

**Paper presented at University of New South Wales: Planning Law and Practice Short Course
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The Honourable Justice D H Lloyd

In this paper I intend to discuss a number of significant planning decisions of the Land and Environment Court and the Court of Appeal this year. I will assume that those present are familiar with the structure of the Land and Environment Court and, in particular, the operation of Classes 1 and 2.

The structure of this paper itself will be as follows. Firstly, I intend to canvas decisions relating to s 90 of the *Environmental Planning and Assessment Act 1979* (which I shall call "the Act"). Secondly, I will consider deferred commencement consents pursuant to s 91AA of the Act; thirdly, a number of cases in which the validity of development consents have been challenged; and fourthly, modification applications under s 102 of the Act. Lastly, I intend to explore the operation of SEPP 1 objections as discussed in several recent cases and make reference to existing use rights.

Section 90(1) of the Act

Section 90 of the Act enumerates of the considerations which must be taken into account by consent authorities when determining development applications. These considerations include:

- (1)(ii) any draft environmental planning instrument that is or has been placed on exhibition ... ;
- ...
- (d) the social and economic effect of that development in the locality;
- ...
- (o) the existing and likely future amenity of the neighbourhood;
- ...
- (q) the circumstances of the case;
- ...
- (r) the public interest
- ..."

I mention the above considerations in particular because they have been the subject of several proceedings this year.

1. Section 90(1)(a)(ii): Draft LEPs

As I have just said, s 90(1)(a)(ii) requires councils to consider the provisions of an exhibited draft local environmental plan (or draft "LEP", as I shall call it) when determining development applications. The relevance of a draft LEP and the weight to be given to it, however, relies on the facts of the case. It is impossible to prescribe the situations and ways in which the existence of a draft LEP will impact upon particular proceedings. A brief mention of a few cases concerning draft LEPs will illustrate this point.

In *Golden Paradise Corporation v Kogarah Municipal Council* (Unreported, 29 October 1997), there was a draft LEP prohibiting brothels in a General Business zone. A development application for a so-called 'five star' brothel was consequently refused by the council. An assessor of this Court, however, issued consent to the application. This decision was appealed to Sheahan J, who had to determine whether the assessor had erred in law in failing to take into account a draft LEP prohibiting brothels in the relevant zone.

Sheahan J assumed on the basis of s 90(1)(a)(ii) that the draft LEP was a relevant consideration. He noted the decision of the Queensland Court of Appeal, however, in *Lewiac Pty Ltd v Goldcoast City Council* (1994) LGERA 224. In that case it was held that the weight to be placed on a draft LEP will usually be of importance only in cases involving major conflicts; an application for a high rise development, for example, in an area about to be planned for a low building profile. It was suggested in *Lewiac* that in such cases draft LEPs should not be pre-empted by ad hoc development. A proposed high-rise building in a planned low profile area, that is, should "await determination of whether the strategic plan is approved, modified or rejected" before it receives consent.

Evidently, Sheahan J did not see the case in *Golden Paradise Corporation* as one of major planning conflict. There was no need for the brothel application to be 'put on hold' until the fate of the draft LEP had been decided. His Honour instead held that the assessor had taken the draft LEP into sufficient consideration when he issued development consent and that no error of law had occurred.

The imminence or certainty of a draft LEP is a matter of some importance, in my view, when considering the weight to be placed upon it in any given situation. In *Denis Leech & Associates v Warringah Council* (Unreported, 26 June 1997) Warringah Council had created a draft LEP which would prohibit all buildings exceeding 9 m in height. The applicant was seeking approval for a mixed commercial/residential development of 11 m in height. In determining whether the draft LEP was a relevant consideration in the proceedings, I had regard to the fact that the Department of Urban Affairs and Planning had not yet seen the document and that it did not comply with a s 117 direction notified by the Minister; primarily that LEPs should not contain sub-zones of the main zone. There was also a circular from the Department stating that detailed development standards should be contained within development control plans rather than LEPs. As a result of these infringements, I found that the fate of the draft LEP was so uncertain as to warrant it being given no weight at all. I was nonetheless prepared, however, to accept that the document represented the views of the council and the local community as to what they would like to see as appropriate planning controls for the area.

I add that although the draft LEP was inapplicable and that the 11 m development proposed by the applicant complied with the height controls in the existing LEP, I still held that the proposed building was too high. This was because it was substantially higher than other buildings in the area and out of character with the general tenor of the locality. It is important to remember that merely because a development complies with the maximum limit set for a particular development standard does not mean that it necessarily can and should be constructed to that limit. Accordingly, I was only prepared to approve of the development in *Denis Leech* if one of its four storeys and its proposed attached townhouses were removed.

The existence of savings provisions in draft LEPs is another matter which may be a consideration relevant to s 90(1)(a)(ii) and the weight to be placed upon the instrument. In *Jokona Pty Ltd & Anor v Liverpool City Council* (Unreported, 4 June 1997), for example, a 'megaplex' cinema complex was proposed in an industrial area. There was a draft LEP which prohibited cinemas in all such areas. Bignold J considered that pursuant to s 90(1)(a)(ii) of the Act the draft instrument was a relevant consideration. It contained a savings provision, however, which allowed development applications to be determined according to the provisions of the original LEP if they had been lodged with the council "but had not been determined" before the draft LEP came into force. If the cinema application had not been determined before the relevant date, therefore, it would avoid the prohibition of cinemas in industrial areas brought about by the new draft LEP.

Bignold J noted that the development application had been refused before the date that the draft LEP came into operation. He thus concluded that the application had been "determined" before the draft LEP came into force. As a result, the applicant could not rely upon the savings provision. The present appeal was to be determined according to the provisions of the draft LEP.

In summary, the primary principles arising out of these cases relating to s 90(1)(a)(ii) are that the weight to be placed upon a draft LEP when determining a development application depends on:

- 1) the extent of conflict between proposed development and planning objectives contained in the draft LEP;

- 2) the imminence of the draft LEP and the degree of certainty that it will come into force;
- 3) the existence and applicability of savings clauses in the draft LEP.

I add that draft LEPs may be relevant as evidence of community or council views with regard to future development regardless of their applicability under s 90(1)(a)(ii).

2. Section 90(1)(d): Social and economic effect

Two recent cases before me have raised as an issue the social and economic effects of a development pursuant to s 90(1)(d). These are: *Hayden Theatres v Penrith County Council & Ors* (Unreported, 12 February 1997) and *Fabcot Pty Ltd v Hawkesbury City Council* (Unreported, 10 April 1997).

In *Hayden Theatres* it was argued that Penrith Council should have had regard to the economic viability of *three* proposed cinema complexes in development applications before it when deciding to grant development consent to any *one* of them. Evidence was adduced to the effect that there would be too many cinemas in the area to cope with current demand should all three development applications be approved. Evidence was also adduced to the effect that shops in the central business district ("or CBD") near one of the cinema complexes would suffer financially as a result of one of the applications having received consent.

In *Fabcot* it was argued that a proposed supermarket was likely to have an adverse economic impact on existing and planned retail supermarkets within the local government area and should thus be refused on the basis of s 90(1)(d). It was further argued that the proposed supermarket would cause a 10 to 15% decline in non-supermarket trading in the Windsor CBD.

In both of the latter cases I held that market forces and fair trading legislation are the appropriate vehicles for regulating economic competition - not the courts. Neither the Council nor this Court should be concerned with mere threat of economic competition between individual competing businesses. In *Hayden Theatres*, for example, Penrith Council could not be required to consider questions of the general economic viability of the cinema applications before it. Similarly, the Council could not be required to delay the consideration of a development application for a cinema complex merely because a like application had been lodged and was yet to be considered. The collective economic impact of both developments was not a matter to which consent authorities must have regard. To allow otherwise would permit persons to frustrate or delay the application of a trade competitor already before a council simply by lodging a comparable application.

In spite of this ruling, there is a limited sense in which the economic impact of a development on businesses in the surrounding area may be considered. This was outlined by the High Court in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 (at 687; cf 681) and was relevant in the aforementioned *Fabcot* case. In *Kentucky Fried* Stephen J stated that:

"If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, ... and if the resultant community detriment will not be made good by the proposed development itself, that seems to me to be a consideration proper to be taken into account as a matter of town planning".

In *Fabcot*, for example, the possibility that the proposed supermarket would cause financial detriment to other supermarkets in the area was not a valid consideration. The decline in non-supermarket trading in the central Windsor area, however, would have a detrimental effect on the availability of such trading facilities enjoyed by the surrounding community; and this detriment would not be made good by the proposed supermarket itself. I therefore held that the development application should be refused on the basis of the test in *Kentucky Fried* and its application to s 90(1)(d).

I note in passing here that Bignold J considered the effect of s 90(1)(d) in the abovementioned case of *Jokona v Liverpool City Council*. As I have said, *Jokona* was a development appeal for a 'megaplex' cinema development a

short distance from the Liverpool CBD. Evidence in the case suggested that the development would cause a 4 to 5 % overall loss to trade for retail activity in the CBD and that it would might cause a local Westfield cinema complex to close down. Consistent with my ruling in *Hayden Theatres* and *Fabcot*, Bignold J considered that the evidence concerning the Westfield complex was relevant, but surprisingly this was said to be due to the "indefinite scope of s 90(1)(d)". Because of the risk of adverse economic input on the existing retail activity in the CBD, a risk recognised in the council's draft LEP, his Honour refused the development application.

2. Section 90(1)(d),(o),(q) and (r): Morality

The question of morality as a consideration in determining development applications has arisen repeatedly this year. Since the decriminalisation of brothels through amendments in 1995 to the *Disorderly Houses Act*, a spate of development applications for brothels have come before local councils. Many councils have refused to grant consent to such establishments, however, and a number of appeals by prospective brothel owners have consequently come before this Court.

The case of *Liu & Ors v Fairfield City Council* (Unreported, 9 December 1996) was heard by Murrell AJ late last year. The proceedings concerned the council's refusal of consent to an "adult swingers' club". Murrell AJ had to consider, as a preliminary point of law, whether morality was a legitimate consideration in determining the application by virtue of s 90(1)(d), (o), (q) and (r).

Murrell AJ held generally that s 90 refers only to "concrete planning matters", not intangibles like morality. She then dispensed with any of these subsections of s 90, just mentioned, as a basis upon which questions of morality could be considered. She held, for instance, that s 90(1)(d) only relates to the *actual* social or economic effects of a development. Fears about a potential for moral corruption could not fit into this category. The only way subsection (1)(d) could be relevant is if it could be shown that the brothel in question would have an *actual* detrimental social effect on its surroundings.

As for s 90(1)(o), Murrell AJ held that the phrase "existing and likely future amenity of the neighbourhood" relates only to the *physical* environment of a neighbourhood. It does not refer to the moral tenor of a locality. Her Honour held that the circumstances of the case and the public interest pursuant to subsections (1)(q) and (r) were likewise irrelevant. It could not be in the public interest, for example, that either local councils or this Court "assume the mantle of moral arbiter" when the appropriate legal vehicle for morality is the criminal law.

Liu & Ors went to the Court of Appeal. The judges there agreed that morality is an irrelevant issue *per se*. It was emphasised, however, that the demonstrable social effect of a particular brothel *is* a relevant consideration under s 90(1)(d).

Not long after the Court of Appeal's decision in *Liu*, the same issues arose in before Talbot J in the matter of *Croucher v Fairfield City Council* (Unreported, 2 July 1997). In that case, Talbot J accepted the Court of Appeal's ruling that considerations of the social effect of a brothel were relevant. He said:

"The Court accepts that there are members of the community who regard brothels with total repugnance on moral grounds and those views are accepted. Where persons holding those views are likely to be confronted by a relevantly proximate, extravagant and audacious display as a consequence of a proposed development ... then questions of morality may arise for consideration under s 90".

His Honour further expressed the view that the brothel in question may have a detrimental economic effect on businesses in the shopping centre in which it was located, and that this would be a relevant consideration under s 90(1)(d). There was no evidence, however, that the brothel would cause such an effect. Neither was there evidence that the brothel, being discreetly located, would cause undue consternation to passers-by. As a result, the development was allowed.

s91AA: Deferred Commencement Consent

Section 91AA is known as the 'deferred commencement' provision of the Act. It reads as follows:

(1) "A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition".

The provision was only introduced into the Act by the *Local Government (Consequential Provisions) Act 1993* and has not been the subject of extensive judicial consideration. I will make reference here to a number of cases this year, however, in which the construction and operation of s 91AA has been at issue.

Talbot J considered s 91AA in late 1996 in *Remath Investments No 6 Pty Ltd v Botany City Council* (Unreported, 11 December 1996). He expressed the view that s 91AA is "not to be regarded as a panacea to overcome any unresolved issue at the time a development consent is granted". Most importantly, "the section is not designed to overcome issues which relate to "impacts that require consideration under s 90 of the *EPA Act*".

His Honour expressed the same view this year in *Cameron v Nambucca Shire Council & Anor* (Unreported, 8 August 1997). In that case, an application for a resort development had received development consent to be deferred in commencement until the completion of a traffic impact study. The applicant alleged that this s 91AA consent should not have been issued because the council had not yet dealt with the issue of traffic contrary to ss 90 and 91 of the Act. The Council had issued a deferred commencement consent when it had not yet considered a s 90 matter.

Talbot J accepted this argument. The decision in *Cameron* thus stands for the proposition that a s 91AA consent is invalid if it is issued when a council has not yet properly considered all s 90 matters.

In *Canyonleigh Environment Protection Society v Wingecarribee Shire Council & Ors* (Unreported, 8 August 1997), Bignold J said that he was "unable to fully embrace" Talbot J's view of s 91AA as expressed in *Remath Investments*. He regarded s 91AA as providing for what he termed an 'in principle' consent to be granted to an applicant; the nature of which he did not actually describe. His Honour said that:

"In my opinion the range or type of 'matter' that may be specified in a deferred commencement condition is obviously and deliberately wide and I do not think it either necessary or wise to attempt to exhaustively define the scope of such matters".

Such matters, in his view, should be "best left to be developed on a case by case basis of judicial exegesis".

The result of the divergent decisions in *Remath Investments* and *Cameron* on the one hand and *Canyonleigh* on the other is such that the nature and operation of s 91AA is unclear. It is my personal view, however, that the decisions of Talbot J should be preferred to that of Bignold J in *Canyonleigh*. It is also my view that this is reinforced by the decision of Sheahan J in *Alan Logan & Associates Architects v Byron Shire Council* (Unreported, 22 September 1997). In that case the council had granted deferred commencement consent to an application pending finalisation of litigation concerning the council's sewerage services. Sheahan J was required to determine whether a clause of the *Byron LEP 1988*, relating to sewerage facilities, prohibited this from taking place. That is, did the obligations imposed upon the council by the LEP take precedence over the power afforded it by s 91AA to issue a deferred commencement consent? His Honour held that it did. He was of the view that the relevant clause in the LEP required the consent authority to satisfy itself of the adequacy of the provision of sewerage facilities prior to granting development consent to the applicant.

It thus seems clear to me s 91AA should not be used as a 'back door' means to overcome the responsibilities imposed upon councils by s 90 and environmental planning instruments. Section 91AA should only be relied upon to defer final satisfaction of a matter which the legislature has deemed *non-crucial* to the determination of development applications and which is not an obligation imposed by an environmental planning instrument.

Section 91AA(4) and (5)

In *Botany Bay Council v Kilzi & Anor* (Unreported, 17 March 1997), an assessor had issued a deferred commencement consent to the respondents for a proposed dual occupancy development, provided that they supply information concerning noise to the council. The assessor had stipulated a period of time in which that information had to be supplied pursuant to s 91AA(4). The specified period had lapsed, however, before the respondents had supplied the information to the council. The respondents subsequently lodged an application under s 102 of the Act seeking modification of the consent to extend the deferred commencement period. The Council sought a declaration from Stein J that the consent itself had lapsed.

In determining whether to issue this declaration, his Honour had regard to s 91AA(5). That section provides that if a consent authority has specified a period in which certain information or evidence be supplied before a deferred commencement consent is to come into force, "the evidence *must* be produced within that period". His Honour emphasised the word "must" here as an indication of the mandatory nature of this provision. He concluded that the applicant's consent had hence lapsed with its failure to comply with the period specified in the deferred commencement conditions.

Stein J added, however, that notwithstanding the lapse of a consent "a discretion remains in the Court to refuse relief". In the present case, no prejudice to the council and no detriment to the environment had been caused by the failure of the applicant to produce its noise impact report in time. It was hence an "appropriate occasion to exercise the discretion as a safeguard against abuse of a salutary procedure". Consequently, there was no bar to the applicants' s 102 application for an extension of the period specified pursuant to s 91AA(4).

Severance of Void Conditions in Development Consents

The case of *Weschler v Auburn Council* (Unreported, 5 March 1997) involved a development consent which contained an invalid condition. Talbot J had to decide whether the whole consent was invalid, or whether the condition could be severed to allow the balance of the consent to remain in force.

There were two different tests on this question available to his Honour. The first test was elaborated by Dixon J in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 and involved the question:

- 1) will the consent operate in a fundamentally different manner once the invalid condition is severed?

The second test was employed by Stein J in *Randwick MC v Pacific-Seven* (1989) 69 LGRA 13, and asked:

- 2) does the condition relate to matters fundamental to the consent?

In the case of both questions, an answer in the affirmative would ensure that the condition could not be severed and that the whole consent was invalid. If the answer was in the negative, the condition could simply be removed, leaving the rest of the consent in operation.

In considering which test to apply, Talbot J had regard to s 32 of the *Interpretation Act* 1976. This section provides that:

"... an instrument shall be construed as operating to the full extent of, but so as not to exceed, the power conferred by the Act under which it is made".

In considering this section, Talbot J firstly held that a development consent was an "instrument" in the relevant sense. Secondly, he concluded that s 32 reverses the common law presumption of the invalidity of instruments. The section establishes, that is, that an instrument is presumed to be divisible. If a condition is *ultra vires* it may be severed, leaving the remainder of the instrument unaffected and operating to the full extent of its power. The

section hence lends itself most readily to the test proposed by Dixon J in *Bank of New South Wales*, establishing that if a consent will operate in fundamentally the same manner once an invalid condition is removed, it should be treated as valid and in force.

His Honour lastly concluded that the invalid condition in the matter before him could be severed. The remainder of the instrument would not operate in a manner fundamentally different to the original consent. This was regardless of the fact that the council had alleged that it would not have issued the consent had it known that the condition in question would be unenforceable. In his Honour's view, the fact that the council may have come to a different decision had it known that the condition would be removed was not a consideration in determining whether the consent would operate differently.

In *MLC Properties v Camden Council* (Unreported, 4 September 1997) I followed *Weschler*. That is to say, I found that an invalid condition could be severed from a development consent on the basis of the *Bank of New South Wales* test.

The applicants in *MLC Properties* had argued that the invalid condition in question could not be removed from a development consent through a s 102 modification application. This was because the invalidity of the condition rendered the consent void and there was thus nothing to which the s 102 application could relate. As I had found that the condition could be severed because the remainder of the consent would not operate in any fundamentally different manner, however, there was indeed a consent in force which could be made the subject of a s 102 application. The consequence of this was that unless or until a consent is found to be void, a consent authority may modify it under s 102 in order to remove any invalidity.

Consent Irrevocable

In both *Pearson v Leichhardt Municipal Council* (1997) 93 LGERA 206 and *J R Hunt Real Estate Pty Ltd v Hornsby Shire Council* (Unreported, 10 April 1997) I was required to consider the validity of consents or approvals issued by a local council in cases where an internal administrative error has occurred. In *J R Hunt*, for example, a development application was approved under delegation contrary to a procedure adopted by the Council in applications involving biodiversity and other environmental issues. In *Pearson*, the applicants had received formal written approval to a s 102 application to modify a development consent. In issuing approval, however, the council had overlooked a letter of objection to the application. The council officer who issued the approval had no delegated authority to do so in cases where there was an objection.

In both *Pearson* and *J R Hunt* three broad legal principles were outlined:

- 1) unless a consent authority has fallen short of its statutory requirements, its consent to a development application is final. This consent cannot be revoked once formally communicated.
- 2) an internal administrative error cannot vitiate a consent or approval issued by a consent authority.
- 3) development consents create rights *in rem* which attach to the land rather than to the applicants for the consent.

This meant that in both cases the development consent was valid. The consents had been formally communicated in situations where there was no failure to observe statutory provisions. I add here, however, that in coming to this conclusion in *Pearson* I also had to consider whether the council had complied with the requirements of s 102 of the Act. The issues involved in this consideration will be outlined in my discussion of s 102 below.

Section 102 applications

Section 102 allows a consent authority to modify a development consent provided that:

"(1)(a) the modified development is substantially the same as the development to which consent was initially granted; and
(b) it is satisfied that no prejudice will be caused to any person who objected to the development application the subject of that consent".

The case of *Pearson*, just mentioned, involved the construction of s 102(1)(b). The question arose as to whether the council had met all statutory requirements in the context of a modification application. As I said above, the letter of an objector had been overlooked when the council issued modification approval to the applicants. Did this mean that prejudice had been caused to the objector within the meaning of s 102(1)(b)?

In determining this question I had regard to the fact that although the letter of objection had been misplaced, all the issues raised within it had been considered by the officer who approved the application. I also held that there must be some degree of objective flexibility and reasonableness in determining whether prejudice has occurred pursuant to s 102(1)(b). If this were not the case "the existence of prejudice to a person who objected, no matter how slight, inconsequential or capricious" would be sufficient to prevent approval of a s 102 application.

Accordingly, I found that no significant prejudice had been caused.

1. Section 102(3A)

Section 102(3A) provides that:

"In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in s 90 as are of relevance to the development the subject of the application".

In *Houlton v Woollahra Municipal Council* (Unreported, 30 July 1997), development consent had been granted for the erection of a dwelling house. The applicants later sought to modify their consent under s 102. Between the time that development consent was issued and the time that the s 102 application was lodged, however, the height limit in the *Woollahra LEP* was reduced. This meant that the applicant's proposed house now exceeded permissible height levels.

The council sought to prohibit the court from granting approval to the s 102 application. In so doing it pointed to s 90(1)(a)(i), which requires consideration of appropriate environmental planning instruments. The council then argued that s 102(3A) stipulates that s 90(1)(a)(i) is relevant, thus requiring that the Court have regard to any the height limits contained in the LEP.

In determining this question, Bignold J referred to the "continuing effectiveness of a validly granted development consent despite subsequent changes in the planning law". A proposed development does not become invalid if the height limits in the local LEP are later reduced to a level below that of the development. His Honour also held that 102 is not to be read down as a result of s102(3A). The court's power to modify a development is not to be constrained in situations where there has been changes in planning laws after the granting of a development consent.

SEPP 1 Objections

State Environmental Planning Policies (which I shall refer to as "SEPPs") may be made by the Minister for Planning in respect of matters which the Minister considers to be of significance to State environmental planning. SEPP 1, in particular, relates to development standards included within environmental planning instruments. The effect of the SEPP is to make development standards more flexible by allowing councils to approve certain developments which do not meet the relevant standards.

Clause 6 of SEPP 1 sets out the way in which this may be done. The clause allows any applicant for consent to a proposed development which does not comply with a given standard to make a written objection to the council with regard to that standard. The objection must state that compliance with the standard is unreasonable or unnecessary in the circumstances of the case and specify the grounds upon which this allegation is made.

The case of *Lido Real Estate P/L and Bookbane P/L v Woollahra Council* (Unreported, 11 August 1997) concerned an application for mixed development comprising six units and a shop with basement car parking. The application was approved in spite of the fact that the proposal exceeded the development standard for floor space ratio in the *Woollahra LEP* 1995. A s 102 application was then made which proposed modifications to the proposal which would further impact on the floor space ratio of the development. The applicants lodged a SEPP 1 objection to the floor space ratio standard in support of their modification application.

In consideration of the issues involved in the case, Talbot J held that a modification application under s 102 of the Act is not to be regarded as a development application. This fact is underlined, he said, by the presence of s 102(3A). This section provides that in determining whether to grant a modification application, regard must be had to all the considerations enumerated in s 90 of the Act. If a modification application was in fact a development application, his Honour observed, s 90 considerations would apply as a matter of course and s 102(3A) would be redundant.

As SEPP 1 only applies to development applications, the consequence of this ruling was that SEPP 1 does not apply to modification applications. The applicants were accordingly unable to make a SEPP 1 objection to the floor space ratio standard in the LEP.

The case of *Lavender Regency Pty Ltd v North Sydney Council [No 3]* (Unreported, 20 August 1997) involved an appeal against a refusal of development consent to an application for a 28 storey residential and commercial building in Milson's Point. The building greatly exceeded floor space ratio and height control standards in the *North Sydney LEP* 1989. A SEPP 1 objection to these standards had been lodged with the original application. During the hearing, expert evidence in support of the SEPP 1 objection was adduced from numerous architects and urban designers stating that the proposed building was of a fine architectural design which would provide a valuable contribution to the area.

In outlining the principles to be applied when considering SEPP 1 objections, Talbot J noted firstly that if a SEPP 1 objection is well founded and if the granting of consent is consistent with the objects of the Act then the discretion conferred on the Court by SEPP 1 is unconstrained. In other words, the Court will not set parameters as to the extent to which a development may permissibly exceed a development standard pursuant to SEPP 1. In determining whether a SEPP 1 objection is indeed well founded, however, it is important to note that:

- 1) there is no one test to be applied in order to determine whether to allow a SEPP 1 objection;
- 2) one such test may be, however, whether the underlying purpose of the development standard objected to will be satisfied by the particular development proposed. This test requires consideration firstly of the aim and objective of the development standard and secondly to the effect of the proposed development upon that standard;
- 3) the planning history of a development standard will be relevant in determining its underlying purpose;
- 4) matters referred to in s 90 which are relevant to the purpose or object of the development standard are to be taken into account as a circumstance of the case.

Having set out these principles, his Honour ruled that regardless of the apparently fine design of the building the Court could not be satisfied that the underlying purpose of the development standards in question could be ignored or disregarded. As his Honour put it:

"The development standards controlling height and floor space ratio are directed at ensuring that development is of an appropriate scale and intensity and has an acceptable impact on the locality in general and the neighbouring properties".

No amount of architectural prowess could overcome this fact and the development was refused.

Existing Use Rights

The aforementioned case of *Fabcot v Hawkesbury City Council* concerned a development application for a supermarket in circumstances where supermarkets were prohibited within the relevant zone. The application was made on the basis of existing use rights as defined in s 106(a) of the Act and cl 39 of the *Environmental Planning and Assessment Regulation 1994*.

The respondent in *Fabcot* argued that pursuant to s 90(1)(a) of the Act a consideration relevant to the application was the objectives of the relevant zone within the *Hawkesbury LEP 1989*. The objectives of the zone were primarily to provide housing and associated facilities, with respect to which the proposed supermarket was inconsistent. I held, however, that since the application was for *prohibited* development, the zone objectives enumerated within the LEP were irrelevant. Existing use rights by definition conflict with the zoning within the appropriate LEP. To judge an application lodged with the council on the basis of existing use rights according to the objectives of that zoning would therefore be misplaced. Accordingly, s 90(1)(a)(i) was an irrelevant consideration in the proceedings.

Another case concerning existing use rights was heard by Pearlman J in March of this year. The proceedings in *Nymboida Shire Council v Skar Industries Pty Ltd & Anor* (Unreported, 7 March 1997) involved a quarry which was presently in use (and had been so since 1973) without development consent. The registration for the quarry had been cancelled in late 1996 due to the provisions of SEPP 37. SEPP 37 came into force in mid '93 and required certain mines and extractive industries to receive development consent within a moratorium period in order to continue in operation.

It was submitted by the owners of the quarry that SEPP 37 did not apply to mines or extractive industries with existing use rights protected by the Act. This was because SEPP 37 is subordinate legislation made under the provisions of the Act and is therefore incapable of overriding the operation of the Act. Pearlman J accepted this submission. She held that SEPP 37 could not extinguish existing use rights under the Act.

In *Parras v Waverley Council* (Unreported, 23 June 1997), Talbot J was required to determine an appeal to a decision of an assessor to refuse an application to extend the opening hours of the Grand Hotel at Bondi Junction. The hotel was a prohibited use within the relevant zone but had the benefit of existing use rights. The assessor had refused the application on the basis that the hotel was located adjacent to a residential precinct. His Honour held that the assessor had committed an error of law in this respect in that "a use permissible pursuant to a planning instrument has no superior public interest over development specifically permitted by ss 106 and 107" of the Act. The assessor should not have considered that the residences in the zone in question should take precedence over the hotel operation merely because the former were a permissible use within the zone whilst the latter was an existing use. In making the finding which he did, Talbot J applied the decision of the Court of Appeal in *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68.

In summary, then, it is important to note that:

- 1) the zone objectives enumerated in an LEP for permissible development do not apply to existing uses;
 - 2) the provisions of SEPPs are subordinate to the Act and cannot displace existing use rights;
 - 3) permissible uses are not to be given precedence over existing uses.
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