Land and Environment Court of New South Wales

Shellharbour City Council v Minister for Planning [2011] NSWLEC 59 (6 April 2011)

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	Land and Environment Court
	New South Wales
Case Title:	Shellharbour City Council v Minister for Planning
Medium Neutral Citation:	[2011] NSWLEC 59
Hearing Date(s):	1 April 2011
Decision Date:	06 April 2011
Jurisdiction:	
Before:	Biscoe J
Decision:	Directions that Respondent Minister provide relevant documents and statement of reasons.
Catchwords:	JUDICIAL REVIEW:-challenge to Minister's

	approval under Part 3A Environmental Planning and Assessment Act 1979 - directions that Respondent Minister provide relevant documents and statement of reasons. PRACTICE AND PROCEDURE:- challenge to Minister's approval under Part 3A Environmental Planning and Assessment Act 1979 - directions that Respondent Minister provide relevant documents and statement of reasons.
Legislation Cited:	Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13 Administrative Decisions Tribunal Act 1997 s 14 Electronic Transactions Act 2000 Environmental Planning and Assessment Act 1979 s 4, Part 3A Evidence Act 1995 Land and Environment Court Class 4 Proceedings Practice Note [14], [15] Land and Environment Court Rules r 4.3 Uniform Civil Procedure Rules r 21.2
Cases Cited:	Austral Monsoon Industries Pty Ltd v Pittwater Council [2009] NSWCA 154, 75 NSWLR 169 Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 2) [2010] NSWLEC 1, 172 LGERA 25 Charlton v Moore (No 2) [2009] NSWLEC 47 Hooper v Port Stephens Council [2010] NSWLEC 41 Xstrata Mangoola Pty Ltd v Muswellbrook Shire Council [2011] NSWLEC 46
Texts Cited:	
Category:	Procedural and other rulings
Parties:	Shellharbour City Council (Applicant)

	Minister for Planning (First Respondent) Delfin Lend Lease Limited (Second Respondent)
Representation	
- Counsel:	Mr J Lazarus (Applicant) Ms K Richardson (First Respondent) Ms A Mitchelmore (Second Respondent)
- Solicitors:	Sparke Helmore (Applicant) Department of Planning (First Respondent) Allens Arthur Robinson (Second Respondent)
File number(s):	40183 of 2011
Publication Restriction:	

Judgment

Introduction

1. These are judicial review proceedings by Shellharbour City Council challenging the approval by the first respondent, the Minister for Planning, of a concept plan under Part 3A of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**). The second respondent, Delfin Lend Lease Ltd, is the proponent of the proposed development.
2. The proceedings are before the Court for directions. The applicant seeks directions, which are contested, that:

    (a) the Minister provide the applicant with access to files held in relation to the concept plan application, including documents and electronic communications held by the Department of Planning or the Minister in respect of the concept plan application;

    (b) the Minister provide the applicant with a written statement setting out:

(i)the findings made by the Minister on any material question of fact;

(ii)the evidence on which any such findings were based;

(iii)the Minister's understanding of the applicable law; and

(iv)the reasoning process that led to the decision;

(c) related directions.

1. The respondents submit that these directions should not be made because:

(a) the Court should not exercise its discretion before the applicant files its points of claim. Thereafter the production of documents and reasons may be restricted to the issues raised by the points of claim;

(b) the applicant is seeking discovery (as indicated by the words "in relation to" in its proposed order) whereas the Class 4 Proceedings Practice Note at [15] says that formal discovery will only be ordered in exceptional cases;

(c) the "Minister" is not a "public authority" (as defined) referred to in r 4.3 of the Land and Environment Court Rules 2007 (**LECR**);

(d) the change in government arising out of the recent election is a discretionary consideration because the Minister who made the challenged decision is no longer the Minister. If the new Minister has to provide reasons, it should be to the best of their knowledge, information and belief.

The Rules and Practice Note

1. Rule 4.3 of the LECR provides:

4.3 Proceedings for the review of public authority's decision

In any proceedings in which a public authority's decision is challenged or called into question, the Court may make one or more of the following orders:

(a) an order directing the public authority to make available to any other party any document that records matters relevant to the decision;

(b) an order directing the public authority to furnish to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:

(i) the public authority's findings on any material questions of fact, and

(ii) the evidence on which any such findings were based, and

(iii) the public authority's understanding of the applicable law, and

(iv) the reasoning process that led to the decision,

(c) an order for particulars, discovery or interrogatories.

1. Rule 1.3 of the LECR provides that "public authority": "has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*". "Public authority" is defined in s 4 of the EPA Act as follows:

public authority means:

(a) a public or local authority constituted by or under an Act, or

(b) a government Department, or

(c) a statutory body representing the Crown, or

(d) a chief executive officer within the meaning of the Public Sector Management Act 1988 (including the Director-General), or

(e) a statutory State owned corporation (and its subsidiaries) within the meaning of the State Owned Corporations Act 1989, or

(f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or

(g) a person prescribed by the regulations for the purposes of this definition.

1. In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd*

(No 2) [2010] NSWLEC 1, 172 LGERA 25 at [70] Preston CJ assumed that, pursuant to r 4.3 the Court could have directed the Minister to furnish a written statement setting out the reasons for the Minister's decision. However, the question whether the Minister was a "public authority", as defined, so as to enliven r 4.3 was not argued before his Honour.

2. In my view, as the respondents submit, the definition of "public authority" in the LECR is not wide enough to include a Minister. Consequently, r 4.3 is not enlivened in this case. It is an anomaly that r 4.3 applies to other decision makers, but not a Minister. The anomaly requires reform through an amendment to r 4.3.

3. However, the Court's Class 4 Proceedings Practice Note at [14] is wider in ambit. The Class 4 Proceedings Practice Note provides for a "public body" or "public official" to provide documents and reasons. In my opinion "public official" includes a Minister. Paragraph 14 provides:

Provision of information in judicial review proceedings

14. Where the proceedings involve a challenge to the decision of a public body or public official:

(a) the respondent public body or public official is to make available to the other party or parties the documents it says record matters relevant to the decision, within 14 days of that respondent's appearance; (b) the Court may, at a directions hearing, direct the respondent public body or public official to furnish to the other party or parties within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision; (c) otherwise in appropriate cases, the Court may, at a directions hearing, make orders for the matters in (b) to be ascertained by way of particulars, discovery or interrogatories.

15. Orders for formal discovery and interrogatories will only be made in exceptional cases and such orders will then generally be confined to particular issues.

1. Since 2005 court practice notes have had statutory recognition as a source of practice and procedure powers, additional to the powers under rules of court: s 15 *Civil Procedure Act* 2005.
2. Rule 4.3 of the LECR and [14] of the Class 4 Proceedings Practice Note are beneficial provisions which follow comparable provisions in [23] of the Supreme Court of New South Wales Practice Note SC CL 3 Administrative Law List, s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 14 of the *Administrative Decisions Tribunal Act* 1997 (NSW): *Charlton v Moore (No 2)* [2009] NSWLEC 47 (Biscoe J). The words "public body or public official" in [14] of this Court's Practice Note mirror the very similar provision in [23] of the Supreme Court's said Practice Note.
3. Directions pursuant to the Class 4 Proceedings Practice Note have been made by this Court in *Charlton* and in *Hooper v Port Stephens Council* [2000] NSWLEC 41 (Sheahan J). In both cases a local council was ordered to provide a statement of reasons for its decision. The respondents contend that the Court should not make directions before the applicant has filed its points of claim. However, in *Hooper* the council was directed to provide the statement of reasons before the applicant was directed to file amended points of claim (earlier points of claim having been struck out).
4. Appellate authority establishes that the provisions in the Supreme Court's Practice Note SC CL3 at [23] apply to a Minister: *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154, 75 NSWLR 169. Therefore, the very similar provisions in this Court's Class 4 Proceedings Practice Note at [14] also apply to a Minister. In *Austral* the Minister for Planning was the second respondent. The case concerned a challenge to the validity of a statement of a statutory opinion by the Minister. There was an issue as to whether the opinion was formed for an improper or collateral purpose. Spigelman CJ (McColl JA and Handley AJA agreeing) held at [97] - [101] that the judicial mechanisms in [23] of the Supreme Court Practice Note SC CL 3 were available to establish the Minister's purpose:

97 [Counsel] submitted that the Briefing Note was evidence of the Minister's purpose because it was signed and thereby adopted by him. However, signature does not necessarily indicate "adoption" of the contents. All the Note itself suggests is that the Minister "note" its

contents. The contents of a departmental memorandum of this character are not usually evidence of what was in the Minister's mind, nor do they establish the Minister's purpose.

98 Establishing the purpose of a decision-maker has always generated difficulty in applications for judicial review of administrative decisions where the decision-maker does not identify his or her reasoning process. That is why it was necessary to enact s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 25D of the Acts Interpretation Act 1901 (Cth). There are no equivalent provisions in this State.

99 However, there are judicial mechanisms for establishing the purpose of the actual decision-maker. In the present case, interrogatories could have been directed to the Minister with a view to eliciting the relevant evidence. Other powers of the court could be called in aid in order to establish the relevant facts.

100 I refer, for example, to Practice Note SC CL 3 which applies to proceedings in the Administrative Law List in the Supreme Court and which states:

23. Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing, direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare Administrative Decisions Tribunal Act 1997 (NSW), s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit.

101 It is not, in my opinion, permissible to infer a Minister's purpose from

a Briefing Note of the character under consideration. The Minister, who had had a long course of dealing with this issue, did not, by accepting the ultimate recommendation, adopt the whole of the reasoning in the document. It was necessary to establish his purpose in some other way. That was not done.

1. Both the Land and Environment Court and the Supreme Court Practice Notes require relevant documents to be made available and a statement of reasons to be provided to the applicant. The purposes of these requirements include: to enable the existence of a legal error made by the decision-maker to be more readily perceived than otherwise might be the case; and, to engender confidence in the community that the decision-maker has gone about their task lawfully: see the authorities reviewed in *Charlton*. Therefore, relevant documents and reasons may inform an applicant's case. This is consistent with [14] of the Class 4 Proceedings Practice Note. In the present case, there seems little point in requiring the applicant, who seeks document and reasons, to plead before seeing them, for it then may only have to amend.
2. The Court is also empowered to order discovery of documents under r 21.2 of the *Uniform Civil Procedure Rules* 2005, which provides:

21.2 Order for discovery

(1) The court may order that party B must give discovery to party A of:

(a) documents within a class or classes specified in the order, or (b) one or more samples (selected in such manner as the court may specify) of documents within such a class.

(2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.

(3) Subject to subrule (2), a class of documents may be specified:

(a) by relevance to one or more facts in issue, or (b) by description of the nature of the documents and the period within which they were brought into existence, or (c) in such other manner as the court considers appropriate in the circumstances.

(4) An order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.

1. However, orders for "formal discovery" are only made in exceptional cases: r 15 of the Class 4 Proceedings Practice Note. Instead of orders for formal discovery, I propose to direct that the documents sought are to be made available informally and to refer to documents as "relevant" (rather than "in relation to") the concept plan application (cf *Xstrata Mangoola Pty Ltd v Muswellbrook Shire Council* [2011] NSWLEC 46).
2. In a case such as this, where the current Minister is no longer the person who granted the approval (because of the recent change in government), the terms of the direction should be moulded so that reasons and relevant documents are to the best of the Minister's knowledge, information and belief. I adopted such a formula in *Charlton* when ordering a collegiate body, a council, to provide reasons: at [21].

Directions

1. The Court makes the following directions:

    (1) The first respondent is to allow the applicant to inspect documents held which, to the best of the first respondent's knowledge, information and belief, are relevant to the second respondent's concept plan application No. MP 09-0082 (Calderwood) approved on 8 December 2010, by 11 April 2011. They are to include any such document or electronic communication in the files of the first respondent or the NSW Department of Planning.

A document has the meaning given to it in the *Evidence Act* 1995 (NSW) and an electronic communication has the meaning given to it in the *Electronic Transactions Act* 2000 (NSW).

(2) If requested by the applicant, the first respondent is to provide the applicant with a copy of any document referred to in direction 1 above, at a reasonable cost to the applicant not exceeding the photocopying rates fixed by the Supreme Court of NSW by no later than three working days

after receipt of the request.
(3)
(4) The first respondent is to provide the applicant by 18 April 2011 with a statement in writing setting out, to the best of the first respondent's knowledge, information and belief, the reasons for the Minister's approval of the said concept plan.
(5)
(6) The applicant is to file and serve its points of claim by 25 April 2011.
(7)
(8) The respondents are to file and serve their points of defence by 9 May 2011.
(9)
(10) The applicant is to file and serve any affidavits and tender bundle on which it intends to rely by 23 May 2011.
(11)
(12) The respondents are to file and serve any affidavits and tender bundle (avoiding duplication with the applicant's tender bundle) on which they intend to rely by 6 June 2011.
(13)
(14) List for directions on 10 June 2011 with a view to fixing a hearing date.
(15)
(16) Liberty to apply.