

The future of planning principles in the Court

The purpose of this paper is to stimulate consideration within the regular users of the Court as to what might be future directions for the Court's planning principles. It also seeks to enlist those regular participants in assisting the Court in the processes that I will outline.

Although perhaps unnecessary for this audience, I propose to set out a little background material to provide a context for the discussion that follows.

The purpose of planning principles

The purpose of planning principles is described on the Court's website in the following terms:

A planning principle is a 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.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.

Planning principles assist when making a planning decision, including:

- *where there is a void in policy*
- *where policies expressed in qualitative terms allow for more than one interpretation*
- *where policies lack clarity.*

Implementation of that purpose has consistently underpinned the development (and more latterly the revision) of the Court's planning principles.

Development of planning principles

The internal processes for development of planning principles are a collegiate. In the first instance, one of the Commissioners will identify, arising out of the facts and circumstances of a particular case, the potential for the development of a broader statement of principle that would fulfil the purpose set out above.

At that time, there will be a discussion amongst the Commissioners as to whether or not, prima facie, a planning principle is desirable on the identified topic. This stage does not involve any development of what might be contained in the principle and is a very coarse, early filtration process. If there is such a consensus, the development of the first draft of what might be considered for adoption in such a principle is prepared by the Commissioner whose proceedings will provide the vehicle for publishing the principle by its incorporation in the judgment on the matter.

Although the particular case will be the vehicle for the principle, the principles are not idiosyncratic and are designed to respond to our collective view that it is desirable to

provide guidance on the particular topic. The Commissioner with carriage of the matter then circulates a first draft. The draft goes through an iterative process until there is consensus on the terms of the proposed principle. The Chief Judge is informed of and consulted about the process of development of a new planning principle or the potential revision or replacement of an existing principle from the commencement of the process until it is finalised. Other Judges of the Court who are known to have a particular interest in the topic under consideration will also be involved if they wish.

At the conclusion of this process, the planning principle that has been developed will be published in the foundational judgment by the Commissioner who initiated the process but the principle enunciated is clearly the product of the collegiate process and thus a principle espoused by the Court as a body.

The historical position of planning principles

The first planning principle was published by Dr John Roseth, my predecessor as Senior Commissioner, in 2003 in *GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council* [2003] NSWLEC 268. This principle concerned seniors living applications in low density zones.

There are now a total of forty-three planning principles published on the Court's website. A list of the topics covered and the cases that were the vehicles for their publication is published on the Court's website and a copy is appended to this paper as Appendix 1.

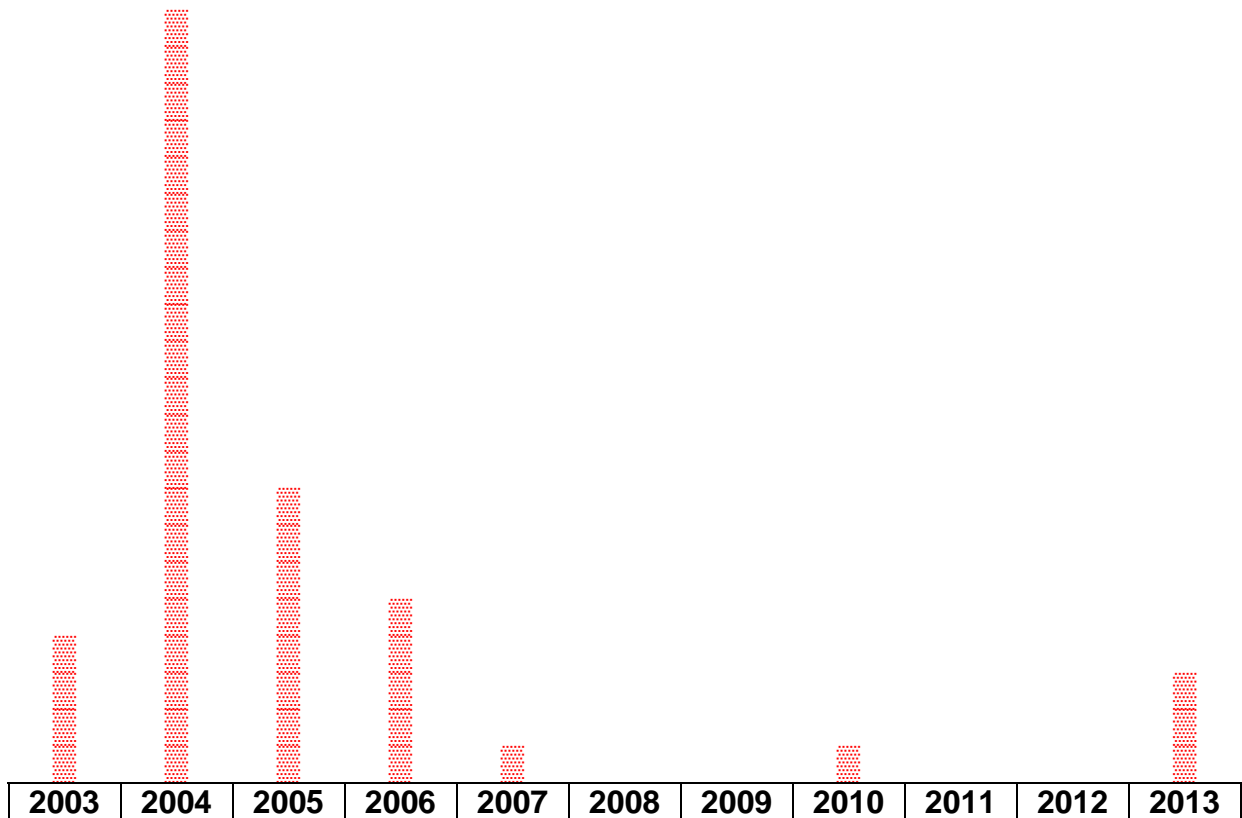
Two original planning principles have been replaced. The first replacement was the principle on sunlight coverage that was published in *Parsonage v Ku-ring-gai* [2004] NSWLEC 347. This was replaced by a revised planning principle published in *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082. The second was the principle on what might constitute an addition or alteration (rather than being a new structure) that was published in *Edgar Allan Planning Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 790. This was replaced by a new planning principle published in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187

The reasons for these are discussed later in this paper.

One other planning principle has been revised in recent times, in the judgment published in *Davies v Penrith City Council* [2013] NSWLEC 1141. This revision was to remove any possibility of the planning principle in *Pafbun v North Sydney Council* [2005] NSWLEC 444 being the foundation of inappropriate anthropocentric interpretation of the word "necessity" as originally used in *Pafbun*.

I discuss, later, the question of revision of existing planning principles in the context of future work to be done.

It is fair to say that there was an early flurry of planning principles and that has tapered off as illustrated in the graph below:



The view of the Court of Appeal

The formulation of and use by the Commissioners of planning principles has been endorsed by the Court of Appeal in *Segal & Anor v Waverley Council* [2005] NSWCA 310; (2005) 64 NSWLR 177 where Tobias JA said at (96) “..... consistency in the application of planning principles is, clearly, a desirable objective. This has been recognised by the Commissioners of the Land and Environment Court (see [16] above)

The reference to (16) was to his Honour’s earlier paragraph – it being in the following terms:

16. In a paper delivered to a Joint Conference of the Land and Environment Court and the Victorian Civil and Administrative Tribunal on 6 May 2005, Dr John Roseth, the Senior Commissioner of the Court, observed under the heading "Establishing planning principles":

"There are ten commissioners in the Court, and all commissioners initiate planning principles as they come across issues that, in their opinion, have general application. Since a planning principle published in a judgment obliges commissioners dealing with similar issues to, at least, consider the principle established earlier, the commissioners find

it useful to consult with each other. The practice is to circulate the principle in draft form and invite the others to comment, amend, delete or add to the draft version. Comments from other commissioners are a particularly useful test."

Types of planning principles

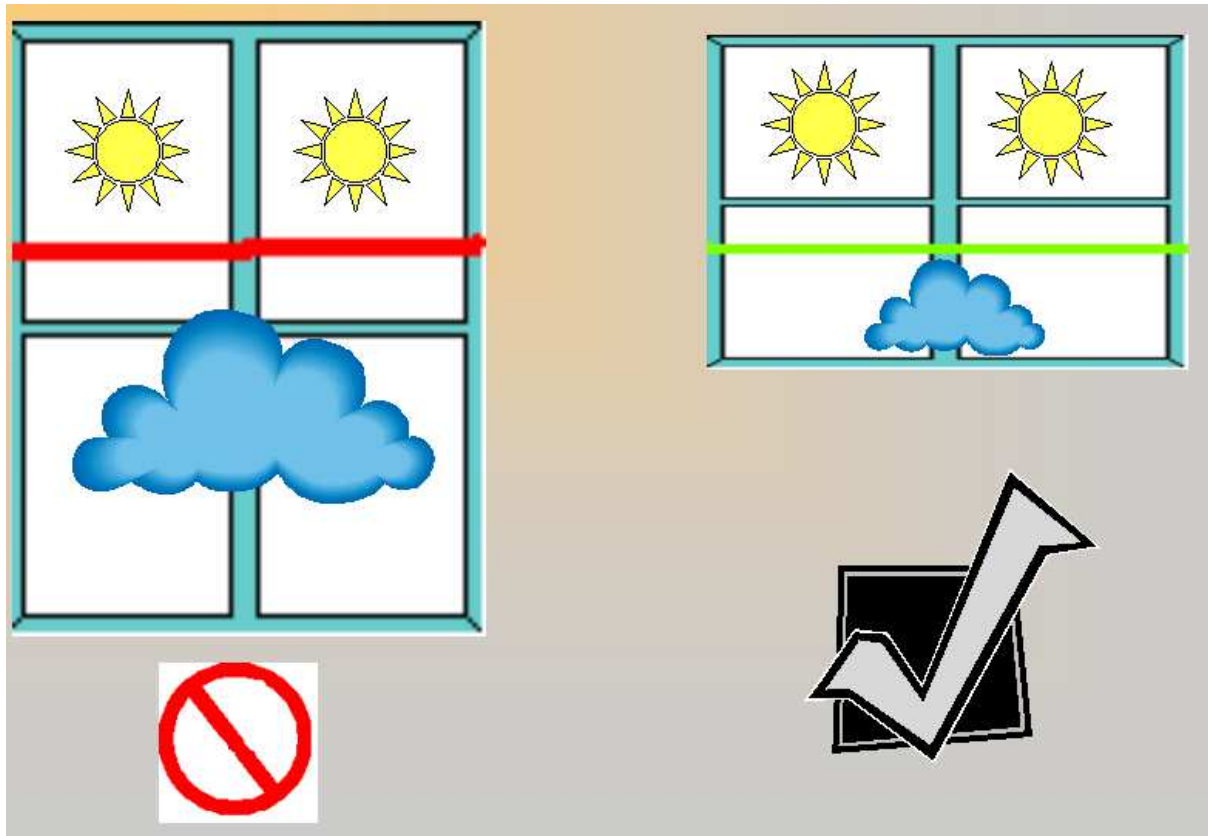
As I have discussed in earlier papers, there are, clearly, two distinct types of planning principles. All existing planning principles fall within either the category of being process oriented or the category of being prescriptive.

Process based principles are those that are designed to provide guidance on how a person assessing a proposal should go about considering a particular issue covered by that principle. Process based planning principles do not set out to define, in any way, the outcome of the assessment. They are intended to be both broad and facultative of the assessment process.

On the other hand, prescriptive planning principles (a minority of those that have been published) set out not how somebody should undertake an assessment process but what ought be the answer to be derived from the assessment process being undertaken. A classic example of this is the fourth element of the planning principle that was published in *Parsonage* concerning sunlight falling on windows. The relevant point of the planning principle was in the following terms:

- *To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.*

Whilst giving a stark black and yellow outcome (rather than a black and white one) this element of the principle was rigid and inflexible and provided no consideration for the circumstances of the particular case. Indeed, as was pointed out to me on a number of occasions (thus stimulating me to consider the replacement of *Parsonage* as eventually occurred) the outcome of complying with this rigid formula could have the counterintuitive, illogical and undesirable outcome of necessitating smaller glazed areas to achieve compliance with the rigid formula. This can be seen from the illustration below:



Such an outcome, mandated by the prescriptive nature of this element of the planning principle is clearly inappropriate.

As a consequence of having this proposition being what I might respectfully describe as superficially attractive but nonetheless a folly that we were collectively persuaded to adopt, I waited until I had a case that provided an appropriate vehicle to revisit this topic. That vehicle was *The Benevolent Society*. Having found the vehicle, I initiated the process with my colleagues to contemplate replacing the prescriptive element of *Parsonage* with new process-based elements for the planning principle. The result was two new dots points to replace the original fourth element of planning principle. These are in the following terms:

- *For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area.*
- *For private open space to be assessed as receiving adequate sunlight, regard should be had of the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of it requiring sunlight for it to have adequate solar amenity. A useable strip adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on private open space should ordinarily be measured at ground level but regard should be had*

to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate.

I am indebted to my colleague, Commissioner O'Neill, for work that she undertook in her Masters in Planning thesis for an analysis and categorisation of the existing planning principles (as at 2011) into ones that were purely process guidance based or contained prescriptive outcome elements or were entirely prescriptive. In her analysis, of the forty-two planning principles at that time, only twenty-three were entirely process based while the remaining twenty were partially or wholly prescriptive.

I have, in the past, expressed my preference for process based planning principles. I also expressed the view, several years ago, that it was unlikely that there would be any further prescriptive planning principles published in the future. I remain firmly of that view.

Indeed, it seems to me that the time is now ripe to consider whether or not there should be a revisiting of the existing prescriptive elements of planning principles to consider whether they should be replaced with process oriented ones or whether they should now be regarded as having fulfilled the purpose for which they were initiated and should be allowed to slip quietly into history (as has occurred with legislation such as the *Ecclesiastical Processes Act 1873* of the New South Wales Parliament or the *Sunday Observance Act 1677* of the Imperial Parliament at Westminster).

I am reminded, however, that, as recently as 1916, the latter legislation required judicial consideration when Justice Darling in the Court of Kings Bench was constrained to determine that ice cream was not meat within the meaning of the 1677 legislation (see *Slater v Evans* [1916] 2 KB 403).

The utility of planning principles

For those of us involved in the development process for planning principles, we are a little like shipwrights building a new vessel, when we metaphorically crack the bottle of champagne across the bows, we have no real way of anticipating the nature of the voyage upon which the principle will embark.

We have no way of anticipating how great or how little will be the utility of what we have developed. Obviously, we would not expend the intellectual energy on the construction of our craft if we did not think that there was likely utility in doing so but there is no guarantee to us that this will be the case.

However, it is possible to track, with greater precision, the use that is made of the Court's planning principles by using citation searching or recording processes such as the AustLII's law citation search engine, LawCite.

We are also able to obtain some useful information by conducting searches of Councils' Development Control Plans, internet published development assessment reports, government departmental assessment processes and the like. These

various sources paint an encouraging picture of the utility, in general terms, of the planning principle process.

It is fair to say that the planning principle in *Tenacity Consulting v Waringah* [2004] NSWLEC 140 is by far and away the most frequently utilised of the Court's planning principles (indeed it is formally incorporated in a number of Council Development Control Plans as part of the assessment process for view impacts).

In addition to their utilisation in the New South Wales development proposal assessment process, our planning principles have also been cited with approval in other jurisdictions. Again, unsurprisingly *Tenacity* is the most frequently arising of our principles in these circumstances.

In addition to the instances where there has been specific application or adoption of a planning principle, other planning principles have been taken and adapted to provide a basis for local controls incorporated in Development Control Plans.

A significant example of this is the planning principle published in *Martyn v Hornsby Shire Council* [2004] NSWLEC 614 dealing with locational considerations in the assessment of applications for proposed brothels. Although, from time to time, *Martyn* is specifically cited in Council assessment reports, the various criteria set out in that planning principle have been used by many Councils, particularly suburban Councils in the Sydney metropolitan area, to provide a basis for the incorporation of the specific controls, derived from some or all of the factors for assessment set out in the planning principle for incorporation in that Council's Development Control Plan.

In 2009, I did some research on the broader use of our planning principles for a paper given at a NEERG Seminar. An extract of the relevant sections are Appendix 2 to this paper. Although I have not been able to update that information for this paper, I am confident that the use pattern there disclosed has continued.

Where to now?

Although the pace of planning principles has slowed, in recent years, in my assessment this does not mean that the opportunity is now exhausted for more work in this area. It may well be the pace will remain slow but there is work yet to be done.

Whilst the process of collegiate development of planning principles within the Court is not, in my view, appropriate to be revisited because planning principles become embodied in judgments of the Court, this does not preclude useful assistance being provided to us in this area.

The two most recent entirely new planning principles adopted are those that were published in *Rose Bay Marina Pty Limited v Woollahra Municipal Council and anor* [2013] NSWLEC 1046 and in *Coorey v Hunters Hill*. During the course of the hearings of each matter, we advised the parties to the proceedings that we were considering whether a planning principle was desirable and indicated that we would value any submissions that the parties might wish to make on the broader principle matter arising from the particular case. We were gratified to receive constructive and

helpful submissions on the broader issues of principle and these were taken into account by us when developing the draft that was eventually adopted through the collegiate process and published.

I had followed a similar course in *The Benevolent Society v Waverley* in 2010 and had, as acknowledged in that decision, received constructive assistance from those involved as experts in that matter.

Whilst, in the future, such instances where the possible desirability of a planning principle emerges early in the proceedings may be rare, when it does occur, it is my view that it is highly desirable that the advocates in the matter be offered the opportunity to participate in the process and, if they wish to consult their own colleagues, the wider the pool of views involved the better.

Similarly, occasions may arise where an advocate in proceedings would wish to suggest that an opportunity was provided by the particular proceedings for consideration of development of a planning principle.

One of my colleagues, Commissioner Pearson, had it suggested to her in *Norm Fletcher & Associates Pty Ltd v Strathfield Municipal Council* [2013] NSWLEC 1118, a case involving an application to demolish an identified local heritage item, that the proceedings provided an opportunity to take the matters discussed in the planning principle relating to proposed demolition of contributory (but not listed) items in a conservation area, published in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66; (2006) 144 LGERA 322, as a basis for a new planning principle.

Whilst, as it transpired, the Commissioner considered that it was not appropriate in that case to develop a new planning principle, the advancing of the proposition by those participating was a welcome step. Indeed, that topic may well be one that, in the future (although I should not be perceived as giving any commitment in this regard) might be developed through the warehousing process later discussed.

There are, in my assessment, three new approaches to planning principles that should be added to and provide supplementation for the existing traditional approach to identification of opportunities for and development of such principles by Commissioners of the Court. Those three opportunities are:

- Revision of existing process-based planning principles;
- Reconsideration (and possible replacement) of the existing prescriptive elements in existing principles; and
- Early identification of topics for new planning principles.

Review of existing process-based principles

I recently had occasion in an otherwise innocuous case concerning a suburban carport in the front setback (although made more forensically interesting by the need to analyse the behaviour of a purported agent in those proceedings – *Davies v Penrith City Council*) to consider the terms of the language used by my predecessor in the planning principle concerning assessment of impacts on neighbouring properties – a principle that had been published in *Pafbarn*. The circumstances of

the particular proceedings, where the applicant had raised what he considered the **necessity** for his carport to provide an undercover opportunity for disabled access to a vehicle proposed an outcome that would have, if granted for that reason, provided a planning determination that had been given *in personam*, quite the contrary to the long-standing, settled position that such consents operated *in rem* only.

The proposition advanced by the applicant caused me to consider the appropriateness of retaining the words “necessity and/or” in the second bullet point of the planning principle. I consulted my colleagues and went through the process earlier described. That process resulted in a revision of the planning principle by the deletion of the words noted above and the publication of a revised planning principle in *Davies*.

It is appropriate, on an ongoing basis, as occasions arise for reviewing existing planning principles or building upon them that this be considered.

A much earlier example, of a slightly differing flavour, occurred with the question of assessment of the impact of extended trading hours or increases in patron numbers of licensed premises where an earlier planning principle published by Commissioner Tuor in *Randall Pty Ltd v Leichhardt Council* [2004] NSWLEC 277 was used as the basis for a later expanded planning principle published by me in *Vinson v Randwick Council* [2005] NSWLEC 142; (2005) 141 LGERA 27.

These internal processes will continue.

However, I wish to extend an invitation to those involved in our cases on a regular, professional basis to consider, when an appropriate case arises, if an existing planning principle warrants being revised or being used as a foundation for some more expanded principle. If so, early identification of the possibility of revision would be appropriate.

Reviewing the prescriptive planning principles

There have been, both through the Court Users’ Group and in general discussions with members of the various professions who are our regular players, comments made over the years about the perceived utility (or more correctly lack of utility) of those planning principles that have adopted the prescriptive approach. I have earlier shown why the planning principle in *Parsonage* had perverse and anti-amenity outcomes thus necessitating its replacement, when a suitable opportunity arose, with a planning principle setting a process for assessing solar access matters. Another example where we have had a number of critical comments is the planning principle in *Edgar Allen Planning v Woollahra Council*, a planning principle dealing with whether a development proposal should properly be characterised as additions or alterations or whether it should be regarded as a fresh development.

It seemed to me that this planning principle was ripe for reconsideration. *Coorey v Hunters Hill* recently provided an appropriate case where it could be reconsidered, with assistance from the advocates in those proceedings. As a consequence, a new planning principle emerged would be in the process genus rather than the prescriptive one.

It is, in my opinion, generally appropriate to see if there are opportunities to revisit the planning principles that are within this class to see whether or not they might better be re-visited and replaced with planning principles of a process nature.

New horizons for planning principles?

At this point, I need to digress a little to talk about one of the Court's newer jurisdictions, that arising under the *Trees (Disputes Between Neighbours) Act 2006*.

It is a jurisdiction where, by and large, self-representation is the norm and, not infrequently, the dispute over the tree merely represents the most recent manifestation of long-running animosity between neighbours.

A little like the Hatfields and the McCoys of American feud history (1863–1891), occasionally neighbours hate each other, they know they hate each other, they can't remember why they hate each other but that a dispute about a tree or a hedge provides a convenient contemporary opportunity of a new manifestation of their dislike.

Very early on, indeed in the second tree dispute case (*Hunt v Bedford* [2007] NSWLEC 130) heard on 15 March 2007 – day one of the Trees Act hearings – it became apparent to (then Acting) Commissioner Fakes and me that, if we took a very permissive attitude to applications based on blocked gutters or the need to clean up minor detritus from a tree to avoid risks of slip and fall and the like, we would be opening the way to clear felling the trees of the Sydney metropolitan area.

In many respects, at a very simplistic level, we considered that the jurisdictional tests in s 10(2) of the Trees Act created what might be regarded as a presumption in favour of the tree because there was a definite onus placed on an applicant to demonstrate satisfaction of one of the threshold jurisdiction tests prior to any engagement of merit or discretionary considerations set out in the legislation.

One consequence of this approach was our determination to find an appropriate opportunity to publish a Tree Dispute Principle to provide guidance for local government and for assistance in consideration of the facts and circumstances of future tree dispute applications. We drafted the first tree dispute principle in the following terms:

For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis.

The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.

This principle was developed in a collegiate fashion involving interested members of the Court – including the then second arborist Acting Commissioner and another member of the Court with horticultural qualifications, one Preston by name, in its proposed terms.

Commissioner Fakes and I then put that principle on the shelf, as it were, and awaited a suitable case to act as a vehicle for publication. We did not need to wait long and the principle was adopted and published and became known as the Tree Dispute principle in *Barker v Kyriakides* [2007] NSWLEC 292. That principle was published in May 2007 and has been applied in 147 tree dispute applications since then in NSW and adopted and applied 4 times by the Queensland Civil and Administrative Tribunal in tree disputes dealt with under the *Neighbourhood Disputes Resolution Act 2011* (Qld).

On none of these 151 occasions has the nature of the deposition of tree detritus been sufficient to warrant the setting aside of that principle and it has been applied in a fashion that has universally resulted in the dismissal of the application or, and for multifaceted applications, that part of the application that was based on the shedding of small detritus by a tree.

In addition, I should add, we have also had a gratifyingly positive response to this principle from local council tree officers who have used it as a basis for developing council policies for Tree Preservation Order applications based on blocked gutters and the like.

The purpose of this digression, apart from enabling me to have the warm inner glow of satisfaction of doing good, is to lead into a discussion, on a serious basis, of where we might go for new planning principles in the future.

I think it is now time to contemplate the possibility of identifying topics where a planning principle would potentially have utility and have the Commissioners of the Court go through the process of developing that principle in advance of (and in anticipation that there would become) an opportunity afforded by an appropriate set of proceedings to publish the principle so developed.

This would involve the identification of a topic for a potential planning principle; development of the principle; warehousing it until an appropriate set of proceedings arose; reviewing it to see whether it needed to be further revised since its original development; and then publishing it using the proceedings as a vehicle for doing so.

I earlier instanced the suggestion being made to Commissioner Pearson that *Norm Fletcher & Associates Pty Ltd v Strathfield Municipal Council* was an appropriate case for the development of a planning principle extending and/or expanding on *Helou v Strathfield Municipal Council* for application to local heritage items rather than merely contributory items in a conservation area as was the position in *Helou*.

Although circumstances did not permit that occurring in those proceedings, the concept of such a planning principle should not be discarded from further consideration. In fact, the matter having been raised, consideration is warranted, in my view, of whether we should not develop such a planning principle and warehouse

it until an appropriate set of proceedings arose when it might be published. Having said that, I am not to be taken as announcing that such a process has been adopted in that or any other instance but merely to suggest that now is the time, given the maturity of the existing planning principle regime, to contemplate whether this is not the desirable path for the future. This matter will be discussed by the Commissioners in the near future.

In addition, there have been two other areas where it could have been possible that consideration might have been given to the development of a new planning principle. The first of them arose in *Solotel Pty Limited v Woollahra Council* [2011] NSWLEC 1210 where issues relating to the impact of antisocial behaviour on occupants of nearby residences was the determinative issue.

Whilst, in those proceedings, I set out a generalised process for reasoning, it was not proposed as and did not purport to be a planning principle. However, for such issues, it may well be a topic appropriate for identification as an appropriate area for anticipatory development of a planning principle.

Similarly, there have been two cases where issues of potential broader social impact on socioeconomically disadvantaged communities by the possible introduction of a new alcohol outlet were canvassed (see *Martin Morris & Jones Pty Ltd v Shoalhaven City Council* [2012] NSWLEC 1280 [Pearson C] and *Cardno Pty Ltd v Campbelltown City Council* [2013] NSWLEC 1056 [O'Neill C]).

In the circumstances of each of those cases, the development of a planning principle was not considered appropriate. However, this is also a broad area where it might be appropriate for us to consider the development of a planning principle in a vacuum and warehousing it until an appropriate set of proceedings arose as a vehicle for its publication.

In revealing these three topics as potential bases for planning principles, I identify them only because there have been cases in the last several years that have thrown up those issues for consideration.

There may well be others, whether they have impinged themselves on our consciousness or not.

As we consider the possibility of the development of new planning principles (or, indeed, the revision of existing planning principles) on an anticipatory basis, we would welcome suggestions, as they might arise, from the regular professional participants in the merit review jurisdictions of the Court as to what topics might benefit from consideration as the foundation of a new or revised planning principle.

Suggestions do not need to arise in particular proceedings although the potential for proceedings to give rise to a principle should not be ignored. If anyone wishes to identify what they considered to be an unfilled gap in the present range of planning principles, they should do so by sending me a short email or note identifying the topic and saying, briefly (and I mean **briefly**) the reason why a principle might be desirable.

I should conclude by saying two things. First, as should be evident from what I have traversed in this paper, that I do not consider that the planning principle course has been run and finished. Although, perhaps, in a different fashion than has been the path followed since the publication of the first planning principle in *GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council*, there remains work to be done and a constructive and evolutionary role for planning principles within the Court.

The second, and final, point that I should make is that, although I am, in today's discussion, endeavouring to widen the process for initiation of consideration for the development of new or revision of old planning principles, my doing so is specifically focused on that initiation.

Whilst the initiation and, indeed, submissions discussing options for planning principles during the course of proceedings are welcome, the decision of whether a new principle should be developed or an old one revised must, necessarily, remain within the closed, collegial processes of the Court because, in the end, their utility comes not only from our collective expertise and experience but primarily because they are vested with the cloak of authority of the Court itself.

Tim Moore
Senior Commissioner

18 October 2013

Appendix 1

| Principle | Specific aspect | Case |
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| Adaptive re-use | Adaptive re-use and public interest | Michael Hesse v Parramatta City Council [2003] NSWLEC 313 at 14-18; revised - 24/11/2003 |
| Aesthetics | Weight to be given to expert opinion on architectural design | Architects Marshall v Lake Macquarie City Council [2005] NSWLEC 78 at 38-42 |
| Brothels | Location of brothels | Martyn v Hornsby Shire Council [2004] NSWLEC 614 at 18-21 |
| Building envelope | Tensions between a prescribed floor space ratio and a prescribed building envelope | PDE Investments No 8 Pty Ltd v Manly Council [2004] NSWLEC 355 at 48 |
| Compliance | Responsibility for monitoring compliance with a condition | Dayho v Rockdale City Council [2004] NSWLEC 184 at 7-8 |
| DCPs and Council policies | Weight to be given to Development Control Plans and to policies which had been adopted by councils although not embodied in DCPs | Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472 at 86-88 and 89-93; revised - 01/10/2004 |
| Demolition | The extent of demolition - alterations and additions or a new building | Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187 |
| ESD and the precautionary principle | Explication of the precautionary principle and framework for its implementation | Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133 at 107-183 |
| ESD principles | What regard should a consent authority give to the principles of ecologically sustainable development | BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 at 82-114; revised - 05/05/2005 |
| FSR | FSR - Compatibility in a suburban context | Salanitro-Chafei v Ashfield Council [2005] NSWLEC 366 at 23-28 |
| General impact | Impact on neighbouring properties - revised principle | Davies v Penrith City Council [2013] NSWLEC 1141 at [116] to [121] |
| General impact | Reasonableness of and necessity for proposal | Super Studio v Waverley Council [2004] NSWLEC 91 at 5-7 |
| Height, bulk and scale | Assessment of height, bulk and scale | Veloshin v Randwick Council [2007] NSWLEC 428 at 32-33 |
| Heritage | Demolition of contributory item in conservation area | Helou v Strathfield Municipal Council [2006] NSWLEC 66 at 43-46 |
| Heritage | Impact of adjacent development | Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353 at 34 |
| Landscaping | Imposition of conditions relating to the preservation of landscaping or protection of existing vegetation. | Falcomata v Ku-ring-gai Council (No 2) [2005] NSWLEC 459 at 53 |
| Licensed premises | Extension of trading hours increase in permitted patron numbers or additional attractions | Vinson v Randwick Council [2005] NSWLEC 142 at 84-85 |
| Master plans | Proposal permissible but inconsistent with Master Plan | Aldi Foods Pty Limited v Holroyd City Council [2004] NSWLEC 253 at 40-43 |
| Noise | Attenuation measures | Stockland Developments v Wollongong Council and others [2004] NSWLEC 470 at 6 |
| Non-statutory regional planning policies | Assessing the role of non-statutory regional planning policies vis-à-vis statutory local plans | Direct Factory Outlets Homebush v Strathfield Municipal Council [2006] NSWLEC 318 at 25-26 |
| Open Space | Location of communal open space | Seaside Property v Wyong Shire Council [2004] NSWLEC 600 at 30 |
| Plan of management | Adequacy or appropriateness of a plan of management to the particular use and situation | Renaldo Plus 3 Pty Limited v Hurstville City Council [2005] NSWLEC 315 at 53-55 |
| Privacy | General principles | Meriton v Sydney City Council [2004] NSWLEC 313 at 45-46 |
| Privacy | Use of landscaping to protect privacy | Super Studio v Waverley Council [2004] NSWLEC 91 at 5-7 |
| Redevelopment | Isolation of site by redevelopment of adjacent site(s) - general | Melissa Grech v Auburn Council [2004] NSWLEC 40 at 51 |
| Redevelopment | Isolation of site by redevelopment of adjacent site(s) - where intensification of development is anticipated | Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189 at 31-34 |
| Redevelopment | Isolation of site by redevelopment of adjacent site(s) - role of Court in assessing consolidation negotiations | Karavellas v Sutherland Shire Council [2004] NSWLEC 251 at 17-19 |
| Redevelopment | Existing use rights and merit assessment | Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587 at 83-84 |
| | The principles to be considered when undertaking a merits assessment of a proposed redevelopment of a site with existing use rights were dealt with by Roseth SC in Fodor Investments v Hornsby Shire Council [2005] | Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71 at 17 |

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| | <p>NSWLEC 71.</p> <p>In Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587 the planning principles in Fodor were considered and confirmed by Pain J at pars 83-89.</p> <p>Principle 2 was specifically supported in paragraph 87 and principles 1,3 and 4 were specifically supported in paragraph 89.</p> <p>Her Honour states, in para 89, that care must be exercised in the application of the principles to ensure that there is not a de facto application of standards in environmental planning instruments as that is prohibited by s 108(3) of the Environmental Planning and Assessment Act.</p> | |
| Seniors living | Seniors living in low density zone | GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268 at 14-18 |
| Setbacks | Building to the side boundary in residential areas | Galea v Marrickville Council [2005] NSWLEC 113 at 17 |
| Site dimensions | Small or narrow sites | CSA Architects v Randwick City Council [2004] NSWLEC 179 at 15-17 |
| Staged development | How much information should be provided at Stage 1 | Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353 at 58-59 |
| Subdivision | When a residential subdivision application should impose constraints on future development | Parrott v Kiama Council [2004] NSWLEC 77 revised - 16/03/2004 at 17 |
| Subdivision | Solar access for allotments in residential subdivisions | Wallis & Moore Pty Limited v Sutherland Shire Council [2006] NSWLEC 713 at 74 |
| Sunlight | Access to sunlight | The Benevolent Society v Waverley Council [2010] NSWLEC 1082 at 133-144 |
| Surrounding development | Compatibility of proposal with surrounding development | Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191 at 22-31 |
| Unusual contemporary design | Basis for assessment | Totem Queens Park Pty Ltd v Waverley Council [2004] NSWLEC 712 at 41-44 |
| Use | Impact of intensification | Randall Pty Ltd v Leichhardt Council [2004] NSWLEC 277 at 25-26 |
| Views | Views – general principles | Tenacity Consulting v Warringah Council [2004] NSWLEC 140 at 25-29 |
| Views | Impact on public domain views | Rose Bay Marina Pty Limited v Woollahra Municipal Council and anor [2013] NSWLEC 1046 at 39 - 49 |
| Zones | Weight to be given to the zoning | BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 revised - 05/05/2005 at 115-119 |
| Zones | Development at zone interface | Seaside Property Developments Pty Ltd v Wyong Shire Council [2004] NSWLEC 117 at 25 |

Appendix 2



Use of planning principles by Councils and the Department of Planning

Councils widely use the Court's principles in development assessments. Woollahra Council's development assessments web site includes:

There will be cases when a proposal complies with numeric or prescriptive controls, but does not meet the objectives of the development rules, Planning Principles or adopted codes and policies.²²

This Council provides details for accessing principles and reinforces their relevance to the Council's processes – saying:

As an example, we will always assess view sharing by using the planning principle from the *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 case. In the *Tenacity* case the relevant questions we will ask in our assessment can be found in paragraphs 26 to 29 of the judgment.²³

However, Woollahra is not alone. In recent case, I had to deal with the express use by a Council of the *Tenacity* principles²⁴. The planning principle is imported into Manly Council's Residential Development Control Plan²⁵ in the following terms:

The ultimate assessment of views and view loss shall be in accordance the following Planning Principles established by the NSW Land and Environment Court, illustrated in Figure 14²⁶ below.

Tenacity is the most frequently utilised principle. A search of Council web sites, through the Department of Local Government,²⁷ shows that 32 of the 152 Councils in NSW have applied *Tenacity* in assessments.

Tenacity's application is not confined to urban or coastal areas (as might be expected). Yass Valley and Parkes Shire Councils have expressly applied *Tenacity* when assessing view impacts of new dwelling proposals in country towns.

Four further planning principles were also searched. Eight Councils have expressly applied *Martyn* to brothel applications. Seven Councils have expressly applied *Parsonage*. Six Councils have expressly applied *Helou v Strathfield Municipal*

²² http://www.woollahra.nsw.gov.au/building_and_development/how_we_assess_your_da/assessment

²³ http://www.woollahra.nsw.gov.au/building_and_development/development_rules/planning_principles

²⁴ See *Cachia v Manly Council* [2009] NSWLEC 1035

²⁵ At 4.3 *Maintenance of Views*

²⁶ Figure 14 sets out the full text of the four steps in Roseth SC's decision in *Tenacity*

²⁷ http://www.dlg.nsw.gov.au/dlg/dlghome/dlg_LocalGovDirectory.asp?index=1&CN=A

*Council*²⁸ (discussed later) to redevelopment applications. Four Councils have expressly applied *Vinson* to licensed premises.

Department of Planning expressly applies planning principles²⁹ when preparing Director-General's reports³⁰.

Other jurisdictions

There are a number³¹ of examples of citation (with approval) in other jurisdictions of a planning principle published by the Court. Two are of *Tenacity* as set out below.

In the South Australian Supreme Court, Debelle J discussed and (adopted³²) the *Tenacity* principles, saying:

The factors which will determine that question are outlined in *Tenacity Consulting Pty Ltd v Warringah Council*.

In *App Corporation Pty Ltd v City Of Perth*³³, the Western Australian State Administrative Tribunal said:

55 The four-step assessment adopted by the Land and Environment Court is not strictly in point, as the planning framework in this case does not require development to allow for the reasonable sharing of views. Furthermore, this is not a case of view loss due to substantial solid structures, but rather of interruption of views. Nevertheless, the four-step assessment is of assistance in determining whether the visual impact of the proposed wind turbines is acceptable.

Randall Pty Ltd v Leichhardt Council [2004] NSWLEC 277 and *Vinson* (both concerning impacts of extended trading hours of licensed premises [*Vinson* being a later case adopting and expanding the principle in *Randall*]) have been cited³⁴ by the Western Australian State Administrative Tribunal and *Randall* applied in that case.

No interstate court or tribunal criticism of the Court's planning principles – either general or specific – has been found.

²⁸ [2006] NSWLEC 66, (2006) 144 LGERA 322

²⁹ For example, *Tenacity* was applied in the Reports of February 2007 – Luna Park Site C; and of June 2006 – Restaurant Breakfast Point – River Front Precinct

³⁰ Reports made pursuant to 75I of the EP&A Act

³¹ These examples are not intended to be exhaustive, as time has not permitted research of citation of all 42 planning principles in the preparation of this paper.

³² *Hutchens & anor v City of Holdfast Bay & anor* [2007] SASC 238 from para 18 with adoption in para 20

³³ [2008] WASAT 291

³⁴ *Randall v Town of Vincent* [2005] WASAT 129