Existing Use Rights - Brinara Pty Ltd v Gosford City Council

Existing use rights first appeared in New South Wales in planning schemes prepared under Part XIIA of the Local Government Act 1919. Since then existing use rights have been a constant source of uncertainty, misunderstanding and sometimes controversy. Existing use rights are one of only a handful of planning law cases that have made it all the way to the High Court of Australia. They have also been the focus of sporadic legislative intervention.

Planning authorities hate existing use rights because they undermine orderly planning. Developers either love them or hate them depending on how much money they need to spend on gaining an approval based on existing use rights.

The decision of the NSW Land and Environment Court in Brinara Pty Ltd v Gosford City Council¹ demonstrates how easy it is, even for a Senior Commissioner of the Land and Environment Court, to be led into legal error when dealing with existing use rights.

Brinara is a case about the expansion of an existing use under 42(b) of the Environmental Planning and Assessment Regulation 2000 (Regulation), and in particular how “land” is identified for the purpose of that clause. The decision provides an excellent guide for town planning practitioners preparing assessment reports that deal with the expansion of an existing use.

The site and proposed development

The topography of the site is material to the facts of the case. The Court’s judgment reveals that the site sloped steeply away from (and below) the Central Coast Highway at Erina Heights. A small part of the ground floor slab was constructed on natural ground. The other part of the ground floor slab extended over the steep slope, being supported by a series of concrete columns.

Beneath the suspended part of the ground floor slab was a significant undercroft or void area. Brinara sought consent to use this area for the purpose of a commercial storage facility comprising several hundred storage lockers of varying sizes.

¹ [2010] NSWLEC 230
The statutory context

Clause 42(b) of the Regulation was central to the legal issues in the case. Clause 42(b) is titled “development consent required for enlargement, expansion and intensification of existing uses” and provides that:

“The enlargement, expansion or intensification: (a) .... (b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date (my emphasis).”

It was agreed by the parties that the ground floor slab did in fact enjoy existing use rights for the purposes of commercial premises. The controversy was whether or not the existing use right also attached to the under floor area. If it did, the commercial use on the ground floor could be expanded to include the under floor area. If it did not, the existing commercial use could not be expanded and the proposed commercial use was prohibited.

History of the litigation

The Council refused the development application and Brinara appealed. The appeal was heard by Senior Commissioner Moore and Commissioner Morris. The Commissioners dismissed the appeal and refused the development on the basis that the land to which the existing use right attached was confined to the parking area and the floor pan at the upper level.

Accordingly the Commissioners could not “...be satisfied that the enlargement, expansion or intensification of the use is only being carried out on the land for which the existing use is permitted.” The status of the under floor area was “merely ancillary to or supportive of but not permitted to be used for commercial purposes.” Brinara appealed the Commissioners’ decision under section 56A of the Court Act. The appeal was determined, and upheld, by Justice Craig of the Land and Environment Court.

There was another chapter in the litigation of the case that, although interesting, does not feature in this case note. It involved a decision on a preliminary question of law determined by Justice Pain on the issue of characterisation of the existing use (see Brinara Pty Ltd v Gosford City Council [2010] NSWLEC 25).

Justice Craig’s decision

Upholding the appeal Justice Craig held that the Commissioners “did err in law in the application of the provisions of cl 42”. He held that the Commissioners’ decision to exclude from consideration, for the purpose of applying clause 42(2) of the Regulation, anything that was “merely ancillary to or supportive of but not permitted to be used for commercial purposes” involved an erroneous application of principle.

The correct principle was outlined in authorities such as Steedman v Baulkham Hills Shire Council [No 1]2 and Parramatta City Council v Brickworks.3 In Steedman the Court observed that the correct approach

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2 (1991) 87 LGERA 26
3 89 LGERA 41
to the determination of existing use rights was properly informed “if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose”.

In *Brickworks* the Court observed that an existing use of land referred to land which, from a practical point of view, should be regarded as one piece of land and not necessarily within one subdivision or title.

The boundaries of the unit of land are to be identified by undertaking both a **qualitative and quantitative analysis** of the features and characteristics of the particular use and of the land on which the use is being carried out. The following paragraph from Justice Craig’s judgment conveniently summarises the relevant principle [44]:

“This dual assessment [qualitative and quantitative] will involve the necessity to identify those areas of the land which, in some way, attract or are necessary to the existing use, albeit that they are not at a moment in time actively occupied for that use. Consideration of land identified as being held in reserve for the existing use, including land that is land without which the current use could not be enjoyed, must necessarily be undertaken.”

Where the lawful existing use is founded in a development consent, the land to which that consent is expressed to relate will usually determine the unit of land upon which the existing use is carried out (*Brinara* [at 47]).

When regard is had to those principles, it is clear that the decision to exclude anything that was “merely ancillary to or supportive of but not permitted to be used for commercial purposes” involved an erroneous application of those principles. One of the elements of development that was sanctioned by the Brinara’s original development consent was the erection and use of a building for commercial purposes.

A full copy of the judgment is published on the Land and Environment Court’s website at www.lawlink.nsw.gov.au/lec

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3 (1972) 128 CLR 1

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