Case Note: Lloyd v Wollongong City Council [2015] NSWLEC 146

A recent decision of Justice Pepper of the NSW Land and Environment Court answers a question that many planners may have thought about from time to time. Many local environmental plans, particularly those applying in rural areas, provide an exception to the minimum lot size required for the erection of a dwelling house if the lot was created before the current plan commenced and on which the erection of a dwelling house was permissible immediately before the commencement of the current plan.

The question considered by Justice Pepper in Lloyd v Wollongong City Council [2015] NSWLEC 146 was - whether “permissible” in those circumstances means only listed as a permitted use in the zoning table in the former instrument, or listed as a permitted use as well as compliant with all relevant development standards under the former instrument.

The Court held that the erection of a dwelling house was not permissible on land immediately before the commencement of Wollongong Local Environmental Plan 2009 (“WLEP 2009”) because the granting of consent under the former planning instrument was contingent on a variation to the minimum lot size under State Environmental Planning Policy No. 1 (“SEPP 1”).

The facts in Lloyd may be briefly summarised as follows:

- A development application was lodged for the construction of a dwelling house on a site at Otford in the Wollongong LGA having an area of approximately 2 ha.

- WLEP 2009 permitted a dwelling house on the lot if, among other things, the lot was “created before [WLEP 2009] commenced that met the minimum lot size specified to permit the erection of a dwelling house under Wollongong Local Environmental Plan 1990 in effect immediately before that commencement (clause 4.2A(2)(b)).

- Under Wollongong LEP 1990 (which was the former planning instrument) a dwelling house was permitted with consent on the land if the land had an area of 10 ha or more (clause 14(1)(c) of LEP 1990). That clause was a development standard, and SEPP 1 applied.
The applicant argued that clause 14 of the LEP 1990 was not a prohibition on development and clause 14(1)(c) did no more than fix a standard in respect of an aspect of the development which was amenable to the dispensation power conferred by SEPP 1. Accordingly, the applicant submitted that a dwelling-house, not being prohibited under LEP 1990, was therefore permissible immediately before the commencement of WLEP 2009.

The council contended that in order for clause 4.2A(2) of WLEP 2009 to be met, what was required was a provision contained in the former instrument that could objectively determine whether the erection of a dwelling was permitted, and which did “not rely on chance” or a “contingency”.

The Court considered the meaning and purpose of clause 4.2A of the WLEP 2009 in its context, particularly the clear purpose of clause 4.2A to limit opportunities for new dwellings in the E3 zone.

The Court held that the possibility of making a SEPP 1 objection did not render the proposed dwelling “permissible” for the purposes of cl 4.2A(2)(b) of WLEP 2009. To find otherwise would “denude” clause 4.2A(2)(b) of any force. Ultimately, the Court held that:

“... a development standard that requires a lot to be not less than 40 ha and which is not relaxed by a dispensation granted under SEPP 1, prohibits the carrying out of development, in the present case, in the form of the erection of a dwelling-house on a lot where that standard is not met.”

In effect the Court said that the distinction between a “development standard” and a prohibition that underlies the test in SEPP 1 does not apply to the question of permissibility in circumstances like clause 4.2A(2)(b) of WLEP 2009. A different test applies. In those circumstances, and unlike the test required in SEPP 1 (ie is the clause a prohibition or development standard?), a development standard can amount to a prohibition.

The decision in Lloyd probably confirms what most planners had already thought about provisions like clause 4.2A(2)(b) of WLEP 2009, but at least now those opinions are supported by a Judge of the Land and Environment Court.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

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