CASE NOTE

Fauna Impact Statements: Club Med Decision Has Important Implications for All NSW Councils

Byron Shire Businesses for the Future Inc v Byron Council and Holiday Villages (Byron Bay) Pty Ltd ("Holiday Villages")

Unreported, Land and Environment Court of New South Wales, Pearlman J, 30 September 1994

Introduction

On 30 September 1994, the Chief Judge of the Land and Environment Court of New South Wales, Justice Mahla Pearlman AM, ruled that Byron Council had failed in its duty by granting development consent to the construction of a Club Med village at Byron Bay. Her Honour concluded that the information on fauna impact before the Council was insufficient and that, as a result, it was not reasonably open to the Council to conclude that there was no likelihood of significant effect on the environment of endangered fauna.

The Court's decision has important implications for ALL councils in NSW in respect of the assessment of ALL development applications.

1. The Applicant's Claims

In the proceedings (No 40032 of 1994), the Applicant, Byron Shire Businesses for the Future Inc ("BSBF"), sought a declaration that the development consent granted by the First Respondent, Byron Council, to the Second Respondent, Holiday Villages (Byron Bay) Pty Ltd ("Holiday Villages"), on 11 November 1993 was void and also sought consequential injunctive relief.

BSBF claimed that the consent was null and void on 5 grounds:

1. The subject development application ought to have been accompanied by a fauna impact statement ("FIS") and no such FIS accompanied the application.

2. The subject development ought to have been accompanied by an environmental impact statement ("EIS") and no such EIS accompanied the application.

3. Development for the purposes of a tourist establishment was prohibited on part on the subject land.

4. Some 21 of the conditions of the consent were invalid and incapable of being severed from the consent.

5. The decision of the Council to grant consent was, having regard to certain circumstances (matters related to acid sulphate soils and drainage), manifestly unreasonable (on the basis of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223) or, in the alternative, that, having regard to those circumstances, the Council was bound but failed, to take into account various matters referred to in s 90(1) of the

Environmental Planning and Assessment Act 1979 (the Act) (on the basis of Parramatta CC and Anor v Hale & Ors (1982) 47 LGRA 319).

2 The Decision of the Court

2.1 Development Consent Void

Justice Pearlman declared void the development consent granted by the Council and ordered that Holiday Villages be permanently restrained from carrying out any development, including the clearing or excavation of any land, pursuant to the consent.

Interestingly, and significantly, all of the Applicant's claims but one (number 1 above) were rejected by her Honour.

2.2 Fauna Impact Statement Required

In relation to the question of whether or not an FIS was required, her Honour found that "it was not reasonably open to (council), on the material before it, to conclude that there was not likely to be a significant effect on the environment of endangered fauna" (p 17). In that regard, her Honour said:

> *"In summary, the material before the council showed that 33 endangered species were predicted on or in the vicinity of the site; that there was no likelihood of significant effect on the environment of one other species; and further information was necessary in order to apply s 4 A (of the Act) to determine whether or not here was likely to be a significant effect on the environment of other endangered fauna".*
> *(p 17)*

2.3 Salient Statutory Provisions

Section 4A of the Act lists the factors which "must be taken into account", for the purposes ofdeciding under ss 77 and 90 of the Act, whether there is "likely to be a significant effect on the environment of endangered fauna".

Section 77(3)(d1) of the Act states that a development application shall "(where the application is in respect of a development which is likely to significantly affect the environment of endangered fauna) be accompanied by a fauna impact statement in accordance with section 92D of the National Parks and Wildlife Act 1974".

Section 90(1)(c2) of the Act requires a council, in determining a development application to "take into consideration" (where it is "of relevance" to the subject development) "whether there is likely to be a significant effect on the environment of endangered fauna".

Section 91(1) of the Act provides that a development application shall be determined by the granting of consent to the application (either unconditionally of subject to conditions) or the refusing of consent.

2.4 The Process of Determination

In the opinion of her Honour, Council "started off with at least the possibility of significant effect (on the environment of endangered fauna)" and was "then bound by the (Act) to determine whether or not that was so" (p 17).

In respect of one species of endangered fauna - the comb-creasted jacana - "the only reasonable conclusion was that its environment was likely to be significantly affected". As regards other

species of endangered fauna the Council "was required to make a determination one way or the other as to the likelihood of a significant effect on environment" (p 17).

In short, her Honour concluded that the information on fauna impact before Council was "insufficient" (p 17). Accordingly, it was "not reasonably open to (Council) to conclude that there was no likelihood of a significant effect on the environment" (p 17).

2.5 Invalidation of Foundation of Development Consent Process

The legal consequence of her Honour's conclusion that Council's decision on the fauna question was "not reasonably open" to it is the invalidation of "the very foundation of the development consent process" (p 18).

Perhaps the most important part of her Honour's judgment is the following:

> *"The council could not proceed to exercise it power of determination under s 91 (of the Act) because a pre-condition for the exercise of that power did not exist. In the circumstance where the development application itself disclosed the fact that approximately 33 species of endangered fauna were likely to be within or near the site, the council was on notice that a question of the likelihood of significant effect on their environment arose for determination. Without a proper determination of the threshold question (ie. whether or not the proposed development would have a significant effect on the environment of endangered fauna) in those circumstances, a development application which complied with the requirements of s 77 (of the Act) could not exist, and without such a conforming development application, the council was not empowered to exercise its power of determination of the development application under s 91." (pp 18, 19)*

In effect, her Honour found that Council made a "jurisdictional error" by misdirecting itself in law or applying the wrong legal test. It proceeded on the "wrong premise" (p 17), by taking the information on fauna that it had and proceeding to determine the question of impact (p 17) and otherwise ameliorate impact. In her Honour's view, that is "not the scheme of the EP&A Act" (p 17).

The Council's determination of the subject development application was therefore of no effect, and, as a consequence, the consent which council purported to grant was void and of no effect.

2.6 The Scheme of the Act

In her Honour's opinion, the "scheme of the Act" is as follows:

1. Is the proposed development likely to have a significant effect on the environment of endangered fauna?

2. If the answer to that question is yes, an FIS is required.

3. If an FIS required, it must properly address the question of impact.

4. With the FIS before it, the council can then proceed properly to determine (and if consent is granted, ameliorate) the impact using the FIS as a tool.

3 Implications of the Decision

3 1 Need for Threshold Determination of Fauna Impact

The **practical** consequence and significance of her Honour's decision would appear to be that, in the case of **very** development application, a council will need to make administrative provision, in it or intermediate" determination of the question of whether or not the proposed development will have a significant effect on the environment of endangered fauna.

This matter ought, in the light of her Honour's decision, to be addressed **before** any other merit-based assessment under s 90 of the Act (and certainly **before** any purported determination under s 91 of that Act) takes place.

Determination of the question of whether or not the proposed development is likely to have a significant effect on the environment of endangered fauna is, in her Honour's view, required as a "threshold or intermediate" matter, **notwithstanding** that the matter is also a relevant head of consideration under s 90(1)(c2) of the Act.

As her Honour put it:

> *"In my opinion ... there is a threshold or intermediate question to be determined before the council can exercise its power under s91(1). Is there a development application to be determined? That question must be answered in every case but it is not required to be answered at the time of lodgement. It must have been answered, however, at the time when a consent authority comes to make it determination to grant or refuse consent" (p 5).*

BSBF submitted that, if an FIS was required, it was mandatory for the FIS to accompany the development application at the time of lodgement. Failure to comply with this mandatory requirement had the effect, according to this submission, of rendering the application itself invalid.

It was submitted on behalf of Holiday Villages and the Council that a development application in the prescribed form had the status of an application, whether or not accompanied by, relevantly, an FIS (assuming an FIS was required in the circumstances): cf Randwick MC v Total Oil Refineries (Aust) Ltd and Anor (1980) 42 LGRA 184 at 191. However, where an FIS was required, and no such document accompanied the application at the time of determination, a council was obliged, according to this submission, to refuse consent (although that may, in practical terms, amount to the same thing)" (p 6).

Although the threshold question referred to by her Honour need not, according to her Honour, be answered "at the time of lodgement" of the development application, **the earlier the question is answered the better**. However, at the risk of stating the obvious, the council's consideration of this threshold question must be "proper", "genuine" and "real".

This leads to the important issue of ensuring that the material before the council is **"sufficient"** to enable it to discharge its statutory responsibility, both in relation to the threshold (or intermediate) determination under s 4A of the Act and in relation to assessment under s 90 and final determination under s 91 of the Act.

3.2 Adequacy and Sufficiency of Material Before Council

A council cannot just rely on the applicant's answer to the "threshold question" of whether or not the proposed development will have a significant effect on the environment of endangered fauna without making its own assessment of the matter. The council is, in the words of Pearlman J, **itself** "bound..... to determine whether or not that (is) so, by taking into account the matters set out in s 4 A" (p 17).

In the first instance, a council should require the applicant for development consent to furnish the council with **sufficient information** (whether in the initial statement of environmental effects

or otherwise) to enable the council to make a proper determination of the threshold question. In that regard, an applicant may need to be told by the council that it will not begin to assess the subject application on its merits until such time as it has been supplied with sufficient information to determine whether or not an FIS is required in the particular case.

In addition, where, after a consideration of the material furnished by or on behalf of the applicant, it is, or ought to be, obvious to the council that other material is "readily available which is centrally relevant to the decision to be made" (Prasad v Minister for Immigration & Ethnic Affairs (1985) 65 ALR 549 per Wilcox J), or where the available material contains "some obvious omission or obscurity" (Videto v Minister for Immigration & Ethnic Affairs (No 2) (1985) 8 ALN 238), the council will need to go further and make further inquiries.

Although the duty to inquire may be a limited one (see Hospital Action Group Association Inc v Hastings MC (1993) 80 LGERA 190 per Pearlman J at 196-197) failure to inquire (that is, solicit sufficient information, whether from the applicant or otherwise) in an appropriate case can have dire consequences.

3.3 Reliance on Views of Officers and Consultants

A council may, of course, ordinarily rely on the inquiry, advice and recommendations of its officers: see Parramatta CC v Hale (1983)

47 LGRA 319 at 346. Equally, the council may also rely on the recommendations of a consultant employed by it: see Bohun v Commissioner for Main Roads (L & E Ct, 11 December 1987, unreported). There is also no legal or policy objection why the council should not be able to take into consideration a consultant's report submitted by, say, an applicant for approval: see Oshlack v Richmond River SC & Anor (1993) 82 LGERA 222. However, it is for the council to determine what weight, if any, it places upon such a report: Oshlack

Finally, the council is also entitled to have regard to the views of a statutory authority or government department whose functions impinge upon a council domain, although the council is not strictly bound by those views: see, for example, Wiggins v Kogarah MC (1959) 5 LGRA 7; Amoco Australia Pty Ltd v Albury CC (1965) 11 LGRA 176.

However, regardless of the source and adequacy of the relevant material, the council is, in the words of Pearlman J, **itself** bound to determine whether or not the proposed development is likely to have a significant effect on the environment of endangered fauna by **itself** taking into account the matters set out in s 4A of the Act. In that regard, the council must exercise that power itself in an independent manner and must not be dictated to by a third party.

3.4 Inability to Remedy Statutory Non-Compliance by Conditions

One further thing is very clear from her Honour's judgment. If an FIS is required in a particular case and none has been provided, the deficiency cannot be remedied by the council purporting to attach "appropriate" conditions to the development consent to protect fauna or ameliorate any adverse effects on the environment of fauna. In her Honour's words:

> *"What is required is a determination of the question of likelihood of significant effect on the environment of endangered species. If there is likely to be such an effect, an FIS is required, and it addresses that question of impact. With the FIS before it, the council can then proceed properly to determine impact using that document as a tool...."* (p 17)

Thus, a council cannot determine the question of whether or not a proposed development is likely to significantly affect the environment of endangered fauna by reference to the imposition

of certain conditions which may have the effect of mitigating the environmental impact. (See also Drummoyne MC v Maritime Services Board & Ors (1991) 72 LGRA 186)

Finally, in framing conditions which actually deal with the crucial issues relating to the matters listed in s 90 of the Act, a council must take care not to purport to postpone or defer the resolution of difficult issues, particularly where those issues really go to the fundamental question of whether or not the development **ought** to be approved, or whether the development is even **legally capable** of being approved in the first place.

This is especially so with respect to measures to reduce environmental harm. Conditions requiring the preparation of management plans and the like are not necessarily bad or flawed (see Oshlack), but extreme care must be taken to ensure that they are not void for lack of finality or uncertainty. At any rate, it is highly desirable that the "substance" of such plans be in existence at the time the conditions are imposed, even if the "final details will, of perforce, need to be settled at a later date" (Oshlack, per Stein J).

In particular, the "aspects" of the proposed development the subject of the conditions must arise out of the council's consideration of relevant impacts of the proposed development. Furthermore, the conditions must specify the relevant aspects which the various management plans must address.

3.5 Conclusions

The relevant question for determination in the proceedings was whether it was reasonably open to the Byron Council, upon the material before it, to conclude that the proposed development was not likely to significantly affect the environment of endangered fauna.

In judicial review proceedings, the Court will not substitute its own opinion for that of the council and is limited to determining whether the council's decision was "reasonably open" to it: see, for example, Leichhardt MC v Maritime Services Board (1985) 57 LGRA 169; Malcolm v Newcastle CC (1991) 73 LGRA 356; Oshlack v Richmond River SC & Anor (1993) 82 LGERA 222

However, a decision will not be "reasonably open" to a council (or any other consent authority for that matter) where the council fails to follow the scheme of the Act, misdirects itself in law, misconstrues the statute, asks itself the wrong question, applies the wrong legal test or makes a decision on the basis of insufficient information.

In the case at hand, the Court found that the Byron Council failed to follow the scheme of the Act (at least in relation to the determination of the question of likelihood of significant effect on the environment of endangered fauna as a "threshold" or "intermediate" matter) and, in any event, did not have before it sufficient information on the question of fauna impact to properly determine the question. As a result, the Council was not empowered to proceed to a determination of the development application under s 91 of the Act.

The implications of the decision of Pearlman J for **all** NSW councils, in respect of the assessment of all development applications, may be conveniently summarised as follows:

1. Without a proper determination, as a "threshold" or "intermediate" matter, of the question of whether or not a proposed development is likely to have a significant effect on the development application which complies with the requirements of s 77 of the Act cannot exist.

2. Without such a conforming develop-ment application, the council will not be empowered to exercise its power of determination of the development application under S 91 of the Act.

3. The council must, in every case, ask itself the question of whether or not there is a development application to be determined. That question must be answered in every case but it is not required to be answered at the time of lodgement of the application. It must have been answered, however, at the time when the council comes to make its determination under s 91 of the Act to grant or refuse consent.

4. A council cannot determine the question of whether or not a proposed development is likely to significantly affect the environment of endangered fauna by reference to the imposition of certain conditions which may have the effect of mitigating the environmental impact.

5. What is required is a determination of the question of the likelihood of significant effect on the environment of endangered species. If there is likely to be such an effect, an FIS is required. The FIS must properly address the question of impact. With the FIS before it, the council can then proceed properly to determine impact using the FIS as a tool.

All of this highlights how essential it is for councils to ensure that (in addition to applying the correct legal test) the material before them in relation to , relevantly, fauna impact is "sufficient" to enable them to properly discharge their statutory responsibility, both in relation to the threshold or intermediate determination of fauna impact under s 4 A of the Act and with respect to assessment generally under s 90 and final determination under s 91 of the Act.

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