NEW SOUTH WALES

Implications from the Barangaroo legal challenge by Harshane Kahagalle and Ashleigh Egan

Australians for Sustainable Development Inc v Minister for Planning **[2011] NSWLEC 33**

Barangaroo is a 22ha site located at Millers Point, adjoining the north-western edge of the Sydney central business district. Lend Lease (Millers Point) Pty Ltd is responsible for development on the southern section of the site known as Barangaroo South. The Barangaroo Delivery Authority (BDA) is the proponent for project applications on the Headland Park section of the site.

Proceedings were brought by Australians for Sustainable Development Inc (the applicant). The proceedings sought judicial review of two decisions of the Minister for Planning (the first respondent) to grant approval for the carrying out of two projects at Barangaroo. The first was a major project related to the excavation, remediation and construction of the basement car park on the southern end of the site (where the proponent is Lend Lease) (basement car park approval). The second was another major project which related to early works for the development of Headland Park (where the proponent is the BDA) (early works approval).

The applicant pressed five grounds of challenge. Four of the grounds related to the way in which contamination and remediation issues were dealt with in the approval processes. The final ground of challenge related to a characterisation question concerning the extraction of sandstone at Headland Park.

Various degrees of contamination are present on the Barangaroo site due to its historical uses. The areas the subject of the applications do not include the declared area that was principally the site of a former gasworks. To deal with the remediation of the site, an overarching Remediation Action Plan (RAP) was prepared for the whole of the Barangaroo site and a site specific RAP was prepared for the basement car park site. At the time of the Early Works Approval no RAP was finalised for the Headland Park site.

Ground 2: failure to comply with cl 17(1)(c) of State Environmental Planning Policy no 55 - remediation of land

The applicant alleged that the proponents were intending to carry out work pursuant to the project approvals in breach of cl 17(1)(c) of State Environmental Planning Policy (SEPP) 55. This ground was rendered ineffective due to a legislative amendment to SEPP 55, which meant cl 17 did not apply to the two approvals the subject of the proceedings. This amendment occurred after the hearing but prior to judgment. Biscoe J stated:

> The applicant would have succeeded in the proceedings on the basis of Ground 2 but for the 2011 amendment.

Therefore, for the purposes of costs, his honour continued to set out the reasons why he would have upheld Ground 2 but for the amendment.

Cl 17(1)(c) provides:

> 17 Guidelines and notices: all remediation work
>
> (1) All remediation work must, in addition to complying with any requirement under the Act or any other law, be carried out in accordance with:
>
> …
>
> (c) in the case of a category 1 remediation work—a plan of remediation, as approved by the consent

authority, prepared in accordance with the contaminated land planning guidelines.

Category 1 remediation work is defined cl 9 as follows:

> 9 Category 1 remediation work: work needing consent
>
> For the purposes of this Policy, a category 1 remediation work is a remediation work (not being a work to which cl 14 (b) applies) that is:
>
> …
>
> (d) development for which another State environmental planning policy or a regional environmental plan requires development consent…

The applicant submitted that cl 9(d) applied to the project applications under Part 3A. The applicant also submitted that the RAPs did not comply with the SEPP 55 guidelines (as informed by the consultants guidelines) and therefore did not comply with cl 17(1)(c).

The respondents attempted to refute this submission on the following grounds, none of which Biscoe J accepted:

- That SEPP 55 does not apply to Part 3A project approvals because the SEPP uses Part 4 language and words have the same meaning as they have in the Act, unless a contrary intention appears. For example in cl 9(d) the words 'development consent' are used. Biscoe J held that SEPP 55 provisions are not inapplicable merely because they use Part 4 language.
- That the work is not 'category 1 remediation work' because cl 9(d) refers to development for which another SEPP requires 'development consent' whereas the relevant projects required project approval under Part 3A. Biscoe J found that the proposed remediation works were category 1 remediation works notwithstanding the use of Part 4 language.
- On the assumption that cl 17(1)(c) applied, that it had nevertheless been satisfied by the overarching RAP and the site specific RAP for the basement car park. Biscoe J held that key elements of the RAP were missing; in particular Site Specific Target Criteria (SSTC) that would define the acceptable level of contamination.

Biscoe J stated:

> The analogy of weevils in breakfast cereal is suggested. If their unwelcome presence is inevitable, cereal eaters would agree that maximum permissible weevil level criteria must be prescribed.

Consequently Biscoe J held:

> in order for a RAP to be 'prepared in accordance with' the SEPP 55 Guidelines (as informed by the Consultants Guidelines), as required by cl 17(1)(c) of SEPP 55, it should incorporate a SSTC in order to define the acceptable level of contamination. It would then have to be approved by the Minister in order to comply with cl 17(1)(c).

Ground 3: cl 7(1)(b) and (c) of SEPP 55

The applicant submitted that the Minister could not have been reasonably satisfied as to the subject matter of cl 7(1)(b) and (c) or erred in law, misdirected himself, asked the wrong question or failed to consider what he was required to consider because there was no finalised RAP in place and the Minister, in effect, delegated satisfaction to an auditor (as there was no condition of approval requiring the site auditor approved RAP to be approved by the Minister).

Cl 7 provides:

> 7 Contamination and remediation to be considered in determining development application
>
> (1) A consent authority must not consent to the carrying out of any development on land unless:
>
> (a) it has considered whether the land is contaminated, and
>
> (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
>
> (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

The respondents submitted that on the proper construction of s 75R(2) of the EP&A Act, SEPPs do not apply at the approval stage of a Part 3A project and therefore cl 7 was inapplicable to the validity of the project approvals. This submission relied upon the findings of Preston CJ in *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA (Rivers SOS)*.

Biscoe J held that, on reflection, it was unnecessary in *Hill Top* to go so far as to say that SEPPs apply at the approval stage and, to that extent, *Rivers* prevails over *Hill Top*. Consequently, Biscoe J held that cl7 was irrelevant to the validity of the project approval and rejected the appeal ground.

Ground 5 and 6: failure to consider ESD principles as an element of the public interest and failure to make enquiries

Ground 5 related to the information before the Minister in relation to the contamination on the site and the Minister's requirements to consider the principles of ESD as an element of the public interest. Biscoe J held that the Minister was not in breach of his obligation to consider ESD as the material before the Minister contained an extensive analysis about the presence of contamination.

Ground 6 related to the fact that even if the Minister did consider ESD principles, then, in the context of this case, the Minister was also under a duty to make further enquiries into the adequacy of the documents before him in addressing the contamination on the site.

In *Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429* the High court held that

> it may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review.

Biscoe J applied this reasoning and held that the applicant had not identified such a fact. Therefore, the principles referred to in *SZIAI* were not enlivened.

Ground 1: impermissible development as part of the early works project

The applicant challenged the validity of the Early Works Project approval on the basis that the proposed excavation of 60 000m^3 of sandstone on the Headland Park section of the site (for re-use elsewhere on Headland Park) constituted an independent use and was for a purpose that was prohibited under the Major Development SEPP, namely, 'extractive industries'.

* Rivers SOS did not follow the judgment of Biscoe J in *Hill Top Residents Action Group Inc v Minister for Planning* (2009) 171 LGERA 247 (HillTop) on this same point.

Biscoe J held that the reason for extracting the sandstone was to enable the creation of Headland Park. Thus the use of the land for the extraction of sandstone was not a separate and independent use from the use of the land for the purpose of a recreation area.

Accordingly, all the grounds of challenge were unsuccessful and the proceedings were dismissed.

Lessons from a planning perspective

The lessons from this case from a planning perspective include that:

- SEPP 55 applies to Part 3A projects even though the SEPP uses Part 4 language
- SEPPs do not apply at the approval stage of a Part 3A project
- proponents need to be prepared to adhere very closely to SEPP 55 requirements and the content of relevant Guidelines
- proponents should be prepared to deal with potential ESD grounds of challenge
- proponents need to be mindful of characterisation related grounds of challenge.

Planning agreements and major developments — Dr Nicholas Brunton

M**inister for Planning again thwarted: *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106**

Background

On the last day of 2010 as most of us were preparing for New Year festivities, the then Minister for Planning, the Hon Tony Kelly MP, gazetted an amendment of the State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP) to rezone 1 702 hectares of land at Huntlee in the lower Hunter Valley. The owner of the site (and the second respondent in this case), Huntlee Pty Ltd (Huntlee), planned to carry out a 15 stage project involving the construction of about 7 200 residential dwellings on the site.

Sweetwater Action Group Inc (Sweetwater) objected to this proposal. Assisted by the Environment Defender's Office and senior counsel, they commenced Class 4 proceedings in the Land and Environment Court arguing that the amendment to the Major Development SEPP was invalid, principally because the Minister had failed to follow the process required by SEPP 55 – Remediation of Land (SEPP 55).

This was not the first time Sweetwater had challenged the Government's approach to this site. In October 2009, on the back of the success of the Gwandalan Summerland Point Action Group case against the Minister involving a land swap arrangement for development at Catherine Hill Bay (made infamous by the court's description of the swap as a 'land bribe'), an earlier amendment to the Major Development SEPP (No 35) was, by agreement, declared void and of no effect. This led to Huntlee and the Minister extinguishing an earlier deed and memorandum of understanding which were on the same broad terms as that which the court found so objectionable in the Catherine Hill Bay case.

Shortly after that debacle, Huntlee wrote to the Director-General of the Department of Planning seeking a declaration of the site as being state significant pursuant to the Major Development SEPP. The Department wrote a briefing note to the Minister recommending that he agree to investigate the declaration of the site. The Minister agreed. The Department then asked Huntlee to prepare a State Significant Site Study (SSS Study) for a rezoning in accordance with the requirements of the director-general. This was done and placed on public exhibition from 29 September – 17 November 2010.

In August 2010, Huntlee offered to enter into a voluntary planning agreement (VPA) with the Minister and provided a draft VPA for his consideration. This VPA was in the context of the proposed rezoning and several project applications under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The terms of the VPA were settled