SIGNIFICANCE

In summary, this case is a timely reminder to Commonwealth Ministers of their responsibility to exercise the powers the Commonwealth Parliament has vested in them for protection of national interests. Whilst the exercise of these responsibilities may, on occasion, bring them into conflict with their State counterparts, it is not open to them simply to defer to the decisions of State Governments, even if they be made after considerable debate under the processes of State law. It may be that the State law gives a lesser degree of protection than Commonwealth law, and that the perspective of State Ministers does not encompass national interests.

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[1]Earlier cases from this saga include **Bropho v Western Australia (1991) 171 CLR 1** and **Western Australia v Bropho (1991) 5 WAR 75.**

[2]Transcript of reasons for judgment of Black CJ. pp. 26-30.

[3]Transcript of reasons for judgment of Lockhart J, p. 28.

[4]Transcript of reasons for judgment of French J, p. 4

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NEW SOUTH WALES

OBJECTOR APPEALS UNDER SECTION 98 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT

R. & W. Davidson v Hornsby Council

Land & Environment Court, 11 October 1993, Bignold J.

This case arose from an application by a third party objector to be joined as party to proceedings. It ended up as an application for costs thrown away because the proceedings had been discontinued. The interesting question addressed in the case was the validity of certain purported appeals by third-party objectors to a designated development, pursuant to s.98 of the **Environment Planning and Assessment Act** ("the **Act**").

FACTS

The applicant developer lodged an appeal in the Land and Environment Court on 4 August, 1993 against a deemed refusal by Council of a development application for a helipad, which was a designated development.

At the first call-over, the Court was informed that the Council had granted consent subject to conditions, after the filing of the appeal in the Court, and had notified people who had objected to the proposed development of its determination. (The authority to grant consent during the pendency of the appeal lies in s.96(2) of the **Act.**) The Registrar adjourned the matter to 24 September, 1993.

The Council notified objectors on 18 August, 1993 of its determination to grant development consent. Two days later it notified the objectors of the developer's appeal pursuant to s.97 of the **Act** and of each objector's statutory entitlement under s.97(2) to be heard at the hearing "as if a party to the appeal".

Before the next call-over, the Registrar received many letters from people who had made objections to the Council. Some of those people purported to exercise the right conferred on an objector by s.98(1) of the Act.

The Registrar's reply to the letters referred to the "application to be heard at the hearing of this appeal (the developer's appeal) as if a party to the appeal". That was an appropriate reply to people wishing to exercise the right pursuant to s.97(2), but it was inapt in relation to the exercise of the **right of appeal as the moving party**, pursuant to s.98.

At the call-over on 24 September, 1993 there was an application by Galston Area Residents Association Incorporated for joinder. The application was opposed and was stood over for hearing on 1 October, 1993.

The applicant discontinued the proceedings on 30 September, 1993 or 1 October, 1993 with the consent of the Council the only other party to the proceedings.

When the matter came on for hearing on 1 October, counsel appearing for the Association accepted that the proceedings had been discontinued and sought from the applicant the costs of the application for joinder thrown away because of the discontinuance.

DECISION

Bignold J. dismissed the application because Counsel for the Association had suggested and consented to the adjournment before the Registrar on 24 September, 1993.

In determining the question of costs, his honour dealt with the validity of the "purported" appeals pursuant to s.98 of the Act. None of them was in the form prescribed by Part VII r1 of the **Land and Environment Court Rules 1980** ("the Rules") and they were not commenced in the manner prescribed by Part VII r2 of the Rules or accompanied by the fee prescribed in the **Land and Environment Court (Fees) Regulation.**

His Honour was satisfied that the purported appeals were to the effect of the form 2 prescribed by the Rules. The fact that they were received within 28 days as required by s.98 of the **Act** and the mistaken manner in which they were filed by the objectors and processed by the Court, led Bignold J. to exercise the discretion conferred by Part 1r(5)(2) of the Rules to dispense with compliance with the requirements of Part VII rr1 and 2 of the Rules and to regard each of the purported appeals pursuant to s.98 of the **Act** to have been made in accordance with the Rules. The objections were therefore on foot.

Consequently, the development consent granted by the Council was not effective (s.93(2) of the Act).

His Honour directed the attention of the parties and the Registrar to his observations about s.98. His Honour said the Registrar might wish to bring the judgment to the attention of the objectors pursuant to s.98 because it was important to the status of the purported development consent. At the time of writing, I was not able to determine whether any of the appeals are proceeding.

DEVELOPMENT APPLICATIONS

S & I Investments Pty Ltd v Pittwater Municipal Council

Land and Environment Court, 13 October, 1993, Talbot J.

FACTS

S & I Investments Pty Limited ("the Company") owned one large lot of land. It applied for development consent to construct on that land three buildings, each comprising two attached dwellings, in the following terms:

"Three Duel (sic) occupancy two storey Brick & Tile

1. Subdiv of one into three
2. Dual .... on the three newly created lots."

The Company also applied for subdivision approval pursuant to Part XII of the **Local Government Act, 1919**, to subdivide the land into three lots and stated "a development application has been lodged in respect of this subdivision".

The Council did not make a decision, so a Class 1 application was lodged against the deemed refusal of the development application. The Council filed a statement raising two questions of law. They were:

1. Whether an application may be approved pursuant to clause 8 of Sydney Regional Environmental Plan No. 12 and State Environmental Planning Policy No. 25 (SEPP No. 25 was not pursued).
2. Whether the application made to the Council constituted in the present appeal is incompetent.

The Council also filed Class 4 proceedings seeking a declaration that the development proposal described above "is not permitted under Sydney Regional Environmental Plan No. 12 (REP 12) in that the proposal does not relate to development which may be carried out on an allotment of land as required by clause 8 of REP 12".

Clause 8 of REP 12 provides:

"8. Where, in accordance with any other environment planning instrument, development for the purposes of dwelling-house may be carried out on an allotment land, either with or without development consent, a person may with the consent of Council:

(a) alter or add to a dwelling-house erected on that allotment so as to create two dwellings;

(b) erect two attached dwellings on that allotment; or

(c) in the case of an allotment that is not land described in Schedule 2:

(i) erect two dwelling-houses on that allotment; or

(ii) erect a second dwelling-house in addition to one already erected on that allotment; or

(iii) alter or add to a dwelling-house or to any other building erected on that allotment so as to create two dwelling-houses.

if, but only if, not more than two dwellings will be so created as a result of the development being carried out."

DECISION

Talbot J. considered the terms of Clause 8. He found the existence of "an allotment" was a pre-requisite for the carrying out of dual occupancy development, whether there is on the allotment an existing dwelling house or whether there is an allotment on which two attached or detached dwelling houses can be erected.

However, Talbot J. posed the real practical question as being whether a development application which deals with two distinct developments on the one piece of land is a valid development application. Once a subdivision of the large lot was completed and the plan registered, the company would be entitled to apply for a dual occupancy on each of the resulting lots, subject to satisfying the requirements of REP 12.

The Council argued that there must be a separate development application for each development proposed. His Honour found that there was no legal impediment to the inclusion of more than one development in the one application where they all relate to the same land and it may be advantageous to a consent authority to "have before it the whole of the plans for future development on one piece of land". His Honour did recognise, however, that there may be circumstances where for administrative convenience, distinct elements of a development in the one application should be dealt with separately.

Although development of dual occupancy cannot be carried out until there is a separate allotment of land created in accordance with the plan lodged with the Council, it does not follow that the application for consent to the dual occupancy cannot be considered and then determined subject to conditions that the separate allotments be created. His Honour held that Clause 8 of REP 12 does not preclude the making of an application for a development consent, but does prohibit the carrying out of the dual occupancy development unless the provisions of the Clause are satisfied. He commented that the best practice was for any application for (development) consent to subdivision to be determined prior to or contemporaneously with the application for consent to dual occupancy.

Talbot J. held in relation to the Class 1 proceedings that the application may be approved pursuant to Clause 8 of REP 12 and that the development application was one which entitled the applicant to appeal pursuant to s.97. He did not make the declaration sought in the Class 4 proceedings.

SIGNIFICANCE

Newspaper reports indicate that this decision has caused the Local Government Association to suggest that there will be a loss of revenue to Councils because fewer applications now need to be lodged.

COMPENSATION

Italiano Oliveriri v Fairfield City Council

Land and Environment Court, 10 September, 1993, Talbot J.

FACTS

The applicant claimed compensation pursuant to s.179 of the **Local Government Act 1993 (the "1993 Act")** "arising out of the respondent's vexatious failure to grant development consent" to an application. This decision concerned an application to have the claim struck out on the basis that there was no building application pursuant to Pt XII of the **Local "Government Act 1919** (the old Act), nor any application pursuant to Pt 1 Div 3 of Ch 7 of the **Local Government Act, 1993** and hence no basis for a claim under s.179.

The only application lodged with the Council and determined by the Court was a development application received by Council on 1 June, 1992 and granted by Bannon J. in proceedings in the Court on 17 June, 1993.

An "approval" in the 1993 Act is an approval under the 1993 Act or one under the old Act which is in force by virtue of Clause 14 of the Savings, Transitional and Other Provisions in Schedule 7 of the new Act.

DECISION

The applicant for compensation argued that it was an approval under the new Act because where development consent and building consent are required, development consent can be treated as a deemed building consent. This argument was not accepted by Talbot J. and on the facts, there was no evidence that the application was treated as both a building and development application. He considered the authorities under the old Act (**Mangano v Holrovd Municipal Council 26 LGRA 357** and **Page v Drummoyne Municipal Council 28 LGRA 263, 30 LGRA 237, Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236)** and the provisions of the old Act but found that the provisions of the new Act were not to the same effect.

Talbot J. found that the applicant was not an applicant for an approval in force under the new Act and he was never an applicant for an approval under the new Act itself, because there is no retrospective operation of the Act and his application for development consent was made and disposed of before the commencement of the Act.

He concluded that the applicant's claim was so obviously untenable that it had no prospects of success. He cited the authorities of **Brimson v Rocla Concrete Pipes Ltd (1982) 2 NSWLR 937** and **Walker v Hussman Australia Pty Ltd (1991) 24 NSWLR 451** as setting out the relevant principles in respect of summary dismissal. Talbot J. held that the Court has an inherent power to stay or dismiss proceedings which are an abuse of the Court's process as being frivolous or vexatious and these proceedings fell into that category. The application was dismissed with costs.

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