

Objector participation in development appeals

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Introduction

Public participation is one of the cornerstones of public interest environmental law. Principle 10 of the Rio Declaration on Environment and Development states that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

In New South Wales, the enactment of the *Environmental Planning and Assessment Act 1979* (“EP&A Act”) and the establishment of the NSW Land and Environment Court (“LEC”) were instrumental in providing for community involvement in planning decisions. The EP&A Act specifically established provisions that enshrined the rights of members of the public to be consulted and to make submissions in respect of environmental planning and land use decisions¹. It provided third party open standing² as well as objector standing³ to appeal against decisions made by a consent authority relating to the validity of a development application and the merits of a designated development respectively. Furthermore, it provided third parties standing to bring legal proceedings to remedy or restrain breaches of the Act⁴.

¹ For example – *Environmental Planning and Assessment Act 1979* sections 66-68 relating to consultation about local environmental plans; s.79 relating to submissions about development applications for designated development and section 79C(1)(d) requiring consent authorities to consider public submissions. These provisions are complimented by the *Environmental Planning and Assessment Regulation 2000* which provides additional details about mandatory timeframes for advertising and submissions.

² *Environmental Planning and Assessment Act 1979* section 101 (and section 35 relating to challenges to the validity of environmental planning instruments)

³ *Environmental Planning and Assessment Act 1979* section 98

⁴ *Environmental Planning and Assessment Act 1979* section 123

Providing what may be termed “procedural access to justice” was a significant first step in facilitating public participation in planning and development decisions. This was achieved by enacting laws which:

- require consultation with members of the public,
- provide for access to information necessary to make informed submissions,
- require consideration of public submissions, and
- provide standing to challenge decisions.

However, the provision of statutory rights can only give rise to substantive outcomes for members of the public if the impediments to exercising those rights, such as the cost of accessing information and the courts, are not prohibitive. The EP&A Act, *Local Government Act 1993* (“LG Act”) and the *Land and Environment Court Act 1979* (“LEC Act”) have provided for substantive access to justice by developing a framework whereby information about planning decisions, such as development applications and supporting documents can be obtained without delay. Furthermore, the process for being involved in proceedings before the LEC has been simplified to make it less intimidating and less expensive to ordinary members of the public to participate.

Whilst procedural and substantive access to justice is given effect to through the planning and development system in NSW, there are only a limited number of cases in the LEC where members of the public, as objectors to proposals, have taken a lead role. In most instances, objectors will be involved in making initial submissions to local or State Government consent authorities opposing a particular development and then may give evidence in support of a Council’s refusal or deemed refusal of a development application (“DA”). Whilst this evidence can be persuasive if a case has the genuine support of the refusing consent authority, there are very few, if any, cases where the LEC has refused consent to a DA in circumstances where the developer and the Council have reached agreement to support a development, notwithstanding objector concerns.

Consent authorities are required to give real and genuine consideration to the matters raised in public submissions. How then, can objectors ensure their concerns are given due weight when pitted against the evidence of expert witnesses called by both the consent authority and a developer?

The aim of this paper is to highlight the most effective ways for members of the public to engage in planning decisions in their local communities. The paper is divided into the following sections:

1. early engagement and effective advocacy - submission writing and lobbying;
2. exercising appeal rights; and
3. the benefits and risks of being a party to LEC proceedings.

Effective Advocacy

Opportunities for commenting upon planning proposals

The first step in the process for community involvement in planning decisions is for members of the community to be aware of proposed developments in their local area. The nature of a particular development will determine whether a DA is advertised and the length of time it is advertised for. The *Environmental Planning and Assessment Regulation 2000* (“Regulation”) requires advertised development to be notified for a minimum of 14 days.⁵ State significant, designated and threatened species developments to be notified for at least 30 days⁶. During this time, members of the public can make written submissions commenting upon the proposal.

In relation to ordinary development, many local councils have a policy of notifying people who are likely to be affected by the development (for example, adjoining landowners). Where a council has a notification policy which it regularly observes, the Court has found that this will give rise to a legitimate expectation that the policy will be followed, thus making the policy legally binding on the council.⁷ However, the Court has found that informal notification policies are not legally enforceable.⁸

In some instances, if a developer engages in early and genuine discussions with a local community about its intentions for a site it can avoid later objections and legal challenges.

⁵ *Environmental Planning and Assessment Regulation 2000*, cl. 87 & 88

⁶ *Environmental Planning and Assessment Act 1979*, s. 79; *Environmental Planning and Assessment Regulation 2000*, cl.89

⁷ *Somerville v Dalby* (1990) 69 LGRA 422 at 427; *Kioa v West* (1985) 159 CLR 550; *Glonpax Pty Ltd v South Sydney City Council* (2000) 111 LGERA 84 at 89. The Court has also held that any plans which are provided as part of the notification process must not be misleading or inaccurate: see *Doncibi v Canterbury City Council* (2003) 133 LGERA 138.

⁸ *Hillpalm Pty Ltd v Tweed Shire Council* (2002) 119 LGERA 86 at 108.

Meeting with neighbours or local community groups as well as the consent authority prior to the lodgement of a DA will provide a developer with a sense as to what issues are important to that community and give it the opportunity to revise a project to address those concerns. Furthermore, keeping the local community updated and advised about any additional information or changes to the proposed development is also beneficial in fostering negotiated outcomes.

The next important aspect of effective participation in planning decisions is to be able to comment meaningfully on the proposed development. Access to information about the nature of a proposed development and its impacts is critical. Members of the public are entitled to go to council offices to inspect development applications and supporting documentation free of charge (except for internal residential plans and sensitive commercial information) in relation to any development application and have a right to make copies of those documents.⁹ Council is entitled to charge a 'reasonable' fee for copying, however, this charge should not be prohibitive.¹⁰

The EDO usually recommends that, if a client is concerned about a development proposal, he or she should obtain, at the minimum:

- a copy of the development application, including relevant plans or maps;
- a copy of any relevant supporting documents, such as a statement of environmental effects ("SEE");
- a copy of any relevant environmental studies;
- the relevant local environmental plan;
- any relevant regional environmental plans or state environmental planning policies¹¹; and
- information about any relevant dates (for example, the closing date for submissions, or the date on which the grant of development consent was published in the newspaper).

When advising clients about commenting upon DAs, the EDO always recommend that a thorough review of the DA and supporting documents be undertaken, and where possible, comments from independent experts obtained. In this respect, members of local

⁹ *Local Government Act 1993*, s. 12. *Environmental Planning and Assessment Act 1979*, s.100

¹⁰ *Local Government Act 1993*, ss. 12B(3); see also *Environmental Planning and Assessment Regulation 2000*, cl. 56.

¹¹ These documents are usually obtainable via the internet at www.legislation.nsw.gov.au

community groups will often have specialist expertise in areas such as town planning or ecology. Furthermore, local residents may also be able to provide anecdotal information about their own observations of the locality – for example, in relation to the presence of threatened species. If a development is particularly technical, the EDO has a register of scientific experts who can assist in reviewing documents on a pro-bono or reduced fee basis.

Effective submission writing

When preparing to write a submission objecting to a development proposal, it is important to frame the submission in a way that will achieve the maximum impact upon the decision maker. Many community groups use petitions and form letters as a way of getting a large number of objections recorded against a particular DA. However, in our experience, these forms of submissions receive less weight than individual letters that address the primary matters that the decision maker must consider. That notwithstanding, petitions and form letters remain a valid form of objection, particularly if time to comment is limited.

We recommend that the first steps should be to identify the matters to be taken into consideration by the consent authority. The starting point for this will usually be section 79C(1) of the EP&A Act which states:

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

(i) any environmental planning instrument, and

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and

(iii) any development control plan, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) the suitability of the site for the development,*
- (d) any submissions made in accordance with this Act or the regulations,*
- (e) the public interest.*

Terms of reference or guidelines for submissions are sometimes available from the local council or statutory authority which is calling for submissions. Similarly, for designated development where an environmental impact statement (“EIS”) or a species impact statement (“SIS”) has been prepared, there may be specific requirements that the EIS or SIS is required to address by virtue of the Regulation or a direction from the Director-General¹². If there are terms of reference, these should also be addressed in a submission.

In terms of the content and style of a submission, some points to note are first, the need to critically analyse the information put forward by the developer. In some instances, the SEE, EIS or SIS may contain information which does not accurately reflect the true impacts of the proposed development. For example, a threatened species present in the area may not have been identified and therefore no 8-part test carried out for it.

Second, we recommend giving details about how you arrived at your assertions. For example, instead of saying:

‘The golf course proposal is outrageous. It will pollute the river.’

consider saying something like:

‘Irrigating the lawns of the 50 hectare golf course, together with using fertiliser and herbicides, is likely to result in changes to the water table, nutrient pollution, and an adverse impact on the red gum forest next to the land where the golf course is proposed.’

Third, the following structural points may improve the effectiveness of a submission:

- make the submission as clear and concise as possible;
- avoid using emotive or abusive language;
- include headings, subheadings and page numbers;

- for long submissions, consider providing an executive summary of the key issues;
- include the objectors name and contact details and date the submission; and
- ask for an acknowledgment and reply to your submission.

It may also be appropriate to consider requesting a meeting with the relevant decision-maker to follow up your concerns and asking to be able to address any relevant meetings of the Council.

Submissions that have been lodged with the consent authority form part of the council's file for the DA. Whilst council officers and council staff are required to consider the contents of the submissions, the submissions are not immediately available to the developer and members of the general public to review¹³. Ordinarily, a report prepared for the consent authority, which is a business record of the consent authority, will refer to the content of submissions, but not the individuals who made the submission. Public submissions may be obtained by members of the public, including the developer, through a request pursuant to the *Freedom of Information Act 1989*. However, the council or other government agency to whom the submission was addressed is required to give notice of the request to the author of the submission and obtain his or her comments about whether the document may be exempt before releasing the document¹⁴.

Once submissions are lodged, the next step for resident objectors is to effectively convey their concerns to the people who will be making the decisions about the proposed development. In this respect, council staff, such as the town planners or environmental officers will ordinarily prepare an assessment report to the consent authority. These reports should objectively review the DA and supporting documentation having regard to the matters listed in section 79C(1) of the EP&A Act. It is often worth liaising with officers about the progress of a DA and bringing any further information about local concerns to their attention. However, the ultimate decision to approve or refuse a DA will be made by either the Council as a whole (being the elected Councillors), a manager with delegated authority or, for State significant development, the Minister for Infrastructure and Planning. Whilst decisions to approve or refuse DAs are not supposed to be political, often councillors are elected on either pro or anti-development platforms. Therefore,

¹² *Environmental Planning and Assessment Regulation 2000*, cl 229-231

¹³ *Environmental Planning and Assessment Regulation 2000*, cls. 266 and 268 – submissions are not documents required to be kept by council for each DA and which are available for public inspection.

lobbying the relevant decision makers, by writing additional letters and arranging meetings and site visits, can be an effective way of conveying community concerns about a proposal.

Appeal rights

As mentioned in the introduction, there are a number of opportunities for objectors to participate in planning appeals in the LEC. The scope for participation depends upon the type of development the subject of the DA. In this regard, appeal rights have historically been more extensive for designated developments which are ordinarily larger, more polluting types of activities or which have greater environmental impacts¹⁵. In contrast, the right to participate in challenge local developments are ordinarily limited to appearing as an objector in a council's case or seeking judicial review if legal errors can be found in the decision making process. In circumstances where development consent has been granted and there is later non-compliance with the conditions of consent, the EP&A Act also provides open standing for any person to bring civil enforcement proceedings in the LEC to remedy or restrain a breach of the Act.

Class 1

Designated development

An "objector" is defined under the EP&A Act as 'a person who has made a submission under s. 79 (5) by way of objection to a development application for consent to carry out designated development.'¹⁶ Pursuant to section 98 of the EP&A Act, objectors may within 28 days after the date on which they receive a notice of determination make an appeal to the LEC seeking to review the merits of the decision¹⁷. This provision is strictly limited to class of persons who have made submissions to the relevant consent authority.

An appeal by an objector pursuant to section 98 of the EP&A Act is a merits appeal in the LEC's Class 1 jurisdiction. This means that appeals are heard by a Judge or Commissioner,

¹⁴ *Freedom of Information Act 1989* s.31

¹⁵ Note that recent amendments to the EP&A Act introduce a new category of development known as critical infrastructure development which has discretionary provisions relating to public consultation and which excludes appeal rights for third parties

¹⁶ *Environmental Planning and assessment Act 1979* s.4.

who stands in the place of the original consent authority and has the same powers to reject or consent to the proposal, and impose conditions of consent. The Judge or Commissioner takes into consideration all of the materials submitted with the original application, and additional expert evidence on the impacts of the proposal is usually submitted. Even if the Judge or Commissioner ultimately approves the DA, additional conditions that had not been imposed by the original consent authority may be imposed to improve the environmental outcomes of the development or to mitigate against its impacts.

There have only been a few of examples where community groups have challenged designated developments and the Court has been persuaded to refuse to grant consent to the development. These include first, the case of *Jungar Holdings Pty Ltd v. Eurobodulla Shire Council*¹⁸ in which objectors successfully argued that a proposed abattoir should not be allowed to proceed in circumstances where the environmental impact assessment for the proposal was hopelessly inadequate and impacts such as odour could not adequately be assessed. Second, the case of *International Study Programs Pty Ltd & Ors v Greater Lithgow City Council & Anor*¹⁹ in which the Court upheld the objectors appeal against the consent granted by the Council for a large scale quarry, on the basis that the noise, heritage and visual impacts of the quarry would be unacceptable and the proponent had not adequately demonstrated the economic need for the project. In many instances, questions of law will also be raised in designated development appeals, for example, claims about the permissibility and characterisation of a particular development or the adequacy of environmental impact assessments.

In appeals where objectors have failed to have the decision of a consent authority overturned, they may still be partially successful in obtaining better environmental outcomes from a development. For example, more stringent conditions have been placed upon certain developments as a result of appeals brought by objectors.

¹⁷ The consent authority must notify each objector by letter within fourteen days of a decision being made to grant or refuse development consent *Environmental Planning and Assessment Act 1979*, s. 81(1)(b), *Environmental Planning and Assessment Regulation 2000*, cl. 102(1). See also) *LEC Act 1979 (NSW) Ss17(d)*

¹⁸ *Jungar Holdings Pty Ltd v. Eurobodulla Shire Council*¹⁸ [1989] NSWLEC 92 (8 September 1989)

¹⁹*International Study Programs Pty Ltd & Ors v Greater Lithgow City Council & Anor* [2000] NSWLEC 91 (11 May 2000)

For example, in the case of *Bruce Wilson on behalf of Gurrungar Environment Group v Bourke Shire Council*²⁰, Bruce Wilson on behalf of the Gurrungar Environment Group appealed against a consent for a cotton farm at “Beemery” near Bourke on the grounds that it was not ecologically sustainable. The development included a large water storage facility for irrigation and, due to the risk of salinity, had a limited lifespan.

Mr Wilson argued and presented expert evidence that the proposal would damage the Barwon-Darling River system, including waterholes and wetlands; & would increase salinity and break down soil structures.

The matter finalised with the parties agreeing on stringent consent orders including conditions for restrictions on when water could be extracted from the water source, an early warning groundwater monitoring system & requirement that irrigation cease if the groundwater table rise to within 5m of the surface, controls on clearing and the ban of the use of herbicides in the irrigation area. These conditions set the standard against which future cotton developments would be measured.

Similarly in the case of *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd*²¹ Pearlman J acknowledged many of the concerns that Greenpeace had in relation to the impacts of emissions of greenhouse gases from a coal fired power station. Whilst her Honour determined to approve the development, the approval was subject to stringent conditions relating to the fuel source to be used in generating the power and the monitoring and reporting on air pollutants.

Major Developments and Critical Infrastructure

Significant changes to the assessment and approval regime for major developments are soon to commence due to the passing of the *Environmental Planning and Assessment (Infrastructure and other Reform) Bill 2005*. The Bill sets up a regime for major infrastructure developments or any development of State or Regional Significance to be dealt with as either Critical Infrastructure Projects or Major Development Projects. These include:

- aquaculture, mining, construction projects, sporting facilities, hospitals, ports, electricity generation, STPs over a certain size or threshold,

²⁰ *Bruce Wilson on behalf of Gurrungar Environment Group v Bourke Shire Council* (2001) 116 LGERA 287 see also *Hobhouse v Minister Assisting Minister for Infrastructure and Planning & Anor Mount Gilead Pty Limited v Minister Assisting Minister for Infrastructure and Planning & Anor* [2004] NSWLEC 477 & *Walker v Kempsey Council* [2001] NSWLEC 84

²¹ *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* [1994] NSWLEC 178

- coastal zone developments,
- specific sites (Kurnell, Kosciuszko Ski Resorts, Rhodes Peninsula, Redfern-Waterloo Authority)

Whilst there is not sufficient scope to fully explore the provisions of the reform bill and their ramifications in this paper, it is important to note that the new provisions (which will be a new Part 3A to the EP&A Act) take away opportunities for community involvement for critical infrastructure projects which are defined as being essential for the State for economic, environmental, or social reasons with regard to the ability:

- (a) to be involved pre-approval processes;
- (b) to challenge an approval on legal grounds,
- (c) to enforce the approval (such as breaches of pollution licences),
- (d) to seek stop work orders, interim protection orders and notices regarding cultural heritage, threatened species and pollution, and
- (e) to appeal on the merits.

These provisions abolish the long-standing right of any person to take legal proceedings where environmental laws are not being followed, and oust the ability of the LEC to entertain challenge to an approval and enforce the approval (such as breaches of pollution licences). Furthermore, the provisions remove long-standing checks and balances (accountability, transparency, technical oversight and community input) for the most important, and potentially environmentally sensitive proposals, such as coal-fired power stations and desalination plants²².

Non-designated development

If an objector doesn't have express standing to be a party to a merits appeal there may still be an opportunity to participate in Class 1 appeals. These ordinary appeals are usually where a developer has appealed against the actual or deemed refusal of a development by the consent authority.

²² For a more detailed review of the *Environmental Planning and Assessment (Infrastructure and Other Reform) Bill 2005* see www.edo.org.au/nsw/publications

Section 79C(1)(d) of the EP&A Act identifies the submissions lodged by members of the public as being a relevant consideration for the decision maker to take into account. Accordingly, if a consent authority refused a development application and the developer appeals, or if the developer appeals against conditions of development consent, then the matters raised by objectors will again be put before the Judge or Commissioner of the Court to consider.

Whilst there is no express right of participation for objectors in ordinary merit appeals, in practice, the consent authority may often call objectors to give evidence at the hearing, and objectors are often granted permission (or leave) by the Court to call evidence, cross-examine witnesses and make submissions, although this does not extend to the right to appeal against any final decision.²³

Recent changes to way in which many LEC merits hearings are conducted have greatly enhanced the ability of objectors to participate in planning appeals. Under the LEC Pre Hearing Practice Direction No.17, the hearings of most Class 1 appeals will commence on site and objectors will be invited to give their evidence to the Commissioner or Judge at that time. This means that objectors do not have to travel all the way to Sydney to appear in Court. Furthermore, evidence is given in an informal and non-adversarial setting and is less intimidating to ordinary members of the public. Feedback from objectors who have given evidence in this manner has, on the whole, been positive.

The ability of objectors to participate in the hearing process continues even if the consent authority and developer are able to reach a compromise before or during the hearing that would result in consent orders. Consent authorities are required to notify objectors of the proposed consent orders and the date for any hearing in relation to the making of those orders by the Court. If the objector still wishes to be heard, he or she may address the Judge or Commissioner at the appointed time. Whilst it is very rare for the Court to refuse a DA where consent orders are agreed to by the parties, the Court may impose additional conditions on the development to address objector concerns. For example, requiring the developer to carry out privacy or noise attenuation measures.

²³ This is known as a “Double Bay Marina order”: *Double Bay Marina Pty Ltd v Woollabra Municipal Council* (1985) 54 LGRA 313 at 314; see also Land and Environment Court Act 1996, s. 38.

Joinder of parties – Recent developments to objector standing for non-designated development

The introduction of section 39A of the *Land and Environment Court Act 1979* “Joinder of Parties in certain appeals” in 2002 has broadened the opportunity for objectors and non-objectors to appeal on a matter of public interest.

Third parties who have an interest in the development application but whom are not previously “objectors” (as defined under the EP&A Act) to an action now have the capacity, upon application to the Court under section 97 or 98 of the EP&A Act to be joined to an action as a third party with rights of appeal against the Court’s decision if the Court is of the opinion that:

- (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or*
- (b) that:*
 - (i) it is in the interests of justice, or*
 - (ii) it is in the public interest,**that the person be joined as a party to the appeal.*²⁴

Section 39A may be relied upon by third party objectors if the Court considers that they are able to raise public interest issues or issues in the interest of justice that would have otherwise been neglected in the proceedings²⁵. These circumstances may include bringing specialist expertise or interests to the case²⁶ in relation to issues which were not raised in development assessment and the subsequent determination by the original consent authority or which are not fully articulated in a Statement of Issues.

This provision does not affect objectors who fall within rights of appeal under section 98 of the Act. Objectors to designated developments still retain full rights of participation and appeal and there is no need to attain further appeal rights as a joinder party under s.39A.²⁷

²⁴ S. 39A of LEC Act 1979 (NSW).

²⁵ See also: *Land and Environment Court Rules 1996, Part 6, Rule 1*; and *Supreme Court Rules, Part 8, Rule 8*.

²⁶ *Kavia Holdings Pty Ltd v Sydney City Council* [2003] NSWLEC 195 where the Potts Point and Kings Cross Heritage Conservation Society were joined as a party to an appeal relating to the redevelopment of a building in a heritage precinct.

²⁷ *Alexandria Landfill Pty Ltd v Sydney City Council* [2004] NSWLEC 639.

However objectors who otherwise fall outside the definition in the EP&A Act can utilise s.39A and attain actual appeal rights at the Court's discretion.

Since the introduction of s.39A of the LEC Act, there have been five recent cases in which objectors have sought to be joined in merit appeals. Briefly, the objectors in each case sought to be joined to give evidence in relation to:

- The heritage significance of a heritage building that was to be demolished as part of a new development, in circumstances where the building itself was not heritage listed and the Council did not oppose the demolition of the building and did not intend to call evidence on that issue²⁸.
- The effect that a proposed subdivision and SEPP 5 development would have upon neighbouring property rights relating to access and rights of way.²⁹
- The quality of the design of a residential flat building in circumstances where the council did not intend to raise design issues.³⁰
- The impact of aircraft noise from Department of Defence planes overflying a proposed tourist facility development and the potential for the development to limit the flexibility of the RAFF base and compromise national defence³¹.
- The social impact of the proposed redevelopment of a caravan park for residential apartments in circumstances where the development would potentially fragment the community of the long term park residents³².

In each of these examples, the Court held that it would be in the interest of justice to allow the joinder of the objector and to allow the objector to call evidence on the particular issues of concern. In two of the cases, the Council had already identified the issues of the objectors, however, the interest of the Council and the interests of the objectors were not necessarily aligned, therefore separate representation was deemed appropriate.

Recent case law developments indicate that the Court has interpreted the terms “in the interest of justice” and “in the public interest”, broadly in order to meet the objectives of the public nature environment law advocacy. Justice Bignold in *Mahogany Ridge* stated that

²⁸ *Kavia Holdings Pty Ltd v Sydney City Council* [2003] NSWLEC 195

²⁹ *Pro-Vision Developments Pty Ltd v Ku-Ring-Gai Municipal Council* [2003] NSWLEC 226

³⁰ *Deancliff Developments Pty Ltd v Hornsby Shire Council & ors* [2004] NSWLEC769

³¹ *Mahogany Ridge Developments Pty Ltd v Port Stephens Council* [2004] NSWLEC 555

the terms of s. 39A are such that they are ‘construed beneficially to confer a wide judicial discretion’.³³ Likewise in *Kavia Holdings* the Court defined its discretion to section 39A as an ‘unfettered discretion’.³⁴

One inconsistent issue among the courts in relation to s.39A is whether Joinder appeals can be awarded to third parties conditionally. Despite the decision of Pain J in *Kavia* which stated that ‘39A(a) [joins] a party with full participation rights. There is not any suggestion in s 39A(b) that the joinder of a party can be on a conditional basis’,³⁵ Bignold J in *Mahogany Ridge* took into consideration the effects of s. 23 of the LEC Act which states that the Court has power “to make orders of such kinds...as the Court thinks appropriate”. In *Mahogany Ridge* his Honour took the view that it was appropriate for the Court to make an order for joinder of a third party, subject to conditions. In that case the joinder party was confined to only participate in the proceedings on particular issues it had raised in the joinder application as other issues had already been raised by the original parties to the proceeding.

In summary, there are three significant issues that would-be intervenors should be aware of:

1. It is accepted that s. 39A of the LEC Act provides a broader scope for intervenors to participate in proceedings than existed previously and the Court has ordered joinder in five of the six cases that have been argued since the section was introduced;
2. The basis upon which joinder may be ordered (whether one or more of the three limbs in s. 39A) is not always clear from the circumstances of the case. Furthermore the cases appear to have adopted inconsistent bases for ordering joinder. Hence those who wish to intervene should be prepared to argue all three limbs of s.39A..
3. The Court has not finally decided whether an order under s. 39A necessarily grants a participant full rights of a party to the proceedings, or whether their participation should be confined to raising the issues that would not otherwise be adequately addressed.

³² *Meriton Apartments Pty Ltd v Fairfield City Council & Anor* [No.2] [2005] NSWLEC 121

³³ Above n 31 para 21.

³⁴ *Kavia Holdings Pty Ltd v Sydney City Council* [2003] NSWLEC 195 para 6.

Class 4

Judicial Review and Civil Enforcement

Section 101 of the EP&A Act enables any person to challenge the validity of a development consent within three months from the date upon which public notice of the grant of consent was given. Furthermore, 123 of the EP&A Act provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of the Act. Thus both objectors (though not necessary as objectors already have standing to bring an action) and third party non-objectors can initiate Class 4 judicial review proceedings for non-compliance with requirements prescribed under the Act in relation to the assessment of development applications and for breaches of conditions of development consents.³⁶

Judicial review proceedings are initiated to decide whether the relevant consent authority complied with the law. The proceedings seek to ensure compliance by decision makers and provide an avenue of public recourse should the consent authority fail to meet statutory and regulatory requirements. The proceedings do not extend the jurisdiction of the Court to making a determination on behalf of the consent authority³⁷. Instead, the Court may make declarations about the validity of an approval or the legality of certain conduct and may make orders with respect to the carrying out or refraining of certain activities.

It is beyond the scope of this paper to review all the various avenues of challenge that may be available in Class 4 judicial review proceedings. However, in short, the types of grounds for review commonly raised in judicial review proceedings include: failure to comply with the requirements of natural justice, failure to observe procedural requirements, failure to take into consideration something that was relevantly required to be taken into consideration, taking an irrelevant consideration into account, exercising a discretionary power at the direction or at the behest of another person, exercising a discretionary power in accordance with a rule or policy without regard to the merits of a particular case, making a determination by asking the wrong question, or making a determination which was so unreasonable that no reasonable authority could ever have come to it.

³⁵ Ibid. para 5.

³⁶ *Environmental Planning and Assessment Act 1979* ss.123 and 35

³⁷ Note that if a jurisdictional fact is raised as a matter in issue, the Court will be required to make its own objective finding about the presence or absence of that fact prior to determining the legal matters in issue. In this respect, a party

Benefits and Risks of Litigation

The benefits of litigation are largely self evident. If an objector is successful in a merits appeal then the particular development under challenge will not be able to proceed. A developer may lodge a new development application for the same or a similar proposal. However, if the Court is of the opinion the development is inappropriate, any further similar application is also likely to be considered inappropriate. An objector may also be partially successful in a merits appeal if the Court imposes additional conditions of consent which minimise the environmental impacts and/ or improve the environmental outcomes of the development.

Similarly, in judicial review proceedings, the Court may, in the exercise of its discretion declare a particular development unlawful and therefore invalidate any consent previously issued by a council or the Minister. However, if the Court's finding is based upon administrative review grounds such as the original consent authorities failure to follow due process or to consider relevant matters, then it will be open for the developer to submit the same development proposal to the consent authority so that it can re-determine the application in accordance with the law. In this respect, Class 4 proceedings often do no more than delay the inevitable approval of a development. However, where developments are economically marginal, the time and costs of fighting an appeal in the Court may ultimately prevent the developer from pursuing the development. Furthermore, judicial review proceedings have the capacity to galvanise local opposition to a project and/or highlight systematic deficiencies in consent authority approaches to environmental impact assessment.

Costs of appeals

The cost of being a party to a merits appeal is often a major barrier against objector appeals in the LEC. Merit appeals will ordinarily involve a number of expert witnesses as well as legal representation which can be extremely costly, notwithstanding the opportunity for the

may be able to adduce evidence going to issues such as the characterization of a development or whether a development is likely to have a significant effect upon threatened species if those matters are relevant to the case.

appointment of joint or Court appointed experts and the ability of objectors to (in some instances) obtain pro-bono assistance from the EDO, the Bar and expert consultants.

Unlike judicial review proceedings where the usual rule is that a successful party can obtain an order for costs against an unsuccessful party, there is no similar provision for merit appeal. Instead, Rule 16.4 of the LEC Rules prescribes that no order for the payment of costs will be made in proceedings Class 1, 2 and 3 appeals to the LEC unless it is fair and reasonable in the circumstances.³⁸

Exceptional circumstances are determined on the facts of each case. However the Court takes into consideration the reasons why the matter was litigated and compares those objectives against non-merit proceedings which enforces the traditional well established principle that the ‘costs follow the event’ against the unsuccessful litigant. In *Gee v Port Stephens* McClellan CJ determined that where merit matters raise points of law for determination during the course of the matter, those points will be subject to the ordinary rule for costs extent and the council was ordered to pay the costs.³⁹ Examples of other circumstances where it may be fair and reasonable to award costs in a merits appeal have been outlined in recent speeches by the Chief Judge and include circumstances where an action is defended for mere political purposes where there are not meritorious reasons for refusal or where an applicant presses an appeal in circumstances where its case is not strong.⁴⁰

Whilst low, there remains the potential risk of negative cost orders being made against parties in merit appeal proceedings. Costs are therefore a key consideration by objectors before initiating merits proceedings.

The potential for an adverse costs order is, on the other hand, a significant deterrent for third parties to bring judicial review proceedings. As mentioned above, the ordinary rule in Class 4 proceedings is that the unsuccessful party will pay the successful party’s costs. Whilst the Court retains a wide discretion in relation to costs⁴¹, and there have been circumstances where the Court has decided not to make the usual award of costs because

³⁸ LEC Rule 16.4 and 16.4(2) – note this test has only recently been introduced, previously the test was whether there were exceptional circumstances

³⁹ *Gee v Port Stephens Council* [2003] NSWLEC 260 para 60.

⁴⁰ *Funtime Investments Pty Ltd v Yass Valley Council* [2004] NSW LEC 300

⁴¹ *Land and Environment Court Act 1979* s.69

proceedings had been brought in the public interest⁴², these provisions cannot be relied upon when proceedings are commenced. Security for costs and undertakings as to damages are also significant deterrents to the bringing of actions by third parties in the LEC. Whilst some Judges of the LEC have taken the view that an order for security for costs should not operate as a bar to deprive third parties of their rights pursue litigation⁴³, there have also been a number of cases in which Judges have required a sum of money to be raised and paid into Court⁴⁴.

Conclusion

It is important to note that many objectors do not have a direct financial or other interest in the subject matter of a merits appeal. Instead, unless directly affected by a proposal (such as by overshadowing or privacy or noise impacts) they are raising their concerns about environmental impacts on behalf of the wider general public. Legal Aid may be available for some public interest environmental matters in the LEC, particularly where the subject matter of the appeal is a significant aspect of the environment of NSW. However, it is unlikely that legal aid would be granted in relation to an ordinary development appeal. Members of the general public rarely have the financial resources to match developers and if they cannot recover costs after a successful action, then there is little incentive to invest in Court proceedings, particularly where the nature of the appeal is subjective and the prospects of success are finely balanced. However, more so than any other jurisdiction, the LEC attempts to facilitate the participation of objectors in the Court process and enable the voice of local communities to be heard in land use planning decisions.

⁴² *Oshlack v Richmond River Council* (1998) 193 CLR 72

⁴³ See for example: *Carriage v Stockland (Constructors) Pty Ltd & Others [No.5] [2003]* NSWLEC 197

⁴⁴ See for example: *Bungendore Residents Group Inc v Palarang Council & Navaroo Constructions Pty Ltd [2005]* NSWLEC 235 in which security in the sum of \$15,000 was ordered.