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A monthly bulletin reporting on decisions of the Resource Management and Planning Appeal Tribunal

PLANNING DECISIONS

SUPREME COURT DECISIONS

ABBREVIATIONS

FP Act:	*Forest Practices Act 1985*
JR Act:	*Judicial Review Act 2000*
LUPAA:	*Land Use Planning and Approvals Act 1993*
RMPAT Act:	*Resource Management and Planning Appeal Tribunal Act 1993*

PLANNING DECISIONS

DJ McCulloch Surveying v Meander Valley Council [2016] TASRMPAT 29

30 September 2016

GP Geason, ME Ball & M Kitchell

Catchwords: Planning Appeal – subdivision – lot size – Zone Purpose

RMPAT Act, s.28; *Meander Valley Interim Planning Scheme 2013*, cl. 12.3.1, 12.4.3.1, and 12.4.3.2

DJ McCulloch Surveying (***Appellant***) appealed against a decision of the Meander Valley Council (***Council***) to refuse a development permit for the subdivision of 1A Bayview Drive, Blackstone Heights into two lots.

Council refused to grant a development permit for the subdivision on the basis that the proposed second lot was not suitable for use, and the size and shape of any development of the lot would not be consistent with the Desired Future Character Statement or Local Area Objective for the Low Density Residential Zone of the *Meander Valley Interim Planning Scheme 2013* (***Scheme***).

Consideration of Zone Purpose

The Tribunal considered the relevant question raised by Performance Criterion P1 of cl.12.4.3.1 was whether, having regard to the slope, shape, orientation and topography of the land, and any established pattern of use and development, the proposed second lot satisfied the test of being suitable for use and consistent with the Zone Purpose.

The Zone Purpose of the Scheme includes the Desired Future Character Statement (***DFCS***) and Local Area Objective for Blackstone Heights. Relevantly, the DFCS states:

> Blackstone Heights is characterized by large, prominent, single dwellings and outbuildings on larger lots. This character is to be maintained with due consideration to the mitigation of building bulk through landscaping and minimisation of cut and fill works where development is viewed from public open space.

The site of the development envelope on the proposed Lot 2 was constrained by the Environmental Management Zone (the lot was partly submerged by Lake Trevallyn). For this reason, any development of Lot 2 would result in three dwellings close to one another. Council contended that such a development would not be in keeping with the character of the area.

However, based on Council's planning report and the Appellant's uncontested evidence that one third of the dwellings in the Blackstone Heights area are within 6 metres of each other, the Tribunal found that the proposed subdivision arrangement was not unusual in the area. It further found that any development on Lot 2 could be designed to comply with the relevant setback and heights under the Scheme.

Useable space

The Tribunal considered whether each lot provided sufficient useable area for a dwelling, parking, access and open space, without adverse effects on the amenity or character of the area.

The Tribunal held that the clause objective of ensuring the "area and dimension of lots are appropriate for the Zone" would be achieved providing each of the elements of Performance

Criterion P1 of cl.12.4.3.2 of the Scheme could be satisfied by the subdivision.

The Tribunal found that Lot 1 of the proposed subdivision met the relevant requirements of P1.

With respect to Lot 2, the Tribunal found that there was sufficient curtilage for any future dwelling and for a car to on the site. The Tribunal further found that the impact on neighbouring dwellings resulting from subdivision was acceptable because:

- the area available for development was sufficient for a new house with a gross floor area consistent with prominent dwellings in the area;
- a house on Lot 2 would not be visible from the street or the lake and the size of the lot would not be perceivable from these locations;
- a house on Lot 2 would be able to comply with side setback standards in the Scheme; and
- Lot 2 provided sufficient useable area as required by P1.

Decision

The Tribunal found that Council's grounds of refusal were not sustainable and upheld the appeal. The Tribunal directed Council to issue a permit for the subdivision within 14 days of the decision.

Fewkes v Clarence City Council [2016] TASRMPAT 30

19 October 2016

GP Geason, ME Ball

Catchwords: Planning appeal - Sunlight to a habitable room - how measured - matters to be considered by Planning Authority in considering compliance

Clarence Interim Planning Scheme 2015, cl.10.4.2, 10.4.4, 10.4.5, and E6.10

Clarence City Council (***Council***) refused an application by Mr Fewkes (***Appellant***) for a permit to construct an additional dwelling at 67 Malunna Road, Lindisfarne. Two of the Appellant's neighbours joined as parties to his appeal (***Joined Parties***).

Council refused the permit on the basis that the proposed dwelling was not contained within the prescribed building envelope and would cause unreasonable loss of amenity to the adjoining property through loss of sunlight and overshadowing, contrary to the relevant performance criteria under the *Clarence Planning Scheme 2007* (***Scheme***).

The Appellant applied to amend his development application in order to bring the development into compliance with Scheme requirements. Council consented to the application and subsequently changed its position to approve of the development. The Tribunal allowed the amendment to the development application pursuant to s.22 of the RMPAT Act.

However, the Joined Parties maintained their opposition to the permit on the bases that the development:

- was not within the prescribed development envelope;
- would cause the habitable room and private open space of the neighbouring dwelling to receive less that the prescribed hours of sunlight during winter;
- would adversely affect privacy of neighbouring dwellings; and

- would require an additional vehicle access resulting in the loss of parking in the street.

Development envelope

The Appellant contended that the proposed dwelling was within the prescribed development envelope in accordance with the requirements of cl.10.4.2 of the Scheme. The Joined Parties however maintained that the dwelling exceeded the allowed height.

Mr Walker, the Joined Parties' engineer, gave evidence that the Appellant's drawings "distorted and misrepresented" the true location of the proposed building, and that the dwelling would exceed the envelope height by 260mm when measured from the existing ground level.

Mr Clark, the Appellant's town planner, acknowledged there were difficulties in interpreting the plans of development due to the sloping topography of the land. A three dimensional plan was provided to assist the Tribunal's deliberations.

The Tribunal was persuaded that the building would either be within the envelope, or any deviation would be so difficult to detect as to make it inconsequential. The Tribunal considered that the imposition of a condition requiring compliance with the building envelope would be appropriate in the circumstances.

Access to sunlight

The contentions in relation to access to sunlight in the appeal turned on whether the proposed development satisfied Acceptable Solution A2(b) of cl.10.4.4 of the Scheme. This provision states:

> *The multiple dwelling does not cause the habitable room [of a neighbouring dwelling] to receive less than 3 hours of sunlight between 9.00 am and 3.00 pm on 21st June.*

The Appellant submitted that the development would allow 3 hours of sunlight in mid-winter through the relevant windows of the neighbouring house. The Joined Parties disagreed. The Tribunal noted that Council's planner wavered on this issue and was unhelpful.

Mr Clark contended that A2(b) could be interpreted in two ways: the provision might be interpreted as being satisfied where *any* sunlight enters through the window for 3 hours on 21 June; or it may be taken as being satisfied where at least 50% of the window receives sunlight for 3 hours on 21 June.

Mr Clark modelled the sunlight in the windows of the neighbouring property based on both of these scenarios. He found that the 3 hour requirement was achieved using the "any sunlight" scenario, however using the "50% sunlight" scenario only 2.75 hours of sunlight would be achieved.

Mr Walker accepted that the "50% sunlight" approach was a reasonable one, however challenged Mr Clark's calculations on the basis that they used the wrong location of the relevant window.

The Tribunal preferred Mr Clark's evidence regarding the location of the window and therefore his calculations as to the sunlight achieved through the window. However, the Tribunal rejected both the "any sunlight" and the "50% sunlight" approaches to the interpretation of the A2(b) requirement.

Noting the particular importance of sunlight during Tasmania's cold winters, the Tribunal found that:

> *The correct approach requires a consideration of the particular circumstances, an assessment which in reality blends quantitative and qualitative considerations... a purely quantitative assessment of the matter will not do. Therefore, the Tribunal eschews a "50% sunlight" approach, and it does so consistently with the language of the Scheme provision.*

The Tribunal then provided a non-exhaustive list of considerations relevant to determining where glazed areas are "in, gaining or receiving sunlight", including:

- the window size (and proportion), number, location and orientation;
- the proportion of the window receiving sunlight;
- the size, type and nature of the affected rooms;
- duration, time, continuity and value of sunlight;

- the location of the development and expectations arising from applicable planning controls;
- whether reasonable steps have been taken to maximise solar access and/or reduce overshadowing; and
- overshadowing by solid structures such as eaves, fences and vegetation (only to the extent it should be treated as a fixture such as a dense, high, evergreen hedge).

Based on Mr Clark's calculations, the Tribunal found that the relatively small window in the neighbouring house would only gain intermittent light where continuity was more desirable for the purposes of amenity. On this basis, the Tribunal found that the proposed development did not satisfy Acceptable Solution A2(b) of cl.10.4.4 of the Scheme.

Having regard to the same list of considerations, the also Tribunal found that the proposed development did not meet Performance Criterion P2 of cl.10.4.4 because it would cause an unreasonable loss of amenity by halving the amount of sunlight entering into a habitable room of the neighbouring house.

Overshadowing

The Tribunal accepted Mr Clark's evidence that over half of the private open space of the neighbouring dwelling would enjoy more than 3 hours of sunlight per day during winter. The Tribunal found that this was sufficient level of sunlight to avoid an unreasonable loss of amenity to the neighbouring dwelling for the purposes of Performance Criterion P3 of cl.10.4.4.3.

Other issues

The Tribunal found that the development could satisfy the relevant performance criteria relating to privacy, parking and access.

Decision

The Tribunal found that the development permit should be refused as the proposed development failed to accord with the Scheme requirements relating to access to sunlight for neighbouring dwellings.

The appeal was dismissed.

SUPREME COURT DECISIONS

Arnold v Hickman [2016] TASSC 55

13 October 2016

Pearce J

Catchwords: Presumptions as to legislative intention – Requirement to prove criminal offence beyond reasonable doubt displaced

FP Act s.21(1A); *Justices Act 1959*, s.107(4)(a)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; *Doney v The Queen* (1990) 171 CLR 207

Leigh Arnold (***Applicant***) applied for the review of his conviction for causing trees to be harvested from his land in breach of the terms of a certified forest practices plan (***FPP***) contrary to s.21(1)(c) of the FP Act.

The Applicant's motion for review was on two grounds:

- the then-Chief Magistrate was incorrect to find the charge need only be proved on the balance of probabilities; and
- the terms of the FPP said to have been breached were incapable of sustaining the charge.

The charge

The Applicant owned land in east of Oatlands from which he wished to selectively harvest timber. On 1 February 2011 the Forest Practices Authority (***Authority***) certified an FPP for his property under s.18 of the FP Act.

The FPP contained a specification that required all trees with a diameter at breast height (***DBH***) of greater than 70cm to be retained as potential nesting habitat for the Masked Owl and Swift Parrot.

In the period between 1 February 2011 and 5 April 2012 trees were felled on the Applicant's property. The Authority conducted a compliance survey which found trees with a DBH of greater than 70cm had been felled in contravention of the FPP specification and s.21(1)(c) of the FP Act.

Trial

At trial, the Applicant conceded all elements of the offence except that the harvesting was in contravention of the FPP. It was therefore necessary for the prosecution to prove that the trees that were removed exceeded a DBH of 70cm.

The prosecution called an expert who adduced modelling of the size of the DBH of the felled trees based upon the size of the stumps. From this modelling, the prosecution submitted that the Chief Magistrate could infer the size of the trees at the time they were felled. The Applicant also called an expert who gave evidence that the size of the harvested trees did not breach the DBH specification of the FPP.

Both experts provided evidence on the basis that the industry meaning for DBH was the diameter of the tree stem measured at a vertical height of 1.3 metres from the point of the highest ground level at the base of the tree.

The Chief Magistrate accepted the interpretation of the meaning of DBH by the experts, however he preferred the modelling of the prosecution expert.

The Applicant was therefore convicted of felling a minimum of 85 trees with a DBH of greater than 70cm in contravention of his FPP.

Standard of proof

Section 21(1A) of the FP Act provides that:

> A person is guilty of an offence under subsection (1) if it is proven, on the balance of probabilities, that the person committed the offence.

The Chief Magistrate interpreted this section as requiring each element of the charge under s.21(1) to be proved on the balance of probabilities instead of beyond reasonable doubt.

The Applicant contended that s.21(1A) of the FP Act allowed only the identity of the person charged to be proved on the balance of probabilities, with the remaining elements of the offence (including the DBH of the felled trees) requiring proof beyond reasonable doubt.

Citing the authority of *Doney v The Queen*, the Applicant submitted that the Chief Magistrate erred by accepting the prosecution's circumstantial evidence when the defence expert provided a reasonable alternative hypothesis regarding the DBH of the trees.

In considering this ground of appeal, his Honour Justice Pearce considered whether the terms of s.21(1A) of the FP Act were sufficiently clear and unambiguous show Parliament's intention to displace the presumption that criminal offences must be proved beyond reasonable doubt. His Honour found that the use of the words "on the balance of probabilities" in s.21(1A) of the FP Act unequivocally revealed the legislative intention to displace the requirement of proof beyond reasonable doubt to some extent.

Applying the principles of statutory interpretation from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, his Honour found that the ordinary meaning of the words of s.21(1A) in the context of the FP Act were clearly directed at the commission of the offence, and not only the identity of the offender. His Honour noted that such a construction was supported by the fact that the identity of the offender was not readily distinguishable from each of the elements of the offence and thus could not be subject to a different standard of proof.

His Honour further found, in accordance with the purposes of the FP Act, that the lower standard of proof for the offence and the imposition of heavy penalties acted as an incentive for land owners to sustainably conduct forest practices.

Justice Pearce rejected the Applicant's submission that the alternative construction of s.21(1A) was supported by extrinsic material such as the clause notes to the Bill that introduced the legislation. Consideration of the notes was excluded, firstly, on the basis that no recourse to extrinsic material was warranted where the words under construction were not ambiguous or obscure, and secondly the notes failed to divert from the clear meaning attributed to the words of s.21(1A) by the Chief Magistrate and the Court.

Ambiguity of FPP

Section 107(4)(a) of the *Justices Act 1959* requires a motion for the review of a decision of a magistrate to be on the ground of "an error or mistake on the part of the justices on a matter or

question of fact alone, or of law alone, or of both fact and law."

The Applicant contended that the Magistrate erred in law by convicting him where the terms of prescription of the FPP were so vague and uncertain that "no person should be convicted of breaching it". The Applicant submitted that it was impossible to define "DBH" as it was not defined in the Act, regulations or Forest Practices Code, and further that tree trunks do not have a diameter because they are not circles.

His Honour found that the Applicant's submissions in relation to this ground of review ought not be entertained. His Honour found the term "DBH" was capable of being given a perfectly sensible meaning that was not disputed by the Applicant when he submitted the FPP for approval; when operating under the FPP; or when experts were giving evidence before the Chief Magistrate.

Decision

The Applicant's motion for review was dismissed.

Purton v Jackson [2016] TASSC 56

24 October 2016

Pearce J

Catchwords: Failure to exercise jurisdiction to hear and determine appeal – Jurisdiction to determine appeals from valid and invalid decisions of planning authority.

RMPAT Act, ss. 23(2), 25; LUPAA ss.61, 62;

R v RMPAT ex parte Calvary Hospital Hobart Inc [2000] TASSC 19; *Purton v Waratah Wynyard Council & Jackson* [2009] TASRMPAT 33; *Jackson v Building Appeal Board* [2010] TASSC 29, 20 Tas R 1; *Purton v Jackson* [2013] TASSC 46, 22 Tas R 333; *Dorset Council v RMPAT* [2014] TASSC 34

The Purtons (***Appellants***) were appealing a 2009 decision in which the Tribunal found it had no jurisdiction to hear and determine a planning appeal concerning a permit granted to the Jacksons (***Respondents***) for a residence on rural land south of Wynyard.

The appeal to the Supreme Court had been delayed due to other related legal proceedings before the Building Appeal Board, the Supreme Court and the Full Court of the Supreme Court. An extension to the 28-day timeframe to lodge an appeal under s.25(1) of the RMPAT Act was granted by Tennent J in *Purton v Jackson* [2013] TASSC 46.

Tribunal decision

In [2009] TASRMPAT 33, the Tribunal found that Council did not have the power to grant a permit for the Respondents' proposed residence because it did not meet the *Waratah-Wynyard Planning Scheme 2000* standards for "secondary uses" within the Primary Industries Zone.

The Tribunal rejected the Respondents' submissions that the dwelling may be construed as an "ancillary use and development" of the primary industries activities on the property as "not to the point", ultimately finding:

> *... the permit purportedly issued by the Council, contrary to the express advice of its professional planning officer, was plainly invalid. From this the only consequence is that the appeal is invalid and the Tribunal enjoys no jurisdiction to further hear and determine the matter.*

Grounds of appeal

The grounds of the appeal to the Supreme Court were:

1. The Tribunal erred in law by holding that the permit granted by the Waratah Wynyard Council (***Council***) was invalid;
2. The Tribunal erred in law by holding that the planning appeal was invalid; and
3. The Tribunal erred in law by holding that it had no jurisdiction to further hear and determine the planning appeal.

Justice Pearce refused to allow the Appellants to amend their notice of appeal to include a fourth ground asserting that the Tribunal erred in law by failing to set aside the permit issued by Council.

Ground 1 - Invalid permit

Justice Pearce found that the question raised by the first ground of appeal had been finally decided by the Court in *Jackson v Building Appeal Board*.

In that case, the Respondents had applied for the judicial review of the Building Appeal Boards' refusal to grant a building permit for their house.

The Board's refusal to grant the building permit was on the basis that a valid development permit had not been granted by Council. However, the Court relevantly found that both the Board and the Tribunal were wrong to conclude that a permit had not been granted by Council, such a finding was open "only if the grant of a permit was not open on any legal basis, or not properly made on any legal ground...". The Court considered that the Tribunal had overlooked a possible ground that the permit may have been validly granted by Council.

His Honour Justice Pearce found that he was bound by the Court's finding in *Jackson v Building Appeal Board* that "the Tribunal erred when it determined that, because the Council had no power to grant the permit, the permit was invalid." For this reason, Pearce J upheld the first ground of appeal.

Grounds 2 & 3 - Invalid appeal and no jurisdiction

Justice Pearce dealt with grounds 2 and 3 of the appeal together. His Honour found that if the permit was not invalid, it stood to reason that the appeal could not have been invalid and the Tribunal had jurisdiction to hear and determine the appeal.

His Honour found that on the proper construction of LUPAA and the RMPAT Act, the Tribunal must have jurisdiction to hear and determine appeals even where it finds "that the use and development which is the subject of an application for a permit is one which the planning authority had no discretion to grant."

His Honour considered that this approach is consistent with the Supreme Court rulings in *R v RMPAT ex parte Calvary Hospital Hobart Inc* and *Dorset Council v RMPAT*. His Honour reasoned that any other construction of the Acts would result in an undesirable situation where the Tribunal is deprived of the power to act upon a finding that a permit has been wrongly issued by Council. His Honour found that such an interpretation is not in accordance with the objectives of LUPAA or the resource management or planning scheme objectives.

Decision

Justice Pearce upheld grounds 1, 2, and 3 of the appeal. His Honour ordered the Tribunal's decision be quashed and indicated that he considered it would be appropriate to remit the matter back to the Tribunal for hearing and determination in accordance with the law, however he stated he would accept submissions from the parties before making final orders.

Picone v Hobart City Council [2016] TASSC 57

31 October 2016

Brett J

Catchwords: Land use permit – extension application – judicial review- error in law

LUPPA s.57; *Land Use Planning and Approvals Regulations* 2014, r.9 *Judicial Review Act 2000*, s.17

Scurr v The Brisbane City Council [1973] HCA 39; (1973) 133 CLR 242; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33, (1990) 170 CLR 321; *Helbig v RMPAT* [2008] TASSC 28; *Dorset Council v RMPATl* [2014] TASSC 34, 23 Tas R 85

Ian and Lynette Picone (***Applicants***) applied for the review of a Hobart City Council (***Council***) decision not to extend the period for representations for a discretionary development application under s.57(5) of LUPAA.

The review of Council's decision was sought under the JR Act on the following grounds:

- Council erred by not extending the due date for representations due to closures during normal business hours on the weekend as required by s.57(5AA)of LUPAA; and
- Council erred by refusing to consider the application for extension.

Background

The Applicants were the owners of a property adjacent to a proposed development site. On 4 August 2016, Council advertised the notice of the development application and invited public representations until 18 August 2016.

In response to this notice, the Applicants instructed their solicitors to draft and lodge a representation that voiced their concerns over development. The Applicant's solicitors lodged the representation a day late on 19 August 2016.

However, the solicitors also lodged an application for an extension of time to extend the representation period pursuant to s.57(5) of LUPAA.

Council refused the application to extend the representation period on the basis that it did not have the power to grant the extension of time as requested.

Normal business hours

Section 57 of LUPAA relevantly provides:

> (5) Any person may make representations relating to the application during the period of 14 days commencing on the date on which notice of the application is given under subsection (3) or such further period not exceeding 14 days as the planning authority may allow.
>
> (5AA) If the time period specified in subsection (5) includes any days on which the office of the planning authority is closed during normal business hours in that part of the State where the land subject to the application for a permit is situated, that period is to be extended by the number of those days.

The Applicants contended that the words "normal business hours" in s.57(5AA) should be interpreted as the normal business hours of the part of the State in which the land subject to the application is situated. They further contended that the words are not constrained by reference to any particular day of the week. Therefore, if Council is closed on any day (including a Saturday or a Sunday) where businesses are ordinarily open in a part of the State s.57(5AA) of LUPAA would be triggered and the representation period should be extended by the duration of the closure.

Justice Brett found that there were two possible interpretations of the words in s.57(5AA) of LUPAA. Either the phrase "in that part of the State" could be read as identifying the location of the office that was closed during normal office hours, or it could be read as qualifying the meaning of "normal business hours" which would require consideration of the various norms for business hours in a particular area of the State. His Honour held that the interpretation that promotes the purpose or object of the Act should be preferred.

For this reason, Justice Brett rejected the Applicants' contentions in relation to the interpretation of "normal business hours", finding that the objective of s.57(5AA) of LUPAA was to account for closure of the council offices in unusual circumstances having regard to councils' normal business hours.

His Honour found that "normal business hours" related to the "the normal business hours of the relevant planning authority".

Having regard to the Minister's second reading speech on relation to Bill that introduced s.57(5AA), his Honour was further satisfied that:

> *..."business hours" is a reference, not just to hours of a day, but to the hours of a day and to the days of the week on which those offices would normally be open.*

As there was no evidence that Council's offices were closed on a normal business day during the advertised period for the relevant development application, Justice Brett dismissed the Applicants' first ground of review.

Power to extend due date for representations

Council contended it did not have the power to grant the extension sought by the Applicants because the power to grant an extension to the period for representations may only be exercised prior to the notice being advertised. Council argued that the legislature would not have intended s.57(5) of LUPAA to operate in any other way, as to do so would cause unfairness between representors and disrupt the operation of the legislative scheme.

Justice Brett rejected Council's arguments, finding that the ordinary construction of the words in s.57(5) of LUPAA demonstrated legislature's intention to confer a wide and general power to allow up to a 14-day extension to the period of representations.

His Honour noted the decisions of *Scurr v The Brisbane City Council* and *Dorset Council v RMPAT*, require that the timeframe for the period for representations must be provided in the public notice of the application. However, Justice Brett found that it would be possible to provide information about the timeframe for representations at the same time as acknowledging Council's discretion to extend the period for representations by up to 14 days.

Justice Brett noted that other provisions of LUPAA accommodate such extensions of the representation period, for example, by calculating the timeframe for the finalisation of the assessment by reference to the lodgement date and not the end of the representation period.

Justice Brett found that a broad interpretation of s.57(5) of LUPAA would not give rise to unfairness because it merely provides Council with discretion to extend the time where, for good reason, a person with a legitimate interest in an application is unable to comply with the initial 14-day time limit. His Honour found such an interpretation of the provision to be consistent with objectives of effective public participation within LUPAA.

Decision

Justice Brett found the Applicants were aggrieved Council's decision not to grant an extension to the period for representations. His Honour further found that the Council erred in law by failing to consider the Applicants' application for an extension to the representation period.

Council was ordered to consider the application for an extension of the representation period before determining the development application.

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