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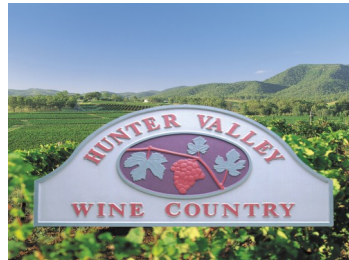
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Welcome to our first installment of **The Expert Report** for 2011. We trust that our readers had an enjoyable Christmas and we hope that the new year is prosperous for one and all.

This issue contains summaries of interesting decisions from the Land and Environment Court and provides our Local Government, Planning and Environmental Law clients with a snapshot of recent legal developments in this area of law.

The same expertise and client focus that enabled our Environmental Law team to win the 2005 Australian Law Awards in Environmental Law is available in our other fields of practice including Conveyancing, Commercial Law, Leasing, Liquor Licensing, Administrative Law, Probate and Wills, Trusts and Criminal Law.

Our Local Government, Environment and Planning Law clients can be assured of specialist knowledge and expertise when they consult the Mallik Rees Lawyers team.

Editor: Michael McGarvey

Contributor: Laura McLellan

Important Planning Law Amendments to Kick-off in February

The Planning Appeals Legislation Amendment Act 2010 will have a major impact on various aspects of planning law. The impact of the changes on our clients will obviously be dependant on their individual circumstances, however the following is a brief overview of some of the important changes that will take effect in February 2011. They are as follows:

- The Land and Environment Court Act will be amended so as to create a new conciliation/arbitration scheme for appeals relating to small scale residential development.
- This conciliation/arbitration process will apply to proceedings relating to development applications and modifications to development consents for detached single dwellings and dual-occupancies, or alterations or additions to such dwellings or dual-occupancies.
- If no agreement can be reached through the conciliation process before a Commissioner, the Commissioner will immediately arbitrate.
- In exceptional cases, a formal hearing may be ordered instead of the conciliation/arbitration process.
- Plans cannot be amended in this process.
- Section 82A is also amended by the Act and will incorporate a right of review on modification applications and where a Council has rejected a development application on the grounds of inadequate information or a failure to comply with statutory requirements.
- Appeals must now be made to the Court within 6 months, down from 12 months.
- In response to much judicial comment, section 97B of the EPA Act is to be amended to require the Court to make an Order for an Applicant to pay the costs of the consent authority that are thrown away, rather than all costs as occurs now, as a result of amendments to plans that are not “minor”. (Continues over the page)

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Staff Profile:

Laura McLellan

Since starting at Mallik Rees Lawyers in early 2010 Laura has developed a reputation for accurate and practical advice on Local Government, Planning and Environment Law matters.

Laura has actively participated in various classes of Land and Environment Court proceedings and has been invaluable in the success of these matters.

She has provided advice on a range of Planning Law issues and is available to provide assistance in other areas including prosecutions under the *Companion Animals Act*.

Laura's drafting skills have also ensured that she has carved out a niche for herself in the area of Leases and Licence Agreements.

If you or a family member need a new or updated Will, Power of Attorney or Enduring Guardian then Laura can also assist you in these matters.

For an appointment with Laura contact our office.

(Planning Appeals Legislation Amendment Act 2010 continued from previous page)

The LEC has introduced a new Practice Note: Class 1 Residential Development Appeals (which commences 7 February 2011) which will apply to these matters. The Practice Note contains short timeframes for conducting these appeals. It is **essential** that Councils have in place a process whereby their legal representatives are advised that proceedings have been commenced at the **earliest opportunity** after appeal documents have been served upon them. The respondent consent authority will usually have just 3 weeks before the first (and only) directions hearing with the statement of facts and contentions to be served on the applicant two days before this directions hearing. The final hearing will take place just 6 weeks later! We can't stress enough the importance of Council's internal processes ensuring quick notification of their legal representatives that an appeal is on foot. ***Council Officers should make an appointment to discuss the effectiveness of Council's internal procedures to adhere to the Court's strict timetable.***

Our developer clients must also understand that as always, the introduction of a new area of law brings with it new traps. It is important to obtain professional legal advice, if possible, prior to the lodging of the development application to avoid unnecessary delays and costs being incurred.

Public Interest Litigation and the Usual Costs Rule

In these proceedings heard before Justice Preston the applicant which was an incorporated association formed to contest exploration and mining on certain land, was contesting an application by the respondents for a costs order, arguing that the proceedings were brought in the 'public interest'.

The respondents argued that pursuant to Part 42, r42.1 of the *UCPR* that the usual rule that costs should follow the event should be applied. There is an exception, however, in rule 4.2(1) of the *Land and Environment Court Rules 2007* which states that the court has discretion to not order costs against an unsuccessful applicant if the proceedings are brought in the public interest (note this rule may not be applicable for all Land and Environment Court proceedings).

Preston J held that a three step approach should be adopted in determining if the usual costs rule should be applied in public interest litigation. These three steps are:

1. Can the litigation be characterised as having been brought in the public interest?

Public interest is very broad and much litigation would be able to be characterised as such. Some considerations to establish if litigation can be characterised as public interest include such things as the number of citizens affected; whether the prime motivation is to uphold the public interest and the rule of law; and whether the applicant has no pecuniary interest in the outcome of the proceedings.

2. If so, is there 'something more' than the mere characterisation of the litigation as being brought in the public interest?

'Something more' can include circumstances such as the litigation raises one or more novel

issues of general importance; the litigation has contributed, in a material way, to the proper understanding, development or administration of the law; where the litigation is brought to protect the environment or some component of it, the environment is of significant value and importance; and the litigation affects a significant section of the public and there was no financial gain for the applicant in bringing the proceedings.

3. Are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?

These can include that the applicant is seeking to vindicate rights of a commercial character and stands to benefit from the litigation; where the applicant is an incorporated association, the private interests of members of the association would be affected, legally or financially; the applicant is supported financially by persons or bodies who would benefit from the litigation; there is disintitling conduct of the applicant, such as impropriety or unreasonableness in the conduct of the litigation; the applicant 'unreasonably pursues or persists with points which have no merit'.

Justice Preston held that the litigation did not directly affect the environment and did not affect the broader community, rather only the holder of the exploration licence and the landowners whose land was within the area of the exploration licence. Furthermore, the applicant would be the only one financially affected by the outcome of the litigation and had the financial means to continue the litigation.

His Honour held that the usual costs rule applied and the applicant had to pay the respondent's costs of the proceedings, including the costs of the application for costs.

Sentencing Considerations

In this recent matter Justice Biscoe had to decide what sentence to give to a defendant who unlawfully demolished 2 structures listed as heritage items under the relevant LEPs.

The defendant pleaded guilty to 2 counts of committing an offence under s125(1) of the EPA Act by demolishing the 2 heritage listed items without development consent contrary to s76A(1) (a). Most fines for this offences (the maximum penalty is \$1.1 million) are between \$20,000 and \$70,000.

The defendant agreed to pay the prosecutors costs and submitted that this should be taken into account in sentencing. Biscoe J made an interesting observation regarding this submission.

Biscoe J referred to a previous Court of Criminal

Appeal case which is authority for the proposition that (a) payment of a prosecutor's costs is an aspect of punishment and (b) payment of a prosecutor's costs may also impact on the financial means of a defendant to pay a fine, which is a consideration pursuant to s6 of the *Fines Act* 1996.

Biscoe J held that given that the harm caused to the heritage environment was low (his Honour decided that if the defendant had applied for the DA it would likely have been approved with conditions of consent); the fact that the defendant offered to do reparation activities, such as erect a plaque identifying the site's history to the public; and the fact that the defendant had no prior convictions and was of good character, the defendant should be fined \$30,000 for both offences and ordered to pay the prosecutors costs.

Section 94 Contributions

In these proceedings there was an appeal against a deemed refusal. Brown C had to resolve a dispute between the parties regarding a condition requiring the provision of a contribution pursuant to s94 of the EPA Act. This dispute arose over the directions given by the Minister for Planning on 4 June 2010 pursuant to s94E of the EPA Act.

Council submitted that the Court was open to impose a condition requiring a contribution consistent with the Council's Contribution Plan. Council also submitted that s94B (3) of the EPA Act allows the Court to amend a contribution even if determined in accordance with the Minister's direction if it is unreasonable. Further Council argued that if the court does not accept the contribution consistent with the Council's Contribution Plan, then the Court should allow a contribution of \$100,000.00, being \$20,000 for each of the five lots of the DA.

The Applicant argued that the Council and the Court should only apply conditions consistent with the Minister's Direction. Anything else would be inconsistent with the Minister's clear intent. The Applicant submitted that a contribution of \$80,000.00 should be adopted, being \$20,000 for each of the five lots but with a credit of \$20,000 for the existing dwelling on the site.

In reaching his decision Brown C said 'importantly, s39(2) of the Court Act provides that the Court has all the functions and discretions of the Council in determining the appeal. It follows, in my view, that this must include the obligations imposed by the Minister's discretion'.

Commissioner Brown accepted the Applicant's submissions in regards to the contribution payable, allowing the credit as only new dwellings can generate a demand for public amenities and public services pursuant to s94 of the EPA Act.

Who Qualifies as an "Applicant"?

This matter heard before Justice Craig qualifies who, or what entities, qualify as an 'Applicant' within the meaning of s97 of the EPA Act.

Council submitted that the appellant did not meet the requirements of the term "Applicant" as described in s97, and therefore the appellant was not entitled to commence the proceedings.

The appellant was not the original applicant on the development application but was successor in title to the original applicant. It was on this ground which the appellant asserted its entitlement to commence and maintain these proceedings.

His Honour stated that "The question posed...is essentially jurisdictional: in the events that happened subsequent to the Council's refusal of

the development application lodged by" the applicant, is the appellant "an "applicant" within the meaning of s 97 of the EPA Act?"

Craig J held that the term "Applicant" includes agents acting on a principal's behalf. However, his Honour stated "Interpreted in context, the provisions of s97 of the EPA Act are intractable in requiring that the "applicant" entitled to institute an appeal to the Court be the person or entity who lodged the development application with the consent authority." Therefore, the appellant was not entitled to commence the proceedings.

Developers should take care when allowing agents such as town planners to apply as the applicant on development applications.

Land and Environment Court Update:

- The Chief Judge has issued a new Practice Note for residential development appeal which commences on 7 February 2011. There is also a new webpage on the LEC website regarding residential development appeals;
- The Land and Environment Court now has the power to hear and determine proceedings for offences under Part 17A of the *Mining Act* 1992.

Quiz Answer:

In our previous issue we asked: Where do Council's obtain their power to install and operate parking meters?

The answer: The Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999.

Quiz Question:

Who was the first Judge of the Land and Environment Court?

APPEAL UPDATE

In a previous Issue we told you about a landmark decision of the LEC regarding the first ever Capping Order being granted.

The Court of Appeal has upheld the decision of Pain J of the LEC ruling that her Honour made no error in approach and nor was the ordered amount unreasonable.

Authorised Officers and Authorised Instructions

In this case Council were seeking to have orders set aside granting consent to a developer to develop its site claiming an 'administrative oversight'.

Council claimed that an officer of the Council, who did not have authority, gave instructions to its solicitors to consent to the Orders made as a s34 conference. Council argued that these orders could be set aside pursuant to Pt 36 Rule 36.15 of the UCPR on the basis that these Orders were made 'irregularly, illegally or against good faith'.

Council argued firstly, the Orders were made by someone without authority; secondly, the objectors to the development were not notified of the appeal; and lastly, that Council intended to consent to the developer's amended plans.

In reference to s34 conferences Craig J stated 'I

would have thought that the subsection imposes an obligation to participate with a genuine preparedness to conciliate the dispute. That obligation, in turn, necessarily requires that the participants have the authority to bind those they represent by any action taken or position agreed at the conference'.

The Court found that the authority of a solicitor/barrister '...is an authority which may exist even in circumstances where an individual or corporate client is found not to have authorised the compromise reached and which has resulted in orders adverse to that client'.

Craig J found that the orders were neither irregular nor illegal, despite the fact the objectors were not informed of the appeal or orders and refused to grant relief.

The Mallik Rees Client Care Commitment is based on:

- Cost effectiveness;
- Communication;
- Highest quality advice;
- Timely completion; and
- Meeting reasonable client expectations.

What Councils Should Know About Conditions of Consent

Senior Commissioner Moore recently published a very enlightening article 'What the Court Expects of Conditions of Consent'. Moore SC summarised 9 key points that every council should keep in mind when drafting conditions of consent (to minimise Commissioner/Judge frustration). They are:

1. Ensure conditions of consent are filed and served on time and in accordance with Practice Note Class 1 Development Appeals;
2. Conditions of consent should be formatted in accordance with Practice Direction No 2 of 2005-Use of Electronic Documents and Images (which Moore SC points out many councils are oblivious to);
3. Conditions of consent must satisfy the 3 tests set out in *Newbury District Council v Secretary of State of the Environment* [1981] AC 578 being (a) they must be for a planning purpose;

(b) they must reasonably relate to the development to which they are addressed and (c) they must be reasonable;

4. Conditions of consent must have a lawful basis in s80A of the EPA Act;
5. Proofread conditions of consent carefully to ensure logical numbering, grouping and ordering;
6. Proofread to make sure conditions are accurately drafted;
7. Conditions must be capable of compliance and must not amount to constructive refusal of a proposal;
8. Conditions should be restricted to being only conditions and not seek to use the Court to provide unnecessary advice; and
9. Conditions cannot not be contrary to public policy.

Section 97B — Mandatory Costs Orders

Council were seeking a mandatory costs order pursuant to s97B (2) of the EPA Act in this matter claiming that amendments made by the applicant to DA were not minor.

Biscoe J believes that s97B has the potential to cause unfair situations as costs orders pursuant to s97B(2) could be disproportionate to costs thrown away or additional costs incurred by the council resulting from the amendment.

His Honour referred to earlier decisions which discussed what amounts to 'minor'. In *Futurespace Pty Ltd v Ku-Ring-Gai Council* [2009] NSWLEC 153 Pepper J outlined several principles from earlier decisions:

"(a) first, the question of what is 'minor' is one of fact and degree;

(b) second, regard must be had not to the number of amendments, but to their cumulative or overall effect in the context and location of the proposed development;

(c) third, where a significant re-assessment of the development application is required by the proposed amendments the amendments are unlikely to be classified as minor;

(d) fourth, merely because the amendments do not involve a change in concept does not mean that they are not minor;

(e) fifth, merely because the amendments do not raise an entirely new issue does not mean that they are not minor;

(f) sixth, merely because the amendments are responsive to issues raised by the council or narrow the issues in contention between the parties is not relevant to the determination of whether they are minor;

(g) seventh, the fact that the amendments do not require re-notification is an irrelevant consideration in determining whether or not the amendments should be classified as minor; and

(h) eighth, an absence of evidence by the consent authority that costs will be incurred or work will be undertaken by it in relation to the proposed amendments may be taken into account but is not determinative."

In this case Justice Biscoe held that the amendments were not minor and granted the mandatory costs order in Council's favour.