
Council takes on a planning panel

Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270 BC201010267

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Background

In 2009, Hyecorp Property Fund No 6 Pty Ltd (Hyecorp) lodged a development application with Ku-ring-gai Council (council) for two residential flat buildings in Roseville. As the proposed development had a capital investment value of greater than \$10 million, the development application was to be determined by a Joint Regional Planning Panel (JRPP).

Council's report recommended the development be refused on the basis that the land, the subject of the development, was affected by a road reserve under the Ku-ring-gai Planning Scheme Ordinance (KPSO). Under the provisions of the KPSO, development was permissible within the road reserve provided the consent authority had formed an opinion that the purpose of the road reserve could not be fulfilled within a reasonable time from the appointed date (1 October 1971).

In addition, the council report identified that Hyecorp could not rely on the road reserve when calculating compliance with deep soil landscaping (DSL) requirements under the KPSO. Based on the council's calculations of the size of the road reserve (later found to be erroneous), the project did not comply with the DSL standards and could not be approved in the absence of an objection under *State Environmental Planning Policy No 1 — Development Standards*.

Hyecorp lodged a SEPP 1 objection to the DSL requirements (SEPP 1 objection) with the Sydney West Joint Regional Planning Panel (panel). The SEPP 1 objection was assessed by the panel without the council ever considering it.

At its meeting on 29 April 2010, the panel granted development consent on the basis that the development largely complied with KPSO and other development standards. The panel accepted Hyecorp's SEPP 1 objection finding that compliance with the KPSO DSL standards was unreasonable and unnecessary in the circumstances.

Council challenged the panel's decision in the Class 4 jurisdiction of the Land and Environment Court on three grounds:

1. the development was prohibited as neither the council nor the panel formed the requisite opinion on the future of the road reserve subject to the proposed development;
2. the panel wrongly assessed Hyecorp's SEPP 1 objection before the council had considered it; and
3. there was denial of natural justice to the council.

Hyecorp challenged the council's standing to bring the proceedings.

Land and Environment Court decision

Justice Bischoe upheld the council's challenge based on the first ground of appeal, but rejected grounds two and three.

Opinion regarding the road reserve

Justice Bischoe held neither the panel nor the council had formed an opinion on the future of the road reserve subject to the proposed development.

His Honour held that pursuant to the KPSO it was an essential precondition to development of the road reserve that the responsible authority (in Bischoe J's opinion, the panel) assess whether the purpose for which the road reserve was created was likely to be fulfilled in a reasonable time from the appointed day (1 October 1971). On the facts, the majority of the panel had not formed that opinion thus the development was prohibited. Accordingly, the panel had no power to determine the application.

SEPP 1 objection

Justice Bischoe held that the panel wrongly considered Hyecorp's SEPP 1 objection without the council first assessing it. The statutory scheme relating to the powers

and functions of a JRPP indicates that a council's assessment of a development application is an essential condition precedent to the panel's determination.

His Honour ultimately found that the SEPP 1 objection was legally immaterial and, accordingly, declined to uphold this ground of appeal.

Denial of natural justice

The council also contended that Hyecorp's late submission of its SEPP 1 objection resulted in a denial of natural justice by preventing objectors from responding. However, Biscoe J also rejected this ground on the basis that the SEPP 1 objection was legally immaterial.

Standing

Justice Biscoe held that the council did have standing to bring the proceedings. His Honour rejected Hyecorp's submission that s 23G(5A) of the Environmental Planning and Assessment Act 1979 deemed a panel exercising council functions to be the council, such that in these proceedings the council was essentially suing itself.

Justice Biscoe found that cl 123D of the Environmental Planning and Assessment Regulation 2000 did not indicate a legislative intent that councils could not challenge a consent granted by the JRPP and referred to precedents where councils had successfully applied for development consents to be set aside on judicial review.

Justice Biscoe found the panel's decision void, issued an order restraining Hyecorp from acting on the consent, and ordered the panel and Hyecorp to pay the council's costs.

Lessons

The key error by the developer in this matter was its failure to carefully consider the provisions of the KPSO and its failure to detail whether the purpose of the road reserve was likely to be fulfilled within "a reasonable time" of the appointed date in its development application. Given the relevant date was in 1971 and the relevant development application was made in 2009, it was highly unlikely that the purpose of the road reserve could be said to have been able to be fulfilled within "a reasonable time". If this issue had been addressed in the development application, it may have prompted the JRPP to form the requisite opinion and, therefore, would have made the proposal permissible with consent. Instead, the issue simply had not been addressed and it had to be, before the consent could be validly issued.

The second lesson is that additional documents such as further reports, revisions to plans and SEPP 1 objections should not be sent direct to the JRPP without council having the chance to consider them. His Honour Biscoe J has made it clear that the JRPP's role is limited to determining applications. It is council's role to assess the applications.



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