



Concordia Pacific
Environmental, Government and Town Planning Law

LOCAL COUNCIL CASE LAW SUMMARIES

Concordia Pacific is pleased to present the second edition of its local government newsletter. The newsletter will provide periodic updates concerning significant enforcement cases brought by local councils in New South Wales. The focus of the newsletter will be to provide guidance to council officers about how to develop successful enforcement strategies to respond to breaches of the *Environmental Planning and Assessment Act*, the *Local Government Act*, the *Protection of the Environment Operations Act*, and other legislation. We invite you to contact us if you have any questions about the cases that we have discussed or concerning how best to make use of the recommendations that we have offered.

Gosford City Council v Australian Panel Products Pty Ltd (2009) NSWLEC 77

This case involved a prosecution under the *Protection of the Environment Operations Act* that was brought in response to a spill incident. Because the premises where the spill occurred were not licensed, the council was the appropriate regulatory authority and therefore took the lead with the prosecution. However, the council's officers did receive assistance from the EPA with the investigation of the incident.

The spill occurred when an employee at the defendant's plant attempted to decant a resinous material that was used in the manufacturing process from a large storage tank into a bulk container. While the resin was being transferred, the employee was called away to perform another task. The resin overflowed from the bulk container, ran into a storm water pit on the plant premises, through an open storm water drain and then ultimately into a creek.

The council's environmental officer commenced an investigation shortly after the spill was reported to the council by workers who were involved in a project near the creek. He observed that the water in the creek downstream of the storm drain was pink, and that it had a distinctive odour, and that the water upstream was relatively clear. He took photographs to document these observations. He then attended the defendant's plant and observed that there was staining on the driveway leading from

the bulk container to the storm water pit. He also observed that a quantity of pinkish-coloured liquid was present in the pit. While at the defendant's plant the council's environmental officer also noticed the same odour that he had detected in the creek.

Additional investigations were conducted before the prosecution was commenced. This work included the collection of samples from the creek and the storm water drain by the EPA; the carrying out of testing to confirm that the storm water pit at the defendant's plant was connected to the storm water drain that led to the creek; the issuance of a statutory notice to the company to obtain information and records; and the taking of records of interview of the defendant's employees concerning the circumstances surrounding the incident.

When the case was filed in court, the defendant promptly pleaded guilty. It was sentenced to pay a fine of \$25,000 and was also required to reimburse the council for its investigative costs.

The following lessons can be drawn from this case:

- 1) When investigating a pollution incident it is vital to carefully trace the source of the pollution, and to document the findings with comprehensive field notes, photographs and samples. The EPA can provide valuable support to a council investigation, particularly with the collection and analysis of samples.



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2) The use of investigative tools such as statutory notices and records of interview can greatly enhance the prospects for a successful prosecution. These tools are available not only under the POEO, but can also be used in cases involving the *Environmental Planning and Assessment Act* (sections 118B and 118BA).

The Owners of Strata Plan 62254 v Rockdale City Council, (2009) NSWLEC 206

An owners' corporation obtained a costs order against a council that withdrew a fire safety order after the order was appealed to the Land and Environment Court.

The council had previously issued another fire safety order, which was withdrawn shortly after it was appealed to the Court. By agreement, the council paid the legal costs that the owners had expending in challenging this first order.

Shortly after the first order was withdrawn, the council issued a second fire safety order. However, the council did not issue a fresh Notice of Intention before the second order was given, nor did it attach a fire safety schedule to the new order specifying the fire safety measures to be implemented in the building (as required by clause 168 of the *Environmental Planning and Assessment Regulation*).

Although the owners' corporation conceded that there were fire safety deficiencies in their building, they did not accept that the rectification works that were recommended by the council's fire safety consultant were necessary. Accordingly, the owners also appealed the second order to the Court. The council decided to withdraw the second order while the appeal proceedings were at a very early stage.

The Court concluded that it was appropriate in the circumstances to make an order requiring the council to pay the costs incurred by the owners.

The result in this case instructs that:

1) It is essential that council officers carefully consider whether the remedial measures that are to be specified in an order are necessary and appropriate before an order is issued, as a council may suffer an adverse costs order if it is unable to defend the order or if the Court determines that the measures required by the order were not reasonable.

2) Councils must follow the procedures specified in the *Environmental Planning and Assessment Act* and the *Local Government Act* for giving a person notice and an opportunity to make representations before an order is given, even if previous orders dealing with the same subject matter have been issued. The failure to give prior notice may make an order vulnerable to a legal challenge. Also, providing an opportunity for representations will assist council officers to anticipate defences that may be raised in response to an order, and to draft the order in terms that will be most likely to withstand challenge.

Richmond Valley Shire Council v Willis (2009) NSWLEC 195

The council was successful in obtaining orders requiring the respondent to comply with consent orders that had been made by a Commissioner of the Land and Environment Court directing him to abide by a development approval that the council had granted.

The development consent had authorised the construction of a rural shed to be used for the storage of agricultural goods. However, the respondent had built the shed in a way that enabled it to be used as a dwelling: a kitchen, spiral staircase, spa bath and a brick fire place had been incorporated into the structure.

The respondent defended against the council's enforcement action by claiming that he could not afford to comply with the consent orders that had been negotiated. He argued that the court proceedings that had resulted in the consent orders had left him with substantial debts, and that the need to service loans on other properties that he owned had caused him to be financially overextended.



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Notwithstanding the respondent's difficult circumstances, Justice Pain directed him to carry out the works specified in the consent orders. While noting that she would in ordinary circumstances have ordered the respondent to complete the work within two months, Her Honour granted him ten months in which to comply.

The following principles can be taken from this case:

- 1) The Land and Environment Court is likely to enforce consent orders that have been made requiring compliance with orders issued by a council even in situations where the recipient of the orders is experiencing financial difficulties.
- 2) The Court will assess a regulated person's capacity to comply with orders on a case-by-case basis. It can be anticipated that the Court will take a respondent's financial circumstances into account when it evaluates how much time to allow for compliance, and that the Court will attempt to balance the urgency of the remedial work against the respondent's ability to pay for the work.

Hawkesbury City Council v Agostino (2009) NSWLEC 176

The council was able to overcome arguments by the operators of a fruit and vegetable shop that they had existing use rights, and was successful in obtaining orders restraining the continued operation of the shop.

The applicable planning instruments had prohibited the use of the land in question for the purposes of a shop since 1964. The Agostinos had purchased the property in 2003, and after originally using it to sell toys, they later began selling fruit and plants from the premises. The council determined that the operation of the shop on a main road was creating traffic safety problems, and therefore commenced proceedings in the Court to force the shop to close.

In his judgement, Justice Lloyd observed that once a council has established that a planning instrument prohibits a particular use, and that a

non-conforming use is being carried out, the person who is engaging in the use has the burden of establishing that the use has the benefit of existing use rights. Further, the person carrying out the use must establish that it has not been abandoned – in other words, that the use has not ceased for a continuous period of 1 year, or alternatively, that even if there had been an interruption in the *physical use* of the premises for a particular purpose, that the owner/occupant of the premises had held a “subjective intention” to continue the use in question.

Accordingly, Justice Lloyd observed that cases in which claims of existing use rights are asserted must be determined based on detailed examination of the historical uses of the land. In this case, extensive evidence was offered from witnesses who were familiar with the way that the property had been used from the time before the planning instruments came into effect until the time that the case came before the Court – a span of over forty years. Because the recollections of the witnesses were different, the Court was required to determine which account of the previous uses was more accurate.

The evidence which was ultimately accepted by the Court established that before the planning instruments prohibiting the operation of a shop on the land came into force, a shed on the property had been used primarily for the purpose of packing fruit. However, as there was also evidence that fruit had been sold to the public from the premises before the controls came into force, the Court concluded that there had been a separate and independent use of the land for the purposes of a “shop”. Consequently, the Court found that existing use rights had been in effect.

Nonetheless, the Court ultimately found that the shop use had been discontinued for several years and that the existing use rights to use the land as a shop had been abandoned. In reaching this conclusion Justice Lloyd decided to accept the evidence of a witness who had owned and occupied the property from 1971 – 1978 (and who had used the land only for the purpose of storing a tractor and bales of hay) and another witness who had regularly visited the locality during the



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interval when the shop use had been suspended, in preference to the recollections of a witness who had only been to the site occasionally during the time in question.

As Justice Lloyd found that the use of the land for the purposes of a shop was prohibited under the planning controls and did not enjoy the benefit of existing use rights, His Honour made orders directing that the shop be closed. However, in recognition of the fact that the shop was the Agostinos sole livelihood, Justice Lloyd postponed the closure for several months to allow them to find an alternative business location.

The result in this case illustrates that:

1) Cases in which a person claims to have existing use rights can be extremely difficult. Although the person engaging in the use has the burden of proving the validity of the existing use rights, Council officers will nonetheless have to go through the process of obtaining evidence concerning the history of land use in order to refute assertions that existing use rights enable an otherwise prohibited use to continue. Records of council inspections, as well as evidence from prior owners and neighbours, are likely to be given considerable weight by the Court when it determines whether a claim of existing use rights should be upheld.

Pittwater Council v Brown Brothers Waste Contractors Pty Limited, (2009) NSWLEC 50

The Land and Environment Court dismissed a notice of motion which sought to vary compliance deadlines that had been fixed through consent orders that had been approved by the Court.

In August 2007, Pittwater Council and Brown Brothers had agreed to consent orders that required the company to stop using a property located in Mona Vale for the purpose of a waste management facility or for storing, sorting or stockpiling any materials other than trucks and waste containers. This prohibition became effective on 28 February 2008.

In March 2008, the council's solicitors sent a letter to Brown Brothers alleging that it was continuing to use the property for the purposes of a waste management facility without development consent, in breach of the consent orders. Brown Brothers' reply to this correspondence admitted that the company was breaching the consent orders. Subsequently, in January 2009, the council again wrote to Brown Brothers to advise that contempt proceedings would be commenced unless the company provided undertakings that it would cease use of the site in breach of the court orders. After this demand was made, Brown Brothers applied to the Court to vary the terms of the consent orders so that the prohibition against using the land as a waste management facility would not come into force until June 2009.

Justice Lloyd refused to vary the terms of the consent orders. His Honour held that the Court does not have power to change any final orders that are made in a proceeding, unless there is some demonstration that either an accidental "slip" (administrative error in recording the terms of the orders, such as misspelling the name of a party) or fraud has occurred. In reaching this conclusion, Justice Lloyd relied on the observations that were made by the High Court of Australia in *Burrell v Queen (2008)*, 82 ALJR 1224:

"...the principle of finality serves not only to protect parties to litigation from attempts to re-agitate what had been decided, but also has wider purposes. In particular, the principle of finality serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time".

This case illustrates that:

1) The Land and Environment Court will not allow the terms of consent orders to be changed. Consequently, it is essential that council officers review draft consent orders before they are handed up to the court for approval, in order to ensure that the orders clearly specify the remedial actions to be taken and the compliance schedule that must be met.



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The Council of the City of Ryde v Fellici, (2009) NSWLEC 27

The defendant was fined \$16,000 for carrying out alterations and additions to an existing dwelling before development consent was issued for the work. The fine was imposed even though the council acknowledged that the unauthorised work was consistent with plans that had been submitted with a development application, that no environmental harm had occurred, that it was likely that the council would issue a building certificate, and that the council had no intention of taking enforcement action to require the illegal works to be demolished.

The defendant was a builder and wished to complete additions and alterations to his home so that they would be ready before his children arrived for a visit from overseas. Therefore, although he lodged a development application with the council, he carried out the work that was proposed before consent had been granted.

The defendant pleaded guilty, and was self-represented at the sentencing hearing before the Land and Environment Court. Although Justice Pain found that the offence was at the lower end of seriousness and did not involve extensive building work, Her Honour declined to dismiss the charge under section 10 of the *Crimes (Sentencing Procedure) Act*. Justice Pain determined that a dismissal was not appropriate because the defendant had acted deliberately in carrying out development before consent had been given and because the defendant was engaged in an area of work (i.e. as a builder) where compliance with the *Environmental Planning and Assessment Act* is important. Furthermore, Her Honour observed that the offence was not trivial in nature in light of the need to ensure orderly development throughout NSW.

The case demonstrates that:

1) A prosecution for carrying out development without consent is likely to result in a penalty, even where the building works in question would have been likely to receive approval and there has been little or no environmental harm.

Fairfield City Council v Hong Son Ngo (2008) NSWLEC 200; Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen (2008) NSWLEC 201

These companion cases involved prosecutions under the *Protection of the Environment Operations Act* against a garbage collection company; the company's director; and a driver of one of the company's trucks. The prosecutions stemmed from a series of incidents in which the driver discharged liquid waste from the rear of the truck into a stormwater drain. The waste dumping was carried out in the early hours of the morning, with the obvious purpose of avoiding detection.

The council used a closed circuit television camera to conduct surveillance of the laneway where it was suspected that the waste disposal was occurring. This surveillance revealed that the driver was opening a valve in the truck and draining the waste into the grate of the stormwater drain. On one occasion, council officers who were stationed in the lane saw the driver hose the rear compartment of the truck with a fire hose, and then release the contaminated wastewater into the drain. By placing a metal tray at the base of the drain, the council officers were able to obtain samples of the liquid that was discharged, which contained solid matter and food waste and had a foul odour typical of garbage and seafood.

Even though the council was unable to demonstrate that the clandestine discharges had caused actual harm to the creek that was downstream of the storm drain, Justice Jagot concluded that the offences were serious, and Her Honour observed that the defendants' actions could not be tolerated. Consequently, even though each of the defendants claimed financial hardship, Justice Jagot imposed penalties on the company, its director, and the driver, of \$22,500 each. In addition, the company and the director were required to pay the councils costs of more than \$68,000.

The following guideline for future prosecutions can be taken from the case:



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1) Extraordinary investigative steps may be required to develop the evidence needed to convict a person who is surreptitiously engaging in illegal activities such as dumping waste.

Blue Mountains City Council v Tzannes (2009) NSWLEC 19

This highly unusual case involved a prosecution for clearing land without development consent, in breach of the applicable local environmental plan. Although the defendant pleaded guilty to the charge, Justice Lloyd of the Land and Environment Court observed in the first sentence of his judgement that the prosecution “should never have been brought”. Furthermore, although Justice Lloyd found that the defendant was “technically guilty of committing the offence”, he dismissed the charge under section 10 of the *Crimes (Sentencing Procedure) Act*.

The defendant and her husband had purchased a property that contained an area which had been cleared by the previous owner. Felled timber and piles of old logs were present on this area of the site. Officers of the Rural Fire Service visited the property and instructed the defendant to reduce the bushfire hazard that was posed by the felled timber and logs. Council officers also met with the defendant on the property and informed her that she did not need written permission to clean up the cleared area, and that she could also remove some “poorer” or “suppressed” trees.

Following the discussions with the council’s officers, the defendant hired a contractor to clean up the dead and fallen timber. Although the defendant specifically instructed the contractor to limit his work to the previously cleared area and not to remove any standing trees, he removed some regrowth and smaller timber and saplings. The defendant was not present on the property when this work was carried out, and for that reason Justice Lloyd concluded that there was nothing that she could have done to prevent the unauthorised land clearing.

Justice Lloyd decided that it was appropriate to dismiss the charge under section 10. His Honour

reached this result due to his findings that the offence was “trivial” in nature; that the contractor had gone beyond the scope of the defendant’s instructions; that a previous prosecution against the contractor who had done the land clearing work had been determined without any penalty being imposed on the contractor; that the defendant had an exemplary record of working for environmental organisations; and that the defendant had agreed to remediate the newly cleared area and pay the council’s costs of the prosecution.

The following guidance can be taken from this decision:

1) In cases where charges are being considered against a defendant for land clearing or the removal of trees carried out by a contractor who has been engaged by the defendant, it is essential that the prosecuting council obtain evidence to prove that the defendant specifically directed the contractor to perform the work in question before the case is commenced. Without this evidence, there is a substantial risk that the prosecution could fail.

Council of the Municipality of Kiama v Furlong [2009] NSWLEC 139

The defendant was prosecuted for carrying out unauthorised building works to an existing dwelling house without development consent, in breach of section 76A(1) of the *Environmental Planning and Assessment Act*.

The defendant was a licensed builder who had obtained a Complying Development Certificate (CDC) from a private certifier to carry out alterations and additions which included an extension at the front of the dwelling; a garage; a pergola; and new metal roofing.

The defendant subsequently lodged a development application in relation to the property. When a Council building surveyor inspected the property to carry out a preliminary assessment of the application, he discovered that the defendant had already commenced construction of a



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number of further alterations which had not been approved under the CDC including: concrete pad footings for a rear deck; a new roof; a new front entry; and a lounge room extension.

The day after his visit to the defendant's property, the Council's building surveyor wrote to the defendant directing him to stop work immediately until relevant approvals were in place. However, when the building surveyor conducted follow-up inspections, he observed that the defendant had continued work on the unauthorized alterations and additions.

Ultimately, the unauthorized works were "regularized" through the issuance of a development approval which permitted the "use" of the works, and through the issuance of a building certificate.

At the sentencing hearing before the Land and Environment Court, the defendant claimed that the Council's building surveyor had told him that it was acceptable to continue with work on the unauthorised alterations by saying that a building certificate would not be issued until the unauthorized works were "tidied up". The building surveyor provided an affidavit which stated that the defendant's recollection of their conversations was incorrect, and that denied that the defendant had been advised that he could proceed to finish the alterations before the proper approvals were given. The Court ultimately accepted the building surveyor's account.

In determining sentence, the Court found that the unauthorized building works had not caused any significant environmental harm, other than increasing the bulk of the building from one elevation. Although the Court concluded that the defendant's overall culpability was low, it nonetheless imposed fines of \$11,000 and required the defendant to pay the Council's costs of \$9,500.

This case illustrates:

1) A prosecution can be brought successfully even though unauthorized building works have not resulted in substantial environmental harm and have been regularized by a development consent or building certificate.

2) Council officers must exercise caution when conducting discussions with a person who is suspected to have committed an offence, as it is often the case that defendants will try to rely on these discussions to excuse or explain away their actions. It is advisable that contemporaneous records be made of such conversations. This material can be vital to refute arguments by defendants that they have been told by Council officers that they could carry out activities that are in fact unlawful.

Council of the City of Sydney v Mae [2009] NSWLEC 84

The Council successfully brought proceedings in the Land and Environment Court to restrain the owner of a two-storey terrace house from using it illegally for the purpose of a boarding house.

The development consent that had been issued by the Council authorized use of the building for the purposes of a two – three bedroom single residential dwelling. The consent permitted two additional rooms in the terrace to be utilized as photographic darkrooms.

However, investigations by the Council revealed that the owner had carried out unapproved alterations to the interior of the house to create extra rooms, and that he was advertising these rooms for rent on the Internet. Inspections by the Council also disclosed that the owner had also built an unauthorized two-room addition in the rear yard of the property, which he was also renting out to the public. The result was that the terrace house had been converted into a building containing a total of nine bedrooms.

There were serious fire safety issues at the property, including a lack of smoke detectors and alarms. In fact, at one point a fire had occurred in the illegal two room addition,



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during which one of the occupants had suffered burns. After the fire, the Council issued an emergency order which required the demolition of the two-room structure. The owner defied this order: instead of demolishing the structure he re-built it and continued to rent rooms in it.

The Council also obtained evidence from both a former tenant and a neighbour which established that there were significant health and amenity problems associated with the use of the illegally modified building, including old and dirty bathrooms; adverse noise, light and privacy impacts on the adjoining property; and accumulated rubbish that attracted rats.

The Court concluded that even though the property had been classified for rating purposes as a single residential dwelling, it was actually being operated as a boarding house without development consent. The evidence that the Court relied on in reaching this determination included: the number of rooms in the building; the fact that the rooms were being rented to unrelated persons; and the fact that there were shared facilities, such as bathrooms, a laundry and a kitchen.

The Court determined that the amenity, health and safety problems at the property justified an order which required the owner to cease using the building as a boarding house; to discontinue advertising that rooms in the building were available for rent; and to remove all unauthorized works, including the illegal two-room structure that had been the subject of the emergency demolition order. In addition, the Council was awarded its costs.

The following principles can be taken from this case:

1) In order to restrain an unlawful use of land, it is essential to gather evidence of any adverse impacts that the use may have upon public safety and the amenity of the surrounding community.

2) In circumstances where a building owner is determined to continue an unlawful use, Councils may need to utilize a number of enforcement mechanisms besides penalty actions, such as orders and injunctions, in order to achieve an outcome that is protective of the public welfare. It may well require several follow up inspections documenting ongoing breaches, and numerous enforcement steps, before a final remedy is obtained.



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