CASE NOTE

Inconsistency Between LEP's And REP's

Coffs Harbour Environment Centre Inc v Minister for Planning and Coffs Harbour City Council

Unreported, Court of Appeal (NSW), Kirby P, Mahoney and Sheller JJA, 31 August 1994

This case involved the determination of two related matters: the first, an appeal from Pearlman_CJ in which she determined that an amendment to an LEP was not void; the second an application to suspend orders and dissolve an injunction granted by the Court of Appeal in an earlier appeal in a related proceeding. This case note deals only with the former issue.

Facts:

The area to which the LEP and REP related was a coastal headland north of Coffs Harbour known as the "Look-at-me-now Headland". Zoning of the headland was controlled by the *Coffs Harbour Local Environmental Plan* 1988 (the LEP) originally made on 6 April 1988. The Coffs Harbour District was also the subject of control under the *North Coast Regional Environmental Plan* 1988 (the REP) made on 15 January 1988.

Sometime in 1991 the Coffs Harbour City Council decided to construct a sewerage treatment facility upon the headland. At the time of this proposal the land was zoned 6(a) (recreational purposes) under the LEP. It was determined in prior proceedings (see *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185) that that zoning precluded the construction of the sewerage treatment works.

As a result of that decision the Council re-zoned the headland by an amendment to the LEP (the *Coffs Harbour Local Environmental Plan* 1988 (*Amendment No 21*)). Amendment No 21 introduced a new zone -- Zone 6(d) Open Space (Coastal Headland) Zone. Amongst the objectives of that zone was clause 2(c) which provided that it was on objective of the zone

> "to enable the development of land within this zone for other purposes [ie other than recreation] where it can be demonstrated by the applicant that appropriate measures can and will be taken to satisfactorily minimise any adverse impact on the scientific, educational, cultural, heritage, conservation and recreation values of the land."

Clause 4 specifically provided, *inter alia*, for the development of the zone for "drainage" and "utility installations" provided development consent was obtained.

The appellant sought, unsuccessfully before Pearlman J, and on the appeal to show that Amendment No 21 was inconsistent with the REP, and that the latter prevailed. Clause 4 of the REP specifically provided:

> "Subject to s 74(1) of the Act, in the event of any inconsistency between this plan and any other environmental planning instrument (other than a State Environmental Planning Policy) applying to the land to which this plan applies, this plan shall, to the extent of the inconsistency, prevail."

It was contended by the appellant that this clause required the REP to prevail over the LEP as amended by Amendment No 21.

The Decision:

The members of the Court of Appeal accepted the findings of Pearlman J in so far as she had determined that there were inconsistencies between the REP and the LEP: see per Kirby P at p_13; per Mahoney JA at p 5.

However, the Court was then confronted with whether such inconsistency between the instruments meant that the LEP was invalid such that the REP was to prevail. In the resolution of this issue the Court was unanimous in the view that the only relevant determinant of the conflict lay in the express terms of s_36 of the *Environmental Planning and Assessment Act* 1979 (the EPAA). Kirby P at pp 8-9 indicated "three principles of construction" arising from the terms of s_36:

1. There is no presumption that, to the extent of any inconsistency, the level of an instrument in the hierarchy of environmental planning instruments determines priority: s 36(a), s 74;
2. There is a presumption of construction that an instrument made later in time will prevail over an instrument made earlier in time where inconsistency arises: s 36(b);
3. Both (1) and (2) may be displaced by a contrary indication expressly included in an environmental planning instrument.

Applying these principles, the Court accepted that Clause 4 of the REP was effective in displacing the first of the principles adverted to by Kirby P as between REP's and LEP's: see per Kirby P at p 12. Accordingly s 36(a) of the EPAA was not relevant to the determination of the appeal.

However, Clause 4 did not expressly overcome s 36(b) of the EPAA. It was clear from the opening words of Clause 4 that s 74(1) of the EPAA was available to enable to the REP to be amended by ***any*** subsequent environmental planning instrument. As Sheller JA pointed out at p_3 of his judgment, s 74

> "accords with the expected Parliamentary intention not to invest the delegate lawmaker with the power to bind itself or its successor by denying it the power later to alter, vary or repeal."

The very inclusion of the opening words of Clause 4 of the REP was considered to be a "tacit acknowledgment of the fact that those later environmental planning instruments would prevail over the REP": per Kirby P at p 12.

Accordingly, resolution of the inconsistency between the provision of the REP and the LEP was to be found in s 36(b) of the EPAA. The simple fact that Amendment No 21 to the LEP was later in time brought into operation the clear terms of s 36(b) which required that the LEP prevail over the REP. In the words of Kirby P at p 14:

> "Applying s 36(b) of the [EPAA] to the REP and the LEP No 21, LEP No 21 must therefore prevail. This is because it is clear that, with respect to the headland, the provisions of the LEP No 21 are relevantly inconsistent with the [sic] some of the provisions of the REP, as stated above. That being so, the LEP No 21 not indicating an intention to displace that presumption of construction and clause 4 of the REP having no enduring prospective operation, which necessarily overrides a later local environmental plan, the provision of the LEP No 21 and the local environmental plan it amended being later in time and specific to the particular land clearly prevail over the REP."

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