

Case Note

Minister for Planning v Walker [2008] NSWCA 224

The Court of Appeal ruled that, although the planning minister must make decisions in the public interest, not having regard to ESD principles does not necessarily constitute a breach of that obligation.

It was "somewhat surprising" that the Planning Minister had not considered the precautionary principle or the principle of inter-generational equity, but that does not constitute a basis for ruling his concept plan approval void, Justice David Hodgson said.

"The 'mandatory' requirement that the Minister have regard to the public interest does not of itself make it mandatory ... that the minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD," he said.

"In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister's decision ... is that the encouragement of ESD is just one of many objects set out s5 of the *Environmental Planning and Assessment Act 1979* (NSW), some of which seemingly would have no relevance to many decisions," Justice Hodgson said.

"It would in my opinion be difficult to discern a legislative intention that decisions by the Minister be void if the Minister had failed to take into account an object of the EPA Act which was not materially relevant to the decision in question."

A failure by the Minister to consider whether a particular object of the Act was relevant, or an incorrect decision that a particular object was not relevant, would not be sufficient to make a decision void, the judge ruled.

The judge reached this conclusion even though he said the evidence "was sufficient to draw the inference that these principles were not considered" by the Minister in granting approval for the concept plan.

"This is particularly the case in relation to the precautionary principle and inter-generational equity," the judge said.

"I agree with the primary judge that consideration of these matters in relation to this project would have required consideration of long-term threats of serious or irreversible damage, not inhibited by lack of full scientific certainty, and that this almost inevitably would have involved consideration of the effect of climate change flood risk."

The evidence indicated these considerations "were not addressed", he said.

This omission – and the Minister making a decision without this information – is "somewhat surprising and disturbing", the judge said.

"Since these aspects of ESD were not addressed by the Minister in giving his approval to the concept plan, in my opinion they will need to be addressed when development approval is sought," Justice Hodgson held.

"I do not think approval of the concept plan should be considered as resolving these matters in favour of the development."

"Because of the approval of the concept plan, there will be no objector appeal available from the development approval," the judge noted.

"So in my opinion it is particularly important that the consent authority and/or the Minister conscientiously address the principles of ESD in dealing with any development application [for the project], and not regard the approval of the concept plan as carrying any weight in this consideration."

"It provides little assistance as to when and how the principles of ESD and climate change and greenhouse gas issues are to be properly considered when making or determining major project applications."