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When does land "relate to" a development application? North Sydney Council v Ligon 302 Pty Ltd

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When does land "relate to" a development application?
North Sydney Council v Ligon 302 Pty Ltd

Commentary on a judgment of the NSW Court of Appeal, 28 July 1995

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Environment protection - development application - Environmental Planning and Assessment Act 1979 (NSW) s.77(1)(b) - proposed development included use of two rights of carriageway across adjoining land - statutory construction - "land to which the development application relates" - whether consent in writing of owners of adjoining land required

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1. Introduction and Factual Background

{1} A development application normally relates to land which is wholly within the control of the developer. Complications arise when an aspect of the proposal, for example access or a buffer area, requires some use of adjoining land which is not within the developer's control. If the developer is obliged to obtain the prior consent of the owner of the adjoining land in all cases, there will be a significant impact upon the development potential of land. The High Court will be considering the issue on 20 June 1996. Their decision may clarify the position in NSW, with implications for other jurisdictions.

{2} Ligon 302 Pty Ltd ("Ligon") lodged a development application for consent with the North Sydney Council ("the Council") on the 23 May 1994. The application was lodged pursuant to the provisions of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"). The subject land is described as Lot 1 in DP580468 and is situated at 88 Berry Street, North Sydney. It is currently used as a club for business people and is zoned partly Special Uses (Club) and Special Uses "C" (Roads) pursuant to the North Sydney Local Environment Plan 1989 (AB 1-2).

{3} To the south of the Club is the Century Plaza building which is a twenty-two storey strata title residential block. Pedestrian access and carriageway to the Club is permitted through the Century Plaza land pursuant to registered easements.

{4} The proposed development incorporated five features:-

- extending the Club building further to the north and increasing the floor space from 900 sqm to 1870 sqm to allow functions, a swimming pool and gymnasium;
- providing a parking area under the Club building;
- providing access from the Warringah Expressway;
- creating an egress road through Road Transport Authority land adjoining the Club;
- the building of a ten storey residential structure above the extended Club building.

2. Procedural Background

(i) Appeal to Land and Environment Court

{5} Ligon appealed to the Land and Environment Court of NSW against the deemed refusal of the application by the Council. The matter was heard by Bannon J with judgment delivered on the 16 December 1994 (No 10481). Although Bannon J had concerns about the desirability of the development he concluded that the appeal should be allowed as the proposal complied with the existing planning criteria. He therefore allowed the appeal subject to development being carried out in accordance with plans and drawings and with specified conditions.

(ii) Appeal to Court of Appeal

{6} The Council appealed to the New South Wales Court of Appeal against the decision of Bannon J (CA 40011/95). The appeal was limited to a question of law as required by s 57(1) of the *Land and Environment Court Act* 1979 (NSW).

{7} The appellant claimed:

1. that Bannon J erred in failing to take into account the provisions of a Development Control Plan which applied to the subject land; and
2. that Bannon J erred in holding that the consent in writing of the owners of the Century Plaza land, namely the Proprietors of Strata Plan 18604 ("the Proprietors"), which was land to which the development application related was not required pursuant to s 77(1)(b) of the EPA Act.

{8} In a judgment delivered on the 28 July 1995 on the first ground of appeal the Court of Appeal held unanimously that an error of law had occurred in that the Judge had either given insufficient weight to the terms of the Development Control Plan or such consideration was not sufficiently reflected in the judgment.

{9} The Court of Appeal held by majority (Sheller JA and Clarke JA, Kirby ACJ dissenting) that the second ground of appeal should be dismissed. The decision of the majority was based on an interpretation of s 77(1) of the EPA Act. This requires that if a development application is made other than by the owner of the land to which that application relates it must be with the written consent of that owner.

{10} The majority determined the Proprietors were not obliged to execute a consent to the proposed development as the Century Plaza land was not land to which the application related. The basis of their argument was that the owners of the dominant tenement already enjoyed access rights over the Century Plaza land. The majority considered the law relating to easements entitles the owner of a dominant tenement to continue to use the easement area for the rights specified in the easement when the dominant tenement is being used for a different purpose and/or with increased intensity from that at the date of creation. (*Jelbert v Davis* [1968] 1 All ER 1182 and *British Railways Board v Glass* [1965] Ch 538).

{11} The majority concluded there was no evidence to suggest that the proposed user of the easements would involve a different or excessive use of the easement areas so as to require the consent of the owner of the servient tenement (AB 71- 72). On this basis the majority concluded that there was no proposal to carry out any development on the Century Plaza land.

{12} Kirby ACJ considered the proposed development related to the land owned by the Proprietors and the application did not conform with the EPA Act. His judgment relied upon a different approach to the nature of the use contemplated.

{13} When speaking of the continued right of access over the Century Plaza land Kirby ACJ stated (AB 63-64):

"It is, on the facts, an integral part of the entire arrangement for the building of the residential flat extension on top of the club premises, that a change will occur. A right of access over the Century Plaza land formerly enjoyed exclusively by club members, their guests and related persons will henceforth be used by entirely different persons, having nothing to do with the club. This leaves the right of way intact. There may also be existing use rights which endure. But that does not in any way affect the application of section 77 of the EPA Act".

{14} His Honour continued (AB 64):

"Properly characterised, the respondent's development application undoubtedly 'relates to' the land owned by the owners of Century Plaza building. There is that connection. That is enough, by the terms of s 77(1), to require that the adjacent owners' consent in writing be obtained before the development application may be made."

{15} Kirby ACJ also relied upon the requirement specified in *Pioneer Concrete (QLD) Pty Ltd v Brisbane City Council and others* (1980) 145 CLR 485 ("the Pioneer case") that development applications will ordinarily require disclosure of means of access.

(iii) Appeal to High Court

{16} The Appellant contends the Court of Appeal ought to have allowed the appeal on the second ground. It ought to have held the application as lodged was invalid in that it was made without the consent in writing of the owner of land to which the development application related in breach of s 77(1) (b) of the EPA Act.

3. Comment

(i) Statutory Provisions

{17} Where development is contemplated in relation to a proposed use which requires consent, application must be made pursuant to s 76(2) of the EPA Act. This provision states a person shall not carry out development on that land unless consent has been obtained and is in force.

{18} Section 77(1) of the EPA Act then specifies:

"A development application may be made only by:

(a) the owner of the land to which the development application relates; or

(b) any person, with the consent in writing of the owner of the land to which the development application relates."

{19} The fundamental issue in this case is whether pursuant to s 77(1) of the EPA Act the Century Plaza land was land "to which the development application relates." If the answer to this question is no, the decision of the Court of Appeal should be confirmed, the contrary conclusion requiring the appeal to be allowed. This issue initially requires a consideration of the "use" contemplated by the application and whether in truth an integral part of that use involves the Century Plaza land.

{20} The requirement for consent is mandatory not directory (*Sydney City Council v Claude Neon Ltd* (1989) 15 NSWLR 724). If the consent of the Proprietors must be obtained the lack of consent would deprive the local authority of the jurisdiction to make a determination on the application.

{21} The terms “to which the development application relates” or “relates” are not defined by the EPA Act. However, assistance is provided by s 4 which defines “development” to include:

“(c) the use of that land or of a building or work on that land.”

{22} This definition was an important part of the dissenting judgment of Kirby ACJ in the Court of Appeal decision (AB 64). As the proposal will not involve any physical structures, buildings or work on the Century Plaza land the key concept in this definition is "the use of that land". If the Century Plaza land is deemed part of "the use of that land" then the consent of the Proprietors would be required.

(ii) "Use" - the Pioneer case

{23} How does one define the term "use"?

{24} The term has a meaning which is both imprecise and variable depending upon its statutory context (*Ryde Municipal Council v Macquarie University* (1976-1977) 35 LGRA 267).

{25} Although the term was considered by Stephen J in the Pioneer case, some authorities have considered it inapplicable to New South Wales (*King v Great Lakes Shire Council* (1986) 58 LGRA 366 and *Grace Brothers v Willoughby Municipal Council* (1981) 2 NSWLR 80. Note the contrary view in DJ & KH Gifford, *Town Planning Law and Practice*, Law Book Company (1987) at 59.18). These decisions distinguished Pioneer on the particular facts before them and on the basis that Pioneer relied on the broad definition of "use" in the *City of Brisbane Town Planning Act* 1964 (Qld) ("CBTPA"). The CBTPA definition incorporates any use which is incidental to and necessarily associated with the lawful use of the land in question. Despite the impact this definition had on the Pioneer case it is submitted that the general principles discussed can assist in what is essentially an analogous fact situation, though the result may be different based on the facts relevant to the Ligon application.

{26} The Pioneer decision is helpful because the provisions at issue (s 22(1A) (c) of the CBTPA) required an applicant for consent to serve notice of the application upon the owner of any land abutting on the land "to which the application relates or applies". Although the decision did place emphasis upon the definition of "use" which Stephen J saw as being of "some significance"(at 500) he also saw the matter as having general application.

{27} The case involved an application by Pioneer Concrete (QLD) Pty Ltd to Brisbane City Council. The application sought consent to use land for a quarry, crushing and screening plant, office buildings and storeroom. The land was a small part of two large allotments owned by an associated company. Neither the application nor the advertising for the proposal indicated the access road required for transporting of quarried material from the site. Amongst other issues this case involved a claim that the Local Government Court lacked jurisdiction to hear the matter as the application did not specify the need for consent for an access road over the neighbouring lots. The majority constituted by Stephen, Murphy and Wilson JJ concluded that the proposed use included the access road and as a result the application was defective and the local authority was thereby deprived of jurisdiction to decide the application.

{28} Stephen J considered there were two critical integers in land use control, i.e. land and use (at 501). In his view the integer of use will dictate the identity and extent of the integer of land. He considered "The land is merely the passive object which is being used; the active integer, use, will determine its extent" (501). Where the application relates to all of an allotment the dominant role of the integer of use will be insignificant. But where the application related to a small area of a larger portion the integer of use may indicate the use should be seen as involving more than the small parcel of land directly involved in the quarrying operations but incorporating the access roads (501).

{29} The significance of access in that case was emphasised as access would be required not from a road frontage from the land itself but via a newly constructed and lengthy access road

over adjoining land. Stephen J saw an intimate connection between the use of the land and its access. Persuasive in that regard was the commercial and industrial use proposed which would have a substantial impact upon local amenity (502). Quarrying is often perceived as a type of use involving special considerations. It involves a process which utilises the land by transporting material away from the site by heavy vehicles. Land apparently unused may be deemed part of the use because it could be quarried in the future. This has resulted in a broader view of what constitutes use of the land when associated with this activity (*Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1).

{30} Stephen J saw the principles in the Pioneer case as "a question of quite general importance in the field of town planning" (500). There were however specific issues involved in that case which suggest the application of the general principle should lead to a different result in this case.

(iii) Application of general principle

{31} Here there is no intention to disturb the general arrangements currently existing in regard to the pedestrian access. This pre-existing access may in fact be protected by the existing use provisions of the EPA Act (Division 2, ss 106-109B). Does this factor distinguish this case from the Pioneer case?

{32} Clearly the circumstances at issue in the Pioneer case were unusual. There the subject land formed a small part of a larger allotment with a long access road traversing the larger balance of the land. It is inherent in quarrying and crushing that large trucks would be required to have access to that site. This activity has a substantial impact upon neighbouring properties in terms of noise, traffic hazard and dust. The importance of transport and access in the context of quarrying was acknowledged by the majority in the Pioneer case. Wilson J endorsed the assertion by the Local Government Court judge that "the whole case comes down to traffic" (515) while Stephen J noted the strict conditions imposed by that judge (503-504).

{33} A similar concern does not exist with the proposed development in this case. It will involve a less intrusive pedestrian access provision. In the Ligon application the proposed use requires only a short access for pedestrians over a neighbouring allotment where the rights giving such access have been in existence for some time.

{34} Section 76 of the EPA Act contemplates an application for consent to future activities. This is shown by wording such as "a person shall not carry out that development" unless a consent is "in force" under the Act. This provision contemplates the obtaining of consent before the use is commenced. Section 77 continues this theme as the application is to be made before the development commences.

{35} This suggests that the term "land to which that development application relates" is concerned with what is intended to take place and not what currently exists. The use of the Century Plaza land is a pre-existing use which does not involve any future change in rights or obligations. There is no proposal to use the Century Plaza land in the future other than to continue to use the existing access rights over that land. Accordingly the current rights of access over the Century Plaza land do not qualify as development in the sense contemplated by s 76 and s 77 of the EPA Act.

(iv) Property Rights

{36} One factor which impacted upon the decision of Kirby ACJ in the Court of Appeal was the need to preserve the rights of owners on neighbouring blocks. Kirby ACJ saw this as a matter relevant to the rights of private property (in this he quoted the Universal Declaration of Human Rights Article 17.1 at AB 59).

{37} However it is arguable that neighbouring owners' rights are adequately protected by the entitlement to object to proposals on town planning grounds. Provision is made in s 84 of the EPA Act for notice of applications to be advertised and made available to adjoining owners. Section 87 entitles a person to lodge a submission in regard to that application with the local authority obliged to consider that submission under s 90(1)(p). A person who has made a submission may commence an appeal against the decision of the local authority whereupon the town planning merits of the proposal can be investigated (s 98).

{38} Unlike the Pioneer case the diagrams and plans lodged by Ligon fully indicate the proposed ingress and egress arrangements. Accordingly, there is little risk that potential objectors will be prejudiced (compare Stephen J in the Pioneer Case at 503).

{39} Even if an adjoining owner is not able to sustain the costs of such an objection or is unsuccessful in any such appeal, this would not impact upon the need for the developer to secure access or other required rights over that property. The neighbouring owner can either grant or refuse this request. In the circumstances of this case if there had been no pre-existing easement rights over the Century Plaza land the proposal would presumably have foundered over the lack of access or access over other land would have been required.

{40} The majority of the Court of Appeal concluded that, in terms of the easement document, the dominant tenement owner would be entitled to continue to enjoy the access rights over the servient tenement after the development was completed. The common law on this point (referred to by the Court of Appeal at AB 69-71) clearly points to the entitlement of dominant tenement owners having continued rights over the servient tenement, as long as the use is not outside that contemplated by the original grant. Any concern by the servient tenement owner could be dealt with by a declaration as to the rights of the dominant tenement owner to enjoy the easement after the development is completed.

4. Conclusion

{41} It seems that the proposal in this case will merely require use of existing access rights within the entitlement of the dominant tenement owner. It could be said that consent to use the servient tenement for access has already been obtained and is inherent in the easement already granted. These access rights can thereupon be used within the confines of the terms of that easement. To require a further consent is to limit the entitlement of the dominant tenement owner under that easement and would be an unnecessary limitation upon the property rights of the owners of the Club.

{42} As is clear from the Pioneer case in these matters "no simple yet precise rule can be formulated in advance which will provide satisfactorily for every case: each must depend very substantially upon the nature and particular features of the use proposed." (Stephen J at

509). Taking the above factors into account, it is submitted that the Pioneer case should be distinguished and the definition of development in s 4 of the EPA Act should be interpreted narrowly. The application does not "relate to" the Century Plaza land as this term should be defined, nor should there be considered to be development on that land as defined by s 4 of the EPA Act. Accordingly it is suggested that no consent to the application should be required from the Proprietors.

{43} Subject to the relevant statutory provisions, it is submitted that the principles enunciated in the Pioneer case should apply in circumstances where access to land is provided over adjoining land to a public road and that access is not pursuant to pre-existing access rights. More rarely it should apply where the access involves the substantial upgrading of an existing access provision (for example the building of a new road or access facilities) or where the proposal by its nature is inherently integrated with the use of the land over which access is provided (for example where the proposed access will involve a significant impact upon the amenity of an area). An example of the latter circumstance may be where the proposal is to use an existing access right previously used for access to residential property and the intention is to incorporate this into an access for a proposed industrial or commercial use involving trucks and other heavy vehicles or where the intensity of the use will be substantially increased.