

Planning & Local Government matters

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SEPP No. 1 Divides Court of Appeal (again!)

A decision handed down by the Court of Appeal on 3 March 2010 has shown yet again the difficulty which can arise in determining whether a provision of an environmental planning instrument is a 'development standard', and therefore capable of being varied under *State Environmental Planning Policy No. 1 – Development Standards (SEPP No. 1)*, or an outright prohibition.

Agostino v Penrith City Council [2010] NSWCA 20 required the Court of Appeal to determine whether clause 41(3) of *Penrith Local Environmental Plan No. 201 (the LEP)* could be varied under SEPP No. 1. This involved a consideration of whether the provision constituted a development standard or a prohibition.

Clause 41(3) provided that:

"Notwithstanding any other provision of this plan, a person may, with the consent of the Council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150m²."

Mr and Mrs Agostino had operated a fruit and vegetable store on land now the subject of the LEP since at least 1992. The land was within Zone No. 1(a) (Rural "A" Zone – General) which prohibited shops, but the Agostino's fruit and vegetable store was recognised by clause 41 of the LEP which applied specifically to their land and permitted, with the consent of the Council, a fruit and vegetable store with a maximum floor area of 150 sq.m.

On 1 September 2008 they lodged a development application with Penrith City Council (**the Council**) for alterations and additions to increase the gross floor area of their store from its present 150m² to 765². The Council refused the application and Mr and Mrs Agostino lodged a Class 1 appeal to the Land and Environment Court. The case centred on whether the area mentioned in clause 41(3) was a development standard capable of being varied under SEPP No. 1.

By a majority of 2 to 1, the Court of Appeal dismissed the appeal. The majority (comprising Tobias and Giles JJA) held that clause 41(3) operated as an absolute

prohibition of a fruit and vegetable store that had a floor area of more than 150m². McClellan CJ at CL held that the provision was a development standard.

The majority placed considerable weight on the fact that shops were generally prohibited in the relevant zone and that clause 41(3) had been inserted as an exception to that general prohibition. The Court therefore accepted the Council's submission that the proper description of that exception was a "fruit and vegetable store with a maximum floor area of 150m²" so that any such store with a floor area exceeding that maximum fell outside the purview of clause 41(3) and was thus prohibited.

In a strong dissenting judgement McClelland CJ at CL came to the opposite conclusion holding that the 150m² maximum was a requirement fixed in respect of an aspect of the development (ie its floor space) and, as such, it was a provision that came within the meaning of 'development standard' as defined in the Act. His Honour observed that clause 41(3) provided that the purpose for which the land might be used with consent was a fruit and vegetable store and that allowing a variation of the floor area so that it exceeds 150m² did not change the purpose for which the land was to be used - a larger building would remain a fruit and vegetable store.

This decision demonstrates once again the difficulty in deciding whether provisions in environmental planning instruments are developments standards and thus amenable to variation under SEPP No. 1. As McClellan CJ at CL said:

The saga of litigation in relation to SEPP 1 is well known to environmental planners and legal practitioners..... The wastage of public and private money debating these issues is a blight upon our planning system which should be resolved, preferably by legislative intervention or amendment to individual planning instruments.

Time will tell whether his Honour's plea will be answered by the State Government. In the meantime Councils would do well to consider the inclusion of provisions in their own local environmental plans which specify which provisions are development standards and which are not. ♦

Exhibition of draft LEP – need for care

In *Homeworld Ballina Pty Ltd v Ballina Shire Council* [2010] NSWCA 65 the Court of Appeal considered the circumstances in which the validity of a local environmental plan could be undermined by the exhibition of material that could mislead members of the public about what the draft LEP proposed to do.

The applicant had challenged the validity of a local environmental plan which rezoned land owned by the Council in part "Industrial" and in part "Environmental Protection (Wetlands)". The purposes of the amendments were described in the plan as being "to enable the land to be used for industrial purposes and for environmental protection".

The applicant argued that the public exhibition of the draft LEP was invalid on the basis that the description of the purposes in the draft plan as being to rezone the land for "industrial purposes", was misleading because it made no reference to the fact that part of the purpose was to permit the land to be used for retailing bulky goods. In the Land and Environment Court, Sheahan J dismissed the application and the appellant appealed.

The issue for determination on appeal was whether a reasonable reader would have been misled into thinking that the amendments permitting rezoning for "industrial purposes" did not include the possibility of "bulky goods retailing".

The Court of Appeal dismissed the appeal. The Court explained that a local environmental plan is required to be placed on public exhibition pursuant to the EP&A Act, s 66. The process of public exhibition, and hence the plan, may be invalid if the material presented would be misleading to the reasonable reader.

The test of what is misleading depends upon the understanding which would be obtained by the reasonable reader. That person is assumed to be able to understand the inter-relationship of various documents placed on public exhibition and, where the local environmental plan being amended is one of those documents, will be expected to have looked at the parts of that document relevant to his or her concerns.

The Court held that the public exhibition of a draft local environmental plan cannot be invalid because the document itself is misleading, unless it could be said that it required accompanying explanatory material which was not exhibited and that a decision of the council not to exhibit such material was manifestly unreasonable. ♦

Removal of 'Trespassers' from Public Reserve

In *St Alder v Waverley Local Council* [2010] NSWCA 22 (8 March 2010) the Court of Appeal was faced with an application by a number of homeless people, who had been sleeping rough in the Bondi Pavilion for between two and eight years, to restrain the Council from evicting them.

The Bondi Pavilion is located within Bondi Park, a Crown Reserve dedicated for the purposes of public recreation under the *Crown Lands Act 1989*. The Council managed the park on behalf of the relevant reserve trust and had given the homeless persons 7 days notice to leave. They then commenced these proceedings seeking to restrain the Council from going ahead with their eviction, claiming that the Council's conduct in allowing them to stay in the pavilion over such a lengthy period had created informal tenancies or licences and/or that the Council was estopped from denying that they had a legitimate entitlement to remain in the pavilion. Their claim was dismissed and they appealed from the dismissal of their application.

The Court dismissed their appeal. The Court noted that the Crown Lands Act prohibited the grant of leases or licences over land in a reserve except on defined conditions and then only with the consent of the Minister. As those conditions had not been met, the Court held that the Council had no statutory power to grant the alleged leases or licences and the leases or licences relied on by the appellants, even if otherwise established, would therefore be ultra vires and void. The Court went on to hold that the Council could not by its conduct create leases or licences by estoppel in circumstances not authorised by the Act.

The Court said that it had every sympathy for the appellants' plight, noting that the social security safety nets provided by government had not provided accommodation for the men but pointed out that the Court's only function was the administration of justice, not the provision of social services to those in need. As the Court observed:

"Under the law which this Court is bound to apply hardship alone, however great, does not confer rights. The Court enforces existing rights, and is not entitled to create new ones to relieve the hardship of some, to the detriment of others." ♦



Alan Bradbury one of Australia's Best Lawyers!

Williams Love and Nicol is pleased to congratulate Alan Bradbury on his inclusion in the Australian Financial Review's 2010 list of Australia's Best Lawyers. Alan is one of only 21 lawyers nationally recognised for their expertise in planning and environmental law and one of only 2 lawyers from outside the major national firms.

The 2010 edition of *The Best Lawyers in Australia* lists lawyers in private practice chosen through an exhaustive survey that asked top lawyers to confidentially evaluate their professional peers. Alan's inclusion is a significant achievement and one he can be justly proud of. ♦

Disclaimer

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