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Decision of the Land and Environment Court of New South Wales

Summary

2.1 The case of *Commonwealth of Australia vs North Sydney Council (unreported, 1998)* involved an appeal to the Land and Environment Court of New South Wales (LEC) by the Department of Defence (DoD) against North Sydney Council's refusal of an application for a medium density residential development on the former *HMAS Platypus* site. The main issues in dispute were the amount and location of public open space to be included as part of the development and the visual impact of the development in relation to its surroundings.

2.2 The LEC allowed the DoD's appeal and approved the development. It also found in favour of the DoD regarding the major condition attaching to development consent, that of the standard to which the site was to be remediated.

Relevant legislation

2.3 The principal legislation governing planning and development approval processes in New South Wales is the *Environmental Planning and Assessment Act 1979* (EPAA). By virtue of section 6 of the Act, the EPAA binds the Commonwealth, except where it is inconsistent with Commonwealth law or where the doctrine of Commonwealth immunity

from State law applies. In practice, this meant that the DoD did not have to comply with the EPAA when engaging in activities that were supported by the defence power of the Commonwealth Constitution[1] including the removal of excess buildings and the remediation of the site prior to vacating it. However, it appears that it was bound by the EPAA in developing the site for commercial purposes, hence the need to lodge a development application.[2]

2.4 The *Contaminated Lands Management Act 1997* (NSW) (CLMA) also applied to the former *HMAS Platypus* site. The CLMA, which repealed the *Environmentally Hazardous Chemicals Act 1985* (NSW), did not actually come into effect until August 1998 (just after the case had been heard). However, the transitional arrangements under the CLMA meant that pre-existing contamination was subject to the clean-up and auditing provisions of the CLMA.

Background

2.5 The DoD lodged its development application for 95 dwellings with the North Sydney Council on 19 December 1997. At that stage the various remediation and other clean-operations, including excavation works, were not complete. As part of its application, it appears that the DoD requested what is known under the EPAA as a deferred commencement consent to the development. This means that the consent does not have effect until the applicant subsequently fulfils prescribed conditions to the satisfaction of the 'consent authority' (which, as in this case, will generally be the local council).

2.6 The North Sydney Local Environment Plan (NSLEP) in force at the time of the development application permitted the former *HMAS Platypus* site to be used for residential-flat buildings, provided Council approval was obtained for any such developments.

2.7 Subsequently, the North Sydney Council also created a development control plan (DCP) specifically for former *HMAS Platypus site.* Like LEPs,

1 Section 51 (vi).

2 There was no explicit statement in the judgment about the applicability of the EPAA. The case law regarding the application of State planning legislation to commercial redevelopment of Commonwealth properties remains somewhat unclear. However, it is arguable that the immunity doctrine does not shield the Commonwealth from State laws of general application where, for example, the Commonwealth is carrying out activities in common with private citizens: *Residential Tenancies Tribunal of NSW; ex parte Defence Housing Authority* (1997) 146 ALR 495.

DCPs generally contain factors to be considered in considering a development approval, but, unlike LEPs, are not legally binding. They are also generally more detailed. The drawings included in the former *HMAS Platypus* DCP indicated that the North Sydney Council intended that almost all the site within 35 metres of the waterfront side should be designated as public open space. While there was no dispute that the DCP had come into effect in February 1998, the North Sydney Council contended that it had been prepared in November 1997 (that is, before the development application was lodged), but elsewhere in the judgment it is implied that it was not prepared until January 1998.

2.8 Notice of the development application was advertised by the North Sydney Council for public comment on 5 January 1998. The standard period for public comment is generally 14 days. The EPAA provides that if no decision is made on a development application within a certain period, it is deemed to have been refused.

2.9 Section 90 of the EPAA required the North Sydney Council, as consent authority, to consider a range of matters in reaching its decision on the development application. In the context of the former *HMAS Platypus* development, relevant section 90 matters included:

- the provisions of relevant environmental planning instruments (such as LEPs);
- the relationship and appropriateness between the characteristics of the development (eg height, design, external appearance) and the site;
- the direct environmental impacts of the development;
- the impact the development will have on its surroundings beyond the site (including amenity and economic and social effects);
- the public interest; and
- public submissions received.

2.10 The relevance and respective weight given to any of the matters as part of its consideration is up to the consent authority to decide.[3]

2.11 The North Sydney Council's reasons for refusing the application were paraphrased in its statement of issues lodged as part of the legal proceedings. The key points in the statement that were subsequently considered in the judgment included:

3 *Parramatta Sports Club v. Hale* (1982) 47 LGRA 319.

- whether the proposed waterfront dwellings on the northern sector of the site are appropriate or whether that part of the site should be provided for as public open space in accordance with the Platypus DCP;
- the visual impact of the proposed development
- the impact of the proposal on the amenity of neighbouring residential properties;
- whether potential contamination of the site has been properly addressed; and
- whether the spiral ramp at the northern end of the site is appropriate.

The major issues in the Judgment

Open space

2.12 The development application submitted by the DoD allocated approximately 5,500 square metres or somewhat over 30% of the total former *HMAS Platypus* site to open space.[4] By contrast, it appears the former *HMAS Platypus* DCP purported to require over 8,000 square metres. The major difference was that the DCP widened a 10 metre strip along the waterfront in the north-east of the site to approximately 35 meters, with a consequential reduction in the number of near-waterfront residences on the site.

2.13 Section 94 of the EPAA provides that, if the consent authority is satisfied that if a development is likely to increase the demand for public amenities or public services in the area, the authority may require the applicant to make a financial payment and / or dedicate land free of cost as a condition of approving the development. Thus where a new development would increase the number of residents in an area, it could require part of the site to become public open space, so as the increased population did not put more pressure on existing public space. The North Sydney Council could also require the developer to provide funds for other purposes, such as expanding childcare facilities, public housing or other community facilities, or to undertake relevant landscaping, parking or roadworks.

4 The Commonwealth led evidence that the land value of the open space was between $8 million and $12 million.

2.14 However, the EPAA provides that any financial or land contribution required by council or other authority under section 94 as a condition of development consent must be in accordance its relevant contribution plan.

2.15 In relation to providing open space on the site, evidence was led that the North Sydney Council's section 94 contribution plan required a contribution of 5.2 square metres per person, which given the number of proposed new residences in the development application, translated to 1071 square metres. According to the judgment, the DoD's development application appeared to dedicate 1400 squares metres for this purpose. However, it is not clear to what extent, if any, the extra 329 square metres was intended reduce its direct financial contribution.[5] The remaining 4100 square metres of open space appear to be mainly via an extension of existing parkland into the south-east corner of the site.

2.16 The North Sydney Council contended that the former *HMAS Platypus* DCP should be the basis of any development proposed for the land. The North Sydney Council argued that the 10 metre waterfront strip incorporated into the development application would be uninviting and unlikely to be used by anyone else other than the residents whose houses would directly front on it.

2.17 However, Justice Sheahan preferred the evidence of the Defence witness, commenting that this evidence contained

> examples…in which relatively narrow access ways have elsewhere proved highly successful as public open space and pedestrian linkages.[6]

2.18 Justice Sheahan considered that the DCP, in designating so much of the former *HMAS Platypus* site as open space, was inconsistent with the provisions of the NSLEP. Although not explicitly stated in the judgment, presumably the legally binding nature of LEPs as compared to DCPs, would mean that LEPs take precedence over DCPs were they are inconsistent. In relation to the North Sydney Council's motivations, Justice Sheahan said that it could be inferred that a least one of the underlying intentions of the DCP was to make the waterfront area almost unusable for anything other than public space. His Honour went on to say that

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5 Condition 19 attached to the LEC's decision put the direct financial contribution that the DoD was to make to the North Sydney Council at $51,388. This total was allocated towards four purposes: library acquisition ($9,686), library building equipment ($1,731), community centres ($19,089), and childcare ($20,882).

6 Exhibit 1, p. 50.

> The Court does not subscribe to the notion that publicly owned land should simply be provided to the local or regional public without financial adjustment.[7]

2.19 It appears therefore that his Honour may have viewed the North Sydney Council's actions as rather opportunistic in trying to obtain a large area of open space for its own benefit without compensating the owner.

The design of the development and its visual impact

2.20 This aspect of the case centred on evidence presented by mainly expert witnesses about the size, character and positioning of the residences (which varied from two to six stories). Some of the design features opposed by the North Sydney Council, such as a spiral vehicular ramp connecting the clifftop with the lower levels of the development were redesigned just before or during the hearing, presumably as a part of a compromise between the parties. After the evidence, and assessing the design changes made by the DoD to the original development application, Justice Sheahan found for the Commonwealth, concluding that:

> The development provides an entirely appropriate and adequate solution to the reuse of a relatively difficult site presently used for a quasi industrial activity…The residential accommodation proposed is likely to constitute a high quality and generally desirable inner residential development.[8]

Contaminated lands

2.21 One of the conditions to which development consent was contingent was the remediation of the site under the CLMA. The only major area of disagreement between the parties was the appropriate remediation standard. Under the CLMA, a range of guidelines have been developed and /or endorsed which provide remediation procedures and outcomes for various situations. The CLMA also provides for accredited auditors to certify whether sites have been remediated to the standards set down in the relevant guidelines.

2.22 It appears that the North Sydney Council wanted the site remedied to a zero contamination level, thus doing away with the need of any ongoing monitoring. By contrast, the DoD wanted standard CLMA requirements.

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7 Exhibit 1, p. 50.

8 Exhibit 1, p. 51.

The Court commented that the North Sydney Council's position was probably motivated by:

> [concerns] that it may not have the same protection in respect of the dedicated land as any purchaser of the balance of the site.[9]

2.23 Justice Sheahan did not elucidate on this point and there no evidence in the judgment about the North Sydney Council's future liabilities under the CLMA once land passed to its control as public open space.

Issues arising from the judgement

2.24 Following the public hearing, the Committee raised with the DoD a number of legal issues relating to the judgement of the LEC, in particular the following questions:

(i) Does the cliff line have to be removed or further modified by reason of the judgment?; and

(ii) What approvals are required if it was intended to proceed with development of the site differently from that approved in the development consent issued by the Land and Environment Court of New South Wales?

2.25 In respect to the first question, the DoD advised the Committee that the judgment of the LEC granted a development consent for the construction of 95 dwellings but did not impose any obligation to undertake the works which are approved by the development consent.[10]

2.26 However, the DoD also advised that, in its opinion, where the approved development is commenced, the applicant/landowner must comply with the terms of the development consent issued by the Court. The conditions applicable to the proposed development do not contain any express requirement which refers to the cliff line or requires its modification, except that the site must be remediated to the standards required by a Site Auditor accredited under the CLMA.

2.27 The Department of Defence advised the Committee that it had received advice which indicated that, in order to remediate the site to the requisite standard it would be necessary to, at least, make substantial modifications to the existing cliff line. It followed, in the DoD's opinion, that if the

9 Exhibit 1, p. 53.

10 Exhibit 7, paragraph 17.

deferred commencement were to be satisfied it would be necessary to make substantial modifications to the cliff line.[11]

2.28 The DoD also advanced the argument that as the judgement of the LEC was based on the proposition that the cliff will be removed in a way which is defined by a site contour plan. As such, while it could be said that there is no compulsion on the DoD or the landowner to modify the site in accordance with that plan, logic dictates that the development consent cannot be implemented unless the site is modified in accordance with the plan.[12]

2.29 In respect to the second question, the DoD advised that Committee that under New South Wales and Commonwealth law it would be necessary to apply for and obtain development consent for the proposed alternative development.[13]

11 Exhibit 7, paragraph 17.

12 Exhibit 7, paragraph 17.

13 Exhibit 7, paragraph 17.