

**The Decision**

The Court found that

- Warehouse clearance outlets sell are intended to sell goods by retail directly to the public, this use falls within the definition of “shop” within the LEP The development of the land as a warehouse clearance outlet is a prohibited use, and the development consent granted by council was unlawful and subsequently the use of the land for the purpose of a warehouse clearance outlet was unlawful
- The breach was not merely technical There was no delay There is no public benefit in allowing the development to continue, the public interest was the orderly development and use of the environment The intent of the EP&A Act is that development and use of the environment will comply with the legislation Finally, an unjust result may be avoided by postponing the injunctive relief

**The Appeals**

- Gazcorp appealed Lloyd J’s decision contending that the judge erred in making the declaration or if the development consent was invalid in declining to postpone the operation of restraining orders
- The appeal was dismissed The Court’s finding was affirmed with an amendment to the wording of the orders to erase any ambiguity and to stay the operation of the restraining order
- There were a further three appeals seeking stays of the restraining order which was extended up until 25 August 2004 The outlet has since closed

<b>Mahogany Ridge Developments Pty Ltd v Port Stephens Council [2004]</b> <b>NSWLEC 555 - third party rights</b>
By Paul Colagiuri – Solicitor Henry Davis York

On 10 February 2003, the rules relating to the circumstances in which parties can be joined to proceedings in planning appeals to the Land & Environment Court (“Court”) were amended Section 39A was included in the *Land & Environment Court Act* as the new rule and is set out in the footnote hereto Previously, the general rule relating to the joinder of parties as set out in Part 8 rule 8 of the *Supreme Court Rules* was applicable and is also set out in the attachment

**Past practice - “intervenor”**

In the past, the Court has seldom given third parties, such as objectors who don’t have a right to appeal under section 98 of the *Environmental Planning & Assessment Act*, the right to be joined as a party to proceedings under the Supreme Court Rules However, the Court has given third parties limited rights to call evidence, cross-examine witnesses and make submissions in which case the party is often referred to as an “intervenor” This type of order is commonly known as a Double Bay Marina order after it was introduced by Cripps J in *Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313 at 314

Some of the consequences flowing from a party’s status as an intervenor in the Court have been the lack of a right to appeal to the NSW Court of Appeal and the inability to pursue an order for costs These rights are available to a party formally joined to proceedings under the rules of Court

**Current practice - Mahogany Ridge Developments v Port Stephens Council**

The new test was recently considered by Bignold J in *Mahogany Ridge Developments Pty Ltd v Port Stephens Council* [2004] NSWLEC 555. The proceedings related to an appeal by Mahogany Ridge against the refusal of its application for a major eco-tourist resort development on land in the Port Stephens area. The Department of Defence, which had lodged objections on the grounds that the development would impact upon flight paths from the Williamstown RAAF Base, sought to be joined as a party to the proceedings.

Bignold J considered that it was clear that the purpose of the new test was to broaden the scope of potential parties to a planning appeal because of the language of the new test and the legislature's awareness of the limited manner in which the Court previously applied the former test. Accordingly, His Honour found that the revised discretion of the Court was to be construed beneficially as conferring a wide discretion.

Bignold J then considered the Department's case to be joined as a party. His Honour found that the Department had made out its case because the impact on flight operations was not likely to be sufficiently addressed if the Department were not joined as a party. This was so, amongst other reasons, because the Department had the greatest knowledge of its flight information and would be more equipped than the Council to deal with the issue. His Honour ordered the joinder of the Department as a party only in relation to the relevant issue of flight paths and ordered that the Council could not also lead evidence on that issue (in order to avoid duplication).

**Conclusion**

The new test will allow more interested parties, such as objectors, to be joined to proceedings. In this regard, it appears aimed at ensuring that all relevant interests are properly put before the Court given that planning disputes regularly affect the interests of persons other than the applicant and the Council. However, it may increase the quantity and complexity of litigation and the number of appeals from the Court to the NSW Court of Appeal, although to date there are only three written judgements which have been handed down by the Court on the new test. In all of these three matters the third person has been allowed to joined the proceedings as a party.

---

**Footnote**

Current rule - section 39A Land & Environment Court Act

"39A Joinder of parties in certain appeals

On an appeal under section 97 or 98 of the *Environmental Planning and Assessment Act 1979*, the Court may, at any time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion

(a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or

(b) that

(i) it is in the interests of justice, or

(ii) it is in the public interest,

that the person be joined as a party to the appeal "

Previous rule - Part 8 Rule 8 Supreme Court Rules

"Addition of parties

(1) Where a person who is not a party

(a) ought to have been joined as a party, or

(b) is a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon,

the Court, on application by him or by any party or of its own motion, may order that he be added as a party and make orders for the further conduct of the proceedings "