# Court takes big-picture approach to planning process challenges

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The Land & Environment Court has come to be seen by some in the industry as restricting development in recent years by an overly legalistic approach to planning processes. One of the reasons for this is a consequence of the increasingly detailed requirements of planning instruments and planning processes which increase the opportunity for the Court to strike down a planning decision because of a perceived irregularity in the process which led to the planning decision.

The New South Wales Court of Appeal, in a well-publicised case, has recently considered the attempt by Sweetwater Action Group to challenge a planning instrument for the Huntlee site south of Braxton in the Lower Hunter Valley on grounds of procedural irregularity.

The developer had entered into a Voluntary Planning Agreement (VPA) in relation to a "major urban release site" for up to 7200 dwellings in accordance with the Lower Hunter Regional Strategy released in 2006. The developer had asked that the proposed development be treated as a state significant site. After public exhibition the draft planning instrument was prepared and put on public exhibition, as was a draft VPA.

The VPA included:

- dedication of 5612ha of environmentally-significant land for conservation purposes;
- a contribution of $100,000 towards the recovery of certain plants; and
- an environmental contribution of $1 million payable in respect of the Huntlee Conservation area of 607ha.

Section 93F of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides that a VPA must contain various provisions including a provision for the enforcement of developer obligations by suitable means (such as the provision of a bond or guarantee) in the event of a breach by the developer. The VPA entered into by Huntlee did not contain any specific security or bond provision in respect of its monetary contribution of $1.1 million.

A local action group challenged the proposed development, alleging irregularities in the process.

The Land & Environment Court held that the effect of failing to include a security provision for developer contributions in the VPA, even though a minor part of the whole process, was sufficient to void any action by the Minister to recommend the making of a State Environmental Planning Policy (SEPP) to rezone the development site consistent with the VPA.

The developer appealed to the Court of Appeal. The Court first considered the law and principles relating to a decision by the Minister to recommend the making of an SEPP. The Court held that the better view is that a Ministerial recommendation is an exercise of executive power rather than legislative power. There was at that time no provision in the *EP&A Act* which expressly conferred a statutory power of the Minister to recommend the making of an SEPP, while the Act assumed the existence of the power of recommendation.

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The Court of Appeal also held that, regardless of the source of the Minister's recommending power, there was nothing in the *EP&A Act* which led to the conclusion that the making of a "valid" ministerial recommendation was a necessary precondition to the Governor exercising the power conferred by Section 37 of the *EP&A Act* to make an SEPP. That power is conditional only on the advice of the Executive Council. In other words, even if there was an irregularity behind the Minister's recommendation, once the Governor (acting on the advice of the Executive Council) made the SEPP, then the validity of that instrument could not be challenged because of an error or oversight of the Minister in making the recommendation.

The Court also considered arguments relating to the VPA and its omission of the security for payment provision, the Sweetwater Action Group arguing on another ground that it voided the recommendation by the Minister because the Minister took into account a document which did not comply with a statutory requirement.

The Court of Appeal held that the better construction of the provision of the *EP&A Act* which called for a security provision in a VPA was that it did not specify a jurisdictional fact or a matter to be determined objectively by the Court. However, the Court said that if it was wrong on that it then needed to consider whether there was suitable security in the VPA to satisfy the requirements of the *EP&A Act*.

The Court examined the legislative scheme, and in particular, the provisions for registration of the VPA on the title to the land. The Court observed that there was an important safeguard in place; relevantly, before any transfer of the land could take place, the Minister must be satisfied that the proposed transferee has the financial capacity to comply with the obligation to pay the development contributions. Ultimately, and notwithstanding the absence of bank guarantees or bonds, the Court of Appeal held that the VPA did contain suitable means of enforcement of the obligation to make development contributions.

The value of the Court of Appeal decision is that it shows that the Court is prepared to take a big picture approach to the issues in dispute. Given the complexity of planning legislation and planning instruments, there is always a risk of a minor or technical non-compliance, such that the Department (or Local Council) and the Minister must be certain that every single point that needs to be adequately covered or addressed in the processes relating to the rezoning of land will necessarily be adequately and fully covered. The Court of Appeal, at least in this instance, has stepped back from that unduly narrow approach.

The Court also showed a preparedness to look broadly and commercially at what constitutes compliance with the requirements of the *EP&A Act* which bear upon the rezoning process. While there is no substitute for thorough preparation of any relevant VPA or other planning documents, and the advisers of developers should take great pains to ensure that all statutory and any related requirements are fulfilled, this case gives some confidence that Courts may be reluctant to allow a technical deficiency to void the whole process.

*(Huntlee v Sweetwater Action Group NSW C of A 8 December 2011)*