

Failure to Consider the Impacts of Climate Change

Walker v the Minister for Planning & Ors [2007] NSWLEC 741

The Facts

The Sandon Point site comprises 53ha of mostly open space land on the coast north of Wollongong. It is an area of considerable significance for the local Aboriginal community. In May 2007 the eastern part of the site was declared an Aboriginal Place under the *National Parks and Wildlife Act 1979*. The site also contains endangered ecological communities and significant bird habitat.

Since the 1990s, there has been strong community opposition to redevelopment of the site for residential purposes. Locals have lobbied the NSW government to acquire the site for public open space. There has been an Aboriginal tent embassy at Sandon Point since 2000.

A Commission of Inquiry into the site in 2003 recommended that only limited areas of the site should be developed, to allow for preservation of Aboriginal cultural values, natural creek corridors and bird habitat.

In 2006 developers Stockland and Anglican Retirement Villages lodged a joint concept plan application to subdivide the site into approximately 180 residential dwelling allotments, 3 super-lots for future apartment or townhouse development, up to 250 seniors living units and a residential aged care facility.

An important issue to be resolved in connection with the concept plan was the treatment of three watercourses on the site, which were prone to flooding. The proponent wanted to construct relatively narrow and straight stream corridors which would maximise the developable area. The Department of Natural Resources (“DNR”) argued that wider creek corridors should be provided to reduce flooding risk and preserve ecological values. The Minister eventually approved the concept plan subject to conditions which modified the creek corridors proposed by the proponent, but not to the full width recommended by DNR.

Neither the Minister nor the Director-General considered whether the flooding risk would be exacerbated by climate change.

The legal consequences of obtaining concept plan approval are that any subsequent approval granted by the local council must be consistent with the concept plan, and further project approvals are not subject to appeal on the merits. Although there is no legal compulsion on the Minister to consent to subsequent project applications on a concept plan site, the concept plan is taken to indicate in-principle approval of the project, based upon which the proponent can proceed to draw up more detailed plans.

The Findings of Justice Biscoe

The applicant alleged that the Minister, when granting concept plan approval, had failed to consider the principles of ecologically sustainable development (“ESD”)

because he had not considered whether the flood risk on the site would be exacerbated by climate change, had not obtained up-to-date mapping of endangered ecological communities, and had not carried out further investigations into a possible “women’s area” on the site. ESD is described in s 6(2) of the *Protection of the Environment Administration Act 1979* and includes the ‘precautionary principle’. The precautionary principle states that decision-makers should make an assessment of the risk-weighted consequences of any action before deciding to proceed with the action.

Justice Biscoe held that under cl 8B of the *Environmental Planning and Assessment Regulation*, the Director-General was obliged to include in his report those aspects of the public interest which he considered to be relevant. It has been established in previous cases that ESD is an aspect of the public interest, therefore the Director-General was obliged to consider ESD in deciding what matters needed to be addressed in his report. In this case the Director-General had apparently failed to consider whether the climate-change related flood risk was a matter which needed to be addressed in his report.

His Honour observed at paragraph [161]:

Climate change presents a risk to the survival of the human race and other species. Consequently, it is a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.

In addition to being a win for the local Sandon Point community, this case has served to highlight the far-reaching ramifications of climate change for all kinds of economic activities. The same reasoning could be applied to any development which is potentially impacted upon by climate change. This might include developments which are affected by increased drought risk, decreased snowfall, coral bleaching or coastal erosion.