellow councillors and whether Mr Chetwynd had breached the Council’s Code of Conduct. A report on the investigation, which concluded that Mr Chetwynd had not breached the Code, was considered by the Council and circulated among councillors, council staff, local MPs, local media and the public. However, in response to the publication of the investigation report, Mr Chetwynd brought an action in defamation against the Council alleging damage to his reputation.

Defamation?

The Council admitted that the published agenda was defamatory because it imputed that Mr Chetwynd had made misleading statements, engaged in conduct which was improper or unethical and constituted an abuse of power and that he failed to act in good faith. However, Council successfully argued that it had a valid defence because the content of the report was substantially true (defence of justification – s25 *Defamation Act 2005*). The Court also indicated that the defences of “qualified privilege at common law” and “statutory qualified privilege” (s30 *Defamation Act*) would be satisfied in the circumstances because it was reasonable for the Council to publish a defamatory report where the person the subject of the report was the given opportunity to refute the allegations in the report prior to its publication.

Brief Take-Home Messages from Recent Case Law

Councils should always consider whether a condition of consent ought to be imposed with defined timeframes for performance.

In *Rich v Lennox Palms Estate Pty Ltd* [2010] NSWCA 242, the Court held that a condition of a subdivision approval requiring the proponent to provide public road access over a residue lot was not required to be satisfied until the subdivision was completed because the condition failed to impose any requirement for the access to be provided at an earlier time.

In development applications and consents, the terms ‘use’ and ‘purpose’ are not interchangeable and Councils should carefully consider the terminology they use.

In *Codling v Manly Council* [2011] NSWLEC 57 the Court held that the ‘use’ of the land was defined as the physical acts/built form which enables the land to serve a purpose, whilst the ‘purpose’ of the land was defined more specifically to include the intention of the applicant as to the use of the land.

The case concerned an appeal from a development application refused on the grounds that part of the proposal was a prohibited use (a restaurant). The proponent alleged that the proposed purpose was not that of a restaurant but rather that of a function centre, which was permissible with consent. Council

submitted that a restaurant could not be distinguished from a function centre which served food in terms of functionality. The court found that the purpose of the site as a function centre could be distinguished in intent from its use as a restaurant and that the development was therefore permissible with consent.

The cost to a Council in supplying a service is not the only relevant factor in setting fees under section 608 of the Local Government Act 1993.

In *Meriton Apartments v City Council of Sydney* [2011] NSWLEC 65, the Court found that the Council could validly impose Work Zone fees to recover forgone parking and disruption to residents, businesses and commuters outside construction sites. They also determined that it would be a valid exercise of Council’s power to charge a slightly higher fee with the intention of penalising development exceeding 12 months in duration. Such a higher charge was deemed not to be manifestly unreasonable despite being greater than the Council’s costs in supplying these services because it was not grossly disproportionate to the services provided.

Councils should ensure that the public notification or advertisement of development applications includes complete and accurate details of the relevant property address(es), including a reference to all streets to which the proposed development has frontage.

In *Csillag v Woollahra Council* [2011] NSWLEC 17, the Court held invalid a consent granted by the Council on the ground that the address included in the notification of the application failed to sufficiently identify the property to be developed. The failure in the particular circumstances to refer to the property’s second street frontage was found to have been likely to mislead prospective objectors.

Council found liable for fatal dog attack

Councils are reminded of their responsibility to follow up all reports of potentially dangerous dogs after a recent incident in which a NSW Council was held liable in negligence when a four-year-old girl was fatally mauled by pig-hunting dogs known to be dangerous.

Warren Shire Council had received numerous complaints that the dogs were aggressive and responded to the

complaints by speaking with the dog owner and issuing infringement notices. The district court found that the Council ought to have taken the further action of declaring the dogs ‘dangerous’ under the *Companion Animals Act 1998*. Doing so would have required that the dogs to be kept in a child-proof enclosure. By not making such a declaration the Court found the Council had breached its duty of care and was ordered to pay more than \$120,000 in damages. Amendments have now been made to the *Companion Animals Act 1998* to enable Councils to declare dogs kept for the purposes of hunting as ‘dangerous dogs’.

Care needs to be taken during the carrying out of routine road maintenance works to ensure that approval is obtained before taking or removing any endangered plants. Otherwise the Council may commit an offence against section 118A(2) of the National Parks and Wildlife Act 1974 which is objectively serious and foreseeable. Councils should carefully consider their potential liability for such offences and be aware that their status.

In *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* [2011] NSWLEC 8, the Council pleaded guilty to unlawfully picking endangered plants during routine maintenance works and the Court ordered the Council to pay \$105,000 for an environmental rehabilitation project. The Court observed that the circumstances of the offence were objectively both serious and foreseeable and that the Council’s status as a public authority did not entitle it to leniency even when carrying out necessary works in the performance of its statutory functions.

Introducing Alice Menyhart, Lawyer



Alice is an experienced Lawyer who has recently joined Williams Love & Nicol’s Planning and Local Government practice. Prior to starting at Williams Love & Nicol, Alice worked for a large national firm for four years providing commercial law advice to Commonwealth and State Governments. Alice has a science/law degree majoring in environment and resource management, and brings an understanding of, and genuine interest in, environmental and planning issues at the local government level.