

recent cases

NEW SOUTH WALES

Sydney City Council v Ipoh Pty Ltd [2006] NSWCA 300

by Paul Colagiuri - Senior Associate, Henry Davis York

What happens when part of your development is on Council-owned land and they refuse to give landowners consent? This is a practical issue that can often confront development.

In this case, Ipoh lodged a development application with Sydney City Council (**Council**) to upgrade certain elements of the Queen Victoria Building (**QVB**). The QVB was leased by Ipoh from the Council. As a result, the lodgment of the DA required the Council's consent as the owner of the land. The land was classified as "operational land" under the Local Government Act 1993 (**Act**). The Council refused owner's consent and Ipoh appealed to the Land and Environment Court against the deemed refusal of the application. The Land and Environment Court held that it stand in the shoes of Council and grant owner's consent in these circumstances. The Council appealed to the Court of Appeal.

Court of Appeal

In a previous case *Sydney City Council v Claude Neon Ltd* (1989) 15 NSWLR 724, the Court of Appeal had held that the Land and Environment Court was empowered to give owner's consent to a development application for erection of a structure over a public road. In Ipoh, the question was whether the same principle applied to land that was owned as an investment asset rather than a public road. The Council argued that being operational land, the QVB site was used for purposes more akin to private land, such as leasing on a commercial basis for revenue. Accordingly, the Council ought to be able to take into account considerations independent of section 79C of the EP&A Act, such as commercial considerations, when considering whether to grant owner's consent.

The decision turned upon the wording of section 39(2) of the Land and Environment Court Act 1979 (**LEC Act**) and the provisions of the Local Government Act. Section 39(2) of the LEC Act provides:

"In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal."

The Court of Appeal held that there was a sufficient nexus between Ipoh's deemed refusal appeal and the Council's discretion to grant owner's consent such that section 39(2) of the LEC Act was satisfied and the Court could exercise the Council's power to grant owner's consent.

The Court of Appeal held that the status of the land as "operational" was not reason to prevent the Court acting in the Council's shoes to grant owner's consent. The Court of Appeal noted that the Council's planner relied in their report upon planning and heritage grounds when considering the issue of owner's consent, and not grounds of commercial consideration as argued by the Council. The Court of Appeal stated that, in any event, there would need to be exceptional commercial considerations for the Court to refuse to exercise the Council's discretion to grant owner's consent.

In addition, the Court of Appeal stated that the Council is not in the same position as a private owner of land because, while operational land is subject to fewer restrictions under the Local Government Act than community land, it is still defined as "public land" under that Act and is still subject to some indirect restrictions. It is not in the same position as private land.

In any event, the Court of Appeal did not accept that the status of the land was relevant to the circumstances of this case. This suggests that the Court of Appeal may consider also that Council land, regardless of its classification or status, may be subject to the Court acting in the shoes of Council in relation to granting owner's consent over it, unless there are exceptional circumstances. Whether or not this is the case remains to be seen.

Discussion

This case extends the previous authorities on the granting of owner's consent by a Council such that not only is a Council prevented from inhibiting the development of public roads by refusing to grant owner's consent, nor can a Council inhibit the development of operational land by refusing such consent unless "exceptional circumstances" are established. Of course, the development must still be capable of a grant of development consent on its merits and in accordance with section 79C of the EP&A Act.

The position on "community" and other Council land remains unclear. It seems apparent from this case that it is more than likely that the Court is lawfully able to act in Council's shoes when considering whether to grant owner's consent over Council owned community land because community land is subject to less commercial considerations than operational.

F & D Bonaccorso Pty Ltd v City of Canada Bay City Council [2007] NSWLEC 159

*by Justine de Torres - Senior Associate, Henry Davis York –
The Perils In Buying From Councils*

A recent decision of the Land and Environment Court of NSW highlights a danger peculiar to buying from councils and potentially other authorities. In *F & D Bonaccorso Pty Ltd v City of Canada Bay City Council* [2007] NSWLEC 159, despite the long-standing principle of "indefeasibility" of the title of the registered proprietor of land conferred by the *Real Property Act* 1900 (NSW) (RPA), the Court ordered rectification of the title register, following the unlawful sale by Council of a public reserve in breach of the *Local Government Act 1993 (NSW)* (LGA). The purchaser ended up losing the land it had bought and paid for.

The case arose from a dispute over the validity of a sale of two adjoining lots known as Chapman Reserve in the local government area of the City of Canada Bay Council. Council had sold Chapman Reserve to a developer. Chapman Reserve is an area of open space that was, before the commencement of the LGA, a public park. However, when the LGA came into force in 1994, the Council purported to exercise rights provided by savings and transitional provisions in the LGA to classify the Chapman Reserve as "operational land". Unlike land classified as "community land", the LGA permits land classified as operational land to be sold. Classification as operational land, however, was not possible under those savings and transitional provisions, where the relevant land comprised a "public reserve" or was otherwise designated as open space.

Although the proceedings were commenced before the sale of Chapman Reserve was completed, the completion of the transfer was finalised before the hearing of the matter. Once the transfer was completed, notwithstanding that the Court proceedings were then on foot, the new owner had the transfer stamped and registered. The Court observed that the registration of the transfer was presumably an attempt by the new owner of the land to gain the protection of the principle of indefeasibility of title.

Ultimately, however, the registration was not effective to preserve the interests of the purchaser of the land. The Court found that at the time of the purported classification, Chapman Reserve was in fact a public reserve and that accordingly the resolution of the Council was ineffective, so that Chapman Reserve remained community land at the time of its sale.

The Court held that the Council's breach of its obligations under the LGA gave rise to circumstances which formed an exception to the principle of indefeasibility. In exercise of the discretion conferred on the Court by the RPA, Biscoe J ordered that the Register under the RPA be rectified to show the Council as the registered proprietor of Chapman Reserve. The decision of Biscoe J is now on appeal to the NSW Court of Appeal, with the appeal presently scheduled to heard on 26 September.

The case illustrates a specific risk of buying land from councils and emphasises the importance in such cases of checking that the land has been properly classified as operational. More generally, the case also highlights the fact that exceptions to the general principle of indefeasibility of the