NELR casenotes

New South Wales - Court of Appeal

Baulkham Hills Shire Council v Ko-Veda Holiday Park Estate Ltd and Norris [2009] NSWCA 160
Enforcing Consent Conditions Against a Developer and Certifier

By Dr Nicholas Brunton - Partner Henry Davis York

Applicants need to be mindful that departures from the conditions of consent can lead to serious consequences. In this case, the developer (Ko-Veda) obtained development consent in 2003 for the expansion of a caravan park on the shores of the Hawkesbury River at Wiseman's Ferry. The development was a designated development and was to be constructed in four stages. The visual impacts of the development from the water was one of the key issues with the proposal and was the reason earlier proposals had been rejected on the merits by the Land and Environment Court.

Some four years after the consent had been granted, the Council commenced Class 4 proceedings in the Land and Environment Court alleging the developer failed to comply with a range of conditions and that the construction certificate issued by the accredited certifier, Mr Norris, was invalid. At the trial before Pain J, the Court found the developer had breached two conditions but as the Council did not seek any relief for those breaches (such as an order to rectify or an injunction to prevent an ongoing breach) the Court dismissed the application and awarded costs against the Council. Not surprisingly, the Council appealed to the Court of Appeal. The leading judgment was given by Tobias JA.

Because visual impacts were a major concern to the Council, the consent contained a range of very detailed and prescriptive conditions relating to the revegetation and landscape management. The conditions included a requirement that cabins were not to be installed until the revegetation program in front of the cabins is in place and sufficiently well advanced. The Council alleged that the developer installed two cabins contrary to a range of conditions. They argued that the developer had not completed the landscaping and failed to first obtain a part 3A permit under the (now repealed) Rivers and Foreshores Improvement Act 1948. They also argued the certifier had invalidly issued a construction certificate (CC) in breach of s 109F because he did not satisfy himself or could not rationally have satisfied himself that the matters which had to be carried out before the certificate could be issued had in fact been carried out.

The question of the validity of the construction certificate was initially important in the trial and the appeal. It was suggested that if it was valid, then any work done pursuant to it, such as the installation of the two cabins, could not be in breach of the conditions in respect of which Mr Norris had expressed satisfaction. This was the case even if there was an objective breach of those conditions of consent. That is, if a valid CC was issued, it "trumped" any earlier breach because once it is issued, a CC forms part of the conditions of consent, see s 80(12) of the EP&A Act.

However, following arguments from the bench, the case developed an unusual twist. Because the cabins that were to be installed were in fact "moveable dwellings", they did not fall within the definition of "buildings" under the EP&A Act and a CC was not required to be issued prior to their installation. Not being required, it did not form part of the consent. The case against Mr Norris was thus misconceived and the original judgment had to be set aside because of the false legal assumption that a CC was in fact required.

The next issue was whether there were other breaches of the consent. The Court did find that the cabins had been installed before the required landscaping works had been "sufficiently advanced" as required by the EIS and "satisfactorily completed" as required by a condition of consent.

In making this finding, Court noted the "difficulty" that can arise when an EIS or SEE purports to describe works that will be carried out in a certain manner and then those documents are incorporated into conditions of the consent. The Court reminded Councils of the need to carefully draft consent conditions to remove any ambiguity and uncertainty given that consents attach to the land for the benefit of current and future owners and given that a

breach can give rise to both civil and criminal consequences.

The trial before Pain J did not deal with the exercise of discretion to grant declarations or make any orders because of the way the Council pleaded their case. However, Pain J did note that there was some evidence that suggested that relief may not be granted. The respondents argued in the Court of Appeal that Her Honour's comments disqualified her from hearing the case after the Court of Appeal judgment. This was rejected and it is only where a judge makes statements that suggest a possibility he or she may not bring an impartial mind to the question of relief will a judge be disqualified.

Young JA noted that the way the Council framed its case against Mr Norris involved seeking a declaration that, in issuing the CC, Mr Norris breached section 109F of the EP&A Act. This was extremely unfair because the Council was in effect asking the Court, in a civil case, to make a finding on the balance of probabilities that Mr Norris had committed a criminal offence. Criminal offences, of course, must be proved beyond reasonable doubt. The way the case was framed was tantamount to an abuse of process. What the Council should have sought was a declaration that Mr Norris could not have considered himself satisfied that certain preconditions to the issue of the CC had been met.

Lessons

This case has been extremely costly for all concerned. Where an issue has prominence, developers are reminded that councils will often require strict compliance with consent conditions. Cutting corners is very unwise. Certifiers need to take care to ensure preconditions are fully met before CCs are issued. Council's are reminded not to fight battles that won't win the war.

New South Wales - Land and Environment Court

Environment Protection Authority v Buchanan (No 2) 165 LGERA 383

By Sarah Froh - Solicitor Henry Davis York

In this case a company director was charged and convicted for a serious environmental offence.

Background

Ms Ruth Buchanan was the sole director of a company called Plastech Operations Pty Limited (**Plastech**). From 2004 until 2006 Plastech leased a site at St Marys at which it operated a hazardous industrial waste storage and treatment facility. Plastech carried out its operations on the site under a valid environmental protection licence issued by the EPA.

Over the course of Plastech's operations, EPA officers carried out a number of site inspections. As result of those inspections clean up notices were issued to both Plastech and Ms Buchanan under section 91 of the *Protection of the Environment Operations Act 1997*. Those clean up notices were issued for Plastech's disorderly and dangerous storage of hazardous wastes in such a way that it was likely to cause a significant pollution incident.

At the time that the clean up notices were issued, both Plastech and Ms Buchanan were experiencing extreme financial difficulties. Ultimately, Plastech went into liquidation and Ms Buchanan was declared bankrupt.

Both Plastech and Ms Buchanan failed to comply with the clean up notices (itself being an offence against the *Protection of the Environment Operations Act 1997*) and Ms Buchanan was charged for failing to comply with the conditions of Plastech's environmental protection licence. Ms Buchanan pleaded guilty to the charge and was accordingly sentenced.

Court's findings

During the inspections by the EPA officers, hundreds of drums and containers of dangerous chemicals were found