case notes

Woolworths Limited v Pallas Newco Pty Ltd [2004] NSW CA 422 - Court Of Appeal Clarifies When and How a Development Consent Granted by a Council Can Be Challenged

The recent decision by the Court of Appeal in ***Woolworths Limited v Pallas Newco Pty Ltd*** **[2004] NSW CA** 422 has clarified uncertainties in planning law over when and how third parties can challenge consents granted by councils. The proposed lessee of the site, Woolworths, lodged a DA for a "Dan Murphy drive-in take away liquor store" in Ashfield. The land was zoned 3(b) special business which listed included in its list of development permissible with consent, "drive-in take away establishments" and small shops not exceeding 90m? were permissible with consent. Development not listed as permissible with or without consent was prohibited. The proposal was large involving a gross floor area of 1310m2, employment of up to 35 staff, with over 5000 stocked items (compared to the usual 1200 to 1300 items for a traditional liquor store) and demand for 39 car parking spaces. Up to four employees were to work in the drive-in component and the rest throughout the store. Up to seven cars could park in the drive-in section where two separate cash registers were positioned. Ashfield Council granted consent to the DA. Pallas Newco took action in the Land & Environment Court arguing that the proposal was more a shop than a drive in takeaway establishment and was thus prohibited. The appeal was filed within the three month window permitted by section 101 of the EP&A Act 1979. Talbot J found the use of most of the site was for the purpose of a conventional bottle shop and thus restrained Woolworths from acting on the consent. Woolworths then appealed to the Court of Appeal.

The fundamental question was whether the decision of Ashfield council to characterise the development as a drive-in take away establishment was a decision which could be reviewed by the courts. There is a long line of cases, dating from 1986, to the effect that if the opinion of the council was not based on irrelevant considerations and was one which was reasonably open to make, the courts will not review the substance of a council's decision. However, in this case, the Court of Appeal confirmed that following the 1998 changes to the EP&A Act, the task of determining what is the development for which consent is sought is a fundamental task central to the operation of the planning system. If a council incorrectly characterises that development, for example, by deciding that what is proposed is permissible with consent where in fact it should properly be characterised as prohibited development, then that would be a an error. A consent granted in such a situation would, in effect, make a prohibited development a permissible development. This cannot occur under the EP&A Act as that would be the same as making an amendment to an environmental planning instrument and this would not satisfy the procedural requirements of Part 3. This and other arguments persuaded the Court of Appeal that the Land & Environment Court was correct in holding that the original decision of Ashfield Council was invalid.

The Court of Appeal also confirmed that a challenge to a consent on this ground must be commenced within three months after the public notification of the grant of development consent as required by section 101 of the EP&A Act. Challenges outside that period cannot be made except where council decisions are manifestly defective in the sense that they are not a bona fide attempt to exercise council's power, that the decision does not relate to the subject matter of the EP&A Act and it is a decision that is not reasonably capable of reference to the power given to the council. Such decisions can be challenged after the three month period has expired.

This case means that a development consent is possibly open to attack within the three month window if the council made a decision which is not supported by the objective facts. However, after the three month period expires, most consents would not be subject to legal challenge unless very unusual and extraordinary circumstances exist.