Land And Environment Court [NSW] Law And Practice

- **MR A.J. Nott, LL.B. (Syd.), LL.M. (NSW), Conciliation and Technical Assessor of the Land and Environment Court of New South Wales.**

The Land and Environment Court has a very significant role in the development and building process in New South Wales. In this article, Mr A.J. Nott, an assessor of the Court, comments upon the Court's jurisdiction, role and function.

The Land and Environment Court [NSW] was established as a superior court of record by the *Land and Environment Court Act* 1979 ("LEC Act"), and the Court commenced to hear cases from 1 September 1980.

The Court replaced the Local Government Appeal Tribunal which heard appeals from Councils in respect of development, building and subdivision applications. The Court also replaced the Land and Valuation Court, and the main matters heard by that Court were claims for compensation and rating appeals. The Land and Environment Court was also given exclusive jurisdiction in respect of injunctions and declarations concerning town planning and certain local government matters, this jurisdiction formerly being exercised by the Equity or Administrative Law Division of the Supreme Court.

At the present time the Court has four Judges (including the Chief Judge, his Honour Justice Jerrold Cripps) and nine Conciliation and Technical Assessors. The Registrar is Mr M. Connell.

Criminal Jurisdiction

The LEC Act divides the jurisdiction of the Court into five classes. Starting with the last class, Class 5, this embraces the summary criminal jurisdiction of the Court under provisions of various Acts including the *Environmental Planning and Assessment Act* 1979 ("EPA Act"), the *Clean Air Act* 1961, the *Clean Waters Act* 1970 and the *State Pollution Control Commission Act* 1970.

Proceedings in Class 5 of the Court's jurisdiction are commenced by filing a summons at the registry and an order by a Judge is required under s. 41 of the LEC Act for the defendant to appear to answer the charge. Under the *Clean Waters Act* proceedings must be commenced within 6 months, and the Court of Criminal Appeal has held that the proceedings are commenced by the filing of a summons and not upon the making of the order for the defendant to appear: see *McGerty v. Dairy Farmers Cooperative Limited* CCA no. 60272 of 1989, 11 August 1989.

Sometimes the same activity may be punishable under two Acts, and this is not contrary to the common law rule that a person cannot be punished twice for the same offence. For example, the Australian Oil Refinery Company was prosecuted for allowing oil to be discharged from a fractured pipeline, and this activity constituted an offence under the *Clean Waters Act* and under the *Oil Pollution of Navigable Waters Act* 1960: see *Australian Oil Refinery Pty Ltd v. Cooper* CCA no. 338/86 19 November 1987.

Of particular importance will be the *Environmental Offences and Penalties Act* 1989 No. 150. This Act was proclaimed to commence on 30 November 1989. The principal object of the Act is to supplement other laws which protect the environment from pollution by creating additional offences relating to the disposal of waste without lawful authority and the leaking, spillage and escape of substances from the containers, by which harm is or is likely to be caused to the environment (s. 3(1)). If the proceedings are heard by the Land and Environment Court a penalty may be imposed of up to $1,000,000 in the case of a corporation, and up to $150,000 or 2 years in prisonment, or both, in any other case (s. 11(3)). There is a period of three years in which to commence proceedings (s. 12).

Class 5 matters can only be heard by a Judge of the Court and not by an Assessor, and this is the case also for Class 4 matters.

Jurisdiction "Equity"

Class 4 matters include, as I mentioned, cases for injunctions and declarations relating to town planning matters that were formerly dealt with by the Administrative Law and Equity Divisions of the Supreme Court.

For a legal practitioner who is contemplating proceedings on behalf of a landowner to restrain the erection of an unlawful building on adjoining land, it is important that the applicant avoid laches or delay. If your client knowingly stands by and allows a building to be erected unlawfully and then seeks an order for the removal of the whole or part of the building, the Court could be expected to be reluctant as a matter of discretion to order its removal.

It is also important that if illegal work is threatened, letters protesting against the proposed work should be written not only to the Council but also to the landowner on whose property the work is to be carried out and perhaps to the builder.

If the illegal work has commenced or is about to commence, an interlocutory injunction should be sought immediately.

A recent significant case decided by the Chief Judge is *Porter v. Hornsby Shire Council* (1989) 69 LGRA 101, in which his Honour declared a building approval invalid because the council had failed to notify adjoining owners before granting approval. This case was confirmed on

appeal by the Court of Appeal (CA. No. 40650/90 15 June 1990).

In order for a third party to have a prospect of successfully challenging a development consent or building approval that has already been granted, it is necessary to be able to establish some illegality. For example, that development consent which is required was not granted prior to or at the same time as granting building approval; or that the erection of the proposed building is prohibited by an environmental planning instrument and the property does not enjoy existing use rights. Except in the case of designated development, a third party does not have a right of appeal, so that it is not possible for the third party to challenge the merits of the consent or approval - for example, it is not open to a third party to say that the Council gave insufficient weight to a certain relevant matter.

The leading case where a development consent was challenged is *Parramatta City Council v. Hale* (1982) 47 LGRA 319 (CA).

Any person may bring Class 4 proceedings for a breach of the Environment Planning and Assessment Act 1979. But a judgment once given is a judgment in rem: *P.E. Bakers Pty Ltd v. Yehuda* CA 196 of 1987, 23 December 1988. So if one person fails to have a consent declared invalid, every other person is estopped from seeking a similar declaration.

If there is a breach of an injunction granted by the Court, proceedings may be brought for contempt. While the standard of proof to obtain an injunction is on the balance of probability, the contempt must be proved to the criminal standard: *Mangur Pty Ltd v. Fairfield City Council* CA No. 512/82, 8 May 1984. The punishment for contempt of Court has included imprisonment of individuals, the appointment of sequestrators of companies, and the imposition in some cases of extremely heavy monetary penalties.

Jurisdiction Class 3

This jurisdiction of the Court includes claims for compensation for resumed land. These claims are mostly heard by Judges of the Court although, as with other Class 3 matters, they may be heard by an Assessor if the Chief Judge has so directed.

Many of the valuation principles are elaborated in judge-made law - see for example the Court of Appeal decision in *Housing Commission of New South Wales v. Falconer* [1981] 1 NSWLR 457 (CA).

Often the proposed resumption of land results in a depreciation of the value of the land, and it is a fundamental principle that land should be valued as if it had not been affected by the proposed resumption: *Housing Commission of New South Wales v San Sebastian Pty Ltd* (1978) 140 CLR 196.

Frequently, a valuer will carry out his valuation by reference to "comparable sales". It is important that the contracts for sale of the land which is said to be comparable to the resumed land should be obtained and available to tender, because there may be special conditions of the contract that have a bearing on the contract price, e.g. the vendor agreeing to grant a low-interest mortgage.

The major number of Class 3 matters are objections to a valuation under the *Valuation of Land Act* 1916. Most of those are heard by Assessor Trefor Davies, who is a qualified valuer.

Rating appeals also fall within Class 3 with the Court's jurisdiction. The most common rating appeal was where an applicant sought to have his or her land rated as "rural land" as that expression has been defined in s.118(1) of the *Local Government Act* 1919. The definition of "rural land" has now been replaced with a definition of "farm land". The onus of proving the entitlement to the farm land rating, as was the case with the rural land rating, lies on the applicant. So it is usual for the applicant to present its case first, unlike the general practice in development and building appeals where the council begins. I have often found that in rating appeals the council elects not to call any evidence where it believes that the applicant has not discharged the onus of proof.

In past cases an applicant often failed to establish that the land was "wholly or mainly" used for one of the rural pursuits mentioned in the definition of "rural land". A typical case would be where an applicant and his family live in a house on a 4-ha property and graze a few goats and a cow - in such a case the land would be "wholly or mainly" used for the purpose of a private residence rather than for grazing. Under the new definition of "farm land" the dominant use of the land must be for farming, and the same applicant would probably lose the appeal.

Other elements that have to be established by an applicant who is seeking a "farm land" rating are that the farming must have a significant and substantial commercial purpose or character and be engaged in for the purpose of profit on a continuous or repetitive basis.

An applicant may be able to establish an income from farming activities, but when one takes in account depreciation of farm equipment and the multitude of other farming expenses, a net loss is often disclosed, with no likelihood of there being a profit made in the future - in such a case the applicant also fails to discharge the onus of proof. The fact that an applicant is accepted for income tax purposes as a primary producer does not automatically mean that he is entitled to a "farm land" rating.

Building Appeals

I move now to Class 2 of the Court's jurisdiction. The majority of cases in this Class involve appeals against the refusal by a Council of building approval or against the imposition of unacceptable conditions of building approval.

In respect of the erection of a building, development consent is sometimes required. Whether or not such consent is required, building approval is required in all areas to which Part XI of the *Local Government Act*

applies (practically the whole of the State).

The relevant matters to be taken into account in determining a building application are set out in s. 313 of the *Local Government Act* 1919.

It is important to note that if a building has been erected unlawfully, retrospective building approval cannot be obtained: *Tennyson Textile Mills Pty Ltd v. Ryde Municipal Council* (1952) 18 LGR (NSW) 231. In such a situation the appropriate course for a landowner is to seek a building certificate under s. 317AE of the *Local Government Act*, which in effect is a certificate of that the Council will take no action for the removal or demolition of the building. Formerly a landowner could have applied for a certificate of compliance under the now repealed s. 317A of that Act.

I have often found that it is possible to avoid the rule about no retrospective building approval by looking at the building and asking whether there is any outstanding work which still has to be done. For example, if an applicant has applied for building approval for a building which has already been erected to the stage where only the windows and doors have to be installed and the roof to be tiled, then it is possible and quite proper for a council or for the Court on appeal to grant building approval, not for what has already been built, but for the completion of the outstanding work. Of course, as a matter of discretion, building approval would not be granted for the completion of the building if it is considered that the building should be the subject of a demolition order or that a certificate under s. 317AE should not be issued upon the completion of the building.

It could be noted that a building certificate under s. 317AE relates to the building itself and not to the use of the building. If development consent under the EPA Act is required for the use of the building for a particular purpose, an application for such consent should be made. If there is already an unlawful occupation of the building, the development consent cannot be granted retrospectively but may be granted for the prospective use.

Appeals in respect of demolition orders are also within Class 3 of the Court's jurisdiction. These orders are given by the Council pursuant to s. 317B of the *Local Government Act*. There may be many reasons why a demolition notice is given - for example, that the building has been erected without building approval, or not in accordance with the approved plans, or is in a dilapidated and unsightly condition which is prejudicial to the amenity of the neighbourhood.

On a Friday, "Duty Assessor matters" are usually heard. These matters are heard without a call-over taking place. The majority of the Duty Assessor matters are objections under s. 317M of the *Local Government Act*, seeking a dispensation from the requirements of *Ordinance 70*.

Development Appeals

Moving now to Class I of the Court's jurisdiction, the greatest number of all matters heard by the Court fall within this Class, and most of the matters are appeals in respect of development applications. A whole weekend seminar could be devoted to these appeals, but I propose to deal briefly with the issue of contributions under s.94 of the EPA Act.

A contribution must fairly and reasonably relate to the proposed development. So, if there are already existing on the land four old flats and it is proposed to demolish them and erect three large units, and if there is likely to be no increased population on the subject land as a result, it would be unreasonable to require a dedication of land for open space purposes.

In a recent case I decided - *Smith Bolin Co. v. Shoalhaven City Council* 10681/89, 21 February 1990 - there were two lawfully erected dwelling houses on a small rural property and all that was proposed was to subdivide the land into two strata title lots with a dwelling-house on each lot. The Council sought to impose a condition of development consent requiring the dedication of land free of cost to the Council for a future road. The evidence, however, indicated that there would be no physical change in the use of the land as a result of the subdivision, and accordingly I accepted the applicant's submission that that condition was not justified.

The Court of Appeal has held that it is not reasonably open to a Council to require a contribution for improving the Shire road network generally: *Richmond River Shire Council v Ramsey* (1988) 66 LGRA 194. Thus if a dwelling is proposed to be erected on a property having a frontage to a main sealed road, it would be difficult to envisage how a contribution for the improvement of roads could be validly levied.

I should also mention that even where development consent is not required, a monetary contribution in an appropriate case could be obtained. In *Coupe v Mudgee Shire Council* (1986) 7 NSWLR 264 (CA) it was held that a monetary contribution could be required as a condition of building approval for the upgrading of a rural road giving access to a proposed dwelling.

Court's Powers

When hearing a Class 1, 2 or 3 matter, s. 39(2) of the LEC Act provides that "...the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal." And so it has been held that when hearing an appeal in respect of a development application the Court may exercise the Council's function to vary a foreshore building line. In hearing a building appeal, the Court may vary a building line fixed by the Council.

In *Huxley Homes Pty. Ltd. v Willoughby Municipal Council* LEC no. 20178 of 1989, 19 July 1989 building approval was sought for the erection of a two-storey house on land in respect of which the Council had imposed a restriction as to user limiting the height of buildings to a

single storey. I held that in granting building approval the Court could exercise the Council's function to vary the restriction so as to permit the erection of the two-storey building. This decision was affirmed on appeal by Stein J.

The Court of Appeal has held that in granting development consent for an advertising structure the Court may exercise the Council's function as the owner of a roadway to consent to lights (to illuminate the advertisement) being erected so as to project over the roadway: *Claude Neon Ltd. v Sydney City Council* CA no.581 of 1986, 14 April 1989.

In passing I could observe that, quite distinct from the question of whether development consent or building approval is required for the erection of an advertising structure, a license is required pursuant to s. 510 of the *Local Government Act* and *Ordinance 55* made thereunder. When considering *Ordinance 55*, note the mandatory requirements concerning the different kinds of advertising structures and note the distinction in the Ordinance between a permit and a license. Also, an advertisement which falls within the definition of a "commercial sign" in *Ordinance 55* does not require a licence or a permit.

The volume of work of the Assessors of the Court, as well as of the Judges, has increased considerably in recent years. Most decisions (and reasons for judgment) of the Assessors are now not reserved but are given orally at the conclusion of the hearing. The number of extempore decisions in Classes 1 and 2 increased from only 13 in 1983 to 588 in 1989.

Heritage Items

The demolition of a building having heritage significance may be controlled under the EPA Act or under the *Heritage Act* 1977. Unless an environmental planning instrument expressly controls the demolition of a building, no development consent is required for its demolition. Under the *Heritage Act* there may be an interim conservation order or a permanent conservation order preventing the demolition of the building or the Minister may make an order under s. 130 of that Act preventing the demolition of the building.

The policy of the Heritage Council is that as far as possible local councils should play a more active role in the preservation of heritage buildings. As a result, many councils have had incorporated into their environmental planning instruments provisions relating to the control and protection of items of the environmental heritage.

There have been a number of instances reported in the newspapers where a council has adopted draft provisions for the control of heritage buildings and, prior to the amendment of the environmental planning instrument, an owner of a building lawfully demolishes a building which is affected by the draft provisions. Bilgola House is one instance.

After the earthquake in December 1989, there were some buildings in Newcastle which were claimed to have heritage value but apparently there was no restriction on their demolition in an environmental planning instrument and they were not the subject of an order under the *Heritage Act*. Even if such a building were classified by the National Trust, it seems to me that the Court would not have power to grant an injunction restraining the demolition of the building.

The question may arise: What if the building is the subject of an order under the *Heritage Act* but the building has become unsafe, can the Council insist upon compliance with a demolition order under s. 317B(1A) of the *Local Government Act*? This question has been answered by the Court of Criminal Appeal in *Caralis v Smyth* CCA No. 304 of 1987, 1 July 1988, where a storm had damaged the roof of a building and the Council issued a demolition order under s. 317B(1A). A few days after the demolition order had been given an order was made under s. 130 of the *Heritage Act*. The building was nevertheless demolished and the persons who played a part in the demolition of the building were prosecuted in the Land and Environment Court. Cripps CJ held that the *Heritage Act* prevailed, and the building should not have been demolished, and His Honour's decision was upheld on appeal. The Court of Criminal Appeal also held that it is not necessary for the prosecution to prove mens rea as an ingredient of the offence, but the proseecution must negate the so-called defence of honest and reasonable belief that it was not unlawful to demolish the building.

In *Villa Floridiana Pty. Ltd. v Hunters Hill Municipal Council* (1989) 39 APA 24 extensive expert evidence was given both by the applicant and the Council as to whether or not a timber cottage should be permitted to be demolished. Having considered the matter in a lengthy judgment, I granted development consent for the demolition of the building but deferred the right to demolish the building for a certain period in order not to possibly nullify the Council's right of appeal on a question of law. An appeal to a judge of the Court was subsequently dismissed. There have only been a small number of such cases where the question of whether an item of the environmental heritage should be demolished has been considered in Class I of the Court's jurisdiction.

Study The Plans

In building or development appeals involving the erection of a building, the most important documents in the proceedings are the plans in respect of which consent or approval is sought. For lawyers, my advice would be not to be afraid to study closely the plans and to get a "feel" for the type of building proposed, its size and dimensions and design. If the plans have been rejected, only by examining the plans in detail yourself, with or without the assistance of an expert, will you be able to come to some sort of decision as to whether the Council's reasons for rejection are justified and advise your client accordingly. In some cases an amendment to the plans might be plainly desirable. Of course, there may be wider issues than the design of the building, and these issues would need to be consid-

ered too, with the advice of experts where appropriate.

During the course of the hearing of an appeal, there may be some aspects of the design of the building which are justifiably criticised by the Council and if you appear for an applicant, it may be desirable to have the applicant's expert draftsman produce an amended plan to overcome the criticism. Often there is no objection to an amendment being made during the course of the hearing, and having an amended plan often facilitates the granting of an approval, if approval is otherwise appropriate.

Rules Of Evidence

In Class 1, 2 or 3 of the Court's jurisdiction the Court is not bound by the rules of evidence, and the Court is directed by s.38(1) the LEC Act to conduct the proceedings "with as little formality and technicality, and with as much expedition, as the requirements of this Act and every other relevant enactment and as the proper consideration of the matters before the Court permit." I have found that generally speaking the more experienced lawyers who regularly practice in the Court make few objections to the admission of evidence. The practice of the Assessors, again speaking generally, is to admit relevant evidence and hear submissions as to what weight should be given to disputed evidence that does not technically accord with the rules of evidence. "People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit the evidence and discuss its weight": Cockburn CJ in *R.N. Birmingham Overseers* (1861) 1 B & S 763 at 767 (QB).

An assessor is of course bound to observe the rules of natural justice.

Further Appeal

There is no right of appeal from a decision of an Assessor except on a point of law. The appeal is to a Judge of the Court. It is not a proper ground of appeal that the Assessor has attributed insufficient weight to a particular aspect of the case: *Randwick Municipal Council v Manousaki* (1988) 66 LGRA 330 (CA). Appeals from a Judge of the Court are provided for in ss. 57 and 58 of the LEC Act and are made to the Court of Appeal or Court of Criminal Appeal.

As far as I am aware, the most recent High Court decision concerning an LEC matter was three years ago in *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145 where the High Court affirmed the interpretation by Cripps J and by the Court of Appeal of the expression "place of public worship" in the Canterbury Planning Scheme Ordinance.

I hope that I have been able to give a broad picture of the work of the Land and Environment Court and to highlight some of the types of cases that are heard.