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## Brinara Pty Ltd v Gosford City Council [2010] NSWLEC 25 (25 February 2010)

Last Updated: 8 March 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Brinara Pty Ltd v Gosford City Council [\[2010\] NSWLEC 25](#)

PARTIES: APPLICANT Brinara Pty Ltd RESPONDENT Gosford City Council

FILE NUMBER(S): 10873 of 2009

CATCHWORDS: QUESTION OF LAW :- whether proposed changes to development based on existing use rights is change of commercial use so that limitations in EP&A Regulation 2000 apply - scope of existing use rights as defined by the terms of development consent considered

LEGISLATION CITED: [Environmental Planning and Assessment Act 1979 s81A\(1\)](#), [s106](#), [s107\(2\)](#), [s108 Environmental Planning and Assessment Regulation 2000](#) cl 41(1)

CASES CITED: ACR Trading Pty Ltd v Fat-Sel Pty Ltd [\(1987\) 11 NSWLR 67](#) House of Peace Pty Ltd v Bankstown City Council [\[2000\] NSWCA 44](#); [\(2000\) 48 NSWLR 498](#) MM & SW Enterprises Pty Ltd v Strathfield Council [\[2010\] NSWLEC 8](#) Reading Properties Pty Ltd v Auburn Council [\[2007\] NSWLEC 186](#); [\(2008\) 158 LGERA 116](#) Rich v Lennox Palms Estate and Anor [\[2009\] NSWLEC 167](#) Warlam Pty Ltd v Marrickville Council [\[2009\] NSWLEC 23](#)

CORAM: Pain J

DATES OF HEARING: 24 February 2010

JUDGMENT DATE: 25 February 2010

LEGAL REPRESENTATIVES

APPLICANT Mr A Hill (solicitor) SOLICITOR Blake  
Dawson RESPONDENT Dr S Berveling SOLICITOR P J Donnellan & Co

JUDGMENT:

**THE LAND AND**

**ENVIRONMENT COURT**

**OF NEW SOUTH WALES**

**Pain J**

**25 February 2010**

**10873 of 2009 Brinara Pty Ltd v Gosford City Council**

**JUDGMENT**

1. **Her Honour:** This matter requires the determination of a question of law in these Class 1 proceedings. The question raised is does cl 41(1)(e) of the Environmental Planning and Assessment Regulation 2000 (the EP&A Regulation) apply to development application No 35344/2008 (the 2008 DA) lodged by the Applicant?
2. Development consent No 25760/2004 (the 2005 consent) was granted by the Council in 2005 for commercial premises at 373-375 The Entrance Road, Erina Heights (the premises). The description of the proposed development in the Notice of Determination was commercial premises. Condition 6 required that specified plans be complied with. These showed the location of the proposed building and different sections were labelled liquor store, fruit barn and

convenience store. Condition 71 states:

*The development being carried out in accordance with the Statement of Environmental Effects prepared by Martin Morris & Jones Pty Ltd dated 1 September 2004, except as modified by the conditions of this consent.*

Condition 4 states:

*The consent of Council is to be obtained prior to any **change of use** of the premises.*

1. The Council tendered part of the Statement of Environmental Effects (the SEE), dated 1 September 2004, which stated that the development involved, in part, the construction of a single storey commercial building within the centre of the site and containing a liquor store, fruit barn, convenience store, plant room/storage and customer/staff amenities.
2. The Applicant has lodged the 2008 DA for consent to “*expansion of existing commercial premises with “infill” storage facility*”. According to the DA, the proposal is to construct two levels of storage units below the existing commercial building footprint. I note that the application has been recently modified to delete some aspects of the proposal as included in the original DA in a s 82A review application made to the Council. These Class 1 proceedings are an appeal against the refusal of that DA by the Council.
3. Existing use rights are provided for under s 106 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) which defines an existing use as the use of a building for a lawful purpose immediately before that use was prohibited under an environmental planning instrument. Section 107(2) imposes limits on the expansion of an existing use. The making of regulations concerning the carrying out of alterations or extensions to a building being used for an existing use, the change of an existing use to another use and the enlargement or expansion of an existing use are provided for under s 108. Clause 41 of the EP&A Regulation (cl 41(1)(e) and cl 41(1)(f) were added, and cl 41(1)(d) amended after 2005 ) states:

*(1) An existing use may, subject to this Division:*

*(a) be enlarged, expanded or intensified, or*

*(b) be altered or extended, or*

*(c) be rebuilt, or*

*(d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act, or*

*(e) if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or*

*(f) if it is a light industrial use—be changed to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act).*

*(2) However, an existing use must not be changed under subclause (1) (e) or (f) unless that change:*

*(a) involves only alterations or additions that are minor in nature, and*

*(b) does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and*

*(c) does not involve the rebuilding of the premises associated with the existing use, and*

*(d) does not involve a significant intensification of that existing use, and*

*(e) relates only to premises that have a floor space of less than 1,000 square metres.*

*(3) In this clause:*

**commercial use** means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the [Standard Instrument \(Local Environmental Plans\) Order 2006](#)).

**light industrial use** means the use of a building, work or land for the purpose of light industry (within the meaning of the [Standard Instrument](#)

*(Local Environmental Plans) Order 2006).*

1. It is agreed between the parties that if cl 41(1)(e) applies then cl 41(2) is not satisfied by the 2008 DA. It is also agreed that the use of the premises relies on existing use rights and that use is now defined by the 2005 consent.
2. I note for completeness that when the 2005 consent was granted cl 41 was in different terms to that set out above. Subclause (d) was in different terms and subclause (e) and (f) were not included. Nothing arises relevant to the question before me based on that previous version of cl 41(1).
3. The applicable environmental planning instrument in 2005 and now is *Interim Development Order No 122* (IDO 122). The relevant parts of that instrument were the same in 2005. IDO 122 defines commercial premises as:  
*... a building or place used as an office or for other business or commercial purposes, but does not include a building or place elsewhere defined in this Order.*

Commercial premises are prohibited under the Scenic Protection 7(c2) Zone under the IDO. That is the zone in which the premises are located. There was and is no definition of business, office or retail premises in the IDO. There is a definition of these in cl 41(3) of the Regulation since its amendment after 2005.

*Applicant's submissions*

1. The existing use rights of the Applicant are determined by the construction of the 2005 consent. The Applicant argues that the genus of use is commercial premises based on the 2005 consent. That is the use which is being enlarged or expanded. Consequently cl 41(1)(e) does not apply as that refers to commercial use and is addressed to a change of a specific commercial use to another commercial use. The proposed development the subject of the 2008 DA is allowed by virtue of cl 41(1)(a) and (b) of the Regulation.
2. Alternatively the 2005 consent must be read as a whole and Condition 4 provides that the consent of the Council for a change of use can be sought. This does not require that development consent be

sought for a change of use as held in *Reading Properties Pty Ltd v Auburn Council* [2007] NSWLEC 186; (2008) 158 LGERA 116 at [30]- [33]. This further supports a finding that the genus of the existing use as approved under the 2005 consent is commercial premises. As the genus of use is broadly commercial premises, provided that the proposed use falls under that genus there is no change in the existing use to which cl 41(1)(e) applies.

### *Council's submissions*

1. In order to answer the primary question a number of other sub questions arise as follows:

(i) can more than one subclause in cl 41 apply to a given development?

More than one subclause of cl 41 can apply to a given development so that sub cl (e) could apply in addition to (a) and (b), relying on *Warlam Pty Ltd v Marrickville Council* [2009] NSWLEC 23.

(ii) was the existing 2005 consent for a commercial use?

The 2005 consent was for a building in light of the definition of commercial premises in the IDO. The use of that building for various retail uses of liquor barn, fruit shop and convenience store was authorised under the consent by virtue of s 81A(1) of the EP&A Act which states:

#### ***(1) Erection of buildings***

*A development consent that enables the erection of a building is sufficient to authorise the use of the building when erected for the purpose for which it was erected if that purpose is specified in the development application, subject to section 109M.*

The distinction must be made between the grant of a consent for a building for commercial premises and the authorisation of its use for specified purposes. The consent was for a building being commercial premises and the uses authorised were retail uses. This supports a finding that the 2005 consent was for a commercial use.

(iii) is the proposed development in the 2008 DA another commercial use?

The proposed development in the 2008 DA is to add storage units under

the existing building, a business use as defined under s 41(3) of the Regulation which adopts the definition from the [Standard Instrument \(Local Environmental Plans\) Order 2006](#). That proposal is a change of the commercial use of various retail uses to another commercial use being a business use to which cl 41(1)(e) applies.

### *Finding*

1. The extensive case law on the correct approach to the characterisation of existing uses was referred to in the parties' submissions. The Applicant's submissions at par 17 referred to a large number of authorities to support the statement that it is well settled law that where an existing use derives its validity from a development consent, the terms of the consent define the use. As identified in *MM & SW Enterprises Pty Ltd v Strathfield Council* [2010] NSWLEC 8 at [81]- [82] the lawful purpose which can be relied on to underpin existing use rights is the terms and conditions stipulated in a development consent. In this case that is the 2005 consent.
2. The parties essentially agreed that the characterisation of the existing use which the Applicant seeks to vary in its 2008 DA is determined by the construction of the 2005 consent. The principles which apply to the construction of development consents must therefore be considered. Unlike cases such as *MM & SW Enterprises* the use of the premises continues in accordance with the plans approved in the 2005 consent.
3. Generally consents are construed on the basis of the documents which form part of the consent; see authorities in [24] in *Rich v Lennox Palms Estate and Anor* [2009] NSWLEC 167. They must be construed objectively according to their written terms per *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67 per Kirby P (Samuels and Hunt JJA concurring) at [77]. In *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44; (2000) 48 NSWLR 498 at [41], Mason P (with whom Stein and Giles JJA concurred) stated that:

*The enduring nature of a development consent encourages a fair but liberal reading of the rights it confers upon a landowner who may spend considerable money in acting upon it and who is likely to wish to sell the*

*land sooner or later.*

1. The determination of existing use rights, as identified in *Warlam* at [17]-[19] as also adopted in *MM & SW Enterprises* at [84]-[85] requires that a liberal approach to construction be adopted.
2. In this case the purpose of the consent must be gleaned from the Notice of the Determination of consent, the plans for which consent was granted as referred to in Condition 6 and in light of other conditions such as Condition 4 and Condition 71 as referred to in argument. The description of the development for which consent was granted in the Notice is commercial premises. The approved plans show the proposed building for commercial premises and identify the particular retail uses of a liquor barn, fruit shop and convenience store within it. Condition 71 requires the development to be implemented in accordance with the SEE. At p 6 the SEE states that these retail uses are the proposed uses of the building.
3. The Applicant emphasised that the description of the proposed development as commercial premises on the first page of the consent together with the operation of Condition 4 in conjunction with Condition 6 and the plans approved therein suggest the proper characterisation of the genus of development is commercial premises. The building and operation of storage units the subject of the 2008 DA fall within the definition of commercial premises in IDO 122 as in force at the time DA 25760/2004 was approved. Accordingly cl 41(1)(e) does not apply as there is no change of commercial use from that approved by the Council in 2005 to another commercial use in the 2008 DA. I agree with that construction of the 2005 consent in light of the approach to construction of development consents identified in *ACR Trading* and *House of Peace* and the various authorities confirming that a liberal interpretation is warranted in the case of existing use rights. That conclusion is confirmed in particular by the operation of Condition 4, informed by *Reading*, that in order to obtain the Council's consent for a change of use a development application is not needed, simply an application.
4. That the commercial premises can have within them various uses which may change over time, with the consent of the Council

according to Condition 4 of the 2005 consent, does not reduce the existing use rights of the Applicant as defined by that consent to the individual uses that may be conducted within the building. It follows that I do not accept the Council's argument that the 2008 DA is for a change of use from a retail use to a business use as identified above in par 11(iii). All those uses occur under the broader genus of the development being commercial premises.

5. I have trouble understanding the relevance of the distinction made in the Council's submissions (par 11(ii)) between the granting of consent in 2005 for a building for commercial premises and separately the authorisation of the use of that building by virtue of s 81A of the EP&A Act. There appears to be little impact on the construction of the 2005 consent if that submission is accepted in any event. If anything, if the individual uses were not approved under the 2005 consent but rather were authorised by virtue of s 81A of the EP&A Act that would appear to support the Applicant's construction of the 2005 consent that it was for a commercial premises, within which could be several uses.
6. It is unnecessary that I express a view on whether more than one subclause of cl 41(1) can apply, the first subquestion raised by the Council. It may well be possible that that be the case but regardless of whether it is, it is still necessary to determine whether cl 41(1)(e) applies, as I have done in favour of the Applicant.

## **Conclusion**

1. The question of law before me is answered to the effect that cl 41(1)(e) of the EP&A Regulation does not apply to the Applicant's development application No 35344/2008.