The incident was detected by a fisheries inspector. Various directions were issued about clean up and amelioration measures. The defendant was prosecuted for causing water pollution in breach of s 12 of the *Protection of the Environment Operations Act 1997* (NSW) and entered a plea of guilty.

There was a significant dispute between the evidence of the EPA and the defendant in relation to environmental harm caused by the spill. This is not uncommon in prosecutions particularly where no direct evidence is obtained from aquatic species that have died or become affected by the spill. In this case, there was dispute about the state of the creek before and after the spill, the time period of the harm caused to the creek and the severity of the harm.

Detailed scientific reports were tendered, joint reports prepared and two days of cross examination occurred. In the end, the Court accepted there was significant actual harm. However, it noted that the harm was likely to be for no more than 2 months and that the creek, which flowed into the Castlereagh River, did not result in anything more than very minor and short term harm to the river.

Having regard to the usual sentencing considerations, being the early plea, contrition, cooperation with the EPA and parity with other cases, the Court imposed a fine of $90 000, reduced by one third to $60 000, order the defendant to pay the EPA's investigation costs of $16 000 plus the EPA's legal costs (unknown at date of judgment) and it was ordered to place advertisements in the local papers publicising the offence and the penalty.

Lessons

Premises that have risky operations involving waste water, odour, and waste products need to carry out regular audits that focus on risk identification. Asbestos cement pipes regularly break and cause leaks. The issue here is risk identification and preventative maintenance. On average around 60% of prosecutions arise from poor risk identification and lack of maintenance. Around 35% arise from human error, and the rest from unusual or unforeseeable events. Specific measures must be put in place to prevent the risks from occurring. Back up measures must be installed if something goes wrong and then additional back up in case the first measure fails. Tanks should have high level alarms, cut off switches and bunding that is greater in volume than the tank. Old pipes should be video inspected, pressure tested and bunding and water control measures installed in case they leak. Think of the worst case and plan for it. This case and many others show that it will save money in the long run.

Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No. 2) [2010] NSWLEC 270

by Janet McKelvey, Henry Davis York Lawyers

Background

In 2009, Hyecorp Property Fund No 6 Pty Ltd (Hyecorp) lodged a development application with Ku-ring-gai Council (Council) for two residential flat buildings in Roseville. As the proposed development had a capital investment value of greater than $10m the development application was to be determined by a Joint Regional Planning Panel (JRPP).

Council's report recommended the development be refused on the basis that the land the subject of the development was affected by a road reserve under the Ku-ring-gai Planning Scheme Ordinance (KPSO). Under the provisions of the KPSO, development was permissible within the road reserve provided the consent authority had formed an opinion that the purpose of the road reserve could not be fulfilled within a reasonable time from the appointed date (1 October 1971). Council argued that it had not formed this opinion.

In addition, the Council report identified that Hyecorp could not rely on the road reserve when calculating compliance with deep soil landscaping (DSL) requirements under the KPSO. Based on the Council's calculations of the size of the road reserve (later found to be erroneous), the project did not comply with the DSL standards and could not be approved in the absence of an objection under *State Environmental Planning Policy No 1 – Development Standards*.

Hyecorp lodged a SEPP 1 objection to the DSL requirements (SEPP 1 Objection) with the Sydney West Joint Regional Planning Panel (Panel). The SEPP 1 Objection was assessed by the Panel without the Council ever considering it.

At its meeting on 29 April 2010, the Panel granted development consent on the basis that the development largely complied with KPSO and other development standards. The Panel accepted Hyecorp's SEPP 1 Objection, finding that compliance with the KPSO DSL standards was unreasonable and unnecessary in the circumstances.

Council challenged the Panel's decision in the Class 4 jurisdiction of the Land and Environment Court on the grounds that:

- the development was prohibited, as neither the Council nor the Panel formed the requisite opinion on the future of the road reserve subject to the proposed development
- the Panel wrongly assessed Hyecorp's SEPP1 Objection before the Council had considered it
- there was a denial of natural justice to the Council.

Hyecorp challenged the Council's standing to bring the proceedings.

Land and Environment Court decision

Justice Biscoe upheld the Council's challenge only on the first ground of appeal. Biscoe J held that neither the Panel nor the Council had formed an opinion on the future of the road reserve subject to the proposed development.

His Honour held that pursuant to the KPSO it was an essential precondition to development of the road reserve that the responsibly authority (in Biscoe J's opinion, the Panel) assess whether the purpose for which the road reserve was created was likely to be fulfilled in a reasonable time from the appointed day (1 October 1971). On the facts, as the majority of the Panel had not formed that opinion, the development was prohibited. Accordingly, the Panel had no power to determine the application.

Biscoe J held that the Panel wrongly considered Hyecorp's SEPP 1 Objection without the Council first assessing it. The statutory scheme relating to the powers and functions of a JRPP indicates that a Council's assessment of a development application is an essential condition precedent to the Panel's determination.

His Honour ultimately found that the SEPP 1 Objection was legally immaterial and, accordingly, declined to uphold this ground of appeal.

The Council also contended that Hyecorp's late submission of its SEPP 1 Objection resulted in a denial of natural justice by preventing objectors from responding. However, Biscoe J also rejected this ground on the basis that the SEPP1 Objection was legally immaterial.

Biscoe J held that the Council did have standing to bring the proceedings. His Honour rejected Hyecorp's submission that s 23G(5A) of the *Environmental Planning and Assessment Act 1979* (NSW) deemed a Panel exercising Council functions to be the Council, such that in these proceedings the Council was essentially suing itself.

Biscoe J found that cl 123D of the Environmental Planning and Assessment Regulation 2000 did not indicate a legislative intent that Councils could not challenge a consent granted by the JRPP and referred to precedents where Councils had successfully applied for development consents to be set aside on judicial review.

Biscoe J found the Panel's decision void, issued an order restraining Hyecorp from acting on the consent, and ordered the Panel and Hyecorp to pay the Council's costs.

Lessons

The key error for the defendant was not carefully considering the provisions of the planning scheme ordinance and detailing in the development application the issue of whether the purpose of the road reserve was likely to be fulfilled within a reasonable time. Given the start date was 1971, it was highly unlikely that purpose could be fulfilled and therefore consent was permissible. The issue simply had not been addressed and it had to be, before the consent could be validly issued. The second lesson is that additional documents such as further reports, revisions to plans and SEPP 1 objections should not be sent direct to the JRPP without Council having the chance to consider them.

Aranda Properties v Warringah Council [2010] NSWLEC 263

by Gwyn Jones, Henry Davis York Lawyers

This case demonstrates that developers should avoid taking too much latitude when constructing a development 'in accordance with' plans. It also reminds us that compliance certificates perform a narrower function than some may realise.

Summary

Warringah Council granted a development consent allowing the construction of a 48 unit residential flat building in Narrabeen (Consent). The Consent required the registration on title of certain positive covenants and a restriction as to user in relation to the maintenance of an on-site stormwater disposal system (OSD).

The Consent required that relevant Land and Property Management Authority (LPMA) request forms be submitted to Council for approval prior to their registration, as well as a compliance certificate in respect of the completed OSD. Aranda submitted the forms, but the Council refused to approve them because the OSD had not been constructed in accordance with the approved plans.

Aranda commenced proceedings to compel Council to approve the forms for registration. Craig J dismissed the claim because the OSD was not constructed in accordance with the Consent.

Detailed facts

The Consent was a deferred commencement development consent with a condition requiring the submission of plans indicating all engineering details regarding the collection and disposal of stormwater from the development.

Aranda duly submitted two stormwater plans, prepared by T. J. Taylor Consultants Pty Ltd ('Taylor Plans'). One plan showed the location, dimension and volume of three stormwater detention tanks to be located on site. A second plan showed the detail of each tank. Each tank was to have concrete walls and top with a porous bottom, allowing stormwater to seep through the floor into the subsoil below. Access to each tank was available through a surface grate, with step irons fixed to the wall of the tank leading down from the grate. This access would allow the tanks to be cleaned and maintained. Council approved the Taylor Plans by way of a letter to Aranda indicating that the Consent was, from the date of the letter, operative.

The condition of the Consent at the heart of the dispute in this case was condition 39, which required, prior to the issue of an occupation certificate – Department of Lands standard forms 13PC and/or 13RPA), works-as-executed plans, hydraulic engineer's certification and compliance certificate.'

In purported compliance with this condition, Aranda submitted:

- draft LPMA request forms setting out maintenance obligations in respect of the OSD 'as depicted in' the Taylor Plans