Case Note

Hasting Point Progress Association v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008]

Background

This was a case involving judicial review of two separate local council decisions to grant development consent. The first was in relation to a development proposal by Aeklig Pty Ltd and the second was in relation to a development proposal by Planit Consulting Pty Ltd.

Both claims related to a failure of the Council to consider relevant matters under section 79C of the *Environmental Planning and Assessment Act 1979 NSW* (EP&A Act). It was also claimed that each of the development consents was manifestly unreasonable.

Due to the similarity of issues, and as each of the development consents being challenged had been granted by the Tweed Shire Council, the matters were heard together.

I) In the Aeklig proceedings consent had been granted for the development of land at 87-89 Tweed Coast Road, Hastings Point for a Seniors Living development under *State Environmental Planning Policy (Seniors Living)* 2004 (SEPPSL) as then in force. The subject property was zoned 2(c) Urban Expansion under the *Tweed Local Environmental Plan 2000* (TLEP); and

II) In the Planit proceedings Council granted development consent to Planit Consulting Pty Ltd for multi-dwelling housing comprising seven units at 21 Tweed Coast Road, Hastings Point. The subject property was zoned 2(b) Medium Density Residential under the TLEP.

The *Tweed Local Environmental Plan 2000* (TLEP) set development restrictions upon the subject land. In both proceedings, The Hastings Point Progress Association argued that the Statement of Environmental Effects for each development had failed to provide reference to clause 8 of the TLEP, the objectives of the TLEP, and other relevant clauses of the TLEP, particularly with regards to the height of the development. As a result, it was argued that the Council had therefore failed to take into account relevant considerations when making its decision.

Clause 8 of the T*weed Local Environmental Plan 2000* provided, amongst other things, that the Council could only grant consent for a development if it could be satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that would be affected.

Clause 16 provided that consent must not be granted for the erection of a building which exceeds the maximum height or number of storeys indicated on the Height of Buildings map in respect of the land to which the application relates.

The 'height of buildings map' existing at the time of both development applications to the Council, provided for a maximum height of three storeys for both subject sites.

The Council had, however, in July 2005, resolved to prepare an amendment to the TLEP to restrict the height of development at Hastings Point south of Cudgera Creek, to two storeys under Amendment 81. The Amendment had been submitted to the Director General pursuant to s. 64 of the *EP&A Act* in March 2006, with the Director General issuing a delegation for a s. 65 certificate for the Amendment, authorising the Council to exhibit Amendment 81. The Council resolved in December 2006 to defer the making of Amendment 81 despite the authorisation to exhibit it.

The Aeklig proceedings

It was argued that in granting consent to the development, the Council had failed to consider the matters it was required to consider and failed to be satisfied about those matters before it granted consent to the development pursuant to clause 8 of the TLEP. The Statement of Environmental Effects and the Report to Council on May 8 2007 failed to make any reference to clause 8 of TLEP, the objectives of the zone or clause 4 or clause5 of TLEP. It was also argued that both considerations required by the TLEP and SEPPSL should be satisfied and applied unless inconsistent.

The Court found that before it could consider the Applicant's argument that the Council failed to consider clause 8 of the TLEP, the issue of inconsistency between that clause of the TLEP and the SEPPSL had to be determined. The Court considered that s. 36(1) (a) of the *EP&A Act* which specifies that in the event of any inconsistency there is a general presumption that a SEPP prevails over a LEP made before or after the date of the SEPP was relevant. Also, the specific words in clause 2(2) of the SEPPSL, as then in force, stated the main aim of the policy was to encourage the provision of housing and to increase the supply and diversity of residences that meet the needs of seniors or people with a disability. Where the housing meets the development criteria and standards specified in the policy, the policy goals may be achieved by setting aside local planning controls that would otherwise prevent the development of such housing.

The SEPPSL also sets out in s. 5(3), that the SEPPSL will prevail over any other planning instrument that applies to a development to the extent that there is any inconsistency.

In this case, the Senior Town Planner at the Council provided evidence of matters that had been considered, in coming to the decision to approve the development. The planner's report noted the proposal had been applied for as a SEPPSL development and was permissible under the SEPPSL. The planner also considered the provisions of the TLEP under s. 79C of the EP&A Act. Oral evidence included consideration of permissibility in the zone, consistency with zone objectives and the aims of the TLEP with respect to the need for urban development and the need to provide for the changing demographic needs of the community, other clauses in the TLEP and

whether from a cumulative perspective, the application would impact on the community.

It was argued, in approving a three storey development, the Council's decision was manifestly unreasonable as:

i) the Council had been given authorisation to exhibit the amendment to restrict building heights in the area to two storeys,
ii) the Director General's expressed concerns,
iii) the provisions of the Tweed Shire 2000+ Strategic Plan which proposed the initiation and evaluation of a two storey height limit for Hastings Point
iv) the adoption of the Coastal Design Guidelines prior to the decision
v) the requirements of clause 31 of the SEPPSL, that the proposed development should maintain reasonable neighbourhood amenity and appropriate residential character, therefore no reasonable decision maker would have concluded that a three storey development would satisfy the specific SEPP requirements given the existing character of Hastings Point which consisted on one and two storey buildings.

The Court found that there was a clear statutory intention in the SEPPSL to alter the application of other environmental planning instruments where complying seniors developments are proposed. Clause 2(2) of the SEPPSL states the aims of the policy "will be achieved by the setting aside of local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy."

The Court also found there to be inconsistency in terms of the language of clauses 30 and 78 of the SEPPSL and clause 8 of the TLEP. This inconsistency meant that the terms of the SEPPSL prevailed over the TLEP. So further consideration of whether clause 8 of the TLEP was adequately considered was not further required in this case.

The Planit proceedings

The Planit DA for multi-dwelling housing was approved by the Tweed Shire Council on 19th June 2007, subject to conditions. Under the TLEP the property was zoned 2(b), Medium Density Residential.

The Applicants challenged the approval on two grounds, similar to those in the Aeklig proceedings. The first challenge was that the consent authority failed to consider clauses 8(1)(b) and 8(1)(c) of the TLEP, and Amendment No. 81. The second challenge was that the approval of a three-storey building was manifestly unreasonable.

The Court found that considering clauses 8(1)(b) and (c) was a pre-condition to the approval of a development application. It also found that the standard for reviewing claims of failure to consider relevant information is that the consenting authority must have given "more than mere advertence" to those provisions, such that they were given "proper, genuine and realistic consideration."

Clause 8(1)(b) requires the Council to determine whether development is consistent with the aims of the TLEP, as provided in clause 4. The Court rejected the Applicant's

challenge, stating that the report provided to the Council did properly consider the TLEP's aims. "[W]hile the aims of clause 4 (a) and (c) were not explicitly identified. . . the essential matters referred to in the Tweed Shire 2000+ Strategic Plan in relation to building height were considered." This was sufficient to bring relevant aims to the attention of the Council.

Clause 8(1)(c) requires the Council to consider the cumulative effect of the development, which the Court interprets to mean the environmental significance of the development in combination with other development in the area. The Court upheld the challenge on these grounds, rejecting the Respondent's claim that cumulative effects can be evaluated by considering individual projects in isolation.

Amendment No. 81 requires the Council to consider the height of the buildings being proposed. The Court rejected this challenge because the height of buildings is likely to have been within the general knowledge of the Council.

The second challenge, that the approval was manifestly unreasonable, demanded a different standard of review. The Court noted that it must only apply the "manifestly unreasonable" standard stringently, so that proceedings do not turn into an appeal on the merits. Council's decision may only be held to be invalid if its decision is "illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds."

The Applicant's argument that the respondent Council was unreasonable in granting an approval for a three-storey building, in face of the Director-General's goal to reduce building heights, failed as the goal was not enough to override existing controls that would have permitted the building, so the decision of the Council was not illogical.