

land and environment

# court reporter

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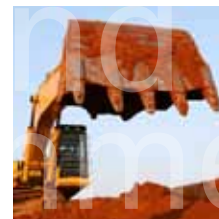
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The material contained in the Land and Environment Court Reporter is of the nature of general comment only. No reader should rely on it without seeking legal advice.



## summary of cases...

Welcome to the March 2011 Land and Environment Court Reporter.

This month the Associations take an in depth look at:

- An appeal against a councils refusal of a development application for the demolition of an existing building and the redevelopment of the land with a new residential flat building
- The difference between a subpoena and a notice to produce
- An appeal against a councils refusal of a development application for alterations and additions to a heritage house which was being used as a residential flat building
- The Court's power to grant ex-parte orders to prohibit a party from communicating with and/or threatening, intimidating or harassing witnesses or potential witnesses
- The Court's dismissal of appeals against the refusal of a council of development application on two separate lots for the demolition of all existing improvements and the construction of a two storey boarding house on each lot

We hope you enjoy the Land and Environment Court Reporter.



## useful links...

Local government, planning, environment and related law:  
<http://localgovnet.maddocks.com.au>

Land and Environment Court website:  
[www.lawlink.nsw.gov.au/lec](http://www.lawlink.nsw.gov.au/lec)

Australasian Legal Information Institute:  
[www.austlii.edu.au](http://www.austlii.edu.au)

Commonwealth Development Assessment Forum:  
[www.daf.gov.au](http://www.daf.gov.au)

NSW Attorney General's Department - Land and Environment Court: [www.agd.nsw.gov.au/lec](http://www.agd.nsw.gov.au/lec)

Case Law NSW: [www.agd.nsw.gov.au/caselaw](http://www.agd.nsw.gov.au/caselaw)

Environment Australia, Environmental Protection Biodiversity Conservation Act: [www.ea.gov.au/epbc](http://www.ea.gov.au/epbc)

Environment Protection Biodiversity Conservation Act - subscription to EPBCA group:  
<http://groups.yahoo.com/group/epbc-info/>

Environment and Planning Law Association NSW:  
[www.epla.org.au](http://www.epla.org.au)

Development and Environmental Professionals Association: [www.depa.net.au](http://www.depa.net.au)

Urban Development Institute of Australia:  
[www.udia.com.au](http://www.udia.com.au)

Property Council: [www.propertyoz.com.au](http://www.propertyoz.com.au)

Housing Industry Association:  
[www.hia.com.au](http://www.hia.com.au)

Department of Infrastructure, Planning and Natural Resources: [www.dipnr.nsw.gov.au](http://www.dipnr.nsw.gov.au)

Planning NSW: [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

Environment Australia: [www.erin.gov.au](http://www.erin.gov.au)

EnviroNET Australia:  
<http://www.deh.gov.au/net/environet.htm>

Environmental Protection Authority (NSW):  
[www.epa.nsw.gov.au](http://www.epa.nsw.gov.au)

EDONet: [www.edo.org.au](http://www.edo.org.au)

Natural Heritage Trust: [www.nht.gov.au](http://www.nht.gov.au)

NSW Agriculture: [www.agric.nsw.gov.au](http://www.agric.nsw.gov.au)

NSW National Park and Wildlife Service:  
[www.racac.nsw.gov.au](http://www.racac.nsw.gov.au)

Planning Institute of Australia:  
[www.planning.org.au](http://www.planning.org.au)

Sustainable Energy Development Authority (SEDA):  
[www.seda.nsw.gov.au](http://www.seda.nsw.gov.au)

## definitions...

RFB: Residential Flat Building

PSO: Planning Scheme Ordinance

DCP: Development Control Plan

Topography: detailed description and analysis of the features of a relatively small area

JRPP: Joint Regional Planning Panel

SEPP 1: This is a State Government Policy which can be used to relax development standards set by planning instruments

## The Owners Strata Plan No. 855 v Gosford City Council

[2011] NSWLEC 9

This case is an appeal against the Council's refusal of a development application for the demolition of an existing building and the redevelopment of the land with a new residential flat building. The appeal was upheld on the basis that the development complied with the character of the site and surrounding developments, addressed the requirements of the relevant planning controls and did not unreasonably impose upon the amenity of the neighbouring properties. In approving the application, Justice Craig said that he was not required to determine the 'perfect solution', but rather one that is satisfactory and one that addresses the applicable planning controls.

**The site:** The development appeal related to a steeply sloped site overlooking Avoca Beach. A 6 unit residential flat building had stood on the land for the past 55 years. Cracking and displacement of walls in the building were apparent and because of its form, size and state of repair, the existing building stood in marked contrast to almost all the other buildings in the general locality. In addition, geotechnical examination of the site revealed that there had been a number of superficial landslips indicating that the site is potentially unstable.

Sections of the site were heavily covered with vegetation, however there was no

adverse comment made by the Tree Assessment Officer on the loss of trees and other vegetation from the site in the event that the proposed development proceeded.

**Proposed development:** The Owners of Strata Plan No. 855 (**Owners**) proposed to demolish the existing residential flat building (**RFB**) and to clear most vegetation from the site. The development application proposed to erect a new RFB of three levels over an enclosed car park for 12 vehicles. The new building was intended to sit on a podium extending 50m across the steeply sloped site and contain 6 residential units each of 3 bedrooms. The proposed development would also contain, at the rear of the property, two lap pools, each being 14m in length and 1.5m wide.

**Planning controls:** The site was zoned Residential 2(a) under the Gosford Planning Scheme Ordinance (**the PSO**). Development for the purpose of a RFB was prohibited under this zoning. However, the present use of the site and the building currently erected on it was accepted to be an "existing use" under the EP&A Act and as such, the proposed development was permissible with consent.

The Council's DCP required development applications to demonstrate consistency or compatibility with the 'desired character' of the area in which they sat. The site was located within the character area known as 'Avoca 7: Medium Density Hillside'. This area was described as 'medium-density redevelopment of former cottage allotments, either singly or as larger sites, for apartments and townhouses'.

The desired character of this area was 'medium-density residential hillside where improved standards of amenity and urban design quality are achieved by new multi-unit developments that are surrounded by leafy hillside gardens.'

**Issues:** There were three main issues to be determined by the Court:

1. whether the character of the proposed development was appropriate when regard was had to the character of existing and likely future development in the vicinity of the site;
2. whether the bulk and scale of the proposed development was appropriate; and
3. whether the proposed development would unreasonably impose upon the amenity within neighbouring residential properties.

Another issue concerned the stability of the site, however there was agreement between the engineers for both parties that the site could be developed in the manner proposed provided a detailed construction management plan was adopted and staged construction works undertaken.

**Character:** The two critical planning controls influencing character of development in the area were the PSO and the DCP. Under the PSO, the emphasis for the Residential 2(a) zone was on low density housing forms, which were essentially domestic in scale. Under the DCP, the character of the area was described as medium-density residential. Justice Craig found that the design of the new building, being stepped up the site in recognition of

its steep topography, did not differ from the existing surrounding development that predominated in the locality. In addition, it was found that the proposed landscaping and vegetation would maintain the characteristic development desired by the planning controls. In particular, Justice Craig noted that it did not seem reasonable that development on the site should be constrained by a perceived need to retain the existing vegetation, which in effect, compensated for the absence of vegetation on surrounding residential properties. Justice Craig therefore held that the character of the proposed development did not compromise the existing character of the area, nor would it appear to compromise the likely future character of the area as expressed in the DCP.

**Bulk and Scale:** Although addressed under the heading of ‘bulk and scale’ it was conceded that the proposed development was not a ‘bulky building’. The primary concern of the Council was the height and length of the proposed podium, and the absence of dispersed landscaping to provide a visual break in the building width when viewed from street level. In response, the Owners argued that there were other buildings in close proximity to the subject site which had similar dimensions to the proposed building, albeit with different orientation. In reaching the conclusion that the bulk and scale of the proposed development was suitable, Justice Craig noted that he was not required to determine the ‘perfect solution’, but rather, one that is satisfactory and is seen to address the applicable planning controls.

**Amenity:** Council argued that the inclusion of the two lap pools in the development would create a source of noise that would unreasonably interfere with the enjoyment of residential properties located to the west site. Justice Craig rejected this argument on the basis that the location of the pools was at a considerable distance from neighbouring properties and the pools were surrounded by walls.

**Conclusion:** Justice Craig was satisfied that it was appropriate to grant development consent to the proposed development. In the absence of final conditions in a satisfactory form, however, Justice Craig deferred the making of any final orders until those conditions were provided and considered.

## Jeray v Blue Mountains City Council

[2011] NSWLEC 28

In this case a self-represented litigant, Mr Jeray, sought a declaration that the Council was guilty of contempt of court for failure to comply with a Notice to Produce. This case highlights the differences between a Notice to Produce and a Subpoena and provides a discussion about the circumstances when a Court may find a party to be in contempt.

**Background:** The contempt alleged by Mr Jeray was the failure by the Council to produce, in response to a Notice to Produce issued by him, an email dated 8 June 2010 which attached a complaint

from Mr Jeray (**8 June Email**). A copy of the 8 June Email was not produced to Mr Jeray until after the hearing of the contempt motion has commenced.

**Applicable principles:** In considering whether the Council was guilty of contempt for failing to provide the 8 June Email, Justice Craig examined the applicable principles for findings of contempt. He noted that the High Court has made clear that the underlying rationale for a finding of contempt is the necessity “to uphold and protect the effective administration of justice”. His Honour also noted that an allegation that a party is guilty of conduct that interferes with the effective administration of justice is a serious allegation. Justice Craig then considered that, as a consequence of the seriousness with which a court views the integrity of its orders, the standard of proof for acts or omissions said to constitute contempt require careful consideration.

**Standard of proof in contempt proceedings:** Justice Craig examined a series of High Court and NSW Court of Appeal authorities, in which it was considered that “all proceedings for contempt must realistically be seen as criminal in nature” and that as a consequence “all charges of contempt must be proved beyond reasonable doubt”. In addition, it has been held that where a contempt of court charge relates to a breach of a court order, a mental element must be proven. That is, a deliberate action or inaction is required in order for the allegation to be made out.

Justice Craig therefore considered that in order to determine whether Council

was in contempt of court for its failure to produce the 8 June Email, it was necessary to establish:

- whether the Notice to Produce filed by Mr Jeray was a ‘court order’; and
- whether Mr Jeray had established that Council met the standards of proof, namely that the failure to produce the email was deliberate and not casual, accidental or unintentional.

**Is a Notice to Produce an order of the court:** The notice which Mr Jeray served on the Council was a Notice to Produce issued under rule 34.1 of the Uniform Civil Procedure Rules (UCPR). Unlike a Subpoena, a Notice to Produce was not a document issued as an order of the Court. The obligation to produce documents in accordance with a Notice to Produce is subject to the qualification “unless the court orders otherwise”. Further, Part 34 of the UCPR does not address consequences for a party who does not produce documents. In contrast, UCPR 33.12(1) provides that failure to comply with a Subpoena without lawful excuse constitutes a contempt of court.

Justice Craig concluded that even if an incomplete or inadequate response was made to Mr Jeray’s Notice to Produce, this did not constitute a contempt of court as the Notice itself was not an order of the court.

**Intention:** It was also held that although the email was a document required to be produced under the Notice to Produce, the failure to produce the particular email did not amount to a contempt of court because Mr Jeray did not establish beyond reasonable doubt that the failure to

produce the email was deliberate and not casual, accidental or unintentional.

**Conclusion:** Justice Craig determined that Mr Jeray had not proved that the Council’s failure to produce the email constituted contempt of court, beyond reasonable doubt.

## **Valero Holdings Pty Ltd v Lane Cove Council**

### **[2011] NSWLEC 1067**

This case concerned an appeal against Council’s refusal of a development application for alterations and additions to a heritage house which was being used as a residential flat building. The appeal was upheld subject to the deletion of one of the proposed apartments on the basis that it would have an unacceptable heritage impact. The issue of existing use rights was also discussed but was not determinative.

**The site:** The subject site was one of a pair of two-storey Federation era houses. The pair of houses were included on a list of local heritage items in the Lane Cove Local Environmental Plan 1987, and as such attracted additional development protection. The site had been used as a residential flat building since 1927, although the use was prohibited in the LEP since 1987. The internal space of the building was rearranged in 1979 to contain three residential flats. In the front setback of the site there was an open carport structure and a concrete slab with additional parking.

**The proposed development:** The proposed development was for alterations and additions to the existing house, the excavation and construction of a predominantly underground car park, the erection of a fourth apartment (**Apartment 4**) on top of part of the podium to the proposed car park, and internal alterations to the existing house to reconfigure the three existing apartments.

**Apartment 4:** A free standing single level structure was proposed to be erected above the car park as Apartment 4. The proposed structure was compared to the three-car garage on the adjacent heritage property, however it was held that the proposed apartment was bulkier, higher, closer to the street, did not sit lightly in its setting and was not recessive in context with the heritage item. It was clearly a separate and disconnected dwelling in the front set back of the heritage structure and would detract from the existing house being seen as part of a heritage pair. Consequently, the Senior Commissioner held that the ‘heaviness’ of the Apartment 4 structure and its dissociated and non-subservient nature meant it would have an unacceptable heritage impact and as such required the refusal of this element of the proposal.

**The Heritage Value:** There had been a number of heritage studies undertaken of the site. All described the heritage value of the site as arising from its exterior when viewed in conjunction with the exterior of the neighbouring property. The proposed interior alterations and rearrangement would therefore not impact the heritage significance of the property. In addition, the proposed additions in the roof space were sympathetic with

the existing structure and did not pose any unacceptable overlooking issues for the neighbouring property. Senior Commissioner Moore also considered that the removal of the existing carport (along with the proposed Apartment 4 which was to be located above the carport) and one of the two trees at the front of the site, would provide an improved view of the property from the street and in fact enhance the appreciation of the two heritage properties.

**Existing use rights:** The site had been used since 1927 as a residential flat building. An issue in dispute between the parties was whether there were existing use rights for a residential flat building, and if so, the extent of the site to which these rights attached – for example, would the proposed new apartment above the car park be included in the existing use rights? In relation to this issue, the Senior Commissioner considered that the Council did not appear to seriously contest that there were existing use rights for the use of the building as a residential flat building. As such, the only existing use rights issue for determination was whether the extended beyond the footprint of the building – that is, to the proposed Apartment 4 on top of the car park. On this point, Senior Commissioner Moore noted it would only be necessary to assess this issue if Apartment 4 was found to be otherwise acceptable. As Apartment 4 had been refused on the basis of its impact on the heritage value of the building, it was not to reach on conclusion on this issue.

**Conclusion:** Senior Commissioner Moore concluded that with the deletion of Apartment 4 and the addition of a landscape plan, the remainder of the

proposal was acceptable. The Court ordered that when revised plans were filed and served and revised settled conditions of consent provided, the Appeal would be upheld and a development consent for alterations and additions to the existing structure would be granted.

## **Waverley Council v Crystal Carwash Pty Limited & Ors**

**[2011] NSWLEC 41**

This case dealt with the Court's power to grant ex-parte injunctive orders to prohibit a party from communicating with (other than through their legal representatives and/or experts) and/or threatening, intimidating or harassing witnesses or potential witnesses.

The urgent request for these orders arose following the attendance by Council's acoustic expert at the Car Wash to undertake measurements of background noise levels, as facilitated by an earlier order of the Court. The Council alleged that there had been deliberate interference with testing done by its acoustic expert and, more seriously, that there had been a communication between the expert and the owner of the respondent Car Wash which the expert had interpreted as a clear threat to him and/or his family.

In his judgment, Justice Sheahan referred to a 2005 Federal Court decision, but otherwise noted that there appeared to be little authority for the making of such

orders. He continued however, stating that the balance of convenience clearly favoured the orders being made as the Car Wash would not suffer any damage by the Court limiting its communications with people who may be called upon to assist the Court in determining the matter. On this basis, Justice Sheahan did not insist upon Council making the usual undertaking as to damages and granted the orders sought.

## **White v Parramatta City Council**

**[2011] NSWLEC 1059**

This case is one of four boarding house development appeals handed down by the Court recently. In this case, the Court dismissed two separate appeals against the refusal by Council of development applications on two separate lots for the demolition of all existing improvements and the construction of a two-storey boarding house on each lot.

**Issues:** The two primary issues raised in the case were the impacts of the proposed developments on the heritage significance of adjoining heritage items and the form and design of the proposed developments. In particular, the case considers whether the zone objectives of a LEP are of relevance when applying the discretion relating to the maximum floor space ratio (**FSR**) of boarding houses under the *State Environmental Planning Policy (Affordable Rental Housing) 2009 (Affordable Rental SEPP)*.

**Heritage:** The proposed sites for the two boarding houses were on adjoining blocks at 59 and 61 Victoria Road, Parramatta. There were two heritage listed properties close to the two sites, being a single story detached dwelling at 63 Victoria Road and a single story duplex at 65-67 Victoria Road.

The primary issue of disagreement between the parties regarding heritage was the degree to which the proposed boarding house at 61 Victoria Road would impact on the heritage significance of the adjoining heritage item at 63 Victoria Road. The Council contended that the proximity and the scale of the proposed development at 61 Victoria Road would introduce a much larger and competing building volume into the immediate backdrop of 63 Victoria Road, which would degrade the visual integrity and prominence of the heritage item.

Commissioner Brown found in favour of the Council on the question of whether the proposed building at 61 Victoria Road would unacceptably impact on the heritage significance of 63 Victoria Road because of its proximity, height and scale. Commissioner Brown determined that this impact warranted the refusal of the development application for 61 Victoria Road on that ground alone.

**Form/design of the proposed developments:** A primary concern of the Council regarding the form and design of the proposed boarding houses was the

issue of FSR. The developments were each proposed to have a FSR of 0.74:1. Under the LEP, the maximum FSR permitted for any form of residential accommodation permitted on the land was 0.6:1. The developer, however, noted that under cl 29(4) of the Affordable Rental SEPP the Court was still able to approve the proposed developments notwithstanding the proposed FSR. As such, the Applicant submitted that there was no planning reasons why the buildings should not be approved with a FSR of 0.74:1.

On the other hand, Council contended that as the boarding houses did not comply with the maximum FSR specified for the zone, it was necessary to consider more broadly whether the design of the boarding houses, in terms of the massing, scale, setbacks, site coverage, relationship to other developments and the streetscape was appropriate and whether these design characteristics ‘enhanced’ and did ‘not compromise’ the amenity and character of the area. Commissioner Brown agreed with Council’s position, noting that, while the Affordable Rental SEPP provides greater flexibility in the provision of a range of affordable rental housing, the flexibility was not unfettered. He continued, stating that in his view, that any exceedance of the FSR standard should be required to be assessed against the objectives of the zone (in much the same way as an exceedance of a development standard can be tested

through an objection under SEPP 1) to determine whether the additional FSR could be supported based on the particular circumstances and characteristics of the proposed development.

Commissioner Brown then considered the specific objectives of the zone, which included to enhance the amenity and characteristics of the established residential area and to ensure that building form is in character with the surrounding built environment. He concluded that the desire to provide the FSR for each of the buildings had resulted in sub-standard design, including the provision of access to the upper level rooms via an open stairway and inadequate setbacks which prevented the opportunity for useful and effective screen planting. In particular, Commissioner Brown considered that the noise which would be likely to generate from the open corridor on the upper levels would negatively impact on the amenity of the adjoining residential flat buildings at the rear of the site.

**Conclusion:** Commissioner Brown held that the proposed developments were inconsistent with the objectives of the zone as they would compromise the amenity of the surrounding residential areas and that the proposed development would negatively impact the adjoining heritage item.

The appeal was therefore refused.