LOCAL GOVERNMENT NSW

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Maddocks

1. Sutherland Shire Council v Sud [2015] NSWLEC 44

In this civil enforcement decision, Justice Craig made demolition, restraining and remedial orders to address breaches of development consent and unauthorised development. Importantly, his Honour confirmed that a conviction for a criminal offence does not preclude Council from commencing civil enforcement proceedings in relation to the same matter.

The site, development consent and prior criminal proceedings

Ms Sud, the first respondent, owned land in Loftus. In 2010 Council granted development consent for the demolition of the existing dwelling on the land, and the construction of a new dwelling, pool and detached garage. The plans of the development consent showed a double storey dwelling with a flat concrete roof, and identified two trees to be retained. The development was managed by Mr Sud, the second respondent.

In November 2011, a Council officer visited the land and observed that the roof slab had been extended over the whole balcony, and was supported by five columns. Neither the columns nor the extension were shown on the development consent plans.

Council subsequently refused two applications to modify the development consent to extend the roof slab. The Court refused Mr Sud's appeal of the Council's decision in respect of the extension of the roof slab over the first floor balcony.

Council also refused to grant a building certificate for the extension of the roof slab over the balcony. On planning and structural engineering grounds, the Court dismissed Mr Sud's appeal of that decision.

In the meantime, Council brought proceedings against Mr Sud for the offence of failing to carry out development in accordance with the development consent. Mr Sud pleaded guilty, was convicted and was fined $30,000 plus costs.

Parties' contentions

On 15 August 2013, Council contended that Mr Sud had carried out building and other work in breach of the development consent for the construction of the dwelling. The Council sought declarations as well as orders for:

- partial demolition of the concrete roof slab extending over the first floor balcony;
- restraint of use of the roof as an outdoor terrace; and
- removal of fill near two trees and a fence.

Mr Sud, the active respondent in these proceedings, opposed the orders sought by Council and sought a permanent stay of Council's claim seeking demolition of the first floor slab, submitting that:

- seeking such demolition was an abuse of process; and
- such an order should not, in the Court's discretion, be made.

This case note focuses on the issues in relation to the roof slab and in particular, whether:

- seeking demolition of the roof slab extension was an abuse of process; and
- the Court should exercise its discretion to order demolition of the roof slab extension?

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Was seeking demolition of the roof slab extension an abuse of process?

While Mr Sud accepted that the roof slab extension did not conform with the development consent, he submitted that proceedings seeking an order for demolition were an abuse of process and should therefore be permanently stayed.

Mr Sud submitted that Council could not prosecute him for an offence under section 125(1) of the Environmental Planning and Assessment Act 1979 (**EP&A Act**) and also bring civil proceedings under section 123 of the EP&A Act to obtain a remedial order for the same breach. Mr Sud submitted that he would be subject to a 'double punishment'.

In essence, Mr Sud submitted that Council had to choose between criminal prosecution or civil enforcement.

The Court rejected Mr Sud's submissions. In doing so, Justice Craig considered the authorities and the relevant statutory framework including sections 124, 125 and, in particular, 127(7), and held (at [56]):

> *Save for the position that pertains when civil enforcement proceedings precede the commencement of a prosecution arising from the same subject matter, s 127(7) does not proscribe the institution of civil proceedings for an order under s 124, once the prosecution proceedings have concluded either by conviction or dismissal.*

This construction of section 127(7) was supported by:

- the different purposes served in prosecuting an offence (punishment and deterrence) and in bringing civil enforcement proceedings (rectification of adverse environmental impacts and upholding the 'integrated and coordinated nature of planning law'); and
- the general principle that it is undesirable to require a person to defend civil proceedings before criminal proceedings founded upon the same subject matter, are concluded – no problems of self-incrimination arise if prosecution proceedings are concluded before civil enforcement proceedings are commenced.

In relation to Mr Sud's double punishment submission, Craig J said (at [84]):

> *No element of punishment is involved in the making of a remedial order under s 124. Such an order, if made, is framed to remedy an adverse environmental impact consequent upon the offender's action. The Second Respondent's contention that the making of such an order exposes him to 'double punishment' cannot be sustained.*

Justice Craig was unable to identify any unfairness to Mr Sud that would justify staying Council's proceedings for a demolition order, noting that despite ample opportunity, Mr Sud had chosen not to take action for removing the slab extension before his sentencing.

Should the Court exercise its discretion to order demolition of the roof slab extension?

Justice Craig was persuaded that an order should be made for the demolition of the roof slab extension. In reaching this conclusion, his Honour noted:

- Mr Sud's concession that he would not contend that he was unable to pay demolition costs;
- the town planning evidence regarding the considerable bulk added to the building by the extended roof, and the amenity impacts on neighbouring properties caused by increased use of the covered balcony; and

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- the lack of evidence that the roof slab was safe.

Orders

The Court made the orders sought by Council, dismissed Mr Sud's notice of motion seeking a stay of proceedings, and ordered that Ms and Mr Sud pay Council's costs.

2. 193 Liverpool Road Ashfield Pty Ltd v Ashfield Council [2015] NSWLEC 1399

This case involved an appeal under section 97 of the EP&A Act against a refusal by Ashfield Council (**Council**) of a development application for the construction of a boarding house at Ashfield (**the site**).

Site

The site was zoned B4 Mixed Use under the Ashfield Local Environmental Plan 2013 (**LEP**) and contained a vacant commercial building and was in close proximity to the railway station and a school. The surrounding development comprised Victorian commercial terraces with ground floor retail, and mixed use residential and commercial development.

Development Proposal

The Applicant proposed to demolish the existing commercial building and to construct a part three and part eight storey building to be used as a boarding house with 47 boarding rooms, and retail located on part of the ground floor. The basement parking proposed was for 9 cars and 2 motorcycles. Additional parking for 2 cars and 8 motorcycles was proposed to be obtained by the Applicant via an easement over adjoining land.

Issues

The main contentions raised by Council against the proposed development were:

- it would result in unacceptable traffic impacts;
- inadequate parking was proposed;
- waste collection arrangements were inadequate; and
- exceedence of maximum permissible building height.

Planning controls

The development relied on the provisions of *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**SEPP ARH**). Under the SEPP ARH, boarding houses are permissible with consent within the B4 Zone. Clause 29 of the SEPP ARH contains standards that cannot be used to refuse consent, including floor space ratio (**FSR**), building height, landscaped area, solar access, private open space, parking and accommodation size.

The Height Map to the LEP specifies that the maximum building height is 23m, however, the site was located in ‘Area 1’on the Height Map which related to the Ashfield Town Centre. The LEP contains provisions permitting buildings located in the Ashfield Town Centre to be up to 30m in height.

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Permissible Height

Clause 4.3A of the LEP enables development consent to be granted to developments that are over the 23m height limit where:

- the development is for the purpose of residential flat or shop top housing; and
- at least one of the dwellings and at least 25% of the floor space is used for affordable rental housing.

Where Clause 4.3A applies, a new building limit of 30m is enforced.

The Council and Applicant disagreed on the purpose of the development, and therefore, whether the height concession was applicable.

The Applicant argued that a boarding house could also be characterised as a residential flat building or shop top housing, and therefore the maximum building height permitted was 30m. Council contended that the purpose was for a boarding house, and not a shop top housing or residential flat building, as this was how the development application and supporting documents described the development.

The Commissioner considered that the correct characterisation of the purpose of the development was for a boarding house. In making this finding, the Commissioner drew a distinction between boarding houses and dwellings located within residential flat buildings or shop top housing.

The Commissioner noted that boarding houses often have shared facilities (living room, laundry and kitchen). In this case, the proposed development had such shared facilities. Accordingly the development could not be characterised as a residential flat building or shop top housing, and therefore, the correct maximum permissible height of the development was 23m.

As the proposal exceeded the permissible maximum height under the LEP, and in the absence of a written request under clause 4.6 to vary the height standard, the Court held that it had no power to approve a development of 30m. The Court held that clause 4.6 is a precondition, which must be satisfied before the proposed development can be approved on a consideration of the merits.

Traffic Impacts and Parking

The proposal sought to include parking for the development on an adjoining property. The Commissioner was not satisfied that the consent should be amended to delete the land as landscaped area to instead be used as parking. Rather, the Commissioner considered that if the land were to be appropriately landscaped it would provide greater amenity to the public domain than the proposal to use it for parking.

The Council's expert raised a number of issues associated with the narrowness of the laneway from which the site would be accessed by vehicular traffic, and which would not enable two vehicles to pass one another. This, the Council's expert argued, could result in cars needing to reverse across a footpath. The Council's expert considered that it was essential to provide a passing bay in the laneway. However, the Applicant's expert considered that because the laneway was relatively short and straight with clear visibility and because of the low traffic volumes generated by the development it would be unlikely that cars would need to reverse out of the laneway and across the footpath.

Due to the difficulties imposed by the width of the laneway, the Commissioner considered that any future development of the site should consider a setback to facilitate two way traffic, particularly if additional height is proposed.

Waste Collection

Due to the constraints imposed by the width of the laneway, the Commissioner agreed with the Council's expert that the waste collection arrangements were less than desirable, although this itself was not a reason to refuse the application.

Conclusion

Due to the non-compliance with the height controls, as well as the additional issues arising with respect to traffic and parking, the Commissioner dismissed the Applicant's appeal.

3. Penrith Lakes Development Corporation Ltd v Penrith City Council [2015] NSWLEC 1329

This case involved an appeal under section 97 of the EP&A Act by Penrith Lakes Development Corporation Ltd (**PLD Corporation**) against the refusal by Penrith City Council of a development application for the subdivision of a lot located in Penrith (**the site**).

Background

The site was located on the floodplain of the Nepean River and was used for the extraction of sand and gravel. The site forms part of the Penrith Lakes Scheme (**PLS**), which was designed to act as a flood control system for the Nepean River. There were two heritage items located within the development site, being The Poplars and McCarthy's Cemetery, but they did not form part of the development.

The site had been created pursuant to an earlier development application that had consolidated a number of allotments to create four super lots, one of which was the subject of the Court proceedings.

PLD Corporation lodged a development application to:

- subdivide the site into 138 lots (each with a minimum area of 2 hectares);
- construct roads on the site; and
- conduct ancillary engineering works such as filling, retaining walls and drainage works.

However, during the hearing, PLD Corporation revised its development application twice, so that it sought only approval of the subdivision layout, with no works to be carried out.

Issues

The Council refused the development application for subdivision on the grounds that:

- the subdivision was prohibited; and
- if the subdivision was not prohibited, the subdivision ought be refused because:
    - there was insufficient detail relating to flood planning levels, contamination, and potential impacts on nearby heritage items;
    - the subdivision was premature given the long-term projected population;
    - there was inadequate water supply to service the subdivision;

- inadequate master planning had been undertaken to address future transport infrastructure, foreshore setbacks, and local traffic management; and
- there were future acoustic impacts.

Relevant Planning Controls

The primary environmental planning instrument which controlled development of the site *was State Environmental Planning Policy (Penrith Lakes Scheme) 1989* (**SEPP 1989**). SEPP 1989 does not "zone" the site and does not contain a minimum allotment size.

The site was also subject to the provisions of Interim Development Order No. 93 (IDO 93) which zones the site Rural 1(a)(2) and contains a minimum allotment size of 2 ha.

Permissibility of the Subdivision

The Council submitted that the development was not permissible pursuant to cl 8, 9 or 10 of the SEPP 1989.

The Court considered that there were limited opportunities under the SEPP 1989 for granting development consent in the PLS area under cl 8(2)(a). The PLS is defined as "the creation of a regional recreational lake system as shown on the structure plan for the benefit of the public" and "includes the identification of land for possible future urban purposes". Clause 8(2)(a) provides that consent shall be granted unless the Court is of the opinion that the development "does not fully implement the Penrith Lakes Scheme on the land to which the application for development relates" or "will not ensure the satisfactory implementation of the Penrith Lakes Scheme".

In considering the submissions and evidence of the parties' town planning evidence, the Court agreed with the Council that consent should not be granted under cl 8(2)(a) for a number of reasons.

The Court did not consider that the proposed development would ensure the satisfactory implementation of the PLS. Instead, the Court considered that the land should not be constrained through the need for re-subdivision or by an interim subdivision. The proper planning for the site needed to eventually accommodate 5000 lots according to the Council's expert and this would be more efficiently achieved if the site remained as one lot.

The Court did not agree with the submissions made by PLD Corporation that the development "fully" implemented the PLS as required by cl 8(2)(a). The term "fully implement" was interpreted by the Court to mean the development must implement the PLS as far as the SEPP 1989 anticipated. One of the aims of the SEPP was to identify land which may be rezoned for urban purposes. The Court was not persuaded by the Applicant's expert that the development was an interim step in the lands progression to "possible future urban uses". Additionally, the Court considered that the planning term "urban uses" includes residential development but that a 2 hectare subdivision would generally be regarded as rural or residential.

In regards to the PLS, the Council's expert argued that the development is not for the purpose of creating a "regional recreational lake system … for the benefit of the public". The Court agreed.

On the issue of interim development as set out in clause 9, the Court further accepted the evidence from the Council's town planning expert that the development was not interim development and therefore clause 9 did not apply. Additionally, clause 10, which related to the construction of and widening of roads, was also not applicable as the purpose behind the development was for subdivision.

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Master Planning

The parties' experts disagreed on whether the proposed subdivision would impede the master planning for the site, which Council's expert contended was an important step in the implementation of the PLS. The Court agreed with the Council's expert, finding that the aims of the PLS could not be achieved through an interim subdivision of the land. There was therefore no demonstrable valid planning reason to support the application.

Merits of the Proposal

The merits of the application were also found by the Court to warrant refusal of the application. In relation to the public interest consideration, the Court stated that it would be harder to find a better example of where the wider public interest is best served by the rejection of the application so that land for the future growth of the Sydney region is produced in an efficient and environmentally sensitive manner. The Court also held it would be hard to find a better example an application that is inconsistent with the aim in s5(a)(ii) of the EP&A Act, which seeks "the promotion and co-ordination of the orderly and economic use and development of land".

Conclusion

For these reasons the Commissioner refused to grant development consent to the subdivision and dismissed the appeal.

4. Kempsey Shire Council v Slade [2015] NSWLEC 135

This case involved a claim by Council to recover the reasonable costs and expenses of taking a clean-up action to remove asbestos (**the pollution incident**) deposited at a waste facility. The facility was leased by Council to Mid Coast Skip Bins and Metal Recycling Pty Ltd (**the Company**) at South West Rocks.

Background

Council was the manager of the reserve trust known as South West Rocks Rubbish Depot Reserve Trust, on which Council operated a waste facility within the premises of the South West Rocks Transfer Station (**the Premises**). In March 2011, Council entered into a six year lease of the Premises with Michael Slade (trading as Mid Coast Skip Bins and Metal Recycling) to use the Premises as a commercial waste facility (**the first lease**). Six months later, the first lease was substituted for a second lease for the same use to the Company (**the second lease**). The Company was founded by Michael and Barry Slade as the directors and shareholders of that Company. After seven months, the Company vacated the Premises and the second lease was terminated.

Shortly after the lease was terminated, the Environment Protection Authority (**EPA**) discovered evidence of asbestos on the property, including within stock piles of waste left on the Premises. The EPA issued a clean-up notice on the Company under section 91 of the *Protection of the Environment Operations Act* 1997 (**POEO Act**). After the company failed to comply with that notice, the EPA issued a clean-up notice on Council as the relevant public authority under section 92 of the POEO Act. Council complied with that notice and sought to recover its reasonable costs and expenses incurred in doing so from the Slades by issuing a compliance cost notice under section 104(2) of the POEO Act.

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Reasonable Suspicion under the POEO Act

The central issue in this case was whether Council was entitled to issue the compliance cost notice under section 104(2) of the POEO Act, which provided that Council was only able to do so if Council 'reasonably suspected' that the Slades had caused a pollution incident.

It was common ground that there were pollution incidents at the Premises, that is, 'that there were incidents during or as a consequence of which asbestos was deposited, as a result of which land pollution occurred, was occurring or was likely to occur'. However, whether Council could reasonably suspect that the Slades had caused a pollution incident turned on when the pollution incident occurred (that is, whether it occurred during the first or second lease), the nature of that pollution incident as well as whether the Company's conduct could be attributed to the Slades.

Council argued, among other things, that it was reasonable to suspect that asbestos was introduced onto the Premises during the first lease. Further, Council argued that before, and throughout the period of both leases, the Slades had represented to Council that they both governed and operated the Company (including being involved in asbestos management at the Premises), and accordingly it was reasonable to suspect that both Slades caused the pollution incidents.

The Slades argued, among other things, that only the Company could have been reasonably suspected of causing the pollution incidents. The basis for this argument was that there could be no pollution incidents while the Premises were being used for a waste facility as the asbestos deposited at that time could not degrade the land because the Premises had already been degraded by its former use for land fill and subsequent use for receiving, sorting and processing of waste. Instead, the pollution incidents occurred when the Premises ceased being used for a waste facility and was vacated, after which time stock piles of asbestos waste were left on the Premises. As the Company was the lessee at this point in time, the Slades argued that they were protected from liability.

Did Council have a reasonable suspicion that a pollution incident had been caused?

The meaning of a reasonable suspicion had not been previously considered in the context of sections 92 and 104 of the POEO Act. Having reviewed the relevant authorities, the Court determined that the relevant principles to consider in determining what is a reasonable suspicion were that:

- Council must have formed a genuine suspicion that a particular person/or persons caused the pollution incident;
- suspicion involves more than a possibility but less than a reasonable belief;
- there must be some objective and factual basis for the suspicion which would 'create in the mind of a reasonable person in the position of the public authority that that person caused the pollution incident'; and
- the objective circumstances do not have to establish on the balance of probabilities that the person in fact caused the pollution incident or that there has in fact been a pollution incident.

Conclusion

Bearing these principles in mind, the Court concluded that Council did have a reasonable suspicion that the Slades had caused a pollution incident, as:

- it was reasonable to have suspected that the asbestos or most of it was deposited on the Premises and that the pollution incidents occurred during the currency of the first lease because the majority of the asbestos was found in the hardstand area and Stockpile 1, which were created during the first least lease; and
- the Slades had, and it was reasonable to suspect they had, authority and responsibility to prevent or correct asbestos being left on the Premises, and failed to do so.

In coming to this conclusion, the Court rejected the Slades' argument that there were no pollution incidents while the Premises were being used by the Slades as a waste facility because the Premises had already been degraded by its former use for land fill and subsequent use for receiving, sorting and processing of waste.

Instead, the Court found that the Slades' use of the Premises as a waste storage facility had caused the pollution incident and that the use of the Premises for a waste storage facility was contrary to the use of the Premises authorised under the leases for a waste facility which involved the sorting and disposal of waste. Further, there was no evidence that asbestos was on the Premises (except for that which had already been capped) before the Slades occupied the land and their actions in depositing asbestos on land that had already been degraded by use for land fill only served to degrade the land further.

The Court also held that, in any event, it made no difference when the asbestos was deposited on the Premises causing the pollution incidents because the control, responsibility and authority of the Slades in relation to asbestos was the same throughout the currency of both leases. That is, the Slades were accountable because of the responsibility and authority of their positions for the conditions that gave rise to the pollution incidents and fact that someone else (such as the Company) also caused the pollution was not inconsistent with the Slades having caused it. Further, the corporate veil provided no defence to the Slades because the status of the proprietor as incorporated or unincorporated is irrelevant where an individual or individuals are the target of liability and those individuals have control or authority and responsibility to prevent and correct a pollution incident.

Accordingly, the Court found that the Council did have a reasonable suspicion that the Slades had caused a pollution incident.

The Slades were ordered to pay the Council's reasonable costs and expenses incurred in connection with complying with the clean-up notice.

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Definitions

Appeal – an application or proceeding for review by a higher tribunal or decision maker.

Consent authority – the body having the function of determining the application, usually a council.

Deemed refusal – where a consent authority has failed to make a decision in relation to a development applications within the statutory time limit for determining development applications.

Development means:
(a) the use of land, and
(b) the subdivision of land, and
(c) the erection of a building, and
(d) the carrying out of a work, and
(e) the demolition of a building or work, and
(f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

Development Application – an application for consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) to carry out development but does not include an application for a complying development certificate.

Environment – includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

Existing use rights – rights under Planning Legislation to continue previously lawful activities on land which would no longer be permitted following the introduction of changes to environmental planning instruments.

LEP – Local Environmental Plan, planning tool created by councils to control the form and location of new development.

Local heritage significance – in relation to a place, building, work, relic, moveable object or precinct means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

Objector – a person who makes a submission to a consent authority objecting to a development application for consent to carry out designated development.

Occupier – includes a tenant or other lawful occupant of premises, not being the owner.

Planning principle – statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.

Premises means any of the following:
(a) a building of any description or any part of it and the appurtenances to it
(b) a manufactured home, moveable dwelling and associated structure
(c) land, whether built on or not
(d) a tent
(e) a swimming pool
(f) a ship or vessel of any description (including a houseboat).

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Procedural fairness – this term is interchangeable with “natural justice” and is a common law principle implied in relation to statutory and prerogative powers to ensure the fairness of the decision making procedure of courts and administrators.

Prohibited development means
(a) development the carrying out of which is prohibited on land by the provisions of an environmental planning instrument that apply to the land, or
(b) development that cannot be carried out on land with or without development consent.

Public authority includes:
(a) a public or local authority constituted by or under an Act
(b) a government Department
(c) a statutory body representing the Crown.

State heritage significance – in relation to a place building, work, relic, moveable object or precinct means significance to the State in relation to the historical, scientific, cultural, social, archeological, architectural, natural or aesthetic value of the item.

Subpoena – a document by which a court compels a person to attend a court to give evidence or to produce documents within that person’s possession.

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Useful links

Land and Environment Court website: www.lawlink.nsw.gov.au/lec

Australasian Legal Information Institute: www.austlii.edu.au

NSW Attorney General's Department – Land and Environment Court: www.agd.nsw.gov.au/lec

Case Law NSW: www.caselaw.nsw.gov.au

Environment Protection Biodiversity Conservation Act - subscription to EPBCA group: http://groups.yahoo.com/group/epbc-info/

Environment and Planning Law Association NSW: www.epla.org.au

Development and Environmental Professionals Association: www.depa.net.au

Urban Development Institute of Australia: www.udia.com.au

Property Council: www.propertyoz.com.au

Housing Industry Association: www.hia.com.au

Planning NSW: www.planning.nsw.gov.au

Environment Australia: www.erin.gov.au

Environmental Protection Authority (NSW): www.epa.nsw.gov.au

EDONet: www.edo.org.au

NSW Agriculture: www.agric.nsw.gov.au

NSW National Park and Wildlife Service: www.nationalparks.nsw.gov.au

Planning Institute of Australia: www.planning.org.au

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