



# The Expert Report

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Welcome to the September installment of **The Expert Report**, a newsletter advising clients on recent decisions of the Land and Environment Court and on changes to Local Government, Planning and Environmental Law. We hope that the information contained in this newsletter and in future newsletters will be informative.

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, Industrial Law, Liquor and Hospitality Law, Administrative Law, Probate and Wills, Trusts and Criminal Law.

Our Local Government and Planning clients can be assured of specialist knowledge and expertise when they consult our Local Government and Planning Law team.

## **RECENT AMENDMENTS TO LEGISLATION**

### ***Swimming Pools Amendment Regulation 2011***

Published 3 March 2011, amends the *Swimming Pools Regulation 2008* so as to require:

- A. child-resistance barriers surrounding new outdoor swimming pools to be designed, constructed, installed and maintained in accordance with the new standard set out in the Building Code of Australia from 1 May 2011;
- B. The means of access to new indoor swimming pools to be restricted in accordance with those standard from 1 May 2011; and
- C. The Division of Local Government, within the Department of Premier and Cabinet, and each local authority, to make the Building Code of Australia available for public inspection.

### ***Native Vegetation Amendment (Assessment Methodology) Regulation 2011***

Published 3 March 2011 and gives effect to a revised Assessment Methodology for the purpose of the *Native Vegetation Regulation 2005*. The Assessment Methodology is adopted by the Regulation for assessing and determining whether proposed clearing improves or maintains environmental outcomes in relation to an application for development consent for broadscale clearing, or for approval of a property vegetation plan that proposes broadscale clearing.

### ***SEPP Amendment (Site Compatibility Certificates) 2011***

Published 2 March 2011 and prevents a consent authority from imposing more stringent conditions for some types of development than is outlined in the site compatibility statement.

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### **Staff Profile:**

#### **Robln Mallik**

**Rob was one of the State's first Accredited Specialists in Local Government and Planning Law.**

**He is also a member of the Specialist Accreditation Committee (Local Government and Planning Law) of the Law Society of New South Wales, charged with the task of setting and marking exams for persons seeking specialist accreditation from the Law Society.**

**He has been a solicitor for in excess of 30 years and has been engaged in many leading cases in the New South Wales Court of Appeal and the Land and Environment Court.**

**Rob represents various Councils, developers and private clients with all receiving the highest quality legal advice.**

**He has hand picked the team of solicitors and support staff at Mallik Rees Lawyers to ensure the provision of exceptional legal advice in the most professional and effective manner.**

**For an appointment with Rob contact our office.**

## **Clause 77 of Manufactured Homes Regulation & its relationship with the Local Government Act & Environmental Planning and Assessment Act**

We have been asked advice on many occasions as to whether the exemption under clause 77 of the *Local Government (Manufactured Homes Estate, Caravan, Camping Grounds and Moveable Dwellings) Regulation* was an exemption to obtain development consent which applied to both the *Local Government Act* and the *Environmental Planning and Assessment Act*.

The recent decision of Dixon C has confirmed the view that we have always taken.

In this case the Council had served the Applicant with a s 121B Order to restore the property to its original condition before the unlawful placement of the structures on the land. The structures that Council were referring to were 2 caravans.

The Applicant argued that the structures were entitled to an exemption from the requirement for development consent under the *Environmental Planning and Assessment Act* 1979 by virtue of clause 77 of the *Local Government (Manufactured Homes Estate, Caravan, Camping Grounds and Moveable Dwellings) Regulations*. Council argued that this exemption was restricted only to a s68 approved under the *Local Government Act* 1993.

The Court agreed with the Council and held that any applicable exemption under the Regulations and in reliance upon s68 approved under the *Local Government Act* 1993 did not displace the need for development consent under the *Environmental Planning and Assessment Act* 1979.

### **What is a dwelling house?**

In this matter Biscoe J was asked to determine the construction of the term “existing dwelling-house” in relation to the relevant Local Environmental Plan and whether each of 2 partially constructed dwellings was an “existing dwelling-house”.

As a background to these proceedings, Council had granted development consent for the subdivision of the subject land into two lots (one of these lots was going to be dedicated to Council) and a building approval for the construction of two dwellings on the remaining lot. Two dwellings were partly constructed on the remaining lot and the proposed subdivision of this lot was refused by Council.

The relevant clause of the Local Environmental Plan provided that Council shall not consent to the subdivision of land unless each allotment to be created by the subdivision had an existing dwelling house on it and no rights for additional dwellings are created.

The Court held:

1. That the Local Environmental Plan definition of “dwelling-house” was confined to one dwelling on one allotment.
2. A dwelling-house had to have not only accommodation for sleeping but kitchen, bathroom and lavatory facilities, if not also laundry facilities.
3. The word “existing” before “dwelling-house” meant that the dwelling-house must be constructed with those facilities, listed in (2) above, not partially constructed at the time of consideration for subdivision.

### **Residential Appeals Process—s34AA**

We discussed this new process with you in our last newsletter, below is a brief overview of the way that a s34AA conciliation conference hearing is run:

If there is agreement between the parties and the proposed orders are lawful than the Court can made the Orders

If there is no agreement. Terminate the conciliation conference and dispose of the proceedings either following a hearing held forthwith, or, if the parties consent, on the basis of what has occurred at the conciliation conference.

## Subdivision—consistency with controls, zone objectives and the character of the area

In this matter which was recently before Tuor C the Applicant was appealing against the refusal of Council of a development application to subdivide the subject site into 2 lots.

The locality of the area where the development was proposed was characterized by large houses on large lots.

The proposal consisted of Lot 1 which had an existing dwelling with an area of 1008sqm and Lot 2 was steep and had an area of 568sqm with a developable area of 340sqm, however with building restrictions this reduced the developable area to 150sqm.

The issue that the Court had to deal with was whether, despite proposed Lot 2 not complying with the minimum lot size requirement in the DCP, the proposal met the objectives of the DCP which sought to allow for subdivision of land which could accommodate a building envelope clear of environmental constraints and ensure that allotment sizes were compatible with existing allotment sizes in the locality.

The Court held that the Applicant could not demonstrate that the environmental impacts that could arise from a dwelling on proposed Lot 2 would be acceptable. Adopting and applying the principle in *Parrot v Kiama Council* and given the steepness of the site and the size of the proposed allotment the Court found that there was the potential for environmental impacts from a dwelling which could not be adequately assessed from the information before it.

The Court found that the size of proposed Lot 2 was smaller than other lots in the zone and was not consistent with the surrounding locality and therefore did not meet the relevant objectives of the DCP and the configuration of proposed Lot 1 was uncharacteristic of the area. Accordingly the Court dismissed the appeal.

## Failure to produce under Notice to Produce—Is it contempt?

In a recent matter the Applicant brought a charge of contempt, amongst other things, against the Council for failure to produce documents in accordance with a Notice to Produce. A single email was uncovered during evidence as the only document that had not been produced under the notice.

The Court had to deal with the following issues in relation to the contempt issue:

1. Whether the failure to produce under a notice to produce us susceptible to a contempt charge;
2. Whether the single email was required to be produced under the notice to produce;
3. Whether failure to produce the single email constituted contempt.

Craig J held that failure to produce under a notice to produce is not susceptible to contempt. It was held that r34.1 of the Uniform Civil Procedure Rules (UCPR), which allows a party by notice served on the other party to produce to the Court “any specified document or thing”, differs from r33.12 of the UCP which deals with the issue of a subpoena and failure to comply attracts a charge of contempt.

The single email was required to be produced under the notice to produce. R34.1 of the UCPR differs in its requirements from that of r21.10 of the UCPR which states that the document or thing must be “clearly identified”.

The failure to produce the document did not constitute contempt. The test relevant to be applied is that in *Markisic v Commonwealth of Australia* that the applicant prove beyond reasonable doubt that the breach was “deliberate and not casual, accidental or intentional”. The applicant failed to satisfy this test in light of evidence from the Council that the failure to produce the single email was an oversight and not a deliberate attempt to disobey the notice.



### Staff Profile:

#### Marlie Caban

Marlie has both an Arts and a Laws degree from the University of Newcastle.

Marlie has gained extensive experience from working with two of the most experienced Local Government and Planning Law solicitors in NSW - Rob Mallik, and former partner and Special Counsel for Mallik Rees, Peter Rees.

Marlie has acted successfully in Class 1 appeals, Class 4 proceedings, and Class 5 prosecutions. Marlie has provided extensive advice to our Council and developer clients.

Marlie has an excellent reputation in this area of the law and this has been recognised by her elevation to the position of Associate of the firm.

Our clients can be assured that Marlie has the extensive legal and commercial skills to provide accurate and confidential advice in relation to all local government, planning and development law.

## Recent amendments to legislation

- The *Courts and Other Legislation Act 2011* commenced on 7 June 2011. The Act amended the *Land & Environment Court Act 1979* and the *Environmental Planning & Assessment Regulation 2000*.
- The *Environmental Planning & Assessment Amendment (Part 3A Repeal) Act 2011* was assented to on 27 June 2011. It will repeal Part 3A of the *Environmental Planning & Assessment Act 1979* and introduce a new system for the assessment of State significant projects. The Act will also make a number of changes to the operation and make-up of the Planning Assessment Commission and Joint Regional Planning Panels.

### In other news...

- The Division of Local Government has released a Circular advising councils of the maximum interest rate that can be charged on overdue rates and charges.
- On 13 July 2011 the Department of Planning & Infrastructure announced the formation of a Planning Review Panel to oversee the review of the State's planning laws.

## Validity of Development Control Plan

This was a Class 4 proceeding brought before the Court to resolve the validity of a Development Control Plan (DCP). On 18 October 2010 the applicant was granted development consent for a mixed residential/commercial development with associated demolition and strata subdivision. The development application included the dedication of a rear laneway and Council approved it on that basis. However, the applicant decided that they would rather keep it as a private driveway rather than dedicate it to the Council for public use as was required under the DCP and development consent. The applicant lodged a s96(2) modification application seeking the removal of this requirement (the dedication of the rear laneway) and some other changes. The Council refused the modification application. The Applicant brought Class 1 proceedings to challenge Council's refusal and the Class 4 proceedings to seek a declaration that the relevant provisions of the DCP were invalid and void.

The Court dismissed the challenge to the validity of the DCP for the following reasons:

1. The DCP was valid as its role was to make more detailed and specific provisions to achieve the purposes set out in the Local Environmental Plan (LEP);
2. The DCP and the LEP were made in accordance with the *Environmental Planning and Assessment Act 1979*;
3. The requirement to dedicate the laneway was not mandated by a condition of consent; rather, the applicant, abiding by the strategy in the DCP, had proposed a voluntary dedication of land for the laneway, and the Council had incorporated this dedication into the development consent;
4. There was nothing contrary to law in the Council:
  - (i) Applying the *quid pro quo* principle in making its planning and development decision; and
  - (ii) Requiring the provision by an applicant of land for public purposes without consideration.

## Does a letter constitute a valid notice?

This matter sought the determination of two preliminary questions in a Class 1 appeal relating to three beachfront properties. The applicant had submitted a development application to the Council to redevelop the land for mixed residential commercial purposes. The Council refused the development application on the basis that a 'road widening order' referred to in s26(1) of the *Roads Act 1993* applied to the subject land. This section of the *Roads Act* prohibits the construction or repair of building work on land subject to a road widening order. It was agreed between the parties that a road widening order under the *Roads Act* had not been issued by the Council. However, the Council argued that the a deemed road widening order applied by virtue of notices in a standard letter served in 1961 on the past owners of the subject land pursuant to s262 of the now repealed *Local Government Act 1919*. The parties disputed whether the letter had been sent to the owners of the subject land, and if so, whether it constituted a valid notice under s262 of the *Local Government Act 1993*.

The Court held that the 1961 letter did not constitute a valid notice under s262 of the *Local Government Act 1993* for the following reasons.:

1. The *Local Government Act* provided measures to prove service. The Council invited the Court to draw the inference from fragmentary evidence that the letters had been sent.
2. Where a provision effecting private property rights is ambiguous, such as s262 of the *Local Government Act*, the Court favours the construction that interferes least with private property rights.
3. The letter that was sent in 1961 erroneously conveyed that the realignment by gazettal gave effect to the realignment. The letter did not sufficiently identify that the Council had elected to employ the realignment method and therefore the Council failed to serve the

notice “accordingly”.

4. The letter that was sent in 1961 failed to clearly identify the parts of the subject property subject to the realignment method and therefore this letter did not constitute valid notice under s262 of the *Local Government Act* 1993.
5. The Council did not discharge its onus of proving that it elected to propose to apply the realignment method and therefore the 1961 letter did not constitute valid notice under s262 of the *Local Government Act* 1993.

## Not substantially the same

This was a Class 1 appeal which arose from Council’s refusal to support a s96 application to modify a consent granted by the Court previously. The previous consent allowed the created of Lot 1 and the subdivision of the remaining land would create 10 lots. The conditions of consent also required the provision of a range of infrastructure, including road upgrading, storm water drainage improvement and contributions towards the extension of the town water supply.

The applicant was now before the Court seeking to undertake the subdivision in the following phases:

1. The first phase – creating 2 lots, Lot 1 and effectively consolidating the ten residential lots into a residue Lot 2.
2. The second phase – subdivision of Lot 2 into the initial 10 lot configuration.

Subsequent to the granting of the original consent a further development application for a new dwelling within the proposed Lot 1 had been granted to the Applicant. A condition of this consent also required the demolition of the existing dwelling within 90 days of the issue of an occupation certificate so that there would not be 2 dwellings on the one lot.

Commissioner Hussey stated that the threshold issue in this matter concerned the appropriateness of allowing this development to be undertaken in the two proposed phases, particularly in light of the s96 considerations regarding whether the development relates to substantially the same development. Also the application’s compliance with the relevant s79C considerations, matters raised by the objectors and compliance with the objections of the Environmental Planning and Assessment Act, particularly those dealing with economic and orderly development.

Commissioner Hussey held that he was not satisfied that by comparison with the original consent that this modification application satisfies the primary requirement, that is, that the modified consent related to substantially the same development as originally approved. Satisfaction of the conditions in the original consent would result in upgrading of road surfaces, removal of existing dwelling, construction of a new internal subdivision road to provide access to the new lots including emergency access to Lot 1 and the provisions of new landscaping. However, the approval of the modification would result in the 10 lots being created in the future, retention of the existing dwelling, delays in road upgrading, water service and drainage upgrades and uncertain time frame for the completion of phase 2.

Commissioner Hussey felt that there was too much uncertainty surrounding the proposed modification and ultimately held that the modification application represents a materially different application to the original approval and as such he did not consider it be substantially the same development. He further did not consider that the ‘phasing’ proposal is consistent with the provisions of the Environmental Planning and Assessment Act.

### And more news...

- The Chief Judge has approved a new Tree Dispute Application form (Form C) which replaces version 2 of the same form. This takes effect from 19 September 2011.
- Commissioner Graham Brown has been appointed as the Acting Senior Commissioner of the Court from 25 August 2011 to 24 February 2012.
- Filing fees for the Land & Environment Court have been increased as a result of amendments to the Civil Procedure Regulation 2005 and the Criminal Procedure Regulation 2010. the new fees are effective from 1 August 2011.
- On July 12 2011 the Minister for Planning announced that a review would be undertaken of the planning laws of NSW. The review will be co-chaired by Senior Commissioner Moore (who has taken leave from the Court from 22 July) and former Labor Minister Ron Dyer.

## Is a Brothel a Commercial Office?

As a background to these proceedings the Applicant conducted a brothel. The premises had consent for use as “commercial offices” since 12 August 1980. There was evidence that the premises had been used as a brothel intermittently from the mid 1980’s. On 6 November 2008 the Council served the Applicant with a Brothel Closure Order pursuant to s121B of the Environmental Planning and Assessment Act. The Local Environmental Plan which was gazette in 1997 zoned the premises so that it now prohibited the use of the premises as a brothel.

At first instance the applicant sought and was declined a declaration that the premises had the benefit of “existing use” rights for the purpose of use as a brothel, within the meaning s section 106 and 107 of the Environmental Planning and Assessment Act. The Applicant appealed this decision which saw it come before the Court of Appeal.

The issue was whether a development consent granted in 1980 permitting use of premises as “commercial offices” permitted use of the premises as a brothel and whether there were existing use rights, within the meaning of ss106 and 107 of the Environmental Planning and Assessment Act that protected the use of the premises as a brothel.

The Court of Appeal dismissed the Appeal.

The Court of Appeal held that the primary judge correctly described the issue for determination, namely, that the applicant must demonstrate that the ordinary meaning of “commercial offices” could be characterized to include a brothel. The primary judge was correct to hold that the construe the use of the rooms for provision of sexual services for reward as “commercial offices” would be to strain the ordinary meaning. The concept of “commercial premises” contains 2 limbs; firstly use an “an office” and secondly use “for other business or commercial purpose”. Use as a brothel may fall within the second limb but not would fit within the first limb.

Lastly, the Court held that the provision of sexual services for reward could not be described as “clerical or administrative work”.

- The Chief Judge has issued a new practice note for Class 3 compensation matters;
- The Chief Judge has issued a new Instrument of Delegation to Registrars pursuant to s13 of the Civil Procedure Act 2005. The new instrument gives the Registrar power under s34AA of the Land and Environment Court Act 1979.

## Demolition of building—heritage

In these proceedings the Applicant was appealing against the deemed refusal by the Council of a development application seeking the demolition of an existing dwelling house.

The main contentions that Morris C had to consider was whether consent should be granted due to the dwellings heritage significance and whether this heritage significance was such that it should be retained and incorporated into any new development.

It was held that the street where the dwelling was located was unique in that it was part of the land to which the relevant Regional Environmental Plan applied its relationship to the area was limited to the fact that it was bound by the railway precinct. The evidence that was submitted by the parties demonstrated that the dwelling had no greater significance that that of a contributory item within a heritage conservation area and given the substantial alteration to the original building fabric of the dwelling it did not have significant heritage significance to warrant its retention.

Accordingly the Court upheld the appeal and consent for the demolition of the dwelling was granted.

***If you know anyone else who would like to subscribe to this Newsletter please forward their details to***

***marlie@mallikrees.com.au***

## Hedges obscuring views

On 13 October 2010 the first proceedings were heard and determined by the Court pursuant to Part 2A of the *Trees (Disputes Between Neighbours) Act 2006* which now permits the Court to deal with applications concerning high hedges that obscure sunlight or views.

In these proceedings the Applicant claimed that three views from their property were being obscured by the bamboo hedge at the rear of the Respondent’s property. The Respondent’s argued that if the hedge was removed it would impact on their privacy in the rear yard if their property, overlooking their swimming pool.

The Court held that it was appropriate to apply the first three steps in *Tenacity Consulting v Warringah Shire Council*, being:

1. to assess the views that are to be affected (water views being more valued than land views);
2. to consider from what part of the property the views are obtained;
3. to assess the extent of the impact on the view.

The final outcome was that the Respondents were ordered to prune and maintain the bamboo at the rear of the their property to a height of 1.8m above the top of the fence between their property and the applicant’s property. This level would have the effect of preventing any view from the applicant’s property into the rear private open space of the Respondent’s property.