

COURT REPORTER



ISSUE 1, 2015

IN THIS ISSUE

PAGE 1
SUMMARY OF CASES

PAGE 2
1. OTAR INVESTMENTS PTY
LTD V BURWOOD COUNCIL
[2014] NSWLEC 1252

PAGE 3
2. EDEN VALLEY HOLDINGS
PTY LIMITED V BLUE
MOUNTAINS CITY COUNCIL

PAGE 6
3. TWEED SHIRE COUNCIL
V FURLONGER [2014] NSWLEC
156

PAGE 7
4. TELSTRA CORPORATION
LIMITED V COFFS HARBOUR
CITY COUNCIL [2014] NSWLEC
1254

PAGE 10
DEFINITIONS

PAGE 12
USEFUL LINKS

Summary of cases

1. A matter concerning a refusal for an application to demolish a former Court House which is a local heritage item.
2. An appeal against a decision by a council to refuse a DA for alterations and additions to an existing house for tourist accommodation even though the LEP contained a heritage incentive clause.
3. A matter relating to the service of an under the Local Government Act which provides a reminder that orders must be served in accordance with or shown to have come into the possession of the person for whom it was intended.
4. An appeal against the refusal of a DA for the construction of a new mobile telecommunications base station that did not satisfy the NSW Telecommunications Facilities Guidelines.

The material contained in the Land and Environment Court Reporter is of the nature of general comment only. No reader should rely on it without seeking legal advice.





1. Otar Investments Pty Ltd v Burwood Council [2014] NSWLEC 1252

This case concerned the refusal by Burwood Council of an application by Otar Investments to demolish the former Burwood courthouse which is a local heritage item and to construct an 18 storey high mixed use development. The case considered whether the demolition of the former courthouse would be justified in order to fund the conservation of the neighbouring former police station which forms part of the same local heritage listing.

Background

The site is located in the Burwood Town Centre and is zoned B4 Mixed Use under the Burwood Local Environment Plan 2012 (**LEP**). The site contains the former Burwood police station and the former courthouse, both of which are used for commercial, retail and community activities.

The former courthouse and former police station are listed as a local heritage item in the LEP.

Otar Investments proposed to demolish the former courthouse but retain the former police station. The proposed development comprised retail and commercial uses which were proposed to be located on the ground floor, commercial on levels 1 and 2, residential apartments on levels 4 – 17 and four levels of basement parking. The proposal was permissible with consent under the LEP.

The Council had refused the development application and the parties had been unable to reach an agreement at a section 34 conference.

Issues

The Council contended that the proposed demolition of the former courthouse should be refused because:

- the heritage significance of the former courthouse,
- the proposed demolition failed to take into account the contribution the former courthouse and former police station make together as they have associated uses and the demolition of the former courthouse would have a negative impact on the police station, and
- allowing the demolition would set an undesirable precedent.

Council also opposed the proposed mixed use development on the basis that it would provide a poor interface to the historic former police station, and it did not comply with State Environment Planning Policy No 65 – Design Quality of Residential Flat Development, it did not satisfy the design excellence provisions in the LEP.

Heritage

The Court noted the agreed evidence of the heritage experts that the former courthouse and police station were designed in 1906 and 1900 respectively, functioned as a pair and were linked by their use, rather than their architectural styling. The alterations and additions to the former courthouse included a large rear extension and smaller additions to the southern offices made in 1926, and major internal alterations in the 1980s. Portions of these additions were later demolished in 2009. Portions of the former police station had also been demolished in 2009 including the rear cell block and yard.

The extent of the current heritage listing represented only a half of the original site which had initially been listed as having local heritage significance in 1989. Following the construction of the new Burwood Police





Centre and subdivision of the site in 2010, the reduced site occupied by the two buildings was listed in the LEP as a heritage item.

The Applicant's heritage expert argued that the 2009 demolition of part of the courthouse made it difficult for the building to be understood as having once functioned as a courthouse, and therefore compromised its heritage significance to the point where the remaining building did not reach the threshold for a local heritage listing.

The Court however accepted the Council's heritage expert's opinion that the 2009 demolition of part of the former courthouse and alterations and additions made to the building, including internal alterations, had still left the original building, and in particular the courtroom, fundamentally intact and able to be understood and interpreted as an early 20th century suburban courthouse building. Furthermore, the Court was satisfied that the former courthouse possessed local heritage significance and considered it remained a good example of the Federation Arts and Crafts architectural style for a suburban civic building.

As the architectural style of the former police station was, in the opinion of the Applicant's heritage expert, considerably rarer than that of the former courthouse, the Applicant had decided to retain the former police station. The Applicant argued that the demolition of the former courthouse would enable it fund the conservation of the more valuable former police station. The Court rejected this argument in favour of Council's heritage expert's opinion, finding that the two buildings together possessed heritage significance and that demolition of the former courthouse would diminish the significance of the heritage item and compromise the heritage significance of the former police station.

Conclusion

Given its findings in relation to demolition, the Court did not consider it needed to determine the Council's contentions regarding mixed use development as the retention of the former courthouse precluded the development of the site as proposed.

The Court therefore refused the development application and dismissed the appeal.

2. [Eden Valley Holdings Pty Limited v Blue Mountains City Council \[2014\] NSWLEC 1258](#)

This case concerns an appeal against a decision by Blue Mountains City Council (Council) to refuse a development application for alterations and additions to an existing house located in Katoomba for use as a tourist accommodation. Issues in the proceedings included whether the proposal was permissible under a heritage incentive clause, the impact on heritage significance, bushfire risks and impact on native vegetation.

Background

The site is located to the south of the Katoomba town centre and is comprised of three allotments. The site slopes towards a Crown Reserve and the Blue Mountains National Park adjoins the western and southern boundary of the site. The Prince Henry Cliff Walk, a heritage listed item, is located downslope of the site below an escarpment. The surrounding development comprises residential dwellings to the north and north east of the site and a number of larger tourist accommodation buildings located further to the east of and above the site, and to the north west of the site.

A two storey dwelling known as 'Khandala' with a tree lined driveway, disused tennis court and croquet lawn, gardens and bushland is located on the eastern allotment (lot 2). Khandala is listed as a heritage item under





the Blue Mountains Local Environmental Plan 1991 (**LEP 1991**), and is within the Jamison Valley Heritage Conservation Area. The other two allotments (lots 3 and 4) are vacant and vegetated.

The development application proposed to convert the existing dwelling into a guesthouse, which required demolition of parts of the building, internal alterations and changes to room layouts, and an addition to be constructed to the west of the dwelling. A two storey two bed villa was also proposed to be constructed. The proposal also includes the construction of car parking areas, driveway access, stormwater infrastructure and landscaping.

As the site is mapped as bushfire prone land, a bush fire Asset Protection Zone (APZ) was proposed to be implemented as an Inner Protection Area (**IPA**) which would extend for 50 metres to the east, south and west of the proposed development.

Planning Framework

The part of the lot containing the existing dwelling is zoned Residential Bushland Conservation (RES-BC) under LEP 1991, with the remainder of the lot and the remaining lots zoned Environmental Protection (**EP**). The proposed use is prohibited in each of those zones. The proposal relied upon clause 25.6 of the LEP 1991 which permitted development of a heritage item if, among other requirements, the item will be “most appropriately conserved if used for the proposed development”.

Issues

The key issues in the case were whether:

- the proposed development is permissible under the heritage incentive clause (cl 25.6) in the LEP;
- the proposed bushfire management measures were adequate to minimise bushfire risk to an acceptable level;
- the APZ would have an acceptable impact on native vegetation; and
- the loss of native vegetation would have an acceptable visual impact.

Heritage

The proposed development relied upon clause 25.6 for its permissibility. The parties disagreed on whether the proposed development satisfied the requirements of this clause, that the heritage item would be “most appropriately conserved if used for the proposed development”. The Applicant submitted that the ongoing cost of maintaining Khandala as a heritage item was prohibitively high if it were to be used as a dwelling, whereas the proposed tourist usage would provide the financial resources to undertake the necessary conservation works. Council argued that the Applicant had not provided sufficient evidence that this was the case. Council submitted that the Applicant needed to identify and compare a number of uses of the heritage item to determine which would be the most appropriate to conserve Khandala, which it had not done. The Court agreed with Council’s submission, finding that at the very least, the Applicant ought to have compared the existing use of the building as a dwelling and the proposal.

Council’s heritage expert considered that the bushland setting of Khandala was part of its heritage significance and that the APZ would have a detrimental effect. The Court agreed, finding that APZ would result in a change to the setting of the heritage item from bushland to resemble something similar to parkland.





Bushfire Safety

The site is classified as bushfire prone land, and as a consequence the development was classified as integrated development and required to comply with certain controls relating to construction.

The Court considered that the key question in relation to bushfire safety was whether the intent of the standards contained in Planning For Bushfire Protection 2006 were met and adequate bushfire safety achieved. These guidelines were required to be complied with by the Rural Fires Regulation 2013. The primary disagreement between the parties' experts was whether an APZ of 50m would be sufficient to ensure adequate safety in the event of a bushfire.

The Applicant's bushfire expert contended that their modelling had been developed in consultation with the Rural Fire Service, and concluded that the proposal was located outside the flame zone, the proposed 50m APZ was adequate, and the type of construction standard proposed would be satisfactory. The Applicant argued that the facility would be closed during a fire event and did not consider any additional risk would be posed to fire fighters. The only change would be there were more persons who would be present onsite, and they were able to safely shelter in the onsite bunker in the event of a fire.

Council's bushfire expert considered that given the sloping nature of the site, modelling showed that the proposed APZ was inadequate and would result in the development being located in the flame zone, where the existing and new buildings could be engulfed by flame in the event of a bushfire. The APZ could only be reduced or traded off for increased construction standards and/or evacuation measures in exceptional circumstances, and the Applicant had not demonstrated to Council's satisfaction that exceptional circumstances existed in this case. Furthermore, Council contended that the site was unsuitable for the proposed development as, even if the occupants could be evacuated or moved to the fire bunker, fire fighters would be exposed to an increased and unacceptable risk. This risk would be greater than the risk arising from the current use of the site.

The Court was not satisfied that the Applicant had demonstrated there were exceptional circumstances to warrant the reduction in the APZ and accepted the evidence of the Council's expert.

Impact of Vegetation

The parties ecologists' disagreed as to whether the existing vegetation on the site is best categorised as Blue Mountains Escarpment Complex (**BMEC**) which is listed as significant vegetation community in the LEP, and the extent of that community. The Applicant's ecological expert considered that portions of the site comprised Open Forest, with other portions being best defined as BMEC, but argued that the Council's mapping of BMEC in the north and north-western parts of the site is shown to be incorrect upon physical inspection of the site.

The Court held that even if it accepted the opinion of the Applicant's ecologist, that there would still be an adverse environmental impact on the significant environmental community (the BMEC) as a consequence of the APZ which would require BMEC vegetation to be cleared. As a result, the proposal did not comply with the LEP which required that a development must have 'no adverse effect' on significant vegetation communities linked to the LEP.

Conclusion

The Court refused the development application and dismissed the appeal.





3. Tweed Shire Council v Furlonger [2014] NSWLEC 156

This case relates to the service of an order under the Local Government Act 1993 (**LG Act**). It provides a reminder that orders must be served in accordance with or shown to have come into the possession of the person for whom it was intended. In this case, the proceedings were dismissed because the orders were not correctly served on Ms Furlonger.

Background

Ms Furlonger lived on a site within a caravan park in the Tweed Shire Council area (**Site**) and was charged with an offence under s 628 of the LG Act for failing to comply with an order given under s 124 of the LG Act. The order required Ms Furlonger to remove a wall, window and portions of roof attached to a carport within 28 days. She did not comply with the order and a summons was filed.

The question before the Court was whether the proceedings should be summarily dismissed, on the ground that prior to being served with the summons, Ms Furlonger was unaware of the s 124 order and an earlier Council notice of its intention to make the order.

Issues

Under s 144 of the LG Act an order is "given" if a copy is served on the person to whom it is addressed. Section 710 authorises a number of methods of service, in addition to personal service.

Section 628(5) provides a defence to prosecution for failing to comply with an order if a defendant satisfies the Court that the defendant was unaware of the fact that the activity which gave rise to the offence was the subject of an order. This section only applies to criminal proceedings and does not apply to civil enforcement proceedings.

Council stated that the notice of intention to issue an order (under s 132 of the LG Act) was sent to the defendant by prepaid mail to her last known place of residence (being the Site). Subsequently, and a copy of the order was placed in the Site's mailbox by the officer of Council. Justice Biscoe noted that s 710 of the LG Act authorises service by the prepaid post but somewhat curiously not by placing the document in the mailbox. The Site's mailbox was located at the caravan park's entrance and not at the Site.

At the time that the notice of intention and the order were issued, Ms Furlonger was not living at the Site. Ms Furlonger did not receive, and was not aware of the notice of intention and the order until after the summons had been served.

Council argued that the matter should not be dismissed because it considered Council had complied with the LG Act and therefore should be taken to have observed the rules of natural justice.

Decision by Justice

Justice Biscoe disagreed with Council and held that the proceedings should be dismissed for two reasons

Firstly, the order was not served in a way authorised under the LG Act because it was simply left in the Site's mailbox, consequently the order was not "given" for the purposes of the LG Act. In reaching this conclusion, Justice Biscoe held that s 710 of the LG Act is not a code for service, as the section uses the words "may be served as provided by this section" rather than "must".

In this regard, Biscoe J held that the function of service is to bring to the attention of the person to be served the content of a document and particular language is required by statute if something short of that is to constitute service. In other words, unless a statute mandates a particular method of service, a document is





served if it comes into the possession of the person for whom it is intended and the means by which the person obtained the document are usually immaterial.

In the context of the LG Act, if it can be shown that an order was hand delivered to a person's mailbox, and it has subsequently come into that person's possession, then the order has been served even though that is not a method of service authorised by s 710. However, where an order was hand delivered to a person's mailbox, and it cannot be shown that it came into that person's possession (as was the case for Ms Furlonger), then it has not effectively been served.

His Honour held that even if he was in error regarding his first reason for dismissing the proceedings, Ms Furlonger had satisfied him that she was unaware of the fact that the activity in respect of which the offence arose was the subject of the order, and this was a sufficient defence for the purposes of s 628(5) of the LG Act. Justice Biscoe held that no one should be found guilty of the crime of disobeying a statutory order of which they are unaware.

Conclusion

Justice Biscoe dismissed the proceedings.

[4. Telstra Corporation Limited v Coffs Harbour City Council \[2014\] NSWLEC 1254](#)

This was an appeal against the refusal of a development application for the construction of a new mobile telecommunications base station in Coffs Harbour. The appeal was dismissed on the basis that the telecommunications facility did not satisfy the NSW Telecommunications Facilities Guidelines, particularly in relation to its visual impacts.

Background

The property was owned by the applicant and used for telecommunications activities (**Telstra site**). The Telstra site had two road frontages.

The predominant built form character within the area was commercial with a general height of around two storeys. However there were a small number of multi-storey buildings within the area, including an eight storey commercial building around 45 m from the Telstra site.

The proposed telecommunications base station comprised a 30m monopole and six panel antennas, giving a total height of 37.40m.

Issues

The contentions raised by Council were:

- the proposed development was inconsistent with the Coffs Harbour Local Environmental Plan 2011 (**LEP 2011**) because it failed to display design excellence;
- a masterplan had not been prepared and approved for the whole site, as required by the LEP 2011
- the proposed development had unacceptable visual and streetscape impacts,
- the proposed development had unacceptable Electromagnetic Radiation (**EMR**) impacts on occupants of future developments near the site,





- the proposed development would create unacceptable Electromagnetic Interference (**EMI**) on existing and future electronic devices near the site, and
- the applicant had not adequately considered alternate sites.

Design excellence

Telstra argued that the proposed development had limited opportunity for further refinement in matters such as height, function and materials as these were fundamental matters to its proper operation. The design proposed offered the best design outcome for a facility of this type in terms of visual and streetscape impact.

Council's expert disagreed and argued that the proposed facility was an off the shelf design of a kind that would be acceptable in many contexts in which the quality of the built form were less relevant. However, in the chosen location, it would appear out of place, unattractive and alien.

Commissioner Brown found that the words "design excellence" were to be considered in the context of the proposed development, stating that it could be argued that "a tower and antenna are of a form of structure that fundamentally has little or no opportunity for design excellence". He concluded that there was little, if any change that could be made to the design of the proposed development to improve its appearance and "almost reluctantly" concluded that the requirement for design excellence had been satisfied.

Masterplan

Commissioner Brown agreed with the Council that no masterplan had been approved for the site as required by LEP 2011 and therefore development consent could not be granted under the LEP 2011. However, Commissioner Brown noted that even though the proposed development was not permissible under LEP 2011, it was with consent under the State Environmental Planning Policy (Infrastructure) 2007 (**Infrastructure SEPP**).

Infrastructure SEPP and Telecommunications Guidelines

Under the Infrastructure SEPP, before determining a development application for telecommunications facility, the consent authority must consider any guidelines concerning site selection, design, construction or operating principles for telecommunications facilities that are issued by the Director-General.

The relevant "guidelines" are the NSW Telecommunications Facilities Guidelines including Broadband published in NSW Planning in July 2010. The Guidelines include principles concerning visual impact, co-location and health impacts.

Visual impact

Commissioner Brown found that the visual impact of the proposed development was unacceptable for the following reasons:

1. The height was excessive: the tower and antenna extended well above the dominant two storey built form of the surrounding and nearby commercial buildings. The photomontages provided to the Court showed that the tower and antenna were visually at least double the height of the adjoining and nearby buildings.
2. The tower and antenna were located in a visually prominent location in the Coffs Harbour commercial area. The main entry to Coffs Harbour had a direct visual connection to the Telstra site where the height of the tower and antenna would be clearly noticeable when contrasted against the backdrop of the sky. Being the principal entry to the commercial centre of Coffs



Harbour, the tower and antenna would be seen by a large number of people, including tourists to the area.

3. The tower and antenna were inconsistent with the future planning direction for the Coffs Harbour commercial centre as anticipated by LEP 2011, DCP 2013 and the 2031 Masterplan.
4. Contrary to Telstra's arguments, weight should not be given to the likely future redevelopment of the adjoining site as it would offer screening of the tower and antenna when travelling from the south. While a future building may ultimately screen the tower and antenna, there was evidence before the Court that this would likely require the relocation of the proposed development to maintain the necessary capacity and coverage for Telstra.

Also, and given the unacceptable visual impact that the tower and antenna would create it would be unacceptable to rely on a building that may never be constructed.

5. No weight should be given to the fact that there would be logistical and financial benefits for Telstra on locating the tower on a site owned by Telstra. The test of suitability should rest solely on any impact rather the ownership of the property for the proposed tower and antenna.
6. Insufficient attention was given to alternative sites.

Co-location

The Court heard evidence of a potential co-location site – an 8-storey commercial building called Federation House located around 45m south west of the Telstra site. An Optus antenna was located on the roof of that building.

Telstra's expert accepted that the roof of Federation House could be a suitable location, however the use of the building would require the cooperation of Optus because of their existing antenna and their lease arrangements with the owner of the building.

Commissioner Brown found that the proposed development could be practically co-located and Telstra had failed to establish that the Federation House was not a practical co-location site.

Electromagnetic radiation

There was general agreement between the parties that the ERM would exceed the required limits at an area 37.37m above ground level. However, Commissioner Brown accepted that the exceedance would only affect a redevelopment of the adjoining property to this height and no such redevelopment was contemplated. As a result he held that this argument did not warrant refusal of the application.

Electromagnetic interference

Commissioner Brown did not consider, based on the expert evidence before him, that the EMI from the proposed development would have an operative effect on electronic devise, such as computers.

Conclusion

The appeal was dismissed on the basis of its visual impact and the application for a new mobile telecommunications base station was refused.





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).





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.





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

Free email subscription

Subscribe to receive the Land and Environment Court Reporter directly by email on the Local Government NSW website: lgnsw.org.au/subscribe

Maddocks: www.maddocks.com.au

LGNSW welcome any feedback or suggestions relating to future editions of the Land & Environment Court Reporter by email to LGNSW's Legal Officer, Frank Loveridge at frank.loveridge@lgnsw.org.au

