



LOCAL COUNCIL CASE LAW SUMMARIES

Concordia Pacific is pleased to present the first 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.

Manly Council v Taheri [2008] NSWLEC 314

The defendant was convicted of clearing trees from a council-owned reserve located on the foreshore of Sydney Harbour, as well as on adjoining lands owned by his wife.

Although the council's officers were not present at the site when the trees were being cut down, the land clearing activities were observed by a resident of a neighbouring property, who subsequently gave evidence in court.

The Court made findings that the defendant had acted deliberately in directing a contractor to cut down the trees; that he was motivated by the desire to maximize the views of the Harbour from a home that he was planning to build on his wife's property; and that he was aware that he did not have development consent to remove the trees from the public reserve.

The Court refused to accept the defendant's claims that he had arranged for the trees to be chopped down in order to facilitate surveying work associated with the development project on his wife's land, and also rejected the defendant's assertion that a council planner had advised him that the council's development control plan authorised the removal of the trees.

The Court concluded that the environmental harm caused by the defendant was significant, as it effectively stripped all vegetation from the land between his wife's property and the foreshore, and that because of the extent of the clearing it would take a number of years to re-establish the native

bushland that had been destroyed.

In determining sentence, the Court took note of the "iconic" character of the Harbour-front lands that had been affected by the defendant's actions, as well as the special protected status of these lands as an item of environmental heritage under the council's planning instruments.

The Court imposed substantial penalties of \$65,000 on the defendant; directed that he pay the council's legal costs (estimated to be \$80,000); and further required that he re-plant the land and maintain the new vegetation for a period of five years (at an additional cost of \$34,000).

The case suggests that applying the following guidelines can assist in achieving a successful prosecution:

- 1) Council officers should attempt to attend a site as a matter of urgency upon receipt of a complaint concerning damage to protected trees, so that: the unlawful work can be directly observed and documented; the persons carrying out the work identified; the number and types of trees that have been affected described; and so that the persons who have organized the work can be interviewed and admissions sought from them.
- 2) In circumstances where a council's investigators have not been able to attend a site in time to directly observe unlawful work causing damage to trees, the assistance of any residents who have made a complaint should be sought and their evidence should be promptly recorded.

- 3) Council officers should exercise caution when responding to questions from the public concerning the nature of works that may lawfully be carried out under applicable planning instruments, and should clearly communicate the circumstances under which development consent or other forms of approval are required.

North Sydney City Council v Moline; North Sydney City Council v Tomkinson (No 2) (2008) NSWLEC 169

This case concerned an unsuccessful prosecution that was brought in relation to development that was allegedly carried out contrary to the terms of a consent.

The defendants in this case were partners in a project that involved the demolition of an existing house and the construction of new dwellings with underground parking facilities. One of the defendants (Moline) was a co-owner of the development site, an applicant for and beneficiary of the consent, and the builder named on the construction certificate. The second defendant (Tomkinson) was the other co-owner of the site. The council claimed that, in the course of re-developing the property, the defendants had conducted excavation works outside the area on which such works were authorised by the approved plans.

The Land and Environment Court found that the evidence against each of the defendants was insufficient to establish that they were criminally responsible for carrying out the unauthorised works. In reaching this conclusion, the Court held that a person's status as the owner of land that has the benefit of a development consent is not, by itself, sufficient to make that person liable for any breaches of the consent that may occur.

The key fact that led to the acquittal of the defendants was that they did not personally carry out the excavation work. Indeed, the evidence produced by the council failed to identify who had actually done the excavation: although the defendants had engaged a contractor to carry out the building work on the property, it was not shown that this contractor had performed the illegal excavation.

The Court determined that since there was no proof that a relationship of employer – employee or principal – agent existed between the defendants and the unknown person who had carried out the

excavation work, the defendants could not be convicted on a legal theory of “vicarious liability”. Furthermore, the Court decided that responsibility for the excavation works could not be brought home to the defendants on any alternative grounds, because the evidence was not adequate to support a finding that they had either authorised or exercised direction and control over the excavation work.

Additionally, the Court determined that a statement that one of the defendants made to the investigating council officer that he was “responsible for the works at the site” did not prove that he had authorised or directed the unlawful excavation works, and therefore could not be relied upon as a basis for conviction.

Several important points can be taken from the result in this case:

- 1) It is essential that councils carefully investigate and determine the precise nature of each potential defendant's involvement in allegedly unlawful development works before commencing an enforcement action, including whether the defendant personally carried out the works or directed another person, such as a contractor or employee, to do the specific action constituting a breach;
- 2) It is a high-risk proposition to take enforcement action against a defendant simply because the defendant is the owner of the property, or the person in whose name a development consent has been issued. Additional evidence to demonstrate that the defendant carried out the works or directed another person to do so is critical.
- 3) An admission, given in general terms, that a person is “responsible” for the works that are performed at a site will likely not be adequate, without further evidence, to convict a defendant. Councils should thoroughly interview prospective defendants and make every effort to obtain express admissions that the defendant has either participated in the illegal work or has instructed another person to do so.

Woollahra Municipal Council v Kincorp (NSW) Pty Ltd and Terence John Daly [2008] NSWLEC 218

The Land and Environment Court dismissed a prosecution which alleged that a company that had been engaged to manage the redevelopment of a site

(Kincorp), and the director of the project management company (Daly), had breached the conditions of a development consent that required that the remnant walls of a Victorian-era terrace building on the property be retained. Council officers had gathered evidence that the walls had been demolished during the course of construction activities.

The Court concluded that the council had not proven beyond a reasonable doubt that the consent had been breached. The Court found that the approved plans did not unambiguously require that the walls be retained: the plans contained notations stating that the extent of demolition of the walls was to “be determined on site” and that the retention of one of the walls was subject to “excavation and discovery”.

The Court observed that the defendants were entitled to the benefit of any “ambiguity, inconsistency or discrepancy” in the approved plans, and therefore determined that the consent did not specify with sufficient clarity that the walls were not to be demolished.

The Court also found that the evidence was inadequate to prove that the project management company and its director had directed that the walls of the terrace building be pulled down. There was evidence that the structural engineer who was supervising the work on the site had instructed the building company that was carrying out the work to demolish the walls, and that, in turn, the project management company had sent emails to the builder directing it to follow the structural engineer’s instructions. However, the Court determined that neither the project management company nor its director had expressly directed the builder to demolish the walls, and that it had therefore not been established that they had committed a breach of the consent.

The following principles can be taken from this case:

- 1) Where a council is seeking to prosecute a person for breach of a requirement of a development consent, it must be certain that the condition alleged to have been breached was clear and definite; and
- 2) In order to sustain a prosecution there must be direct evidence that a party alleged to have breached a consent either directly participated in the work constituting the breach, or expressly

instructed another person to carry out the work. It can be anticipated that the Court and/or the defendants will test the sufficiency of the evidence relied on to establish that a person has breached a consent. Therefore, it will be desirable to obtain admissions of liability from prospective defendants whenever possible before criminal enforcement proceedings are begun.

Auburn Council v Hiken Group Pty Limited; Auburn Council v Proprietors of Strata Plan 74671 [2008] NSWLEC 91

The Land and Environment Court dismissed an application by the council which sought to enforce a fire safety order that was issued under the *Environmental Planning and Assessment Act*.

The Court found that the council’s enforcement action was defective on two separate grounds. First, although the “heading” of the document that was issued to the respondents stated that it was an “order” made under section 121B of the Act, the text recited that it was issued pursuant to the provisions of section 121H of the Act. The Court observed that section 121H only authorises a council to issue a Notice of Intention to Give an Order and consequently concluded that a fire safety order had not actually been issued under section 121B-6. There was therefore no basis for the council’s allegation that a fire safety order had been breached.

Secondly, the court found that the council’s enforcement action was flawed because the council had failed to follow the statutory procedures specified in section 121P of the Act. Section 121P provides that instead of specifying the precise things that a person must do to satisfy an order, a council can direct that the recipient of the order must meet a particular standard (for example, comply with a requirement of the *Building Code of Australia*). Further, where the order allows a person to comply with a standard, it may allow the person to provide particulars concerning how the person intends to meet the standard.

The Court noted that when an order is given in these terms, the council must, under section 121R, either accept or reject the particulars proposed by the recipient or, where the recipient fails to provide any of the particulars, then the council must specify the particulars itself.

The Court found that because the council had failed to specify any particulars, it had not issued a valid order and the enforcement proceedings could not be brought.

Three important lessons can be drawn from the case:

- 1) It is essential that orders be written with care and that they correctly identify the specific legislative authority under which they are given;
- 2) Where a council chooses to direct the recipient of an order to comply with a standard rather than to carry out a specific action to correct an environmental problem, the council must take care that it follows all of the procedures specified in the Act; and
- 3) Before enforcement proceedings are commenced, the validity of the order sought to be enforced must be checked and confirmed.

Hurtsville City Council v Jacobs (No 2) [2008] NSWLEC 240

The council made a successful application to the Court for an order under the *Local Government Act* which allowed the council to clean up a property that had become a health hazard due to the failure of the owner to remove accumulated refuse material and overgrown vegetation.

The council first became aware that unhealthy conditions existed on the property through an inspection that it conducted in October 2004. That inspection revealed that large amounts of old bricks, timber, rusted metal, rubble, broken plastic pipes and general refuse were being stored on the land, and that it was overgrown with weeds and other vegetation.

Numerous enforcement actions were taken by the council to force the owner to clean up the site. The council issued a Notice of Intention and an order under the *Local Government Act*; commenced proceedings in the Land and Environment Court to enforce the order; and secured the owner's agreement to consent orders by which he undertook to remedy the conditions on his property.

The enforcement actions were not effective to compel the owner to take corrective action: four years after the original inspection, and two years after the consent orders requiring clean up had been approved by the Court, substantial quantities of waste material still remained on the property. Instead of taking the

corrective actions agreed to in the consent orders, the owner instead engaged in a drawn-out court battle against the council, which included proceedings both in the Land and Environment Court and the High Court to have the consent orders set aside.

Finally, in 2008, the council sought an order from the Court for leave to carry out the clean up work itself under the authority of section 678(10) of the *Local Government Act*. This section of the Act provides that if a person fails to perform work that is required by an order given under section 124, a council may do the work and may also seek recovery of the costs that it incurs. The Court found that the evidence of the owner's continuing noncompliance justified the making of an order enabling the council to proceed with the clean up work.

This case illustrates:

- 1) The difficulties that councils commonly encounter when attempting to require people who hoard waste material on their properties to remove the waste;
- 2) The need for council enforcement staff to carry out follow up inspections to document ongoing breaches of council and Court orders and to aggressively pursue all available legal remedies to seek compliance when dealing with people who fail to comply; and
- 3) The importance of considering alternative means of correcting problems that impact on the public welfare when traditional enforcement approaches do not promptly achieve desired outcomes.

Wollongong City Council v Ensile Pty Ltd and Wollongong City Council v Hogarth (2008) NSWLEC 232

The council unsuccessfully prosecuted a company (Ensile) and its director (Hogarth) on charges that they had unlawfully removed a large amount of native vegetation from farmland that the company owned. The council's case was based on two alternative legal theories: 1) that the defendants had carried out an activity, namely, "clearing", that was prohibited under the council's local environmental plan; and 2) that the defendants had performed the clearing work without development consent.

The Land and Environment Court determined that the prosecution could not be sustained under either legal theory.

First, the Court held that the land use that had been carried out by the defendants was not properly characterised as “clearing”, but instead was more accurately described as “grazing”, which was a permissible use under the LEP. Consequently, the Court concluded that the council’s allegation that the defendants had engaged in a prohibited landuse could not stand as a basis for conviction.

Secondly, the Court found that the council’s evidence that the defendants did not have development consent for the use that was permissible (grazing) was not sufficient. The Court ruled that in cases where it is alleged that a person has carried out development without consent, the council that is conducting the prosecution must affirmatively demonstrate that the required consent has not been granted. The council failed to meet that burden in this case, because it did not offer evidence to show that it had comprehensively checked all of its paper and electronic recordkeeping systems to confirm that development consent had not, in fact, been granted. Therefore, the Court concluded that the council had not proven, beyond a reasonable doubt, that development consent had not been granted for the activities that were the subject of the prosecution.

Valuable guidance for future enforcement actions can be taken from this result:

- 1) Before starting a prosecution charging a person with carrying out a prohibited land use (in other words, an offence under section 76B of the *Environmental Planning and Assessment Act*), council officers should carefully review the provisions of the applicable local environmental plan to confirm that the activity in question can clearly be classified as something that is prohibited under the LEP;
- 2) A prosecution for carrying out development without development consent in breach of section 76A(1) of the *EP & A Act* should not be brought until council has thoroughly reviewed all of its records and has prepared evidence from an appropriate officer to prove that consent has not been granted.



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