CASE NOTES -

Western Australia

Confidentiality of Environment Groups Membership List

South West Forest Defence Foundation (Inc) -v- Executive Director of the Department of Conservation and Land Management and the State of Western Australia

(Supreme Court of Western Australia, May 1995)

In this action, the Plaintiff Association sought a declaration that the Defendants would be acting illegally if they were to proceed with logging operations in Sharpe Forest in the South West of Western Australia. The Defendants applied for the production and inspection of the list of members of the Plaintiff Association in the course of proceedings by the Plaintiff seeking an interlocutory injunction to prevent the logging operations by the contractors of the Department of Conservation and Land Management. The grounds of the Defendants' application were that it would lead to a train of enquiry of assistance to the Defendants in the case or that it "may - not must, directly or indirectly enable the party requiring the (document) either to advance his own case or to damage the case of his adversary": *Compagnie Financiere et Commerciale du Pacifique -v- The Peruvian Guano Company (1882)* 11 QBD 55 at 63.

The Defendants contended that the list of members was relevant on several bases:

(1) The list was suggested to be relevant to establishing an abuse of process on two bases.

(a) It was argued that the list might provide evidence that members of the Plaintiff Association had been concerned in illegal activity and the Plaintiff was therefore not coming to Court in compliance with the equitable principle that those who seek equity must come with "clean hands".

(b) It was argued that the Plaintiff, through its members, had engaged in illegal activity in order to obtain evidence to support the application. It was suggested that, in order to decide whether to argue that such illegally-obtained evidence was admissible, it was necessary to determine whether the four persons who made Affidavits filed in the proceedings which appeared to contain material obtained by entering the logging area in breach of a Temporary Control Area Notice under the *Conservation and Land Management Act*, were members of the Plaintiff. The relevance of the list was as a basis for arguing that the Plaintiff itself had been engaged in the collection of illegal evidence.

(2) The membership list would reveal thenames and addresses of the members and the names of members in order to ascertain whether members had taken part in activities asserted to contribute to the Plaintiff's claim for standing and whether the Plaintiff represented the local community and was entitled to claim standing on that basis.

(3) The Plaintiff's claim in the proceedings that there was a denial of procedural fairness could be tested by ascertaining the extent to which the Plaintiff represented the local community on the basis of where the Plaintiff's members lived and whether the Deponents to Affidavits asserting denial of procedural fairness were indeed members of the Plaintiff.

(4) It was asserted generally that to seek to maintain anonymity for the members of the Association was a misuse of corporate status and contrasted with the requirement under the Corporations Law that a membership register be open to inspection.

(5) It was also argued that Section 109 of the *Conservation and Land Management Act* 1984 (WA) which extended legal responsibility to those who aid, abet, counsel, procure or are directly or indirectly concerned in the commission of an offence may apply to the Plaintiff Association in respect of the activities of its members.

A number of arguments were made on behalf of the Plaintiff against the production of the list of members.

1 An order for the production of documents for inspection is only to be made if the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs: Order 26 of the Supreme Court Rules.

2 The principle of "unclean hands" is restricted to situations where the party seeking an injunction is seeking protection for its own inequitable or unconscionable conduct. Such a principle did not apply to this Plaintiff which was acting in the public interest to restrain the Defendant from unlawful conduct.

3 The question of procedural unfairness was not raised in the injunction application, though it was pleaded in the Statement of Claim.

Wallwork J ruled that the list be produced to the Court on the basis that it may provide evidence in support of an application to have the evidence in four Affidavits excluded on the basis that they had been obtained illegally if the makers of the Affidavits were members of the Plaintiff.

The list was produced to the Court contemporaneously with an application to vary or discharge the order of the Court and supported by an Affidavit on behalf of the Plaintiff association deposing to the fact that the list contained the names and addresses of 142 members of the association:

* sixty-five of whom had consented to their names being released to the Defendants;

* twelve of whom were opposed to their names being released; and

* the balance had not, at the time of filing the Affidavit, been able to be contacted.

Of the twelve who were opposed to their names being released:

* four did so because they had family members in the timber industry;

* two did so because they had businesses in the region which they apprehended would be adversely affected if participants in the timber industry became aware that they were members of the Association;

* one was an employee of the First Defendant;

* one was an Environmental Consultant who was concerned that his/her business may be affected upon it becoming known in the timber industry that he/she was a member of the Association;

* one had, as one of its major customers, 'Bunnings', the timber producer;
* one had a political affiliation and believed that it would embarrass other members of his/her political party for it to be known that he/she was a member of the Association;

* one objected to the release of the name on any grounds on the basis that upon him/her becoming a member it had been understood that the name would not become public; and

* one objected on the basis of 'personal' reasons.

The Plaintiff's counsel had not, in the course of arguing the Defendants' application in the first instance, raised an argument based on confidentially or privacy, although the Judge questioned whether that might be a relevant argument. Wallwork J had initially granted the Defendants' application for production of the list of members. However, upon further instructions from the Plaintiff, the Plaintiff's counsel applied to vary the order on the basis of the privacy/confidentiality of the list and sought to support the argument with an Affidavit from the Solicitor for the Plaintiff annexing draft Affidavits from members of the Association (using pseudonyms) deposing to the personal and practical difficulties which would flow to them and their families within the local community where the logging was occurring if their identities became publicly known as members of the Association.

The Defendants questioned whether the Plaintiff was entitled to pursue an application to vary the order on the basis of claims of privacy of the Plaintiff's members or whether it was necessary for the members themselves to pursue such an application.

The Plaintiff proceeded with the application and prepared written argument pointing to its duty not to disclose the identity of its members as a consequence of their entitlement to confidentiality and its obligation to raise such a matter in the proceedings.

The Plaintiff raised in written argument the necessity of considering confidentiality in fairly disposing of the matter, as well as the interests of the members as third parties to litigation in maintaining their privacy.

The Plaintiff also referred to the formidable obstacles in the path of the Defendants in reaching the result of having the evidence excluded and pointed to the privilege of self incrimination.

Wallwork J, now having before him evidence and arguments in relation to the entitlement of the members of the Plaintiff to privacy and confidentiality, after hearing argument for the Defendants, discharged the order for production of the membership list on the basis that Affidavit evidence from the Plaintiff deposed to the fact that none of the four persons who made Affidavits, said to contain illegally-obtained evidence, were members of the Plaintiff. He made that order on the basis of:

* an undertaking from the Plaintiff to provide the Defendants with a list of the towns and suburbs in which members resided; and

* the disclosure by the Plaintiff as to which of the several Deponents to Affidavits filed on behalf of the Plaintiff were members of the Plaintiff.

Wallwork J expressed the view that that was the limit of the information that could be said to be relevant to questions of standing or obtaining evidence by illegal activity and that it was not necessary to disclose the content of the list of members to the Defendants. He relied heavily on the principle at common law that an individual is not obliged to give a name and address to authorities unless there is some compelling legal requirement so to do.

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Subdivision Assessment of Landscaped Value and Public Interest

Marford Nominees Pty Ltd v State Planning Commission,

Town Planning Appeal Tribunal of Western Australia,
Appeal No 11 of 1994, Judgement Delivered 23 February 1995.

In the recent case of *Marford Nominees Pty Ltd v State Planning Commission,* the Town Planning Appeal Tribunal of Western Australia dismissed an appeal against the State Planning Commission's refusal of an application to subdivide land with an inherent landscape value. The decision is not only important for its consideration of town planning schemes and policies, but also for the methods employed by the Tribunal to assess "landscaped value" and "public interest".

The Facts

The appellant was the owner of 60 hectares of land in the Shire of Busselton in the southwest of Western Australia. The north, west and southwest boundaries of the property adjoined the Leeuwin Naturaliste National Park, while the western boundary of the property was formed by the portion of coastline between Canal Rocks and Wyadup Rocks. It was accepted by all parties to the appeal that the immediate impression of the locality was one of "absorbing beauty".

In August 1993, the appellant made an application to subdivide the property into five lots for residential development. The Shire of Busselton, after proper consideration, supported the proposed subdivision, and actively assisted the appellant in the appeal.

The land in question was originally zoned "Non-Urban (General Farming)" under the Shire of Busselton's Town Planning Scheme No 5. The land was also shown on the Scheme Map as being within a "Landscape Value Area". Part V of the Scheme provided that no development could take place in a Landscape Value Area without first obtaining the consent of the Council. In granting consent, the Council was required to have regard to how the proposed development would act on the landscape and environmental value of the area.

The Council decided that the land was suitable for the proposed subdivision. However, the Council was of the view that the land should be within a "Rural Landscape Zone" (which was more receptive of residential development), and that appropriate land use controls should be imposed in order to protect its unique landscape value. Accordingly, the Council proposed an amendment to the Scheme, and drafted land use conditions. These included:

(1) provisions imposing building restrictions;

(2) a prohibition against clearing vegetation for reasons "other than as may reasonably be required for certain purposes including construction",

(3) the prevention of any further subdivision of the land, or entry into any agreement, arrangement, lease or licence which have the effect of further subdividing the land;

(4) the appellant agreeing not to transfer the land other than to a person who has entered into a deed evidencing these conditions; and

(5) the appellant agreeing to charge an interest in favour of the Shire, and authorising the Shire to lodge a caveat to prevent transfer unless the purchaser had entered into a deed.

It was intended that deeds would be entered into between both the Shire and the appellant, as well as the appellant and prospective purchasers, giving effect to these terms. It was clear that the Shire was cognisant of its responsibilities under the Scheme, and to the local environment. However, the final approval of the State Planning Commission was required before the development could take place. In the face of opposition to the proposal from various parties, the State Planning Commission refused the appellant's application.

Consequently, the appellant appealed to the Town Planning Appeal Tribunal seeking a review of the State Planning Commission's decision.

The Appeal

The Tribunal was required to consider four factors in determining the appeal:

(1) The Town Planning Scheme and its provisions.

(2) The proposed Scheme amendment and its provisions (which the Tribunal held was a consideration since Council had resolved to propose an amendment. The case of *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 was distinguished).

(3) The recommendations of the Shire forwarded to the State Planning Commission under s24(3)(a) of the Town Planning and Development Act 1928. The Shire recommended approval to the State Planning Commission after detailed consideration. The Tribunal held that the Commissionmust give considerable weight to the recommendations, and that those recommendations were an important factor in the appeal since they evidenced a desire to control the development of land by imposition of land use controls in co-operation with the land owner.

(4) Town planning strategies created pursuant to clause 7.10 of The Town Planning Scheme. Regard was had to both the Busselton Rural Strategy Outcomes document and the Leeuwin-Naturaliste Region Plan - Stage 1. The Rural Strategy sought to limit rural residential development of environmentally fragile locations, by imposing stringent controls and guidelines where development was approved. Although the Rural Strategy had been adopted by the Shire, it had not been formally endorsed by the State Planning Commission. Nevertheless, the Tribunal gave considerable weight to the document and its provisions. On the other hand, the Regional plan encompassed the entire Shire and was a policy of the State Planning Commission. Again, the objective of the Regional Plan was to maintain and enhance the attractiveness of the area, when development was approved.

After consideration of each of these factors, the Tribunal came to the conclusion that the overall effect of the Regional Plan, the Rural Strategy and Scheme was to emphasise that any form of residential development must be suitable for the area having regard to its landscape value. The Plan, Strategy and Scheme all regarded landscape value as such a significant factor, that development would only be permissible to the extent that it would not derogate from these qualities of the landscape.

Landscape Evaluation Methodology

Consequently, it was necessary for the Tribunal to undertake an evaluation of the area's landscape value. The Tribunal identified four elements that were definitive in this regard:

(1) the topographical features of the land;

(2) the topographical features of the land in relation to the topographical elements of surrounding land;

(3) the quality of the topographical features, and their significance as a matter of public interest; and

(4) the impact of the proposed development on the public interest.

In relation to the first two elements, the Tribunal assessed the methodologies of evaluation of landscape value that were employed by the witnesses for both the appellant and the respondent. The appellant's expert witness expressed his methodology as involving traversing the site from different locations, and with the aid of photographs, examining what could and could not be seen. A judgement was then made as to whether or not the addition of homes would substantially diminish the landscape value. The respondent's expert witness (a CALM representative) employed a methodology based on the CALM "summary of Visual Landscape Management System". This process involved 7 steps described as:

(1) Visual Landscape Character Typing;
(2) Visual Quality Classification;
(3) Observer Analysis;
(4) Sensitivity Levelling;
(5) Seen Area Mapping;
(6) Compositing; and
(7) Project Application Level

The Tribunal went to some length to emphasise that landscape evaluation must be conducted according to a coherent methodology and must not be too abstract and imprecise. It was considered that the following factors should be included in the testing methodology:

(1) exclusion of the bias of the evaluator;

(2) the possibility of holistic evaluations must be reduced by the exclusion of tests that are discrete, and do not automatically imply a result;

(3) the reaction to one part of the methodology should not spill over to other parts;

(4) the test should not proceed from the basis of trying to prove or disprove a proposition;

(5) the results should be congruent with the observable investigation; and

(6) the number of independent variables should not be so great as to make any result speculative,

The Tribunal concluded that the respondent's methodology was superior

> "The area, of which the subject site is part, contains topographical elements which combine to create a land form of high scenic quality with interrelated viewing locations. The Tribunal is therefore of the opinion that the subject land can be considered to be an integral part of an area of high scenic value with a low visual absorption capacity for development which will diminish that value."

Turning to the public interest factors, the Tribunal made it clear that the public interest cannot be evaluated on the basis of value judgements describing the beauty of the area *(Sarris v Shire of Pakenham (1987)* 26 APA 250)), but rather, it must be determined by listening to the

evidence of witnesses to determine the significance of the land, so as to be able to determine the degree to which its preservation is in the public interest. The Tribunal came to the conclusion that:

> "This subject land is a component of an area which is of interest to more than the neighbouring residents or inhabitants of the Shire of Busselton. The area is clearly of significance to the southwest region and may be said to be accordingly, of State importance. There is therefore a component of the public interest which must be considered by the Tribunal".

The Impact of the Development

Upon finding that the land in question possessed a high landscape value that was in the public interest to protect, the Tribunal was required to balance this against the recommendation of the Shire, and the land use controls designed to protect the environment.

The Tribunal recognised that the appellant had a strong case for the subdivision of the land. The proposed amendment to the Scheme, in conjunction with the conditions of use, were a good faith attempt by both the appellant and the Shire to develop the land in harmony with its landscape value. Also, the Rural Strategy and the Region Plan had not, in any way, been contradicted.

However, the Scheme, the proposed amendment, the Rural Strategy and the Region Plan all placed fundamental importance on the predominance of landscape value over development. The Tribunal was of the view that the proposed subdivision would introduce a development that would forever change the inherent landscape value and the character of the area.

Evaluation of the Decision

The Tribunal was, however, at pains to point out that this decision should not be interpreted as implying that no development can occur in the southwest of the State. What is required, is sufficient evidence to dislodge the heavy burden that rests with any developer to convince the State Planning Commission or the Tribunal that the proposed development does not derogate from the special benefit of a unique landscape value.

Although the Tribunal made it clear what was required in this regard, practical difficulties can still arise with evidence of this type.

In relation to the topographical assessment of the landscape value, no matter how coherent and logical the procedures may be, the results that are compiled still require the subjective interpretation of the person conducting the tests. In these circumstances, all tests will necessarily include the bias of the evaluator.

Consequently, parties would be advised to reinforce their case by obtaining the results of more than one expert, each of whom pursue different methodologies. No doubt this will be a costly exercise.

The Tribunal's determination of "public interest" is also open to question. Again, differentiating between value judgements and proper evidence of the land's significance may prove difficult. In spite of the Tribunal warning against the bias of the evaluator and results influencing other analyses forming part of any methodology, it would appear that these elements will prove very difficult to exclude.

Conclusion

Although the Tribunal has not ruled out development in landscape value areas, the high onus already resting on developers, as well as perceived evidentiary difficulties, means that subdivision approval in such areas may prove a difficult task to achieve.

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Environmental Planning Instruments - Grounds of Invalidity

Leichhardt Municipal Council v Minister for Planning
Unreported, Court of Appeal (NSW), Priestly, Sheller and Cole JJA, 17 May 1995

The Facts

This case concerned the procedure required by Part 3 Division 3 of the *Environmental Planning and Assessment Act 1979* (the EPAA) for the making of a Regional Environmental Plan (REP). That procedure generally requires an environmental study to be undertaken, consultation with relevant bodies (such as local councils), preparation and submission of a draft REP, public exhibition of that draft REP, submissions to be made and considered and finally, submission of the amended draft REP to the Minister for consideration under s 51 of the EPAA.

In the present case the Greater Metropolitan REP had been made in order to give effect to State Environmental Planning Policy No 32 (SEPP32), which provided for the development of urban land, no longer required for the use for which it had been zoned to be redeveloped for multi-unit housing. Certain land formerly zoned industrial was thus sought to be redeveloped for this purpose.

The appeal was concerned with whether the Greater Metropolitan REP was invalid by reason of non-compliance with Part 3 Division 3 of the EPAA.

The Decision

The Leichhardt Council contended that the REP was invalid on two grounds:

(1) That s 45 of the EPAA had not been complied with; and
(2) That the REP actually made by the Minister was invalid under s 51 of the EPAA.