Land and Environment Court
of New South Wales

CITATION :	**Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008] NSWLEC 219**
PARTIES :	APPLICANT Hastings Point Progress Association Inc FIRST RESPONDENT Tweed Shire Council SECOND RESPONDENTS Aeklig Pty Ltd Planit Consulting Pty Ltd THIRD RESPONDENTS Kylie Ann Campion Jody Anne Kearney Kelly Anne Gillies
FILE NUMBER(S) :	40785 of 2007, 40967 of 2007
CORAM:	Pain J
KEY ISSUES:	Judicial Review :- failure to consider mandatory matter in grant of development consent by the Council - whether order under s 25B Land and Environment Court Act 1979 should be made to suspend operation of consent
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 s 79C Land and Environment Court Act 1979 s 25B, s 25E Tweed Local Environmental Plan 2000
CASES CITED:	Belmore Residents' Action Group Inc v Canterbury City Council and Anor (2006) 147 LGERA 226 Bungendore Residents Group Inc v Palerang Council and Anor (No 4) [2007] NSWLEC 536 Centro Properties Limited v Hurstville City Council and Anor (2004) 135 LGERA 257 Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008] NSWLEC 180 Homemakers Supacenta-Belrose Pty Limited v Warringah Council and Anor [2008] NSWLEC 54 Kindimindi Investments Pty Ltd v Lane Cove Council and Anor (2007) 150 LGERA 333 Mid Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Ltd [2007] NSWLEC 411
DATES OF HEARING:	Written submissions filed after substantive judgment

DATE OF JUDGMENT:	31 July 2008
LEGAL REPRESENTATIVES:	APPLICANT Mr A Pickles with Ms Y Cachia SOLICITOR Environmental Defenders Office FIRST RESPONDENT Submitting appearance SECOND and THIRD RESPONDENTS Mr P McEwen SC with Dr S Berveling SOLICITOR Stacks

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Pain J

31 July 2008

40785 of 2007, Hastings Point Progress Association Inc v Tweed Shire Council and Anor (No 2)

40967 of 2007 Hastings Point Progress Association Inc v Tweed Shire Council and Ors (No 2)

JUDGMENT

1 **Her Honour**: In *Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 180 I held that the Tweed Shire Council as the First Respondent (the Council) in matter no 40967 of 2007, (Planit Consulting Pty Limited as Second Respondent and Kylie Ann Campion, Jody Anne Kearney and Kelly Anne Gillies as Third Respondents), had failed to take into account cl 8(1)(c) of the *Tweed Local Environmental Plan 2000* (TLEP) when it granted development consent to the Third Respondent's development consent for DA07/0022. The relevant background to the finding is set out in the judgment. Importantly, I found that this clause was a condition precedent to the granting of development consent under the TLEP and the Council had failed to consider it; see [91]-[111]. The Applicant now seeks a declaration that the development consent is invalid.

2 Under Pt 3 Div 3 of the *Land and Environment Court Act* 1979 (the Court Act) the Court may, instead of declaring a development consent invalid, make orders under s 25B whereby the operation of the consent is

suspended and terms for compliance specified. Under s 25E of the Court Act I must consider whether I should make an order under Div 3 instead of determining that a development consent to which this Division applies is invalid. The parties have filed opposing submissions as to whether I should make an order pursuant to s 25B or not.

Applicant's submissions

3 The Applicant opposes the making of a s 25B order, relying on the reasoning of Tobias JA in *Kindimindi Investments Pty Ltd v Lane Cove Council and Anor* (2007) 150 LGERA 333 at 342 that such an order could be inappropriate if the breach involved the failure to consider a relevant matter under s 79C of the *Environmental Planning and Assessment Act* 1979 (the EP&A Act).

4 Clause 8(1)(c) is central to the power of the Council to grant or refuse development consent which cannot be granted unless the Council is satisfied that the development will not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by the development being carried out in the Tweed area as a whole. While each case must be considered on its own facts and other cases applying s 25B approached with caution, this case is similar to the circumstances in *Belmore Residents' Action Group Inc v Canterbury City Council and Anor* (2006) 147 LGERA 226 and *Centro Properties Limited v Hurstville City Council and Anor* (2004) 135 LGERA 257. The requirement to consider cumulative impact is not an isolated, specific procedural requirement but rather is a substantive matter going to the heart of the merits of the proposal.

5 As identified by Jagot J in *Mid-Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Ltd* [2007] NSWLEC 411 at [49], orders should not be made if no satisfactory order under s 25B can be formulated. No such orders can be made in this case as the whole of the merit assessment of the proposal will have to be reconsidered by the decision-maker in order to assess the cumulative impact of the proposal. The orders proposed by the Third Respondent

demonstrate a flawed approach and represent a risk in approach warned against by McClellan J in *Centro* at [84]. Accordingly a declaration should be issued that development consent DA 07/0022 is void and of no effect.

Third Respondents' submissions

6 This is a matter where it is appropriate to make a s 25B order under the Court Act. In *Kindimindi* Tobias JA held that an order pursuant to s 25B was not limited to steps preliminary to the granting of the consent but could be made in relation to the consideration of matters under s 79C of the EP&A Act. This case is similar to *Homemakers Supacenta-Belrose Pty Limited v Warringah Council and Anor* [2008] NSWLEC 54 where a s 25B order was made when there was a matter outstanding at the time development consent was granted. The matter outstanding in this case was the consideration of cumulative impact under cl 8(1)(c) of the TLEP. The invalidity in this case did not arise from an absence of power, rather the failure to carry out a particular step in a process. *Bungendore Residents Group Inc v Palerang Council and Anor (No 4)* [2007] NSWLEC 536, a case in which a s 25B order was not made, is distinguishable on the basis that the breach in the present matter is not substantive, whereas in that matter the breaches were. This is an appropriate case in which to consider making a s 25B order and draft orders have been prepared to enable this to occur.

Finding

7 Section 25B was introduced into the Court Act in 1997. The Court of Appeal in *Kindimindi* held that the circumstances in which s 25B orders under the Court Act can be made are wider than had previously been the approach in this Court. Orders are not limited to steps preliminary to the granting of consent. In *Kindimindi* Tobias JA stated at [32]:

> *It seems to me that s.25B(2)(c), for instance, would authorise the imposition of a term requiring a consent authority to reconsider if it has already considered the matter, or to consider for the first time if it has failed to consider the matter, any one or more of the matters required to be considered by, for instance, s.79C of the Environmental Planning and Assessment Act. That, of course, does not*

mean that in every case where a purported consent is invalid upon the basis that s.79C has not been complied with, that the court will exercise its discretion to suspend the consent and to require the consideration or reconsideration of a s.79C matter.

8 In *Bungendore* I considered a number of cases in light of *Kindimindi* at [42]. In *Bungendore* I held that as the breaches I had found were substantive and related to important aspects of the consideration required under s 79C of the EP&A Act it was not appropriate that s 25B be applied. The nature of the breaches in this case are of a similar nature to those in *Bungendore*, contrary to the submissions of the Third Respondents.

9 Each case must be considered on its own facts. *Homemakers*, in which I made a s 25B order, was unusual as it was clear the relevant council had undertaken an extensive assessment of the matters it was required to by the EP&A Act before incorrectly delegating to an officer the power to approve (but not reject, the relevant failure to properly delegate) a development application. The parties in that matter agreed that in light of *Kindimindi* the making of a s 25B order was open to the Court. While the failure to delegate powers correctly is significant, in the particular circumstances of that case where apart from the failure to properly delegate no other substantive failure in consideration was relied on by the party challenging the consent, I considered appropriate s 25B orders could be made. I do not consider the circumstances of this case are similar.

10 The TLEP specifies mandatory matters which must be considered as a condition precedent to the decision whether or not to grant consent and I have held that one of these mandatory matters in cl 8(1)(c) has not been complied with. It is not a discrete matter which can be divorced from the general consideration of the merits required by s 79C of the EP&A Act in my view and I agree with the Applicant's submissions in this regard. I do not consider in these circumstances that orders suspending the operation of the consent and requiring the entire consideration of the merits to occur under s 79C are appropriate to be made under s 25B of the Court Act. Accordingly I consider that I should declare DA07/0022 to be invalid.

11 I also need to make final orders in the other proceedings heard at the same time, the Aeklig proceedings (matter 40785 of 2007) to the effect that the Class 4 application should be dismissed. As I have not heard any submissions on costs I will make an order reserving these in both matters.

Orders

12 The Court makes the following declaration and orders:

In matter no 40967 of 2007:

1. A declaration that development consent DA 07/0022 in respect of development at lot 9 DP 14141, 21 Tweed Coast Road, Hastings Point, granted by the First Respondent on 19 June 2007 is void and of no effect.
2. Costs are reserved.

In matter no 40785 of 2007:

1. The application is dismissed.
2. Costs are reserved.

I CERTIFY THAT THIS AND THE 4 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE JUSTICE N. H. M. PAIN

Associate

Date 31/7/08