

CASE NOTE

South East Forest Rescue Incorporated v Bega Valley Shire Council and South East Fibre Exports Pty Ltd [2011] NSWLEC 250

Preston CJ; 16 December 2011

Background

The applicant (**South East Forest Rescue Incorporated**) brought judicial review proceedings in the Land and Environment Court challenging the validity of the first respondent's (**Bega Valley Shire Council**) consent to a development application, made on 14 June 2011, for the installation of a pilot wood pellet manufacturing plant in Eden, NSW by the second respondent (**South East Fibre Exports Pty Ltd**).

SEFE is a joint venture between Nippon Paper Industries Co Ltd and Itochu Corporation. SEFE operates a woodchip mill near Eden and is a major exporter of wood products produced in Bega Valley Shire. The proposed plant would allow SEFE to examine the feasibility of constructing a full-scaled wood pellet production mill. Raw material feed or "wood waste" for the proposed pilot plant was to be sourced from local hardwood and softwood mills within a 100km radius, including wood emanating from native forests. A common use of wood pellets is to fuel wood-fired power plants.

The applicant challenged the validity of Council's decision on 4 grounds:

- (1) Council failed to consider and form the requisite mental state of satisfaction under cl 8(3) of *Bega Valley Local Environmental Plan 2002* ('the LEP') that the development is consistent with the objectives of Zone 1(a) (Rural General Zone) under the LEP;
- (2) Council failed to consider all of the submissions made by the public under s 79C(1)(d) of the *Environmental Planning and Assessment Act 1979* ('EPA Act')- particularly those which objected based on the grounds of inconsistency with zone objectives and principles of ecologically sustainable development ('ESD');
- (3) Council failed to consider ESD either under cl 79 of LEP or as an element of the public interest under s 79C(1)(e) of the EPA Act; and
- (4) Council failed to consider anthropogenic climate change as an element of the public interest under s 79C(1)(e) of the EPA Act.

Decision

Preston CJ found for the applicants on grounds 1, 2 and 3, and for the respondent on ground 4. His Honour declared:

- (1) The development consent granted by the Council on 14 June 2011, for the installation of the wood pellet manufacturing plant as invalid and of no effect,
- (2) Reserved the question of costs.

Reasoning

Ground 1

Preston CJ heard an extensive amount of evidence on this issue and concluded that Council (through the actions of its councillors) did not access the important documents at both Council Meetings (24 May 2011 & 14 June 2011), such as the Statement of Environmental Effects, and the two versions of the s 79C Assessment Report prepared by the assessing council officer, and therefore, did not in 'terms or substance', properly consider and form the required mental state of satisfaction in regards to the consistency of the proposed development with the zone objectives under cl 8(3) of the LEP. His Honour also found cl 65 and cl 8(3) to be substantially different and that consideration of cl 65 does not satisfy a consideration of cl 8(3). As a result, his Honour held Council had no power to grant the development consent and held the consent invalid on this ground.

Ground 2

His Honour found that although the EPA Act did not require advertisement of the proposed pilot plant (as it was not designated development nor development which required advertisement under the Act), Council retained the discretion to determine whether or not to advertise the development application consistent with the Development Control Plan No. 3-Notification Policy. Since Council decided in the affirmative, it is become bound under s79C(1)(d) of the EPA Act to consider the public submissions made in making its decision to approve the DA. The 'summary' of the public submissions provided to the councillors at the meetings did not address the key issues of consistency with the zoning objectives and the principles of ESD nor did the two versions of the s79C Assessment Reports. His Honour found that Council failed to consider the submissions raising the consistency of the development with zoning objectives and ESD.

Ground 3

His Honour found that the principles of ESD under cl 79 of the LEP and under s 79C(1)(e) of the EPA Act (ESD as an element of the public interest) were relevant matters to be taken into consideration, but that Council had failed to do so as there was no material before the Council at meetings held in May and June 2011 that addressed the issue of ESD.

Ground 4

The applicant failed to establish anthropogenic climate change as an element of the public interest under s 79C(1)(e) of the EPA Act, and His Honour determined that the applicant has not established that Council failed to consider the upstream and downstream effects of the development on anthropogenic climate change.

Implications

This case reaffirms the status of cl 8(3) zoning objectives as a precondition to development consent and that ESD is an element of public interest under s79C(1)(e). It also gives legal status to public submissions received in response to a public notice made at the discretion of

Councils where the EPA Act does not specifically require public notification or the invitation of public submissions.

