

PLANNING PRINCIPLES AND CONSISTENCY OF DECISIONS

Talk delivered by Dr John Roseth, Senior Commissioner, Land and Environment Court of New South Wales to the Law Society's Local Government and Planning Law Seminar on 15 February 2005.

What are planning principles?

Around September 2003 two changes occurred in the judgments of the commissioners of the Land and Environment Court. The first change saw the judgments being published on the Internet. The second change was that some of the judgments included planning principles.

The word *principle* derives from the Latin *principium*, meaning the *beginning, origin or source*. This has given rise to many meanings of the word; however, I use it in the sense of a general assumption or belief forming the basis of a chain of reasoning. A planning principle therefore applies to a situation that arises frequently and can be applied to assist in reaching a decision in a particular case.

While legal principles have always been the basis of decisions by judges, they are a new phenomenon in merit decisions by commissioners. (As far as I can tell, they are a new phenomenon in merit decisions generally; even those made by consent authorities other than the Court.) This is not to say that in the past planning principles were absent in the assessments of development proposals. They hovered in the background of most assessments, but they were usually not explicitly stated. Let me give an example.

Assume that there is a proposal for a two-storey house in a street in which the existing houses are single-storey and where the only objection to the proposal is its impact on the streetscape. Where a commissioner (or anyone else) considers the proposal, he or she is likely to take into account factors such as the scale and character of the street, whether or not it is in a conservation area, the setback of the proposed house in relation to other houses, and the likelihood that one day the existing houses might also be extended to two-storeys. Assume that these considerations have led to the conclusion that the impact of a two-storey building in the street is acceptable.

One way to explain this conclusion in a judgment is to state the reasoning only in relation to the particular two-storey building proposed in the particular street. An obvious disadvantage of this approach is that no one can guess what a decision is likely to be on another two-storey building proposed in another street of single-storey buildings, even if the circumstances were fairly similar. Nor would the commissioner hearing the second case be able to apply the criteria that were applied to reach a decision in the first.

The point I would like to make is that, even where a decision is expressed only with reference to a particular case, the reasons are likely to be based on criteria that have wider application and are implicit in the decision. In the present example, the criteria are likely to be those outlined above, ie the character of the street, whether or not it is in a conservation area, the setback

and the likelihood of two-storey extensions. However, the decision may not explicitly state these criteria. When it does, it establishes a planning principle. This makes the decision clearer to those who are affected by it. It also assists in making future decisions of a similar kind consistent with the first.

Planning principles in recent judgments

The commissioners of the Court keep a record of judgments that include planning principles. I know that several advocates who practise in the Court keep their own record. While we have not yet made the record publicly available, we will do it within a matter of weeks.

So far there have been judgments containing planning principles on

- adaptive re-use, (*Michael Hesse v Parramatta City Council* [2003] NSWLEC 313);
- the location of brothels, (*Martyn v Hornsby Shire Council* [2004] NSWLEC 614);
- the relationship between building envelopes and floor space ratio (*PDE Investments No 8 v Manly Council* [2004] NSWLEC 355);
- the monitoring of compliance with conditions of approval (*Dayho v Rockdale City council* [2004] NSWLEC 184);
- heritage impact (*Anglican Church Property Trust v Sydney City Council*[2003] NSWLEC 358);
- noise attenuation (*Stockland Developments v Wollongong City Council* [2004] NSWLEC 470);
- location of communal open space (*Seaside Property v Wyong shire Council* [2004] NSWLEC 600);
- privacy (*Meriton v Sydney City Council* [2004] NSWLEC 313);
- reliance on landscaping (*Super Studio v Waverley Council* [2004] NSWLEC 91);
- seniors' living developments in the streetscape (*GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council* [2003] NSWLEC 268);
- small or narrow sites (*CSA Architects v Randwick City Council* [2004] NSWLEC 179);
- staged developments (*Anglican Church Property Trust v Sydney City Council*[2003] NSWLEC 358);
- sunlight access (*Parsonage v Ku-ring-gai Council* [NSWLEC 347);
- the assessment of view impact (*Tenacity Consulting v Warringah* [2004] NSWLEC 140);

The list gets longer as judgments containing planning principles are published. Within a short time most major issues in planning disputes are likely to be covered.

Planning principles on the assessment of view impact

There is no time to discuss all of the above principles; in any case they ought to be self-explanatory. However, it may be useful to look at one set of principles that has been widely applied since its inception, namely the principles applying to the assessment of view impact (*Tenacity Consulting v Warringah* [2004] NSWLEC 140).

View impact is an issue that frequently arises in appeals. When planning instruments deal with the assessment of view impact, they tend to contain generalised statements that are difficult to apply to particular cases. For example, they might state that *view sharing* should be encouraged. It is left to applicants and those assessing proposals to decide what view sharing means, when it is reasonable and when it is not. Clearly, those whose views are about to be obstructed by a new building consider the impact as *view taking* rather *view sharing*.

The judgment in *Tenacity Consulting v Warringah* sets down four steps that should be undertaken to reach a decision whether a view impact is reasonable.

The first step requires the assessment of views that the proposal will affect. It establishes a value system for assessing different kinds of views. Water views are valued more highly than land views; iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

One may ask: from where did the commissioner (in this case I) receive the mandate to attribute values to views? I accept that the attribution of values to views is a subjective exercise. It is conceivable that someone disagrees with it. If that is the case, it is legitimate to argue that the values in *Tenacity Consulting* should not be applied in a subsequent case. However, even where the values established in the *Tenacity Consulting* planning principle are rejected, the existence of the principle will ensure that the debate about view loss will be more structured and more intelligent than would have been the case without the existence of the planning principle.

The second step is to consider how reasonable it is to expect to retain the views. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position is also relevant. Many people who now have a view sitting on their lounge suites consider that they have lost the view if they have to stand up to see it. Yet, it is difficult to retain a sitting view as it may require that the adjoining property forgo most of its development potential.

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

The same comments about subjectivity apply as before. If someone wants to argue that views from bedrooms are more important than from living rooms because people spend more time there than in living rooms, that argument may be made.

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

This last principle states what many objectors are reluctant to accept. This is because in many cases people obtain panoramic views as a result of an adjoining site being developed to a level far below its potential. When the time arrives to intensify the development, it is hard to accept the often-devastating effect on views.

Establishing planning principles

There are ten commissioners in the Court, and all commissioners initiate planning principles as they come across issues that, in their opinion, have general application. Since a planning principle published in a judgment obliges commissioners dealing with similar issues to, at least, consider the principle established earlier, the commissioners find it useful to consult with each other. The practice is to circulate the principle in draft form and invite the others to comment, amend, delete or add to the draft version. Comments from other commissioners are a particularly useful test.

In practice we rarely get complete unanimity. However, by the time the principle is made public, it has usually reached a form in which most of us can live with it.

Experts and planning principles

I have so far dealt with planning principles in Court decisions. Is there a role for planning principles in expert reports prepared for the Court? Clearly, where an expert is considering an issue on which the Court has established principles, he/she should consider those principles. However, the expert is not obliged to adopt the principle. Nor is an advocate obliged to adopt it in submissions.

Where an expert agrees with a planning principle, the correct approach is to adopt it and to apply the relevant parts to the case in question. Where an expert thinks that the planning principle is not entirely correct and requires modification, the correct approach is to adapt it to a form that the expert does consider correct.

The third approach is to reject parts or the whole of a principle as being misguided. This would be appropriate where the expert believes that the planning principle established by the Court is wrong. For example, the Court has established a principle that it is not sufficient to rely on landscaping alone to overcome the problems of overlooking. Where an expert thinks that landscaping is sufficient, he or she should state it. Clearly, the rejection of the principle should be supported with good reasons.

I turn to the situation where the Court has not yet established planning principles on an issue. There is no obligation for an expert to do the Court's work for it. However, an expert may find that an opinion is more persuasive when it arises out of a general principle. I return to the example used earlier where the Court has not yet established a planning principle, namely the compatibility of single-storey and two-storey buildings in a residential street.

In considering the issue the expert may say only that, in the case being considered, the proposed two-storey building is compatible (or incompatible) with the particular single-storey buildings that exist in the street. The expert may go further and state the general principles that underlie the issues in the particular case.

Once the more general criteria are stated, the expert has entered the field of planning principles. A planning principle contained in an expert report will, of course, will not appear on the Internet and is unlikely to be read by many people. However, by making explicit the general basis for an opinion, the expert's opinion on the particular case becomes much more persuasive.

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