Greendene Development Corporation Pty Ltd and Environmental Protection Authority [2003] WASCA 242 - Referrals to the EPA under Part IV of the Environmental Protection Act 1986

The Full Court of the Supreme Court delivered its judgment in *Greendene Development Corporation Pty Ltd and Environmental Protection Authority* [2003] WASCA 242 on 10 October 2003. The case concerned an application for prerogative relief by a developer who proposed to subdivide land in the Margaret River area against a decision of the Environmental Protection Authority (EPA) to assess the subdivision proposal.

After several revisions of an "outline development plan" for the subdivision, in February 2000 the Shire of Augusta – Margaret River (Shire) forwarded to the Department of Environmental Protection (as it was then called) (DEP) a copy of "an application" received in relation to the "Proposed Riverslea Outline Development Plan" (as the Shire described it). The Shire's covering note requested that the DEP assess the application and provide any comments it wished to make within 30 days. The DEP's "EPA Service Unit" (a section of the DEP which provides advice and assistance to the EPA) considered the proposal for the purpose of providing advice to the Shire and did not pass the letter to the EPA. It did not treat it as a referral to the EPA under section 38 or 48A of the *Environmental Protection Act* 1986 (the EP Act) and made that explicit in its response to the Shire. The DEP also commented that it would not support the proposal due to the lack of information regarding a number of environmental issues.

Subsequently, the applicant revised the plan and modified it further and a final form was endorsed by the Western Australian Planning Commission (WAPC) on 11 December 2001. On 19 July 2002, the revised application for subdivision was approved, subject to conditions by the WAPC.

By letter dated 15 October 2002, the Leeuwin Conservation Group (Inc) referred the subdivision approval at Riverslea for environmental impact assessment under section 38 of the EP Act. On 23 December 2002, the Chairman of the EPA determined that the subdivision should be assessed under the EP Act by way of a public environmental review, one of the most comprehensive levels of assessment. The EPA notified the applicant and the Shire of this decision and the Shire then notified the applicant that it was precluded from any further decision making in relation to the matter pursuant to section 41(2) of the EP Act.

The applicant then sought that the Supreme Court quash the decision of the EPA that the approved subdivision of the land be assessed. The three grounds were (1) that when the WAPC conditionally approved the application to subdivide, it ceased to be a "proposal" for the purposes of the EP Act, (2) that the application was essentially the same as the proposal that had already been referred to the EPA in around March 2000 and could not be referred again under section 38(5), and (3) that contrary to section 40(1)(b), the EPA failed to inform the applicant in writing within 28 days after the referral that the EPA considered the that the proposal should be assessed.

The Court dismissed the application and held that:

1. An application for subdivision is a proposal, whether or not the application has been approved. "Proposal" is not limited to proposals which cannot be implemented without further approval from some decision making authority. Rather, the EP Act continues to operate until such time as a proposal has been fully implemented. Further, the application in this case required further approvals by the Shire, which is a "decision making authority" and the application was therefore a proposal under the EP Act.

2. The application had not been previously referred to the EPA and section 38(5) of the EP Act did not apply to prevent the application being referred to the EPA in 2002. The letter from the Shire in 1999 was not a referral to the EPA because it was not expressed to be so and did not contain the detailed subdivision plan.

3. Although the EPA had clearly breached the 28 day time limit, the court held that the legislature intended that time limit in the EP Act was set to ensure that the proponent and others were not left in limbo for an undue period of time. The legislature did not intend that if the time limit was not complied with, the proposal could no longer be assessed. Accordingly, the failure of the EPA to notify the applicant within 28 days did not prevent the EPA from considering the application.

The decision demonstrates the importance of ensuring referrals to the EPA are made unambiguously and of ensuring the EPA acknowledges the referral.