A Land and Environment Court case law update

By Michael Mantei

A recent decision of the Land and Environment Court confirms that a consent authority lacks power to require creation of a right of carriageway as a condition on a development consent where there is no nexus between the right of carriageway and the development. This situation arises from time to time when a council seeks to give effect to a localised strategic plan by requiring a developer of land closest to a public road to grant a right of carriageway over the development site in favour of other land further away from the public road, thus giving that other land vehicular access to the public road.

These circumstances arose in Cavasinni Constructions Pty Ltd v Fairfield City Council [2010] NSWLEC 65. The facts of the case were that the Council had imposed a condition on a development consent for alterations and additions to a restaurant required the creation and registration of a right of carriageway 7.315m wide across the site, for the benefit of three adjacent properties. The plan identified in the condition required that the location of the right of carriageway to be such as to provide an extension to a public road across the site.

Cavasinni appealed the condition to the Land and Environment Court. Surprisingly, the Commissioner hearing the matter dismissed the appeal and refused the modification application. Cavasinni appealed the Commissioner’s decision to a Judge of the Court. The appeal came before Justice Craig on 15 March 2010.

Craig J considered the power to impose conditions under section 80A(1)(a) of the Environmental Planning and Assessment Act 1979 and the “Newbury tests”. The Court confirmed that in order for any condition to be validly imposed it must: (a) be authorised by the EP&A Act and (b) meet each of the 3 tests (“the threefold Newbury tests”) established in Newbury District Council v Secretary of State for the Environment [1981] AC 578.

Section 80A(1)(a)

Section 80A(1)(a) of the EP&A Act confers power on a consent authority to impose a condition on a development consent if it “relates to any matter referred to in s 79C(1) of relevance to the development the subject of the consent.” The Court held in Cavasinni that the subject condition was not authorised by section 80A(1)(a) of the Act because:

(i) none of the instruments or documents identified in s 79C(1)(a) were identified as being relevant;
(ii) no impacts of the development authorised by the development consent were identified as justifying the imposition of condition 3(a), there being no access or vehicle movement issue arising from the implementation of the approved development (s 79C(1)(b));

(iii) no issue was identified that could sustain a condition by reference to paragraphs (c) and (d) of s 79C(1); and

(iv) the broader public policy of seeking to improve rear lane access for properties to the east of the subject site could not justify condition 3(a) taking account of “the public interest”, as that expression is used in paragraph (e) of s 79C(1).

His Honour then turned to the 2nd of 3 Newbury tests, which stipulates that in order to be validly imposed a condition “must fairly and reasonably relate to the permitted development.”

The Court held that the condition did not pass the 2nd of the Newbury tests. It held that there needs to be a nexus between the condition proposed and the development for which consent has been granted in order for the condition to fairly and reasonable relate to the development. This was a “fundamental consideration.”

The Court noted that “ordinarily, that nexus will be established if benefit, even though indirect, is demonstrated” but in the case before the Court no such benefit had been identified. Further, the Court held that the Commissioner erred by “going directly to consideration of the advantages and disadvantages of the condition, if implemented, without first identifying the nexus between the development authorised by the consent under consideration and the condition.”

The granting of a right of carriageway is a valuable property right and should not be acquired by stealth disguised as an invalid condition of development consent. Applicants for development consent should be aware of a consent authority’s limitations in this regard. No nexus, no power.

If you wish to discuss this or any other planning law matters, or if you require specific legal advice on a particular matter please contact me on the numbers listed below.

Michael Mantei
Solicitor, Planning Law Solutions
T: 4647 2840 E: michael@planninglawyer.com.au
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