CASE NOTE

Western Sydney Conservation Alliance v Penrith City Council
[2011] NSWLEC 244

Moore AJ; 16 December 2011

Background

The Western Sydney Conservation Alliance (WSCA) challenged a decision by the Penrith City Council to grant development consent for subdivision of land in Western Sydney on the basis that the Council failed to consider a recovery plan made under the *Threatened Species Conservation Act 1995* (TSC Act) in the manner required by that act and *Environmental Planning and Assessment Act 1979* (EPA Act). The development land formed part of the former "ADI site". The land was wholly within the broad shale basin of the Cumberland Plain in Western Sydney, to which the *Cumberland Plain Recovery Plan* of 18 February 2011 (Recovery Plan) applied. Species covered by the Recovery Plan included Cumberland Plain Woodland, a critically endangered ecological community, as well as a number of other threatened species and ecological communities.

Decision

The Court held that the Council had failed to consider the Recovery Plan as required under the EPA Act, but that s 69 of the TSC Act and related sections in Div 2 of Pt 4 of the TSC Act, dealing with implementation of recovery plans, did not apply to consent authorities determining development applications under Pt 4 of the EPA Act. The Court ordered that the operation of the consents be suspended and that the consents be validated upon the Council reconsidering the development applications, having regard to the details of the Recovery Plan. The Court ordered the parties to pay their own costs.

Reasoning

Ground 1 - failure to consider recovery plan as required by EPA Act

The first ground of review alleged that Council had failed to consider the Recovery Plan when determining the development as required by s 79C of the EPA Act and s 69 of the TSC Act. This ground was successful in part, to the extent that the Council was found not to have considered the Recovery Plan. The Court held that:

- Section 5A(2)(f) of the EPA Act requires consideration of whether a proposed action is consistent with the objectives or actions of a recovery plan. Thus, it is mandatory to consider whether activities involved in carrying out the proposed development are consistent with those objectives or actions.
- The considerations under s 5A(2)(f) must be taken into account in determining whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats, including for the purpose of administering s 79C of the EPA Act.
- Section 79C does not, in terms, require a recovery plan to be considered as part of the consideration of environmental impacts of a development: s 79C(1)(b), or the public interest: s 79C(1)(e).

- If an SIS has been prepared and submitted, the consent authority must proceed on the basis that the applicant has formed the view that activities proposed are likely to have a significant effect on threatened species, populations or ecological communities or their habitats.

- A consent authority must consider an SIS as a necessary relevant consideration in exercising its power to determine a development application. This requirement comprehends, as subsidiary requirements, consideration, in appropriate cases, of the matters the SIS must address, including the details of any recovery plan (TSC Act s 110(2)(c))

- The SIS contained a number of errors, including incorrectly stating that a recovery plan had either not been prepared in respect of certain threatened species, or that a draft plan was in preparation in respect of two ecological communities. In fact, the Recovery Plan was already in effect in relation to the five threatened species.

- The SIS did not discuss provisions of the Recovery Plan identifying the Council (amongst others) as having responsibility of the promotion and adoption of specified best practice standards for bushland management, including on private lands, including the adoption of site action or management plans addressing the management of threatened biodiversity. Reports by a Council officer and an ecological consultant retained by the Council did not fully rectify the deficiencies in the SIS.

- Any historical consideration of the Recovery Plan was not directed to the particular circumstances of the endangered species or ecological communities specifically impacted upon by this development.

- The Court considered that the Council did not have before it details of the recovery plan as it applied to flora and fauna other than Cumberland Plain Woodland, and thus failed to consider a requisite matter.

Whether s 69 of the TSC Act is applicable

Section 69(1) of the TSC Act requires Ministers and public authorities (which includes councils) to take any appropriate action available to them to implement those measures in a recovery plan for which they were responsible, and must not make "decisions" that are inconsistent with the provisions of a recovery plan. There is a regime under ss 71-73 requiring concurrence with the Director General where a public authority proposes to exercise a function in a manner inconsistent with implementation of measures in a recovery plan.

Moore AJ held that when initially enacted in 1995, s 69 of the TSC Act was not intended to operate on a decision by a consent authority whether to grant consent to a development application. The Court held that the term "decisions" in s 69(1) refers only to decisions made while discharging the duty required by the first element of s 69(1), that is, implementation of measures in a recovery plan. Subsequent amendments to the EPA Act had not altered that position.

The Court considered that the grant of consent to a development application did not of itself effect the implementation of measures in a recovery plan. Accordingly, a grant of consent could not, of itself, effect the implementation of recovery measures, and was not subject to the restrictions in ss 69-73.

The Court considered that the 1995 legislation, which enacted the TSC Act and amended the EPA Act, created two schemes which operated for what might be viewed as "the same general purpose" but which potentially followed "different pathways of decision-making with the possibility of different results". Accordingly, s 69 was not intended to operate on a decision by a consent authority as to whether to grant consent to a development application.

Grounds 2, 3, 4 - failure to consider recovery plan as required by TSC Act

The other three grounds were contingent on the application of ss 69-73 of the TSCA, and were accordingly unsuccessful as the Court found those sections did not apply.

Implications

The Court has held that s 79C of the EPA Act does not, in terms, require a recovery plan to be considered as part of the consideration of environmental impacts of a development or the public interest. Rather, a recovery plan becomes a relevant consideration only where an SIS is submitted, or as an adjunct to consideration required under s 5A regarding whether the proposed development is likely to have a significant effect on threatened species, populations or ecological communities, or their habitats.

An implication of this finding would appear to be that if a development will impact on a threatened species, population or ecological community but the impact does not meet the "significant effect" threshold then a recovery plan is not a mandatory relevant consideration. This reduces the impetus for consent authorities when assessing development applications to take positive steps to help recovery of a threatened species, particularly in cases where the likely impact is not 'significant'.

The Court specifically noted that when s 79C replaced s 90, Parliament removed the express reference in that former section to recovery plans. This decision highlights the need for recovery plans to again be specified as a mandatory consideration for councils in assessing development applications under s 79C, requiring councils' to proactively implement recovery plans.

The Court has also taken a very narrow interpretation of s 69 of the TSC Act, finding that the requirement that Ministers and public authorities must not make "decisions" that are inconsistent with the provisions of a recovery plan under s 69(1) refers only to "decisions" made while discharging the duty "to take any appropriate action to implement those measures in the plan for which they were responsible" as required by the first element of s 69(1). Consideration should be given to whether the legislation should be strengthened in order to extend its operation to other decisions.