casenotes

NEW SOUTH WALES

Cranky Rock Road Action Group Inc & Anor v Cowra Shire Council & Ors [2006] NSWCA 339 - Does a Statement of Environmental Effects have to be lodged with a DA?

On 16 October 2003, a Development Application (**DA**) was lodged with Cowra Shire Council seeking Council's consent to the subdivision of a sizeable tract of land in Canowindra into 28 lots. On 23 February 2004, the Council granted consent subject to conditions. Those conditions were later amended by the Council pursuant to section 82A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The applicant brought proceedings in Class 4 of the Land and Environment Court challenging the consent on the ground that the DA, either at the time it was made or at any time prior to the consent being granted, was not accompanied by a Statement of Environmental Effects (**SEE**) pursuant to section 78A(9) EP&A Act. The appeal was dismissed by the Land and Environment Court.

Cranky Rock Road then appealed to the Court of Appeal. The Minister, who was not a party to the proceedings at first instance, was given leave to intervene. The Minister argued that the correct view was that a DA should be accompanied by a SEE.

In a unanimous decision, the Court of Appeal held that the structure of the EP&A Act and the Regulations drew a distinction between DAs likely to have significant environmental effect (designated development) and other (non-designated) development.

Where the DA concerns a designated development, the EP&A Act provides that certain documents such as a species impact statement or an environmental impact statement are required before the DA can be considered at all. Where a DA concerns a non-designated development, the EP&A is silent on what documents must accompany a DA as these requirements are set out in the Regulations.

The Court held that there was no discernible legislative intention to invalidate a consent granted where the DA did not include a SEE or any other document required by the regulations.

The Court noted that SEEs often provide limited assistance to consent authorities as they often reflect the applicant's perception of likely environmental impacts and thus compromise a "self serving document of varying quality and objectivity."

The Court of Appeal noted the practical consequences of the appellant's argument would be that a consent could be invalid if the DA failed to include a site plan. The appeal was dismissed. Note however a consent authority may reject a DA if more information is requested (whether that information be in the form of a SEE or not) and the applicant fails to provide such information. The DA may be rejected if the information required is considered necessary for the consent authority to properly perform its function.

The upshot is that a consent is not invalid if the DA did not include an SEE. However a failure to prepare one runs the risk of the DA being rejected without it being assessed and determined.

Residents Against Improper Developments v Chase Property Investments [2006] NSWCA 323 - characterisation as designated development

For a period of about 2½ months, thanks to the New South Wales Court of Appeal, NSW had a major change in the law on what is "designated development". The government then jumped in to amend the law, reversing much of the effect of the Court's ruling and at the same time making some other significant changes.