Hutchens & Anor v City of Holdfast Bay & Anor [2007] SASC 238

by Nicole Harris (Senior Associate) Wallmans' Lawyer - Development and Protection of Views:

The Supreme Court recently ruled that development consent for a development which would have obstructed the views of existing residents should not have been granted.

This is a matter of particular interest as the Supreme Court does not ordinarily rule on planning issues. In the usual course, after finding that the ERD Court has erred in respect of the application of the law, the Supreme Court remits the matter to the ERD Court for hearing and determination in accordance with the correct application of the law. In this case, Justice Debelle considered the issue to be so clear to enable the Supreme Court to determine the question.

Justice Debelle in *Hutchens & Anor v City of Holdfast Bay & Anor* [2007] SASC 238 set aside the decision of the City Holdfast Bay approving the construction of a building on The Esplanade at Seacliff which, the objecting neighbours contended, would have obstructed their views of the coast.

The proposed development, consisting of three storeys and otherwise complying with the Council's Development Plan, would have comprised a take-away food shop on the ground level and dwellings on the first and second levels with provision for car parking.

Justice Debelle noted that although the law does not generally recognise a right to a view, planning controls such as development plans provided a means for views to be protected and that planning authorities must have regard to them when determining whether to grant development consent.

This decision recognises the need to balance the interests of developers with the interests of existing residents and that regard must be had to the type of view (e.g. water, icon, whole or partial), from where the view is obtained (e.g. front, side, rear, from standing or sitting) and the extent of the impact (from a living area or from a bedroom or bathroom).

Justice Debelle referred to the Council's Development Plan and noted that while the provisions relating to the zone in question did not contain any provisions expressly protecting views, the Council wide provisions did because those provisions required that the amenity of the area should not be impaired.

In this case, the objecting neighbours had clear views of the sea and horizon from the upper front levels of their dwellings. Justice Debelle concluded that the proposed development would almost completely obstruct these views which would result in an extreme loss for those neighbours. Although the development complied with the Development Plan in so far as it allowed development of that type and height, it did not comply with all relevant principles of development control, in particular the Council wide principles regarding views.

WESTERN AUSTRALIA

Re Minister for the Environment; Ex parte Elwood & Anor (WA)

by Vince Paparo and Anna Wasylkewycz, Solicitors, Freehills, Perth

The recent decision of the Court of Appeal in Elwood has shed some light on the process of changing a proposal which has already been assessed and approved for implementation under the EP Act. The case concerns a proposal referred to the EPA on 12 January 1990 by the second respondent (Hanson) to relocate an existing hard rock quarry on their property (P1) to another location on the same property (P2). The general location was described in a PER but precise boundaries were not identified. The EPA assessed the proposal and recommended implementation conditions, notably 'commitment 22' - that P2 not be visible from outside Hanson's property. The Minister approved the proposal on 4 December 1991 under s45(5) EPA, subject to conditions.

In 1994 Hanson applied for an extractive industry license which was referred to the EPA. This application included an extension to the west pit of P2, not included in the 1991 approval. The environmental impact was deemed not so severe so as to require an environmental assessment.

The Minister wrote to the EPA on 12 February 2004 under s46(1) asking for advice regarding commitment 22 and the scope and definition of operations at P2. The EPA reported to the Minister:

1. that the proposed extension of the west pit was not part of the original proposal;
2. on the general scope of Hanson's quarrying operations at P2;
3. that the quarrying operations were visible from 'Teewana' (the Applicant's property) and several other locations;
4. that neither the Ministerial approval or 1991 PER detailed the approved footprint of the quarry;
5. that the west pit extends 94m south and 68m above the expected location of P2; and
6. that, as commitment 22 could not be complied with (due to an inaccurate Visual Impact Assessment Plan in the 1991 PER) and that, as P2 is visible outside Hanson's property, commitment 22 should be removed.

The Minister wrote to the Applicant on 21 December 2005 summarising the EPA's report, recording the submissions made by the Applicant in regard to the report and specifically addressed the following:

1. That the west pit was part of the original proposal, so implementation conditions in regard to it could be amended under s46.
2. That some form of overburden dump was part of the original proposal, so implementation conditions in regard to it could be amended under s46.
3. That the northwest extension to the west pit was not part of the original proposal and is not subject to those implementation conditions. The EPA's conclusion that the extension was referred to it as part of the 1994 extractive industry license application was incorrect.
4. That the northwest extension would be approved as a change to the proposal under s45C as it does not raise any environmental issues likely to have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal. The conditions of the original proposal will be extended to apply to the west pit extension.
5. That commitment 22 would be deleted as it did not effectively address the visual impact of P2's operations. New, more specific conditions would be implemented to better address the issue.

The implementation conditions were changed under s46 on 21 December 2005. The Minister confirmed approval of the revised plan of the west pit extension, pursuant to s45C, to Hanson by letter dated 25 January 2006.

The Applicant brought the case on grounds in relation to both the s45C and s46 decisions. The key findings of the court in relation to the various grounds were (in summary):

1. The EP Act does not contain a bare prohibition against implementing a proposal unless it has been referred to the EPA under s38 of the EP Act. The constraint on such 'unauthorised activities' is provided by the regulatory framework in Part V of the EP Act.
2. Section 45C of the EP Act allows the Minister to approve minor changes to a proposal that do not lead to a significantly different detrimental environmental impact.
3. The Minster is precluded from approving a change if the Minister considers that the change might have a significant detrimental effect on the environment in addition to, or different from the effect of the original proposal. This is not a condition precedent on the exercise of the power – it is the existence of the Minister's opinion that enlivens the s45C power.
4. The s45C power can be exercised at any time while the proposal is yet to be fully implemented. The Minster is not confined to approving a change that is wholly prospective.
5. For the purposes of the test in s45C, the original proposal is the proposal as implemented in fact (rather than the proposal as authorised by the original approval). In applying the test the Minster is not to be concerned with the detrimental effect which the proposal would have had on the environment if it had been implemented in accordance with the approval. The Minister must compare the detrimental effect of the proposal, as implemented in fact, with the detrimental effect that the change might have on the environment.

6. While the environmental review and conditions are part of the assessment and regulation of a proposal, they do not form part of the content of a proposal.
7. However, the scope and nature of a proposal can only be determined in the context of the overriding purpose of the EP Act – protection of the environment.

The Elwood decision has implications for companies in circumstances where certain activities are proposed to be undertaken after the approval has been granted subject to conditions. The extent of these implications will depend on:

1. What constitutes the proposal.
2. The specificity and role of the key characteristics and conditions associated with an approval.
3. The nature and scale of the proposed change and environmental impact.
4. The nature and scale of the operation and physical setting.